

# Analysis of the New Iraqi Constitution

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Submitted to the Faculty of Political Science, Public Administration &  
Diplomacy

In Partial Fulfillment of the Requirements for the Degree of Master of Arts in  
International Affairs and Diplomacy

Notre Dame University-Lebanon  
2008

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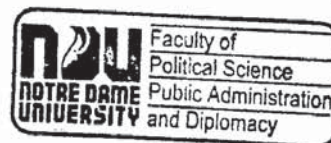
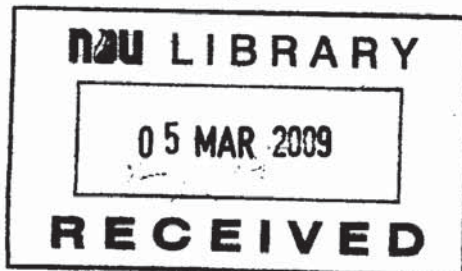
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### *Transliteration Rules Used in this Research*

This research follows the English transliteration method used by McGill Institute of Islamic Studies as well as the font type prescribed by the Institute.<sup>1</sup> I have transliterated mainly proper names, place names and some technical Arabic words that help to clarify concepts or ideas related to the main topic of this investigation. Words and terms in Arabic are transliterated only the first time and, followed by the most commonly used method of writing in modern English for the sake of simplicity (e.g. transliterated word as *baghdad* is latter written as Baghdad). In these cases, *italic* letters have been appropriated while using the transliterated term. Also, because there are no capital letters in Arabic script I chose to follow Hans Wehr system of transliteration of proper names, which are without capital letters<sup>2</sup>. However, I have not used Pr. Charles A. Ferguson's suggestion of transcribing "ending of roots having a weak third radical (س١-) with the pausal form -ah instead of -at"<sup>3</sup>. In this case I preferred to transliterate *ta'marbutā* in an absolute state as *a*, and in genitive construct (*idāfa*) as *-at*, following Julio Cortés system of transliteration, because it reflects more properly the actual form of the language<sup>4</sup>.

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<sup>1</sup>New Times Arabic Transliteration Fonts. McGill Institute of Islamic Studies. June, 2001. <<http://www.mcgill.ca/islamicstudies/students/arabic/>>

<sup>2</sup> Hans Wehr. *A Dictionary of Modern Written Arabic*. Edited by J. Milton Cowan. 3ed. Librairie Du Liban, Beirut, 1980. P, XII.

<sup>3</sup>*ibid.*

<sup>4</sup> Cortés, Julio. *Diccionario de Árabe Culto Moderno*. Gredos. Madrid, 1996.

a	=	أ	z	=	ز	f	=	ف
b	=	ب	s	=	س	q	=	ق
t	=	ت	sh	=	ش	k	=	ك
th	=	ث	s	=	ص	l	=	ل
j	=	ج	dh	=	ض	m	=	م
h	=	ح	t	=	ط	n	=	ن
kh	=	خ	z	=	ظ	h	=	هـ
d	=	د	'	=	ع	w	=	و
dh	=	ذ	gh	=	غ	y	=	ي
r	=	ر						

**Short:** a = ' ; i = . ; u = ^ . Initial *hamza* has no transliteration and final *hamza* = '. **Long:** ā = ˆ ; ī = ˆ ; ū = ˆ . Article: *al-* and *l-* after a word ended with vowel. **Diphthong:** ay = اِي ; aw = اِ . *Alif maqsūra:* à

## *List of Abbreviations by Alphabetical Order*

Coalition Provisional Authority	<i>CPA</i>
Council of Representatives	<i>CoR</i>
Council of Ministers	<i>CoM</i>
Constitutional Committee	<i>ConComm</i>
Constitutional Drafting Committee	<i>CDC</i>
Constitutional Preparatory Committee	<i>CPC</i>
Constitutional Review Committee	<i>CRC</i>
Electoral Committee	<i>EC</i>
Federation Council	<i>FC</i>
Federal Supreme Court	<i>FSC</i>
Federal Oil and Gas Commission	<i>FOGC</i>
Greater Middle East Initiative	<i>GMEI</i>
High Commission for De-Ba'athification	<i>HCDB</i>
Higher Judicial Council	<i>HJC</i>
International Atomic Energy Agency	<i>IAEA</i>
Independent Electoral Commission of Iraq	<i>IECI</i>
International Foundation for Electoral Systems	<i>IFES</i>
International Mission for Iraqi Elections	<i>IMIE</i>
International Republican Institute	<i>IRI</i>
Iraqi Anti-Terrorism Law	<i>IATL</i>
Iraqi Interim Government	<i>IIG</i>
Iraqi Governing Council	<i>IGC</i>
Iraqi High Tribunal	<i>IHT</i>
Iraqi Leadership Council	<i>ILC</i>
Iraqi Penal Code	<i>IPC</i>
Iraqi Property Claims Commission	<i>IPCC</i>
Iraq Reconstruction and Management Office	<i>IMRO</i>
Kurdish Anti-Terrorism Law	<i>KATL</i>

Multinational Forces	<i>MNF</i>
National Clandestine Service	<i>NCS</i>
National Commission for Human Rights	<i>NCHR</i>
National Democratic Institute	<i>NDI</i>
Leadership Council	<i>LC</i>
Office for Reconstruction and Humanitarian Assistance	<i>ORHA</i>
Presidential Council	<i>PC</i>
Prime Minister	<i>PM</i>
Revolutionary Command Council	<i>RCC</i>
Special Representative of the U.N.	<i>SRUN</i>
Statute of the Supreme Iraqi Criminal Court	<i>SSICS</i>
Transitional Administrative Law	<i>TAL</i>
Transitional National Assembly	<i>TNA</i>
United Arab Republic	<i>UAR</i>
United Nation Assistance Mission in Iraq	<i>UNAMI</i>
United Nations Monitoring Verification and Inspection Commission	<i>UNMOVIC</i>
United Nation Security Council Resolution	<i>UNSCR</i>
United Nation Secretary General	<i>UNSG</i>
United States Agency for International Development	<i>USAID</i>
Weapons of Mass Destruction	<i>WMD</i>

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## Introduction

The framework of this research is the war on Iraq and the American occupation that followed. The war on Iraq raised a great deal of controversy among states, diplomats and experts on international relations and law. A simple way of presenting this controversy would be to say that the former state of Iraq did not launch an attack against the United States, but the claim of the U.S. government that the *Ba'ath* regime posed a great threat to the security of the United States (National Security Strategy 2002), triggering the supposed right of self defense (Article 51 of the UN charter) were invoked to start a war against Iraq. The contradiction is clear; the U.S. government attacked Iraq because it represented an “imminent threat” to its national security even though Iraq did not initiate any military activity against the United States.<sup>1</sup>

In order to understand this controversy and to correctly interpret why the United States went to war against Iraq, it is necessary to understand the current international order and the dominant role of the United States in it. The study of this context is relevant because the adoption of a new Iraqi constitution is a byproduct of the toppling of *saddam hussain's* regime. Since the end of the Cold War, the United States has reaffirmed its role and predominance in the world order, especially after the terrorist attacks of September 11, 2001.<sup>2</sup> This research studies the effects of September 11<sup>th</sup> in reaffirming the absolute role and predominance of the United States in world politics as well as the establishment of new patterns of intervention in order to achieve the United States' goals in world affairs. The war on Iraq and the creation of a new state may be considered the beginning of a new pattern of American intervention based on a series of values that are highly questionable.

Since its occupation of Iraq, the United States has monopolized all the powers of the Iraqi state in order to create a pro-American Iraqi coalition government that shares its values,

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<sup>1</sup>Please see Krieger, David. “The War in Iraq as Illegal and Illegitimate”. In Thakur, Ramesh (ed). *Iraq Crisis and World Order: Structural, Institutional, and Normative Challenges*. United Nation UP. 2006. P. 381-382.

<sup>2</sup>Please see Chomsky, Noam. *Hegemony or Survival. America's quest for global dominance*. Owl Books, New York, 2003. Dodge, Toby. *Inventing Iraq. The Failure of National Building and a History Denied*. Hurst & Company. London, 2003. And Said, Edward W. *From Oslo to Iraq and the Roadmap*. Bloomsbury. London, 2004.

commitments and goals.<sup>3</sup> As this research will show, the United States failed to develop a viable plan for the reconstruction of Iraq and, in many instances; the war's planners largely underestimated the difficulties and challenges that the reconstruction process entailed.<sup>4</sup> Nevertheless further research is needed to assess whether or not the United States thought that the creation of a new Iraq would be as smooth as the initial military campaign.<sup>5</sup> This research focuses on the reconstruction management process planned by the United States and implemented by the Coalition Provisional Authority (CPA) in Iraq.<sup>6</sup>

The idea is simple: the United States wanted to create a new state and nation based on what it considers to be necessary for Iraq. The new Iraqi constitution plays a fundamental role in the CPA's project for the reconstruction of Iraq and the creation of a new nation and state. The CPA established the condition that the writing and adoption of interim constitution (TAL) was a necessary requisite in order to return sovereignty to the Iraqi people.<sup>7</sup> Therefore, the constitutional process was limited by regulations preconceived by the CPA. Although the constitution was finally portrayed as an initiative regulated by the CPA but implemented by an Iraqi National Assembly after the January election in 2005 –under what I considered to be a blurred concept of partnership- the truth is that certain events behind the constitutional process, as well as other events during the reconstruction, entirely compromised this partnership and therefore created doubts about the legitimacy of the whole process.<sup>8</sup>

Thus, the creation and adoption of a permanent constitution responds to the necessity of creating a new state which by definition will be weak. One must remember that the infrastructure under the new state was largely destroyed, not only because of previous wars and international sanctions, but also because of U.S. military mismanagement since the beginning

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<sup>3</sup>Friedman, George. "Endgame: American option in Iraq. August 30<sup>th</sup> 2007. Strategic Forecast inc (Stratfor) <[https://www.stratfor.com/products/premium/read\\_article.php?id=294563&selected=Analyses](https://www.stratfor.com/products/premium/read_article.php?id=294563&selected=Analyses)>.

<sup>4</sup>Bremer and McConnell. *My Year in Iraq. The Struggle to Build a Future Hope*. Simon & Schuster. New York. 2006.

<sup>5</sup>J. B. A. Bailey. "Over by Christmas": Campaigning, Disillusions and Force Requirement. The U.S. Army Writing Collection. September, 2005. <[http://www.army.mil/professionalwriting/volumes/volume4/april\\_2006/4\\_06\\_3.html](http://www.army.mil/professionalwriting/volumes/volume4/april_2006/4_06_3.html)>

<sup>6</sup>*Ibid.*

<sup>7</sup>*Ibid.*

<sup>8</sup>Please see report "Unmaking Iraq: A Constitutional Process Gone Awry." International Crisis Group. Middle East Briefing n° 19. Amman/Brussels, September 2005. <<http://www.crisisgroup.org/home/index.cfm?id=3703>>. And Morrow, Jonathan. "Iraq's Constitutional Process II. An Opportunity Lost." United States Institute of Peace USIP. Special report n° 155. November 2005. <<http://www.usip.org/pubs/specialreports/sr155.pdf>>.

of the occupation.<sup>9</sup> For example, the only ministry that was really protected by the U.S. led-Coalition forces was the Oil Ministry, while other state buildings were destroyed, looted or robbed.<sup>10</sup> The Iraqi Army and intelligence services were dissolved and the Iraqi economy, after years of war and sanctions, was incapable of managing the situation. The new Iraq state thus became incapable of functioning by itself, and therefore was rendered a dependency<sup>11</sup> on the United States and its Coalition.

The United States had created a new political elite based on exiles and those Iraqis who complied with the plans of the reconstruction of the State. Paul Bremer formed a group of seven politicians or G-7: *ahmad jalabī* (Shiite), *iyād 'allāwī* (shiite), *māss'ud bārzanī* (Kurdish), *jalāl tālabānī* (Kurdish), *nasir al-jadarjī* (Sunni), *ibrāhīm al-ja'afarī* (Shiite), and *'abdu-l'azīz al-hakīm* (Shiite). Some of them were part of the Iraqi National Congress (INC), well known for their strong ties with Great Britain and the United States. Others as Ibrahim al-Ja'afari, 'Abdul Aziz al-Hakim, Massoud Barzani, and Jalal Talabani have a long record of resistance against Saddam. Ibrahim al-Ja'afari, and 'Abdul Aziz al-Hakim had fled Iraq, and had finally settled in Iran where they formed, organized and developed their political parties with the help of the Ayatollah's regime.<sup>12</sup> Massoud Barzani, and Jalal Talabani received assistance and support from

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<sup>9</sup> Schmitt, Michael N. "The Law of Belligerent Occupation". *Crimes of War Project*. Special about the War on Iraq. April, 2003. <<http://www.crimesofwar.org/special/Iraq/news-iraq5.html>>. See also Human Rights Watch report Coalition Forces Must Stop Iraqi looting, April, 2003. New York. HRW <<http://hrw.org/english/docs/2003/04/12/usint5597.htm>>. Also Feldman, Noah. *What We Owe to Iraq. War and the Ethnic of Nation Building*. Princeton UP. New Jersey. 2004. P. 126.

<sup>10</sup>For detail about the looting on ministries see "War and Occupation in Iraq". Specially: Chapter 1: Introduction. This report has been written and produced by *Global Policy Forum* and co-sponsored by thirty NGOs in June 2007 <<http://www.globalpolicy.org/security/issues/iraq/occupation/report/1introduction.htm>>. About the looting of the Oil Ministry see Riedlmayer, Andras. "Yes th: Oil Ministry Was Guarded" Iraq War and Archeology (IW&A), May, 2003. <<http://iwa.univie.ac.at/oilministry.html>>.

<sup>11</sup>"Dependency theory." *Encyclopedia Britannica*. 2008. Encyclopedia Britannica Online. 14 Oct. 2008 <<http://www.britannica.com/EBchecked/topic/1082230/dependency-theory>>.

<sup>12</sup>Members as Ibrahim al-Jaafari and Abdul Aziz Hakim are active members respectively of *Hizb ad-Da'wa* and the *Supreme Council for Islamic Revolution*, SCIRI. These parties had developed strong links with the Iranian regime in Teheran, but as Rodger Shanahan had pointed out, the great competence that emerged amongst different Shi'a oriented groups since the overthrow of Saddam Hussein had moderate Da'wa's position in many issues regarding the implementation of an Islamic state, following the Iranian Islamic revolution as well as its ties with Iran. According to Shanahan: "*ad-Da'wa has also been careful to portray itself as a genuinely independent Iraqi nationalist movement, particularly since the death of Ayatollah Khomeini removed a competing source of allegiance for party members. This independence has also been reflected in the party's attitude to the US intervention in Iraq. Although the party met Zalmay Khalilzad, the US special envoy for Iraq, it refused to join any US-sponsored opposition group. Similarly, while it acknowledges the obvious realities of the US occupation (and participates in the IGC) ad-Da'wa also insists on the earliest possible transfer of political authority to Iraqis and the withdrawal.*" Please

the United States since the end of the First Gulf War. These men were the core group of the new political elite that had flourished in Iraq, and since this group was formed, the process of appointing new politicians and creating new political parties has proven to be problematic. Paul Bremer explains in his book the difficulties of appointing a new political elite which would represent the whole of Iraqi society under the premises established by the CPA (the CPA banned any person that had ties with the Ba'ath regime or Saddam Hussein).<sup>13</sup> The character and representativeness of these new political groups need further analysis. There are questions that have remained unanswered such as: does the new constitution reflect the will of all of the Iraqi society? Or what degree of representativeness did those in charge of writing the constitution actually have in Iraqi society?

Finally the method and speed in which the new Iraqi state and government were created fulfilled all the necessary conditions for Iraq to become a client state, dependent on U.S economic and military assistance. The continued presence of the United States in Iraq confirms this position and raises questions about the capacity of this new Iraq to become a sovereign nation and stand on its own feet in order to achieve peace, security and the rule of law.

I-This thesis posits that the new Iraqi constitution has several problems of legitimacy due to: a) foreign occupation, b) a society with lack of contemporary democratic culture, c) and a highly polarized environment between those who support the constitution and a democratic Iraq, and those who rejected it because they consider it a product of foreign intervention.

II-Therefore my goal is to assess the new Iraqi constitution as a means of promoting real democracy and real citizenship participation in political and social affairs, and evaluating how the new government is fulfilling the postulates of the new Iraqi constitution.

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see Shanahan, Rodger. "Sh'ia political development in Iraq: The case of the Islamic Da'wa party." Carfax Publishing. Taylor & Francis Group. Third World Quarterly, vol. 25, n°5. 2004. Pp 943-954. <<http://hahmadi-persia.com/links/Al%20da'wa%20party%20of%20Iraq%202004.pdf>>. This list (G-7) is based on Bremer's memories. Bremer and McConnell. *Op. Cit.* P, 46.

<sup>13</sup> *Ibid.*

**Main focus of this research:**

This research focuses on two main topics that are directly related to the two main questions I have mentioned in the previous paragraph: a) the Iraqi constitutional process, and b) the new Iraqi constitution:

A) The study of the Iraqi constitutional process seeks to discover if the constitutional process followed the necessary steps to become a legitimate constitutional process. According to several experts any constitutional process must follow certain procedures in order to be considered a legitimate process comprising the hopes and aspirations of the people. Thus this section focuses on the U.S occupation, and the mechanism envisioned by the U.S. government to initiate a constitutional process in Iraq.

B) the analysis of the new Iraqi constitution approved by the Iraqi National Assembly and the Iraqi population after a national referendum held on October 15<sup>th</sup>, 2005. The study of the new constitution is important because it defines the foundations of the new Iraqi state from the legal and political point of view which are paramount for the reconstruction of Iraq.<sup>14</sup> Constitutional experts often refer to the constitution as a fundamental step for the reconstruction of a state and a nation.<sup>15</sup> The Iraqi constitution has the aim –like other constitutions around the world– to establish the very basic foundations of a new state (division of power, administration, justice, economy, political and civil rights and obligations). This study focuses particularly on the new political system and institutions created for the new Iraqi state, the new mechanisms envisioned to organize the relationship between the population and the state, and the division of power and roles within the state established by the constitution.

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<sup>14</sup> According to Paul Salem: *"The constitution is the defining document of any political system. It sets up the main institution of the policy, organizes the relationship between the population and the state, and decides the distribution of power and roles within the state."* Salem, Paul. "Constitution Building in Iraq. Comparative Constitutional Patterns: Lesson for Iraq from the constitutions of Turkey, Iran, Lebanon and the Arab Countries. May 2005. A paper prepared and presented at Friedrich Naumann Foundation Conference. Niqas.org Amman, June 2005. <<http://www.niqash.org/content.php?contentTypeID=113&id=608>>.

<sup>15</sup> Samuels, Kirsti. "Post-Conflict Peace-Building and Constitution-Making". Chicago Journal of International Law. V 6. N°2. Chicago. 2006. P. 2. Available at <<http://www.kirstisamuels.com/publications/Samuels%20Chicago%20Journal%20Int%20Law.pdf>> And Ghai, Yash and Guido Galli. "Constitution Building Processes and Democratization". International Institute for Democracy and Electoral Assistance (IDEA), 2006. Stockholm, Sweden. P. 7. <[http://www.idea.int/publications/cbp\\_democratization/index.cfm?renderforprint=1&](http://www.idea.int/publications/cbp_democratization/index.cfm?renderforprint=1&)>. Also IDEA Institute offers numerous research materials related to constitutional building processes around the world. <<http://www.idea.int/conflict/cbp/>>.

### The study of the Iraqi constitutional process:

The constitution was drafted by members of the Iraqi Constitutional Committee (ICC) in order to replace the Law of Administration for the State of Iraq for the Transitional Period (TAL).<sup>16</sup> The drafting and adoption of a new constitution was one of the major political and legal projects initiated by the Iraqi Governing Council and the Coalition Provisional Authority (CPA) in a joint effort to rebuild and create a new Iraqi state after the U.S. Coalition war on Iraq was declared accomplished on May 1<sup>st</sup> 2003.<sup>17</sup> The CPA was therefore an American institution created by the United States' government to rule Iraq during the period of the occupation.<sup>18</sup>

Since the occupation started in March 2003, there have been different actors involved in the process of drafting a permanent constitution for Iraq: the U.S. led–Coalition forces, the U.S. administration, domestic Iraqi political circles and Iraqi mass media among others. All these actors considered the adoption of a democratic constitution to be a key element for the reconstruction of Iraq.<sup>19</sup> Nevertheless, a large portion of the Iraqi population and political elites were not consenting to the occupation. This lack of agreement was clear among political leaders and Iraqi citizens who boycotted the whole political process, including the drafting of a new constitution.<sup>20</sup> One of the great challenges that the new Iraqi constitution had to face was the profound ethnic-religious division that surfaced in Iraq as a consequence of the occupation.

The constitutional process was not a genuine political procedure initiated by a truly independent Iraqi government. It took place in two different stages. The first one began with the U.S. led–Coalition occupation in March 2003 and ended with national elections and the creation of a Transitional National Assembly (TNA) in January 2005. During this period, the occupation authorities set up the main framework of the Iraqi constitutional process with the

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<sup>16</sup>“Iraqi Constitution.” [Wikipedia.org](http://en.wikipedia.org/wiki/Constitution_of_Iraq). Last modification 23<sup>rd</sup> September, 2007.

<[http://en.wikipedia.org/wiki/Constitution\\_of\\_Iraq](http://en.wikipedia.org/wiki/Constitution_of_Iraq)>

<sup>17</sup>Please see article: “Bush declares victory in Iraq.” [BBC news](http://news.bbc.co.uk/2/hi/middle_east/2989459.stm). May 2<sup>nd</sup>, 2003.

<[http://news.bbc.co.uk/2/hi/middle\\_east/2989459.stm](http://news.bbc.co.uk/2/hi/middle_east/2989459.stm)>.

<sup>18</sup>Halchin, L. Elaine. “The Coalition Provisional Authority (CPA): Origins, characteristics, and Institutional Authorities.” Congressional Research Service (CRS). The Library of Congress. Order code RL32370. April, 2004. P. 5. <<http://www.fas.org/man/crs/RL32370.pdf>>.

<sup>19</sup> Morrow, Jonathan. *Op. Cit.* P. 4.

<sup>20</sup> Dann, Philipp & Zaid Al-Ali. “The Internationalized *Pouvoir Constituant*”. Constitution-Making Under External Influence in Iraq, Sudan and East Timor. In: Max Planck Yearbook of UN Law, Armin von Bogdandy, Rüdiger Wolfrum (eds.), Martinus Nijhoff Publishers, Leiden 2006. P. 12-13.

collaboration of some U.S. appointed Iraqi politicians.<sup>21</sup> The second stage began with the formation of a National Assembly after the January 2005 elections and ended with a national referendum in order to approve the new Iraqi constitution in October 2005. The National Assembly had the task of designing the constitution.<sup>22</sup>

The Iraqi constitution is the result of a complex transition period engineered by the U.S.-led Coalition forces, and this thesis examines among, other issues, the whole process behind the constitutional design. The study of the Iraqi constitutional process aims to demonstrate the lack of legitimacy of the constitutional process. The study of the Iraqi constitutional design is of paramount importance because as United Nations experts and specialists on peace-building operations have pointed out, the success of constitutions in countries suffering violent conflicts and difficult transitions is not based only on the content of the constitution itself or the new political system it defines, but also on the growing importance of the constitutional process itself, e.g., *how* the constitution was planned, drafted and approved.<sup>23</sup> These experts consider “participatory constitutional processes” as an opportunity for “social dialogue” among all the parties involved in the political reconstruction of the country.<sup>24</sup>

This constitutional design approach based on “participatory constitutional processes” and “social dialogue” highlights that the constitutional process ideally would provide a forum where negotiations about sensitive issues can take place; it can provide political education for the population on the values that are intended to be implemented (e.g., democratic values), it can start a social dialogue process capable of reconciliation, and it can create a common vision of the state based on consensus.<sup>25</sup> Therefore, the new Iraqi constitutional process can play a critical role in promoting peace and stability through constitutional design and consensus-building. Thus the question arised: How did the CPA manage the creation of a new political elite, and what weight had previous commitments with the United States (semi-independent

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<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> Please see: Samuels, Kirsti. *Op. Cit.* p. 5. And Ghai, Yash and Guido Galli. *Op. Cit.* pp. 13-16. <[http://www.idea.int/publications/cbp\\_democratization/index.cfm?renderforprint=1&](http://www.idea.int/publications/cbp_democratization/index.cfm?renderforprint=1&)>. Also IDEA Institute offers numerous research materials related to constitutional building processes around the world. <<http://www.idea.int/conflict/cbp/>>.

<sup>24</sup> Samuels, Kirsti. *Op. Cit.* p. 5.

<sup>25</sup> *Ibid.*

Kurdish community or Iraqi exiles) influence the values and political theory introduced in the constitution?

This research is divided into six chapters; each one covers an issue directly related to the constitution and its formulation process. The first chapter studies the new U.S. Foreign Policy after September 11<sup>th</sup> and how the attempt to expand U.S. control over the Middle East is related to the Iraqi War and the Iraqi constitutional process. The efforts to establish democracy in Iraq are one of the most controversial issues regarding this process. Is the United States promoting democracy in Iraq? What are the objectives of the United States in Iraq and the rest of the region? This chapter analyzes the goals of the United States in Iraq, and how the United States legitimized the drafting of a new constitution based on the concept of Nation-Building and implementation of democracy in Iraq.

The second chapter focuses on current theories regarding constitutional studies and constitutionalism, state, nation, and constitution building. These theories are needed to correctly analyze the new Iraqi constitution through the state, nation, democracy and consensus-building approach. Special attention will be given to theories regarding constitutional design in order to outline basic factors that should be taken into consideration when designing post-war constitutions.

The third chapter investigates the work of the Coalition Provisional Authority regarding the constitutional process: the creation of an interim Government, the election of January 30, 2005, the creation of a National Assembly, and the election of a Constitution Drafting Committee (CDC). This chapter studies the constitution-making process, and how this process helped to create reconciliation and consensus in Iraq.

The fourth chapter provides an analysis of the new Iraqi constitution. The main purpose is to understand the basic principles of the state and the nation. This section would be divided into two parts according to the constitutional text. The first part deals with technical aspects of the constitution. This section studies the new political system and institutions created for the new Iraqi state, the new mechanisms envisioned to organize the relationship between the population and the state, and the division of power and roles within the state established by the constitution.



The second part focuses on a description of specific aspects. This section studies the new identity of the Iraqi state based on its complex social structure. It focuses on the decentralization of the state, and it will evaluate the status of individuals and their rights and freedoms as set by this constitution. The aim is to define the parameters of the new Iraqi nation in order to compare these parameters with other constitutions in the region. Chapter five is dedicated to the implementation of the new constitution, and more specifically, to problems, challenges and achievements that the new constitution had accomplished since its implementation. This chapter reviews the latest developments in the new Iraqi government, and assesses the measures taken by the government in implementing the principles and postulates of the new constitution. The main question here is to evaluate whether the new constitution is providing what it was designed for, and identify problems or possible amendments discussed by the political elite and social society.



## Exposing the relationship between the Bush Doctrine and the War in Iraq: National Security Doctrine or Regime Change Strategy?

"To create a country is one thing; to create a nationality is another."<sup>26</sup>

"[...], the Arabs are in fact people, not a collection of random countries passively available for outside intervention and rule. There is a clear line of imperial continuity that begins with Ottoman rule over the Arabs in the sixteenth century until our own time."<sup>27</sup>

"This war is not as in the past; whoever occupies a territory also imposes on it its own social system. Everyone imposes his own system as far as his army can reach. It cannot be otherwise."<sup>28</sup>

### 1.1-The Bush Doctrine approach to implement democracy and security around the world:

This investigation studies the new constitution of Iraq which was drafted and approved after the U.S. led-Coalition occupation of Iraq in 2003. In order to properly understand the context under which the constitution was drafted, it is necessary to comprehend the reasons behind the war on Iraq and, the American occupation that followed. The US president George W. Bush, as a result of the terrorist attacks on September 11<sup>th</sup>, introduced a new national security strategy to fight American enemies around the world. The so called "War on Terror" had immediate consequences in the Middle East and other countries around the world and ultimately, was the official rationale behind the occupation of Iraq.<sup>29</sup> The Bush Doctrine is the term commonly used to describe *the National Security Strategy of the United States* published on September 20<sup>th</sup>, 2002.<sup>30</sup>

This doctrine introduces "power" as a clear means to defend the U.S. from this new threat and according to it: "create a balance that favors human freedom."<sup>31</sup> According to his

<sup>26</sup>Salibi, Kamal. *A House of Many Mansions. The History of Lebanon Reconsidered*. California UP. Los Angeles, 1988. P. 19.

<sup>27</sup> Said, Edward W.. *From Oslo to Iraq and the Roadmap*. Bloomsbury. London, 2004. P, 273.

<sup>28</sup> Stalin, Joseph. Milovan Djilas. "Conversation with Stalin. Hancout, Brace, and, World. New York. 1962. P. 114. In Chesterman, Simon. *You the People. The United Nations, Transitional Administration, and State Building*. Oxford UP. 2005. p. 1.

<sup>29</sup> Ahmed, Nafeez Mosaddeq. *Behind the War on Terror. Western Secret Strategy and the Struggle for Iraq*. New society Publisher. 2003. P, 243-244.

<sup>30</sup>Please see "Bush Doctrine" [Wikipedia.org](http://en.wikipedia.org/wiki/Bush_Doctrine). 23 September, 2007 (last modification). <[http://en.wikipedia.org/wiki/Bush\\_Doctrine](http://en.wikipedia.org/wiki/Bush_Doctrine)>.

<sup>31</sup> Bush, George W. "The National Security Strategy of the United States of American." The White House. September 2002. P, 3. <<http://www.whitehouse.gov/nsc/nss.pdf>>.

theory America's "unparalleled military strength and great political and economic influence" might be put into practice in two complementary ways.<sup>32</sup> The first way is to the realist power theory<sup>33</sup>, which has raised considerable criticism among political scientists and legal scholars studying U.S. foreign policy:<sup>34</sup> the launch of preventive –and not preemptive– strikes against potential enemies of the United States.<sup>35</sup> The implications of this theory in international politics and law are tremendous, but the bottom line is that the threat of "terrorist" and "rogue states" using the latest technology provided the motivation for a global hunt for Islamic radicals and terrorist groups against U.S. interests around the world. This international mission targeted during the past years (2002-2006) several radical Islamic groups around the world in places such as: Afghanistan, Iraq, Iran, Syria, Jordan and Egypt as well as other groups in the Gulf region. Even in Europe American activities had been denounced and ultimately this argument was used to start a war on Iraq.<sup>36</sup> According to Bush, the "War on Terror" would be against rogue states which seek WMD and foster radical terrorist groups.<sup>37</sup>

The second aspect introduced by the Bush Doctrine is the ideal utilization of power as a means of implementing democracy in countries that are considered to be "rogue," "failed" or

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<sup>32</sup>See Ibid. And there is an excellent compendium of George W. Bush's speeches at tribal Messenger.org.  
<<http://www.tribalmessenger.org/security.htm>>

<sup>33</sup>please see Keohane, Robert O.. "Theory of World Politics: Structural Realism and Beyond." In Viotti, Paul and Kauppi, Mark V's *International Relations Theory. Realism, Pluralism and Beyond*. Longman Publishers, 3<sup>rd</sup> ed. 1998. P, 169.

<sup>34</sup>Contributors are International Progress Organization staff and the book was edited by Köechler, Hans. *The Iraq Crisis and the United Nations. Power politics vs. International Law*. I. P. O. Vienna. 2004. P, 3.

<sup>35</sup>The difference between these two concepts regarding war and conflict is: preventive is based on the perception that an enemy is planning to attack you even though there are not solid or objective fact to prove this threat. In the other hand, pre-emptive is based on the fact that your enemy is making moves that suppose an imminent threat to your security. Lawrence Freedman, Professor of War Studies, Kings College in London wrote: "Prevention is cold blooded: it intends to deal with a problem before it becomes a crisis, while preemption is a more desperate strategy employed in the heat of crisis." Freedman, Lawrence. "Prevention, Not Preemption". *The Washington Quarterly* - Volume 26, Number 2, Spring 2003. Pp. 105-114. This definition and other related to this topic can be found at [US-Iraq procon.org](http://www.usiraqprocon.org):

<<http://www.usiraqprocon.org/bin/procon/procon.cgi?database=5-M-Subs9.db&command=viewwone&op=t&id=13&rnd=616.8930823116809>>

<sup>36</sup>Please see CIA activities in Europe: European Parliament adopts final report deploring passivity from some member states. 2007. Parliament's Temporary Committee on the alleged use of European countries by the CIA for illegal activities (TDIP). Justice and home affairs. Report available at [European Parliament website](http://www.europarl.europa.eu/news/expert/infopress_page/019-3030-043-02-07-902-20070209IPR02947-12-02-2007-2007-true/default_en.htm):  
<[http://www.europarl.europa.eu/news/expert/infopress\\_page/019-3030-043-02-07-902-20070209IPR02947-12-02-2007-2007-true/default\\_en.htm](http://www.europarl.europa.eu/news/expert/infopress_page/019-3030-043-02-07-902-20070209IPR02947-12-02-2007-2007-true/default_en.htm)>.

<sup>37</sup> Bush, George W.. "The National Security Strategy of the United States of American." *Op. Cit.* P, 18.

harboring “terrorist” states.<sup>38</sup> The promotion of democracy in the Middle East has become one of the principal U.S. foreign-policy goals in order to strengthen United States efforts to eliminate terrorism. Therefore, the use of military power should be complemented with the promotion of democracy in those regimes where authoritarian or totalitarian regimes had flourished. One of the main loopholes is that the current president of the U.S. lack of a formal definition of democracy, but it can be argued quoting from the ideas gathered in the Bush doctrine, that the US president has an idealist, and neo-liberal approach to democracy.

He presents democracy as a model for national success along with freedom and free-enterprise. George W. Bush states that: “*Democracy and economic openness are the best foundations for domestic and international stability and order.*”<sup>39</sup> He also bases this model on American social idiosyncrasy and experience in history. The United States is a “multi-ethnic democracy” that confirms the possibility of “many heritages and faiths” to live in peace.<sup>40</sup>

### 1.2-The *casus belli*:

George W. Bush’s realist and idealist approaches were applied in the case of the War on Iraq. The War began in March 2003 and the main objectives of operation “Iraqi Freedom<sup>41</sup>”

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<sup>38</sup>The definition used here as idealism its base on two general ideas. The first one is “one who sees such values or human preferences as justice or desire for world peace as potentially decisive and capable of overcoming obstacles to their realization” and, the second definition see idealist as one who “considers ideas as having important casual-effects as opposed to others who see power or material factors as being the determinants of political outcomes” (Viotti and Kauppi, 1999: 480). Judith Goldstein and Robert O. Keohane complement this definition base on ideas versus materialism and regard “ideas” as the medium through which communication and understanding is accomplish. These authors mention that: “we seek to show that ideas matter for policy, even when human beings behave rationally to achieve their ends. [...], actions taken by human beings depend on the substance quality of available ideas, since such ideas help to clarify principles and conceptions of casual relationship, and to coordinate human behaviour.[...] Hence [we] criticize approaches that deny the significance of ideas, but do not challenge the premise that people behave in self-int<sup>o</sup>rest and broadly ration ways” (Goldstein and Keohane in Viotti and Kauppi, 1999: 298).

<sup>39</sup> Bush, George W.. “The National Security Strategy of the United States of American.” *Op. Cit.* P, 15.

<sup>40</sup>*Ibid.* P, 3.

<sup>41</sup>George W. Bush and Prime Minister Tony Blair declared during March 16<sup>th</sup> 2003-meeting in the Azores Islands- that the main objective of operation “Iraqi Freedom” was to overthrow Saddam Hussain’s regime and create a democratic, united and pluralistic Iraq. According to these leaders “we will uphold our responsibility to help the people of Iraq build a nation that is whole, free and at peace with itself and its neighbors. We support the aspirations of all Iraq’s people for a united, representative government that upholds human rights and the rule of law as cornerstones of democracy.” “Joint Statement by President George W. Bush and Prime Minister Tony Blair on Iraq.” April 2003. Belfast, North Ireland. US Department of the State.

<<http://www.state.gov/p/eur/rls/rm/2003/19406.htm>>. Also see Bodansky, Yossef. *The Secret History of the Iraq War*. Regan Books, New York, 2004. P, 242. The operation officially began on March, 20<sup>th</sup>, 2003 although the

were, according to Bush to overthrow Saddam Hussein's "failed" regime, to find the Weapons of Mass Destruction (WMD), and to create a democratic, united and pluralistic Iraq.<sup>42</sup> The Iraqi president, Saddam Hussein, was portrayed as the most anti-democratic president, the Hitler of the Middle East<sup>43</sup>, and was formally accused of being an imminent threat to United States and Israel due to his alleged connections with al-Qaida members responsible for 9-11.<sup>44</sup> Since the early days of the war, the Bush administration, the Republican party as well as US intelligence community had managed to create an image of a Ba'ath regime working hand in hand with al-Qaida for decades. A supporter of this thought was former Secretary of State Colin Powell who consistently reinforced this connection.<sup>45</sup>

Soon after the war in Afghanistan started against the Taliban regime, the Bush administration as well as army officials, scholars, foreign policy analysts and journalists linked Saddam Hussein with al-Qaida. The search for WMD and the image of Saddam Hussein collaborating with Osama Ben Laden were used among other arguments to legitimize the war against Iraq.<sup>46</sup> During the war campaign prior to the US-led occupation of Iraq (2002), President George W. Bush declared to the mass media:

*"Al-Qaeda hides, Saddam doesn't, but the danger is, is that they work in concert. The danger is, is that al-Qaeda becomes an extension of Saddam's madness and his hatred and his capacity to extend weapons of mass destruction around the world. . . . [Y]ou can't distinguish between al-Qaeda and Saddam when you talk about the war on terror."<sup>47</sup>*

Now, in retrospect, it has been revealed that these links and threats posed by Saddam Hussein were exaggerated. The threat of WMD, as well as the connection of Saddam Hussein

authorization from Congress came in a Joint Resolution to Authorize the Use of United States Armed Forces against Iraq. This resolution gave the power to the president to use any means necessary to achieve this objective. 2003 "Invasion of Iraq". [Wikipedia.org](http://en.wikipedia.org/wiki/2003_invasion_of_Iraq). At <[http://en.wikipedia.org/wiki/2003\\_invasion\\_of\\_Iraq](http://en.wikipedia.org/wiki/2003_invasion_of_Iraq)>. This page was late modified on 2007.

<sup>42</sup>Bodansky, Yossef. *Op. Cit.* P, 242.

<sup>43</sup> Fisk, Robert. "The Wartime deceptions: Saddam is Hitler and Is Not about Oil". January, 2007 and published by The Independent UK. [Commondreams.org](http://www.commondreams.org/news_center) news center. <<http://www.commondreams.org/views03/0127-06.htm>>.

<sup>44</sup> Chomsky, Noam. *Op., Cit.* P, 3.

<sup>45</sup> Colin Powell was nominated by George W. Bush as the Secretary of the State and served from 2001 to 2005. His resignation seems to be apparently connected with "differences" about the method used by the US Administration to fight the War on Terror. Collin Powell. [Wikipedia.org](http://en.wikipedia.org/wiki/Colin_Powell). This page was last modified in 22<sup>nd</sup> of January, 2007.

<sup>46</sup> Corn, David. *Lies of George W. Bush: Mastering the Politics of Deception*. Westminster, MD, USA: Crown Publishing Group, Incorporated, 2003. P. 208.

<sup>47</sup> *Ibid.*

with al-Qaida has been proved to be based on falsified and manipulated evidences.<sup>48</sup> Therefore the war on Iraq can be considered as an illegitimate war, orchestrated by the US and UK intelligence agencies to justify the policy of President George W. Bush and Prime Minister Tony Blair. In this regard I consider the testimonies of Scott Ritter –UN Weapons Inspector in Iraq with UN Special Commission (UNSCOM) during 1991-1998– to be particularly revealing:

*“The CIA was designated as the principal implementer of this policy. Therefore, when one looks at the March 2003 invasion of Iraq and the subsequent removal from power of the government of Saddam Hussein, the only conclusion that can be reached is that the CIA accomplished its mission. Iraq was, in fact, a great intelligence victory, insofar as the CIA, through its manipulation of the work of the UN weapons inspectors and the distortion of fact about Iraq’s WMD programs, maintained the public perception of an armed and defiant Iraq in the face of plausible and plentiful evidence to the contrary. We now know that both the US and UK intelligence services had, by July 2002, agreed to ‘fix the intelligence around policy’. But the fact remains that, at least as far as the CIA is concerned, the issue of ‘fixing intelligence around policy’ predates July 2002, reaching as far back as 1992 when the decision was made to doctor the intelligence about Iraqi SCUD missile accounting, asserting the existence of missiles in the face of UNSCOM inspection results which demonstrated that there were none.”<sup>49</sup>*

During his speech on September 12<sup>th</sup>, 2002, Bush accused Iraq of failing to comply with several resolutions adopted by the UN Security Council (UNSC). Iraq denied these charges and announced that it would permit the re-entry of the UN arms inspector to Iraq. Negotiations between the members of the Security Council followed the speech and, it has been suggested that: Russia, China and France were against any measure that would lead to an invasion of Iraq.

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<sup>48</sup>About the WMD please see Charles Duelfer’s report on Weapons of Mass Destruction. Available at the [CIA webpage](https://www.cia.gov/library/reports/general-reports-1/iraq_wmd_2004/index.html) <[https://www.cia.gov/library/reports/general-reports-1/iraq\\_wmd\\_2004/index.html](https://www.cia.gov/library/reports/general-reports-1/iraq_wmd_2004/index.html)>. Under the title “Comprehensive report: DCI Special Advisor Report on Iraq’s WMD”. CIA. September, 2004. The document itself is too long and I suggest reading two press articles published in Internet. “Report: No WMD Stockpiles in Iraq.” October 7<sup>th</sup>, 2004. [CNN International](http://edition.cnn.com/2004/WORLD/ineast/10/06/iraq.wmd.report/). <<http://edition.cnn.com/2004/WORLD/ineast/10/06/iraq.wmd.report/>>; and “CIA’s final report: No WMD found in Iraq.” April 25<sup>th</sup>, 2005. [MSNBC](http://www.msnbc.msn.com/id/7634313/). <<http://www.msnbc.msn.com/id/7634313/>>. About the connection between al-Qaida and Saddam Hussein please see Pincus, Walter. “CIA learned in ’02 that Bin Laden had no Iraqi Ties, Report Says.” [Washington post](http://www.washingtonpost.com/wp-dyn/content/article/2006/09/14/AR2006091401545.html). September 15<sup>th</sup>, 2006. P.A14. <<http://www.washingtonpost.com/wp-dyn/content/article/2006/09/14/AR2006091401545.html>>. Also see Chesterman, Simon. *Op. Cit.* P. 92. Finally about the falsification of data and intelligence report see: Lewis, Neil A.. “Libby Guilty of Lying in CIA Leak Case.” March 6<sup>th</sup>, 2007. [The New York Times](http://www.nytimes.com/2007/03/06/washington/06cndlibby.html?ex=1330837200&en=1bb94ee632b66a01&ei=5088&partner=rssnyt&emc=rss). <<http://www.nytimes.com/2007/03/06/washington/06cndlibby.html?ex=1330837200&en=1bb94ee632b66a01&ei=5088&partner=rssnyt&emc=rss>>

<sup>49</sup>Ritter, Scott. *Iraq Confidential: The Untold Story of America’s Intelligence Conspiracy*. GBR: I. B. Tauris & Company, Limited, 2005. London. P, 291.

The resolution was jointly drafted by the United States and the United Kingdom after long negotiations with Russia and France.<sup>50</sup>

The next month, November 8<sup>th</sup>, 2002, the Security Council voted and passed Resolution 1441 unanimously (Russia, China, France and Arab countries participated in the voting). The resolution accused Iraq of no compliance with numerous previous resolutions regarding its disarmament. The main accusation was that it possessed WMDs and other military programs aiming to develop WMD as well as other types of weaponry. The resolution also cited the links between Iraq and terrorist groups and violation of human rights by the regime. According to some members of the UNSC this resolution was not passed with the intention of attacking Iraq.

For instance, Syrian Foreign Minister Farouk al Shar'a declared that he favored the resolution after receiving a letter from U.S. Secretary of the State Colin Powell assuring that: "*there is nothing in the resolution to allow it to be used as a pretext to launch a war on Iraq.*"<sup>51</sup> On the contrary, this resolution had the intention of giving Iraq a final opportunity to comply with previous resolutions and permit the United Nations Monitoring Verification and Inspection Commission (UNMOVIC) and the International Atomic Energy Agency (IAEA) return to Iraq in order to certify elimination of these weapons<sup>52</sup>. According to Resolution 1441:

*"1. Decides that Iraq has been and remains in material breach of its obligations under relevant resolutions, including resolution 687 (1991), in particular through Iraq's failure to cooperate with United Nations inspectors and the IAEA, and to complete the actions required under paragraphs 8 to 13 of resolution 687 (1991);*

*2. Decides, while acknowledging paragraph 1 above, to afford Iraq, by this resolution, a final opportunity to comply with its disarmament obligations under relevant resolutions of the Council; and accordingly decides to set up an enhanced inspection regime with the aim of bringing to full and verified completion the disarmament process established by resolution 687 (1991) and subsequent resolutions of the Council;..."<sup>53</sup>*

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<sup>50</sup>Please see Gordon, Philip. *Allies at War*. Blacklick, OH, USA: McGraw-Hill Companies. 2004. Pp. 108-111.

<sup>51</sup> Wintour, Patrick & Brian Whitaker in Cairo. Nov. 11, 2002. "UK Expects Iraq to Fail Arms Tests." The Guardian. <<http://www.guardian.co.uk/guardianpolitics/story/0,3605,837561,00.html>>.

<sup>52</sup>Gordon, Philip. *Op. Cit.* P, 113.

<sup>53</sup>Resolution 1441. Adopted by the Security Council at its 4644<sup>th</sup> meeting, on November 8<sup>th</sup> 2002. United Nation. <<http://daccessdds.un.org/doc/UNDOC/GEN/N02/682/26/PDF/N0268226.pdf?OpenElement>>.

Iraq agreed to the terms of the resolution and Hans Blix (UNMOVIC) and Muhammad al Baradei (IAEA) returned to Iraq to conduct such inspection on November 27, 2002.<sup>54</sup> The search for WMD lasted several months and, during December, Hans Blix and Muhammad al Baradei presented a report to the U.N. arguing that although Iraq had collaborated with the inspection, it had not fully respected the terms of disarmament established in resolution 1441.<sup>55</sup> At this point, the United States viewed this violation enough to consider that Iraq “remained in material breach of the U.N. Resolutions.” On the other hand, France, Germany, Russia, and China regarded this report positively and suggested continuing with the inspections until Iraq was totally disarmed.

The U.S., the U.K. and Spain argued that the inspector’s report was a clear evidence of the strategy of the regime to hold up the mission of the inspectors and, therefore enough to force the disarmament of Iraq, but nevertheless tried to amend resolution 1441 with the hope of clarifying the parameter under which they would consider a satisfactory compliance with the condition embodied in resolution 1441.<sup>56</sup> The president of France, Jacques Chirac, opposed these measures and announced that any resolution that would lead to a military operation would be vetoed by France.<sup>57</sup> The project for a new resolution was abandoned. In this regard French Foreign minister, Dominique de Villepin stated in the Security Council in March 8:

*“I would like solemnly to address a question to this body, and it’s the very same question being asked by people all over the world. Why should we now engage in war with Iraq? And I would also like to ask, why smash the instruments that have just proven their effectiveness?”*<sup>58</sup>

Finally the US the UK and Spain had a joint conference in the Azores Islands a week later, on March 16<sup>th</sup>, 2003. The conference declared that the time for diplomacy has ended and

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<sup>54</sup>“Iraq accepts resolution 1441”. Letter from the Iraqi government to the United Nations, dated 13 November 2002, accepting Security Council resolution 1441 on the return of weapons inspectors. [Albab.com](http://www.albab.com/arab/docs/iraq/iraq2002a.htm). <<http://www.albab.com/arab/docs/iraq/iraq2002a.htm>>.

<sup>55</sup> Katzman, Kenneth. “Iraq: Weapons Threat, Compliance, Sanctions and US Foreign Policy”. *CRS*. February 2003. P,7. <<http://fpc.state.gov/documents/organization/18224.pdf>>

<sup>56</sup> Fellmeth, Aaron X.. “Divided by Common Interest: Transatlanticism and the Future of International Law after Iraq”. *The Berkley Electronic Press* (bepress). 2005. P, 8. <<http://law.bepress.com/cgi/viewcontent.cgi?article=3049&context=expresso>>.

<sup>57</sup>Gordon, Philip. *Op. Cit.* Pp, 119-123.

<sup>58</sup>Please see the UN Report: “Statement by the United Nations on March 7, 2003”. Security Council 4714<sup>th</sup> Meeting. United Nations Weapons Inspector Report to the Security Council on Progress of Disarmament of Iraq. UN Press Release sc/7682. Pp, 1 and 5. [Media without Borders.org](http://www.MediaWithoutBorders.org) <[www.adamhodge.com/MediaWithoutBorders/PDF/UNReport-March2003](http://www.adamhodge.com/MediaWithoutBorders/PDF/UNReport-March2003)>.



that Iraq must comply immediately with resolution 1441, otherwise Iraq exposed itself to an invasion by Coalition forces<sup>59</sup>. The next day, Bush announced in a televised speech an ultimatum stating that Saddam Hussein had 48 hours to leave the country. The war officially began on March 18<sup>th</sup>, two days after the ultimatum<sup>60</sup>. The U.S.-led Coalition declared war based on UNSC resolution 1441. This decision was considered by some Security Council member and other legal experts to be illegal. According to U.N. procedures the Security Council, rather than a member or members of the Security Council have the right and obligation to implement U.N. resolutions. In this regard, the U.N. Secretary General had always regarded the war as “*an illegal act that contravenes the UN Charter*”<sup>61</sup>. In a recent interview with BBC, Kofi Annan declared answering to the question: “*was the invasion of Iraq in 2003, without a Security Council resolution, the most difficult point for you in your term?*”

*“It was extremely difficult, because I really believed that we could have stopped the war and that if we had worked a bit harder - given the inspectors a bit more time - we could have. I was also concerned that for the US and its coalition to go to war without the consent of the Council in that particular region, which has always been extremely controversial, would be extremely difficult and very divisive and that it would take quite a long time to put the organization back together, and of course it divided the world too.”<sup>62</sup>*

Various members of the Security Council (France, Germany, Russia and China) while discussing the possibilities of a military action, considered that Iraq was making progress in the process of disarmament and, thus it was unnecessary to pass another resolution relating this matter. The interpretations about how to implement resolution 1441 were totally different. The U.S. and the U.K. defended the idea that the fact that Iraq did not fully disarm after the weapon inspectors was far enough to start the war; meanwhile other members of the Council interpreted the testimony of Hans Blix and Muhammad Al-Baradai as proof of Saddam Hussein’s regimes willingness to find a peaceful solution.

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<sup>59</sup>Please see [BBC News](http://news.bbc.co.uk/1/hi/world/middle_east/2855817.stm). “UN decision day on Iraq”. US President George W Bush said Monday would be a “moment of truth for the world”, following a summit on the Iraq crisis with his Spanish and British allies in the Portuguese Azores islands. March 17<sup>th</sup>, 2003.

<[http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/1/hi/world/middle\\_east/2855817.stm](http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/1/hi/world/middle_east/2855817.stm)>.

<sup>60</sup>Bodansky, Yossef. *Op. Cit.* P, 181.

<sup>61</sup>“Iraq War Illegal says Annan”. [BBC News](http://news.bbc.co.uk/2/hi/middle_east/3661134.stm), September, 2004.

<[http://news.bbc.co.uk/2/hi/middle\\_east/3661134.stm](http://news.bbc.co.uk/2/hi/middle_east/3661134.stm)>.

<sup>62</sup>“Kofi Annan Interview: Text”. [BBC News](http://news.bbc.co.uk/2/hi/6205056.stm), Special Report. December 2006.

<<http://news.bbc.co.uk/2/hi/6205056.stm>>.

It took almost two year to U.S. led–Coalition forces to abandon the search for this kind of weaponry. Iraq did not have WMD and those reports used by U.S. intelligence apparatus were based on vague, wrong, and false information.<sup>63</sup> The U.S. government overrode and undermined the authority of the U.N and other internationally recognized institution as the IAEA in their work to provide the world with solutions as well as with unbiased and reliable information about Iraq nuclear facilities and capabilities.

The Bush administration with the help of the several intelligence institutions and agencies fixed evidences in order to initiate and legitimacy certain policies. Also the White House speeded the diplomatic process to find support for the war, even though members of the UNSC as well as several U.S. allies disagreed with the perception that Iraq represents a major threat to the U.S and the international community. Since September 11<sup>th</sup>, The U.S. foreign policy has been reluctant to find other ways to deal with the Iraqi crisis that ultimately could have been more appropriate. Why did the U.S. follow this path? Why it was so important to end with Saddam Hussein's regime? And finally, are there other theories to explain this conflict? Therefore the United States went to war on Iraq without a clear consensus from many traditional and strategic allies. It seems clear from the information gathered that members of the UNSC as well as several U.S. allies disagreed with the perception that Iraq represents a major threat to the U.S and the international community.

### **1.3- Engineering regime change through military intervention: Nation-Building, Client State-Building, or Creating a client state through nation-building?**

At this point, the U.S. with the support of U.K. and other nations, which formed the Coalition forces, decided to engineer regime change through military intervention, despite a strong opposition of the permanent members of the Security Council.<sup>64</sup>This unilateral approach is not new amongst American neo-conservative politicians, as Toby Dodge argues. The ideas

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<sup>63</sup> Please see: "Official: U.S. calls off search for Iraqi WMDs". [CNN.com](http://www.cnn.com/2005/US/01/12/wmd.search/). January 12, 2005. <<http://www.cnn.com/2005/US/01/12/wmd.search/>>.

<sup>64</sup>Please see. Litwak, Robert S. "Non-proliferations and the Dilemmas of Regime Change." Woodrow [Wilson Center](http://www.wilsoncenter.org/topics/pubs/survival2.pdf). December-January 2003-2004. <<http://www.wilsoncenter.org/topics/pubs/survival2.pdf>>.

and thinking behind the Bush Doctrine was a result of Bush's senior presidency in 1992.<sup>65</sup> For instance, Dodge explains that at those days, Dick Cheney was Secretary of Defense, and back then, he gathered a team to study the geopolitical strategy that the U.S. should follow after the end of the Cold War.

This team concluded that the U.S. should endeavor in its unilateral dominance of the International System and gathered all this advice in a report called the Defense Planning Guidance, which was supervised by Under Secretary of Defense for Policy, Paul Wolfowitz.<sup>66</sup> This text, which could be considered as an antecedent of the Bush Doctrine, recommended the administration to "*distance from the standing multilateralism of the United Nations and rely on ad hoc coalition of the willing.*"<sup>67</sup> According to this report the United States should stop the proliferation of WMD in weaker states and third world countries.

These ideas were considered too extreme and burdensome during that period but emerged anew after September 11<sup>th</sup>. Following Dodge's arguments, the Bush doctrine is a new attempt to "codify" changes in international relations in the post-Cold War era. He argues that the Bush Doctrine represents the biggest blow to the concept of sovereignty in the developing world: "*ultimately the Bush Doctrine is an attempt to return to the pre-Woodrow Wilson international system, where the right of sovereignty has to be earned.*"<sup>68</sup> Therefore the evolution and resolution of the war in Iraq is paramount to settle and codify a new system of international interventions. According to Dodge: "*if successful (the war in Iraq) it could result in the imposition of coherent model for Post-Cold War international relations across the world. If it fails, the result could be a rapid curtailment of American's international ambitions and a drastic scaling back to its commitments.*"<sup>69</sup>

Therefore, if we take into consideration this argument, the Bush Doctrine justifies through national security concerns the use of force in foreign countries to engineer regime change. It is necessary to remember here that Iraq was not as much of a threat to the United States as it was important from a strategic and economic point of view. Iraq is located in the heart of the Middle East. Mesopotamia lies between Syria and Iran, two regional powers, which

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<sup>65</sup>Dodge, Toby. *Op. Cit.* P, XVII.

<sup>66</sup>*Ibid.*

<sup>67</sup>*Ibid.*

<sup>68</sup>*Ibid.* P, XVI.

<sup>69</sup> Dodge, Toby. *Op. Cit.* P, XIX.

had traditionally opposed the growing influence of the United States in the region.<sup>70</sup> For instance, these two nations have declared publically and off the record their resistance to recognize Israel as a sovereign nation, and both countries had been accused of supporting terrorist groups and operations in the region.<sup>71</sup> The occupation of Iraq breaks the possibility of creating a possible arch of alliances or cooperation amongst these three nations: Syria, Iraq and Iran.

The economic perspective is clearly related to Iraq's vast natural resources, namely oil and gas. Since the Iraqi invasion of Kuwait, Saddam Hussein's regime represented a menace to the security, stability and development of the oil trade in Iraq as well as in several countries in the Persian Gulf area: Kuwait, Saudi Arabia, Qatar and United Arab Emirates –all allies to the U.S.<sup>72</sup> If we take into consideration these factors, the Bush administration had two main options to deal with the Iraqi issue. The first option was to continue with the sanctions which were put in place since the war between Iraq and Kuwait, and the second position was to eliminate Saddam's regime and create a new Iraq that would ultimately become a strong ally of the U.S. in the region. This last option was finally adopted because years of sanctions on Iraq proved to be inefficient, and did not offer clear guarantees about the full disarmament of Iraq.<sup>73</sup> The Bush administration was worried about the ability of the Iraqi regime to override the sanctions and rebuild their military capabilities, which at the end, would bring political instability and threaten the development of the oil economy in the region.<sup>74</sup>

This unilateral approach left the United States and its Coalition forces without a clear consensual vision of the international community and, therefore, without the rational (legal) and material (financial) support of other nations in the international community. However this fact was ameliorated by the support of the U.K. and Spain, and also by the great confidence that

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<sup>70</sup> Zisser, Eyal. "Syria and the United States: Bad Habits Die Hard". *The Middle East Quarterly*. Summer 2003. Vol. X, No. 3. <<http://www.meforum.org/article/555>>. Roth, Richard. "U.S. Official on U.S. Relations with Iran". Middle East Policy Council Conference. *Federation of American Scientists*. December, 2000. <<http://www.fas.org/news/iran/2000/iran-001212.htm>>.

<sup>71</sup> Abdo, Geneive. "Mideast Crisis Resurrects Old Hostilities: Iran's Anti-U.S. Fete Turns against Israel". *The Herald Tribune International*. November 2004. <<http://www.iht.com/articles/2000/11/04/iran.2.t.php>>. Ben-Aharon, Yossi. "Negotiating with Syria: A First-Hand Account". *MERIA*. Vol. 4, No. 2, June 2000. <<http://meria.idc.ac.il/journal/2000/issue2/jv4n2a1.html>>.

<sup>72</sup> Klare, Michael. *Blood and Oil*. Penguins Books. 2004. P, 94-105.

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.* P, 98.

the Bush administration has in the military capabilities of the U.S., a factor mentioned several times in the Bush Doctrine. There was a clear advantage in using a unilateral approach to tackle Iraq's regime: the control of the operations. The U.S. led–Coalition forces, as the principal actor in the war, has to assume all the responsibilities of an occupying power. The responsibilities of an occupying power are embodied in 1907, the Hague declaration, and the Fourth Geneva Convention of 1949. These regulations stipulate the legal basis for an occupying force to exercise authority over those territories that comes under its control:

*“the occupying power is entitled to ensure the security of its forces, but also it is required to ‘take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely, the laws in force in the country’. In addition to other positive obligations, such as ensuring public health and sanitation as well as the provision of food and medical supplies, the occupying power is prohibited from changing the local laws except as necessary for its own security and it is limited in its capacity to change state institutions.”*<sup>75</sup>

Simon Chesterman explains that the problem of creating a transitional administration in an occupied country is that it is precisely intended to change laws and institutions in its territories. The Hague regulation and the Fourth Geneva convention do not provide enough legal bases for this task. The source of legal authority needed is intended to come from the Security Council.<sup>76</sup> The Security Council possesses the power to administer territories on a temporary basis; although this power is not mentioned in the U.N. Charter as following the end of World War II different missions (peacekeeping and peace –building operations) had been formed to administer occupied territories.<sup>77</sup>

Therefore the U.S. led–Coalition forces assumed the task of administering the territory during its occupation. The United States' plan to administer Iraq was announced by the Department of State and Defense, which declared before the Senate Foreign Relations Committee, February 2003, that the United States would take charge of Iraq rather the United Nations or some provisional government of Iraqi exiles.<sup>78</sup> The administration of the territory would be directed by the Pentagon's Office for Reconstruction and Humanitarian Assistance (ORHA) established by Bush in January 2003.<sup>79</sup>

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<sup>75</sup>Please see 1907 Hague Regulation, art. 43; Fourth Geneva Convention, art. 54-6, 64. In Chesterman, Simon. *Op. Cit.* P. 6-7.

<sup>76</sup>*Ibid.*

<sup>77</sup>*Ibid.*

<sup>78</sup>Chesterman, Simon. *Op. Cit.* p. 95-96

<sup>79</sup>*Ibid.*

Nevertheless, the U.S. and the U.K. during the months ahead decided to reconsider this approach and work on a new resolution that would enable the U.N. to provide Coalition forces the necessary legitimating for their occupation or as Chesterman argued: “*political cover for what was essentially a US military occupation.*”<sup>80</sup> UNSC Resolution 1483 passed on May 2003 recognized the U.S. and the U.K. as occupying powers in Iraq. The resolution called on them to respect their obligations under the Hague Regulations and the Fourth Geneva convention and seek the authorization for lifting the economic sanctions imposed on Iraq since the first Gulf War of 1991 (the oil for food program was cancelled).<sup>81</sup>

This resolution gave the Coalition Provisional Authority (CPA) –the CPA is a civil institution created by the U.S. Department of Defense to administer Iraq during the U.S. led–Coalition occupation<sup>82</sup>– the power to control oil revenues, and it established the basic obligation under which the CPA should re-build Iraq. The CPA has to:

*“Promote the welfare of the Iraqi people through the effectiveness of the territory, including in particular the restoration of conditions of security and stability and the creation of conditions in which Iraqi people can freely determine their own political future.”*<sup>83</sup>

This new resolution may have given the U.S. led–Coalition forces a source of legitimacy, but it did not make a considerable difference as far as the role of the U.N. should be in a scenario such as this.<sup>84</sup> The U.N. did not have the ‘veto’ power in decision taken by the CPA.<sup>85</sup> The Special Representative of the U.N. (SRUN) therefore had the role of “reporting, assisting, promoting, facilitating and encouraging” various aspects of the human relief and reconstruction. The U.N. had also to collaborate with the CPA and the Iraqi people in order to restore Iraqi political and public structures, and to assist these two entities in their goal of “establishing national and local institutions for representative government.”<sup>86</sup> The mission and role of the United Nations was greatly diminished after a car bomb targeted the U.N.

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<sup>80</sup> *Ibid.*

<sup>81</sup> Younge, Gary (New York) and Black, Ian (Brussels). “Blue Print gives Coalition control over Oil.” May 10, 2003. The Guardian. <<http://www.guardian.co.uk/world/2003/may/10/iraq.oil>>.

<sup>82</sup>Please see “*An History Review of the CPA Accomplishments.*” Available at: The Coalition Provisional Authority official web site. <<http://www.cpa-iraq.org/>>.

<sup>83</sup>Chesterman, Simon. *Op. Cit.* p. 95-96.

<sup>84</sup>*Ibid.*

<sup>85</sup>*Ibid.*

<sup>86</sup>*Ibid.*

Headquarters in Baghdad in August 2003. The attack killed SRUN, Sérgio Vieira de Mello and other twenty one members of the United Nation Assistance Mission for Iraq (UNAMI).<sup>87</sup>

In theory the action of occupation means to assume the monopoly of the power of the occupied state and to rule the territory during a period of autocracy in order to create the conditions for legitimate and sustainable national governance.<sup>88</sup> If we take a look at the Iraqi case this concept is clear since the invasion. Paul Bremer was appointed in May 2003 by George W. Bush: *“the Presidential Envoy to Iraq with full authority over all US government personnel, activities and funds”* and Donald Rumsfeld -Secretary of Defense- designated Bremer as the official administrator of the CPA: *“empowered with all executive, legislative, and judiciary functions.”*<sup>89</sup>

The occupation of Iraq and the reconstruction and management of its territory had been defined by Bush as a clear commitment to create a new country under what he had called *“nation building”* efforts.<sup>90</sup> What is even more contradictory are the ideas of Bush and the Republican Party before the current president was elected. Conservatives never approved the so called *“humanitarian-interventions”* by the Clinton administration in Somalia, Kosovo, and East Timor, and today Democrats strongly criticize George W. Bush’s rationale behind the war in Iraq.<sup>91</sup>

Several authors argued that the concept of nation building used by the U.S. president is broad, vague, and imprecise. The problem arises with definition of creating a nation. According to Francis Fukuyama this term means: *“creating or repairing all the cultural, social, and historical ties that bind people together as a nation.”*<sup>92</sup> In this regard Simon Chesterman clarifies that the concept nation building developed during the post-colonial context amongst those leaders who *“attempt to rally a population within sometimes arbitrary territorial frontiers”*. In this case the term *nation* is referred to those *“people who share the common customs, origins,*

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<sup>87</sup>*Ibid.*

<sup>88</sup>Chesterman, Simon. *Op. Cit.* P. 1.

<sup>89</sup>Bremer and McConnell. *Op. Cit.* P, 12-13.

<sup>90</sup>According to Francis Fukuyama George W. Bush declared on 26 February 2003: *“we meet here during a crucial period in the history of our nation, and the civilized world. Part of that history was written by others; the rest will be writing by us...Rebuilding Iraq will require a substantial commitment for many nations, including our own: we will remain in Iraq as long as necessary, and not a day more.”* (italics added). Francis Fukuyama. *“Nation-Building 101”* The Atlantic Monthly 293, February/January 2004. <<http://www.theatlantic.com/doc/200401/fukuyama>>.

<sup>91</sup>*Ibid.*

<sup>92</sup>*Ibid.*

history, and frequently language.”<sup>93</sup> One of the main points that Chesterman is trying to underline is the concept of nation is too broad because a particular community usually exceeds defined borders. In a good interpretation of this idea is found in Karin Van Hippel’s explanation of different U.S. contemporary military intervention in other countries:

*“when the US government and the UN attempted to rebuild Somalia, they did not try to reunite all Somalis living in Djibouti, Kenya, and Ethiopia with Somalis in the former Somali Republic, which would have indeed created a Somali nation, but rather they focused on rebuilding the former Somali Republic.”*<sup>94</sup>

These authors explain that the right term to define this operation is not nation building but state building. The usage of this terminology confuses and complicates about what should be the real objectives of the U.S. led–Coalition forces in Iraq. In addition to this, the U.S. administration before the occupation in late 2003, announced a broader policy known as the Greater Middle East Initiative (GMEI).<sup>95</sup> The idea behind this policy was that once the United States has toppled Saddam Hussein the democratization of Iraq would be easier and, it would lead to a domino rally effect spreading democracy across the Islamic world.<sup>96</sup>

Cherterman, Fukuyama, and Von Hippel had pointed out that the concept of state building explains better what should be the objectives of the U.S. led–Coalition forces in Iraq. The term state building according to Chesterman:

*“Refers to extended international involvement (primarily not exclusively, through the United Nations that goes beyond traditional peacekeeping and peace–building) mandates and, is directed at constructing or reconstructing institutions of governance capable of providing citizens with physical and economic security. [...] With in this class of operations, transitional administration denotes the less common type of operations in which these ends have been pursuing by assuming some of all the powers of the state on a temporary basis.”*<sup>97</sup>

In other words, state building could be summarized as the creation and strengthening of government institutions such as armies, police force, judiciaries, central bank, tax-collections agencies, health and education systems.<sup>98</sup> Therefore the meaning of nation building or state

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<sup>93</sup>Chesterman, Simon. *Op. Cit.* P, 4.

<sup>94</sup>Von Hippel, Karin. *Democracy by Force : U. S. Military Intervention in the Post-Cold War World.* Port Chester, NY, USA: Cambridge University Press, 2000. P, 1.

<sup>95</sup> Stewart, Dona J.. “The Greater Middle East and Reform in the Bush Administration’s Ideological Imagination”. *The American Geographic Society.* P, 409. January 2005, <<http://www.amergeog.org/gr/jul05/stewart.pdf>>.

<sup>96</sup>*Ibid.*

<sup>97</sup>Chesterman, Simon. *Op. Cit.* P, 5.

<sup>98</sup> Fukuyama, Francis. “Nation-Building 101”. *Ibid.*



building goes beyond the concept we have of an ordinary military interventions. The difference between an ordinary military intervention and nation building had been well defined by Minxin Pai and Sara Kasper in "Lesson from the past: The American Record on Nation Building". According to these authors there are three strict criteria that make this distinction clear:

- A) The first characteristic of nation building operations is regime change or regime continuation. The US in order to achieve any plan they have in a country occupied either has to back up the regime -which without its support would collapse- or has to engineer regime change. Regime change or the continuation of a regime is the main objective of Nation Building. U.S. Nation building efforts during the past were pursuant of certain strategic interests as economy or security and, these operations were never related to democratic building efforts. The idea of democracy building is a new concept in U.S. foreign intervention.<sup>99</sup>
- B) The second characteristic of nation building is the deployment of huge amounts of ground troops in an occupied country. There are exceptions like the Guatemala case (1954) where regime change was accomplished with the deployment of U.S. troops, but as the Iraqi cases show us, nation building entitles the long-term commitments of ground forces in order to support the continuation of a regime or the creation of a new one. The responsibility of the ground forces usually goes beyond fighting hostile forces in the occupied country. They also have to perform administrative function with the goal of establishing law and order.<sup>100</sup>
- C) The third characteristic of nation building is the deep involvement of US military and civil personnel in the political administration of the occupied country. The involvement of Washington in the political process of occupied countries has the goal of selecting new political leaders that will rule the new regime. This operation entitles the restructuring of crucial political institutions through the draft and implementation of basic laws and constitutions and, the US participation in ordinary administrative affairs.<sup>101</sup>

These two authors used this criteria to divide and classify the different military intervention undertook by the U.S. in its history. The U.S. record of nation building is very low

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<sup>99</sup>I have organized these criteria in order to adapt it for this research. Please see: Pai, Minxin and Kasper, Sara. "Lesson from the past: The American Record on Nation Building". Carnegie Endowment for International Peace. May, 2004. P, 1-2.

<sup>100</sup>*Ibid.*

<sup>101</sup>*Ibid.*

and of more than 200 military interventions only 8% match the criteria mentioned above.<sup>102</sup> One of the leading theories in their investigation is precisely the mix record of democracy implementation through nation building operations. The current implementation rate of democracy by the U.S. is 26 %. This means that in 15 case studies analyzed only four countries (West Germany, Japan, Grenada and Panama) have actually become democratic or have adopted substantial measures towards democratization.

Another relationship established with these 16 operations is whether they were managed by the United States using unilateral or multilateral approach. From these 16 cases, 12 were pursued unilaterally (Afghanistan and Haiti were approved by the U.N.). And, perhaps the most important discovery of this research is that in all the cases, when the U.S. had used an *interim surrogate regime* in order to democratize the country, the project has collapsed soon after the withdrawal of U.S. troops.<sup>103</sup> The combination of unilateralism and the appointment of a regime designed by Washington have failed in establishing democracy.<sup>104</sup> The U.S. led-Coalition occupation in Iraq meets the three features of nation building operation mentioned above: regime change, deployment of U.S. military and, the use of U.S. military and civil personal to administer territories occupied. Another interesting feature to take into consideration for this research is that the so called nation building operation had traditionally focused on strategic concerns (economic or security) rather than democratization efforts per se. This is particularly relevant in the case of Iraq.

There are two factors that had made these efforts fail: a unilateral approach to the use of force and a deep involvement of the United States in the political process of the occupied country. These features led in several cases to surrogate regimes unable to stand by themselves

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<sup>102</sup>*Ibid.*

<sup>103</sup>“Surrogate regimes are characterized according Minxin Pai and Sara Kasper, by their dependency on the United States: “They were headed by individuals picked by or acceptable to the United States. American military support was crucial to their survival. Such virtual American protectorates included the regimes in Panama (1903–1936), Nicaragua (1909– 1933), Haiti (1915–1934), Cuba (1917–1922), South Vietnam (1964–1973), the Dominican Republic (1965–1966), and Cambodia (1970–1973).” Pai, Minxin and Kasper, Sara. *Op. Cit.* P, 3.

<sup>104</sup>Minxin Pai and Sara Kasper argue that: “The record of past US experience in democratic nation building is daunting. [...] Of the sixteen such efforts during the past century, democracy was sustained in only four cases ten years after the departure of US forces. [...] Unilateral nation building by the United States has had an even rougher time—perhaps because unilateralism has led to surrogate regimes and direct US administration during the post-conflict period. Not one American-supported surrogate regime has made the transition to democracy, and only one case of direct American administration has done so. Importantly, many of the factors that experience shows are most crucial to success are absent in Iraq.” Pai, Minxin and Kasper, Sara. *Op. Cit.* P, 3.

after the withdrawal of U.S. troops. Thereby the prospect of democratization throughout nation building should be taken carefully as Minxin Pai and Sara Kasper had pointed out.

Authors such as Paul Rogers, Jayati Ghosh and Patrick Seale had interpreted nation building operations in Iraq as a means to create a client state. Paul Rogers argues that although the U.S. had returned sovereignty to an interim Iraqi government in May 31<sup>st</sup> 2004, the nature of the interim government lead by Prime Minister Ayad Alawi has all the components of a client regime.<sup>105</sup> To prove this theory he presents various arguments. The first one is that Paul Bremer –head of the CPA– during one of its final acts as temporary president –administrator of Iraq appointed several inspectors general to oversee the role of numerous Iraqi ministries. Also the CPA had appointed the heads of key security and intelligence officers that would hold office for five years and, thereby remaining in power whatsoever government might eventually elected.<sup>106</sup>

The second argument is that the United States substituted Paul Bremer with Ambassador John Negroponte who is a well experienced diplomat in regime change operations in South America.<sup>107</sup> Moreover, he points out that the United States had opened in Iraq the largest U.S. embassy in the world.<sup>108</sup> The embassy had allocated over 200 staff to ministries, and the embassy has four major regional centers and five sub-centers distribute across the country. The third argument is that the United States controls many relief and development projects in such a fashion that it is conditioning the new Iraqi economic.<sup>109</sup> The fourth idea is that the CPA had established a wide range of emergency powers which include martial law, which may be used for instance for delaying the January 2005 elections if the security situation does not improve and, finally the United States maintained a large number of troops in the country (140,000) that are planned to stay for several years. All these arguments prove the deep involvement of the United States in Iraqi affairs.<sup>110</sup>

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<sup>105</sup>Rogers, Paul. *Iraq and the War on Terror: Twelve Months of Insurgency 2004/2005*. London, , GBR: I. B. Tauris & Company, Limited, 2006. P, 31 -32.

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.*

<sup>108</sup>Please see "Permanent Bases". [Global Policy Forum](http://www.globalpolicy.org/security/issues/iraq/perminindex.htm). New York. <<http://www.globalpolicy.org/security/issues/iraq/perminindex.htm>>

<sup>109</sup>Rogers, Paul. *Op. Cit.* P, 32.

<sup>110</sup> *Ibid.*

The arguments used by Jayati Ghosh are focused on the pressures of the United States to approve a new Iraqi constitution.<sup>111</sup> U.S. officials usually had referred to the 30 January elections in 2005 for a Transitional National Assembly as a probe of the democratizing efforts led by Coalition forces in Iraq. The constitution was approved in a popular referendum in October 15<sup>th</sup>, 2005. According to Ghosh the Iraqi Government resulting from the January elections is a government with low representativeness among the Iraqi populations. The government consisting of Kurds and various Shiite factions has no credibility among the majority of the Iraqi people and it was appointed by the U.S. led–Coalition through a “*meaningless election organized by the occupation*”.<sup>112</sup> He argues that this government had betrayed the Iraqi people because it had failed to fulfill its promises during the pre-election campaign of a quick withdrawal of U.S. led–Coalition troops. Nevertheless the core of his theory is that the Iraqi constitution presented for referendum facilitates the creation of a client state. In this regard he had mentioned:

*“The pushing through of a Constitution was seen as a way of encouraging Iraqis to believe that they would eventually be delivered a representative and democratic government. The process of drafting has been problematic from the start, and not only because it has been undertaken in the shadow of military occupation. It has brought to the front the deep divisions within Iraq. But these relate not to the Shia-Sunni-Kurd divide that is given so much publicity, but to the divisions between those sections of the elite (who are willing to trade away domestic resources and democratic rights in return for control over particular territories) and everyone else in Iraq. [...] The concerns of the US regime in lauding and pushing through this document are all too apparent. The Bush administration wants to put in place a regime that has the power to carry through a sell-off of the oil industry, and to sign agreements sanctioning the permanent US military bases that are being built in key areas around the country. In order to transform Iraq into an effective client state of the US, it appears that these Kurdish and Shia faction leaders have emerged as the most viable candidates to fulfill this role.”<sup>113</sup>*

The idea underlying Ghosh’s argument is that the United States had found among several Shia and Kurdish parties (greatly fragmented from within) a friendly elite ready to collaborate with U.S. led– Coalition forces. The main U.S. interest behind the approval of the constitution was to have a regime that would not call for the withdrawal of U.S. forces. According to this author, the constitution will privatize the Iraqi economy along a free market oriented approach that ultimately would allow the United States to have greater control of the

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<sup>111</sup> Ghosh, Jayati. “A quisling Constitution.” *Frontline*. Vol 22 –issue 19, September 10-25, 2005. Available in Internet at: <<http://www.hinduonnet.com/fline/fl2219/stories/20050923003811200.htm>>.

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*

huge natural resources and economy of Iraq. Patrick Seale follows these arguments and declares that officials in the Bush Administration as Dick Cheney were trying to consolidate a client state with clear economic purposes.<sup>114</sup>

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During this chapter I have reviewed some of the most important issues regarding U.S. led–Coalition war in Iraq. I have explained the weak and for many, illegal foundations under the United States, United Kingdom and other countries have started the war on Iraq. Also I reviewed several studies focusing on U.S. nation’s (or state’s) building operations during the twentieth century, and they show a poor record of success in democratization efforts through military intervention initiated by the United States. Usually the junction of a unilateral approach in the use of force and, the creation of a surrogate or client regime had led to failure of these efforts after the withdrawal of U.S. troops.

Therefore we should at least be skeptical about the possibilities of democratizing Iraq through the nation building approach used by the U.S. led–Coalition force in Iraq. According to all the data gathered in this chapter a sovereign, independent and democratic Iraq could collapse after the U.S. led–Coalition forces withdraw from Iraq. This research through the study of the constitutional process would try to expand the knowledge about the nation building process led by the United States. Jayati Ghosh had pointed out the importance of the understanding of the constitution, and how a deep analysis of the “context” and the “content” would help us comprehend the large amount of challenges and issues that Iraqis have to resolve in the process of creating of a new constitution.

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<sup>114</sup>This author argues that: “Cheney may have been seduced by the thought of turning fabulously oil-rich Iraq into a US client state, with fat reconstruction contracts for Haliburton, the giant company of which Cheney was formerly the CEO. Rumsfeld may have thought that, after 9/11, the war was necessary to teach the Arabs a sharp lesson about America’s military power: they needed to be shown the big stick so as never to dare attack America again.” Please see Seale, Patrick. “Valerie Plame and the War in Iraq.” [Agenceglobal.com](http://www.agenceglobal.com) Nov, 2005. <<http://www.agenceglobal.com/article.asp?id=702>>.

## Chapter 2

### Theoretical and Methodological Approach to the Analysis of the Iraqi Constitutional Process and Constitution:

*"These [occupation] authorities do not have the authority to appoint the members of the constitution writing council. There is no guarantee that this council will produce a constitution that responds to the paramount interests of the Iraqi people and expresses its national identity of which Islam and noble social values are basic components. The [constitution writing] proposal is fundamentally unacceptable."<sup>115</sup>*

*"It is useless to have the most beneficial laws, fully agreed upon by all who are members of the constitution, if they are not going to be trained and have their habits formed in the spirit of that constitution..."<sup>116</sup>*

*"I read the draft constitution and did not find anything in it that endangers Iraq's unity. It guarantees the rights of all Iraqis and is the only safeguard against dictatorship. I vote yes and it was the most beautiful yes I have ever experienced in the whole of my life."<sup>117</sup>*

#### 2.1-Introduction to the study of the constitution:

The drafting and adoption of a constitution was one the most important legal and political projects undertaken by the U.S. led-Coalition forces since the beginning of the occupation. Iraq as an occupied entity lacked a government or a state to manage the country's affairs. It needed to formulate and institutionalize its own governance methods and institutions, and the writing and adoption of a permanent constitution was the first step, in a long process, for providing Iraq with self-governance instruments. The constitution would provide Iraq with a political and legal map to rebuild the state.

The adoption of a constitution in Iraq is important because, as other communities around the world (e.g. states, private or public institution, civil organizations, NGOs, private companies, clubs, etc...), decisions must be taken regarding crucial issues that concern all members of a particular society or organization. Societies therefore set a collection of explicit or

<sup>115</sup>Ali al-Husaini al-Sistani. 15<sup>th</sup>, 2003. In Arato, Andrew. "Sistani vs. Bush: Constitutional Politics in Iraq." *Constellations* V. 11, N<sup>o</sup>. 2. 2004. Pp. 4-5. <<http://www.constellationsjournal.org/Arato-Sistani.pdf>>.

<sup>116</sup>Aristotle. *The Politics*, Translated by T. A. Sinclair, Revised and Re-presented by Trevor J. Saunders, Penguin Books, London 1992, Book V, ix. P, 331.

<sup>117</sup>Turki, Fayez. This and other views as gathered from a survey carried out by BBC Arabic. Please see: "Iraq constitution: your views". BBC News. October 10<sup>th</sup>, 2005. <[http://news.bbc.co.uk/1/hi/talking\\_point/4335472.stm](http://news.bbc.co.uk/1/hi/talking_point/4335472.stm)>.

implicit rules to manage these matters<sup>118</sup>. The analysis of these rules, how these norms are adopted, and how we can improve and change them are the main concerns of constitutional specialists and scholars. The drafting of constitution is regarded to be the fundamental phase in the process for providing political, social and economic prosperity.<sup>119</sup>

This chapter will provide a basic understanding of the meaning of the constitution in modern societies. In order to properly comprehend the role of the constitution in our communities, it is necessary to focus on four main issues: their content, their functions, their role in political, social and economic development and, finally how they are created and amended.<sup>120</sup> The study of these elements will provide fundamental theory tools to correctly analyze and interpret the meaning and the role of the constitution, formulate basic questions, and hopefully, promote debate regarding the constitution and the constitutional process in Iraq. Finally, the goal in this chapter is to create a road map which will provide information to scholars, politicians, students and citizens about the constitutional process and the Iraqi constitution.

An important concept in constitutional studies is that different cultures and societies have, in one way or another, developed constitutional forms of governance. Constitutions are a universal phenomenon regardless of the cultural, social and political traditions where they are implemented. Perhaps this is best reflected in the approach adopted by 18<sup>th</sup> century French philosopher Montesquieu: *“the law of each country reflects the spirit and the soul of the people”*.<sup>121</sup>

Modern societies around the world tend to approve permanent constitutions to regulate the management of governmental affairs. In this regard constitutions are not anymore a mere Western method of regulating the state but a phenomenon extended to all continents. African, American, Asian and European communities and societies have developed

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<sup>118</sup> Graham, John & Elder C. Marques. “Understanding Constitutions: A Road Map for Communities.” Institute on Governance. October, 2000. Canada. P, 2. <[www.iog.ca/publications/Constitution.PDF](http://www.iog.ca/publications/Constitution.PDF)>.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*

<sup>121</sup> Fleiner, Thomas. “Ethno-Nationalist Demands as Contemporary Phenomenon: Structural Challenges for Modern Constitutions.” Lecture on the occasion of the birth centenary of Dr. Colvin R. de Silva. Sri Lanka’s first Minister of Constitutional Affairs, Colombo, Monday 26, February 2007. P, 1. <[http://www.federalism.ch/files/documents//Colvin%20de%20Silva%20Lecture\\_Colombo%20Feb07.pdf](http://www.federalism.ch/files/documents//Colvin%20de%20Silva%20Lecture_Colombo%20Feb07.pdf)>

constitutions.<sup>122</sup> It is obvious that these countries share similarities and differences in their constitutional traditions but how could we established a basic criterion to distinguish between constitutional traditions? According to Mark Corray a basic distinction among constitutions is between those constitutions that limit the power of the state, and those constitutions that “exist at the pleasure of the powers” and enhance the power of the state to suppress and oppress the people.<sup>123</sup>

In this regard constitutional scholars have developed theories to investigate how constitutions may serve better society. Constitutional studies, or constitutionalism, focus its efforts on developing theories in order to study how constitutions can improve democracy and the rule of law in their communities.<sup>124</sup> Therefore states can draft and approve constitutions, but if these states do not respect the laws and their constitutions, they are considered to be contrary to constitutionalist principles. Constitutionalism theories emphasize the idea that the power of the government in any given state should be limited by the laws and regulations embodied in the constitution and other laws of that state. The constitution itself does not guarantee that the government or regime of a state is bounded by the constitution and other laws (e.g., it cannot be argued that the Soviet Union followed constitutionalism principles although they had a constitution) and, in other cases, countries have developed constitutions, but they ignored their principles. This is what Corray has described as countries with a *façade* of constitutionalism.<sup>125</sup>

The author offers various examples: Singapore, South Africa and Sri Lanka. For instance, Singapore has a system of constitutional government. This means that the government follows the laws and the constitution: a parliament, a cabinet system and a

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<sup>122</sup>Please see [constitution, treaties and declarations](http://www.psr.keele.ac.uk/const.htm) website (<http://www.psr.keele.ac.uk/const.htm>) and the [International Constitutional Law Project](http://www.servat.unibe.ch/law/icl/) (<http://www.servat.unibe.ch/law/icl/>). Both sites offer a great compendium of constitutions around the world.

<sup>123</sup>Mark Corray is professor at the Faculty of Law at Sydney University. He has published an electronic version of his book under the title: “The Australian Achievement: From Bondage to Freedom.”, 2<sup>nd</sup> V, 1996. [Ourcivilisation.com](http://www.ourcivilisation.com) Available at <<http://www.ourcivilisation.com/cooray/btof/index.htm>>. This is important to highlight the mechanism to quote his work because pages are not numbered. The book is divided in 35 chapters plus bibliography. In this case I have taken the quote from chapter 17. “The Role of a Constitution” <<http://www.ourcivilisation.com/cooray/btof/index17.htm>>. Therefore further quotation will be composed by name of author, chapter and link address.

<sup>124</sup>Graham, John & Elder C. Marques. *Op. Cit.* P, 3.

<sup>125</sup>Corray, Mark. “Constitution Means More than Just Having a Constitution.” [Ourcivilisation.com](http://www.ourcivilisation.com) <<http://www.ourcivilisation.com/cooray/btof/chap171.htm>>.



judiciary, but the system violates the concept of secret suffrage.<sup>126</sup> Rather, there is a system of numbered election ballots by which individual votes can be identified.<sup>127</sup> In other cases like South Africa, Sri Lanka, Egypt and India, their governments have declared a state of emergency for long periods of time or in some cases, indefinitely. Under these circumstances the cabinet can ignore the Parliament as a law making body, and it has approved emergency regulations which grant the government extra powers.<sup>128</sup>

Unfortunately this is also the case in many countries in the Arab-Muslim world. Nathan J. Brown's "*Constitution in a Nonconstitutional world*" focuses on how countries in the Middle East have never implemented constitutionalism although they have drafted and approved constitutions.<sup>129</sup> A good example would be the cases of Syria, Egypt and Iraq. The first two countries developed similar constitutional systems as result of their attempt to create a United Arab Republic (UAR). Both countries have constitutions that promote parliamentary life, human rights, and independent judiciary. The Syrian constitution (1973) and the Egyptian constitution (1971) offer very weak checks on presidential authority.<sup>130</sup> However in Iraq, the constitution in place before the occupation was the interim constitution of 1970. This constitution was drafted after the overthrow of the monarchy in 1958 by the Revolutionary Command Council (RCC).<sup>131</sup>

According to Brown, the Iraqi interim constitution (1970) established all the means to create an authoritarian regime. The RCC was vested with almost all authority, and was only to be held accountable by the RCC.<sup>132</sup> The members of the RCC were appointed by the Ba'ath Party, and the president of the RCC also held the title of the president of the republic. The RCC and the president had extensive legislative authority which had to be shared with an elected parliament. Cabinet ministers were held accountable only by the RCC.<sup>133</sup> The Iraqi constitution

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<sup>126</sup>*Ibid.*

<sup>127</sup>*Ibid.*

<sup>128</sup>*Ibid.*

<sup>129</sup>Brown, Nathan J. *Constitutions in a Nonconstitutional World, Arab Basic Laws and the Prospects for Accountable Government*. State University of New York Press, 2002.

<sup>130</sup>*Ibid.* P, 70.

<sup>131</sup>*Ibid.* P, 86.

<sup>132</sup>*Ibid.* P, 87.

<sup>133</sup>*Ibid.*

was authoritarian, lacked accountability mechanisms, and offered very poor democratic procedures and liberal rights.<sup>134</sup>

The theory presented by Corray and Brown raises an important question of how we can define the Iraqi constitution. Does the Iraqi constitution fit under the model of countries following constitutional principles, or *façade* principles or non-constitutional principles? These authors also demonstrate that a deep and well selected knowledge of constitutional experiences can help us better understand what the constitution really has to say about various issues that have been described by constitutional specialists (separation of power, sovereignty, human rights principles, etc...). Therefore if we consider the Iraqi constitution as part of a universal phenomenon, and we take a look at the analysis of other constitutions around the world, we can find analogies and differences, with other constitutional experiences, and even detect if the Iraqi constitution is based on a particular model or it is completely different and genuine in comparison with other constitution experiences around the world. We may argue for instance that Iraq is suffering from a foreign occupation, led by a Western coalition headed by the United States and the United Kingdom, and thereby it may be plausible a significant influence of Western constitutional models.

Even though I am conscious of the great number of state and constitutions around the world, and a comprehensive comparison of different constitutions makes this task endless, perhaps confusing and to some extent unachievable for this research. Instead I rather narrow my research in order to focus on specific constitutional models in the hope that the analysis and comparison will be carried out exhaustively and precisely. The parameters, models and criteria under which the comparison should be carried out will be discussed in a section below dedicated to constitutional theory and methodology principles.

## **2.2.-Theoretical approach to study the constitution: definition and functions:**

Constitutional experts generally point out that the study of constitutions is important because it helps us understand the legal and political foundations of nation states.<sup>135</sup> Although

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<sup>134</sup>*Ibid.*

modern political scientists abandoned the study of the constitutions during the 60s and the 70s in favor of other fields of study such as “modernization, political culture, and dependency”,<sup>136</sup> there has been a small revival of the interest in constitutional studies, due to the development of democratization in various countries in Latin America,<sup>137</sup> Eastern Europe and Asia after the decomposition of the former Soviet Union.<sup>138</sup> Since the end of the Cold War, the world has witnessed the development of several international interventions in developing countries such as Haiti, Liberia, Afghanistan, Kosovo, and Iraq causing a renewed interest in the constitutional process and constitutions.<sup>139</sup>

The war on Iraq is one clear example of this situation. The elimination of the Ba’ath regime and Saddam Hussein resulted in a total decomposition of the former Iraqi state.<sup>140</sup> We may argue about the reasons behind this situation, but obviously the principal reason is the invasion of Iraq and the creation of a new legal, political, economical and social order. This is why I believe the study of the Iraqi constitution is fundamental. The Iraqi constitution has the aim –like other constitutions around the world– to establish the very basic foundations of a new state. There is no doubt among constitutional experts that constitutions help to create these foundations, and that the lack of a strong base under which a state may develop could result in the disintegration of the state or other undesirable outcomes such as dictatorship or totalitarian regimes. Therefore is Iraq going into that direction? Or on the contrary, is Iraq building the foundation for a strong state?

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<sup>135</sup> Please see Salem, Paul. *Ibid.* Samuels, Kirsti. *Op. Cit.* P. 2. And Ghai, Yash and Guido Galli. *Op. Cit.* P. 7. Also IDEA Institute offers numerous research materials related to constitutional building processes around the world: <<http://www.idea.int/conflict/cbp/>>.

<sup>136</sup> Brown, Nathan. *Op. Cit.* P, 4.

<sup>137</sup> Please see Garretton Merino, Manuel A. *Incomplete Democracy: Political Democratization in Chile and Latin America*. Chapel Hill, NC, USA: University of North Carolina Press, 2003. p 35-36.

<sup>138</sup> Gövenz, Levent. *Prospects for Constitutionalism in Post-Communist Countries*. W.B. Simons Ed. 2002. P, 1.

<sup>139</sup> Samuels, Kirsti. *Op. Cit.* P, 1.

<sup>140</sup> During a meeting in Baghdad, US Ambassador Paul Bremer declared commenting on the de-Ba’thification order: “We’ve got to show all the Iraqis that we are serious about building a New Iraq. And that mean that Saddam’s instrument of repression have no role in that new nation.” Bremer III, Paul. *Op. Cit.* P, 39.

### 2.2.1-The double nature of constitutions:

Traditionally the study of constitutions has been tackled by legal and political science scholars. Experts as Cass R. Sunstein (2002), Levent Gövenç (2002), Mark Tushnet (1999), Neal Devins *et ali* (2004); Sanford Levison (2004) and Stephen Griffin (1996) among others have developed with great success, different methodologies to study constitutional processes from legal or political points of view. However, recent works on constitutions tend to intermingle both approaches and to analyze constitutional text and processes using a politico-legal theory approach as well as other areas of expertise like history, political science, philosophy, etc.<sup>141</sup> Modern scholars tend to use a multidisciplinary approach to analyze constitutions.

The legal and political nature of the constitution can be better understood if we take a close look at what a constitution really is and what constitutions are for. One possible way of defining it is that constitutions are legal documents settling rules and regulations in order to control and limit the power of the state. Or for instance as Gövenç had defined it: *"neither purely legal nor purely political documents; they appear mainly as sets of legal rules constituting the supreme law of the land, but they differ from other legal rules in their function to organize, limis and divide political power"*.<sup>142</sup>

These definitions clearly depict the mixed nature of the constitution as well as deliberately mentioning political and legal nature of constitutions, but they tell us little about the role of the constitution in the political system. In this regard, Paul Salem's definition could perhaps clarify this relationship: *"The constitution is the defining document of any political system. It sets up the main institutions of the polity, organizes the relationship between the population and the state, and decides the distribution of power and roles within that state"*<sup>143</sup>.

Therefore if we take into account this double dimension of constitutions, and we consider, on the one hand, constitutions are a compendium of regulations and, on the other hand, that these regulations are meant to define the nature of the political system which could

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<sup>141</sup>Gövenç, Levent. *Op. Cit.* P, 3.

<sup>141</sup>*Ibid.* P, 3. And see also Griffin, Stephen M. *American Constitutionalism : From Theory to Politics*. Ewing, NJ, USA: Princeton University Press, 1996.

<sup>142</sup>Gövenç, Levent. *Op. Cit.* P, 3.

<sup>143</sup>Salem, Paul. *Op. Cit.* P, 1.

be divided into several functions: organizing institutions, distributing power and clarifying the relationship between the population and the state, I find Graham and Marques's definition, perhaps very similar to the definition mentioned above, but indeed more compelling of both views. According to them constitutions are "*codes of norms which aspire to regulate the allocation of power, functions, and duties among the various agencies and offices of government and to define the relationship between these and the public*".<sup>144</sup>

It is important to remark that the laws embodied in the constitution can be based on written or unwritten elements.<sup>145</sup> The U.S. constitutional example of a single document should not be considered as the only standard model for constitutions<sup>146</sup>. In this regard, the most used and typical example is the British constitutional model (Westminster tradition) which is a: "combination of parliamentary traditions, recognized civil rights, and legislative documents that included, for example, the Magna Carta (1215), the Bill of rights (1689), the Act of Settlement (1701) and the Act of Union with Scotland (1707) as well as other documents and treaties".<sup>147</sup>

However, the fact that a country does not have a constitution does not mean that laws, regulations and traditions of that country can enjoy the status of a constitution. The fact that constitutions are written or unwritten is not as relevant as the fact that constitutions generally express the core values that the regime is entitled to. These values are related to the basic goals pursued by the regime, its ideology and in other cases to the program of the state.<sup>148</sup> In many cases the preamble of a constitution is used to introduce basic beliefs and foundational values of the regime. This formula helps to include these values with the intention to reflect the basic beliefs of the people in order to promote and awaken a feeling in the citizenry of some form of nationalism.<sup>149</sup>

The example mentioned by Brown, and Graham & Marques is the case of the former Soviet Union.<sup>150</sup> The constitution of the Soviet Union was approved in 1918 with the primary

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<sup>144</sup> Graham, John & Elder C. Marques. *Op. Cit.* P, 4.

<sup>145</sup>*Ibid.* P, 5.

<sup>146</sup>Please see: Williams, Andy. *UK government and Politics*. Harcourt Heinemann. 2<sup>nd</sup> ed. Oxford, 1998. P, 11.

<sup>147</sup>*Ibid.* For a full description of laws which are part of the British constitution please see Williams, Andy. *Op. Cit.* P, 11-12.

<sup>148</sup>Brown, Nathan J. *Op. Cit.* P, 11.

<sup>149</sup>Graham, John & Elder C. Marques. *Op. Cit.* P, 9.

<sup>150</sup>Please see Brown, Nathan J. *Op. Cit.* P, 11. And, John Graham & Elder C. Marques. *Op. Cit.* P, 9.

objective of implementing the new ideology of the revolution and transforming society according to it. The Soviet constitution did not have the intention of limiting the power of the state, but to summarize the official understanding of the concept of class relations.<sup>151</sup> These types of constitutions are considered to be ideological because their consideration towards ideological elements exceeds the content of elements related to legal and political procedures.<sup>152</sup> Constitutions under this category, clarifies Brown, are expected to include “lengthy, and elaborate preambles or ideological statements” leaving little room for norms defining and limiting political authority.<sup>153</sup> In relation with this study, it is interesting to know if the Iraqi constitution includes a preamble or ideological statements, and if it does: what kind of description of ideological statement does this introduce?

The definitions I quoted above mention terms such as “supreme law” or “defining document of any political system”. What do these terms really mean? Why constitutions are the supreme law and what makes a constitution different from other ordinary laws? In this regard, I consider Griffin’s approach appropriate to answer these questions. He argues that the laws embodied in constitutions are not different to other ordinary laws approved by states and government. For instance, ordinary laws and constitutions are similar because they are drafted and enacted through authoritative means.<sup>154</sup> However a reasonable way to define them is by talking a closer look to what actually makes them different.

Griffin argues that the main difference between ordinary laws and constitutional laws is that ordinary laws are intended to limit the freedom of individuals, while constitutions are intended to restrain –and in some cases to enhance<sup>155</sup>– the power of the state.<sup>156</sup> Moreover what makes constitutions “supreme law” above any ordinary law is that the laws gathered in the constitution are the “law of lawmaking.”<sup>157</sup> Constitutions are so important for society because decision taken regarding constitutional laws will affect everyone in society.<sup>158</sup> This is the reason

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<sup>151</sup> *Ibid.*

<sup>152</sup> Brown, Nathan J. *Op.Cit.* P, 11.

<sup>153</sup> *Ibid.*

<sup>154</sup> Griffin, Stephen M. *American Constitutionalism: From Theory to Politics*. Ewing, NJ, USA: Princeton University Press, 1996. P, 13.

<sup>155</sup> Please see introduction of this research pages: 23-24.

<sup>156</sup> Griffin, Stephen M. *Op. Cit.* P, 13.

<sup>157</sup> Frank I. Michelman. “Brennan’s Constitutional Democracy”. Princeton UP and copyrighted, 2005. P, 6. <<http://press.princeton.edu/chapters/s6759.html>>.

<sup>158</sup> *Ibid.*

why on many occasion constitutions are designed through a special process engaging the public. States and governments usually invoke a special convention for this purpose, especially in regimes that aspire to be democratic. This, for instance, was the case of the creation of the American constitution as Griffin has pointed out:

*"The entire people through the mechanism of the convention and subsequent popular ratification were the creators of the constitution. The constitutional convention was thus linked intimately with the doctrine that the people were the sole sovereign in American government".<sup>159</sup>*

### 2.2.2-The constitution as the voice of the people:

The constitution is the supreme law of a country; it defines its political system, and ultimately it should be ratified by the population. The idea that popular ratification is necessary emanates from the concept that the people possess the final authority to legitimize the constitution. The concept of popular sovereignty was first put into practice in real politics, and finally institutionalized during the drafting of the American constitution in 1787.<sup>160</sup> The term sovereignty which has constantly developed since the Middle Ages is understood today as *"the supreme authority within a territory"*.<sup>161</sup> Previously, the supreme authority within a territory – before the concept of popular sovereignty appeared– was the king.<sup>162</sup> The idea of popular sovereignty in the American constitutional tradition for instance is that the people have the power and voluntarily delegate their powers to the parliament. However we must bear in mind that the concept of popular sovereignty is better understood as an ideal and relative concept rather than a real fact. For instance, John F. Knutsen describes the concept of popular sovereignty in Western countries as follows:

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<sup>159</sup>*Ibid.*

<sup>160</sup>The origins of popular sovereignty are in the social contract school during the mid XVII to the XVIII century. The basic notion of popular sovereignty is that no rule or legislation is legitimate until has the direct or indirect approval of the people concerned. Prominent members of the social contract school were: Thomas Hobbes (1588-1679), John Locke (1632-1704) and Jean Jacques Rousseau (1712-1778). These authors defended the theory that: *"a natural society, whatever its origins, was contractual arrangement between its members."* Please see Knutsen, John. "Popular Sovereignty". Blueprint for a New Confederation. 1991-2003. <<http://basiclaw.net/Principles/Popular%20sovereignty.htm>>.

<sup>161</sup>*Ibid.*

<sup>162</sup> Please see Philpott, Dan. "Sovereignty." *First published May 31<sup>st</sup>, 2003; substantive revision Wed Jun 18, 2003. Stanford encyclopaedia of philosophy.* <<http://plato.stanford.edu/entries/sovereignty/>>.

*“Most Western democracies claim to base their government on popular sovereignty, but in reality the people have little ultimate authority short of revolution. Most decisions, even fundamental decisions, are left to the legislatures. It is usually the legislature that controls the constitution, the most basic instrument of government, and the extent of popular authority is usually at this body’s discretion. Even where popular consent is required, the legislature usually has the sole authority to propose amendments. In reality this means that sovereignty is most commonly placed in the legislature. It is this body, rather than the people, that has the ultimate power to make law”.*<sup>163</sup>

This description considers sovereignty as an illusion at least in a constitutional, parliamentary and democratic systems such as the United States. The idea is that popular sovereignty would exist only if the people actually rule. This concept is known as true direct democracy.<sup>164</sup> The United States system of government had been described as representative democracy or semi-direct democracy and therefore, sovereignty lies in the national government or the legislature. Authors such as Griffin proposed to re-consider the concept of popular sovereignty in favor of a more accurate term which is political authority:

*“The constitutional convention provides a way to operationalize popular sovereignty in creating the constitution but, there was not way to use the convention as a continuous means of settling disputes. This suggests that when a claim of sovereignty is made, the validity of the claims should be judged on whether the individual, group, or institution in question actually wields political authority. We are now in a position to offer a test for validating claims of sovereignty. Validating claims of sovereignty is a matter of discovering whether the asserted location of sovereignty matches a concrete set of institutions that exercise political power”.*

The Iraqi constitution postulates in article 5 that: *“the law is sovereign. The people are the source of authority and its legitimacy, which the people shall exercise in a direct general secret ballot and through their constitutional institution”.*<sup>165</sup> According to this article, Iraqis exercise their authority through those people who vote during elections. These people along with other institutions are the real sovereignty holders. This research questions whether we should consider Iraq as a sovereign country, or we should rather talk about levels or degrees of sovereignty. After all Iraq is under military occupation, and therefore the transfer of sovereignty to Iraqis is questionable.

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<sup>163</sup>John Knutsen. *Ibid.*

<sup>164</sup>Michael J. New. “Limiting Government through Direct Democracy. The case of State Tax and Expenditure Limitation”. Policy Analysis, Cato Institute, December, 2001. N°420. P, 1-2 <<http://www.cato.org/pubs/pas/pa420.pdf>>.

<sup>165</sup>“Constitution of Iraq”, (Final Draft). This is the official name of the constitutional text I am using for this research and it is the official translation from the Arabic -presented to voter during referendum on October, 2005- by the United Nation’s Office for Constitutional Support. “The Iraq Constitution: past and present”. The Iraqi foundation.org. <<http://www.iraqfoundation.org/projects/constitution/constitutionindex.htm>>.



This last question introduces one of the most important characteristics of modern constitutions and a core question of this thesis. How do constitutions delineate and limit the roles of different political actors. In theory, in order to avoid conflict among different political actors, constitutions should be based on minimum consensus among its citizens. The population should agree upon which basic rules are related to the relationship between the state and the population.<sup>166</sup> According to this theory we may argue that the validity of a constitution depends on the degree of political representation embodied in the political authority, which ultimately drafted and approved the constitution. The process of transferring sovereignty to the Iraqi people is paramount to measure the validity of the constitution. This thesis examines the transfer of sovereignty to the Iraqi people and tries to answer the question: did the U.S. led-Coalition forces really return sovereignty to the Iraqi people, and to what extent?

### 2.2.3-New trends in constitutional processes:

Experts belonging to various and different fields of studies often remind us that success in the constitutional process, especially in countries suffering violent conflicts and difficult transitions, is not based only on the content of the constitution itself, or the new political system it defines, but how the constitutional process was planned, designed, and approved.<sup>167</sup> Why constitutional processes are so important could be better understood if we take a look to Stephen Griffin's consideration of the final goal of any constitution. He has pointed out that constitutions have the goal of regulating political life.<sup>168</sup> This characteristic makes constitutions vulnerable to political actors who may seek to interpret the Supreme Law for their own advantage.<sup>169</sup> Although constitutions have mechanism to prevent abuses (the judiciary branch) constitution are the most difficult laws to enforce.

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<sup>166</sup>Graham, John & Elder C. Marques. *Op. Cit.* P, 4.

<sup>167</sup>Please see: Samuels, Kirsti. *Op. Cit.* p. 5. And Ghai, Yash and Guido Galli. *Op. Cit.* pp. 13-16.  
<[http://www.idea.int/publications/cbp\\_democratization/index.cfm?renderforprint=1&](http://www.idea.int/publications/cbp_democratization/index.cfm?renderforprint=1&)>. Also IDEA Institute offers numerous research materials related to constitutional building processes around the world.  
<<http://www.idea.int/conflict/cbp/>>.

<sup>168</sup>Griffin, Stephen M. *American Constitutionalism: From Theory to Politics*. Ewing, NJ, USA: Princeton University Press, 1996. P, 15.

<sup>169</sup> *Ibid.*

How constitutions can be abused by politicians and what are the mechanisms to prevent these abuses will be discussed later, but the basic idea I would like to address here is that conflicts emerging among politicians, state institutions and the laws embodied in the constitution can be reduced or mitigated if there is a wide consensus among different and, sometime antagonistic, political forces regarding the meaning of the constitution. Griffin states that the viability of any given constitution resides in the kind of politics during the designing process.<sup>170</sup> Consensus among political actors is fundamental for any constitution to survive.

This constitutional design approach is what experts such as Kirsti Samuels have denominated “participatory constitutional processes”. These processes are based on what is called a “social dialogue” among the institutions of the state and citizens.<sup>171</sup> This theory remarks that constitutional processes should provide a social forum for negotiations of sensitive issues. These kind of initiatives help provide political education for the population on the values that are intended to be implemented (e.g. democratic values), can start a social dialogue process capable of initiating reconciliation activities, and can create a common vision of the state based on consensus, especially in countries emerging from conflict.<sup>172</sup>

Therefore the new Iraqi constitutional process can play a critical role not only in the reconstruction of the state but in paving the ground for peace and stability through community building. In highly complex ethnic, nationalistic, and I may argue religious societies –that also have suffered conflict– a wide ranging social consensus should be regarded as a fundamental cornerstone for providing enough legitimacy to state institutions and the legislature; the latter which have to enforce the laws and regulations of the state as well as to take decisions that will affect everyone in society. In this regard, I take as an assumption Fleiner’s statement when he concludes in his study about new ethnic and nationalistic challenges confronting modern states that: “*A community can only be established if peoples agree to live together. Without reconciliation and common trust a common political community cannot be established*”.<sup>173</sup>

The definition of constitutional design in this research takes into consideration this approach based on political consensus and open dialogue between the state and the citizenship,

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<sup>170</sup> *Ibid.*

<sup>171</sup> *Ibid.* Also see Samuels, Kirsti. *Op. Cit.* p. 5.

<sup>172</sup> *Ibid.*

<sup>173</sup> Fleiner, Thomas. *Op. Cit.* p. 9.

where constitutional issues can be discussed and explained freely and openly and, of course be available to all sectors of society through programs, seminars, mass media programs, etc... Participatory constitution making goes beyond traditional constitution-making process put in practice in many post-colonial countries, where closed constitutional processes were used by political elites and legal experts in order to draft and create constitutions.<sup>174</sup> Thus the question arises: how was the constitutional process managed by the new Iraqi government and other actors involved directly or indirectly in the constitutional process?

#### 2.2.4.-The separation of powers as a cornerstone for modern constitutionalism:

As we can see the constitutional process is important because it helps to create consensus amongst different political actors, though we may argue that consensus by itself does not provide clear guidelines to resolve future conflicts emerging between state institutions, politicians and other actors involved. Also, consensus does not provide procedures to define the relationship between political actors as well as the relationship between the state and the population. This is where the role of the constitution becomes essential. Constitutional scholars such as Tom Campbell, Graham Spindler, Marck Corray, and Neal Devins amongst many others, argue that one of the fundamental features of a constitution is to establish some form of separation of powers in order to clearly lay down the extent of authority belonging to each branch of government or political office.<sup>175</sup>

The reason behind the separation of powers is two-fold. Separation of powers helps to prevent the accumulation of powers in the hand of one entity. This is intended to prevent corruption and tyranny as the English philosopher John Locke (1632-1704) pointed out several centuries ago. Corruption emerges when “[...] *the same persons who have the powers of making laws have also in their hands the power to execute them ...*”.<sup>176</sup> Following this theory Corray

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<sup>174</sup>Please see “The Role of Constitution-Building Process in Democratization. International project outline by Institute for Electoral and Democratic Assistance, (IDEA), December, 2004. <[http://www.idea.int/conflict/cbp/upload/CBProjectF%20\(3\).pdf](http://www.idea.int/conflict/cbp/upload/CBProjectF%20(3).pdf)>.

<sup>175</sup>John Graham & Elder C. Marques. *Op. Cit.* P, 8.

<sup>176</sup>Please see Spindler, Graham. “Separation of Powers: Doctrine and Practice.” Parliament of New South Wales. March, 2000. This quotation belongs according to the author to John Locke’s *Second Treatise of Civil Government*. <<http://www.parliament.nsw.gov.au/prod/parliament/publications.nsf/0/E88B2C638DC23E51CA256EDE00795896>>

considers that the main purpose of the constitution is not to provide a formula for creating an efficient government which ultimately will try to transform society in accordance to socialist or capitalist principles.<sup>177</sup> The purpose of the constitution is rather to limit power because power corrupts and, therefore a constitution stipulates how power is distributed amongst political entities:

*“A constitution is concerned with the allocation of powers – what the legislature, the executive and the judiciary may or may not do. A constitution is established to restrict the possibility of abuse of power by those exercising governmental functions, whilst providing a reasonable area for state activity”.*<sup>178</sup>

Corray’s statement introduces the second function of the distribution of powers. The separation of powers designates areas of activities of the different branches of government. According to Campbell, separation of power is also intended to improve the performance of each branch of government. This feature enables each branch to efficiently provide solutions when conflicts emerge in public policy matter or private dispute. This is a way to increase the confidence of the public about how each branch of government had reached the decision to adopt certain policy.<sup>179</sup>

The division of powers can be carried out in different manner. The American constitution and other modern constitutions have divided powers in three different branches: the legislative, the executive and the judiciary. In the case of a federal or decentralized unitary system, there is also a division of power and competencies between the federal and regional government.<sup>180</sup> This does not mean that there are no other ways to divide political power following the same principles. The case of Australia and the United Kingdom are among well known cases where different ways of dividing political power have been implemented, but traditionally, constitution have divided power in three or more different branches following the theories of John Locke and Baron Montesquieu.<sup>181</sup>

The traditional doctrine of separation of powers divides the institution of government in three different branches: legislative (has the role of making laws), the executive (has the role

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<sup>177</sup>Mark Corray. “Function of a Constitution”. A Theory of Civilization by Philip Atkinson. 2000. [ourcivilisation.com](http://www.ourcivilisation.com)  
<<http://www.ourcivilisation.com/cooray/btof/chap173.htm>>.

<sup>179</sup>Campbell, Tom. *Separation of Powers in Practice*. Stanford UP. Palo Alto, CA, USA., 2004. p 1.

<sup>180</sup> Spindler, Graham. “Separation of Powers: Doctrine and Practice.”

<sup>181</sup> *Ibid*

of implementing these laws) and the judiciary (has the role of interpreting these laws).<sup>182</sup> The powers and functions of each branch are separated, and the personnel working in each should be different as well. Each branch is independent and none of these branches can exercise authority over the other.<sup>183</sup> As I had mentioned earlier, the division of power tries to prevent the concentration of power in one entity as in the case of monarchies and dictatorships where all the power is concentrated in a single authority.<sup>184</sup> The division of power in different branches also has the goal of controlling other branches of government from abusing their competences. This method had been denominated by specialists as the system of checks and balances.<sup>185</sup> Each branch of government is independent, and each branch monitors the performance of the other branches of governments. This ensures that branches do not exceed in their competencies, and also enhances the rule of law, and the protection of individual rights.<sup>186</sup> This thesis examines the division of powers established by the constitution and how the Iraqi constitution prevents accumulation of powers.

#### **2.2.5-Federalism versus Unitarianism:**

Another level of discussion, following the principles of division of power, is the debate about whether states should be organized following a unitary or federal conception of the state. The unitary or centralized concept of the state is one of the most extended models of the state in the world. The basic principles behind the unitary concept of the state were laid out by English philosopher John Locke, who estimated that the inalienable interests of human beings could be divided in two main themes: human rights –each individual should be protected against abuses by courts –, and common wealth –the state should be responsible for providing a fair distribution of wealth, goods and services–.<sup>187</sup> Thereby one of the duties of the state is to care about the common interest of society.

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<sup>182</sup> *Ibid.*

<sup>183</sup> *Ibid.*

<sup>184</sup> *Ibid.*

<sup>185</sup> Devins, Neal E. *Democratic Constitution*. Cary, NC, USA: Oxford UP, Incorporated, 2004. p 77.

<sup>186</sup> *Ibid.*

<sup>187</sup> Fleiner, Thomas. *Op. Cit.* P, 2.

The state should provide “efficient majority procedures” in order to guarantee good state services and products.<sup>188</sup> According to this theory, the rule of the majority is the best way to provide legitimacy to the policy of the state and, human rights provisions are regarded as a security clause in order to protect the individual against the abuses of the majority.<sup>189</sup> Therefore “*the parliament has full sovereignty to rule, but only on common interest issues and provide within this legislation for the common wealth of the state by simple majority*”.<sup>190</sup>

Nowadays the unitary state model is understood to be comprised of a single central source of authority. The administrative units that form the state exercise their rights through the common organs of the central government.<sup>191</sup> Though the unitary model also transfers a certain degree of political power to regions, they depend on the central government policies and institutions, and they are constitutionally subordinated to the central government to exercise their authority<sup>192</sup>. Finally, to protect the interest of minorities, the central government may grant autonomy to regions that are ethnically, or religiously different. These entities are usually considered to be autonomous, and they are granted with certain rights in order to protect and promote their unique culture, religion or language.<sup>193</sup> In addition to this, the unitary model may also protect and promote diversity by designing a pluralistic executive structure or reserving some parliamentary seats for minority groups or creating a bicameral legislature.<sup>194</sup>

Nevertheless the unitary state system had been always criticized for its homogeneous views, and sometimes simplistic approach in dealing with complex social societies. In this regard, Fleiner points out that this model is too simple because it was designed based on the concept that all individuals are equal in society. The problem here is that modern countries usually have a more complex societal configuration whether we talk about different ethnic or religious differences. Modern societies are diverse and complex, they are not as homogeneous as they may appear, and conflicts emerging from smaller communities are common in many

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<sup>188</sup> *Ibid.*

<sup>189</sup> *Ibid.*

<sup>190</sup> *Ibid.*

<sup>191</sup> “Establishing a Stable Democratic Constitutional Structure in Iraq: Some Basic considerations”. Public International Law & policy Group and the Century Foundation. May 2003.

<<http://www.tcf.org/list.asp?type=PR&pubid=9>>. P, 17.

<sup>192</sup> *Ibid.*

<sup>193</sup> *Ibid.*

<sup>194</sup> *Ibid.*

countries these days. Smaller entities within the state are claiming their right to be different from the rest of the community they live in.<sup>195</sup>

For instance, according to the UN, the number of countries formed by multiethnic societies reached 95% of the total member countries.<sup>196</sup> The European Union (EU) has recently recognized the importance of recognizing the rights of smaller communities in the EU and, if we take a look in general around the world there are still a great number of conflicts where social complexity plays a significant role.<sup>197</sup> Nowadays many states must deal with tough resistance from smaller communities claiming more rights and, in many cases, claiming independence from the central authority. For instance in Europe, the Flemish community in Belgium, the Irish community in the United Kingdom, the Kosovo community in Serbia, and the Basque, Galician and Catalan communities in Spain have a long record of resistance against the central model authority displayed by the countries they live in.<sup>198</sup>

The system regarded as an alternative to the unitary model of the state is the federation. A federal system of government differs from a unitary model in that federalism is “*a state with two level of government which rules the same land and people. Each one has at least one area of action in which it is autonomous, and there is some [constitutional] guarantee...of autonomy of each government in its own sphere*”.<sup>199</sup> This is a rough definition of federalism but it is sufficient to explain the main difference with a unitary conception of the state. The federal system is designed to “combine the values and diversity within a political union”.<sup>200</sup> Federal systems are

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<sup>195</sup> Fleiner, Thomas. *Op. Cit.* P, 2.

<sup>196</sup> *Ibid.*

<sup>197</sup> Wok, Wim. “Enlarging the European Union. Achievements and Challenges.” Report to the European Commission by the European University Institute and Robert Schuman Centre for Advance Studies. March 26<sup>th</sup>, 2003. P, 8. <[http://cadmus.iue.it/dspace/bitstream/1814/2515/1/200303KokReport\\_EN.pdf](http://cadmus.iue.it/dspace/bitstream/1814/2515/1/200303KokReport_EN.pdf)>

<sup>198</sup> Benedikter, Thomas. “Territorial Autonomy as a Means for Minority Protection and Conflict Solution in the European Experience – an Overview and Schematic Comparison.” Society for Threatened Peoples. Bolzano/Bozen, 19<sup>th</sup>, June, 2006. <<http://www.gfbv.it/3dossier/eu-min/autonomy.html>>. Also the European Council has recently adopted a resolution on December 13<sup>th</sup> 2005 suggesting member states: “*to promote in their national legislation the recognition of the cultural right of the minorities on territorial autonomy and to take the appropriated measures in order to make sure that the member states reject any attempt to promote the ethnic purity of the state or to organise the territory and the administration of the state on an ethnic basis with the exception of the affirmative measures which aim to achieve a fair representation of the national minorities in their country's administration, at the central and local level and to stop defining and organizing themselves as exclusively ethnic or exclusively civic states.*” Recommendation of the Parliamentary Assembly 10762, December 2005. Quoted from Fleiner, Thomas. *Op. Cit.* P, 5.

<sup>199</sup> Filippov, Mikhail. *Designing Federalism: A Theory of Self-Sustainable Federal Institutions*. West Nyack, NY, USA: Cambridge University Press, 2004. P, 5.

<sup>200</sup> “Establishing a Stable Democratic Constitutional Structure in Iraq: Some Basic considerations”. *Op. Cit.* P, 17.

supposed to allow greater autonomy to regions within the state to the point that these smaller entities developed full autonomous functionality.

Therefore, a federal state develops a combined governmental structure in which the powers, competencies and objectives of the state are distributed and divided between the central government and the regional governmental units within a single political system, so neither is subordinated to the other.<sup>201</sup> Federal systems constitutionally divide legislative and executive authority between the central government and the regional units in a way that political authority is ensured in particular areas for each government unit, while other areas of authority are shared amongst them.<sup>202</sup> Both levels of government (central and regional) possess executive, legislative, and judicial powers, and regional units are represented in the central government at the parliamentary level.<sup>203</sup>

Nonetheless this clean cut dividing the two systems does not show the reality behind the two models. Unitary systems have developed more complex systems of distribution of authority amongst smaller entities of the state, in many instances, granting greater autonomous powers to communities. In constitutionally decentralized unions, regional units are subordinated to the central government which at the end has the ultimate authority, though identified administrative powers may be devolved to the regional units as well as other executive and legislative powers.<sup>204</sup> Although the federal model has traditionally been conceived as a way to decentralize authority, it has also developed counter-decentralization policies which entitle a tight control of smaller entities by the federal state as was the case of the Soviet Union.<sup>205</sup> It seems clear in Filippov's work that there is not a clear and unified criterion to define what a federal system is due to the amount of different models and experiences that are regarded as federal.<sup>206</sup> For instance there are confederations which are a type of federation amongst pre-existing units that came together to form a common government for specific and

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<sup>201</sup> *Ibid.*

<sup>202</sup> *Ibid.*

<sup>203</sup> *Ibid.*

<sup>204</sup> Countries following this model are Japan, Italy, Macedonia, and Indonesia. *Ibid.*

<sup>205</sup> Filippov, Mikhail. *Op. Cit.* Pp. 9-10.

<sup>206</sup> *Ibid.*



limited established purposes (e.g. Switzerland or Serbia and Montenegro before the independence of the later in May 2006).<sup>207</sup>

Despite the different levels and types of federations, the federal state model is basically understood as a type of “governmental structure” which is “characterized by multiple layers of governance generally national, regional, and local”.<sup>208</sup> Also the federal model of government is important for our study because according to different authors, the federal model usually offers better solution regarding the distribution of power and wealth than the unitary system does.<sup>209</sup> According to Fleiner, communities choose a federal system of government because it facilitates the participation of ethnic and religious minorities in political affairs rather than encouraging secession and division within society.<sup>210</sup> There is also the opposite view regarding federalism; according to other authors federalist systems facilitate secession and division within societies that could lead to the disintegration of the state. This is the case for instance in Spain –which has a unitary system of government that granted significant autonomy to regional governments- where right wing politicians defended the idea that greater decentralization of the state could lead to facto disintegration.<sup>211</sup>

This is one of the most important issues regarding my study of the Iraqi constitution. The new Iraq had been conceived as a federal state which would allow greater autonomy to certain regions. There are authors on both sides supporting and opposing the federal government structure of the state. Those who support it believe that a federal system of government is the only way to organize justly a country formed by such an ethnic, tribal, linguistic and religious configuration.<sup>212</sup> Also there are those who oppose this model, basing

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<sup>207</sup> “Establishing a Stable Democratic Constitutional Structure in Iraq: Some Basic considerations”. *Op. Cit.* P, 17.

<sup>208</sup> Filippov, Mikhail. *Ibid.*

<sup>209</sup> According to Riker a federal system of government is desirable based on two assumptions: one economic and the other political. Economic because in a federal system of government the state can solve market failures associated with economic asymmetries of regions. Politically, there are various reasons that can be summarized as inclusion and integration of minorities (ethnic, religious or linguistic). The decentralization of conflict is a mechanism where political barriers are established in order to prevent conflict from spreading through the nation and, finally there are entities that would only join larger federations if their political autonomy were respected. For more information about this issue, please see Willian H. Riker. *Federalism: Origin, Operation, Significance*. Boston. Little Brown. 1964. In Filippov, Mikhail. *Op. Cit.* P, 1.

<sup>210</sup> Fleiner, Thomas. *Op. Cit.* Pp, 4-5.

<sup>211</sup> *Ibid.*

<sup>212</sup> Please see Hulsman, John C. and Phillips., James “Forging a Durable Post-War Political Settlement in Iraq.” The Heritage Foundation. Executive Summary. N° 1593. September 24<sup>th</sup>, 2004. P, 1 <[http://www.heritage.org/Research/Iraq/upload/24530\\_1.pdf](http://www.heritage.org/Research/Iraq/upload/24530_1.pdf)>. Also see O’Leary, Brendan and Mc Garry, John.

their arguments on the high risk of civil war and disintegration due to Iraq's social structure.<sup>213</sup> Usually those who support this view also consider that the federal system would not satisfy parts of society with a rational and fair distribution of natural resources<sup>214</sup>. The question remains unanswered; will the Iraqi constitution promote unity or secession?

#### 2.2.6-The difficult task of interpreting constitutions:

The theory of dividing power either through a tripartite division of powers or the creation of a federation are intended, among other things, to provide a mechanism to control the state authority. These mechanisms are popularly known as a system of checks and balances. This system would in theory help the state to prevent undesired concentration of powers in one single entity. Nevertheless this system is not efficient to deal with other kinds of conflict and problems emerging from political actors, public institutions or even between individuals in society.

The system of checks and balances and, other laws of the constitution, are not designed to answer many questions for new dilemmas that are constantly appearing in our lives. It is difficult to imagine that the politicians who drafted the American constitution had in their mind, the intense debate that abortion has caused in society, or the drafters of the Spanish constitution could had foreseen a sexual revolution in Spain, where lesbians and gays are demanding the right to get married, or that other constitutional drafters around the world could predict the approval of legislation that are consciously race-oriented.<sup>215</sup> Constitutions are

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*The Future of Kurdistan in Iraq*. Pennsylvania UP, 2006. P, 187-195. And finally, Stanfield, Gareth. "The Only Solution Left for Iraq: A Five Way Split." [Telegraph.co.uk](http://www.telegraph.co.uk). October, 2006. <<http://www.telegraph.co.uk/opinion/main.jhtml?xml=/opinion/2006/10/29/do2904.xml&sSheet=/opinion/2006/10/29/ixopinion.html>>.

<sup>213</sup>Please see Philp, Catherine. "Sunnis Threaten Civil War as Iraq Constitution Deadline extended." [Times-online](http://www.timesonline.co.uk). August, 2005. Baghdad. <<http://www.timesonline.co.uk/tol/news/world/iraq/article558089.ece>>. Also see "The Next Iraqi War? Sectarianism and Civil Conflict." [International Crisis Group](http://www.crisisgroup.org). Middle East Report N° 52. February 2006. <<http://www.crisisgroup.org/home/index.cfm?id=3980&CFID=17086862&CFTOKEN=41685086>>. And Fearon, James D.. "Iraq's Civil War". *Foreign Affairs*. March/April, 2007. <<http://www.foreignaffairs.org/20070301faessay86201/james-d-fearon/iraq-s-civil-war.html>>.

<sup>214</sup>See "The Next Iraqi War? Sectarianism and Civil Conflict." *Op. Cit.* Pp, 12-13.

<sup>215</sup>This rhetoric questions are inspired in similar questions formulated by. Michelman, Frank I in Brennan's *Constitutional Democracy. Op.Cit.* P, 7.

living documents that are constantly in the process of evolution<sup>216</sup>. This characteristic makes more difficult the study of constitution because constitutions influence political life in different ways and at different time.<sup>217</sup>Time changes as well as the necessities of a given society.<sup>218</sup> The demand of political actors and institution should change in accordance with the new necessities emerging as a result of the evolution of history. Rigid constitutions that do not allow amendments may produce conflict among political actors in the long run.<sup>219</sup> These and many other questions of paramount importance for many people in society are not in many cases foreseen or contemplated in constitutions.<sup>220</sup> This is one of the reasons why constitutions generally provide mechanisms to achieve final interpretations to the norms embodied in them.

According to Grey, the basic mechanisms to interpret constitution can be divided in two general approaches: the first one is what he calls “special enforcement”, the mechanism that relies on institutions that are recognized to have the power of constitutional review. Constitutional courts are an example of such an institution in charge of constitutional review. The second approach, perhaps not well known among the public, is what he denominates “political enforcement”. This mechanism provides constitutional interpretations through political institutions, legislature, executive vetoes or referenda.<sup>221</sup>

The main debate in this issue is, according to specialists such as Michelman, is that in democratic systems the people should be –according to the sovereignty theory I have previously mentioned– the ones who decide whether the state has the right to adopt a particular solution

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<sup>216</sup> Graham, John & Marques, Elder C.. *Op. Cit.* P, 5.

<sup>217</sup> *Ibid.*

<sup>218</sup> In 1910 the New York Times published an article based on a declaration during U.S. presidential campaign of Col. Theodore Roosevelt in Colorado and Kansas about the benefits of leaving constitutions easy to amend. Col Roosevelt declared: “Many of my friends there [New Mexico and Arizona] have written asking me to advise them about their constitutions. [...]. But there is one point upon which I would like to advice and that is to leave the Constitutions easy to amend at any time when the people feel that they should be amended. Experience had shown that not only doctrines but also designing corporations attorneys often get put into constitutions matters which are thoroughly understood by the people at that time, and my plea is that the people of the United States should be left with their hands free so that if any time they find that something has been put into their Constitutions which they did not know was there, or if they find that something is working badly which they believed would work well, they have the opportunity to easily make any change that is necessary.” Horace, Kan. “Roosevelt against Rigid Constitutions. Warns New States That Corporation Attorneys May Slip in Things they’ll regret.” The New York Times. August 30<sup>th</sup>, 1910. The New York Times Archive published on November 28<sup>th</sup>, 2007. <<http://query.nytimes.com/gst/abstract.html?res=9C07E1D91239E433A25752C3A96E9C946196D6CF>>.

<sup>219</sup> Graham, John & Marques, Elder C. *Op. Cit.* P, 9.

<sup>220</sup> Reese, Charley. “The Role of Judges”. Lewrockwell.com. 2005. <<http://www.lewrockwell.com>>.

<sup>221</sup> Graham, John & Marques, Elder C.. *Op. Cit.* P, 6.

to a problem that is directly related to their lives.<sup>222</sup> Neither of the two models mentioned above are based on direct participation of the population in constitutional interpretation. Nevertheless there is a clear difference between the two models. The first one grants to special institutions the task of interpreting the constitution; these institutions are recognized to be representing the majority of the people.<sup>223</sup> The second model on the other hand is considered to be less democratic because the mechanisms to take final decisions are by political institutions. This is for instance the case of the Colombian constitution which allows parliament to interpret and introduce any amendments to any article embodied in the constitution.<sup>224</sup>

Judicial review is by far the most used mechanism to interpret and solve conflicts emerging between the federal state and the regional government, government institutions and the public. Following arguments presented by Michelman, Graham & Marques, Roderick M. Hill, Jr. and Stronks, judiciary review is considered to be the most proper way to make interpretation on constitutional norms because the knowledge and expertise of judges allows them to make balanced decision on constitutional matters.<sup>225</sup> Therefore especial institutions such as the Constitutional Courts, Supreme Court of Appeals, High Courts and Magistrate Courts, and the judges that are part of it, all of whom investigate and carefully listen to all the perspective of a given case before taking any decision. Finally, judges should make decisions according to the constitutional text avoiding decisions based on their personal opinions, moral or own interpretation of the constitutional text.<sup>226</sup>

Therefore constitutional judges must show a high degree of objectivity and professionalism in order to produce decisions that satisfy the demands of society. The question of objectivity has of course raised much controversy among politicians, law specialist and judges that highlight the lack of clear and objective methodology to interpret the constitution.

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<sup>222</sup> Michelman, Frank I.. *Op. Cit.* Pp, 6-7. Stronks, Julia K. "The Constitution and the Role of the Judiciary: Are Judges Assaulting Marriage? The Seattle Times. August 19<sup>th</sup>, 2004. < <http://seattletimes.nwsource.com>>. Roderick M. Hills, Jr. "The Pragmatist's View of Constitutional Implementation and Constitutional Meaning." *Harvard Law Forum Review*. Vol.119:173. Pp 173-182.

<sup>223</sup> Stronks, Julia K.. *Ibid.*

<sup>224</sup> Bernal Pulido, Carlos. "Links between Constitutional Law and Political Control: The Case of Colombia". This Century Review. 2006-2007. <[http://www.thiscenturyreview.com/article.html?&no\\_cache=1&tx\\_ttnews%5Btt\\_news%5D=17&tx\\_ttnews%5BbackPid%5D=17&cHash=198acf0545](http://www.thiscenturyreview.com/article.html?&no_cache=1&tx_ttnews%5Btt_news%5D=17&tx_ttnews%5BbackPid%5D=17&cHash=198acf0545)>.

<sup>225</sup> Michelman, Frank I.. *Op. Cit.* P, 3.

<sup>226</sup> Stronks, Julia K.. *Op. Cit.*

There is a fine line between a fair constitutional resolution and biased decisions taken under political influences. The fact that judges are not elected but rather are appointed by government officials, and that their decisions could follow a political stand rather than objective one, is the main critic against constitutional professionals.

I believe that one of the cases which best exemplifies this *problématique* in constitutional judicial decision are the recent attacks on some Spanish constitutional judges who are investigating the constitutionality of the peace talks process led by the Spanish President Rodríguez Zapatero (Spanish Socialist Labour Party PSOE) and the Basque president (Lehendakari Juan José Ibarretxe) with the Basque terrorist organization Euskadi Ta Askatasuna (E.T.A) during 2006.<sup>227</sup> Opposition leaders who oppose negotiations with ETA had accused the government of interference in judicial decisions that were contrary to the governmental objectives.

This thesis examines the Iraqi constitutional review system. Since the Iraqi constitution was approved in 2005, there have been voices, especially Sunni politicians, demanding for a constitutional change regarding crucial political, social and economical issues<sup>228</sup>. The Council of Representatives (CoR) following constitutional procedures included in the constitution -Article 141- invoked in late 2006, a Constitutional Review Committee (CRC) in order to prepare a report addressing these problematic issues.<sup>229</sup> The report was submitted recently to the CoR in May 2007, after Sunni members agreed on key issues related to the constitution. The CRC's proposal is a package of amendments focusing on five different areas: the distribution of oil revenues, the federal council, taxation and other federal powers, judiciary, independent commission, Kirkuk, presidential authority, and de-ba'athification.<sup>230</sup> As we can see many of the topics mentioned above are all related somehow to key questions of this research, and are directly related to this section as the amendment's proposal to the judiciary. The efficiency of

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<sup>227</sup> Guenaga, Aitor. "No creo que los jueces del 'caso Ibarretxe estén encantados". Interview with Joaquín Jiménez. Magistrate of the Supreme Penal Court. *El País*. November, 2007.  
<[http://www.elpais.com/articulo/pais/vasco/creo/jueces/caso/Ibarretxe/esten/encantados/elpepuesppvs/20071118elpvas\\_1/Tes](http://www.elpais.com/articulo/pais/vasco/creo/jueces/caso/Ibarretxe/esten/encantados/elpepuesppvs/20071118elpvas_1/Tes)>

<sup>228</sup> "Shia, Kurds agree on new Constitution". *Aljazeera.net*. English. August 2005.  
<<http://english.aljazeera.net/English/archive/archive?ArchiveId=14319>>.

<sup>229</sup> Kritz, Neil J. and Sermid Al-Sarraf, and J Alexander Their. "Constitutional Reform in Iraq: Improving Prospects, Political Decisions Needed". *USIP*. September 2007.  
<[http://www.usip.org/pubs/usipeace\\_briefings/2007/0903\\_constitutional\\_reform\\_iraq.html](http://www.usip.org/pubs/usipeace_briefings/2007/0903_constitutional_reform_iraq.html)>.

<sup>230</sup> *Ibid.*

this branch and other institution as the CRC would be examined. The main question regarding constitutional review is: are Iraqi politicians prepared to take the necessary steps and do they have the political will to implement solutions suggested by their institutions as in the case of the CRC's report?

### 2.2.7-Mechanisms to protect citizenship:

I have mentioned above that constitutional law legitimizes the political authority which assumes sovereignty over the people and the state. I had also reviewed how the power of the state is divided and limited in order avoid over concentration of powers, though how citizens can protect themselves from "unfair" actions undertaken by the state still remains unexplained. Constitutions often include norms regulating and limiting the ability of governments to approve legislation that are contrary to the right of citizens.<sup>231</sup>

The rule of the majority may, under certain circumstances, underestimate and undermine fundamental values that are inherent to each individual in society. Traditionally, the modern concept of sovereignty as the rule by the people (democracy) is regarded to be in contradiction to the adoption of constitutional structures that protect individual rights.<sup>232</sup> Western countries show a clear tendency these days to adopt liberal constitutional models rather than allowing coercion and tyranny of the majority. For this reason modern constitutions tend to include human rights clauses protecting the right of each citizen against the sometimes called, "dictatorship" of the majority.<sup>233</sup> For instance during the French

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<sup>231</sup> Graham, John & Marques, Elder C. *Op. Cit.* P, 8.

<sup>232</sup> Schneider, Cornelia. "The Constitutional Protection of Rights in Dworkin's and Habermas' Theories of Democracy." *UCL Jurisprudence Review* 2000. P.102. <<http://www.ucl.ac.uk/laws/jurisprudence/jurisprudence-review/index.shtml?2000>>

<sup>233</sup>Please see the "Madisonian" theory of democracy by Alan Dahl, Robert in *Preface to Democratic Theory*. Chicago UP, 1956. Chicago. P, I. Also Allan, T. R. S. *Constitutional Justice: A Liberal Theory of the Rule of Law*. Oxford UP. 2001. P, 206-207. Also in relation to Iraq see Ghazi Yawer, who is one the most prominent Sunni Arab politician and; also a former exile appointed president by U.S. led –Coalition forces during the transition period declared in Baghdad that: "Sunni Arabs are living under a "dictatorship of the majority," referring to the Shiite Muslims and Kurds who dominate the government. "The Iraqi national identity is diminishing more and more, and this constitution is not helping that" Allam, Hannah. "Iraq's Highest-Ranking Sunni Muslim Arab Criticizes Constitution". Published by Knight Ridder. August 30th , 2005. [Commondreams.org](http://www.commondreams.org) News Center. <<http://www.commondreams.org/headlines05/0830-01.htm>>.

Declaration of 1789 the concept of protection of rights was fundamental: “*any society in which the guarantee of the rights is not preserved...Doesn't have a constitution at all*”.<sup>234</sup>

Nevertheless, political philosophers such as Ronald Dworkin (1931) and Jürgen Habermas (1929) have tried to reconcile both views on what modern scholars denominated ‘constitutional democratic thinking’.<sup>235</sup> In this regard I consider Habermas’ theory more appropriate for this research because he had adopted a wider, I may say more global approach, rather than focusing on U.S. institutions as Dworkin has<sup>236</sup>. Habermas’ most important theory known as ‘*communicative action*’ tries to create a new understanding of social relations which inevitably leads to a new understanding of the concept of democracy. According to Habermas’ theory we are living in ‘*condition of social and ideological pluralism*’.<sup>237</sup>

This idea opposes the classical ideal developed by Immanuel Kant which explains social relations under the principles of universal reason. One of the main characteristics of the principle of universal reason is that there exists a ‘*unitary common consciousnesses*’. Kant believed that human make decision according to reason, ‘*human usually do what they have to do*’.<sup>238</sup> Thus human beings make decisions that could appear to us to be a mere physical causality, but they may also be considered a product of rational will. Rational will is therefore a phenomenon by itself and thereby ‘*not dependent to any other causality*’.<sup>239</sup> In other words: there is a common reason valid for all. This vision greatly curtails the position of the individual in society and according to Habermas this view can no longer be helpful in such a complex world:

*“Members of a pluralistic society naturally embrace competing philosophies of life, hold widely diverging conceptions of the good, and find themselves in significant disagreement over fundamental values. A unitary common consciousness no longer exists and, universal reason is dead”*.<sup>240</sup>

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<sup>234</sup> Mata, José de la Maya. “Human Rights Protection by Ordinary Courts.” Conference on “Human Rights Protection System.” European Commission for Democracy through Law. Bishkek. November, 2002.

<sup>235</sup> Schneider, Cornelia. *Op. Cit.* P, 102.

<sup>236</sup> *Ibid.* P, 110.

<sup>237</sup> *Ibid.* P, 111.

<sup>238</sup> Mathew, G. J.. “Lectures on Immanuel Kant”. Eighteen Century European Philosophy. Course Material. Faculty of Philosophy. UC Davis, 1996.

< <http://www-philosophy.ucdavis.edu/matthey/phi023/18THCENT.HTM>>

<sup>239</sup> *Ibid.*

<sup>240</sup> Schneider, Cornelia. *Op. Cit.* P, 111.

Habermas' theory of '*communicative action*' considers that reason is part of the procedure of communication rather than the goal itself. This means that when we end a process of argumentation following this theory, the final result may not be a universal valid view of the world, but instead will be a gathering of the views of all the people. Following this argument, individuals may disagree with decisions taken by a higher entity, but '*we*' as individuals will be more prone to abide as long as each one of us perceives that his view is at least considered in the equation that lead to the final decision. Discursive action makes possible a wider understanding of important issues because decisions are based on the '*common reason*' understanding of the problem. Habermas' position inevitably introduces a new element in the concept of legitimacy which is that there may be very good arguments to consider a norm to be right and just, but if they are not recognized as such by the people, the norm lacks all legitimacy.<sup>241</sup>

Following this argument, legitimacy politically speaking can be understood in different ways but, perhaps the simplest way to explain it is what Habermas has developed as principle of legitimacy based on relativism. This theory states that "*just those norms are valid to which all possibly affected persons could agree as participants in rational discourse*".<sup>242</sup> This theory that he leveled legitimacy 'D' is an attempt to create an ideal and hypothetical approach to the adoption and acceptance of norms. As long as it remains very difficult to gain validity of a norm through universal agreement, due to the complexity of society, we must then make an effort to differentiate between *what we could approve by all as an ideal solution*, and *what is recognized by all as a correct procedure condition*.

This dual concept allows legitimacy to gain universal validity –under presumed ideal condition– and to be accepted as valid with just the approval of a wide range of society who agreed on specific procedural conditions.<sup>243</sup> The problem also could be seen as: we may never know what the truth is; we may not regard the recognition of the majority enough to consider a law just, but ultimately, we will fully accept a norm if it is considered and respected by each citizen. Under this scenario the state could implement the norms by force but never legitimize

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<sup>241</sup>Habermas, J. 'Legitimation Problems in the Modern State', in W. Outhwaite, *The Habermas Reader* (Oxford, 1996), p. 248. Cornelia Schneider. *Op. Cit.* P, 112.

<sup>242</sup> Habermas, J., 'Reconciliation through the Public Use of Reason - Remarks on John Rawls' Political Liberalism', (1995) *Journal of Philosophy*, 109, p. 117. In Schneider, Cornelia. *Op. Cit.* P, 112.

<sup>243</sup>*Ibid.* P, 113.



its actions under moral justifications.<sup>244</sup> This theory takes away from the law any metaphysical consideration, but it recognizes the validity and rightness of a law in a particular period of time under specific conditions. A law may be right and just today, but tomorrow could become inappropriate and unfair.

Therefore it is plausible to consider a shift in the traditional role of the individual in society. The individual has changed from being part of the equation to become the goal of the equation, and accordingly states should provide the necessary resources to secure that citizen's rights are implemented properly.<sup>245</sup> Also the state should provide policies as well as agencies (human rights and anti-discrimination commissions, privacy and information commissioners, inspector general of different kinds, administrative tribunals and auditor general among other similar institutions) in order to guarantee these rights.<sup>246</sup> Nowadays modern states such as Australia have promoted institutions such as the Ombudsman that are independent, and thereby beyond the powers of the judiciary and the legislature precisely in order to prevent any shortcomings that this institution may have in their role as human right protectors.<sup>247</sup> The principle question related to Iraq will be: how or through which institutions does the Iraqi constitution promote the protection and defense of civil rights?

### 2.2.8-Final considerations to the study of constitutions:

The study of constitutions should take into consideration the basic principles and functions of the documents as well as the conceptual framework that should include a wide scope of different models, philosophies and changes that have influenced the constitution through history.<sup>248</sup> Thomas C. Grey has developed an analytical framework that includes these considerations mentioned above. Grey considers that traditional constitutional studies have

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<sup>244</sup> *Ibid.*

<sup>245</sup> Graham, John & Marques, Elder C. *Op. Cit.* P, 8.

<sup>246</sup> Please see McMillan, John. "The Role of the Ombudsman in Protecting Human Rights." Commonwealth Ombudsman, to conference on 'Legislatures and the Protection of Human Rights.' University of Melbourne, Faculty of Law. July, 2006. P, 1.

<[http://www.comb.gov.au/commonwealth/publish.nsf/AttachmentsByTitle/speeches\\_2006\\_05/\\$FILE/omb-role\\_protect\\_human\\_rights-july06.pdf](http://www.comb.gov.au/commonwealth/publish.nsf/AttachmentsByTitle/speeches_2006_05/$FILE/omb-role_protect_human_rights-july06.pdf)>.

<sup>247</sup> Please see McMillan, John. *Op. Cit.* P, 1.

<sup>248</sup> Graham, John & Marques, Elder C. *Op. Cit.* P, 5.

focused on categorizing constitutions according their written or unwritten status, their degree of flexibility, or their status as conventional or legislative.<sup>249</sup> Instead he has developed a wider framework that focuses on three different levels that can help us categorize constitutions: status, enforcement, and source of legitimacy.

**Table 1.**

**Grey's analytical framework<sup>250</sup>**

<b>1-Status:</b> legal norms can be divided in two different categories <b>extra-legal norms</b> and <b>legal norms</b> .
<b>1.1-Extra legal norms</b> are laws embodied in the constitution, but yet they have not been defined by legislation.
<b>1.2 -Legal norms</b> are those either established by regular legislation ("ordinary laws) or they have the form of extra-ordinary law. This means that the law enjoys a special status as a form of "fundamental law" and regular legislation would be subordinate to it.
<b>2-Enforcement:</b> there are two main divisions about how constitutions are enforced.
<b>2.1 -Political enforcement:</b> Constitution norms are enforced politically when final decisions about constitutionality are made by political institutions or mechanism.
<b>2.2 -Special enforcement:</b> In some cases norms are implemented through a special enforcement when specific institutions are recognized to have the power of judicial review.
<b>3-Source of authority:</b> there are three sources of authority to take into consideration.
<b>3.1. -Written constitution norms:</b> some norms derive their authority from their enactment by a legislative body or political process.
<b>3.2. -Unwritten constitution norms:</b> these are norms legitimized by their broad acceptance in a particular political community.
<b>3.3. -Fundamental laws:</b> these constitutional norms derive their status as moral or political truths. These norms appeal to a fundamental "natural law".

Using this analytical framework Grey has demonstrated that a single constitution may be regarded as a product of very different kinds of norms.<sup>251</sup> He uses the example of the American constitution which is made of laws that can be placed in different categories outlined

<sup>249</sup>C. Grey, Thomas. "Constitutionalism: An Analytic Framework". in Richard N. Bronaugh, Michael A. Eizenga, and Stephen B. Sharzer, eds., *Readings in the Philosophy of Constitutional Law*, Third Edition (Dubuque, Iowa: Kendall/Hunt, 1990), pp. 252-262. In Graham, John & Marques, Elder C. *Op. Cit.* P, 5.

<sup>250</sup>This analytical framework has been adapted by Graham and Marques from Thomas C. Grey analytical framework. *Ibid.*

<sup>251</sup> Graham, John & Marques, Elder C.. *Op. Cit.* P, 6.

above.<sup>252</sup> For instance, the American constitution emphasizes the concept of judicial review – this feature would be placed on special enforcement– but, he points out, that in important issues constitutional enforcement is entirely political.<sup>253</sup> For instance, the U.S .Congress is the body in charge of deciding which high crimes are misdemeanors and, under which conditions certain public official, including the President, should be impeached.<sup>254</sup>

When we study the Iraqi constitution we should be aware that constitutions are dynamic documents in constant process of evolution. The constitution has a close relationship with the political system because it shapes the political system but also it is shaped by it.<sup>255</sup> Therefore, the study of the constitution is necessary to comprehend how the political system functions, but at the same time, it is not enough to understand the complexity of the political system which it is regulating. The constitution only clarifies limited parts of the country's political life.<sup>256</sup> Thus if we want to have a better understanding of the complexity of political system in Iraq we have to focus on constitutional practices in order to correctly comprehend how norms rule key relationships in society.<sup>257</sup> This is of course out of the scope of this research, and although a full understanding of the new Iraqi political system would require further research, the analysis of the Iraqi constitutions should to some extent facilitate the understanding of the political system that is being established in Iraq.

### 2.3. Methodological approach to analyze the Iraqi Constitution.

In this chapter I have presented a diverse range of theories related to the current study of constitutions and constitutionalism. Unfortunately I was not able to introduce other concepts and ideas that surely would have greatly enriched this study. Nevertheless I hope I have posed all the basic principles and theories about those issues I regard to be of paramount

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<sup>252</sup> *Ibid.*

<sup>253</sup> *Ibid.*

<sup>254</sup> *Ibid.*

<sup>255</sup> *Ibid.*

<sup>256</sup> S.E. Finer, Vernon Bogdanor, and Bernard Rudden, *Comparing Constitutions*. Oxford UP. Oxford. 1995. P, 2. In Graham, John & Marques, Elder C. *Op. Cit.* P, 6.

<sup>257</sup> *Ibid.*

importance for this research. The aim is to have a better understanding of the Iraqi constitutional process and the new Iraqi constitution in order to answer several questions which shared a common denominator. What did the US want from the Iraqi constitutional process? How the U.S.-led Coalition forces organized their resources to achieve their goals? And foremost, did the Coalition authorities allow the Iraqi people to declare their constitutional aspirations?

The approach I chose to study the constitution could be summarized under the title of “constitutional design approach”. This approach entitles the analysis of the political process behind the constitution, and the process of designing the constitution itself. Under this approach both analyses are equally necessary and important. Above I have mentioned the shortcomings and limitations that have focused my study only on the constitution. A deep understanding of the new Iraqi political system not only requires the study of the constitution, but also the surveillance of constitutional practices in Iraq. In order to fulfill this requirement I chose to study the political process behind the constitutional design, and the Iraqi constitutional review that is in process nowadays.

Another feature that would enrich the study of the constitution will be a comparison of the Iraqi constitution with other similar experiences. My study will produce basic definitions that could be used as points of references in order to establish similarities and differences with other comparable constitutional processes. This research does not pretend to establish a rigorous comparison with constitutional process and practices around the world. This is beyond the scope of this research, but the advantages of establishing comparisons are obvious, if we regard as paramount the experience other peoples and states under similar circumstances. Also, according to constitutional theory, comparison will enable me to avoid ethnocentric views and rather generate theories, hypotheses and concepts in order to establish generalizations and predictions.<sup>258</sup> Nevertheless state building analysts often mention that in democracy or in state building around the world, “*every situation involves different choices and constrains*”.<sup>259</sup> We should be conscious of historical contexts, cultural, social, political and economic

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<sup>258</sup>Gövenz, Levent. *Prospects for Constitutionalism in Post-Communist Countries*. W.B. Simons Ed. Ankara University. 2002. P. 7-8.

<sup>259</sup> McCreedy, Amy *et al.* “Durable Democracy: Building the Japanese State.” Asia Program Special Report. Woodrow Wilson International Center for Scholars. N° 109, March, 2003. P, 1. <[http://www.wilsoncenter.org/topics/pubs/asiarpt\\_109.pdf](http://www.wilsoncenter.org/topics/pubs/asiarpt_109.pdf)> .

particularities, and the Iraqi constitutional process is original and to some extent incomparable with other constitutional processes.

The main problem using comparison methods is the vast number of cases and examples of constitutional processes. For this reason I have chosen two basic criteria to select appropriate cases. This first criteria is that Iraq is an Arab-Kurdish and Islamic country with a complex religious and ethnic configuration, and the second criteria is that Iraq is under foreign occupation, in what has been denominated a nation building process. Iraq is perhaps the only country in the Middle East with such a diverse social structure; only Lebanon is similar in this regard.<sup>260</sup> Recently many analysts have compared what is happening today in Iraq with the Lebanese civil war that tore apart the country during the late seventies and eighties. Others have pointed out the relationship and similarities with the Balkan war in the nineties. Thus it is not rare to hear specialists talking about the *lebanonization* or *balkanization* of Iraq.<sup>261</sup> Perhaps a closer look at the Lebanese or Balkans war could bring some light to analyze correctly what suffering is Mesopotamia nowadays.

These two features (social complexity and foreign occupation) are primordial to find cases close to Iraq, and in this regard, I found two cases that are particularly relevant to the Iraqi constitution. The first one is the Lebanese case, an Arab country with a complex, plural social and religious configuration and, also with, an extended record of domestic conflict. Perhaps the most important disadvantage is that the Lebanese constitution was approved long time ago (1926), under a very different national, regional and international framework, but certain challenges that have faced the Lebanese people surely could bring some light on the difficulties facing Iraq. The Lebanese constitution was promulgated by the French High Commissioner during the French Mandate after a series of political crises between the Lebanese leadership and the French authorities.<sup>262</sup> Nevertheless the Lebanese Chamber of Deputies ratified the constitution even though they were conscious that it was designed and written by the French (the constitution recognized the mandate). The Lebanese people did not have a

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<sup>260</sup>El-Zein, Fares and Sims, Holly. Reforming War's Administrative Rubble in Lebanon. John Wiley & Sons, Ltd. Published online in Wiley InterScience, ([www.interscience.wiley.com](http://www.interscience.wiley.com)) DOI: 10.1002/pad.327., p. 1.

<sup>261</sup>There is a difference of meaning between Lebanonization and Balkanization. The first means religious or other types of conflicts in a single country. The later refers to the division of a country into smaller unities. Please see, William Safire. "On Language; Izationization". *The New York Times*. April, 2001.

<<http://query.nytimes.com/gst/fullpage.html?res=9D0CEFD8133FF932A15757C0A967958260>>.

<sup>262</sup> Brown, Nathan J. *Op. Cit.* P, 70-72.

chance to introduce amendments in the constitution until the independence from France was granted in 1943.<sup>263</sup>

Despite parliament's approval of several constitutional reforms after independence, Lebanon suffered from several political crises. In 1958 the country almost fell into civil war when the parliament was unable to elect a president.<sup>264</sup> Between 1975 and 1990, the Lebanese civil war took place due, among other reasons, to tension between sectarian groups. In 1989, during the Ta'if agreements conference, a diverse range of Lebanese politicians agreed to amend the constitution, but failed to address specific demands from sectors of the population demanding the end of the sectarian system, and an institutional reform in order to change the system of quotas which distributes competencies among communities.<sup>265</sup> Even though, the parliament formed an Independent Constitutional Council which reviewed the constitution and introduced changes in the 1990.<sup>266</sup> Therefore, the main question related to our study would be, did the Lebanese constitutional reforms help end the conflict? How can the Lebanese experience help in the Iraqi case? Therefore it would be interesting to know how the Iraqi constitution faces the challenge of complex society. What model is Iraq following? Does the Iraqi constitution promotes sectarianism, or on the contrary tries to abolish it?

There is another model that could really help to better understand the Iraqi constitution. The reconstruction of Japan is usually considered as one of the most successful state building enterprises led by the United States during the 20<sup>th</sup> century.<sup>267</sup> The Japanese case is relevant as well because according to several Asian scholars, one of the principal causes that made the Japanese reconstruction successful was the drafting and approval of a new constitution.<sup>268</sup> Despite the success of this Japanese state building process, the drafting of the Japanese constitution is one clear example of American interference in constitutional affairs. After reading closely Dale Hellenger's impressive work it is clear how the U.S. pressured

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<sup>263</sup>*Ibid.*

<sup>264</sup>*Ibid.*

<sup>265</sup>*Ibid.*

<sup>266</sup>*Ibid.*

<sup>267</sup>McCreeedy, Amy *et Ali. Ibid.*

<sup>268</sup>*Ibid.*

Shidehara's Cabinet to reform their draft constitution in order to meet MacArthur draft Constitution's principles.<sup>269</sup>

A comparison with the Japanese constitutional process is particularly revealing. As this research will show later both processes share extraordinary similarities. The Japanese case offers a very good example of the political maneuverings from both sides (American and Japanese); the conflicts and dilemmas they had to face, and the solutions accommodated to tackle misunderstandings, and disagreements among those actors who were involved in the process. The lessons learned from the Japanese constitutional process in comparison with the Iraqi case will demonstrate tendencies and trends that similar constitutional design projects often have to go through. Of course there are other constitutional experiences and constitutional models that could positively improve the result of this research but, obviously they would extend the length of this research beyond the scope of this study. The drafting of the German Bill of rights, the Bosnia-Herzegovina constitutional process, and the Iranian constitutions are all experiences that could enrich the analysis of the Iraqi constitution, but unfortunately for this research will only be occasionally mentioned when the analysis or explanation of a particular issue may require so.

This investigation will use both primary and secondary research material. The primary research materials include a study of the drafts and text of the constitution. Other primary sources include reports and documents published by the United Nations Assistance Mission for Iraq (UNAMI). In this regard, I have been able to contact members of the Office for Constitutional Support (OCS) who participated as advisors for the Interim Government and Transitional National Assembly on the process of holding elections and, the writing of a permanent national constitution. I conducted some interviews with institutions and individuals who had participated or contributed to the Iraqi Constitutional Process.

The secondary research section studies the work of different specialists in the field of international relations, constitutional studies, Iraqi history and politics. This area of research includes: books, articles, and documentaries. The primary methods in this area of research are background information related to Iraq's social, political and economic status, studies and

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<sup>269</sup>Hellegers, Dale M. *We, the Japanese People: World War II and the Origins of the Japanese Constitution*. Palo Alto, CA, USA: Stanford University Press, 2001. p 520.

reports related to the constitution, constitutionalism and democracy. This category includes the observation and analysis of treaties, doctrines and laws related to the political process in Iraq.



### Chapter 3

## The role of the Coalition Provisional Authority in the state-making process:

*"In any situation of occupation or imperial dominion, there is always a tension between control and legitimacy. The less control you have or can impose as an occupying power, the more you need legitimacy and voluntary cooperation. In many parts of its colonial empire, Britain addressed this challenge through the system of "indirect rule," which used local rulers to maintain control and gradually devolved more power through elections and local self-rule. [...]United Nations peace implementation missions have addressed this problem in part through the mobilization of international legitimacy, via UN Security Council resolutions, and in part by developing explicit and transparent timetables for the transfer of power back to the people through elections. But even in these UN or other international trustee missions, success has depended in part on the presence of a sufficiently large and robust international force to keep (and in some instances impose) peace".<sup>270</sup>*

*"We cannot know how different things would have been if the Security Council had duly authorized force. But they surely could not be more difficult if the international community had been less divided and if there had been a proper UN-led process for the reconstruction, rather than Anglo-American effort whose motives are distrusted by almost every Iraqi I have met, including so many of its present governmental officials."<sup>271</sup>*

### 3.1-Was there ever a plan for Iraq?

The idea to design and approve a new Constitution for Iraq remains a difficult question to answer. The U.S. president, George W. Bush appointed on May 6, 2003, L. Paul Bremer III - a retired U.S. diplomat working in the private sector- as Presidential Envoy and director of the Coalition Provisional Authority (CPA); this institution was designed to be a temporary governing body in Iraq.<sup>272</sup> Paul Bremer was not an expert on Iraq, and it is a matter of fact that he did not know Iraq well enough, but as U.S. diplomat in Asia he had the opportunity to visit different countries in the Arab world -including Iraq-.<sup>273</sup> Bremer seems to be a specialist in solving all type of crises, from natural disaster to terrorism.<sup>274</sup> However, the appointment of

<sup>270</sup>Testimony of Larry Diamond to the Senate Foreign Relations Committee. [Stanford University](http://www.stanford.edu/~ldiamond/iraq/Senate_testimony_051904.htm). Washington, DC, May 19, 2004. < [http://www.stanford.edu/~ldiamond/iraq/Senate\\_testimony\\_051904.htm](http://www.stanford.edu/~ldiamond/iraq/Senate_testimony_051904.htm)>.

<sup>271</sup>Sands, Philippe. *Lawless World. Making and Breaking Global Rules*". Penguin Books, 2006. P, 202.

<sup>272</sup>Please see L. Paul Bremer. [Wikipedia.org](http://en.wikipedia.org/wiki/L._Paul_Bremer); <[http://en.wikipedia.org/wiki/L.\\_Paul\\_Bremer](http://en.wikipedia.org/wiki/L._Paul_Bremer)>. The page was last modified on 22 February, 2008. Bremer worked as director of the crisis management division of Marsh & McLennan. See also Bremer and McConnell. *Opus Cit.* P, 4.

<sup>273</sup> *Ibid.*

<sup>274</sup> *Ibid*

Bremer and the CPA were not the first attempt by the U.S. Government to manage the reconstruction of Iraq.

The first Presidential Envoy sent to Iraq was Jay Garner, a retired U.S. Army General, with substantial experience in Iraq. He participated in the Gulf War (1991) and after the war; he took charge of US security operations in Northern Iraq, an area also known as Kurdistan. After this post, he officially retired from the Army in 1997, and soon after became the president of SY Coleman Corporation, a private enterprise and defense contractor that designs and develops missiles system technologies for the U.S. Army.<sup>275</sup> Following the U.S. invasion of Iraq in 2003, Garner received the offer to work on the reconstruction, and was latter appointed by the Pentagon, Director of the Office for Reconstruction and Humanitarian Assistance (ORHA) for Iraq. After less than a month on the job, Garner was replaced by Bremer following direct orders from Secretary of Defense Donald Rumsfeld.<sup>276</sup>

According to the Washington post, the Bush administration depicted the replacement as just part of the plan for the reconstruction of Iraq –this explanation is corroborated by Garner himself during an interview in 2006–,<sup>277</sup> nevertheless the same source mentions that White House’s advisers agreed with President Bush to replace Garner due to the poor image of the reconstruction during his tenure.<sup>278</sup> It seems that the chaos reigning in Baghdad during the first stage of the occupation took its first victim along those civil officials in charge of the reconstruction.

Other sources, including Garner (which contradicts his later declaration 2006), and Bremer himself point out that his early decision to call for national elections in order to appoint an Iraqi government could have been one of the main reasons for his replacement.<sup>279</sup> In this regard, during a radio interview with the BBC on 2004, the former general suggested that the White House had a radically different economical and political approach to the reconstruction.

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<sup>275</sup> Morgan, Oliver. “US arms trader to run Iraq.” Exclusive: Ex-general who will lead reconstruction heads firm behind Patriot missiles. The Guardian. March 30<sup>th</sup>, 2003. <<http://www.guardian.co.uk/business/2003/mar/30/iraq.globalisation>>.

<sup>276</sup> Please see interview with: Lt. Gen. Jay Garner (Ret.). “The lost year in Iraq”. Frontline. October 17<sup>th</sup>, 2006. <<http://www.pbs.org/wgbh/pages/frontline/yeariniraq/interviews/garner.html>>.

<sup>277</sup> *Ibid*.

<sup>278</sup> DeYoung, Karen. “U.S. Sped Bremer to Iraq Post.” Washington Post. March 24, 2003; Page A01. <<http://www.washingtonpost.com/wp-dyn/content/article/2006/09/27/AR2006092701475.html>>.

<sup>279</sup> Leigh, David. “General Sacked by Bush Says He Wanted Early Elections”. The Guardian/UK. March 18, 2004. <<http://www.guardian.co.uk/world/2004/mar/18/iraq.usa>>. See Bremer and McConnell. *Opus Cit.* p, 12-15.

During this interview he stated that: "my preference was to put the Iraqis in charge as soon as we can, and do it with some form of elections ... I just thought it was necessary to rapidly get the Iraqis in charge of their destiny".<sup>280</sup> This last statement coincided with recent declarations during an interview with Sa'ad Hussein, political adviser and exile who was part of the Iraqi Independent Democrats headed by 'adnān pājāji who tried to create a secular and unified Sunni front.<sup>281</sup> During this interview he mentioned that the Iraqi people expected a fast transition from the U.S. led–Coalition based on previous negotiations with Garner.<sup>282</sup> Therefore, if we take into consideration these accounts, a poor image and performance during the first stages of the invasion, and different approaches to the reconstruction seems to be the reason behind an early transition to the CPA and Bremer's team.

At this stage it is worth mentioning the grave security situation under which Iraq was going through during the first stages of the invasion, even after a successful military campaign. Indeed, the U.S. led–Coalition forces were incapable of providing security to the capital and other areas of the country. Prior to his departure to Iraq, Bremer met Jim Robbin, a former diplomat and senior analyst of RAND corporations, one of the most important and influential think tanks in the U.S.<sup>283</sup> Dobbins handled Bremer with a RAND report that examined the relationship between troops and stability during previous U.S. occupations in Germany, Japan and Somalia. The report concludes that during initial military campaigns the level of troops needed to reach a sufficient level of security should be 20 soldiers per every 1000 residents.<sup>284</sup> According to this report, the Coalition troops needed for Iraq would be around half a million (the population of Iraq is estimated to be around 25 million. Exceeding threefold the amount of troops they had on the ground). This was a fact well known by the Pentagon and Secretary of Defense Donald Rumsfeld.<sup>285</sup>

Another study that reinforces this view is a RAND report called the "Rebuilding of Iraq" submitted to the Pentagon in summer 2005 –the report involved hundreds of interviews with

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<sup>280</sup> *Ibid.*

<sup>281</sup> Interview with Sa'ad Hussein. Director of the Iraqi Institute for Strategic Studies (IIIST) Studies and Adnan Pachachi's adviser. <<http://www.iraqstudies.org/>> Beirut, 29<sup>th</sup> February. Also please see table 2: Member of the Iraqi Governing Council.

<sup>282</sup> *Ibid.*

<sup>283</sup> Bremer and McConnell. *Opus Cit.* P, 8-10.

<sup>284</sup> *Ibid.*

<sup>285</sup> Bremer reported himself about this fact to Donald Rumsfeld. *Ibid.*

governmental and military officials during a survey that lasted 18 months- highlights the lack of leadership of U.S. President G. W. Bush and Secretary of the State Condoleezza Rice in planning, preparing and coordinating several governmental agencies as the Defense Department (Donald H. Rumsfeld), the State Department (Colin L. Powell) and the Central Command which oversaw the military operation in Baghdad under the charge of Gen. Tommy R. Franks.<sup>286</sup>

The report which has been classified by the Pentagon as state secret until released recently in 2008, underlines the lack of coordination and the wrong assumptions made by the US president that the reconstruction efforts would be minimal. According to this report, "*there was never an attempt to develop a single plan that integrated humanitarian assistance, reconstructions, governance, infrastructure development and postwar security*".<sup>287</sup> Following RAND's findings, when American troops entered Baghdad, they have erroneously assessed that the war was over. Gen. Franks and Mr. Rumsfeld took the wrong decision of cancelling further deployment of the First Cavalry Division; moreover the troops that were already deployed lacked the needed equipment to play the role of policemen. The reports stated that the troops "*were largely mechanized or armored forces, well suited to waging major battles but not restoring civil order*".<sup>288</sup>

The security problems were composed of two different factors: the first factor was chaos, looting and the formation of organized mobs spreading rapidly around major cities in Iraq: Baghdad, Mosul and Kirkuk.<sup>289</sup> In this regard, the U.S. led-Coalition forces proceeded too slowly, and the only ministry that was really protected by the U.S. led-Coalition forces was the Oil Ministry, while other state buildings –including the Baghdad National Museum- were looted, robbed and often destroyed".<sup>290</sup> The second emerging factor was the formation of resistance forces against the occupation. According to Bodarsky, Saddam Hussein's Fedayeen

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<sup>286</sup> Gordon, Michael R.. "Army Buried a Study Faulting Iraq Planning". The New York Times. February, 11<sup>th</sup>, 2008. <<http://www.nytimes.com/2008/02/11/washington/11army.html>>.

<sup>287</sup> *Ibid.*

<sup>288</sup> *Ibid.*

<sup>289</sup>"Baghdad descends into chaos." BBC-News. April 2003. <[http://news.bbc.co.uk/1/hi/world/middle\\_east/2938535.stm](http://news.bbc.co.uk/1/hi/world/middle_east/2938535.stm)>

<sup>290</sup>For detail about the looting on ministries see "War and Occupation in Iraq". Specially: Chapter 1: Introduction. This report has been written and produced by Global Policy Forum and co-sponsored by thirty NGOs in June 2007 <<http://www.globalpolicy.org/security/issues/iraq/occupation/report/1introduction.htm>>. About the looting of the Oil Ministry see Riedlmayer, Andras. *Ibid.*

forces and a *mêlée* of Islamist terrorist groups associated with al-Qaida were operating in Baghdad. These groups were fighting U.S. led-Coalition forces using urban *guerrilla* warfare strategies.<sup>291</sup> In the southern city of Najaf a young religious Shiite scholar *muqtadà as-sàdr* formed and led a resistance movement and militia against the Coalition forces.<sup>292</sup> The steady growth of different paramilitary groups along religious and ethnic affiliations became the most difficult problem during the reconstruction.

These security problems were also aggravated by the early decision adopted by the CPA. Since the ORHA took control of the management of Iraqi affairs, there was a clear condition from the Pentagon to clean the former Iraqi administration from previous Saddam Hussein supporters.<sup>293</sup> The U.S. policy was to erase any reminiscence of the Ba'ath regime in the country as this was stipulated by regulation n° 1/2003 issued by the Coalition Provisional Authority in May 16<sup>th</sup> 2003.<sup>294</sup> Bremer explains that the aim was to dismiss all Ba'ath members of Iraq, but he specified that only those who were close to the former Iraqi president: *"our concern was only the top four levels of the party membership, which the order officially excluded from public life. [...] Our intelligence community estimated that they amounted to only one percent of all the party members or approximately 20,000 people, overwhelmingly Sunni Arabs. [...] some Baathists had formed the leadership of every Iraqi ministry and military organization. By banning them from public employment, we would certainly make running the government more difficult"*.<sup>295</sup>

The second order approved by Bremer was CPA order N° 2, "Dissolution of Entities" on May 23<sup>rd</sup>, 2003.<sup>296</sup> This order had the goal of dismissing the Defense Ministry, all related national security ministries and offices, and all military formations, including the Republic Guard, Special Republic guard, Ba'ath Party Militias, and the Fedayeen. The order was

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<sup>291</sup> *Ibid.* P, 279.

<sup>292</sup> Bay, Austin. "The Quiet War Against Muqtada Sadr". *Strategy Page*. April, 2006. <[http://www.strategypage.com/on\\_point/2006412.aspx](http://www.strategypage.com/on_point/2006412.aspx) >

<sup>293</sup> The order was given in a memo to Bremer by Rumsfeld on May 9<sup>th</sup>. The memo said according to Bremer's book: *"the Coalition will actively oppose Saddam Hussein's old enforcers –the Baath Party, the Fedayeen Saddam, etc... – We will make clear that the Coalition will eliminate the remnants of Saddam Hussein's regime.* Bremer and McConnell. *Opus Cit.* P, 39.

<sup>294</sup> Al Nasir, Samer. "El Futuro Constitucional de Iraq, Asignatura Pendiente en la Transición Política." Magazine *Hesperia Culturas del Mediterráneo*. January, 2005., p., 34-35. Translation: "The Constitutional Future of Iraq, unsettled subject of the Political Transition."

<sup>295</sup> Bremer and McConnell. *Op. Cit.* P., 39-41.

<sup>296</sup> *Ibid* P, 57.

complemented by two announcements, the payment of all dismissed soldiers will be made (this policy was intended to buy the silence of sensitive Ba'ath soldier and secret services members), and the CPA's plan to create a New Iraqi Army (NIA). Consequently Bremer describes that the NIA would be a force "under civilian control, [...] professional, non-political, military effective, and representative of all Iraqis".<sup>297</sup>

The fact that can really contribute to this study is the rationale behind both orders. First, the CPA representing the U.S wanted to give a clear and direct statement that the Ba'ath regime would not come to power ever again. This sort of reprisal policy was very much welcome by the Iraqi population, especially among Shiite and Kurdish circles, but the extent of its consequences is still a sources of debate and research. The second reason can be summarized as the lack of proper equipment (barracks, and bases were demolished) and the Sunni prominence in high official rank belonging to the former Army that would make very difficult the creation of a plural and non- partisan Army.<sup>298</sup>

However the main issue here is how this policy was carried out. There are no doubts about the atrocities of the regime during almost thirty years of rule, but the problem is that since the CPA took power the Ba'ath party has been demonized as the Nazi party after WW II.<sup>299</sup> Although Bremer presented a sort of idyllic de-Ba'athification process where only the most senior Ba'ath were going to be dismissed, other sources, including Bremer's accounts, show a very different picture.<sup>300</sup> The de-Ba'athification process turned out to be a massive purge of military staff, civil servants from several ministries, and members of many security agencies, bureaucrats, professionals, teachers, and ordinary workers.<sup>301</sup> Anyone who was either related to

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<sup>297</sup>*Ibid.*

<sup>298</sup>*Ibid.* pp, 53-58.

<sup>299</sup>Analogy mentioned by Bremer and McConnell. *Op. Cit.* P, 38.

<sup>300</sup>For instance, although the de-ba'thification process was initiated by the CPA, the implementation of this policy was transfer to the Governing Council (first Iraqi Interim Administration appointed by the CPA and with a Shi'ia majority). Ahmed Chalabi as member of the GC was in charge of this plan and according to Paul Bremer, the CPA received different reports from provincial offices denouncing the exaggerated number of individual that were affected by the de-Ba'thification process. The numbers changes depending on the sources, and more research is needed to have a clear perception of the extent of this policy. According to scholars as Samer al Nasir, the CPA's de-ba'thification policy dismissed about 4 million employees from the former regime, a number totally different from Bremer accounts. For a detail list of all the ministries and institution affected see: Samer Al Nasir. *Op. Cit.* P., 34-35. And Bremer and McConnell. *Op. Cit.* P, 260-261.

<sup>301</sup>Raphaeli, Nimrod. "The De-Ba'thification of Iraq - Pros and Cons". MENRI.The MiddleEast Media Research Institute. N°176. March, 2004. <<http://www.memri.org/bin/articles.cgi?Page=countries&Area=iraq&ID=IA17604>>.

the Ba'ath regime in the past, or belong to a Sunni community was either accused of being Ba'athist or suspected of being part of the resistance in its different forms. What seems clear as a result of this policy is the gradual isolation of the Sunni community from the political process, even the constitutional process and the Iraqi community itself.

The CPA found it very difficult to find any relevant Sunni Iraqi politicians to represent this community and, the Sunnis as a response started to develop a feeling that the new Iraq would greatly lessen the traditional prominent role that the community had during its history.<sup>302</sup> This situation would have serious consequences for the Sunni Iraqis and their later participation in the constitutional process. Bremer decided to re-integrate many former Ba'athist member from teachers, professionals and army officers in an attempt to reverse the wrong implementation of the policy.<sup>303</sup> This was misinterpreted by Shiite and Kurdish leaders who accused the CPA of bringing the Ba'athists back. Also, it seems that this policy had a limited effect amongst hardcore Sunni radical circles –either Islamist or Ba'athist.<sup>304</sup>

### 3.2-The idea of writing a constitution and the “*immaculate conception*” option:

Now focusing on following Bremer's view and the CPA, the U.S. President and the Secretary of Defense did not replace Garner because of his inefficiency or mismanagement of the situation, but because of his poor political skills.<sup>305</sup> This view -which seems to be widely spread-,<sup>306</sup> is the main feature that according to Bremer differentiates him from Garner. Bremer considers political negotiation skills as a fundamental tool, not only for the reconstruction of the country, but for drafting and adopting a permanent constitution. The CPA had many tasks under his command and, according to official sources its mission consists of: “*restoring conditions of security and stability*”, in order “*to create conditions in which the Iraqi people can freely determine their own political future (including advancing efforts to restore and establishing national and local institutions for representative governance) and facilitating economic recovery,*

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<sup>302</sup> Bremer and McConnell. *Opus Cit.* P, 93.

<sup>303</sup>Raphaeli, Nimrod. “The de-Ba'athification of Iraq - Pros and Cons”. *Ibid.*

<sup>304</sup> *Ibid.*

<sup>305</sup> Bremer and McConnell. *Opus Cit.* P, 15.

<sup>306</sup> Interview with Sa'ad Hussein. Director of the Iraqi Institute for Strategic Studies (IIIST) Studies, and Adnan Pachachi's adviser. <<http://www.iraqstudies.org/>> Beirut, 29<sup>th</sup> February, 2008.

*sustainable reconstruction and development*".<sup>307</sup> As we can see, the directives given to the CPA is clear, but leaves a lot of room for interpretation. The directive does not mention at all writing and adopting a permanent constitution, but since Bremer's first meetings with the Iraqi Leadership Council (ILC) –a group of exiles that formed the first political interlocutors with the Coalition– this goal seemed to be clear on Bremer's agenda:

*"First, the important takeaway is that the president of the United States insists that since the interim Iraqi government will have to write a constitution, a legal code, and oversee Iraq's economic reforms, that government body has to be fully representative of all Iraqis, north and south, Sunni, Shia, Kurd, Turkmen, and Christian. And it's not going to happen overnight, despite what exile leaders hope or even believe".<sup>308</sup>*

Although Bremer mentions the U.S. president, there is nothing during their interviews and other sources I had collected that makes us think that the idea of writing a constitution was his own. There are several facts that support this theory. The first one is Bremer's interview with President Bush just before his arrival to Baghdad, during which Bremer presented the President with his plan. Bremer told the president that he supports the view of creating a stable political structure through installing democratic institutions, and what he called "shock absorbers". These are institutions such as free press, trade unions, political parties, and professional organizations. In summary institutions from civil society that would help individuals to absorb the impact of an overpowering government.<sup>309</sup> The president's answer was simple and straight, but one again lacking any clear strategy or guidance for the reconstruction and the constitutional process. Basically he said: *"I'm fully committed to bring a representative government to the Iraqi people. We are not going to abandon Iraq. [...] We stay until the job is done".<sup>310</sup>*

The second fact was the lack of specific planning for the post-war scenario. It seems clear since Bremer arrived in Baghdad that the U.S.-led Coalition did not have a plan or road map to rebuild the country. There were general approaches to a diverse range of issues<sup>311</sup>, but according to Bremer and political experts, Ambassador Ryan C. Crocker –working for the

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<sup>307</sup> Halchin, L. Elaine. *Op. Cit.* P, 1.

<sup>308</sup> Bremer and McConnell. *Opus Cit.* P, 43.

<sup>309</sup> *Ibid.* P, 13.

<sup>310</sup> *Ibid.*

<sup>311</sup> Please see interview with: Lt. Gen. Jay Garner (Ret.). note: tienes que ver que numero es cuando la pegues.



ORHA- the State Department released a study on the future of Iraq, but the study did not offer any directives or protocols about how the CPA should proceed on political or economical issues. Crocker explained in Bremer's book that he knew this report well because he worked on it during his work in the Pentagon prior the invasion. At his point Bremer asked Crocker if the study included guidance or premises to follow after the war. His answer was negative, Crocker replied: "*Not at all [...] it is supposed to engage Iraqi-American thinking about their country's future after Saddam was ousted. It was never intended as a post war plan*".<sup>312</sup> The lack of planning in addition to Bremer's conviction –sometimes obsession– throughout his book about the necessity of drafting and adopting a constitution could be considered as an indicator that the idea of writing a constitution came from Paul Bremer or one of his advisers in the CPA".<sup>313</sup>

This fixation with the designing and approving of a constitution has of course an explanation. The CPA's principal approach to revive the political life in Baghdad was to create a new constitution and organize national elections. We should keep in mind that Garner's idea to organize early elections was rejected by Bremer because according to his Governance Team there was neither census, nor electoral law, or political parties or regulation for them.<sup>314</sup> Henceforth Bremer decided that regarding the political arena, the Coalition would better work on two fronts, what he called a fast-slow approach. The fast side of the work was to appoint an Interim Iraqi Administration. Bremer legitimized this action under United Nation Resolution 1483 calling the Coalition "*to facilitate a process leading to an internationally recognized representative government of Iraq*".<sup>315</sup> The idea was to choose a group of politicians with enough representation among the Iraqi population in order to create an administration that would take charge of the ministries and initiate a constitutional process.<sup>316</sup> The slow side of the plan was to design and write a constitution. According to Bremer the constitution should have been a process engaging all sides of societies, religious tendencies and ethnic groups, and hopefully produce discussion and debate among Iraqis. The complexity of this issue and the spoiled state

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<sup>312</sup> *Ibid.* P, 25.

<sup>313</sup> *Ibid.* p, 43, 73, 79-80, 83-84, 89, 101, 163-67, 175, 189, 210-18, 224-3.

<sup>314</sup> *Ibid.* p, 89.

<sup>315</sup> Bremer and McConnell. *Opus Cit.* P, 79.

<sup>316</sup> *Ibid.* Pp, 79-84.

of the political structures in Iraq indicates that this approach would be complex and time consuming.

### **3.3-The creation of temporary Iraqi Administration and its role in the constitution making process:**

The first step was to set up an Iraqi Administration; a group of politicians capable of leading this process. Bremer did not have to start from scratch *per se* because prior to his arrival, the ORHA had been in contact with a group of Iraqi exiles that considered themselves to be an “exile government” before the war even started.<sup>317</sup> During mid 2002 the Bush administration was already preparing for possible military action, and began to establish contacts with opposition members with the aim of building up an Iraqi opposition.<sup>318</sup> These contacts were made through the Defense Department which invited several groups to hold meetings with U.S. officials. The core group was composed of six major parties: The Iraqi National Congress (INC), Iraqi National Accord (INA); Kurdistan Democratic Party (KDP), Patriotic Union of Kurdistan (PUK), the Supreme Council for the Islamic Revolution (SCIRI), and the Movement for Constitutional Monarchy, (MCM). Also other groups were contacted, Iraqi ex-military Officers and other ethnic based groups as Iraqi National Movement (INM), The Iraqi National Front (INF), Iraqi Free Officers and Civilians Movement (IFOCM), the Higher Council for National Salvation (HCNS), Iraqi Turkmen Front (ITF), the Islamic Accord of Iraq (IAI), and others.<sup>319</sup> The Bush Administration (1989-1993) formed these groups, and during the second Bush administration, they were allowed –the Higher Council For National Salvation was excluded due to its previous connections with Iraqi intelligence– to receive \$92

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<sup>317</sup> There was an Iraqi resistance living abroad since the end of the first Gulf War (1991). The Iraqi National Congress -funded by the CIA and other American agencies- created an exile government through different international meetings in different European capital. The INC was mainly formed by Kurdish and Shi ‘is Iraqi with a small percentage of Sunnis. The INC hoped that after the end of the War, the United States would return to them sovereignty.

<sup>318</sup> Katzman, Kenneth. “Iraq: U.S. Regime Change Efforts and Post-Saddam Governance”. Congressional Research Service (CRS), The Library of Congress. January 28<sup>th</sup>, 2005. P, 16-17.< <http://www.fas.org/man/crs/RL31339.pdf>>.

<sup>319</sup> *Ibid.*

million worth of goods and services that were available thanks to the Iraqi Liberation Pact, signed by president Clinton on October 1998.<sup>320</sup>

The Iraqi Leadership Council seems not to be precisely a very representative group of the Iraqi society as Bremer recalls. According to him the ILC was composed of exiles Iraqis living abroad who, during a well known conference in London in 2002, were elected among several hundred candidates to represent Iraq after the war ended.<sup>321</sup> The CIA, Zalmay Khalizad (U.S. Ambassador) and the ORHA had been in contact with numerous exiles before the end of the War in order to create a political elite and a new administration.<sup>322</sup> However Bremer regarded this group as having two main disadvantages: first, governments in exile tended to be considered suspicious by those people who stayed in the country (e.g. Germany after WW II); and second, the group was limited in nature and not representative at all of Iraqi society, “the ILC lacked a proper balance between Sunni and Shia, was overly weighted toward Kurds, and had no Christians, Turkmen, or women”.<sup>323</sup>

During the first days of arrival Bremer had the opportunity to meet the Iraqi representatives of this exile government. This group called by Bremer the G.7 formed the core group of politicians that lead the political process and the first steps of writing the constitution. Bremer regarded this group as limited in nature, and very ambitious in their aspirations. They were Ahmad Chalabi (Shiite from the Iraqi National Congress), Ayad Allawi (Shiite from the Iraq National Accord), Massoud Barzani (Kurdish leader of the Kurdish Democratic Party), Jalal Talabani (also Kurd and head of the Patriotic Union of Kurdistan), Nasser Jaderji (Sunni, National Democratic Party), Ibrahim al Jaafari (Shia, Islamic Dawa Party) and finally Adel

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<sup>320</sup> *Ibid.*

<sup>321</sup> Please see: “Political Statement of the Iraqi Opposition Conference in London, 14-16”. [Iraqi National Congress](http://www.inciraq.com/English/INC/021216_Political%20Statement%20of%20The%20Iraqi%20Opposition%20Conference.htm). December 2002. <[http://www.inciraq.com/English/INC/021216\\_Political%20Statement%20of%20The%20Iraqi%20Opposition%20Conference.htm](http://www.inciraq.com/English/INC/021216_Political%20Statement%20of%20The%20Iraqi%20Opposition%20Conference.htm)>.

<sup>322</sup> In February 2003, the Pentagon established the Reconstruction and Development Council (IRDC). This body was made up of Iraqi exiles that were selected to be part of a temporary government after Saddam. This group started its activities in Virginia US, and its members were later transported to Baghdad in April 2003. This people were in charge of running the ministries until they hand over to them to the new Iraqi Authority. Lt. Gen. (retd) Jay Garner monitored them. Imad Dhia heads the team. The Members of IRDC are official employed by San Diego defense contractor, Science Applications. International Corporation (SAIC). Please see: Rangwala, Glen. Middle East. Referentes.org. “The Iraqi Reconstruction and Development Council.” 2003, [Middleeastreference.org](http://middleeastreference.org.uk/irdc.html). <<http://middleeastreference.org.uk/irdc.html>>.

<sup>323</sup> Bremer and McConnell. *Opus Cit.* P, 39-43.

Mahdi and Hamid al-Bayati (Supreme Council of the Islamic Revolution in Iraq, SCRI).<sup>324</sup> The G7 had a long lasting relationship with the United States and England pushing for the deposition of Saddam Hussein and the creation of a New Iraq, especially Ahmad Chalabi and Iyad Allawi.

All the members of this group suffered from the persecution of Saddam Hussein for years, and they all in a way or another were part of the opposition to the regime. Some of them were organized and funded by the CIA, and were lobbying since the end of the war for a quick transfer of power, and others were supported financially and logistically from Iran. At the same time, the Pentagon was giving a lot of support to Kurdistan leaders who were very helpful for the Coalition forces during the invasion, and were –understandably– expecting protection and support for the autonomy and semi-independence of Kurdistan which more or less they had since 1991. The Kurdish demanded a federal state, while the Shiite block requested: the withdrawal of U.S. led–Coalition troops, an Iraq free of Sunni dominance, and of course as much power as possible, ought to the great percentage of population they represented.<sup>325</sup> Both were allied in their objective to overthrow the regime, but when it comes taking collective decision they were divided, not only among themselves, but also inside their own communities or religious tendencies (Kurdish vs Kurdish / religious Shia vs moderate Shia).

In order to revive the Iraqi administration, Paul Bremer decided to create an “interim administration” that will be called the Iraqi Governing Council (IGC) by July 2003.<sup>326</sup> This body would be composed of thirty members belonging to all major strands of Iraqi society (a mixture of exiles and national, Shia, Kurd, Sunna, Turkomen, and women). The IGC will have six months to write and approve a constitution, and soon after national election would be held. The whole process would take a year approximately.<sup>327</sup> After this plan was outlined, Bremer’s objective was to convince the G7 to become part of this governing body. Members of the G7 were reluctant to accept. Their main concerns were the lack of legitimacy and powers that this new administration would have. Bremer mentioned that there are two members constantly

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<sup>324</sup>The main leader Abdul Aziz al-Hakim was invited to be part of this group but until later he did not agree to participated in the government and administration creation process. Bremer and McConnell. *Opus Cit.* P, 48.

<sup>325</sup> Alkadiri, Raad and Toensing, Chris. “The Iraqi Governing Council’s Sectarian Hue”. [Merip.org](http://www.merip.org/middle-east-report) Middle East Report Online. August 20<sup>th</sup>, 2003. < <http://www.merip.org/mero/mero082003.html>>.

<sup>326</sup> *Ibid.* P, 93.

<sup>327</sup> *Ibid.* P, 84.

undermining CPA's efforts to create an IGC. These are Ahmad Chalabi and Jalal Talabani. Both according to Bremer were accusing publicly the CPA of abandoning previous agreements with them.<sup>328</sup>

The SCIRI representative and leader, Abdul Aziz Hakim demanded to convene a "national conference" and the writing of a new constitution as soon as possible. The SCIRI were opposed to the creation of the IGC.<sup>329</sup> While the heat of the summer was rising, Bremer describes the inability of the IGC to expand their representativeness by themselves. Bremer, displaying a cut and thrust diplomacy with high doses of intimidation, warned the G7 to expand their representativeness, *if they do not act fast*, as Bremer told them at one point, the UN and the CPA will choose other candidates, and your power will be "diluted in a broader council".<sup>330</sup> According to Bremer the CPA gave enough time to the G7 to expand their group in order to proceed with the creation of an interim administration, and the G7 failed not only at broadening their representativeness, but also at deciding on other simple matters as coordinating meeting or taking minor decisions. Bremer ordered the Governance Team to work on a list of new representatives across Iraq, and the CPA finally expanded the G7 with other candidates he found across Iraq.<sup>331</sup>

Bremer's pressure seems to have had some effect on the G7 who realized that should they abstain from participating in his plans they would be soon isolated in any future political process. During the middle of the summer, the G7 began to adopt a different approach regarding the CPA. However, at the same time Ayatollah Sayyid *'alī hussānī as-Sistānī*, an elder and well respected religious figure across the Shiite community began to influence the negotiations between the CPA and the G7, using public statements, private messages to Bremer, and in cases issuing religious *fatāwā*. These religious decrees have an immediate effect on pious Muslims, and the most famous fatwa issued by Al-Sistani was precisely referred to the constitutional process. The Ayatollah insisted on the requisite that the constitution be written by the Iraqi people and not by the Coalition.<sup>332</sup> In June 2003 Al-Sistani publicized a religious

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<sup>328</sup> Ahmed Chalabi claimed that the US Coalition should return power immediately to the Iraqis as was promised previously by US Ambassador Zalmay Khalizad. Bremer and McConnell. *Opus Cit.* P, 83.

<sup>329</sup> *Ibid.* p, 87.

<sup>330</sup> *Ibid.* p, 86.

<sup>331</sup> *Ibid.* p, 86-89.

<sup>332</sup> *Ibid.* P, 94.

decree stating that: *“The occupation authorities are not entitled to name the members of the assembly charged with drafting the constitution... There is no guarantee that such a convention will draft a constitution which upholds the Iraqi people's interests and expresses their national identity”*.<sup>333</sup>

This fatwa meant a major setback for Bremer's plan to initiate a constitutional process after a well-formed Government Council was formed. The CPA hoped to create a provisional government without having national elections, appointed and monitored by the Coalition that would write a constitution, but ultimately favoring U.S. demands and hopes for the future Iraq. Ayatollah Sistani demanded the constitution be designed and approved by the Iraqi people, a position that Bremer could not ignore, if he wanted the Shiite community to participate in the political process. However, Bremer decided to proceed with his plan to create the IGC but slowly modified his position about the IGC's role in writing a constitution; nevertheless Bremer attempted several times to change Ayatollah's position about the constitution through notes and messages delivered by Ahmed Chalabi.<sup>334</sup> The Ayatollah's refusal to adopt a constitutional process led by the IGC pressured Bremer to change his position about the constitutional process. He decided to merely delegate the IGC with the task of “preparing the constitutional process” though what he called the Constitutional Preparatory Committee (CPC).<sup>335</sup>

The CPA, after long negotiations with the G7, and other candidates chosen by the Governance Team managed to create the first Iraqi government on Sunday July 13<sup>th</sup> 2003.<sup>336</sup> Bremer expanded the G7 including some men and women from different political and religious affiliation, but nevertheless the weight and importance of the G7 members overcame the political experience and connections that the rest of the cabinet possessed as table 2 included at annex 1 shows. The CPA fixed the new interim government with a Shiite simple majority, 52%, and the other 50% were divided amongst other ethnic and religious groups, 20% Sunni, 20% Kurds, and the remaining 10% to Turkman and Christians.

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<sup>333</sup>Please see “Ayatollah Sistani in Quotes”. *BBC News*, 27 August, 2004.  
<[http://news.bbc.co.uk/2/low/middle\\_east/3604810.stm](http://news.bbc.co.uk/2/low/middle_east/3604810.stm)>.

<sup>334</sup>*Ibid.* P, 78.

<sup>335</sup>*Ibid.* P, 99.

<sup>336</sup>*Ibid.* P, 101.

This balance of power was designed to motivate the Kurds, Sunnis and other forces to unite in order to balance Shiite dominance, but as later will be shown; this policy resulted to favor a Shiite-Kurdish alliance leaving Sunnis in isolation. Other accounts consider this policy the main cause for changing the traditional balance of powers in Iraq to a simply one based on ethnic and religious affiliation that had broken Iraq in three major blocks.<sup>337</sup> Also the conformation of this view could be considered to be as the result of the secrecy and lack of transparency that the CPA was characterized by during their work in Iraq.<sup>338</sup> For instance, the name of all the members of the cabinet were not made public until the cabinet assumed its competences.<sup>339</sup> There is not much information about the CPA policies, initiatives and activities during the formation of the IGC, other than the information presented by the CPA's webpage, and Paul Bremer's book.<sup>340</sup>

The ceremony organized by the Coalition to announce the appointment of the new cabinet included the presence of the U.N. Envoy in Iraq Sérgio V. de Mello, Coalition members and, obviously the 25 members of the IGC. The event took place in a restored building near a former Saddam Hussein's palace, now used by the CPA as its headquarters. After the ceremony a press conference followed. Bremer's plan for the ceremony was to let these 25 politicians declare themselves as the IGC in what he called sarcastically the "immaculate conception" option.<sup>341</sup> The idea was to give the impression that the CPA was creating a legitimate government with more than mere advisory powers but without transferring formally sovereignty to it.

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<sup>337</sup> Docena, Herbert. "Iraq's Neoliberal Constitution". *Foreign Policy in Focus (FPI)*. September, 2005. <<http://www.fpi.org/fpifxt/492>> Alkadiri, Raad and Toensing, Chris. *Ibid.* Amy Chua and Jed Rubenfeld. "Ethnic Division in Iraq"--A Commentary by Profs. Amy Chua and Jed Rubenfeld. *Yale Law School*. June, 2004. <<http://www.law.yale.edu/news/2478.htm>>

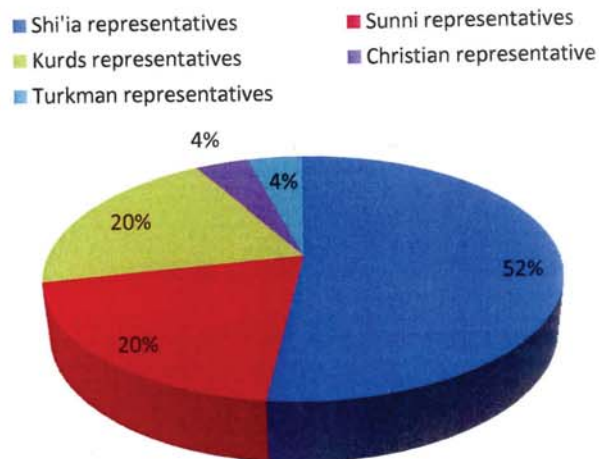
<sup>338</sup> *Ibid.* See also: So, Mr. Bremer, where did all the Money go? *The Guardian.co.uk*. July 2005 <<http://www.guardian.co.uk/world/2005/jul/07/iraq.features11>>

<sup>339</sup> Haven, Paul. "New Iraqi Governing Council to hold first meeting today". July 13<sup>th</sup>, 2003. *Associated Press (AP)*. P, 1. <[http://findarticles.com/p/articles/mi\\_qn4176/is\\_20030713/ai\\_n14555232/pg\\_1](http://findarticles.com/p/articles/mi_qn4176/is_20030713/ai_n14555232/pg_1)>.

<sup>340</sup> Iraq's Governing Council Assumes Broad Authority. Revenue Watch n°1. *Open Society Institute (OSI)*. 2003 <<http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN017436.pdf>>. This report as other reports I had founded in Internet and libraries covers the Governing council composition and competences but offered little information about the political process behind.

<sup>341</sup> Bremer and McConnell. *Op. Cit.* P, 111.

**Table 3: distribution of members in the Iraqi Governing Council**



### 3-4. the rationale and virtuality behind the transfer of sovereignty to the Iraqi people:

During the previous section I have reviewed the impact that Al-Sistani's fatwas had regarding the writing of the Constitution. Moreover the consequences of this religious edit went beyond the constitutional process that followed. This fatwa had a great impact on the whole political approach adopted by the CPA to return sovereignty to the Iraqis. In other words, Bremer regarded fundamental a series of principles that should be achieved before the transfer of power is done. These principles presented an inevitable dilemma between what the CPA expected –to empower the IGC with the necessary powers to write a constitution– and what other actors involved expected from the CPA. For instance, the Pentagon pressured up to speed the political process, and return sovereignty as early as possible to the Governing Council which could write a constitution. These views were shared by several members of the Governing Council such as Ahmad Chalabi who expected a fast transfer of powers.<sup>342</sup> They expected to consolidate their posts in the administration, and therefore consolidate their political power.

The Governing Council had the powers to appoint ministers, prepare the budget, and as Bremer announced earlier, appoint the members of a Constitutional Preparatory Committee to

<sup>342</sup> Bremer and McConnell. *Op. Cit.* P, 88.



study different possibilities regarding the constitutional process.<sup>343</sup> Bremer often criticized the inability of the group to coordinate, and their incapacity to agree on basic issues regarding the process.<sup>344</sup> Also, violence was growing since the mid of that summer, and the security and economic situation was improving very slowly for most Iraqis.

All these problems were further complicated by members of the Department of Defense (DoD) such as Paul Wolfowitz who pressured for a fast transition of powers to the IGC. During a meeting that took place at the Pentagon (October 2003), Bremer presented his plan which basically was to empower the Governing Council with some provisional powers, and devolve more authority to the Iraqis in April 2004.<sup>345</sup> Also, the Bush Administration was introducing major changes in the configuration of command structure since the beginning of the war. The DoD was not the only agency in charge of operations in Iraq and Afghanistan anymore, and the State Department's National Security Adviser, Condoleezza Rice, assumed several competences for the operations in both countries.<sup>346</sup> Rice was appointed head of the Iraqi Stabilization Group which constantly assisted the CPA in the political and constitutional process. According to her, this new policy was intended to speed up the reconstruction efforts through the elimination of red tape, but however as other analysts had pointed out; there was an extended discontent about the performance of the DoD in the Iraqi crisis.<sup>347</sup>

Bremer had little trust in the ability and capacity of the IGC to solve any problem. The CPA exercised absolute control almost over all major issues. Bremer recognized that regarding many fundamental matters as electricity, unemployment, the creation of police, reconstruction, etc... will be designed by the CPA, but presented by the IGC's as theirs.<sup>348</sup> The way Ministers and members of the CPC were appointed was a clear sign to Bremer of how incapable the new cabinet was. The IGC expanded the governance apparatus with 25 Ministries in order to give a chance to each member of the IGC to choose one minister. The Constitutional Preparatory

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<sup>343</sup>A full account of the powers of the GC please see Open Society Institute's report. Iraq's governing council assumes Broad Authority. Open Society Institute (OSI). Revenue Watch. N° 1.

<<http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN017436.pdf>>

<sup>344</sup>Bremer and McConnell. *Op. Cit.* P, 121.

<sup>345</sup>*Ibid.* P, 205.

<sup>346</sup>Keen, Judy. Rice will manage Iraq's New Phase. US Today. Posted on June, 2003 and updated on July, 2003  
<[http://www.usatoday.com/news/world/iraq/2003-10-06-rice-iraq\\_x.htm](http://www.usatoday.com/news/world/iraq/2003-10-06-rice-iraq_x.htm)>

<sup>347</sup>*Ibid.*

<sup>348</sup>Bremer and McConnell. *Op. Cit.* P, 123.

Committee was selected following this procedure as well.<sup>349</sup> The CPC was formed by 25 members: twelve Shiite Arabs, five Sunni Arabs, five Sunni Kurds, one Turkmen, one Assyrian (Christian), and three women (one Turkmen and two Shiite).<sup>350</sup> Authors such as Faleh A. Jaber argued that the formation of the CPC following this procedure promoted a “polarized process into conflicting blocks”. CPC members were more worried about the method of selecting the drafters than on the principles and issues related to adopt a new constitution.<sup>351</sup>

Therefore, the CPA and the Governance Team designed different plans to solve the problem of transferring sovereignty to an appointed group of Iraqi politicians. Bremer described his plan which he regarded to be inspired by the British Empire model used during its occupation of Iraq at the end of the WW I. According to him, the British pattern was to convene a constitutional convention comprising a selected group of Iraqi representatives. They will write a constitution, and thereafter it would be presented to the Iraqi people in a national referendum for its approval. If the constitution is accepted, election would be held for a sovereign parliament based on the terms of the constitution, and the Coalition would return sovereignty to the Iraqis.<sup>352</sup>

This sequence can be summarized in promulgating a constitution, holding elections, and installing a new government. This pattern was the same displayed by Gen. McArthur during the reconstruction of Japan after WW II.<sup>353</sup> Also, there are similarities with Lebanon's history. During the French occupation, and later the mandate, the French republic favored the creation of a separate state from Syria that would be called: *Etat du Grand Liban* in 1920. One of the first measures taken to concretize this new entity was to write a constitution. The Lebanese constitution developed by French and Lebanese politicians in 1926 laid down the foundations of the modern Lebanese estate. After the constitution was approved, elections followed in 1927,

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<sup>349</sup> *Ibid.* 148.

<sup>350</sup> A. Jabar, Faleh. “The Constitution of Iraq: Religious and Ethnic relation”. Minority Right Group International. Micro Study. Minority Rights and Conflict Prevention. December, 2005. <[http://www2.reliefweb.int/rw/RWFiles2005.nsf/FilesByRWDocUNIDFileName/EVOD-6K5GTY-mrg-irq-16dec.pdf/\\$File/mrg-irq-16dec.pdf](http://www2.reliefweb.int/rw/RWFiles2005.nsf/FilesByRWDocUNIDFileName/EVOD-6K5GTY-mrg-irq-16dec.pdf/$File/mrg-irq-16dec.pdf)>

<sup>351</sup> *Ibid.*

<sup>352</sup> *Ibid.* P, 163.

<sup>353</sup> Thornton, Ted. History of the Middle East Database. The Coalition Provisional Authority Rule of Iraq 2003-2004. Last revised 2007. <[http://www.nmhschool.org/tthornton/mehistorydatabase/united\\_states\\_in\\_iraq.php](http://www.nmhschool.org/tthornton/mehistorydatabase/united_states_in_iraq.php)>.

and since then, elections have been held regularly until today in order to elect a parliament albeit several conflicts have disrupted the political life of the country.<sup>354</sup>

The basic problem that Bremer had was how to write a constitution before sovereignty is transferred. Bremer expected that the Governing Council would somehow appoint a constitutional writing committee for a permanent constitution. But not only Al-Sistani's fatwa, but also the CPC were against this idea. The Constitutional Preparatory Committee after consulting with different leaders decided that the constitutional convention should be elected, and not appointed by the IGC and the CPA. However, the CPC presented a second option which will not entitle national elections, but a selection of candidates through local elections or caucuses.<sup>355</sup>

Al-Sistani's declarations had an echo amongst CPC member's that obviously was mostly Shiite (50%). Bremer was totally reluctant to adopt this approach, and gathered several experts from the U.N. and several NGO's to prove his position. According to their reports the process of transferring sovereignty would entail at least two years. Also Bremer had the choice to use the last resolution passed on Iraq –UNSC 1511, 16<sup>th</sup> October–to strength his position as the final decision maker in Iraq. The resolution reinforced the dominant role of the U.S. led–Coalition in the reconstruction process.<sup>356</sup> The resolution only urged the authorities to establish a timetable –which should include a plan for a constitution and elections by December– in order to begin a transfer of power as soon as possible.<sup>357</sup> Ultimately Bremer hoped to bargain with the IGC to delay the transfer of power in exchange for creating an interim government, and creating a constitutional convention for writing a constitution.<sup>358</sup>

The White House, the Pentagon and some Iraqis in the IGC pressured for a faster transition. Under these circumstances Bremer had to change his approach which was to adopt an early constitution before the transfer of sovereignty. Now, he decided to adopt a Solomonic decision which would take into account the demands of the Pentagon, the CPA and the IGC. At this point –between the end of October and the beginning of November 2003– Bremer in close

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<sup>354</sup> Salem, Paul. *Ibid.* Also see Paul Salem. "Lebanon at the Crossroads: Rebuilding an Arab Democracy". *Brookings*. March, 2008. < [http://www.brookings.edu/articles/2005/0531middleeast\\_salem.aspx](http://www.brookings.edu/articles/2005/0531middleeast_salem.aspx)>.

<sup>355</sup> Bremer and McConnell. *Op. Cit.* P, 164 and 189. Also see Faleh A. Jaber. *Ibid.*

<sup>356</sup> Ted Thornton. *Ibid.*

<sup>357</sup> Please see UNSC 1511. Adopted by the United Nation Security Council on 16 October 2003. <<http://daccessdds.un.org/doc/UNDOC/GEN/N03/563/91/PDF/N0356391.pdf?OpenElement>>

<sup>358</sup> Bremer and McConnell. *Op. Cit.* P, 193.

collaboration with the Governance Team and the National Clandestine Service Iraq's stabilization group designed a plan that would satisfy all the parties involved in the process.

The new plan envisioned by Bremer would be as follows: sovereignty will be transferred before a permanent constitution is in place in order to satisfy Iraqi demands and U.S. pressures. The risks of this sequence was that Iraq would be then in hands of a non-elected or illegitimate-government. Therefore, the CPA needed to design a corpus of norms that would regulate this period in order to continue with the transfer of sovereignty. Also, the settling of a legal framework would help Bremer introduce the fundamental U.S. theory of government based on democratic and liberal principles.<sup>359</sup> The idea was to bestow the IGC –with the assistance of some qualified Iraqis– with the necessary powers to write a temporary constitution. This law would specify the procedures to invoke national elections for establishing a Transitional National Assembly (TNA). Sovereignty would be returned to the TNA which will appoint a new constitutional committee to a write a permanent constitution.<sup>360</sup>

This plan designed by the CPA was present it in private to Adnan Pachachi, Sunni member of the IGC. After discussing the plan, Bremer convinced Pachachi to make this plan his, and presented as such to the Governing Council.<sup>361</sup> This technique was also used during the drafting of the Japanese constitution as Dale Hellegers tells us: *"the Japanese government would 'change their own constitutional provisions to fit our demand for a liberal Constitution,' and MacArthur would then accept this Constitution as the work of the Japanese Government and so promulgate it to the world"*.<sup>362</sup> Also during the British occupation and Mandate of Iraq (1920-1932) this procedure was followed as well. The British High Commissioner appointed a committee of British advisors in the Iraqi Ministry of Justice that worked on a draft constitution in 1921.<sup>363</sup> When the draft was finish the committee handed the draft to King Faisal, who accepted it, but first decided to refer it to a committee of Iraqis for its approval. The Iraqi committee submitted to the Constituent Assembly, and after introducing some minor changes, the Constituent Assembly approved it in July 1924, and later approved officially by the King in

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<sup>359</sup>Bremer and McConnell. *Op. Cit.* P, 212.

<sup>360</sup>*Ibid.*

<sup>361</sup>*Ibid.* P, 213-4.

<sup>362</sup> Hellegers, Dale M. *"We, the Japanese People: World War II and the Origins of the Japanese Constitution"*. Palo Alto, CA, USA: Stanford University Press, 2001. P, 520.

<sup>363</sup> Bengio, Ofra. "Pitfalls of Instant Democracy" in Michael Eisenstadt and Eric Matheson. *"U.S. Policy in Post-Saddam Iraq. Lessons from the British Experience"*. The Washington Institute for Near East Policy. 2003. P, 18.

March 1925.<sup>364</sup> However the Japanese and the Iraqi constitutional processes in 1925 differ in that those constitutions meant to be permanent, while CPA-GC's constitution will be temporary.

The following day Pachachi announced and discussed the idea to several IGC members in November 15<sup>th</sup>. After a long session the Governing Council decided to proceed with this plan. The November 15<sup>th</sup> agreement was accepted by all the IGC, but it was not free of controversy, especially between Kurds and SCIRI's members who were worried about federalism, and the supposed caucuses' procedure envisioned by the CPA.<sup>365</sup> Although the IGC adopted the plan which was also officially endorsed by the U.N. in December 5<sup>th</sup>, 2003<sup>366</sup>, the spiritual leader, Ayatollah Al-Sistani once again disagreed with the caucuses procedures planned by the Coalition. The spiritual leader insisted that the "transitional legislature" should be elected, and he threatened the CPA and the IGC several times to issue a fatwa in order to declare the November 15<sup>th</sup> agreement null.<sup>367</sup> This problem was solved through a temporary agreement between the CPA and Al-Sistani. The Ayatollah demanded that the CPA and IGC to invite an U.N. team to Iraq to produce a report about the impossibility of holding national elections.

### **3-5. The drafting of the Transitional Administrative Law (TAL):**

The Governing Council established a drafting committee to work on the Law of Administration for the State of Iraq for the Transitional Period –also known as the Transitional Administrative Law (TAL) – somewhere between the end of 2003 and the beginning of 2004.<sup>368</sup> The TAL was meant to be a temporary constitution in order to have election and appoint a Transitional National Assembly. The CPA and the IGC were gaining momentum due to the capture of Saddam Hussein during this month. Although the capture of Saddam reduced the violence and gave some air to the Coalition, it did not mean at all the end of the resistance. Violence was reduced up to 20% but soon after, new security challenges started: al-Qaida

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<sup>364</sup> "Iraq until the 1958 revolution, British Occupation and the mandatory regime". Encyclopedia Britannica. <<http://www.britannica.com/eb/article-22902/Iraq>>.

<sup>365</sup> Bremer and McConnell. *Op. Cit.* P, 213-4.

<sup>366</sup> *Ibid.* P, 245.

<sup>367</sup> *Ibid.*

<sup>368</sup> Please see: "Law of the Administration for the State of Iraq for the Transitional Period". Coalition Provisional Authority official web-page. March 8<sup>th</sup>, 2004. <<http://www.cpa-iraq.org/government/TAL.html>>.

operations were growing; some Shiite leaders as Muqtada al Sadr were reaffirming their resistance against the Coalition. Ba'athists were still operational in some areas, and the CPA and the U.S. army had serious problems training the new army and police. Iraqi jails were full of prisoners, and the scandal of Abu Ghraib prison evidenced the poor conditions under which detainees were treated as well as physical and psychological abuses conducted by some member of the U.S. led –Coalition forces and intelligence in Iraq.<sup>369</sup>

The TAL was a fundamental step, not only because it would enable to return more authority to Iraqis, but because it also prescribes and formalizes the procedures to adopt a permanent constitution. The IGC agreed with the CPA that the TAL should be ready by the 1<sup>st</sup> of March 2004. This meant that the IGC had less than three months to write the interim constitution. The main problem facing the Governing Council during the first stages of the negotiation was the inflexibility of Kurds members regarding the issue of federalism and the final status of Kirkuk.<sup>370</sup> The Kurds regarded the city as their historical capital, and they have always demanded the inclusion of this city in the Kurdistan region. Arabs (Sunnis and Shiites) and Turkmen rejected these claims and opposed the idea of invoking a referendum to formalize this union. The Kurds had in mind to create an independent state along ethnicity lines that would have led, according to Bremer and other members of the Governing Council, to a disintegration of Iraq.

The IGC asked for assistance to the CPA, and Bremer decided to follow two parallels tracks to write the interim constitution: first the governance team will work with the Arab section of the drafting committee, and second, Bremer would try to mediate with the Kurds in an attempt moderate their positions regarding their autonomy demands.<sup>371</sup> At the same time, the Sunnis started criticizing the low representativeness they had in the political process, while the Shiites pressured to convene elections as early as possible. The idea was to work in two separated teams which would gather together and ensemble the TAL.<sup>372</sup>The NSC requested the

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<sup>369</sup>Please see "Iraq timeline: February 1 2004 to December 2004". [Guardian.co.uk](http://www.guardian.co.uk). Special Report Iraq. <<http://www.guardian.co.uk/Iraq/page/0,12438,1151021,00.html>>. Also Diamond, Larry. "What Went Wrong in Iraq". *Foreign Affairs*. September-October 2004. <<http://www.foreignaffairs.org/20040901faessay83505-p10/larry-diamond/what-went-wrong-in-iraq.html>>.

<sup>370</sup> McDonough, Challis. "Iraqi Kurdish Autonomy Remains Difficult Issue to Settle". *Payvand News*. January, 2004. <<http://www.payvand.com/news/04/jan/1067.html>>.

<sup>371</sup>Bremer and McConnell. *Op. Cit.* P, 271-73.

<sup>372</sup> *Ibid.*

U.N. to assist the CPA with some mediator experts. Soon after, the U.N. sent to Iraq a new Envoy, Lakhdar Brahimi, an Algerian diplomat with broad experience in the constitution-making process in Afghanistan.<sup>373</sup> His only task was to work on a report about the difficulties of holding election following the petition demanded by Ayatollah Al-Sistani.<sup>374</sup>

The drafting committee and the governance team worked together on a daily basis.<sup>375</sup> The CDC was chaired by Adnan Pachachi, Sunni representative, who clearly supported the necessity of the interim constitution.<sup>376</sup> As the teams were approaching the deadline, several problems emerged regarding the government structure, the distribution of authority among the center and the regions (the Kurdistan autonomy), the role of religions and in particular Islam, and finally, the method to be use for the ratification of the TAL.<sup>377</sup> Regarding the role of Islam, the Shiite block led by al-Da'wa and the SCIRI demanded Islam to become the source of legislation.

During February 'Abd Aziz al-Hakim assumed the presidency of the IGC, and during his tenure, the Shiite leadership tried to pass a resolution to activate *shari'a* law in all the territory. Bremer refused to sign this resolution, and proposed the CDC to focus on individual rights, and to introduce in the TAL, strong checks and balances mechanism to lessen the power of the Shiite majority in parliament. The idea is that the Shiite as a majority should not hold all the power to approve legislation without first discussing and reaching agreements with the rest of political forces in the council.<sup>378</sup> For instance, the IGC decided on a formula which would entitle the election of a Prime Minister as head of the state, but its powers will be limited by a presidency council formed of three deputies. The presidency body has veto powers over appointments and legislation proposed by the Prime Minister.<sup>379</sup>

By the end of February, the CDC had managed to unify all proposals in one draft that was then distributed to the members of the council. The Shiite block did not agree on the role of

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<sup>373</sup>For a detailed profile of Brahimi, Lakhdar please see Abedin, Mahan. "Doswsier: Lakhdar Brahimi". Middle East Intelligence Bulletin. Vol. 6, N° 6-7. June-July 2004. <[http://www.meib.org/articles/0407\\_iraqd.htm](http://www.meib.org/articles/0407_iraqd.htm)>.

<sup>374</sup> *Ibid.* P, 289. Also Diamond, Larry. *Ibid.*

<sup>375</sup> *Ibid.*

<sup>376</sup> Diamond, Larry. *Op. Cit.* P, 7. Also see: "Interview with Former Presidents Bush and Clinton; Interview With Adnan Pachachi; Interview With Jalal Talabani". CNN late edition with Wolf Blitzer. Transcript. April 2005. <<http://edition.cnn.com/TRANSCRIPTS/0502/20/le.01.html>>.

<sup>377</sup> *Ibid.*

<sup>378</sup>Bremer and McConnell. *Op. Cit.* P, 289.

<sup>379</sup> Diamond, Larry. *Op. Cit.* P, 7

Islam in the draft, and often walked out of the negotiation tables. This situation made negotiations very difficult, and the CPA decided to gather all the members in the Green Zone in order to have all the members of the committee in one area.<sup>380</sup> Each group would hold their meeting in contiguous buildings. The Kurd committee gathered in the CPA offices, while the Shiite committee met at the IGC building. This would help speed up the negotiations. The difficulty about the role of Islam was aggravated by the Kurdish position on the concept of federalism.<sup>381</sup> Kurdish representatives proposed the possibility of allowing governorates to merge in order to create autonomous regions.<sup>382</sup>

One of the main issues emanating from this proposal was the way the constitution will be ratified. According to the Kurdish proposal, the permanent constitution will not be ratified if two-thirds of the electorate rejects it in three provinces. This procedure clearly favored the Kurdish regional government which compromised three provinces; it would give them veto powers in the constitutional process.<sup>383</sup> This proposal had great implication for the whole process, and Bremer decided to consult first with Condoleezza Rice who later accepted this proposal. Finally an agreement was reached with the Kurds, the CPA and the other members of the GC. The Kurds shall keep the autonomy they enjoyed in the territory they controlled since 1991, but in return they should wait to discuss and negotiate the final status of Kirkuk until the constitutional process begins in 2005.<sup>384</sup>

The final method to reach a final consensus was to invoke all the members of the council in a plenary room to discuss article by article the TAL. The meeting was chaired by the president of IGC and Paul Bremer. During this meeting, the issue of Islam, article 7 of the TAL, was one the most difficult issues to resolve. There was a profound division between those members who were religious oriented, and those members professing secularism. Finally, after long hours of discussions, the Shiite and Kurds agreed to disregard Islam as the source of

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<sup>380</sup>Bremer and McConnell. *Op. Cit.* P, 295

<sup>381</sup> "Iraq's Kurds: Towards a Historic Compromise?" International Crisis Group (ICG). M.E. Report N°26. Amman/Brussels. April, 2004.

<[http://www.crisisgroup.org/library/documents/middle\\_east\\_north\\_africa/iraq\\_iran\\_gulf/26\\_iraq\\_kurds\\_toward\\_an\\_historic\\_compromise.pdf](http://www.crisisgroup.org/library/documents/middle_east_north_africa/iraq_iran_gulf/26_iraq_kurds_toward_an_historic_compromise.pdf)>.

<sup>382</sup>Bremer and McConnell. *Op. Cit.* P, 295.

<sup>383</sup>*Ibid.* P, 297.

<sup>384</sup> "Iraq's Kurds: Towards a Historic Compromise?". *Ibid.*



legislation, but at the same time, Sunnis started to complain about the prominent role of Islam pressuring to amend article 7.

The Sunni member, Dr. Rubaie, suggested introducing references to democratic principles and human rights guaranties. The Sunnis were worried about an interim constitution too religiously oriented that would not secure some basic rights to the Sunni community given the current de-Ba'athification policy, and their clear disadvantage position as a minority. The final formula reached was to describe Islam as "a", – instead of "the" – principal source of legislation. Thus no law could contradict the tenets of Islam and a list of democratic principles included in chapter II of the law.<sup>385</sup> For instance, during an interview with Peter Cave, 'Abd al Aziz al-Hakim was asked why did he – as a Shiite who represent 60% of the population– finally sign the TAL which gave veto power to other minorities as the Kurds; Hakim responded: *Our disagreement is based on the restriction the veto will impose on the free will of the entire Iraqi people. Giving such rights to individual communities will limit the freedom of choice of the Iraqi people –and this is the basis of our opposition*".<sup>386</sup>

There were other issues of great importance that were discussed for the TAL. The law included an agenda for democracy as Bremer called it. This means that the TAL will include a time table for implementing democracy in Iraq. Following the November 15<sup>th</sup> agreement, sovereignty will be returned no later than January 31<sup>st</sup>, 2005. After the transfers of powers, there were three additional steps to follow: a) Iraqis should write its constitution by August 15<sup>th</sup>, 2005; b) The document should be ratified by October 15, and if approved; c) elections should be held based on its provision on December 15<sup>th</sup>, 2005.<sup>387</sup> This was an extremely ambitious agenda due to many security problems that Iraq was facing as Bremer himself recognized.<sup>388</sup>

Another achievement of the council was to introduce a 25% quota of women representation in the National Assembly. Also, it was agreed to review the de-Ba'athification policy despite strong opposition from Ahmed Chalabi who wanted to expand this policy. Finally, Chalabi's nephew raised questions about article 59 which dealt with CPA security

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<sup>385</sup> Please see article 2 and 61. "Law of the Administration for the State of Iraq for the Transitional Period". *CPA. Op. Cit.*. Also, Bremer and McConnell. *Op. Cit.* P, 299.

<sup>386</sup> Peter Cave interview with Abdul Aziz al Hakim. *Foreign Correspondent. Broadcast* May, 2004. Transcript available at <<http://www.abc.net.au/foreign/content/2004/s1101371.htm>>.

<sup>387</sup> Please see article 2, 60 and 61. *Op. Cit. CPA.*

<sup>388</sup> Bremer and McConnell. *Op. Cit.* P, 293.

agreements providing legal rationale for U.S. military presence. Bremer argued that it was too late to reopen the negotiation after the long process of drafting the TAL, and CPA lawyers convinced Chalabi's nephew not to mention the issue to other members of the IGC.<sup>389</sup> However, the TAL left the door open for a long presence of U.S. troops in Iraq. According to article 59, the presence of U.S. troops depended on the obligations established under UNSCR 1511 (2003). This resolution does not specify the date for the withdrawal of U.S. troops, and it only mentions that the multinational force's mandate should be reviewed one year after the adoption of the resolution.<sup>390</sup>

Another important issue was that the TAL did not provide any law or mechanism to hold accountable members of the Coalition forces. Although article 50 stipulates that the Iraqi transitional government shall establish a National Commission for Human Rights (NCHR), this body had no authority to investigate U.S. led-Coalition forces activities. This body had the right to examine the implementation of IGC's policy, and investigate complains about violations of Human Rights in Iraq. This institution was an independent body, and it had the power to start its own investigations over governmental authorities, but did not have the authority to investigate the CPA, and the U.S. led-Coalition forces. This is clear also in article 15 that allows police, investigators, and other government authorities to solicit a magistrate to issue a search warrant for conducting investigations related to abuses, but this law is only binding for Iraqi institutions (see also article 22). The CPA and later on the U.S. led-Coalition forces (that from now on will be called multinational-force) were only accountable under resolution 1511, and other relevant regulations related to it. Therefore, any legal complaint against coalition forces will become a political issue rather than a legal action.

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<sup>389</sup> *Ibid.* P, 300.

<sup>390</sup> UNSCR 1511. Adopted by the United Nation Security Council at its 4844<sup>th</sup> meeting on October 16<sup>th</sup>, 2003. <<http://daccessdds.un.org/doc/UNDOC/GEN/N03/563/91/PDF/N0356391.pdf?OpenElement>>.

### 3-6. Final consideration about the TAL:

Although the TAL was approved by all members of the IGC the day before the signing ceremony reserved some surprises.<sup>391</sup> The day after the TAL was finished Ayatollah Al-Sistani expressed his disappointment in a letter to Bremer stating that: the law was undemocratic because it allowed two-thirds majority in any three provinces to veto the permanent constitution. He obviously did not accept any Kurdish veto.<sup>392</sup> During March 4, Dr. Rubaie handled Bremer with a list of 8 changes that Al-Sistani wanted to include it in the TAL. Bremer rejected the idea because the TAL was agreed under consensus. Bahr al 'Uloum and other Shiite members tried to persuade the Kurdish members to drop this system of ratification, but the Kurds wanted in return the city of Kirkuk as well as other demands that were rejected by Bremer.<sup>393</sup> During the TAL signing ceremony the Shiite community did not show up on time, and the session had to be postponed for two days in the mid of great protests by the rest of IGC members. The Shiite representatives requested two days to discuss the matter with Al-Sistani in Najaf. At the end only after the Shiite leadership had the approval of Al-Sistani the TAL was passed on March 8<sup>th</sup> 2004.<sup>394</sup>

The TAL has 62 articles which are divided in nine chapters each on head by a title that specifies its content: *preamble, fundamental principles (articles 1-9), fundamental rights (10-23), the Iraqi transitional government (24-29), the transitional legislative authority (30-34), the transitional executive authority (34-42), the federal judiciary authority (43-47), the special tribunal and national commissions (48-51), regions, governorates, and municipalities (52-58), and the transitional period (59-62)*. The TAL has all the characteristics of what we might call a temporary constitution. Article 2 and 61 clarified the period of validity of the Law which is from the 30<sup>th</sup> of June (date of the transfer of sovereignty) to the 31<sup>st</sup> December 2005, date by which the new constitution should be drafted and approved by referendum. Article 62 outlines the procedures to follow if the referendum fails to approve the constitution. Section (e) in this case prescribes the dissolution of the National Assembly, and calls for new elections to form a new

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<sup>391</sup> Diamond, Larry. *Op. Cit.* P, 8.

<sup>392</sup> Bremer and McConnell. *Op. Cit.* P, 302.

<sup>393</sup> *Ibid.* P 303-305.

<sup>394</sup> "Iraqis agree on new constitution". *BBC News*. March 8<sup>th</sup>, 2004.  
<[http://news.bbc.co.uk/2/hi/middle\\_east/3541875.stm](http://news.bbc.co.uk/2/hi/middle_east/3541875.stm)>.

National Assembly in order to start the process again. Nevertheless section (f) and (g) of the same article stipulates that the president of the National Assembly with the approval of the cabinet can ask for additional time to finish the writing of the constitution. The deadline can be extended six months.

The TAL as other constitutions around the world has a preamble where the meaning and utility of this law is contextualized. The preamble states that the new Iraq should be in its final form a democratic nation, with an elected government, and operating under a legitimate constitution. This declaration of principles seeks to reject any despotic or authoritarian form of government as the previous regime which is described as violent, usurper and despotic regime.

The TAL provides a new concept and model for the state. Article 4 stipulates that Iraq should be conceived as a republican, federal, democratic, and pluralistic state. This means that power should be shared among the federal government, the regional governments, municipalities, and local administrations. Also, this article mentions that the federal system should be based upon geographic and historical realities and the separation of powers, instead of origin, race, ethnicity, nationality, or confession.<sup>395</sup> This decentralized model significantly differentiates from to the centralized system. This new federal system was designed in order to accommodate the Kurdistan Region that since the 50's and the 60's had claimed their right to create an independent entity from Iraq. Kurdish nationalism developed as a reaction to Turkish and Arab nationalisms based on strong ethnic (Turks or Arab), and cultural (Turkish or Arabic language and Islam) grounds, with strong central governments, that left little room for the Kurdish people to exercise their cultural traditions.<sup>396</sup>

Turks and Arabs have regarded Kurdish nationalism as a threat to the emerging identity based on ethnic and cultural principles that these emerging nations were trying to establish after the disintegration of the Ottoman Empire.<sup>397</sup> Turks and Arabs recognized the right of the Kurdish population but only as long as they recognized their Arabness and Turkishness. Kurdish nationalism is based on a strong ethnic and cultural sentiment that

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<sup>395</sup>Please see article 4. "Law of the Administration for the State of Iraq for the Transitional Period." *Ibid*.

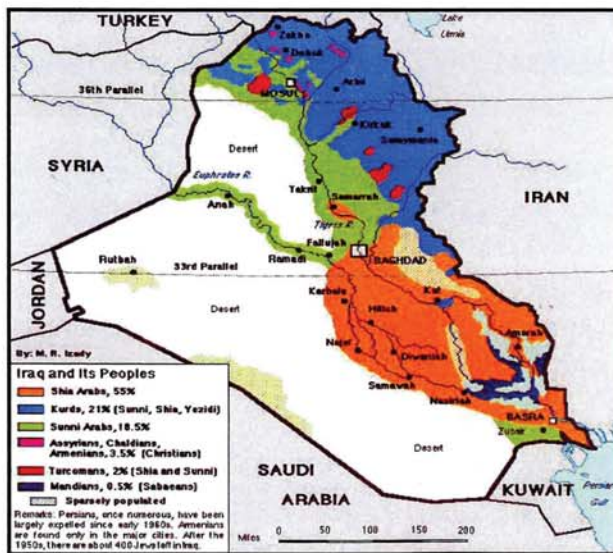
<sup>396</sup> Maya, Shatzmiller, (Ed). *Nationalism and Minority Identities in Islamic Societies*. Montreal, PQ, CAN: McGill-Queen's University Press, 2005. Pp, 230-232.

<sup>397</sup>*Ibid*. P, 232.

extends beyond geographic boundaries,<sup>398</sup> and therefore, the distinction established by the TAL to differentiate between 'geographic and historical realities', 'nationality, race, and origin' is vague and imprecise. Kurdish nationalism rejects the idea of a centralized state because it resembles previous policies carried out by the previous regime to homogenize Iraq under the title of a united Arab and Muslim country.

Unfortunately the TAL could not prevent Iraqis to understand the concept of federalism under the premises of race, ethnic and religious affiliations. We must take into account that Iraq is divided into three different regions which historically have been inhabited by each of the major communities. If we take a look at the map below, we can see clearly how the Iraqi population spreads out in three different areas: the North by Sunni Kurdish, the Center by Sunni Arabs, and the South by Shiite Arabs. However, there are small areas inhabited by other communities such as Arab Sunnis in Kurdish areas in the North, and in the Shiite areas in the south. Christians are located in the North and in the South, and Turkmen communities are spread along the Kurdistan region. Also, there are mix populated areas where there is not a predominant ethnic or religious community near the capital and towards the south. The current social configuration in Iraq is considered to be the result of the promotion and imposition of state policies aiming to redistribute the population.

Map-1. Religious and Ethnic composition of Iraq<sup>399</sup>



<sup>398</sup> *Ibid.*

<sup>399</sup> "Demographics of Iraq". [Wikipedia.org](http://en.wikipedia.org/wiki/Image:Iraq_demography.jpg). <[http://en.wikipedia.org/wiki/Image:Iraq\\_demography.jpg](http://en.wikipedia.org/wiki/Image:Iraq_demography.jpg)>.

The former regime encouraged and promoted the allocation of Sunni Arabs in Kurdish and Shiite areas in the South in order to counter balance Kurdish nationalism and Shiite resistance against the regime in the North and in the South. However, this view cannot deny that migrations are also a social phenomenon often related to the search for a better life. The oil industry in the North and the South offered job opportunities for many Iraqis who decided to flee their villages or abandon their farms to work in the oil industry in Iraq.<sup>400</sup>

The policy promoted by the TAL is that each community will have the right to manage their own social affairs (federalism), and to compensate those families that suffered the policy of ethnic relocation. Thus, many people will have to leave their actual homes and find a new place to settle. Another important factor is the lack of security produced by Sectarian violence that may encourage many Iraqi families to abandon their current residences in order to look for protection in areas belonging to their community. This policy is promoting the cantonization of Iraq, and the creation of regions following ethnic, national or religious principles.

Finally there are two issues that are relevant for our research: the de-Ba'athification policy and the formation of the National Assembly which would work on a new constitution. The TAL specifies that the Iraqi Transitional National Assembly shall be elected after referendum between December 2004 and January 2005. Elections should be held according to the norm stipulated by an electoral law and political party's law (article 30, section c). Therefore an elected National Assembly will write the constitution following certain norms, and bestowing the process with popular legitimacy according to constitutional theory. The de-Ba'athification process is codified in article 49 of the TAL. It establishes the Higher National de-Ba'athification Commission as well as other institution (Commission on Public Integrity, or the Iraqi Claims Commission) which all try to investigate abuses during the previous regime. The TAL however does not provide particular guidance about conflicts that may emerge between these institutions and the Human Rights Commission created in article 50. This means that the Federal Supreme Court will have the final saying on conflict, and resolution taken by these bodies.

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<sup>400</sup> Sfakianakis, . "The next Sim City". *Al-Ahram*. Issue n°617, December, 2002.  
<<http://weekly.ahram.org.eg/2002/617/ec1.htm>>.

The CPA organized a media propaganda campaign to improve the image of the TAL amongst Iraqis. This campaign was important due to the secrecy under which the political process was carried out. Several months before the TAL was signed, the CPA contracted a British advertising agency to prepare a propaganda campaign in Iraq.<sup>401</sup> The campaign was launched several weeks after the TAL was signed, and this inexplicable delay, gave enough time to the opposition to start their own campaign using leaflets and fanzines portraying the TAL as “unfair, unrepresentative, undemocratic” and “a dictatorship of the minorities”.<sup>402</sup> Many Iraqis lacked proper information about the process, and therefore their capacity to make a decision was significantly undermined. The political process was highly polarized between two views. Thus, if you reject the TAL it could be seen as promoting the insurgency, making it difficult to have a critical stance regarding the Law.

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<sup>401</sup>Diamond, Larry. *Op. Cit.* P, 8.

<sup>402</sup> *Ibid.*


**Chapter 4**

## The Iraqi constitutional process

*"So we had serious problems of security, reconstruction delivery, and legitimacy. We failed to ameliorate these by putting enough resources in (particularly enough troops) and by giving Iraqis early on more control over their own affairs. Now we are transferring control soon to Iraqis, and that is truly the only hope for rescuing a rapidly deteriorating situation. But in transitional politics, as in all other politics, timing is crucial, and what could be achieved by a certain initiative at one moment in time may no longer be possible months or years later, when the parameters have shifted and the scope for building a moderate center may have been lost".<sup>403</sup>*

*"Jonathan Morrow, UIIP's expert on the Iraq constitution who was out here with me during the drafting, says that this has been the worst constitution making process in post-colonial history. For me it has been the worst failure in the long string of failures over the last couple of years. The worst because, though less dramatic than some of our other blunders, it was the last opportunity to turn things around, and I am not sure there are any chances left".<sup>404</sup>*

### 4-1. CPA's work in order to establish an Interim Government and a National Assembly:

After the TAL was signed, the CPA began with the last steps that were agreed on November 15<sup>th</sup> (2003). Now, the CPA's activities were focused on creating an interim government, and although the TAL provided a description of the competences of this body, it did not provide guidance about how to proceed with the selection of its members.<sup>405</sup> Meanwhile the security situation was deteriorating fast. During the Shiite celebration of the 'ashūra on 2<sup>nd</sup> of March (2004) several cities were attacked by supposedly al-Qaida followers led by *abū mus'ab az-zarqāwī* causing hundreds of casualties and wounded.<sup>406</sup> At the same time, the Shiite cleric Muqtada al Sadr started sort of a revolt in the south, and his militias occupied several government buildings, some mosques and religious centers in al-Kut, Baghdad, and Najaf.<sup>407</sup> The CPA and the Army had in their hands enough evidences to detain Muqtada Sadr but the

<sup>403</sup> Testimony of Diamond, Larry to the Senate Foreign Relations Committee. *Ibid.*

<sup>404</sup> Letter from Coyne, A. Heather. Officer at the Center for Mediation and Conflict Resolution. US Institute for Peace. August 2007. unpublished.

<sup>405</sup> Katzman, Kenneth. *Op. Cit.* P, 21.

<sup>406</sup> "Iraqi Shias massacred on holy day". BBC News. Middle East. March 2<sup>nd</sup>, 2004. <[http://news.bbc.co.uk/2/hi/in\\_depth/3524589.stm](http://news.bbc.co.uk/2/hi/in_depth/3524589.stm)>.

<sup>407</sup> Bremer and McConnell. *Op. Cit.* P, 339.



fear of more revolts, and other political considerations constrained the CPA to order his detention.<sup>408</sup>

In addition to this, the Coalition forces decided to besiege the town of Fallujah which was located in the core of the Sunni area,<sup>409</sup> and the news were all covered by articles and images from the sexual abuses and torture from *Abū Ghraīb*.<sup>410</sup> Bremer knew well about the precarious situation of detainees since the first months of the occupation,<sup>411</sup> and now, the CPA was receiving attacks from all fronts in relationship with the coalition mismanagement of detainees. It may be argued, as Bremer did, that the main problem was the lack of troops, but a close look to certain events in Fallujah and Abu Ghraib uncovered the wrong path chosen by some military commanders to approach the security situation in Iraq.

Also, the Coalition was very slow and unsuccessful in building up new police and military forces which at that time were totally unreliable as the high percentage of absences occurred on difficult occasions (especially during the Fallujah offensive).<sup>412</sup> During mid March and April, the CPA in coordination with the Led-Coalition forces started several military campaigns to fix the security situation. The IGC decided by consensus to face the crisis with Muqtada Al-Sadr. Also, the coalition forces began a huge military campaign against the Arab Sunni insurgency in Fallujah (without any consultation with the IGC)<sup>413</sup> after the failure of previous strategies approved by the CPA which used Sunni and former Ba'athists as intermediaries with the insurgents.<sup>414</sup>

Despite the security situation, the CPA and the U. N. continued with the design of the interim government. The CPA opened the door slowly to U.N. new Envoy, L. Brahimi to help

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<sup>408</sup> Please see the transcript of an ACP briefing by Brig. Gen. Mark Kimmitt, Deputy Director for Coalition Operations; and Dan Senior, Senior Adviser, CPA. April 5, 2004. [U.S. Department of Defense](http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2421). <<http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2421>>.

<sup>409</sup>For a detailed account of the Fallujah offensive see: West, Bing. *No True Glory: A Frontline Account of the Battle for Fallujah*. Westminster, MD, USA: Bantam Books, 2005.

<sup>410</sup> Brody, Reed. "The Road to Abu Ghraib". June, 2005. P. 1. Human Rights Watch ([HRW](http://www.hrw.org)) Report <<http://www.hrw.org/reports/2004/usa0604/usa0604.pdf>>

<sup>411</sup> Sergio Vieira de Mello sent to Paul Bremer an ICRC memorandum based on 200 allegation of ill treatment of detainees. *Ibid.* P, 32.

<sup>412</sup> Karon, Tony. "Bush to Iraq: Lost in Translation". *TIME Magazine*. April 2004. <<http://www.time.com/time/columnist/karon/article/0,9565,611132,00.html>>.

<sup>413</sup>West, Bing. *Op. Cit.* P, 321.

<sup>414</sup>Bremer and McConnell. *Op. Cit.* P, 239-330. And West, Bing. *Op. Cit.* P, 322.

with the search and appointment of Iraqis for the new government.<sup>415</sup> The inclusion of the U.N. in the political process was owing to Al-Sistani's insistence to have official reports from the U.N. about the unfeasibility of holding elections, and also -as other reports show- due to a sort of urgency to bestow the whole process with more legitimacy in front of the international community.<sup>416</sup> However after reading Paul Bremer's version, the CPA needed help in their search for new Iraqi candidates for the new government.<sup>417</sup> Ibrahimi's work in Afghanistan as mediator amongst different actor in Afghan society was very successful, and his work helped to expand the number of candidates for the Afghani political process. However, Ibrahimi complained several times about the lack of security which prevented him to travel around Iraq in order to meet new candidates. He could not leave the Green Zone easily.<sup>418</sup>

The coalition offensive in Fallujah was disturbing many IGC members who threatened the CPA to resign: the Interior Minister, Nouri Badram, Abu Hatem -the legendary Shiite warrior from the marshes -, Minister of Human Rights, Abdel Basit Turki (moderate Sunni from Anbar province), and Adnan Pachachi. Later on other members such as Hachem al-Hassini (Sunni Islamic party), and Ghazi al-Yawar<sup>419</sup> followed the protest. Even U.N. Envoy Ibrahimi was considering withdrawing from Iraq due to the Fallujah offensive.<sup>420</sup> Bremer recognized that this was the worst crisis they ever had. Finally, U.S. led-Coalition forces resumed operations in Fallujah with the hope that the CPA would find a political agreement with all members of the IGC.<sup>421</sup>

On April 15<sup>th</sup>, Ibrahimi announced his plan which would entail the establishment at the end of May a "caretaker government" with a president, two deputy ministers, a prime minister and a cabinet.<sup>422</sup> This procedure would give the IGC a month to prepare itself for assuming their new responsibilities. About the method of elections, Ibrahimi decided to convoke a national conference during the summer, what he called a "consultive assembly" following the example of

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<sup>415</sup>Diamond, Larry. *Op. Cit.* P, 8

<sup>416</sup>Katzman, Kenneth. *Op. Cit.* P, 21.

<sup>417</sup>Clawson, Patrick. "Iraq for the Iraqis: How and When" *Middle East Quarterly*. Vol. XI, N°2, Spring 2004. <<http://www.meforum.org/article/601>>.

<sup>418</sup>Bremer and McConnell. *Op. Cit.* P, 328.

<sup>419</sup>*Ibid.* P, 333.

<sup>420</sup>Abedin, Mahan. *Ibid.*

<sup>421</sup>Bremer and McConnell. *Op. Cit.* P, 337-9. Also, West, Bing. *Op. Cit.* P, 320.

<sup>422</sup>*Ibid.* P, 340.

the *loya jirga* (literally Grand Assembly)<sup>423</sup> organized in Afghanistan in 2002<sup>424</sup>. The U.N. and the CPA agreed that after the transfer of sovereignty, the new government should convene a “National Consultative Conference” of up to one thousand Iraqis from all over the country to broaden the public discussion on Iraq’s future.<sup>425</sup> Ibrahimi’s final position was to reject the caucuses method proposed by the Governance Team and the Constitutional Preparatory Committee. The interim government was appointed through what the U.N. Envoy denominated a broad negotiation among the CPA, the U.N. and the new Iraqi political elite.<sup>426</sup>

The Governance Team worked on different possibilities for the new government in May. The CPA and the U.N. had different views about the general approach to appoint members of the cabinet.<sup>427</sup> Ibrahimi’s position was to nominate Iraqis without political skills.<sup>428</sup> He proposed to appoint technocrats, engineers, industrialists and financial experts that would run a caretaker cabinet.<sup>429</sup> He even regarded as necessary to change all members of the IGC including all ministers in the existing government. Moreover he advised to make them ineligible to run for January elections.<sup>430</sup> Although Bremer shared with Ibrahimi some views, in general the CPA disagreed with this approach. The CPA regarded that appointing a complete new cabinet would trigger a negative reaction amongst members of the Governing Council.<sup>431</sup> According to Bremer, if we ignored the IGC, we have the risk of having A. Chalabi and Al-Sistani trying to boycott the new government.<sup>432</sup>

The final decision adopted by the CPA was to include members of the Governing Council and political party notables for cabinet positions. The CPA had also direct guidance from the White House and the Pentagon which during a meeting at NSC in May 19<sup>th</sup>, President Bush made clear that the U.S. needed a: “*president that won’t attack U.S. coalition after the*

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<sup>423</sup> “Q&A: What is *loya jirga*.” *BBC News*. July, 2002. <[http://news.bbc.co.uk/2/hi/south\\_asia/1782079.stm](http://news.bbc.co.uk/2/hi/south_asia/1782079.stm)>.

<sup>424</sup> *Ibid.* Also George Packer. “Caught in the Crossfire. Will moderate Iraqis embrace democracy-or Islamist radicalism?” *The New Yorker*. May 2004. <[http://www.newyorker.com/archive/2004/05/17/040517fa\\_fact](http://www.newyorker.com/archive/2004/05/17/040517fa_fact)>.

<sup>425</sup> *Ibid.* P, 349.

<sup>426</sup> *Ibid.* P, 340.

<sup>427</sup> Diamond, Larry. *Op. Cit.* P, 7. And, Warren Hoge. “The Struggle for Iraq: the Transition; U.N. Envoy Seeks New Iraq Council by close of May”. *The New York Times*. April, 2004.

<[http://query.nytimes.com/gst/fullpage.html?res=9807E4DD1F3AF93BA15757C0A9629C8B63&sec=&spn=&pa\\_gewanted=print](http://query.nytimes.com/gst/fullpage.html?res=9807E4DD1F3AF93BA15757C0A9629C8B63&sec=&spn=&pa_gewanted=print)>; Mahan Abedin. *Ibid.*

<sup>428</sup> *Ibid.*

<sup>429</sup> Bremer and McConnell. *Op. Cit.* P, 348. Also Packer, George. *Ibid.*

<sup>430</sup> *Ibid.*

<sup>431</sup> *Ibid.* P, 349.

<sup>432</sup> *Ibid.*

return of sovereignty". Rumsfeld also stated that: *we need a prime minister that is solid as a rock*.<sup>433</sup> Bremer presented Ayad Allawi as the best candidate because he was well known in Washington –he helped to compile evidence of WMD–, and although Al-Sistani would complain about him, he usually showed a high degree of compromise with U.S. policies in Iraq.<sup>434</sup>

During a meeting with Ibrahimi, Bremer made clear that the CPA would have priority electing the top 7 positions in government: the prime minister, the ministers of defense, interior, finance, foreign affairs, and oil and trade.<sup>435</sup> The prime minister, the president and deputy president (respectively: Iyad Allawi, Sheikh Ghazi al-Yawar, Ibrahim Ja'afari) were exiles and members of the IGC.<sup>436</sup> The CPA in collaboration with the U.N. team worked to develop a joint list of candidates. Bremer and Ibrahimi were in charge of interviewing candidates for the top jobs.<sup>437</sup> Regarding the IGC, their position on this process was very different. The IGC pressured the CPA to have the opportunity to expand the IGC by them.<sup>438</sup> Bremer considered that this was a bad idea: *"contrary to the spirit of 'partnership and consultation', which we had all pledges to support"*.<sup>439</sup> On May 17<sup>th</sup>, the IGC president, 'Abd al-Zahra Uthman Muhammad –also known as Izzadin Salim– and 3 security members, and other civilians perished during a bomb attack at the doors of the Green Zone.<sup>440</sup>

The final decision that the CPA had to make was to appoint a prime minister and a president. Bremer and Brahimi had two candidates in mind for president and prime Minister. The man that Bremer and Brahimi chose for president was Adnan Pachachi, although Bremer had in mind also Sheikh Ghazi al-Yawar.<sup>441</sup> According to Bremer Adnan Pachachi had demonstrated great leadership during the TAL negotiations; he was moderate Sunni Arab,

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<sup>433</sup>*Ibid.* P, 361.

<sup>434</sup>*Ibid.* Claude, Patrice. "Ayad Allawi: The CIA's Main Man in Baghdad." *Guardian Weekly* (UK), July 2004. Posted on Mindfully.org. <<http://www.mindfully.org/Reform/2004/Allawi-CIA-Baghdad23jul04.htm>>.

<sup>435</sup>Bremer and McConnell. *Op. Cit.* P, 349.

<sup>436</sup>Members of the Iraqi Interim Government. *CNN.com*, June, 2004. <<http://www.cnn.com/2004/WORLD/meast/06/01/cabinet.list/>>

<sup>437</sup>Bremer and McConnell. *Op. Cit.* P, 349.

<sup>438</sup>Testimony of Larry Diamond to the Senate Foreign Relations Committee. Stanford University. *Ibid.*

<sup>439</sup>Bremer and McConnell. *Op. Cit.* P, 350.

<sup>440</sup>"Baghdad Blast Kills Iraq Leader". *BBC News*, May, 2004. <[http://news.bbc.co.uk/2/hi/middle\\_east/3720161.stm](http://news.bbc.co.uk/2/hi/middle_east/3720161.stm)>.

<sup>441</sup>Steele, Jonathan. "How Brahimi Lost Out". *The Hindu*, June, 2004. <<http://www.hinduonnet.com/2004/06/04/stories/2004060401381300.htm>>.

friendly with the CPA and the U.N.<sup>442</sup> For Prime Minister, Ibrahimi had chosen Hussein al-Shahristani who was the ideal technocrat, and very critic of the occupation. During the formation of the IGC he had declined a post on the Governing Council arguing that it would be seen as a U.S. puppet.<sup>443</sup>

Bremer considered him to be very well educated but too soft.<sup>444</sup> He did not show a clear commitment with the CPA.<sup>445</sup> This decision took Ibrahimi by surprise, when Ayad Allawi was announced by Bremer as Prime Minister without consulting his decision with Ibrahimi.<sup>446</sup> Regarding the president, Ibrahimi considered Adnan Pachachi more appropriate for the presidency, and after consulting with the CPA and the IGC, he was chosen by the coalition for this post. However, Adnan Pachachi retired his candidacy at the last moment –Pachichi argued that he declined this post after watching a TV show criticizing him–, and Sheikh Ghazi al-Yawar was thus nominated for President.<sup>447</sup>

The next day the CPA with the U.N. discussed the electoral law for January elections. The UN CPA, IGC and NGOs such as The International Foundations for Election Systems participated in choosing the appropriate system of elections. The IGC appointed an Electoral Committee formed by 18 members.<sup>448</sup> During their study the EC held extensive consultation with Iraqi political actors (political groups, civil society, women's groups, youth groups, academics, tribal leaders, media, religious leaders, professional, labor unions and government representatives) in 9 governorates of 18 provinces comprising Iraq.<sup>449</sup> The U.N. presented to the EC different options to conduct the elections (proportional representation, majority and mixed systems).<sup>450</sup> The EC after discussing all options decided to chose a single national constituency. The IGC voted this proposal in plenary session, and with 21 votes in favor and 4 votes against,

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<sup>442</sup> Bremer and McConnell. *Op. Cit.* P, 358-9.

<sup>443</sup> Steele, Jonathan. *Ibid.*

<sup>444</sup> *Ibid.* And, Mahan Abedin. *Ibid.*

<sup>445</sup> Bremer and McConnell. *Op. Cit.* P, 350.

<sup>446</sup> Steele, Jonathan. *Ibid.*

<sup>447</sup> Bremer and McConnell. *Op. Cit.* P, 373.

<sup>448</sup> "Iraq Electoral Fact Sheet". UN News Center. <<http://www.un.org/news/dh/infocus/iraq/election-fact-sht.htm#current>>.

<sup>449</sup> *Ibid.*

<sup>450</sup> *Ibid.*

the IGC adopted the EC's recommendation.<sup>451</sup> According to Bremer, this formula would prevent former Ba'athist and Islamists to take advantage of the elections.<sup>452</sup>

Once the electoral was chosen, the last issue left was how to accomplish a smooth transition. Bremer decided to convince the IGC to dissolve itself after the new government takes office. Also, Bremer promised the IGC's members that will not continue in the new government to become automatically members of the National Consultative Council keeping their salaries and privileges until the elections.<sup>453</sup> Probably, the most remarkable issue was the deal achieved between Bremer and Ayad Allawi. Bremer wanted to be sure that if he would back Allawi, the latter will support the U.S. operations after handling sovereignty over, and that he would carry out the agreements established in the TAL. The IGC in May 28<sup>th</sup> agreed unanimously that Ayad Allawi will be prime minister.<sup>454</sup>

#### 4.2. The Transfer of sovereignty:

The Iraqi Interim Government (IIG) took power officially on June 28<sup>th</sup>, 2004. This cabinet is considered to be the first sovereign government in Iraq after the occupation due to the powers bestowed on it. Although, the IIG was appointed, the government will run only Iraqi internal affairs, and had no saying about military operations undertaken by the U.S. led-Coalition. If we take a close look at the definition of sovereignty, it is usually described as the supreme, independent and final authority.<sup>455</sup> State Sovereignty is the attribute of a state that refers to its right to exercise complete jurisdiction over its own territory. In international relations, states, as sovereign units, have the right to be independent or autonomous with respect to other states. States may differ in their powers, but as sovereign entities, they are all considered to be equal in front of the international law".<sup>456</sup> The IIG had only some powers as a

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<sup>451</sup> *Ibid.* And, Bremer and McConnell. *Op. Cit.* P, 367.

<sup>452</sup> *Ibid.*

<sup>453</sup> *Ibid.* P, 368.

<sup>454</sup> *Ibid.* P, 369.

<sup>455</sup> Donnelly, Jack. "State Sovereignty and Human Rights." -Unpublished- Graduate School of International Studies University of Denver. Revised on September 2006, <<http://mysite.du.edu/~jdonnell/papers/hrssov%20v4a.htm>>

<sup>456</sup> Viotti, Paul and Mark V. Kauppi. *International Relations Theory: Realism, Pluralism, Globalism, and Beyond*. New York: Macmillan Publishing Company: 1999. P, 495.

sovereign cabinet, and there was a long way to go in order to reestablish full sovereignty to the Iraq state.

The powers of the interim government were describe in the TAL which was signed by the members of the IGC in June 1<sup>st</sup>, 2004.<sup>457</sup> The key positions were appointed by the CPA, many of them were exile that had participated in the IGC, although there were some new faces introduced by the CPA in the IIG. Also, UNSCR 1546 specified that U.S. officials have no longer authority over non-security issues. This means that the CPA was dissolved, and Paul Bremer will leave Iraq, but the U.S. led –Coalition (now called multinational forces) will stay in Iraq. He left in June 28<sup>th</sup>, after the ceremony of transfers of sovereignty was held in the Green Zone.<sup>458</sup> Now, the United States Embassy would be the principal political actor and mediator of the United States in Iraq. John Negroponte was appointed U.S. Ambassador in May 2004.<sup>459</sup> Also, the construction of the biggest embassy in the Middle East started. The embassy will have around 1000 U.S. personnel, about 160 officials and representatives that would serve as advisers to the IIG.<sup>460</sup> The CPA did not also disappear completely. Some departments and personnel from the CPA were recycled, and the team in charge of advising the government, the “governance Team” stayed.<sup>461</sup> They were now working as advisors to the local Iraqi governments, and local government councils. The military units were retained by the embassy under the new department called “Iraq Reconstruction and Management Office (IRMO).<sup>462</sup>

In summary, the interim’s government primary functions were to run Iraqi ministries, and prepare the ground for elections to form a national assembly planned for January 2005. The IIG had also the authority to amend the TAL, or declare null decrees issued by the CPA, but it did not use these powers during its tenure. Regarding security issues, the U.S. still held control. The UNSCR 1546 was complemented with correspondence annexed between Prime Minister Ayad Allawi and Secretary of State Collin Powell.<sup>463</sup> This annex stated that the Iraqi security can participate in operations organized by the coalition, but the Iraqi government has no veto

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<sup>457</sup>Katzman, Kenneth. *Op. Cit.* P, 23.

<sup>458</sup> Filkins, Dexter. “Extent of government’s Control Unclear as It Formally Steps In”. The New York Times. June, 2004. <<http://www.nytimes.com/2004/06/28/international/28CND-IRAQ.html?ex=1246161600&en=826b1b05a6f8ff45&ei=5090&partner=rssuserland> >.

<sup>459</sup>Katzman, Kenneth. *Op. Cit.* P, 25.

<sup>460</sup> *Ibid.*

<sup>461</sup> *Ibid.*

<sup>462</sup> *Ibid.* P, 26.

<sup>463</sup> *Ibid.*

powers when it comes to coalition operations. This resolution renewed the military mandate of the multinational forces which would have to be reviewed every twelve months from the date the resolution was passed. This mandate will end when the permanent government is formed in 2005, and the Iraqi government formally requests it.<sup>464</sup>

It is worth mentioning several controversial decisions taken by Ayad Allawi's cabinet. He re-introduced the death penalty, and he banned the Arab channel *al-Jazeera* to move freely in Iraq. Allawi accused this news channel of instigating the resistance by publishing pictures of insurgents and hostages.<sup>465</sup> Adnan Pachachi protested against this measure arguing that although the channel showed videos of hostage takers, "*as a matter of principle I don't think we should try to intimidate or punish any news media*".<sup>466</sup> Also, the re-introduction of the death penalty was seen as principle contrary to the human rights approach introduced in the TAL. Ministry of the State, Adnan al-Janabi, and Human Right's Minister, Bakhtiar Amin declared that it was a difficult decision, and it is meant to be a temporary measure until the security situation improves.<sup>467</sup> For instance, the death penalty was used to punish Saddam Hussein and former members of his government after they were tried by a special Iraqi tribunal, approximately one year after it was introduced.<sup>468</sup> The Iraqi Government led by Prime Minister Nouri al-Maliki, and U.S. Ambassador (Khalilzad) backed up the jury decision, and regarded the judgment as an important milestone in the path to peace and stability.<sup>469</sup>

#### 4-3. The January 2005 elections and the formation of the Transitional National Assembly:

The January 2005 elections were regarded as fundamental step in the whole process of transferring full sovereignty. Elections were held simultaneously in two places, in Baghdad for

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<sup>464</sup> *Ibid.*

<sup>465</sup> Macintyre, Donald. "Iraq brings back death penalty as Allawi calls on militants to disarm". *The Independent*. August, 2004. <<http://www.independent.co.uk/news/world/middle-east/iraq-brings-back-death-penalty-as-allawi-calls-on-militants-to-disarm-555884.html>>. Also see other article from the same author: "Iraqi PM bans al-Jazeera for 'inciting hatred'". *The Independent*. August, 2004. <<http://www.independent.co.uk/news/world/middle-east/iraqi-pm-bans-aljazeera-for-inciting-hatred-555816.html>>.

<sup>466</sup> *Ibid.*

<sup>467</sup> *Ibid.*

<sup>468</sup> Kirk Semple. "Saddam Hussein is Sentence to Death". *The New York Times*. November, 2006. <<http://www.nytimes.com/2006/11/05/world/middleeast/05cnd-saddam.html?hp&ex=1162789200&en=55feeded58d269df&ei=5094&partner=homepage>>

<sup>469</sup> *Ibid.*



the Transitional National Assembly (275 members), and in Kurdistan for the Local Transitional Assembly. The TNA will later have to agree on a Prime Minister, a President, two deputy presidents, and the rest of ministers to form a cabinet.<sup>470</sup> The elections took place under heavy security measures as fears considerably grew over the possibility of attacks.<sup>471</sup> Violence slightly increased during the previous days before the elections and numerous incidents were reported<sup>472</sup>. However elections were held despite insurgent's attacks and the level of participation was higher than expected, around 58 %.<sup>473</sup> The Independent Iraqi Electoral Commission corroborated the validity of the results, and Iraqis, foreign politicians and officials (inside and outside Iraq) regarded the election as fundamental turning point in Iraqi history.<sup>474</sup>

Nevertheless elections evidence also the existence of many issues, especially regarding the Sunni community which slowly but steady was isolated from the process. The Sunni started a political campaign which aimed to boycott the elections for the formation of the Transitional National Assembly (TNA).<sup>475</sup> Several towns in Sunni dominated areas (Fallujah, Tikrit, Ramadi, Samara, and Baghdad suburbs) did not cast their ballots.<sup>476</sup> On February 2005, Iraq's interim president, Ghazi al-Yawar stated that: "*tens of thousands were unable to cast their votes because of the lack of ballots in Basra, Baghdad and Najaf*".<sup>477</sup> It seems that many Iraqis could not cast their votes that day.

Since 2004, several Sunni leaders and parties, including the Iraqi National Foundation Congress and the Islamic Party rejected to participate in the elections due to the perception that

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<sup>470</sup>Al-Marashi, Ibrahim. "Boycotts, Coalitions and the Threat of Violence: the Run-Up to the January 2005, Iraqi Elections". Published by the Gloria center, and MERIA (Middle East Review of International Affairs).

<<http://meria.idc.ac.il/news/2005/05news1.html>>

<sup>471</sup>"Iraq shuts down borders for poll." BBC News. January 2005.

<[http://news.bbc.co.uk/1/hi/world/middle\\_east/4217927.stm](http://news.bbc.co.uk/1/hi/world/middle_east/4217927.stm)> . Also see Sam Wilson. "Iraq's election security challenge". January, 2005. <[http://news.bbc.co.uk/1/hi/world/middle\\_east/4192239.stm](http://news.bbc.co.uk/1/hi/world/middle_east/4192239.stm)>.

<sup>472</sup>*Ibid*. See also: "Deadliest day for U.S. in Iraq war." CNN.com. January, 2005.

<<http://www.cnn.com/2005/WORLD/meast/01/26/iraq.main/>>

<sup>473</sup>"Sporadic violence doesn't deter Iraqi voters." CNN.com. January, 2005.

<<http://www.cnn.com/2005/WORLD/meast/01/30/iraq.main/>>. And, "Shiite alliance wins plurality in Iraq."

CNN.com. February, 2005. <<http://www.cnn.com/2005/WORLD/meast/02/13/iraq.main/index.html>>.

<sup>474</sup>"World leaders praise Iraqi poll." BBC News. January, 2005.

<[http://news.bbc.co.uk/2/hi/middle\\_east/4220551.stm](http://news.bbc.co.uk/2/hi/middle_east/4220551.stm)>.

<sup>475</sup>Al-Marashi, Ibrahim. *Ibid*.

<sup>476</sup>Pattanayak, Satyanarayan. "Regime Change in Iraq and Challenges of Political Reconstruction." Institute for Defense Studies and Analyses. October 2005. P, 636. (pdf, p,8.).

<<http://www.idsa.in/publications/strategic-analysis/2005/oct/SatyanarayanPattanayak.pdf>>.

<sup>477</sup> *Ibid*.

the electoral process was illegitimate due to the occupation.<sup>478</sup> The view –not only among Arab Sunnis but amongst other political groups amongst Arab Shiites too – was that the TAL was drafted too quickly, by unrepresentative elite of the Iraqi people, and during an obscure and secret process. Their perception was that the TAL was heavily influence by U.S. political interests.<sup>479</sup> The TAL stipulates that if three provinces fail to approve the TNA, the cabinet should be dissolved, and the whole process of creating an interim government should start again, article 61 (c) TAL. Therefore, the boycott significantly lowered the chances of the Sunni block to participate in the drafting of the constitution, and was used by political rivals to augment their own power and further isolate Arab Sunnis in the constitutional process.

However, Sunnis thought that whatever the final results for the TNA elections were, they would have anyway the right to participate actively in the constitutional process. This misinterpretation was also influenced by early statement of Shiite and Kurdish party leaders before the January elections. For instance, Hussein Shahrstani (Shia Alliance) declared: *“if the people of any area of Iraq are not represented in the elected National Assembly -[...] - we will call for a national dialogue with the real representatives of these areas. We will not write a constitution that does not satisfy all sectors of Society”*. And, Ayad Allawi stated on January 24<sup>th</sup>: *“we know that the [TAL] does not mean that only the ones who voted will write the constitution. It is possible for anyone to participate in writing the constitution”*.<sup>480</sup>

The Sunni community promoted a boycott through the main Sunni provinces of Anbar, Salahaddin and Niniveh, but at the end only two provinces followed this call. This defeat had terrible consequences for the Sunnis who had lost considerable leverage in the formation of the TNA. The Shiia and the Kurds were the most beneficiated groups after the elections. Especially the Iraqi Alliance lead by Abdual Aziz al Hakim, Ibrahim Jaafari, Hussain Sharistani, and Ahmed Chalabi won 140 seats, (51 % of the seat in the TNA).<sup>481</sup> The Democratic Patriotic Alliance of Kurdistan (Barzani and Talabani) won 75 seats, which means 27 % of the TNA, and the Iraqi National List (Sunni-Shiite coalition) lead by Ayad Allawi, 40 seats, 15 % of the

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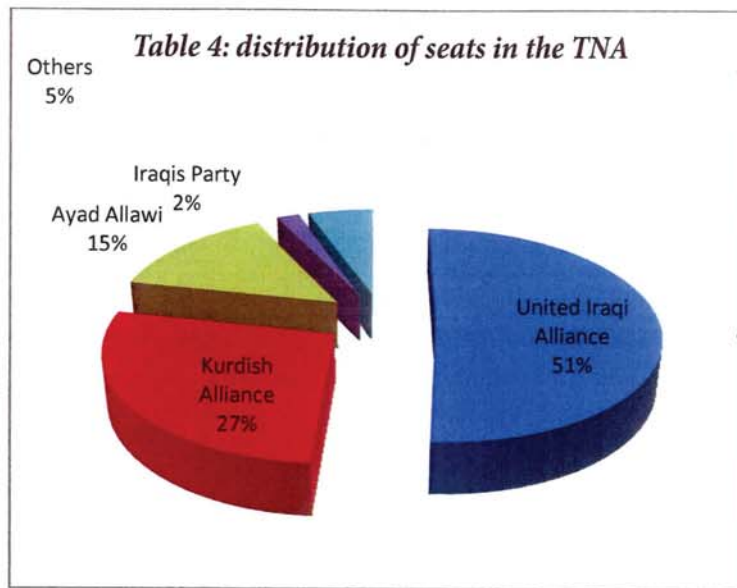
<sup>478</sup> Morrow, Jonathan. *Op. Cit.* Pp, 5- 6.

<sup>479</sup> *Ibid.*

<sup>480</sup> *Ibid.* P, 7.

<sup>481</sup> Pattanayak, Satyanarayan. *Ibid.*

parliament. The only Sunni group that won a seat was the Iraqis Party head by Ghazi al-Yawar, with 5 seats, and 2% of the votes.



The TAL stipulates that in order to convene the Presidential Council (President and two vice-presidents) a two-third majority was essential in the TNA. Also, the PC has the role to approve unanimously the appointment of a Prime Minister.<sup>482</sup> The United Iraqi Alliance's simple majority was not enough to appoint the PC, and the UIA needed to form a coalition with other parties in order to reach the two-third support from the TNA. The UIA established a coalition with the Kurdish Alliance after negotiations, and the PC was formed: President: Jalal Talabani (Kurd) and the vice-Presidents were: Adel Abd al-Mahdi, (Shiite), and Ghazi al-Yawar, (Sunni).<sup>483</sup> The PC elected Ibrahim Ja'afari (al-Dawa'a) as Prime Minister, and Hajim al-Hassani (the Iraqis Party) was elected as Speaker of the TNA.<sup>484</sup> The most difficult part was the election of 37 ministers to run the government which last for three months (even then 7 Ministries were still vacant).<sup>485</sup>

<sup>482</sup> *Ibid.*

<sup>483</sup> *Ibid.*

<sup>484</sup> *Ibid.*

<sup>485</sup> *Ibid.* Also see Becky Branford. "Iraq's political system under fire". *BBC News*. April, 2005. <[http://news.bbc.co.uk/2/hi/middle\\_east/4359559.stm](http://news.bbc.co.uk/2/hi/middle_east/4359559.stm)>.

The elections showed the division that existed inside the Iraqi society. The third force of the country was very little represented and divided internally. Although Sunnis were part of the problem, they were also victims of the pressure from the Sunni insurgents that considered that the political process was opposing their interests. Also de-Bathification process went too far in many cases, and previous plans undertaken by the CPA and the U.N. to include more Sunnis in the process had little success. The situation did not improve very much during the first months of tenure of the TNA.

#### 4-4. The appointment of the Constitutional Drafting Committee:

The three months delay to form the TNA held back the appointment of the Constitutional Drafting Committee (CDC), also known as the Constitutional Committee (ConComm) until May 10.<sup>486</sup> The drafting process was significantly short.<sup>487</sup> This body was composed by 55 members, and during its first session had no Sunni representation in it.<sup>488</sup> The Assembly elected Sheikh Humam Humoudi (SCIRI member) to chair the committee, but he was not officially appointed until May 23<sup>rd</sup> due to the delay in the process of formation of the Iraqi government. The TAL provided only some basic guidelines, and a timetable for the constitutional process, leaving to the TNA freedom to decide how the constitution should be drafted.<sup>489</sup> Finally, the Assembly agreed that the CDC should be chair by the SCIRI, and CDC's members should follow a proportional representation in accordance with the results of the elections.<sup>490</sup> Other suggestion, presented to TNA by political advisers, was to form an independent constitutional committee but the Assembly rejected this proposal.<sup>491</sup> The CDC agreed to include Sunni leaders in the process, after Ayatollah Ali al-Sistani urged Iraqi elected leaders to incorporate Arab Sunnis in the CDC;<sup>492</sup> however they were not included until June 16<sup>th</sup>. This decision came very late –July 8<sup>th</sup>– when the deadline stipulated by the TAL was due

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<sup>486</sup> The committee was simply denominated Constitutional Committee (ConComm).

<sup>487</sup> "Unmaking Iraq: "A Constitutional Process Gone Awry". International Crisis Group. Amman/Brussels. September, 2005. P, 5. < <http://www.crisisgroup.org/home/index.cfm?id=3703>>.

<sup>488</sup> Morrow, Jonathan. *Op. Cit.* P, 2.

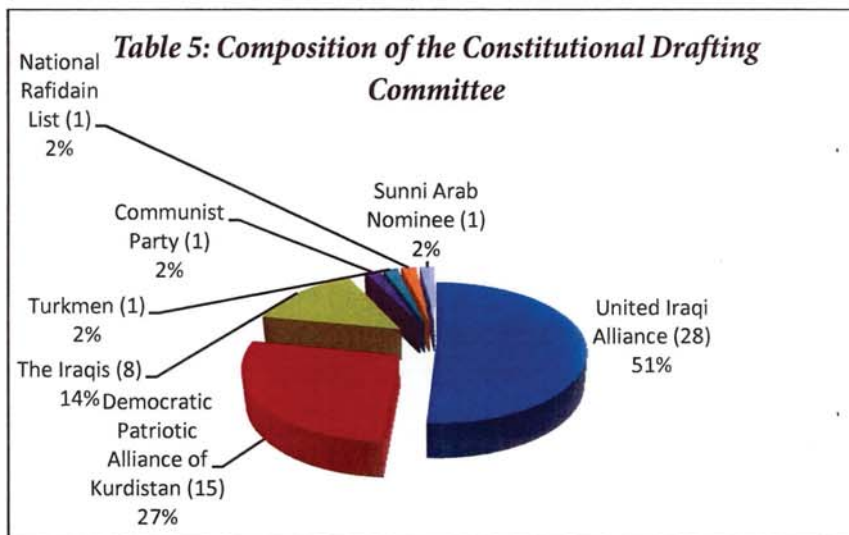
<sup>489</sup> Brown, Nathan J..*Op. Cit.* The Carnegie Endowment. July, 2005. P, 3. <<http://www.carnegieendowment.org/files/PO19Brown.pdf>>

<sup>490</sup> *Ibid.*

<sup>491</sup> Jonathan Morrow. *Ibid*, P, 9.

<sup>492</sup> Unmaking Iraq: "A Constitutional Process Gone Awry". *Ibid.* P, 2.

the 15<sup>th</sup> of August (only two month ahead to conclude with the draft, and a month after the TNA was formed). Moreover, this decision did not make any difference because Arab Sunni members included in the CDC had not vote in the committee.<sup>493</sup> The CDC was expanded by 15 more Arab Sunni representatives (there were already 2), plus 10 Arab Sunni experts that would collaborate as advisers.<sup>494</sup> Another problem facing Arab Sunni members was the criticism from other sectors of Iraqi society that regarded Arab Sunni representatives to be comprise by a small elite belonging to Baghdad, and therefore too narrow to represent their coreligionists in the process.<sup>495</sup> Although some initiatives were discussed to broaden the Arab Sunni representativeness through caucuses in some Arab Sunni areas and tribes, they were all rejected by Arab Shiite, and Sunni Kurdish members on the grounds they would time consuming.<sup>496</sup> The distribution of members in the CDC was:



#### 4-5. CDC's dynamics, foreign influence and defunctness:

The constitution committee in order to work faster rarely met in plenary session. The CDC decided to divide itself into six subcommittees: five subcommittees focused on different areas of the constitution: *basic principles, system of government, federalism and local government, constitution guarantees, rights and duties, transitional and amendments*; the sixth

<sup>493</sup> Morrow, Jonathan. *Op. Cit.* P, 9.

<sup>494</sup> Dann, Philipp & Al-Ali, Zaid. *Ibid.* 17.

<sup>495</sup> Morrow, Jonathan. *Op. Cit.* P, 10.

<sup>496</sup> *Ibid.* P, 11.

had the task of coordinating and deciding on difficult issues.<sup>497</sup> This procedure was very similar to the method used during the drafting of the TAL. The CDC agreed to make decision based on consensus rather than majority rule.<sup>498</sup> Once the subcommittees finish their work, they should report it to the CDC which will gather and merge all the different parts in one single draft.<sup>499</sup> The CDC agreed also that advice from outside experts may be required but only after the CDC finishes its work. If the TNA estimates that the drafting of the constitution cannot be accomplished based on the recommendation of the CDC, the TNA has until the 1<sup>st</sup> of August, 2005 to solicit an extension for writing the constitution.<sup>500</sup>

The work of the CDC has been criticized for its method of discussions. What should have been a bargaining opportunity for the all the political forces in Iraq became a hostile competition among the three major blocks. Frequently, the process was characterized by resignation and walkouts from members of the three blocks. According to Jonathan Morrow, the CDC did not take minutes of their meetings, focused on highly abstract theoretical matters rather than practical discussions, and could not agree upon common norms or procedures to work on the draft. There was not a protocol to discuss matter properly in order to take into consideration the views of the major political groups. The previous consensus method that was displayed in the TAL drafting process was not used for the permanent constitution. Morrow describes the negotiations as follows: “[...], these political discussions were always fated to take the nature of peace treaty talks, as if among three sovereign governments”.<sup>501</sup>

The Arab Sunni representation was very low, had very little weight in the decision-making process, and were included too late to actively contribute to the drafting. This situation was also aggravated when in July 19<sup>th</sup> a Sunni Arab member of CDC, Sheikh Mijbil Issa, was targeted and murdered in an attack in Baghdad.<sup>502</sup> The assassination was not claimed by any group but analysts often blamed Arab Sunni insurgents.<sup>503</sup> As a result, the Sunni representatives withdrew from the CDC mainly as a way to protest against their role in the drafting process, the

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<sup>497</sup>J. Brown, Nathan. “Iraq’s Constitutional Process Plunges Ahead. *Op. Cit.* P, 4. Also see: “Unmaking Iraq: “A Constitutional Process Gone Awry”. *Ibid.* P, 3.

<sup>498</sup> *Ibid.* P, 4.

<sup>499</sup> *Ibid.*

<sup>500</sup> *Ibid.*

<sup>501</sup> Morrow, Jonathan. *Op. Cit.* P, 10.

<sup>502</sup>“Sunni Constitution Member Slain. Mijbil Issa Gunned Down, Along With His Advisor, In Baghdad” CBS News. July, 2005. < [http://www.cbsnews.com/stories/2005/07/20/iraq/main710236\\_page2.shtml](http://www.cbsnews.com/stories/2005/07/20/iraq/main710236_page2.shtml)>.

<sup>503</sup> *Ibid.*

security situation, and the reluctance of the CDC to provide them with all the sections of the constitution that have been drafted by this body.<sup>504</sup> A week later, the Arab Sunnis returned to the negotiations after President Jalal Talabani mediated in the crisis on July 24.<sup>505</sup> At this point, the Kurdish leader was optimistic, and predicted that: “*the constitution could be completed by the end of the month if a deal can be worked out with Sunni Arabs who have reservations about parts of the document*”.<sup>506</sup>

The possibility of delaying the constitutional process was discussed but finally not applied. The CDC decided to continue with the timetable stipulated by the TAL. This decision seems to be opposed to the opinion of several CDC members including its Chairman Sheikh Humam Hamoudi who favored the extension of the constitutional process invoking part (f) from article 61 in the TAL.<sup>507</sup> Sheikh H. Homoudi sought advice from USIP consultants about the possibilities of an extension due the lack of consensus.<sup>508</sup> Also, other senior Kurdish members such as Mahmoud Othman –including their international advisers as Abbas Bayati– favored the extension as well as other members of the TNA and the CDC. For instance, the Chairman of the Council of Iraqi Minorities, Dr. Hunain al-Qaddo, and Dr. Younam Kanna (CDC member, and leader of the independent Chaldo-Assyrian Christian party) were also demanding an extension. In addition to this, international observers and U.S. non-profit organizations as the National Democratic Institute (NDI) or the International Crisis Group (ICG) were advising as well about the necessity to extend the process.<sup>509</sup>

The CDC was working under a lot of pressure not only due to the security situation, and frequent Sunni Arab complains, but also due to the rigid timetable specified in the TAL. Also, public and private statements by senior U.S. officials belonging to the Secretary of the State, the Secretary of Defense, and the White House favored the finishing of the constitution by the 15<sup>th</sup> of August.<sup>510</sup> For instance, during August 1<sup>st</sup>, the U.S. Ambassador Khalilzad issued a public

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<sup>504</sup> Unmaking Iraq: “A Constitutional Process Gone Awry”. *Ibid.* P, 3.

<sup>505</sup> Gigot, Paul. “We the people.” *The Journal Editorial Report*. August, 2006.  
<<http://www.pbs.org/wnet/journaleditorialreport/082605/leadstory.html>>.

<sup>506</sup> “Sunni Constitution Member Slain. Mijbil Issa Gunned Down, Along With His Advisor, In Baghdad.” *Ibid.*

<sup>507</sup> Morrow, Jonathan. *Op. Cit.* P, 10.

<sup>508</sup> *Ibid.*

<sup>509</sup> *Ibid.*

<sup>510</sup> *Ibid.* P, 9.

statement –after meeting with several Iraqi political leaders– addressing the Iraqis and the international community about the preferences of the U.S. government on this issue.<sup>511</sup>

These events did not prevent the CDC to continue its work, and on the 8<sup>th</sup> of August, the CDC met in the green zone to finish the draft. The negotiations were mainly dominated by Kurdish and Shiite political leaders. The group was known as the Leadership Council (LC) or the Kitchen (*matbakh*). The LC was formed by SCIRI leader Abul Aziz al Hakim, al-Da'awa leader and Prime Minister Al-Jaafari, and Kurdistan leadership (Jalal Talabani and Massoud Barzani). The LC finished the final details of the negotiations throughout private meetings in private residencies and other compounds in the Green Zone.<sup>512</sup> And at least, one of LC's plenary meetings was held in the U.S. Ambassador's residence. According to Khalid Ahmed, member of the Office of the Constitution Support from UNAMI, three officers from the U.S. Embassy were directly implicated in drafting particular sections.<sup>513</sup>

These meetings were not officially scheduled, took place in different places, and Arab Sunni leaders were not informed. Moreover, Arab Sunni members asked to participate in this meeting but they were not invited.<sup>514</sup> As a summary of the atmosphere that reigned during the negotiation, Hussein Qaddo, (member of the UIA and representative of the Shabak minority), complained about the process: *"we don't know what is going on. Political leaders are meeting behind closed doors. Changes may have been made to the draft, but we don't know what they are. This is not right; it will only bring instability. It is a very bad sign"*.<sup>515</sup> Since these meetings took place during August the discussions about the constitution were taking place out of the CDC which was officially dissolved on the 15<sup>th</sup> of August.

On August 12<sup>th</sup>, the U.S. Embassy distributed among TNA members their own English version of the constitution suggesting some changes to early drafts of the CDC.<sup>516</sup> The U.S. version introduced changes regarding issues of great concern such as federalism, the judiciary,

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<sup>511</sup> *Ibid.* P, 10.

<sup>512</sup> Different sources confirm these meetings. Jonathan Morrow, and A. Heather Coyne working with USIP. International Crisis Group. "Unmaking Iraq: A Constitutional Process Gone Awry". *Op. Cit.* P, 3. And, Robert H. Brandstetter and Victoria Fontan. "Monitoring and Evaluating Performance Program, Phase II. Final Report for Political Process Assistance Review". United States Agency for International Development (USAID). December 13<sup>th</sup>, 2005. <[http://pdf.usaid.gov/pdf\\_docs/PDACH531.pdf](http://pdf.usaid.gov/pdf_docs/PDACH531.pdf)>.

<sup>513</sup> Dann, Philipp & Al-Ali, Zaid. *Ibid.* 17. Note n°, 53.

<sup>514</sup> Morrow, Jonathan. *Op. Cit.* P, 9.

<sup>515</sup> "Unmaking Iraq: A Constitutional Process Gone Awry". *Op. Cit.* P, 3.

<sup>516</sup> J. Morrow., Jonathan *Op. Cit.* P, 15.



human rights protections, and the de-Bathification. On August 25<sup>th</sup>, the U.S. President Bush participated in these efforts through a telephone call to SCIRI leader Abdul Aziz Al-Hakim that was later made public and strongly criticized by the Arab media.<sup>517</sup> The U.S. argued that these suggestions for amendments were made to accommodate Arab Sunni demands.<sup>518</sup> The U.S. efforts to include these changes at the last minute clearly indicated the level of exclusion of this community adding more reasons for oppositionist to consider the constitution as a U.S. product.<sup>519</sup>

When the deadline was reached on August 15<sup>th</sup>, the CDC requested from the TNA to expand the deadline for a week, which was approved unanimously by the TNA.<sup>520</sup> Members of the CDC and the TNA argued that this extension was needed to seek a final agreement with Arab Sunnis. During that day, the TNA assembled in the Convention Center, and international observers were told to stay outside of the main area allocated for TNA members in order to minimize international presence (this is a usual procedure in this kind of circumstance in order to lessen criticism about foreign intervention). The only exception allowed was the U.S. Embassy whose staff could freely move and converse with TNA members.<sup>521</sup>

On August 28<sup>th</sup> (second deadline) the CDC finished its work after introducing some minor changes on the wording of federalism. The Assembly read loudly the document in a joint session without the attendance of Arab Sunni representatives.<sup>522</sup> The draft was accepted without voting it on the TNA.<sup>523</sup> However, the constitution had still to be voted in referendum, scheduled in October 15<sup>th</sup>, 2005. Arab Sunnis rejected the document complaining about the Kurdish-Shiite attempt to impose a constitution that is contrary to their interests.<sup>524</sup> For

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<sup>517</sup> *Ibid.*

<sup>518</sup> *Ibid.*

<sup>519</sup> *Ibid.*

<sup>20</sup> "Iraq constitution deadline extended. National assembly allows extra week for further negotiations". CNN.com. August 16<sup>th</sup>. 2005. <<http://www.cnn.com/2005/WORLD/meast/08/15/iraq.main/index.html>>. Also see Filkins, Dexter. "Iraqi Assembly Agrees to Extend Constitution Deadline by a Week". The New York Times. August, 15, 2005. <[http://www.nytimes.com/2005/08/15/international/middleeast/15cnd-iraq.html?\\_r=1&koref=slogin&pagewanted=print](http://www.nytimes.com/2005/08/15/international/middleeast/15cnd-iraq.html?_r=1&koref=slogin&pagewanted=print)>.

<sup>521</sup> Coyne, A. Heather. *Ibid.*

<sup>522</sup> "Q&A: Iraq Referendum". BBC News. October 15<sup>th</sup>, 2005. <[http://news.bbc.co.uk/2/hi/middle\\_east/4337200.stm](http://news.bbc.co.uk/2/hi/middle_east/4337200.stm)>.

<sup>523</sup> Brown, Jonathan. "The Final Draft of the Iraqi Constitution: Analysis and Commentary". Carnegie Endowment. September 2005. <[www.carnegieendowment.org/files/FinalDraftofIraqiConstitution1.pdf](http://www.carnegieendowment.org/files/FinalDraftofIraqiConstitution1.pdf)>

<sup>524</sup> "Iraq's Sunnis Reject Constitution." BBC News. August, 2008. <[http://news.bbc.co.uk/2/hi/middle\\_east/4192122.stm](http://news.bbc.co.uk/2/hi/middle_east/4192122.stm)>.

instance, Tariq al-Hashimi –secretary general of the Iraqi Islamic party- stated that: “we struggle to participate in the drafting, but at the end of the day our role was one of adviser”.<sup>525</sup> On the other hand, thousand of Arab Shiites demonstrated in Basra supporting the organic law.<sup>526</sup>

Even though, negotiations did not conclude here, and between August and September more talks followed. On September 16<sup>th</sup> the Speaker of the Parliament presented a new draft constitution, in the name of the TNA, and drafted without consultation with the CDC.<sup>527</sup> The September 16<sup>th</sup>, draft introduced two changes in legal aspects regarding civil and human rights.<sup>528</sup> Arab Sunni members strongly protest, and demonstrations in Arab Sunni areas spread denouncing the constitution and the referendum.<sup>529</sup> Negotiations continued basically until the last moment, and three days before the referendum more changes were introduced. U.S. Ambassador Khalilzad brokered a compromise stipulating that the new parliament pursuant to the final ratification of the document would appoint a Constitution Review Committee (CRC) to propose amendments.<sup>530</sup> Thus any amendments proposed by this body will become officially part of the constitution, even though a new referendum will have to be invoked for a final ratification. Also, it was agreed that the de-Ba’athification process should be reviewed as well.<sup>531</sup> This means that there were three drafts circulating at the same time, and this situation obviously added more confusion to the public about which was the right draft.<sup>532</sup>

The completion and delivery of the constitution to the TNA was delayed during two occasions. The decision to continue with the process led the National Assembly to postpone the 15<sup>th</sup> August deadline without any legal procedure.<sup>533</sup> The right procedure would be to amend the TAL in order to extend the deadline from the 15<sup>th</sup> to another date, or otherwise dissolve the

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<sup>525</sup> “Unmaking Iraq: A Constitutional Process Gone Awry”. *Op. Cit.* P, 3.

<sup>526</sup> Ryu, Alisha. “Iraqis Demonstrate for and Against Draft Constitution”. *Global Security.org*. September 2005. <<http://www.globalsecurity.org/wmd/library/news/iraq/2005/09/iraq-050902-voa03.htm>>

<sup>527</sup> Brown, Jonathan. “The Final Draft of the Iraqi Constitution: Analysis and Commentary”. P, 1.

<sup>528</sup> These changes will be discussed in the chapter dedicated to the analysis of the constitution. *Ibid.*

<sup>529</sup> F. Worth, Robert. “More than 950 Iraqis Die in Stampede on Baghdad Bridge”. *The New York Times*. August 31<sup>st</sup>, 2005. <<http://www.nytimes.com/2005/08/31/international/middleeast/31cnd-iraq.html>>.

<sup>530</sup> Kfoury, Assaf. “The Struggle for Iraq’s Constitution”. *Znet*. December, 2007. <[http://www.zmag.org/content/print\\_article.cfm?itemID=14549&sectionID=1](http://www.zmag.org/content/print_article.cfm?itemID=14549&sectionID=1)>.

<sup>531</sup> Bennis, Phyllis. “The Iraqi Constitution: A Referendum for disaster”. *Institute for Policy Studies. IPS*. October 2005. UFPJ Talking Points n° 34. <[http://www.truthout.org/docs\\_2005/101605X.shtml](http://www.truthout.org/docs_2005/101605X.shtml)>.

<sup>532</sup> Unmaking Iraq: “A Constitutional Process Gone Awry”. *Ibid.* P, 4.

<sup>533</sup> Morrow, Jonathan. *Op. Cit.* P, 15.

National Assembly, and invoke new elections as it was stipulated in article 61 (f).<sup>534</sup> This means the creation of a new assembly and constitutional committee, and of course, the dissolution of the Leadership Council.<sup>535</sup> The TNA without having a final draft decided to continue with this unlawful procedure, contributing to the perception that the constitutional process was illegitimate.<sup>536</sup>

#### 4-6. Scarce public consultation and the limited role of international advisers:

The United States assigned to the United States Agency for International Development (USAID) the task of assisting the Iraqi interim government during its transition to democracy.<sup>537</sup> The USAID organized a consortium of three agencies (National Democratic Institute (NDI), the International Republican Institute (IRI), and the International Foundation for Electoral Systems (IFES))<sup>538</sup> to implement three different programs: a) Iraqi government and constitutional development assistance, b) domestic oversight and voter education activities for Iraqi electoral processes, c) and electoral assistance for the IECI.<sup>539</sup> After the elections (November-December 2005) a team of experts was sent from Washington to Iraq to investigate the level of performance and the impact of their programs during the political process.<sup>540</sup> According to their research, only programs that have focused on assisting the elections have achieved great success. Meanwhile programs aiming to improve the political reconstruction, and the drafting of the constitution did not have the impact they were expecting for. The reports stated that:

*“Those programs whose primary focus has been on institution building—strengthening the capacities of the legislative and executive branches of the transitional governments, and assistance to the constitutional drafting process—have not achieved their long term results. This was primarily for three*

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<sup>534</sup> *Ibid.*

<sup>535</sup> *Ibid.*

<sup>536</sup> *Ibid.*

<sup>537</sup> For a detailed description of the programs of each agency see: Brandstetter, Robert H. and Fontan, Victoria. *Op. Cit.* P, 2.

<sup>538</sup> There were other agencies participating in this consortium which were sub-contracted by the major agencies mentioned above. Other agencies that participated were: American Bar Association (ABA) and the State University of New York/Center for International Development (SUNY/CID). *Ibid.*

<sup>539</sup> This institution reached an agreement known as: Cooperative Agreement with the Consortium for Elections and Political Process Strengthening (CEPPS). *Ibid.*

<sup>540</sup> *Ibid.*

*reasons: the original project results were too ambitious given the short time frame; there was a lack of technical and professional capacity among the Iraqis; and, the interim period between the end of the CPA and the election of the Representative Council was a time of intense, internal political activity which delayed practical decision-making on institutional issues. The constitution drafting assistance activity did not anticipate the exclusion of constitutional experts from key decision making meetings and the highly political nature of these meetings”.*<sup>541</sup>

Focusing on the constitutional process, two of the problems mentioned above have been discussed during this research: the ambitious time frame, and the difficulty to find proper Iraqis for the process, but the role of the international community has not been fully addressed yet. It seems that there was a serious lack of international mediation in the process. The UNSCR 1546 granted the U.N. with a mandate to assist Iraq. UNAMI sent during May a team of experts to assist the Constitutional Committee.<sup>542</sup> The U.N. team was slow to prepare its work mainly due to delays in coordination with the TNA. In addition to this, the CDC did not allow the U.N. team to collaborate in the process, being suspicious of what they considered to be possible foreign intervention.<sup>543</sup> Finally during June, the CDC permitted the U.N. to advice members of the CDC, and several experts had the opportunity to help, especially Arab Sunni members in issues related to federalism: distribution of powers, the creation of federal units, joint federal/regional oil management, etc...<sup>544</sup> However, U.N. advisers could not continue with their work after August. The contribution of foreign advisers was limited in time and scope.

Another flaw of the process was the insufficient participation and consultation with civil society about key issues regarding the constitution. The CDC invoked occasional press-conferences in the Convention Center in order to update the press about their work, but these press briefings did not help to engage society in fundamental discussions or dialogue about the constitution.<sup>545</sup> Also, international organizations, including the U.N., carried out several public campaigns and consultations throughout Iraq promoting the constitutional process, but a lack of coordination made impossible an effective use of the data collected during this period.<sup>546</sup> The media campaign which included TV, radio and press seems to have worked efficiently, but other activities involving the public seems to have failed. The U.N. designed a plan to study

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<sup>541</sup> *Ibid.* P, 5.

<sup>542</sup> Morrow, Jonathan. *Op. Cit.* P, 13.

<sup>543</sup> *Ibid.* P, 14.

<sup>544</sup> *Ibid.*

<sup>545</sup> Al-Bayati, Zeid. *Ibid.*

<sup>546</sup> Coyne, A. Heather. *Ibid.*

public opinion through the distribution of boxes around Iraq.<sup>547</sup> Iraqis were expected to insert their views into these boxes, but they were not prepared on time and were ill distributed. Also, the CDC designed a questionnaire that had been criticized for its simplicity and inefficiency to collect data.<sup>548</sup> For instance, one of the questions asked was: do you prefer a parliamentarian or a presidential system? These questions did not take into account the complexity of issues that were at stake during the constitutional process, and sometimes were formulated in a technical language that is not commonly used by ordinary people.

However, there were many Iraqis engaged in local associations and civil society organizations which held meetings and workshops about the constitution. Iraqis were very interested in the process, and demonstrated to have serious questions and sophisticated views about the constitution. These associations collected voluminous amount of data about what Iraqis think and expect from the constitution, but the data system used by the U.N. was not designed to introduce these kinds of comments (the system was designed to introduce simple answers as yes or no), and therefore these comments were left out of the statistics.<sup>549</sup> The USIP found it very difficult to use all this data, but they were able to make a report for the CDC only a couple of days before the deadline was over. It seems very unlikely that members of the CDC had time to examine the opinions gathered in the report.<sup>550</sup>

Also, the lack of a single unified text did not help in the process of promoting the constitution amongst the public. This process was even more postponed because the U.N. had to print five million copies to be distributed in Iraq.<sup>551</sup> The U.N. and other organizations did not have enough time to start a proper public education campaigns about the organic law. According to a study produced by USIP in 20 countries that recently went through constitutional processes pointed out that: *"the best way to derail transparency and participation is to rush the process so that there is not time for an organized process that allows public*

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<sup>547</sup> *Ibid.*

<sup>548</sup> *Ibid.*

<sup>549</sup> *Ibid.*

<sup>550</sup> *Ibid.*

<sup>551</sup> "Unmaking Iraq: A Constitutional Process Gone Awry". *Op. Cit.* P, 4.

*education, consultation, and review of early drafts, for lobbying and advocacy*".<sup>552</sup> This seems to be the case during the Iraqi constitutional process.

#### **4-7. The referendum and the approval of the Constitution:**

The referendum was finally held on Saturday, October 15<sup>th</sup>, 2005. The IECI was in charge of setting up the rules for the consultation, organizing the event, and monitoring the referendum. The IECI was assisted by UNAMI in voting procedures, and logistical operations.<sup>553</sup> Numerous observers from different national and foreign organizations were monitoring the event.<sup>554</sup> Poll stations were open since early in the morning 7 a.m until 5 p.m, and voters had simply to mark "yes" or "no" on their ballots to express their views. Iraqis over eighteen were allowed to vote, but only Iraqis living in Iraq could vote.<sup>555</sup> During that day, several security incidents were reported during the counting of ballots, and results were not made public until days later. According to the BBC, the main reason behind the delay was that the IECI found some statistical irregularities and had to re-count the ballots.<sup>556</sup> This delay was criticized especially when Secretary of the State, Condoleezza Rice, declared publicly that the Iraqi constitution was ratified before the results were announced, she had to retract from this statement.<sup>557</sup> The IECI released the results in October 25<sup>th</sup>, and according to them: 78% of the voters approved the constitution, and 20% rejected.<sup>558</sup> Two out of 18 provinces rejected, Anbal and Saluhuddin. The final results were presented by IECI spokesman Farid Ayar who invoked a

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<sup>552</sup>Letter from Coyne, A. Heather. *Ibid.* The report she is citing was published at USIP by Neil Kritz. "Constitution-making process: Lesson for Iraq. Testimony by Neil Kritz, director of the Rule of Law Program at the U.S. Institute of Peace, before a joint hearing of the Senate Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Property Rights; and the Senate Committee on Foreign Relations, Subcommittee on Near Eastern and South Asian Affairs". United States Institute for Peace.org, June, 2003. <[http://www.usip.org/congress/testimony/2003/0625\\_kritz.html](http://www.usip.org/congress/testimony/2003/0625_kritz.html)>.

<sup>553</sup>UN Technical Assistance to the Iraqi Elections". UNAMI, June, 2004. <<http://www.uniraq.org/elections/default.asp>>.

<sup>554</sup> *Ibid.*

<sup>555</sup>Al-Bayati, Zeid. "The Referendum on Iraq's Constitution". CAABU, October, 2005. <[http://www.caabu.org/resources/iraq\\_factsheets/referendum\\_iraq/](http://www.caabu.org/resources/iraq_factsheets/referendum_iraq/)>.

<sup>556</sup> Iraq's vote count 'point to fraud.' BBC News, October 18<sup>th</sup>, <[http://news.bbc.co.uk/2/hi/middle\\_east/4351680.stm](http://news.bbc.co.uk/2/hi/middle_east/4351680.stm)>.

<sup>557</sup> *Ibid.*

<sup>558</sup> For a detailed account of the results see "Final Report of the IECI on the Referendum Audit Process". The IECI, 25<sup>th</sup> October, 2005.

<<http://www.ieciraq.org/English/docs/Results%20Breakdown%20by%20Governorates,%2025.10.2005.php>>.

news conference announcing the results. According to his data, the level of participation was higher than the January election; about 63% of Iraqis went to vote.<sup>559</sup>

#### **4-8. Conclusion about the Iraqi Constitutional Process:**

It is clear from the data I have gathered that the Iraqi constitutional process suffered from several flaws and problems that posit serious questions about the legitimacy of the process. These could be summarized in:

- The TAL introduced an ambitious time frame that significantly rushed the constitutional process. The rigidity of the time frame which was also complicated by delays in settling the TNA reduced considerably the time needed for the CDC and the TNA to draft and discuss the constitution. These constraints undermined the efforts of the CDC which also suffered interferences from local leaders and foreign actors diminishing its authority, competences and role in the constitutional drafting process.
- The TNA opted to design the CDC following the configuration of the interim parliament. This procedure is legitimate but perhaps not recommendable under the highly polarized atmosphere. It would have been more appropriate to form a constitutional committee following the social configuration of Iraq, allowing more representation to minority groups. This method could have considerably enriched the constitutional drafting process.
- The effort to expand the CDC with more Arab Sunni representativeness was insufficient. They did not have the possibility to vote during the negotiation, and in several cases were ignored in the process of drafting the constitution. They were isolated and relegated to mere advisors.
- The CDC did not develop proper methods of discussions, and valuable time was lost with theoretical discussions deviating the meeting from important issues. Decisions were not taken under a consensus method but under a zero-sum approach that took the shape of peace negotiation rather than constitutional dialogue.
- These constraints undermined the efforts of the CDC which also suffered interferences from local leaders and foreign actors diminishing its authority, competences and role in the constitutional drafting process. There were continuous interferences from the interim government and the United

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<sup>559</sup> Alexander, Caroline. "Iraqi Constitution Approved by 79 Percent of Voters (Update4)". [Bloomberg.com](http://www.bloomberg.com/apps/news?pid=10000087&sid=amqz7dZlEx3w&refer=top_world_news). October 25<sup>th</sup>, 2005.  
<[http://www.bloomberg.com/apps/news?pid=10000087&sid=amqz7dZlEx3w&refer=top\\_world\\_news](http://www.bloomberg.com/apps/news?pid=10000087&sid=amqz7dZlEx3w&refer=top_world_news)>.

States during the negotiations. The possibility of delaying the process became a necessity due to divisions within the CDC about paramount constitutional issues, but political considerations overrode this possibility. The Leadership Council and the U.S. Embassy took the lead of the constitutional process leaving aside the CDC. These actors took decision unilaterally in secret meetings without consulting with other members.

- The role of the international community as advisor had a very limited impact due to the short time frame, and the interference of U.S. and the LC in the process. Also, campaigns aiming at data collection from the public were slow and ineffective, denoting serious problems of organization and coordination amongst those agencies in charge of education and social awareness campaigns.



## Chapter 5

### Analysis of the New Iraqi constitution

*"Our founders faced many difficult challenges – they made mistakes, they learned from their experiences, and they adjusted their approach. Our nation's first effort at governing – a governing charter, the Articles of Confederation, failed. It took years of debate and compromise before we ratified our Constitution and inaugurated our first president. It took a four-year civil war, and a century of struggle after that, before the promise of our Declaration was extended to all Americans. [...]"*

*"It is important to keep this history in mind as we look at the progress of freedom and democracy in Iraq".<sup>560</sup>*

*"Basic to the failure of the initial Ottoman experiment with constitutional government was the absence in the Empire of the foundations upon which any successful constitutional regime must rest: national unity, common objectives, respect for the law by both the rulers and the ruled, and understanding and acceptance of their duties as well as their rights by all citizens, irrespective of rank, position, or social and economic status".<sup>561</sup>*

#### 5-1. Introduction:

In chapter two I have reviewed basic features and themes related to constitutions and constitutionalism through a comprehensive approach. The analysis of the constitution in this chapter departs from these ideas which, in summary, define constitutions as a body of norms seeking to establish the foundations of any political system. These norms regulate and distribute powers, functions and duties of the institutions and agencies belonging to the state; and set up the channels to establish relationships between the state and the public.<sup>562</sup> Therefore, this chapter studies how the constitution establishes the distribution of power among its institutions and agencies; and how the constitution promotes constitutional principles based on public participation, transparency, and protection, and promotion of fundamental rights.

My analysis focuses on the principles embodied in the final draft of the Iraqi constitution submitted by the Speaker of Parliament to the TNA on September 16, 2005. The constitution I used for this analysis is the official translation from the United Nations –as well

<sup>560</sup> Bush, George W.. "The Struggle for Democracy in Iraq: Speech to the World Affairs Council Philadelphia, Pennsylvania". [The president Rethoric.com](http://www.presidentialrhetoric.com). December 12<sup>th</sup>, 2005. <<http://www.presidentialrhetoric.com/speeches/12.12.05.html>>.

<sup>561</sup> Devereux, Robert. *The First Ottoman Constitutional Period. A Study of Midhat Constitution and Parliament*. The Johns Hopkins Press. Baltimore. 1963. Pp, 252-253.

<sup>562</sup> Please see note 137.

as the original Arabic text released by the same agency –. I have included the English translation at the end of this thesis in the annex section.<sup>563</sup> However, it should be kept in mind that this new organic law is not permanent after all. During the previous chapter, I mentioned the agreement reached between the major political groups to invoke a constitutional review commission aiming to promote Arab Sunni participation in the process, and to study possible amendments for the constitution.

After the constitution was approved by referendum, elections were held on December 2005 to form the first regular (not transitional) parliament and government since the beginning of the occupation.<sup>564</sup> 361 political parties participated in the elections, and 19 of them were multi-party coalitions. Elections were won by the UIA–Kurdish coalition which dominated the parliament with two-thirds of the seats. Although elections were smooth, the results were clearly favoring the UIA (the party leading the coalition was the SCIRI which in May 2007 changed officially its name for Islamic Supreme Council of Iraq –ISCI–). The appointment of a Prime Minister and the government were problematic. The first candidate for Prime Minister was Ibrahim al-Ja‘afari who resigned after failing to form a government due to discrepancies with members of his coalition.<sup>565</sup> Thereafter, Nouri al-Maliki was elected PM on April 20. President Jalal Talabani was elected President, and Mahmoud Mashhadani was elected Speaker of the Parliament.<sup>566</sup>

The Iraqi Parliament approved the formation of a Constitutional Review Committee (RCR) in September 2006.<sup>567</sup> The Parliament appointed Iyad al-Samarra‘i from the Iraqi Accord Front (Arab Sunni party) to chair the committee. This body comprised 27 members

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<sup>563</sup> Official Constitutional Text. (English Translation). U.N. September 16, 2005. The text is available at [the Iraqi foundation](http://www.iraqfoundation.org/projects/constitution/constitutionindex.htm). <<http://www.iraqfoundation.org/projects/constitution/constitutionindex.htm>>.

<sup>564</sup> The elections were held under strict security measures, and violence did not disrupt the voting as before due to the end of the boycott by most of Sunni’s organizations. The electoral law that rule election was adopted by the TNA on December, after the IECE designed a formula that allowed a more representative system to form a parliament. This law was designed to attract more Sunni groups to the elections. Voter chose from close lists representing their sects and religion. Katzman, Kenneth. “Iraq: Government Formation and Benchmarks”. *CRS Report*. January, 2008. <<http://www.fas.org/sgp/crs/mideast/RS21968.pdf>>. Pp 1-3.

<sup>565</sup> Please see note 347.

<sup>566</sup> However the task of appointing governmental posts proved to be problematic as well. PM. Nouri al-Maliki managed to create a 37 members cabinet after long negotiations within the CoR including himself and two deputy prime ministers, nevertheless three key posts -Defense, Interior and Nation Security- were not appointment until June. Katzman, Kenneth. “Iraq: Government Formation and Benchmarks”. *Ibid*.

<sup>567</sup> Ahmad, Tha’ir. “Constitution Amendment Committee Formed”. [Niqash.org](http://www.niqash.org). September, 2006. <<http://www.niqash.org/content.php?contentTypeID=273&id=1520>>.

representing the major political parties in government.<sup>568</sup> The United Iraqi Alliance had 14 members; the Kurdish Alliance (5), the Iraqi Accord Front (4), the Iraqi list (2). The Iraqi National Dialogue Front had the right to have a member in the CRC but refused to participate in the process. Also, the Speaker of Parliament, Mahmud al-Mashhadani, officially invited three representatives of minority groups Turkmen, Sabeans and Yazidis to participate in the process after some parliamentarians protested against the non inclusion of minorities in this body.<sup>569</sup>

The CRC submitted to the Parliament (Council of Representatives) their proposals (there were dozens of amendments proposal) for amending the constitution on May 2007. Their suggestions covered eight areas: distribution of revenues, the federation council, taxation and other federal powers, judiciary, independent commissions, Kirkuk, presidential authority and de-Ba'athification.<sup>570</sup> Nevertheless the Iraqi government has to take the necessary steps to endorse publically these changes in order to begin the review process. Since the beginning of its tenure the al-Malaki's government has gone through several crises that had considerably slowed the constitutional review process: sectarian violence (e.g. the parliament was attacked by insurgents on April 12), the withdrawal of key alliance figures in his coalition government, including the Kurdish coalition that demands an immediate referendum for establishing the final status of Kirkuk, the drafting of the oil law, and the mounting pressure from the parliament calling for the withdrawal of U.S. troops.<sup>571</sup> Maliki's government lacks the full support needed from all the political forces in Parliament to effectively introduce changes in the constitution.

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<sup>568</sup> *Ibid.*

<sup>569</sup> *Ibid.*

<sup>570</sup> Kirtz, Neil J, Sermid al-Sarraf, and J. Alexander Their. "Constitutional Reform in Iraq: improving Prospects, Political Decision Needed". *USIP*, September, 2007. <[http://www.usip.org/pubs/usipeace\\_briefings/2007/0903\\_constitutional\\_reform\\_iraq.html](http://www.usip.org/pubs/usipeace_briefings/2007/0903_constitutional_reform_iraq.html)>. For a detail account of the amendment proposed by the CRC please see: "UNAMI OCS Commentary on the Constitution Review's Draft Report". *UNAMI*, Baghdad. May, 2007. <[http://www.forumfed.org/pubs/UNAMI\\_OCS\\_ResponseENG.pdf](http://www.forumfed.org/pubs/UNAMI_OCS_ResponseENG.pdf)>. P, 1.

<sup>571</sup> "Report to the Security-General pursuant to paragraph 30 of the resolution 1546 (2004)". *UNSC*. June, 2007. <[http://www.uniraq.org/FileLib/misc/SG\\_Report\\_S\\_2007\\_330\\_EN.pdf](http://www.uniraq.org/FileLib/misc/SG_Report_S_2007_330_EN.pdf)>. P, 1-7.

## 5-2. The preamble:

Since the beginning of the occupation the U.S. led-Coalition forces have through different laws and regulations dismantled the previous regime, and thus set the foundation to create a new concept of the state. I had mentioned in chapter 2, how constitutions are intended to express the core values that the regime is entitled to. Constitutions include usually a preamble which enumerates and introduces basic beliefs of the population and foundational values of the regime. Preambles are considered to be a source of inspiration for legal interpretation rather than a rule or norm legally binding.

The preamble in the Iraqi constitution tries to reflect these values and beliefs in an attempt to awake the feelings of people regarding the state they are living in. None of the previous organic laws (1925 and 1970) included an introduction. The preamble –which is headed by the traditional Quranic formula in official documents and speeches, –*In the name of God, the Merciful, the Most Compassionate*–starts with a brief interpretation of Iraqi history. Several authors had argued that the introduction offers a Kurds-Shiite oriented interpretation of Iraqi history, mainly because it extensively focuses on the atrocities and calamities to the Iraqi population by the previous regime.<sup>572</sup>

Also, following their arguments, the preambles defines the Iraqi union (*wāhda al-wataniya*) with the same term that federalism (*ittihad*) along the preamble and the organic law. During the drafting process some Kurdish drafters pushed to introduce a legal clause making the preamble legally binding. This proposal was finally dropped and the preamble has only an interpretational value.<sup>573</sup> Indeed the reconciliatory tone that the preamble has in some part of the text is shadowed by the constant allusions to atrocities perpetuated by the former regime.

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<sup>572</sup> Brown, Nathan. "The Final Draft of the Constitution: Analysis and Commentary". *Op.Cit.* P, 1. Zaki, Badur, Ahmad Hussein Kirkush et Ali. "Maziq al-dustur. Naqad wa tahlil". The Iraqi Institute for Strategic Studies. Baghdad-Beirut, 2006. P, 31.

<sup>573</sup> *Ibid.*

### 5-3. Fundamental Principles:

The new model is considerably different from previous state model in Iraq's recent history. Iraq has gone through a constitutional hereditary monarchy with a representative government imposed by the British Empire, to a socialist system, based on Arab nationalistic principles, highly authoritarian (the government could not be held accountable) and centralized,<sup>574</sup> to a federal system of government based on representative, parliamentary and nominally democratic principles.

However, the foundations of the new Iraqi nation are based on three different pillars (federalism, Islam and democracy). The idea of federalism is meant to be that Iraq is an entity formed by different nationalities, religions and sects. Islam is the second pillar, and the constitution establishes religion as the official religion of the state, and a principal source of legislations (article 2). This last article is complemented by article 3 which considers Iraq to be an Arab League member, and part of the Islamic world (article 3). Democracy and law: the Iraqi constitution is the supreme law of the land and it is binding in all Iraqi provinces (article 13), and the Iraqi system of government shall be based on the division of powers and the representation of Iraqi society in its institutions (article 1 and 43).

The new national identity is based on the concept that Iraq is a multi-ethnic, multi-national and multi-linguistic country. This is an innovation in Iraq's conception of the state which in previous constitution promoted a single, unified and sometimes monolithic conception of the state. The first Iraqi constitution (1925) did not mention the Arabness of the Iraqi state, rather preferred to establish Islam as the official religion of the state (article 13), and declared Arabic the official language of the state (article 17). The fact that Iraq's King became a fundamental institutional figure in the Iraqi state was enough to vindicate its Arabness (article 19). King Faisal I belonged to a royal Sunni Arab family who professed Islam and spoke Arabic. This was an explicit declaration of the Arab national identity. The fact that the first constitution declared that all Iraqis are equal before the law regardless of their race,

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<sup>574</sup> Brown, Nathan J.. "Constitution in a Nonconstitutional World". *Op. Cit.* P, 87.

language and creed (article 6) did not hide the fact that Arabic and Islam were the foundation of Iraq's identity above any other sect, creeds or languages.<sup>575</sup>

Another question in comparison with previous conceptions of the state is the inclusion of democracy as a fundamental principle as well as the official mechanism to transfer authority in government. Previous constitutions declared that the Iraqi sovereignty resides in the people (article 19 of the first constitution (1925), and article 2 of the former constitution –1970), but only the constitution approved under the British mandate declared the constitutional and democratic principles under which Iraq is conceived. However, the first constitution declares that the people transfer these powers to the House of the King and the parliament. The king was elected during fraudulent election fixed by the British and since then, he became an institution that could not be held accountable by the people during periodical election or by the Parliament.<sup>576</sup> Article 25 of the Iraqi constitution in 1925 established that the: “*The King is safeguarded and is not responsible*”.

Moreover, the legislative was composed of the house of the King and the parliament, and the King had extra powers that could veto the executive and the parliament in their decision (article 62). Also, this organic law (1925), allowed only males over twenty to vote (article 38) which is against universal suffrage principles accepted universally (although we must take into consideration that universal suffrage was slowly implemented globally during the twentieth century). The flawed democratic principles envisioned in the first Iraq constitution promoted the rule of an oligarchy and therefore excluded large segments of society who were unrepresented in government. The British failure to establish a fair democratic system doomed democracy to be regarded as a tool of the occupier. The constitution was seemed to be against Arab and Islamic principles of good governance and justice.<sup>577</sup>

During the republic, national identity evolved but still promoted the supremacy of Arabism and Islam. These two ideals summarized the essence of the Arab political culture in opposition to imperialist powers which aspired to expand their political and economic influence over the East. During the Cold War, the growing emergence of Egyptian *Nasirism*

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<sup>575</sup> “Constitution of the Kingdom of Iraq”. *Ibid.*

<sup>576</sup> Einsestadt, Michael and Mathewson, Eric (edit.) *U.S. policy in Post-Saddam Iraq. Lessons from the British Experience*. The Washington Institute for Near East policy. 2003. P, 16.

<sup>577</sup> *Ibid.*

which influenced significantly Iraq, and other states in the region, tended to leave behind the era of imperial powers.<sup>578</sup> Thus certain democratic and liberal values and structures were unfortunately attached to the past. The emergence of the Ba'ath party in Syria and Iraq is an example of the attempt by several Arab states to position themselves in a rapidly changing world divided between two major blocs.<sup>579</sup> This is clearly visible in the principles established during the republic period. The principle objective of the state was to achieve Arabism (Arab State) and Socialism (article 1) while at the same time proclaimed Islam as the official religion of the state (article 4). Democratic principles were erased and supplemented by one party rule embodied in the Revolutionary Command Council following Soviet practices of government.

However, the Iraqi interim constitution (1970) took some important steps to recognize the existence of Kurdish nationalism. Article 5 declared that the Iraqi people were composed of two nationalities: Arab and Kurdish (article 5). The interim constitution acknowledges the rights of the Kurdish people and other minorities within the framework of national unity. These concessions are the result of intense negotiation between Saddam Hussein and Kurdish leader Mustafa Barzani to end years of conflict and resistance between both communities. The central government allowed the creation of a special regional administration and the use of the Kurdish language in Kurdish areas, but these initiatives were shadowed by policies of the central government which held great control over these institutions.<sup>580</sup> The acceptance of Kurdish nationality was a mere formalism rather than a true declaration of principles that would lead to peace and stability between both communities.

The main innovation in the new constitution resides in the creation of a federal concept of the state which recognized all Iraqi nationalities without placing one over the other: "*Iraq is a country of multiple nationalities, religions, and sects*" (article 3). Plurality is further promoted through the recognition of multiple tongues enjoying the same status at the federal level. Article 4 declares Arabic and Kurdish the official language of the state. Other languages are allowed at the regional and local level. Ethnic minorities such as Turkomen and Assyrians have the right to teach their tongues in their schools or private institutions but in order to use them at the regional administration they need to hold a referendum first.

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<sup>578</sup> Hourani, Albert. *A History of the Arab Peoples*. Faber and Faber. London, 1992. Pp, 407-415.

<sup>579</sup> *Ibid.*

<sup>580</sup> Tripp, Charles. "*History of Iraq*". Cambridge UP. 2003. Madrid. Pp, 260 and 275.

Another question is that the constitution clearly evades referring directly to Iraq as an Arab country. This provoked significant protest from Sunni and Shiite Arabs who perceived this omission as being unfair. This seems to be a secure measure against any repression policy that could come from any ideologies based on Arab supremacy. The drafters (most probably Kurdish) pressured to declare Iraq only as a member of the Arab League, and in return some Arab drafters (most probably Sunni but probably also with the support of various Shiite as well) wanted to make this provision legally binding in accordance with the regulations established in the Charter of the Arab League. This proposal was finally dropped due to the international implications that this article would have for Iraq. The final formula agreed on was to declare Iraq just as an active member of the Arab League.<sup>581</sup> It is interesting to observe how this formula seems to satisfy those who fear that Iraq was being disfranchised from the Arab community. However, Arabism had played a paramount role in the region's history, developing an identity beyond religious boundaries.<sup>582</sup>

Religion acquires also a prominent role in shaping not only a new national identity but also as a source of legislation (article 2). The establishment of Islam as the official religion is not surprising according to the overwhelming majority of Muslim in Iraq. However, since the beginning of the occupation, Shiite and Sunni religious and political figures pressured the CPA to implement the *Shari'a* law as the main legislation on all the territory.<sup>583</sup> Despite the fact that Bremer rejected this kind of proposals does not deny the prominent weight that conservative Shiite parties were having in politics as well as in the constitutional drafting process. During the drafting, Muslim positions were softened by those members opposed establishing Islamic law as the source of legislation. After long discussions, the final formula was to consider Islam as just a source of legislation amongst other sources such as democracy and constitutional rights and freedoms stipulated in the constitution. The role of Islam in this formula can be considered as moderate.

Conservative drafters secured the role of Islam in the decision making process of the Parliament. Provision A, included in part 1 of article 2, established that: "*No law may be enacted*

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<sup>581</sup> Brown, Nathan. "The Final Draft of the Constitution: Analysis and Commentary". *Op. Cit.* P, 4.

<sup>582</sup> Please see "Uruba". *Encyclopaedia of Islam* CD-ROM Edition v. 1.0. 1999 Koninklijke Brill NV, Leiden, The Netherlands.

<sup>583</sup> Bremer and McConnell. *Opus Cit.* P, 292.



*that contradicts the established provisions of Islam*". This last arrangement is quite confusing because it does not clearly establish what these established provisions are. "Established" is the Arabic translation of *thawābit* (*fix elements*) and "provisions" is the translation of *al-ahkām* (*ruling*). These two words do not have a specific and definite meaning in Islamic jurisprudence. *Thawabit* refers to those principles and values that are commonly accepted by the Islamic tradition in a general sense.<sup>584</sup> The second term is the word in Arabic used for decision or judgment, and in legal terms, *ahkam* means the judicial prescription or decision which establishes the status of a person, thing or law according to the Islamic law.<sup>585</sup>

This formula would give certain authority to religious figures to prescribe laws and rules that could affect all aspects of religious, political, and social life. What impact this law will have in future legislation depends on who has the authority to interpret this article.<sup>586</sup> Establishing Islam as a source of legislation means that the parliament has to be very careful issuing laws and regulations that do not contradict these principles. The weight of Shiite and Sunni conservative parties is considerable in Iraqi politics, and these figures will lay down the meaning of these principles. However, in cases of conflict, the Federal Supreme Court (FSC) will play a significant role interpreting these "provisions".<sup>587</sup> According to article 90, the SFC requires experts in *shari'a* law to be included in this body along with jurist and judges.<sup>588</sup> This further enhances the participation of religious figures in judicial decision. In addition to this, article 99 establishes the right to form independent institutions such as the State Council. This article allows this institution to have some judiciary authority and functions as *ifta'*. This term refers to '*religious rulings*' and thus further promotes the inclusion of religious experts in judicial decisions.<sup>589</sup>

The fact that the constitution protects and guarantees freedom of worship and religion does not cover the issue that the Iraqi constitution promotes a very conservative vision of the state. Article 3 promotes the multi-national and multi-linguistic and multi-religious character of the state but the prominent role of Islam could undermine the freedoms of other

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<sup>584</sup> Brown, Nathan. "The Final Draft of the Constitution: Analysis and Commentary". *Op. Cit.* P, 3.

<sup>585</sup> "Ahkam". *Encyclopaedia of Islam* CD-ROM Edition v. 1.0. 1999 Koninklijke Brill NV, Leiden, The Netherlands.

<sup>586</sup> Brown, Nathan. *Ibid.*

<sup>587</sup> *Ibid.*

<sup>588</sup> A. Jaber, Falah.. *Op. Cit.* P, 5.

<sup>589</sup> *Ibid.*

minor religious communities in the public sphere. Also the vagueness of the concept of Islam could also in the long run create conflict between different interpretations of Islam (Sunni-Shiite for instance). There are different schools of law in Islam, and the imposition of one of them is often related to a particular religious values professed by one or a group of clans, tribes or families in a particular area.<sup>590</sup> However the Western tradition to separate politics and religion is not completely new in other Muslim countries of the region. The Turkish secular model prescribes for instance that: “sacred religious feelings may not interfere in state affairs and politics”.<sup>591</sup> Turkey had developed a secular model of the state that has been successful in establishing a clear separation between the state and religion.

It can be argued that the Turkish constitutional model is perhaps too radical for Iraq given the significant role of religion in society. Perhaps this could be a reason for the state to precisely adopt a secular position in order to be neutral regarding religious issues. Nevertheless, there are other concepts of secularization much more moderate with religious values and principles. For instance, Nehru’s concept of secularization in India positioned the state in a neutral position while recognizing the great weight of religiosity in the daily life of Indians.<sup>592</sup> Although India is a Hindu country, and therefore the constitution could establish Hinduism as the official religion of the state, the Indian model finally favors a neutral position in order to avoid the establishment of the supremacy of Hinduism that would entail conflicts within Hinduisms (casts and gender inequalities), and also with other religious confession such as Islam and Christianity. A neutral position can help the state to decide or choose among policies without the risk of being accused of promoting a particular interpretation of religious beliefs.<sup>593</sup>

These conservative principles are counterbalanced also by other modern principles that are equally important. The constitution declares that: *no law may be enacted that contradicts the principles of democracy* (article 2, b) And, that: *No law may be enacted that*

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<sup>590</sup> Armanios, Febe. “Islam: Sunnis and Shiites”. *CRS*, February, 2005  
<<http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-6025:1>>.

<sup>591</sup> Salem, Paul. *Op. Cit.* P, 9.

<sup>592</sup> Katherine, Adeney., *Federalism and Ethnic Conflict Regulation in India and Pakistan*. Gordonsville, VA, USA: Palgrave Macmillan, 2006. p 96.

<sup>593</sup> Adeney argues that: *These polyethnic rights were expressed through the policy of secularism defined as neutrality of the state to, rather than separation from, religion: “The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them (Article 15[ 1] –of the Indian constitution– )”*. Adeney, Katherine. *Ibid.*

*contradicts the rights and basic freedoms stipulated in this Constitution* (article 2, c). According to the principles of democracy two thirds of the Parliament could amend the current constitution and implement the Islamic law after referendum following the procedures established in article 126. The last part, section c, is welcomed by some authors as a real guarantee that would enable the Parliament to strengthen civil rights stipulated in the constitution, but once again, drafters opted to leave it vague on purpose allowing some space to the Parliament for interpretation.<sup>594</sup>

The constitution also makes two declarations of principles that would influence the formation of a new national identity, the rejection of terrorism and the creation of a new Army. The organic law rejects any manifestation of racism and terrorism based on ideological and religious terms (article 7). For instance, the constitution prohibits *takfir* (apostasy) which is an old Sunni formula used sometimes to legitimize aggression against Shiite practitioners or individuals that do not possess any religion.<sup>595</sup> This article seems to be in line with the current U.S. foreign policies principles in Iraq which pursue the elimination of the Ba'ath regime, and prevents the emergence of Islamic fundamentalist terrorism. This is clear also in section 2, article 7, which states that: *The State shall undertake to combat terrorism in all its forms, and shall work to protect its territories from being a base, pathway, or field for terrorist activities.* As this research has demonstrated, Paul Bremer issued order n°2 that banned former Ba'athist members to participate in the public life of this country. This policy had terrible consequences during the beginning of the occupation, and boosted partly the formation of resistance groups against the U.S. led –Coalition. The constitution tries to reverse these mistakes by abandoning previous wording prohibiting the Ba'ath ideological principles for a formula (*Saddamist Ba'ath*) that would allow previous Ba'athist without blood on their hands to participate in government and the administration.

Also the inclusion of the word terrorism should be carefully addressed. There is a lack of consensus internationally speaking about what terrorism is, especially regarding certain military groups that due to political considerations are regarded as terrorist's organization

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<sup>594</sup> Brown, Nathan. "The Final Draft of the Constitution: Analysis and Commentary". *Op. Cit.* P. 3. And, Jabar, Faleh A. *Op. Cit.* P, 5.

<sup>595</sup> *Ibid.* P, 4.

while others are considered to be resistance groups.<sup>596</sup> This is clear in the case of the Muhayidin in Afghanistan which were backed and supported financially by the U.S. to liberate the country under Soviet occupation,<sup>597</sup> but later on banned and overthrown from the government for hosting al-Qaida members related to September 11<sup>th</sup>. This same argument was partly used during the war campaign against Saddam Hussein as well as with other uncomfortable groups that are contrary to U.S. interests or its allies (Hezbollah, FARC, Hamas, etc...). Hamas for instance is a clear example. Hamas was democratically elected during transparent and fair elections in the Palestinian territories but their reluctance to accept Israel, and their inability, perhaps laxity, to control certain military factions led some of the international community (United States and the European Union) to withdraw their support to Hamas.<sup>598</sup>

Since September 11<sup>th</sup>, terrorism has been used to legitimize foreign intervention, and curtail human rights and civil liberties that are universally recognized. The case of *Güantánamo* prison is a clear example of how prisoners of war are unprotected by the international and national (U.S.) law due to their status as terrorists.<sup>599</sup> However, the constitution leaves this article to be further elaborated by the parliament, and although the organic law prohibits: *All forms of psychological and physical torture and inhumane treatment* (article 37 -b-), there are no constitutional guarantees about how presumed terrorists will be treated by the state.

The constitution prescribes that the composition of the Iraqi Army, security services and Intelligence services has to be in accordance with the multi cultural character of Iraq. The most important provisions introduced in this article are that the Army, security and intelligence services will be under the control and supervision of the civil authorities. Also, members of these agencies and institutions (including the Ministry of Defense) are prohibited to run for

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<sup>596</sup> Senechal de la Roche, Roberta. "Toward a Scientific Theory of Terrorism". *American Sociological Association. Sociological Theory*, Vol. 22, No. 1, Theories of Terrorism: A Symposium. March, 2004. pp. 1-4. Also see: "There is no UN definition for terrorism". *Eye on the UN. A Project of the Hudson Institute New York and the Touro Law Center Institute for Human Rights*. May 5, 2008. < <http://www.eyeontheun.org/facts.asp?1=1&p=61> >.

<sup>597</sup> Kepel, Gilles. *Jihad. The Trail of Political Islam*. The Belknap Press of Harvard UP. Cambridge, Massachusetts. 2003. P, 12.

<sup>598</sup> "U.S. offer aid to Abbas-led Palestinian government". *CNN.com*. 17<sup>th</sup>, June 2007. <<http://www.cnn.com/2007/WORLD/meast/06/18/palestinian.cabinet/index.html>>.

<sup>599</sup> Stout, David. "U.S. Denies Guantánamo Inmates' Rights. Judge Say". *The New York Times*. January, 2005. <<http://www.nytimes.com/2005/01/31/politics/31cnd-gitmo.html>>. Also Mikkelsen, Randall. "High court probes Guatanamo prisoners' right". Reuters. December, 2007. <<http://www.reuters.com/article/topNews/idUSN0455718720071205>>.

election and form political parties. There is no doubt that the separation between politics and military is a step forward limiting the influence of the military in politics.

The constitution also bans the formation of militias outside the framework of the armed forces but this article is in contradiction with the authority of the regional government to create their own armed forces (article 121 -5). This contradiction could in the long run undermine the authority of the Iraqi Army in the whole territory, and therefore erasing the symbolic unifying value that the Army could play in the configuration of a new identity.

The last issue I want to deal with is mentioned superficially in the constitution but it will play a significant role in shaping the Iraqi national identity: the impact of the U.S. occupation on the Iraqi population. The constitution was delivered and approved during an ongoing occupation, and since U.S.-led Coalition forces returned officially sovereignty to Iraqis, the number of U.S. troops had increased from 140,000 to a number of 160,000 approximately. In addition to this number, we have to add another 180,000 foreign personnel working and collaborating with the U.S.-led multinational forces as contractors. These include private security companies and personnel working in the reconstruction. The total number of foreign personnel in Iraq is approximately 400,000.<sup>600</sup> The opposition to the occupation has steadily been growing since the war started, and more Iraqis, regardless of their ethnic or religious background demand the withdrawal of U.S. forces despite the security concerns adduced by the U.S. military and the Iraqi government to maintain foreign troops.<sup>601</sup> It is not rare to hear Iraqis linking the actual situation with the former regime led by Saddam Hussein. The permanence of the occupiers could greatly damage the image of independence, freedom and sovereignty that the constitution deems to imprint. The current constitution could become a symbol of the occupation and U.S. rule in Iraq, and therefore loses all its legitimacy in the eyes of Iraqis.

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<sup>600</sup> Since U.S. led-coalition forces devolved sovereignty officially to Iraqis the number of U.S. had increased from 140,000 to a number of 160,000 troops approximately. In addition to this number we have to add another 180,000 foreign personnel working for along the U.S. troops as contractors. These included private security companies and personnel working in the reconstructions. The total number of foreign personnel in Iraq is approximately 400,000. Goodman, Amy and Gonzalez, Juan. *Ibid.*

<sup>601</sup> "Massive 'End of the Occupation' protest in Baghdad Dwarf the Saddam 'Toppled' rally photos". [Bellaciao.org](http://bellaciao.org). Saturday 9, 2005. < [http://bellaciao.org/en/article.php3?id\\_article=5723](http://bellaciao.org/en/article.php3?id_article=5723)>. For more Iraqi opinions about the occupation please see a poll commissioned by the BBC, ABC and NHK to assess the effects of the US military's surge strategy. September 2007. < <http://www.globalpolicy.org/security/issues/iraq/resist/2007/09bbciraqipoll.pdf>>.

#### 5-4. Civil Rights and Liberties:

The right, freedoms, and duties enjoyed by Iraqis are all contemplated in Section 2 of constitution (article 14—46). This section is divided in two main chapters. Chapter 1 is dedicated to rights and is divided as well into two parts: first, civil and political rights (14—21), and second economic and cultural liberties (22—36). Chapter 2 is entirely dedicated to liberties (37—46).

The constitution grants and guarantees basic rights to Iraqis and installs several provisions limiting the authority of the state. The main issue commented on by scholars and experts is that the Iraqi constitution describes numerous civic, cultural, religious and economic rights and liberties but at the same time leaves key articles regarding civil rights to be elaborated on legislation.<sup>602</sup> For instance, the organic law considers all Iraqis equal in front of the law regardless of their gender, ethnicity, nationality, religion, color, sect, thoughts or beliefs (article 14). This idea is reinforced by article 37, 2, which states that: “*the State shall guarantee protection of the individual from intellectual, political and religious coercion*”. And article 42 which stipulate that: “*each individual shall have freedom of thought, conscience and belief*”. Also article 20: *Iraqi citizens, men and women, shall have the right to participate in public affairs and to enjoy political rights including the right to vote, elect, and run for office*”.

The promotion of individual rights contrasts with certain restrictions imposed on fundamental rights such as the freedom of expression. The law stipulates that the press, advertisement, and publication should not violate public order and public morality. The constitution does not specify what can be regarded as contrary to public morality, and therefore due to the conservative position on religion, liberties such as the freedom of expression can be significantly reduced. This limitation affects also the right to organize public assembly and peaceful demonstrations (article 38). Regarding this article, the constitution does guarantee the

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<sup>602</sup> Brown, Nathan. “The Final Draft of the Constitution: Analysis and Commentary”. *Op. Cit.* P, 3. And, Jabar, Faleh A. *Op. Cit.* P, 6.. Jaber, Faleh. A. *Op. Cit.* P, 5. Edward Wong. “The struggle for Iraq: Religious Law; New Iraqi constitution may curb women’s rights.” [The New York Times](http://query.nytimes.com/gst/fullpage.html?res=9E03E1DB143CF933A15754C0A9639C8B63). July, 2005. <<http://query.nytimes.com/gst/fullpage.html?res=9E03E1DB143CF933A15754C0A9639C8B63>>. Also see Deen, Thalif. “Iraqi Women May Lose Basic Rights Under New Constitution”. [Inter Press Service and Common Dreams.org](http://www.commondreams.org/headlines05/0723-06.htm). July, 2005. <<http://www.commondreams.org/headlines05/0723-06.htm>>.

freedom to form and join associations and political parties, but does not specify how this will be implemented (article 39).

However, we should take into consideration article 46 which prescribes that ordinary laws that may restrict, affect or limit these rights cannot be in contradiction with the essence of the constitution. This is a security clause in order to protect the meaning of the constitution by those who will have the task of developing further legislation. Therefore the Parliament will have a prominent role as the body in charge of drafting and enacting new legislation. The Federal Supreme Court will play a significant role as well, because it is the authority that will study and approve the constitutionality of laws. Other bodies such as the Human Rights Committee is intended to contribute to the process but is not yet clear its authority and competences regarding these issues. Therefore the interpretation of these laws will depend on the composition of these institutions.

Another principle that will have significant consequences in the daily life of Iraqis is article 41 which introduces the personal status law.<sup>603</sup> This article states that: "*Iraqis are free in their commitment to their personal status according to their religions, sects, beliefs, or choices, and this shall be regulated by law*". The "personal status law" is a corpus of norms which regulates marriage, divorce, and inheritance based on religious practices. Iraq has a "personal status law" since 1959 which was considered as one of the most modern personal status law in the Arab world. This type of legislation is based on Islamic practices as I had mentioned, but it was implemented by secular courts, and applied to all Iraqis except those who did not belong to the Muslim community.<sup>604</sup> It was an attempt to homogenize and unify different Muslim religious codes. The constitution does not derogate the personal status law, but leaves the possibility to amend it, leading perhaps to a very conservative and different version of the personal status law. Shiite conservative drafters claimed during the drafting process the necessity to update the law which according to their demands did not allow Shiites and other religions to follow their laws and traditions. They rejected the authority of secular judges.<sup>605</sup>

Previously, during the Shiite presidency of the IGC, conservative members approved a resolution (act 137) in order to derogate the former personal status law and reinstate the *Shari'a*

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<sup>603</sup> *Ibid.*

<sup>604</sup> *Ibid.*

<sup>605</sup> *Ibid.*

in matters related to personal status affairs. The resolution was not legally binding and Bremer did not approve its implementation.<sup>606</sup> There are no guarantees that the former law of 1959 would remain as it is (unified code based on Islamic principles but implemented by secular judges). Also it is not clear what other choices Iraqis would have to manage their marriages, divorces and inheritance affairs. Will each community have a different personal status law? Would secular Iraqis have the possibility to choose other kind of legislation? These steps toward the implementation of conservative traditions had worried specially women who also had protested about article 29, a, which declares that the state should guarantee the preservation of the 'ethical and religious values' in the family. A conservative interpretation of these articles could lead to the restriction of basic rights to Iraqi women but a more balanced interpretation would invoke articles 37 (prohibits religious coercion), and article 41 which in theory would allow Iraqis to chose between secular or religious courts.<sup>607</sup>

In addition to this, and according to the theory I presented in chapter 2, in the section dedicated to civil rights, modern constitutions tend to include the creation of certain institutions to defend, protect, monitor and promote civil rights and liberties. These institutions can be under the authority of the judiciary (tribunal, inspector or auditor general), or they may be completely independent from any branch of government such as human right commissions or institutions such as ombudsman. The Iraqi constitution makes a timid commitment to promote civil society institutions through article (45, 1), but once again it gives little guidance about how this would be implemented. The Federal Supreme Court is the main institution with the authority to interpret the constitution. Article 90 establishes that the FSC has to be composed by several judges including experts in Islamic jurisprudence. Therefore depending on the composition of this body the law would be interpreted in a way or another.

Further the drafters adopted a constitution that only assures basic social services. The constitution establishes that basic education should be guaranteed to all Iraqis (article 34), but

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<sup>606</sup>As I had mentioned before, during the presidency of Al-Aziz al-Hakim in Interim Government Council, conservative Shiite members tried to take advantages of their presidency in order to approve resolution 137. However, the resolution 137 establish the foundation of a new personal status law based on the *Shari'a*. This resolution contemplates that each religious community should be rule by a specific law. The IGC hold the implementation of this resolution because as Adnan Pachachi (member of the IGC) pointed out this resolution could not replace the existing law which can only replaced by a new law, and therefore this resolution will not yet be implemented. "Iraq new Family Law on hold". UN Office for the Coordination of Humanitarian Affairs. IRIN. February, 2004. <<http://www.irinnews.org/report.aspx?reportid=23381>>.

<sup>607</sup> Faleh. A. Jaber. *Op. Cit.* P, 5-6.



social security and health services are guaranteed only to Iraqis that are old, sick, orphans, or with physical disabilities (30 –2–). The law does not guarantee social security services for all Iraqis. Regarding workers rights, the constitution makes an ambiguous commitment to social justice principles (article 22). For instance, the constitution allows the formation of worker unions and the organization of assemblies or public demonstrations, but leaves to legislation their rules and regulations. Also, the constitution stipulates the reform of the Iraqi economy in accordance with “modern economic principles”, and the development of the private sector. How these reforms are codified and implemented in relationship with the ambiguous social principles mentioned above could greatly result in a significant reduction of workers’ rights.

The weakness and poor effectiveness of the rights and freedoms introduced in the constitution can be further exemplified by the introduction of the death penalty during 2004 by the IGC. The CPA decided to suspend capital punishment with CPA order n°.7, but since this institution transferred sovereignty to Iraqis, first to the IGC and later on to the Iraqi parliament, several laws had been passed strengthening the implementation of this punishment<sup>608</sup>. The constitution establishes that: “*Every individual has the right to enjoy life, security and liberty. Deprivation or restriction of these rights is prohibited except in accordance with the law and based on a decision issued by a competent judicial authority*”. This article should be a guarantee to protect the life of individuals in any circumstance, but eventually the last wording of the article suggests that the judicial authority have the power to deprive life. Therefore according to this article and the principle established in International Law and *the Universal Declaration of Human Rights* capital punishment is accepted for “the most serious crimes and subject to a number of conditions”.<sup>609</sup> The Iraqi Penal Code allows the usage of capital punishment and this code was used by Saddam Hussein to try thousands of Iraqis. The law was amended several times to enhance the powers and authorities (RCC) which came to impose the death penalty for a variety of reasons that range from insulting the president to stealing a car.<sup>610</sup> Now, the new Iraqi government justified its re-introduction of this penalty due to the grave security situation

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<sup>608</sup> Amnesty International “Unjust and Unfair: the death penalty in Iraq”. *AI*. April, 2007.

<<http://www.amnesty.org/en/library/asset/MDE14/014/2007/en/dom-MDE140142007en.pdf>>. P, 1.

<sup>609</sup> Mayer, Elizabeth. *Islam and Human Rights: Tradition and Politics*. Westview press (San Francisco), and Pinter publisher (London). II ed. 1995. P, 63.

<sup>610</sup> Amnesty International “Unjust and Unfair: the death penalty in Iraq”. *Ibid*. Pp, 5-6.

despite the fact that the death penalty does not guarantee per se the increasing of security and stability.<sup>611</sup>

Some voices within the Iraqi government such as the Iraqi President, Jalal Talabani, have been opposing the use of the death penalty. The President refused to sign Saddam Hussein's sentence as well the sentences of the others that were tried with him.<sup>612</sup> The Minister of Human rights Wijdan Salem justifies the re-introduction arguing that the government will only apply this punishment in a limited number of cases and during a particular period of time, but so far the parliament had passed legislation pointing out to another direction.<sup>613</sup> I have already mentioned the Iraqi Penal Code (IPC) introduced by decree in 2004, but since it was re-introduction, it has been complemented by the Statute of the Supreme Iraqi Criminal Court (October 2005); the Iraqi Anti-Terrorism Law (IATL) –November 2005 –; and the Kurdish Anti-Terrorism Law (KATL), July 2006.<sup>614</sup>

According to the report prepared by Amnesty International these codes fail to meet international human rights standards.<sup>615</sup> The law tries to be an effective tool against terrorism but is too broad and vague. For instance, the law considers that the mere fact of being part of a terrorist affiliation is enough to be punished by death penalty (article 1 KATL).<sup>616</sup> Also, these laws have contradictory articles and provisions. For instance, the IPC allowed the President to commute the death penalty but the SSICC derogates these provisions.<sup>617</sup>

Since this law was introduced in mid 2004 more than 204 people had been sentenced to death. The Iraqi government is not keeping records about the executions, and so far 100 Iraqis had been executed. This number could be higher due the lack of information.<sup>618</sup> The previous regime used the IPC as a repression tool, and it is very strange why with such a bloody record some Iraqi politicians decided to re-introduce this penalty in the Iraqi legal system. There are no guarantees that these measures will reduce terrorism or sectarian violence in Iraq, these laws may further complicate conflicts, especially in Iraq, where the Judiciary system still

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<sup>611</sup> *Ibid.*

<sup>612</sup> *Ibid.* P, 9.

<sup>613</sup> *Ibid.*

<sup>614</sup> *Ibid.*

<sup>615</sup> *Ibid.*

<sup>616</sup> *Ibid.* P, 15

<sup>617</sup> *Ibid.* P, 12.

<sup>618</sup> *Ibid.* P, 3-4.

lacks the independence and impartiality of a mature legal system. The United Nations and the European Union had already denounced the lack of guarantees that Iraqi courts had demonstrated during the trial of several Ba'athist members.<sup>619</sup> Thus an unfair judiciary system could become a revenge tool unable to protect innocent Iraqis. The abolition of the death penalty could be a paramount step towards a more humanitarian judiciary system.

#### 5-5. The Iraqi federal model (federal vs. regional):

##### Introduction:

The Constitutional Drafting Committee found during its work that one of the most difficult issues was to settle the federal concept of the state as well as what type of federal model would be put in place. It seems very unlikely that negotiation could really have contemplated the idea of creating a unitary state due to Kurdish autonomy demands prior to the occupation.<sup>620</sup> During the drafting process, the main points of discussions were about federalism (*al-ittihādīyah*). Kurdish, and later on Shiite, members were convinced of the necessity to create a federal structure in Iraq, while Arab Sunni members were reluctant to adopt this model. In this regard, some authors had interpreted the reluctance of the Sunni community to accept a federal system of government to a nostalgic hope to restore some form of Ba'athist rule, "*under which Shiites and Kurds would be treated, as best, as second class citizens*".<sup>621</sup> This statement perhaps is based on a wrong interpretation of Sunni delegates' intentions in the constitutional process, but why?

Kurdish politicians and constitutional drafting members had been since the beginning of the process demanding great amounts of autonomy that would lead to a *de facto* independency. The position of the Sunni drafter was based on the fact that granting too much autonomy to the Kurdish region would lead to the disintegration of Iraq in three major units. Although the Shiite representatives were reluctant to accept a federal system of government

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<sup>619</sup> *Ibid.*

<sup>620</sup> Mostly all the political organization and parties organized before the occupation abrogated for a formation of a federal system: the Kurdish draft constitution, the Declaration of Shi'ias in Iraq in 2002, political stamens of the Iraqi opposition conference, the INC draft constitution, the report of the democratic principles working group and other documents promotes this idea. "Establishing a Stable Democratic Constitutional Structure in Iraq: Some Basic considerations". *Ibid.*

<sup>621</sup> Rivkin, David b, Jr. And. Casey, Lee A. "The New Iraqi Constitution". The Heritage Foundation. September, 16<sup>th</sup>, 2005. < <http://www.heritage.org/Research/Iraq/BG1879.cfm>>.

during the TAL, now during CDC meeting were moving towards accepting a federal system that would enable them to create a unified Shiite autonomous region, very close to what the Kurds were demanding, called by some “*Shiiistan*”. The Kurds and Shiites finally reached an agreement that would allow one or more Iraq’s governorate (Iraq is divided in 18 governorates) “the right to organize into a region” through referendum. The Sunnis rejected this proposal on the grounds that they will be caught between two larger entities with huge oil reserves and other natural resources.<sup>622</sup> During the last phases of the drafting process Kurds and Shiites – August 2005– were accusing the Arab Sunni community blocking the negotiation about federalism.<sup>623</sup>

According to Morrow these accusations were not totally accurate, and during July some relevant Arab Sunni leaders participating in the CDC accepted the possibility of governorates-based federalism that would grant Sunni areas self-governance.<sup>624</sup> However, Arab Sunni representatives could hardly move forward with the negotiations because there was a strong resistance within the Arab Sunni community to accept federalism. Accepting *al-ittihadiyah* would mean to accept Kurdish demands of independence. Federalism was not seen as an internationally recognized system of government as Morrows points out, and it was not regarded as well as a real alternative way of government that would help all communities in Iraq to live together, but on the contrary, it was regarded as a way of dividing Iraq.<sup>625</sup> According to surveys conducted by the United Nations Office for Project Services (UNPS) in Sunni areas, 51% of the Sunni interview seems to believe that federalism would lead to a divided Iraq, and 46.8% believed it would lead to a civil war.<sup>626</sup> Therefore, although there was resistance to accept federalism among Arab Sunnis, they were almost a 50 % of the Arab Sunni population favoring a federal model. Sunnis were changing their views especially when they understood what federalism entitles. There is a statement of an Arab Sunni lawyer that exemplifies this tendency: “when you ask a Sunni if they want Anbar to rule Najaf they say no; if you ask if they want Najaf to rule Anbar, they say no. They want federalism without realizing it”.<sup>627</sup> The Arab Sunnis were approaching to accept this model as the Shiites did during the first year of occupation, but the

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<sup>622</sup> Morrow, Jonathan. *Op. Cit.* P, 11-12.

<sup>623</sup> *Ibid.*

<sup>624</sup> *Ibid.*

<sup>625</sup> *Ibid.*

<sup>626</sup> *Ibid.*

<sup>627</sup> *Ibid.*

pressure from different actors to complete the August 15<sup>th</sup> deadline prevent a broader agreement to be achieved.

The federal model –stipulated in section one, fundamental principles, article 1 of the new Iraqi constitution– describes Iraq as a: *single federal, independent and fully sovereign state* [...]. This definition follows the same system of government approved by the CPA and IGC during the spring of 2004, and as I had mentioned in previous chapters, is greatly influenced by the Kurdish view and understanding of the Iraqi state”.<sup>628</sup> After intense negotiation with Kurdish drafters, the Iraqi state is based on a federal model dividing authority in five different levels of government: the federal (central) government, the capital (non-federated entity); the regional (federated provinces, or two or more provinces); the governorates (provinces), and local (municipal) administrations (article 116).<sup>629</sup> The only exception is the capital, Baghdad, which is by itself an independent region, and cannot merge with other regions (article 124). The Iraqi federal system allows the Kurdish region to become a federal region enjoying almost the same powers that the federal government has (article 117).

Nevertheless, the federal government has exclusive power on key issues such as: foreign policy, approving international treaties, appointing diplomats, formulating national security policy and controlling army forces, conceding citizenship and political asylum, regulating measures and weights, and managing the distribution of water (articles 110). The organic law stipulates also that all the competences which are not mentioned under the exclusivity of the federal government are competences that belong to the regional government (article 115). In addition to this, whenever conflicts emerge regarding competences (which are not exclusive to the federal government) between the federal and regional government, the constitution favors the position of the regional government, and allows the region to amend ordinary legislation that may undermine its authority (121, –2<sup>nd</sup>–). Although the Iraqi federal government has the exclusivity on several key issues, there are political, economic, and military competences bestowed to the regional government that would greatly weaken the management capacity of the federal government. The constitution clearly favors the regional governments when it

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<sup>628</sup> Article 4 of the TAL establishes that the system of government should be: “*republican, federal, democratic, and pluralistic, and powers shall be shared between the federal government and the regional governments, governorates, municipalities, and local administrations*”.

<sup>629</sup> A. Jabar, Faleh. “The Constitution of Iraq: Religious and Ethnic Relation”. Minority Rights Group International. December 2005. P, 4. < <http://www.reliefweb.int/library/documents/2005/mrg-irq-16dec.pdf>>.

comes to interpretation of the constitution,<sup>630</sup> and allows also the regions to approve legislation that may contradict resolution approved by the federal government except exclusive competences of the federal government (foreign affairs and defense).<sup>631</sup>

If we take a look at other Arab countries, the competences of the central government are usually greater,<sup>632</sup> Although authors as Rivkin and Casey defend the idea that a strong central government will emerge in Iraq due to the exclusive competences bestowed in it,<sup>633</sup> and following Brown's argument that a strong federal administration may emerge depending on how the central government expands its authority through legislation and interpretation of the constitutional language.<sup>634</sup> We have to take into consideration that the Federal Supreme Court will have the last saying in many conflicts emerging between levels of government (depending on the interpretation could be a federal or confederal system), and the central government will only have two exclusive competences defense and foreign affairs which are both limited by other articles in the constitution as well.<sup>635</sup>

The powers of the regional government are extensive. Obviously they have the same federal right to develop legislative, executive, and judicial institutions (article 120). They have the authority to write their own constitutions, to open commercial offices in Iraqi embassies abroad, and to manage their own security forces (article 121). This last point is especially sensitive because the constitution allows the creation of regional armed forces which I believe is against one of the basic principles stipulated in the constitution in article 9 section -B- which stipulates that: "*The formation of military militias outside the framework of the armed forces is prohibited*". This last article can be undermined by article 121 -5- which permits the creation of

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<sup>630</sup>Article 115: "All powers not stipulated in the exclusive powers of the federal government belong to the authorities of the regions and governorates that are not organized in a region. With regard to other powers shared between the federal government and the regional government, priority shall be given to the law of the regions and governorates not organized in a region in case of dispute".

<sup>631</sup>Article 121 -2-, *In case of a contradiction between regional and national legislation in respect to a matter outside the exclusive authorities of the federal government, the regional power shall have the right to amend the application of the national legislation within that region.*

<sup>632</sup>Brown, Nathan. "The Final Draft of the Constitution: Analysis and Commentary". *Op .Cit.* P, 13.

<sup>633</sup>Rivkin, David B., Jr. And Casey, Lee A.. *Op. Cit.* P, 3-4.

<sup>634</sup>Brown considers that the central government has some tools to expand its authority. There are re two reasons: "*First, some of the division of responsibilities explicitly requires implementing legislation; the rest implicitly require it. Second, it might be possible to use some of the general language (such as the authority to regulate trade between regions and provinces) very expansively*". Brown, Nathan. "The Final Draft of the Constitution: Analysis and Commentary". *Op .Cit.* P, 13.

<sup>635</sup> *Ibid.*

regional security forces: *The regional government shall be responsible for all the administrative requirements of the region, particularly the establishment and organization of the internal security forces for the region such as police, security forces, and guards of the region*". This issue is considerably delicate because the lack of security during the occupation has boosted the consolidation and formation of several militias in Iraqi society. These are small, local, paramilitary-style brigades that had been formed under the patronage of local tribes, religious leaders, and political parties.<sup>636</sup> Will these militias become the *guards of the region*?

There are militias fighting against the Arab Sunni insurgency and in a way or another collaborate with the Interior and Defense ministry; but there are other groups operating freely without the consent of Iraqi authorities. The most important established militias are the *peshmerga* (Kurdish), the Badr organization (Shiite), and the Mahdi Army (Shiite).<sup>637</sup> These organizations are tied to Iraq's leading political parties, organized along sectarian lines, and they work to enforce their concept of order in their respective regions. The relationship of these militias with the U.S. led-Coalition forces and the Iraqi federal government is variable and complex.<sup>638</sup> Especially with the Mahdi Army and his leader Muqtada al-Sadr who rejects the occupation and the occupiers, and calls for the liberation of Iraq while he vaguely compromises sometimes with the Iraqi government. In a recent statement al-Sadr mentioned:

*"If the deployment of the security forces shows anything –he is referring to a recent order by Maliki's government to deploy more forces in the south–, it shows that the government is still under the despicable pressure of the Americans, their lowly, hateful policies of deception, and their unjust power. Therefore, this government is trying to prevent the annual Million Strong demonstrations against the occupation, and to prevent believers from participating in the elections. It is also working to lay the groundwork of the American project which dictates that Iraq is divided along sectarian and ethnic lines. [...] The Iraqi government should know that the*

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<sup>636</sup> Beehner, Lionel. "Iraq: militia groups". *Council on Foreign Relations*. June, 2005. <<http://www.cfr.org/publication/8175/#1>>.

<sup>637</sup> This is just one example of the numerous active militias that are in Iraq these days: the Badr organization which is affiliated to the largest Shiite party (IISC), the Mahdi Army, Shiite militia composed by followers of Muqtada al-Sadr, the Wolf Brigades (a very violent Shiite group), General Adnan Thavit, retired Sunni general that leads a counterinsurgency militia. The list goes on and on and although the government had condemned some of them, there are others that enjoy the support of the Iraqi government and the U.S. Led-coalition forces (Wolf Brigades) due to the lack of security in Iraq as had been pointed out by some U.S. officials. *Ibid.*

<sup>638</sup> *Ibid.*

*army of the Imam al-Mahdi will continue to work hand in hand with the people of Iraq to provide this people with the security, stability, independence, liberation, unity, and brotherhood which it needs”.*<sup>639</sup>

The Kurdish liberation Army, also known as *Peshmergas*, is one the oldest and best organized militias in Iraq. Their forces are around 100,000 troops and they serve as the primary security forces in the Kurdistan region.<sup>640</sup> Kurdish authorities had always demanded the conservation of the *Peshmergas* as a requisite in order to abandon their independence claims, and accept the authority of the federal government. As a result, the new Iraqi Army has not been deployed in the Kurdistan region, and Kurdish officials demand that the Kurdistan parliament should approve first the deployment of Iraqi troops which is totally unnecessary according to the constitution.<sup>641</sup>

Regarding foreign affairs, the constitution foreseen in chapter four articles 105-106, – under the title of Independent Commission– the creation of an independent public commission with two main competences: to assist regions and provinces in international conferences (article 105), and to monitor and audit the proper distribution of the central government’s revenues (article 106). This body should have amongst its members, representatives from all the level of government, and as Brown had pointed out, depending how this commission operates can determine whether the Iraqi political system is moving towards federalism or confederalism –which allows greater autonomy and independence.<sup>642</sup>

Another unclear point that we should carefully address is the distribution and management of natural resources. This is probably one of the most ambiguous and unclear articles of the constitution (articles 111-112). The constitution stipulates that oil and gas is for all Iraqis in all regions and governorates (article 111). These two laws seem to promote solidarity amongst all the administrative units, and areas which had been historically deprived from oil revenues; the law however does not clarify if the benefits of the oils industry will be

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<sup>639</sup>Rabkin, Nathan. “A Statement of Muqtada al-Sadr”. *The Institute for the Study of War*. April 8, 2008. <[http://iraqstatusreport.org/index.php?option=com\\_content&view=article&id=248&Itemid=3](http://iraqstatusreport.org/index.php?option=com_content&view=article&id=248&Itemid=3)>

<sup>640</sup>Beehner, Lionel. “Iraq: militia groups”. *Council on Foreign Relations*. June, 2005. <<http://www.cfr.org/publication/8175/#1>>.

<sup>641</sup> *Ibid.*

<sup>642</sup> Brown, Nathan. “The Final Draft of the Constitution: Analysis and Commentary”. *Op.Cit.* P, 12.



distributed equally, or it would be shared with the sub-national units.<sup>643</sup> Also, the law makes a distinction between old and new oil fields. The constitution grants the federal government the power to administrate oil revenues but only oil fields currently under exploitation will be distributed nationally. The constitution remains silent about the future of new oil and gas explorations. The only guidance offered by the organic law is that the federal, regional and local administrations share the authority to manage these fields, and they should collaborate and coordinate together in order to design plans enhancing the benefits from oil and gas extraction using “market principles” (article 112). However, how the federal government and the regions and local administration will share the management and revenues is not specified.

One of the first projects handled by the Iraqi government was the drafting of the oil and gas bill which was approved by Malaki’s cabinet on February 26, 2007.<sup>644</sup> The bill was sent to parliament, but since then, this institution has been unable to approve it due precisely to disputes between the federal government and the Kurdistan regional government<sup>645</sup>. This new bill established the creation of the “Federal Oil and Gas Commission” (FOGC) to assist the Council of Minister and the Ministry of Oil in creating and designing oil policies and plans<sup>646</sup>. This body is not a pure federal institutions but rather a hybrid that combines members of the federal government (the Prime Minister, four Ministers, and top officials from governmental agencies), and representatives from regional and local administration (each federal region will be represented by a minister, and each “producing governorate” not belonging to a region will have a representative of its own), as well as three oil experts (how they are appointed is not specified).<sup>647</sup> According to the decision-making model envisioned by the law, the federal government represented by the Ministry of Oil will have only the power to design plans not to

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<sup>643</sup> *Ibid.* P, 13.

<sup>644</sup> Mekay, Emad. “New Iraqi Oil as Cover for Privatization”. *Inter Press Service*. February 28<sup>th</sup>, 2007. <<http://www.commondreams.org/headlines07/0228-05.htm>>.

<sup>645</sup> “Iraq Oil Bill Sent to Parliament”. *BBC News*. May, 2007. <[http://news.bbc.co.uk/2/hi/middle\\_east/6616015.stm](http://news.bbc.co.uk/2/hi/middle_east/6616015.stm)>.

<sup>646</sup> Visser, Reidar. “Iraq’s Draft Oil: The Federal Dimension”. *Historiae.Org* 6, March 2006. <<http://www.historiae.org/oil-law.asp>>. Also I had used an unofficial translation of the drafted law by Jarrar, Raed: “The Official Draft Oil and Gas Law of the Iraq Republic”. *Al-Ghad.org*. 15<sup>th</sup> January, 2007. <<http://www.al-ghad.org/2007/02/14/exclusive-the-official-draft-of-the-oil-and-gas-law-of-the-iraq-republic-15-jan-2007/>>.

<sup>647</sup> Visser, Reidar. “Iraq’s Draft Oil: The Federal Dimension”. *Ibid.*

approve them.<sup>648</sup> This competence will be the power of the FOGC which has the final authority to approve any project related to the discovery and exploitation of oil fields.

This model is highly decentralized and sometimes chaotic but it does not make a differentiation between producing and non-producing provinces. Although this bill ratifies the concept forwarded in the constitution in article 111: "*Oil and gas are owned by all the people of Iraq in all the regions and governorate*"; the bill does not specify how revenues will be distributed between provinces leaving this issue for further legislation by the federal government. The bill opts for a strong privatization policy, open market, and allows foreign companies to exploit Iraq oil and gas resources for a period of twenty years.

The hydrocarbon bill had been criticized as well because it was drafted secretly by three members of the Iraqi cabinet (Kurd-Shiite) and without the participation of key actors involved in the oil sector.<sup>649</sup> This model also is a radical change from the former oil industry model which was based on public and socialist principles, nationalization, and according to analysts the oil and gas remains in the hand of the state but not in substance.<sup>650</sup> The fact that the federal government is transferring ownership to foreign companies could be used as a pretext to continue the U.S. occupation on the grounds of providing security to these companies. The bill does not clearly mention how disputes between the government and companies will be handled as well. Finally the bill mentions three annexes that are not included in the draft bill, and according to the sources had not been drafted yet. All these elements make the bill very complicated, dark and confusing.<sup>651</sup>

Therefore, the Iraqi constitution advocates the establishment of a highly decentralized federal system as a way to solve the multiple and complex societal configurations of Iraq. However, the fact that the country is organized under a unitary or federal model of government is not enough to assure a peaceful resolution of conflicts amongst different ethnic or religious sects as the Lebanese case shows to some extent. The Lebanese constitution established a

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<sup>648</sup> *Ibid.*

<sup>649</sup> Mekay, Emad. "New Iraqi Oil as Cover for Privatization". *Ibid.*

<sup>650</sup> *Ibid.*

<sup>651</sup> Al-Amir, Fouad. "Discussions on the Iraq Oil Law". *Al-Ghad.Org*. February, 2007. <<http://www.al-ghad.org/2007/02/20/discussion-on-the-iraq-oil-law/>>.

parliamentary democracy in the framework of a single and united state (article 1).<sup>652</sup> Although the Lebanese constitution advocates for a well balanced divisions of powers, cooperation amongst branches of government, and respect for human rights, the Lebanese organic law establishes a provisional political confessional system which assures that different religious communities enjoy an “*equitable representation in public employment and the composition of the Council of Ministers*” (article 95).<sup>653</sup>

This provisional period shall last until the Chamber of Deputies forms a National Committee in order to abolish such system as it was agreed in the Document of National Understanding or Taif Agreement.<sup>654</sup> Paul Salem argues that the Taif Agreement was useful in removing the relative supremacy of one of the sects (Christians Maronite), but so far had failed in solving political confessionalism in Lebanon.<sup>655</sup> The Iraqi constitution does not promote explicitly a political system following confessional or ethnic lines, but it does implicitly promote a highly decentralized federal system (considered by other as an extreme model of federalism)<sup>656</sup> which has the potential to create –and it had already established Kurdistan as a federal region (article 117)– political entities following ethnic and confessional lines. In this regard I consider Katherine Adeney argumentation particularly enlightening in her analysis of federalism and ethnic conflict in India:

*“When a federation is organized around territorially concentrated ethnic groups, federalism can provide a mechanism of affirming ethnic segmental autonomy. When these homogeneous units secure representation in decision-making bodies at the center, they are part of a wider consociational segmental autonomy framework”.*<sup>657</sup> Therefore federalism may promote the representation of all religious and ethnic groups in the new political system through allocating powers and authority to manage their own affairs and administration but, if these units are not equally-proportional represented in the decision making process at the central government, there is the risk of paving the way for the creation of isolated cantons without

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<sup>652</sup>The Lebanese Constitution. Approved on 1926 and based on the translation of Paul Salem for the Lebanese Center of Political Studies, N°1/1991. <[http://www.servat.unibe.ch/icl/le00000\\_.html](http://www.servat.unibe.ch/icl/le00000_.html)>.

<sup>653</sup> Salem, Paul. *Op. Cit.* P, 6.

<sup>654</sup> *Ibid.*

<sup>655</sup> *Ibid.*

<sup>656</sup> Bennis, Phyllis. *Ibid.*

<sup>657</sup> Adeney, Katherine. *Federalism and Ethnic Conflict Regulation in India and Pakistan*. Gordonsville, VA, USA: Palgrave Macmillan, 2006. P, 91.

connections one to each other. For instance, if we take a look to map 2 showing the ethnic and religious configuration of Iraq we easily appreciate the absolute asymmetry among regions that may possibly emerge. Kurdish in the north and Shiite in the south are located in geographic areas particularly rich and wealthy compared with the small arid and deserted area with fewer natural resources where Arab Sunnis population is located.

However, a proportional distribution of powers and resources may not be not enough if the country lacks of a national identity, beyond religious or ethnic differences, capable of unifying diverse and antagonistic forces. Perhaps the main problem is the tendency of intermingling politics with religion, or party structures with clan, tribal or family affiliations. For instance, in the last parliamentary elections, moderate parties constituted along trans-ethnic and religious lines had gained only 18% of the votes, while political parties based on ethnic nationalism or religious believes have achieved great success.<sup>658</sup> The construction of a new national identity would necessary comprise the multiple facets of Iraqi society: Kurdish, Arab, Christians and Turkmen. It would need to promote respect and tolerance between religious believes (between and within Muslim and Christian sects); and promote the participation of women, non-religious figures, and other minorities in politics. In other to accomplish this, the Iraqi state should assume a neutral ideological position. One possible solution to this situation is the elaboration and promotion through the constitution of a national identity that does not denied or refers to a particular religious group or sect but a combination of all. The State rather than being secular will be neutral, and religious and ethnic manifestation will have limited space in place in public life.

#### **5-6. The Iraqi federal government institutions: the legislative, executive and judicial branches:**

The organic law stipulates that the powers of the federal government (*al-sultāt al-itihādīya*) will consist of the legislative, executive, and judicial powers according to the theory of division of powers (article 47). The legislative authority consists of two bodies the Council of Representatives or *majlis an-Nuāb* (CoR) and the Federation Council or *majlis al-itihād* (FC)

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<sup>658</sup>Jabar, Faleh. A. *Op. Cit.* P. 3.

(article 48). The executive authority consists of a President, and the Council of Ministers (articles 66), and the judiciary authority is composed by different types and levels of courts (article 87). The constitution established that the federal judiciary authority should be comprised by the Higher Juridical Council, the Federal, Supreme Court, the Federal Court of Cassation, the Public Prosecution Department, the Judiciary Oversight Commission, and other federal courts (article 89).

### **The Council of Representatives:**

The Iraqi constitution declares that the country is based on the principles of parliamentary democracy (article 1). The people elect a Parliament which is bestowed with the legislative authority according the organic law (article 48). The Parliament in return elects a President (article 61 -3-) and Prime Minister (article 76 -4-), this latter is bestowed with the direct executive authority (article 78). Thus elections are a fundamental step for establishing a truly representative government and depending on the various electoral systems available nowadays (e.g., plurality, majority or proportional representation) the council of minister would be more or less representative of the Iraqi people.<sup>659</sup>

The constitution stipulates basic guidance principles about how elections should be hold, and how many seats this assembly needs to be representative of the Iraqi people (article 49). Regarding the elections, the Council of Representatives -or parliament- should be formed by a number of members at a ratio of one seat per 100,000 Iraqis (article 49). Other requirement mentioned by the organic law is that a minimum of one-quarter of the CoR should be women. However, the constitution stipulates that all issues referred to elections should be established by law (article 40, -3<sup>rd</sup>-). The electoral law used for the December elections was drafted by the IECI,

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<sup>659</sup> Please see "Electoral Systems". *Commission of Legislative Democracy. Government of New Brunswick*. 2003. <<http://www.gnb.ca/0100/doc/fact4system-e.pdf>>. Also for more information about different models see: Andrew Reding "Democracy: Electoral Systems". *World Policy Institute*. 1996-1999. <<http://www.worldpolicy.org/projects/globalrights/prindex.html>>. About countries changing or updating their electoral systems including those that suffered violent conflicts: Kenneth Benoit. "Models of Electoral System Change". *Elsevier and Electoral Studies*. 2004. <[http://www.kenbenoit.net/pdfs/benoit\\_MES.pdf](http://www.kenbenoit.net/pdfs/benoit_MES.pdf)>. Regarding the Iraq electoral model, please see: "Electoral Support". *UNAMI*. <<http://www.uniraq.org/aboutus/ElectoralSupport.asp#Q2>>.

and passed by the TNA on September 2005.<sup>660</sup> The law determines all related to the elections including candidates and voter's requirements. In summary the electoral system used during the last election fall into the category known as close list proportional representation.<sup>661</sup>

The IECI argues that the principal objective of the law was to provide more representative elections by allocating seats to political parties not on the basis of the total amounts of votes obtained across the country –system put into practice during the January elections- but based on the votes they obtained in 18 governorates electoral districts.<sup>662</sup> Thus the law stipulates that the CoR shall be composed by 275 seats.<sup>663</sup>

According to the final report conducted by the International Mission for Iraqi Elections the formula meets the representative objectives proposed by the law. The report considers the law to be an example of democratic practices because it increases the opportunities for minority representation as well as it assures a gender quota of 25% of the seats for women.<sup>664</sup> This formula seems to be regarded as one of the most advanced in positive discrimination because these quotas are not only assured in the constitution –which seems to be the case in many other countries–but also regulated in the electoral laws.<sup>665</sup> Nevertheless, some voices claim that the electoral law would leave unrepresented minorities as Chaldo-Assyrians and Turkmen, and other members of the three main communities “who will be minorities in provinces dominated by other groups”.<sup>666</sup> The parliament is discussing to introduce some changes in the electoral system for the coming elections in 2008.<sup>667</sup> Despite some imperfections, the Iraqi electoral system assures a fair representation of the Iraqi people and it was designed in accordance with

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<sup>660</sup> Electoral Law Fact Sheet. The IECI. <<http://www.ieciraq.org/final%20cand/Fact%20Sheet%20-%20Elections%20Law%20-%20En.pdf>>

<sup>661</sup> “Electoral Support”. UNAMI. <<http://www.uniraq.org/aboutus/ElectoralSupport.asp#Q2>>.

<sup>662</sup> *Ibid.*

<sup>663</sup> According to the formula designed by the IECI: “230 seats shall be distributed to the electoral districts in accordance with official borders and 45 shall be compensatory seats. Each governorate is one electoral district and shall be allotted a number of seats proportional to the number of registered voters in the governorate in accordance with the elections of January 2005 “based on the public distribution list”. Electoral Law, Fact Sheet. *Ibid.* Also see: “International Mission for Iraqi Elections (IMIE)”. This is a committee formed between the U.N. and the IECI. Final Report on the December 15, 2005. Iraqi Council of Representatives Elections. IMIE. April, 2006. <[http://www.imie.ca/pdf/final\\_report.pdf](http://www.imie.ca/pdf/final_report.pdf)>.

<sup>664</sup> *Ibid.*

<sup>665</sup> *Ibid.*

<sup>666</sup> Jabar, Fahh A. “The Constitution of Iraq: Religious and Ethnic Relation”. *Op. Cit.* P, 6.

<sup>667</sup> “Electoral Support”. UNAMI. <<http://www.uniraq.org/aboutus/ElectoralSupport.asp#Q2>>.

similar practice in other democratic countries as German, Sweden, Switzerland, Belgium, Holland, Austria, Australia, Mexico, etc...<sup>668</sup>

Also, the constitution established the necessary requirements that their members should meet, and clarifies the procedures that this cabinet should follow during its sessions (56-58). The responsibilities and functions of the CoR are also specified along article 59. The CoR needs a simple majority to approve laws unless otherwise stipulated (article 59 -2- ). This cabinet has the authority to approve federal laws, monitor the performance of the executive – including the President and the Prime Minister, (article 61, 7)–, and has to ratify the law that will regulate international treaties and agreements. It is very strange that the constitution leaves to legislation the procedure to approve international agreements when article 73 mentions that international agreements will need the approval of the president and the CoR.<sup>669</sup> This last idea seems to be underlying the last draft of August 28<sup>th</sup> but was ultimately modified to its actual wording in September 13<sup>th</sup> draft. The CoR has the power to appoint key positions in the judiciary, ambassadors, and high rank positions in the military and intelligence (article 61 -5- ). Also, the CoR has the authority to declare war and establish the state of emergency with the absolute majority of the cabinet.

The Parliament has great powers designing and establishing an official budget for the federal government (article 62). The organic law describes the rights and privileges of the Parliament members, and the procedures to follow in order to dissolve the Parliament (article 64). Finally, the constitution calls for the formation of a Federation Council (FC) (article 65). This council is supposed to be an additional parliamentary chamber in order to broaden the representation of Iraqis in the legislative from the regions and governorates that were not organize into regional governments (article 65). This council will be an independent chamber of parliament but unfortunately the article is very general and leaves all its competences to be specified by law. The fact that the authorities and competences of an independence chamber will be written by the Parliament undermines the possibility of this house to become a strong

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<sup>668</sup> "What is Proportional Representation?" World Policy Institute. 1996-1999.  
<<http://www.worldpolicy.org/projects/globalrights/prindex.html>>.

<sup>669</sup> Brown, Nathan. "The Final Draft of the Constitution: Analysis and Commentary". *Op.Cit.* P, 8.

institution. As Brown argues this arrangement is giving the Parliament supremacy over the FC.<sup>670</sup>

The CoR has all the characteristics to become a strong democratic institution. It will have the power to oversee the executive (the Parliament can withdraw confidence from ministers including the Prime Minister and the President); it has a prominent role approving, relocating and reducing the amount of spending in the federal budget, and also has the function of appointing top positions in the judicial, military-intelligence and diplomatic institutions. The constitution timidly promotes the role of the opposition in the government decision making process, setting a high percentage for approving international agreements and the declaration of state of emergency, unless the government's cabinet controls over two-thirds of the CoR. The declaration of state of emergency (*halāt at-tawāri*) has been used in the past by the Executive to suspend the constitution. This is for instance the case of Egypt that has been almost all the twentieth century under martial law.<sup>671</sup> The Egyptian constitution allows the president to declare the state of emergency if it has the parliament's approval. The Iraqi constitution does not specify under what circumstances the state of emergency can be declared. The organic law also leaves to future legislation what powers should the executive have during this period, and the state of emergency can be renewed indefinitely with the consent of parliament.

However, the fact that the executive can rule with simple majority and the presidency has become a ceremonial council with no powers is regarded a step towards majoritarian tyranny with breaks the previous consensual method put into practice since the TAL was approved.<sup>672</sup> This procedure favors Shiite rule (they are the majority in Iraqi population), and satisfy those who believe in a strong central authority but under a broad and multi-communal based government.<sup>673</sup> The way to counterbalance any authoritarian tendency using majoritarian rule was the Kurdish proposal to create the Federation Council. Kurdish delayed the implementation of majoritarianism by keeping the veto powers of the Presidential Council for another four years (article 138).

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<sup>670</sup> Brown argues as well that this is consequences of the acceleration of the constitutional process. *Ibid.*

<sup>671</sup> Sadiq Reza. "Endless Emergency: the Case of Egypt". New York Law School and Boston University School Law. *New Criminal Law Review*, Vol. 10, p. 532, 2007. <<http://ssrn.com/abstract=1088827>>.

<sup>672</sup> Jabar, Faleh A.. "The Constitution of Iraq: Religious and Ethnic Relation". *Op. Cit.* P, 4.

<sup>673</sup> *Ibid.*



The idea is that the FC will play a prominent role as an institution curbing any attempt to impose the will of the majority.<sup>674</sup> The main problem is that the powers and competences of the FC are not clearly established in the constitution. Now, the Presidential Council is the institution that has the authority to veto decision taken by the Parliament. This institution is in place until the law regulating the FC is enacted. Article 138 extends the President Council during one term of four years but does not provide any guidance about how to proceed if after this period the FC is not formed. This situation had rose serious concerns amongst those who worry about a majority rule system which could undermine civil liberties, democratic freedoms, minorities' rights and power sharing.<sup>675</sup>

Since the constitution was approved and the formation of the Parliament and cabinet was accomplished, the U.N. mandate (UNSCR 1546) to continue with the occupation during the transitional period is over.<sup>676</sup> The Iraqi government had requested –under great U.S. and U.K. pressures– to continue with the occupation under the U.N. mandate alleging that Iraqi security forces and Army are not prepared to take over the security due the ongoing local and regional instability.<sup>677</sup> Maliki's government had renewed the mandate with U.S. led–multinational Forces annually (UNSCRs 1637, 1723 and 1790<sup>678</sup>) without the approval of the legislative,<sup>679</sup> and albeit the strong criticism from numerous political forces and civil figures (some Shiite groups as Muqtada al-Sadr and other Arab Sunni parties as well) that consider the presence of U.S. troops as clear sign of an endless occupation process.<sup>680</sup> The cabinet argued that they had renewed the mandate because U.N. resolution does not fall in the category of an international treaty. This position is highly questionable and it is based on the fact that the constitution does not mentioned explicitly U.N mandates as an international treaty. The response of the

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<sup>674</sup> *Ibid.*

<sup>675</sup> *Ibid.*

<sup>676</sup> Brown, Nathan. "The Final Draft of the Constitution: Analysis and Commentary". *Op .Cit.* P, 8.

<sup>677</sup> "UN Extends Forces Mandate in Iraq". [Al-Jazeera.net](http://english.aljazeera.net/NR/exeres/32FDCBFD-5E06-40A0-B25B-2B8CCBD1A5D3.htm), June 14<sup>th</sup>, 2007. <<http://english.aljazeera.net/NR/exeres/32FDCBFD-5E06-40A0-B25B-2B8CCBD1A5D3.htm>>

<sup>678</sup> "Operations in Iraq: about the U.K. Mission in Iraq". Defense Factsheet. [U.K. Ministry of Defense](http://www.mod.uk/defenceinternet/factsheets/operationsiniraqabouttheukmissioniniraq.htm). <<http://www.mod.uk/defenceinternet/factsheets/operationsiniraqabouttheukmissioniniraq.htm>>

<sup>679</sup> Holland, Joshua and Jarrar, Raed. "The Iraqi Government Opposes Renewing the U.N. Mandate for U.S. troops". [Znet](http://www.zmag.org/content/showarticle.cfm?ItemID=14238), November 9<sup>th</sup>, 2007. <<http://www.zmag.org/content/showarticle.cfm?ItemID=14238>>.

<sup>680</sup> "Sadr ministers quit Iraqi cabinet". [BBC News](http://www.bbc.co.uk/2/hi/middle_east/6558405.stm), April 2007. <

[http://www.bbc.co.uk/2/hi/middle\\_east/6558405.stm](http://www.bbc.co.uk/2/hi/middle_east/6558405.stm)>. Also there are several polls that reflect Iraq's opinion in a great array of issues. Please see: "Opinions Poll in Iraq and the Occupation". [Global Policy Forum](http://www.globalpolicy.org/security/issues/iraq/pollindex.htm).

<<http://www.globalpolicy.org/security/issues/iraq/pollindex.htm>>.

parliament was to draft a binding resolution that would oblige al-Maliki's government to seek Parliament's approval in order to extend the mandate again. The drafted resolution was approved by the total majority of the Parliament as well as the President but –under estranges and unexplained reasons– the UNSG Ban Ki-Moon declared that the resolution approved was not legally binding; the drafted law is just a declaration of principles.<sup>681</sup>

Also, Al-Maliki's government recently signed a non-binding declaration with President Bush on November 2007 to extend the current U.N mandate another year. This declaration announces that once the U.N. mandate ends in 2008, it should be replaced it by a bilateral agreement covering security, political and economic issues.<sup>682</sup> This move by Maliki's government has lead to more accusations once again because it was signed without the approval of the Parliament; thus overriding article 73 of the constitution that calls for the approval of the CoR and the Presidency regarding international agreements.<sup>683</sup> Supporters of the declaration argues that this not an international agreement, just a declaration, and any international agreement will need the approval of the majority of the CoR.<sup>684</sup>

### **The presidency:**

The powers of the executive are divided between two institutions: the Presidency and the Council of Representatives. The constitution describes the President as the Head of the State. This institution is intended to become a ceremonial symbol rather than a political institution with broad authority (articles 67 and 73). The President needs that two-thirds of the Parliament to approve his nomination (article 70), and the President can hold only the post for two electoral terms (article 72).The Prime Minister does not have this limitation. Also, the

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<sup>681</sup>According to Holland and Jarrar, the UNSG declared: *"The Council of Representatives passed a nonbinding resolution on 5 June obligating the cabinet to request parliament's approval on future extensions of the mandate governing the multinational force in Iraq and to include a timetable for the departure of the force from Iraq"*. Holland, Joshua and Jarrar, Raed. *Ibid*.

<sup>682</sup> Baker, Peter and Tyson, Ann Scott. "Bush, Maliki Sign Pact on Iraq' Future". *The Washington post*. November 27, 2007. <<http://www.washingtonpost.com/wp-dyn/content/article/2007/11/26/AR2007112600649.html>>.

<sup>683</sup> Dreyfuss, Robert. "Maliki, Bush Trample Iraq's Democracy". December 21<sup>st</sup>, 2007. *The Huffington Post* <[http://www.huffingtonpost.com/bob-dreyfuss/maliki-bush-trample-iraq\\_b\\_77903.html](http://www.huffingtonpost.com/bob-dreyfuss/maliki-bush-trample-iraq_b_77903.html)>.

<sup>684</sup> Rodolfo, Kathleen. "Iraq: Sunnis, Sadrist, Attacks U.S. Security Pact. *Radio Free Europe-Radio Liberty*. December 13, 2007. <<http://www.rferl.org/featuresarticle/2007/12/2C4F103F-5B73-4926-827D-1A6701C35B26.html>>.

organic law prescribes for further legislation the nomination and appointments of officials working in the presidency (article 69), and the term of the presidency ends at the same time that the CoR's term does (article 72, second –a–), both arrangements are very unusual for an institution with such limited powers.<sup>685</sup> However, the institution of the presidency holds some powers that may play a significant role in the executive's decision making process as I have mentioned above during the case of U.N. mandate extension. These powers are clearly specified in article 73, and the President has the authority to ratify international treaties and laws discussed and approved by the CoR. Although it is being argued that the role of the presidency is merely ceremonial, the president could block initiatives coming from the Parliament and the Cabinet.

#### **The Council of Ministers:**

The Council of Ministers (CM) is an institution formed by the Prime Minister (PM) and his Cabinet comprising one single authority (article 83). The constitution describes the figure of the Prime Minister as the direct executive authority, responsible for the general policy of the state and the commander in chief of the army forces. He is the head of the CM and he has the authority to dismiss its members with consent of the CoR (article 78). The constitution sets a high bar for the PM in order to form a cabinet. The PM needs absolute majority to approve his governance team (76, 4), and thus a government with simple majority will need to establish coalitions with other groups in order to form the CM.

This procedure that assures a broad consensus among political forces to form a government could actually lead to parliamentary deadlock if the largest elected party does not have absolute majority. Articles (76, 1 and 81) stipulate that the president has 15 days to nominate the Prime Minister (the candidate must be appointed from the largest political formation in parliament) for its approval by the Parliament (article 76). If the Parliament fails to approve his nomination, the President has the authority to nominate another Prime Minister

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<sup>685</sup> Brown, Nathan. "The Final Draft of the Constitution: Analysis and Commentary". *Op. Cit.* P, 8.

(article 81, 2). Also each minister need to receive the confidence from the parliament otherwise if any of them fails; the parliament will withdraw his confidence from the entire cabinet.<sup>686</sup>

The Prime Minister is the highest position and most paramount figure in the Iraqi state. He is the direct executive authority that is responsible to design and execute the general policy of the state. He is the director of the Council of Ministers, and general chief of the army forces (article 78). Key powers bestowed on the executive are: monitoring ministries, state institutions and agencies that are not part of the ministries. He has to propose laws, negotiate and sign international treaties, and prepare the federal budget. Also, he has the authority to appoint high rank officials in the Administration and the Army (Article 80). These competences are similar to the authorities and powers granted to the Executive in other parliamentary systems.

There are only two different approaches from other constitutions. The system of succession in article 81 which stipulates that in the case that the position of Prime Minister becomes vacant, the President of the Republic will assume all its powers (article 81, 1). Brown argues that this article "*seems odd to give the post even temporarily to a president who lays beyond Parliamentary oversight*". Brown observations are right based on the idea that the executive authority is responsible before the Parliament, and therefore the mechanisms to monitor a deputy minister are extensively elaborated in the constitution. However I disagree with his position that: *the President lays beyond parliamentary oversight* because according to the powers of the CoR, the Parliament has the authority of questioning and reliving the Presidency (article 61, 6).

### **The judiciary:**

The organic law describes the judiciary as in independent institution, and as such no other branch of government has any authority to intervene over decision made by judges. They are only bounded by regulations embodied in the constitution and the laws of the state. The constitution established different levels and types of courts:

–The Higher Judicial Council (HJC): The role of this body is well described in articles 90 and 91 but the constitution remains silent about their composition and competences. This

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<sup>686</sup> *Ibid.*

should be stipulated by law. The main role of HJC is to manage and supervise the federal judiciary system (article 91). The HJC proposes the nomination of members for Federal Court of Cassation, the Chief Public Prosecutor, and the Chief Justice of the Judiciary Oversight Commission. These institutions are a positive step to create a strong judicial review system.

–The Federal Supreme Court (FSC): This is an independent body within the judicial branch (article 92 –1–). This institution is the only authority that has the power to revise the constitutionality of law and interpret the provision of the constitution. The FSC’s role is fundamental in settling conflicts between the federal government, the regions and governorates, municipalities and local administrations including those conflicts that emerge amongst them (for instance the government of region and governorates). This includes settling disputes that between the federal judiciary, and the judiciary institutions of regions and governorates that are not part of a region. Also, they have authority in settling disputes at the regional and governorate level. They have the jurisdiction to process accusation directed to the President, the PM, and the Council of Minister (Article 93). The authority and competences of this body are well defined but the way the constitution prescribes its formation had raised much controversy because the organic law stipulates that members of this body will be judges, experts on Islamic law, and legal scholar.

The fact that Islamic law expert should be part of this body is interpreted by author as Jaber A. Faleh as a clear turn towards religious law.<sup>687</sup> This theory can be also supported if it takes into consideration the wording of article 96 that leaves to legislation how judges will be appointed. There is not a clear description about the requirement that judges need to be appointed. How will this be applied in the case of religious experts that do not hold an official certification in law remains unspecified. The only guarantee that the constitution offers is that members of this institution needs the confidence of two-thirds of the CoR (article 92 -2-).

Also courts procedures, methods, types, levels and jurisdictions are left to be specified by legislation. This is the case for instance of military courts. Their formation and jurisdiction shall be regulated by law although the constitution prescribes their limitation to crimes within the Army and of the security forces. Also, the constitution prohibits the creation of special or extraordinary courts which are a guarantee to assure civil rights (article 96).

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<sup>687</sup> Jaber, Faleh. A.. *Op. Cit.* P, 5.

**5-7. Independent commissions:**

The Iraqi constitution promulgates the formation of several commissions in order to monitor the performance of the three traditional powers. Although these bodies are governmental agencies, they are designed to be independent covering issues related to human rights, elections, and integrity. The commissions are the High Commission for Human Rights, the Independent Electoral Commission, and the Commission on Public Integrity. These institutions can play a fundamental role assuring and protecting basic rights stipulated by the Constitution but the organic law leaves to legislation their function and competences. The organic law also mentions the creation of other minor agencies such as the Central Bank of Iraq, the Board of Supreme Audit, the Communication and Media Commission, the Endowment Commission, the Martyr's Foundation, the Federal Public Service Council and the creation of public commission that should be established and regulated by law as well. One good example we have about the work of the independent commission is the IEC. Since its creation the ICE has been very effective, designing an electoral law, and monitoring elections during previous referendums.

**5-8. Amendments to the constitution:**

The constitution can be amended but it will not be an easy task. The constitution establishes the procedures that the Iraqi government has to follow to change or alter the constitution. The amendments need the approval of two-thirds of the CoR as well as the approval of the people through a national referendum and the final approval of the president (article 126, 3). There are two limitations to amendments: The principles and rules described in Section One (general principles of the state), and Section Two which stipulates that liberties and rights gathered cannot be changed or amended until two successive electoral terms has passed. The second limitation is directed to the federal government. The constitution stipulates that the federal government cannot approve amendments that would expand the authority of the government beyond the exclusive powers of the regions (article 126, 4). Therefore the constitution prevents the federal government to diminish the powers of the region by

approving amendment related to powers that are not exclusive powers of the federal authority. The federal government would need the consent of the parliament of the regions and the approval by referendum by the population of the regions. Thus amendment of this type would be very difficult if we take into consideration the long parliamentary process that any proposal of this kind would open between the federal and regional parliament.

#### **5-9. Transitional Provisions:**

The constitution includes various articles under the title of transitional provisions. These provisions allow the continuity of several institutions and decrees that were approved and applied before the constitution. For instance, the body of legislation issued by decree by the CPA and the TNA continue to be valid in Iraqi legislations. Although the TAL is officially rescinded by article 143, there are parts of the legislation that will be still in force. This is the case of articles 53 –a–, and 58 of the TAL. Article 53 –a–, recognizes the Kurdistan Regional government, and its government institutions (Kurdistan National Assembly, the Kurdistan Council of Minister, and the Judicial authority) that took power in Kurdistan on March 19, 2003. This regional government is composed by the governorates of Dhuk, Arbil, Sulaimaniya, Kirkuk, Diyala and Neneveh. This legislation includes the recognition of all the laws approved by Kurdistan authorities since 1992. In this regard, the central government cannot intervene in this legislation unless contradicts the constitution (article 141).

The constitution regards as valid article 58 of the TAL (article 140). Article 58 stipulates the mechanisms that should applied in order to reserve the alteration of demographic character of certain regions by forcing immigration and settling population alien to those areas. The article makes an explicit mention to Kirkuk which has been always a matter of conflict between the Kurdish and Arab nationalism. Thus article 58 obliges the Iraqi transitional government to initiate specific measures to remedy this situation. First, the establishment of the Iraqi Property Claims Commission (IPCC), this commission investigates the replacement of Iraqi population. The TAL gives authority to this body to resettle and compensate those families affected by the previous policy (article 58, TAL). The TAL specifies that the Presidency Council of the Iraqi Transitional Government has to propose to the National Assembly remedies and solutions to

resolve the manipulation and changes of administrative boundaries in Iraq for political ends (article 58, TAL).

Second, the Presidency Council was expected to recommend mechanism for altering administrative boundaries but this body had so far not recommended any solution. Third, the TAL stipulates that in this case, either the presidency appoints a committee to study the case, or request a neutral arbitrator from the U.N. to assist in the final settle of these disputes. Finally, the permanent resolution of dispute territories including Kirkuk will be delayed until all this measures above mentioned are implemented, and a new census is prepared, and a permanent constitution is ratified. However, article 140 specifies that the census and the referendum should be held by 31<sup>st</sup> December 2007, but it have not been held yet.

Therefore, the constitution guarantees the validity of agencies previously created during the transitional period in charge of investigating crimes committed by the previous regime (article 58). These institutions are the IPCC, the Iraqi High Tribunal, and the High Commission for de-Ba'athification (article 134–135, 136). These agencies will play a prominent role taking measures in order to reduce the tension between religious and ethnic factions, but so far the interference of the executive in their work is widening the gap amongst communities. These agencies are attached to the government, and the Executive has the authority to dissolve them but only with the approval of the majority of the CoR.

In practice the IPCC was officially established by the CAP in April, 2003. The CPA hoped that the principles and objectives of the IPCC would be settled down by the Governing Council though legislation.<sup>688</sup> These principles were designed by the commission without taking into consideration the Iraqi Civil Code. This meat that the Governing Council needs to approve specific legislation and unfortunately, during its tenure, this body failed to approve the legislation needed. After the CPA was dissolved, the Iraqi Interim Government initiated a reform of the IPCC's status in order to enhance its effectiveness and to allow the Iraqi judicial system to collaborate in their work.<sup>689</sup> Since then this agency has been resolving conflicts among families and residents of those area affected by the replacement of population. Despites some

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<sup>688</sup> Dan E. Stigall. "Courts Confidence and Claims Commissions: the case for remitting to Iraqi civil courts the task and jurisdiction of the Iraqi Property Claims". Bnet. March, 2005.

<[http://findarticles.com/p/articles/mi\\_m6052/is\\_2005\\_March/ai\\_n13717520/pg\\_1](http://findarticles.com/p/articles/mi_m6052/is_2005_March/ai_n13717520/pg_1)>.

<sup>689</sup> *Ibid.*



improvements the IPCC has being very slow resolving disputes and unable to meet all the goals and objectives stipulated by the TAL and the constitution.<sup>690</sup> In September 10<sup>th</sup> 2007, the Kurdish Alliance agreed with the government to delay the full implementation of article 140 until the end of 2008.<sup>691</sup> The Kurdish Alliance justified these agreements due to the slow implementation of the policy, the delay in several deadlines, and the possibility of conflict between Arab, Kurds and Turkmen during the referendum.<sup>692</sup>

The Iraqi High Tribunal or the Supreme Iraqi Criminal Tribunal is an institution designed by the CPA and the Governing Council to reestablish the Iraqi judicial system. The CPA transferred the authority to create an Iraqi special tribunal to the recently appointed GC. This body decided to appoint a four person commission presided by Salem Chalabi, nephew of the GC' member Ahmad Chalabi. This commission with the help of the CPA established the principles and regulations of these courts. The main function of these courts is to try Iraqi residents for crimes against humanity, war crimes, and genocide, and other minor crimes committed by the former regime between July 1968–2003 (Saddam Hussein's rule period). These courts sometimes follow different legislation than the Iraqi penal code, and contemplate the use of the death penalty as it was reintroduced by the GC. Also the statutes of the IHT also include strong language favoring de-Ba'athification.

For instance, according to the regulations of this court, the executive power has the authority to transfer judges from other tribunal to the IHT. Also, since the courts were formed strong political battles started among Iraqi politicians regarding the direction of the court administration. The fact that Ahmad Chalabi was president of the de-Bathification commission, and his nephew Salem Chalabi headed the SICT raised serious question about independence and impartiality of the courts. Also Salem Chalabi was accused of murder (the charges were dropped later) and he had to resign from this post. Then, the post was transferred to a Salem's deputy and soon later to deputy loyal to Prime Minister Ayad Allawi. He was dismissed in August 2005 after a new battle for the direction of this institution. This court was responsible of

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<sup>690</sup> *Ibid.*

<sup>691</sup> Sumedha Senanayake. "Iraq: Kirkuk Referendum Likely To Be Delayed". Radio Free Europe–Radio Liberty. September 13<sup>th</sup>, 2007. < <http://www.rferl.org/featuresarticle/2007/09/77A2D8AB-39B5-43DC-9A49-672B349D17B3.html>>.

<sup>692</sup> *Ibid.*

trying Saddam Hussein and his supporters in the former government, and according to experts, these trials did not offer enough guarantees to consider them fair and just.<sup>693</sup>

Along this research I had reviewed some of the flaws and shortcoming that the de-Ba'athification process had since it started. The de-Ba'athification process dismissed ten thousands of employees that were nominally attached to the former regime. This policy has widened the gap between sections of society, and has fed the resistance with insurgents and oppositionists to the new political system. A positive step in the HCDB for instance was to introduce some modification in the way this body was managing the de-Ba'athification of Iraq. Now, the mere membership in the dissolved Ba'ath is not enough to initiate legal action against this person (article 135 -5-). Since the adoption of the constitution the U.S. administration has pressure the Iraqi government to modify its position on the de-Ba'athification process.<sup>694</sup> The Parliament had recently approved a resolution which modifies the de-Ba'athification law allowing many former employees of the former security forces and other professions to return to their jobs.<sup>695</sup>

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<sup>693</sup> "Dujail: Trial and Error". International Center for Transitional Justice. November 2006. New York. <<http://www.ictj.org/static/MENA/Iraq/ICTJDujailBrief.eng.pdf>>. Also, "Unjust and Unfair: the death penalty in Iraq". *Ibid*. Also see "Iraq: Flaws in the first trial before the Supreme Iraqi Criminal Tribunal should not be repeated". AI. August, 18<sup>th</sup>, 2006. <<http://archive.amnesty.org/library/Index/ENGMDE140312006?open&of=ENG-2D4>>.

<sup>694</sup> Cogan, James. " 'De-Baathification' Laws modified by Iraq's parliament". World Socialist Web Site. January, 17<sup>th</sup>, 2008. <<http://www.wsws.org/articles/2008/jan2008/iraq-j17.shtml#top>>.

<sup>695</sup> *Ibid*.

## Conclusion

The aim of this research is to study the Iraqi constitutional process as much as its result: the Constitution that followed. My goal has been not only to study solely the Iraqi Constitution from a legal and political point of view –which is the standard method used by constitutional scholars– but to offer a wider view of the Iraqi Constitution by taking into consideration the political and legal processes behind its promulgation. Such dynamics have taken place within the framework of an ongoing nation-state building process that the United States is still currently undertaking in Iraq. This approach was necessary to understand fully all the details that surround the Iraqi constitutional process as well as the meaning of the constitution.

I believe this approach is necessary to fully understand all the details that encompass the Iraqi constitutional process as well as the meaning of the Constitution itself. After studying the whole constitutional process from its very start to its official promulgation by Iraqi politicians and American officials, my knowledge and understanding on the matter is much wider than I could ever expect, and I believe the results I have achieved are far more satisfactory than they would have been, had I studied the laws and regulation issued by the Constitution alone. By taking into consideration a wider framework -the U.S. led–Coalition reconstruction process, - I have intended to offer a bigger picture of the dilemmas and problems that U.S. official and Iraqis had to face during this project.

At the beginning of this research I mentioned how different national building projects undertaken in the past century by the United States have failed. These failures are related to the specific approaches led by the United States have assumed during these campaigns: unilateralism, large deployment of troops, and political interferences in the process of reconstruction. Mainly the reluctance of the U.S. to reach a broader agreement with its allies and other countries belonging to the United Nations. These include, but are not limited to the most appropriate measures to address the Iraqi problem with the WMD; the U.S. policy to keep large troops on the ground, and to dismantle the Iraqi Army –therefore rendering Iraq dependent on U.S. forces to provide security to Iraqis–, and finally the U.S. interferences in the political affairs of the country. Other previous studies about Iraq have focused on the two first points, but my research aspired to shed light on the political process that was taking place in Iraq. It is in this

regards that focusing on the study of the constitutional process has provided me with the right framework to study the relationship between U.S. officers in Iraq and Washington, and the new political élite that was assuming the responsibility of initiating the political reconstruction of Iraq back in Iraq on 2003.

By observing this relationship, I have concluded that the United States has surpassed in various cases the duties and responsibilities that an occupying force has according to international law. It is very difficult to set up the boundaries of what it is and what it is not rightly named as intervention, as Simon Chesterman has shown us, since an occupying force has the rights to monopolize the powers of an occupied country in order to reestablish peace and security. The lack of a precise formula regarding the role and duties of an occupying entity makes this task even harder; there is not a definitive procedure to undertake the reconstruction of defeated country after an armed conflict.

Even though, I consider the Iraqi constitutional process and the Iraqi constitution as a clear example of foreign intervention in the domestic affairs on a country in process of trying to recover its sovereignty. I nevertheless find very interesting and paradoxical that the U.S. has become to some extent, the victim of its own plan regarding the constitutional process. The drafting of the interim Constitution is in itself an example of collaboration between American and Iraqi politicians. Both American and Iraqi officials discussed the content of the interim law throughout several rounds of gatherings and meetings that according to my findings did not exclude any of the members that were considered as representatives of the Iraqi population. The problem was, rather, that the political élite in charge of writing the TAL lacked the representativeness and the legal, political, and ethical legitimacy to write a constitutional text. Such political élite, supposedly endowed with the right to represent the Iraqi population, was instead appointed by U.S. officials and had to collaborate with the U.S. if they wanted to have a chance in the new political scene and in order to keep their position in the Government and Administration.

However the TAL process was not free of political interferences and pressures from U.S. officials. The main problem emerging from the TAL process was the very strict agenda promoted by the U.S. and approved by the Governing Council to proceed with the constitutional process. The reconstruction process was resulting much more complicated on all

levels than the American had originally foreseen in their plans, and the process of creating an interim government, and a national assembly consumed a precious time that the Constitutional Drafting Committee could have used to solve many issues and problems that were of paramount importance.

Another problem that was clear since the beginning of the constitutional process was it's the lack of significant Sunni participation in this project. Growing discontent was mounting in the Sunni community about the reconstruction process and the drafting of the new Constitution. This added to the fact that neither the new Iraqi political élite neither U.S. officials in charge of the reconstruction did much to address and reverse this problem. The Sunni community was been cut off from the whole political process due to decisions taken by U.S. officials (De-Ba'athification process) and by decision taken by Sunni political élite that in turn resolved to boycott to the constitutional process.

The wrong implementation of the De-Ba'athification process greatly affected the creation of a new Sunni political élite capable of representing its community in this project. This led to mistrust and isolation from the Sunni community that was very suspicious about the real intentions of the occupier entity. This situation was also aggravated by the chosen approach of the U.S. concerning the formation of such political élite. The U.S. in its attempt to create a plural society in Iraq through a new redistribution of powers and resources polarized instead the Iraqi society divided along sectarian lines that ended in a silent and cold civil war, thus failing in providing the Sunni community with the proper political representation and strong leadership needed in the political process and the drafting of the new constitution.

During the constitutional process, Kurdish and Shiites politicians were much more concern about what they could obtain from this process in terms of powers and resources for their communities, than in reaching a fair agreement for all Iraqis, that should including their fellow Sunnis, regarding paramount issues in the constitution. This problem was also aggravated by the misunderstanding of Arab Sunnis representatives regarding the constitutional process as well. Arab Sunnis believed that the CDC would be formed following a wide representation of the Iraqi population regardless of the outcome of the general elections. Perhaps the consensus formula used during the TAL, and early statements by Kurdish and Shiite representatives calling for a wide constitutional process comprising all the Iraqi

communities, confused the Arab Sunni representatives who then decided to adopt a hard position regarding the constitution.

Thus CDC's members were appointed following the results in the January 2005 national elections, and although had representation from major parties failed to include significant representation from minor political groups. The mix results in the general elections as well as the wide support from U.S. official resulted in a wide representation of Kurdish and Shiites political forces in the CDC, but left Arab Sunnis' parties out this body as well as other minorities that were significantly isolated from the process.

I regard the U.S. policy responsible for this situation, which occurred as a result of the imposed pressures on the backs of Kurdish, Shiites and Sunni politicians to move forward in the reconstruction process. It may be useful to recall that, at this point, the price to be paid in terms of time and resources should the constitution failed, was extremely high. According to the regulation and procedures established by the CAP in the TAL, such failure would have meant the dissolution of the interim government and the national assembly, thus delaying for six months the process of celebrating elections and creating the first Iraqi genuine government. This was a major milestone in the White House Nation-Building project designed for Iraq and its policy of democratizing the Middle East. The failure to accomplish the constitutional process would have inevitably affected the Iraqi reconstruction process as much as the image of reconstruction that the U.S. was trying to achieve both home and abroad. On the other hand, how the failure of the constitutional process could have affected the positions of high U.S. governmental official needs further research but it could help bring on more important data to explain the constitutional process.

The urgency to find a final agreement for the constitution had very negative consequences in the constitutional process. Sunnis politicians and drafters were isolated, and Kurdish, Shiites and U.S. officials took ad hoc decisions annulling the powers of the drafting committee that had the authority to write a constitution. The rushing of the constitutional process broke the principles of consensus and dialogue that for instance prevailed in the drafting of the TAL. The modifications in terms of policy introduced by the CPA along its plans for drafting a new constitution were insufficient and did not provide the necessary social dialogue and political consensus needed to build a new and sustainable political system. This

fact alone, in addition to the scarce participation that the population had in the process of drafting the constitution brings up serious doubts about the legitimacy of the constitutional process itself.

In this regard, experts, such as Samuel Kristy have pointed out that how critical and crucial dialogue and political consensus are in a constitutional process intended to be developed in countries that have been through war. Iraqis needed a constitutional process that would have enabled their nation to discuss issues and controversies that are of critical importance and that have been proven problematic in multiple occasions since the official creation of Iraq by the British Empire. Problems such as the distribution of the land, the complex and plural composition of Iraqi society and the large amount of natural resources are few examples of these historically unresolved issues. The approach used by the U.S. to write the constitution was not based on political consensus and dialogue that would have expressed the voice of the Iraqi people. In this regard the U.S. opted to negotiate with those politicians that were favoring U.S. plans in Iraq and instead of facilitating and promoting a wider political consensus. In sum, the U.S. decided to focus its efforts in leading, controlling, banning and managing all issues regarding the constitutional process. By engaging in this dynamic, the US was presumably hoping that the natural outcome of it would imply the settlement of the necessary foundations to move forward in the creation of a new state and a new political elite friendly and complacent with the U.S. aspirations and hopes for Iraq.

The urgency and rush to approve the constitution had also side effects rather than providing solutions to legal and political questions, complicated even more the whole process of reconstructing Iraq. Actually the constitution itself could not be completed and some important issues had to be postponed for future discussions. The final document had to be approved under the promises of future amendments. Since the Constitutional Review Commission was appointed to study possible changes, the number of recommendations to amend the constitution affected directly great number of articles and constitutional issues. But, after reading close the constitutional text, such recommendations are not very surprising. The Constitution favors a federal concept of the State allowing extensive powers to the different regions. This has been done by limiting the role of the federal government to an extent that could seriously undermine political, economic, and security issues that concern to all Iraqis.

We have seen that one of the principal reasons behind this new concept of government is the Kurdish insistence on being recognized as a nation. The necessity to accommodate Kurdistan in Iraq has implied as a consequence the creation of a federal system that in some aspects is granting more competences than a government of its characteristic would otherwise concede to its regions. The extensive competences that the Kurdish regional government has acquired from this constitutional process is inspiring and encouraging other communities in Iraq to regroup and unite in the same way the Kurds did it. Thus favoring the consolidation of a sectarian socio-political system, rather than promoting a plural concept of society.

A clear example of this situation is the creation of the federation council which is a key constitutional body in any federal system. The Constitution intends this issue to be resolved by legislation, thus leaving incomplete a key element that would improve the chances of a federal system of government. The federation council could play a paramount role expanding the representation of all Iraqis in political affairs, hence balancing the asymmetric distribution of powers that exists between larger regions and small governorates that are not part of any region.

However, it is not only the peculiar federal system of government what promotes sectarianism among Iraqi communities. The role of religion in the Constitution might set the foundation for future division and inequities in Iraqi society as the analysis of the constitution indicates. The freedom to believe in any religion or faith is a universal right that any modern and democratic state should guarantee to all its citizens. Nevertheless this constitution promotes a significant role of Islam as well as other beliefs in the legislation; this characteristic must be carefully observed. The constitution goes beyond declaring Islam as the religion of the state by empowering the religious establishment to participate in the approval of legislation and also participate in judicial courts decisions. How will this affect the legislation depends on who interprets the norms and tradition of Islam which are not specified in the constitution.

This formula could restrain the Civil Rights of many Iraqis who do not feel they belong to a particular religion or faith. The fact that any Iraqi could be tried depending on his or her religious beliefs establishes all the elements to create further divisions among different communities. Religion has always been a key element in shaping identities in Iraq as well as in the Middle East. But while promoting and protecting a religious value in the Constitution is



one thing, producing legislation depending on what religion the legislator belongs to, is quite another. All Iraqis should be equal under the law regardless of the sex, economical condition, race, married status or religious affiliation. This a mechanism used by other democratic states and societies to promote equality among its citizens, thus advancing the values of plural nation where all its citizens can live in peace and prosper under specific guarantees. Instead, the Iraqi constitution declares Iraq to be a religious country based on Islam and other confessions, consequentially prompting that religious beliefs have a prominent role in politics, and legislation. This tendency encourages social division and sectarianism, since depending on their religious and personal beliefs; Iraqis will find their choices restricted in both private and public spheres.

The fact is that in the current legal, system Iraqis will attain a particular social status depending on the area, the region, the community and the faith that they are born into. In conclusion these facts limit and violate the civil rights of all Iraqis that were regarded as equal under the law (Article 14 of the Constitution). The current tendency to organize and configure Iraq along ethnic and religious regions such as Kurdistan is in fact curtailing and diminishing the rights of those minorities that happen to live under the administration and governments of such regions. The creation of these regions following ethnic configuration or religious beliefs may even led individual members or families, and even perhaps entire communities, living in regions where they represent a minority, to decide to emigrate in order to find better places to settle down with their coreligionist in other areas, encouraging even more the current sectarian division of society.

The Iraqi Constitution, according to the finding I gathered in this research, is an incomplete constitution even if it has partially succeeded in gaining the support of the Iraqi population. The fact that the Constitution was approved by people should not obscure the multiple interventions behind the constitutional process that were most likely unknown to the majority of Iraqis. Iraqis have the right to know the truth of what happened in such a complex process. Only then, after assessing and weighting all facts, they will be able to rightly assess whether or not the Constitution expresses their voice and aspirations. The question whether the Iraqis will keep or derogate this Constitution is something that History will eventually tell. We

may argue that although there is not a definitive formula to create a perfect constitution, there are certain conditions and measures that can help to facilitate the way in the process.


The Iraqi Constitution promotes a parliamentary and representative system. It is important to mention that the success of democracy in Iraq is also closely related to the adoption of modern democratic culture and practices by the Iraqi political class and not just democratic formalities. The lack of democratic tradition in Iraq is, indeed, a very negative precedent. Iraqi parliamentarians must make efforts to display understanding and empathy with the rival's cause, and to exercise great doses of diplomacy and negotiation techniques in order to solve conflicts and difficulties in the process of creating a new political system. The incorporation of democratic culture and practices in Iraq can make a significant difference in the resolution of conflicts among its various communities, but a defective or wrongly implemented democracy may as well open the path for political deadlocks, divisions and conflict, that could throw the nation back into chaos and war.

For this reason, I am an advocate for a shift in the U.S. approach regarding the reconstruction of the country. Iraq deserves to have a chance to decide its future and exercise its sovereignty without political interferences from foreign nations. The US forces as well as other countries that are participating in this process should withdraw their troops as soon as possible, and those nations involved in the reconstruction of Iraq should be controlled and monitored by the international community and the Iraqi State in order to neutralize any foreign interference in this process. They should limit their help to technical, material and humanitarian assistance; minimizing political interferences in Iraqi internal and foreign affairs.

The ongoing occupation of the country, in addition to political interferences as the ones already described affecting the constitutional process, could severely maim the chances of success of this crucial reconstruction project. The process of amending the current Constitution could take place in a free and stable country, with Iraqi politicians willing to raise the necessary awareness and enthusiasm in the population to engage in the process. The writing and adoption of a Constitution is an amazing but extremely sensitive political exercise that requires as much political will and consensus, as human and material resources, stability and security.



## Annex 1

Table 2: Member of the Iraqi Governing Council<sup>696</sup>

Shiite Members	
	<p>'Abdul Aziz al-Hakim was born in Iran. He studied in the city of Qom, and later on he lived in Najaf (Iraq).<sup>697</sup> Then he fled Iraq with part of his family to Tehran in 1980 where he lived until the deposition of Saddam. He is Arab Shiite Muslim leader, chairman of the Supreme Council of the Islamic Revolution (SCIRI), and brother of Muhammad Baqir al-Hakim (former president of the SCIRI) who was assassinated in Najaf on August 2003. After his brother death he took the leadership of the party. During years they lived exiled in Iran where they founded the SCIRI in 1982 with the help of the Iranian government. These facts have induced analysts to portray him as a strong supporter of Iran, but as the same time he has accepted a pluralistic, and secular view of the state. He was part of the G7, and later he became part of the IGC. He led the United Iraqi Coalition during December 2005 elections for the Iraqi National Assembly which conglomerates the majority of religious oriented Shiite formations (radical to</p>

<sup>696</sup>The data used to create this table was extracted from diverse sources. There is much information about this group, and although the information can be considered accurate, there is plenty information about some members, meanwhile the information about others is scarce. Bakovic, Danilo. Brief guide to Iraq General Elections December 2005. [http://lugar.senate.gov/iraq/pdf/Iraq\\_Elections\\_Info.pdf](http://lugar.senate.gov/iraq/pdf/Iraq_Elections_Info.pdf). Sources used for this table are [global security.org: Iraqi National Congress](http://www.globalsecurity.org/Iraqi_National_Congress). [Global Security.org](http://www.globalsecurity.org/military/world/iraq/igc.htm). Page last modified on June 2005. <http://www.globalsecurity.org/military/world/iraq/igc.htm>. [Wikipedia.org](http://en.wikipedia.org/wiki/Iraqi_Governing_Council): "Iraqi Governing Council" at [http://en.wikipedia.org/wiki/Iraqi\\_Governing\\_Council](http://en.wikipedia.org/wiki/Iraqi_Governing_Council). [BBC New](http://news.bbc.co.uk/2/hi/middle_east/2950371.stm): "Who's who in Post-Saddam Iraq after Saddam". [http://news.bbc.co.uk/2/hi/middle\\_east/2950371.stm](http://news.bbc.co.uk/2/hi/middle_east/4511450.stm) And, "Guide to Iraqi Political Party". January, 2006. [http://news.bbc.co.uk/2/hi/middle\\_east/4511450.stm](http://news.bbc.co.uk/2/hi/middle_east/4511450.stm) [The Middle East Media Research Institute](http://www.memri.org/bin/articles.cgi?Page=countries&Area=iraq&ID=IA18204): Nimrod, Raphaeli. "The New Leaders of Iraq (2): Interim Prime Minister Iyad Hashem Allawi and the Interim Government." Middle East Media Research Institute, ([MEMRI](http://www.memri.org/bin/articles.cgi?Page=countries&Area=iraq&ID=IA18204)), June 2004. No. 182. [http://www.memri.org/bin/articles.cgi?Page=countries&Area=iraq&ID=IA18204](http://www.theestimate.com/public/071103.html). [The Estimate](http://www.theestimate.com/public/071103.html): political and security intelligence Analysis of the Islamic World and its neighbors: "Iraq's new Governing Council: A profile". Volume XV, n° 14<sup>th</sup>, July 2003. [http://www.theestimate.com/public/071103.html](http://www.niqash.org/content.php?contentTypeID=152). [Niqah.org](http://www.niqash.org/content.php?contentTypeID=152): "who's who? Iraq Politics and the constitution." <http://www.niqash.org/content.php?contentTypeID=152>. Other sources are [Associated Press](http://www.rferl.org/specials/iraqcrisis/iraq_gov.asp), [Reuter](http://www.rferl.org/specials/iraqcrisis/iraq_gov.asp), [MSNBC](http://www.rferl.org/specials/iraqcrisis/iraq_gov.asp), [al-Jazeera](http://www.rferl.org/specials/iraqcrisis/iraq_gov.asp), and [Radio Free Europe](http://www.rferl.org/specials/iraqcrisis/iraq_gov.asp). For instance see: "Sketches of Iraqi Governing Council Members". [Radio Free Europe](http://www.rferl.org/specials/iraqcrisis/iraq_gov.asp). [http://www.rferl.org/specials/iraqcrisis/iraq\\_gov.asp](http://www.rferl.org/specials/iraqcrisis/iraq_gov.asp).

<sup>697</sup>Katzman, Kenneth. *Op. Cit.* P, 9.

	<p>moderate ones). His party received the highest number of votes during the elections for the Iraqi Legislative, but Hakim decided not hold any government post.<sup>698</sup> Instead Ibrahim al-Ja'afari (al-Da'wa) was nominated to ran for the elections.<sup>699</sup></p>
	<p>'Abd-al Karim Mahmoud al-Mahmadawi (Abu Hatem) is well known for being the leader of a resistance movement against Saddam Hussein in the southern Iraqi marshes. Known as the "Prince of the Marshes", he became leader of a moderate Islamist party in Amarah in Southern Iraq after the invasion. He was not part of the G7. He became part of the IGC but he resigned during April 2004 in protest of U.S. led-Coalition operation on the Sadriyyun.<sup>700</sup> Nowadays Abu Hatem is focus on local politics after his coalition led by Ahmad Challabi did not received enough votes to have representation in parliament. He is heading the Council of Notables, a senate-like civic council made up of representatives from Maysan, Nasiriyah and Basra. Analysts often regarded him as possible mediator in intra-violence between Shiites, and Sunnis and Shiites.<sup>701</sup></p>
	<p>'Abd al-Zahra Uthman Muhammad was a prolific intellectual and editor of several newspapers and magazines. He stayed in Iran 20 years in exile trying to avoid persecution from the regime. He was one of the founders of al-Da'wa in Iraq, but when he fled to Iran, he founded the <i>Harakat al al-Da'wa al-Islamiyya</i>, (Islamic Da'wa Movement). When he returned, he was based in Basrah, but on 17 May 2004 'Abd al-Zahra Uthman Muhammad -also known as Izza al-Din Salim-, and a number of other Iraqis were killed in car bomb attack as their convoy waited to enter the headquarters of the U.S. led-Coalition in Baghdad- also known as the "Green Zone".<sup>702</sup> Before his assassination he participated as a mediator to end the military standoff in the south Iraq between the U.S.-led Coalition, and armed supporters of radical Shiite cleric Muqtada al-Sadr. He was not part of the G7.<sup>703</sup></p>

<sup>698</sup> *Ibid.* Also see Abdul Aziz al-Hakim. February, 2008. < [http://en.wikipedia.org/wiki/Abdul\\_Aziz\\_al-Hakim](http://en.wikipedia.org/wiki/Abdul_Aziz_al-Hakim)>.

<sup>699</sup> Martin Asser. Profile: Ibrahim al-Ja'afari. *BBC News*. April, 2005.

<[http://news.bbc.co.uk/2/hi/middle\\_east/4268143.stm](http://news.bbc.co.uk/2/hi/middle_east/4268143.stm)>.

<sup>700</sup> Rangwala, Glen. "Iraq's Governing Council". *Middle East Reference.org.uk*.

<<http://middleeastreference.org.uk/index.html>>.

<sup>701</sup> Terrorism focus. *The Jamestown Foundation*. Vol. III, Issue 33. August, 2006.





<[http://www.jamestown.org/terrorism/news/uploads/tf\\_003\\_033.pdf](http://www.jamestown.org/terrorism/news/uploads/tf_003_033.pdf)>.

<sup>702</sup> "Leader of Iraq's Governing Council Assassinated in Car Bomb Attack" *Associated Press*. May, 2004.

<<http://www.commondreams.org/headlines04/0517-03.htm>>

<sup>703</sup> For a full detailed of his profile see: Profile: Ezzedim Salim. *BBC News*. May, 2004.

<[http://news.bbc.co.uk/2/hi/middle\\_east/3721755.stm](http://news.bbc.co.uk/2/hi/middle_east/3721755.stm)>.

	<p>Ahmad al-Barak worked in the Iraqi Foreign Ministry from 1991-2003 collaborating with the U.N. Also he is general coordinator for the Human Rights Association of Babil, and he is organizer as well for the Iraqi Bar Association. He was not part of the G7.</p>
	<p>Ahmad Chalabi is a former successful businessman; and prominent member of the executive council of the Iraqi National Congress (INC) based in London in 1992. He was one of the leading opposition figures, and a major U.S. ally against Saddam Hussein's regime. He was part of the G7 and served as president of the IGC in September 2003. Later on he was accused of several corruption charges involving part of his family, the INC, and the Ministry of Finance during his work in the Governing Council.<sup>704</sup> After hearings and an investigation the case was dropped by an Iraqi judge.<sup>705</sup> He ran for election in 2006 but he won no seat. However current Prime Minister Nouri al Maliki appointed Chalabi as head of the service committee which is a consortium to re-establish basic services in Iraq (Electricity, policy, schools, clinics, etc...).<sup>706</sup> Therefore he is politically active nowadays.</p>
	<p>Aqilah al-Hashimi was one of the three women that became part of the council. She worked in the Iraqi Foreign Ministry (she worked closely in several UN programs) during Saddam Regime's rule. Unfortunately she was assassinated during a car bomb in Baghdad on September 2003. She died of her wounds, and so far no group has claimed the attack. Analysts suggested that Saddam's loyal groups could be behind this assassination. She was not part of the G7.</p>
	<p>Hamid Majid Musa is an economist, petroleum researcher and secretary of the Iraqi communist party. He was an exile during (1978-1983), and he was not part of the G7.</p>
	<p>Ibrahim al-Ja'afari is a doctor who had lived in exile in Iran and the U.K. until 2003. He is spokesman for the Islamic Da'wah Party in Karbala, and won his nomination of the UIA to be its candidate for Prime Minister. He participated in the election, and the IUA</p>

<sup>704</sup>Please see Profile Ahmad Chalabi. BBC New. October 3<sup>rd</sup>, 2002.






<[http://news.bbc.co.uk/1/hi/not\\_in\\_website/syndication/monitoring/media\\_reports/2291649.stm](http://news.bbc.co.uk/1/hi/not_in_website/syndication/monitoring/media_reports/2291649.stm)>

<sup>705</sup> Edward Wong. "Iraqi Judge Drops Case against Leading Exile Figure". The New York Times. September, 2004.

<[http://www.nytimes.com/2004/09/27/international/middleeast/27CND-IRAQ.html?\\_r=1&pagewanted=1&hp&oref=slogin](http://www.nytimes.com/2004/09/27/international/middleeast/27CND-IRAQ.html?_r=1&pagewanted=1&hp&oref=slogin)>

<sup>706</sup> A. Youssef, Nancy. "Chalabi Back into Action". McClatchy Washington Bureau. October, 2007.

<<http://www.mcclatchydc.com/homepage/story/20893.html>>

	<p>won, therefore he became Prime Minister. During April Ja'afari had to resign from his post as PM due to discrepancies with the U.S. and other members of the UIA. He could not form a government, and after an official visit of Condoleezza Rice, and Jack Straw, he resigned and Nouri Al-Maliki took his position. He was part of the G7.<sup>707</sup></p>
	<p>Iyad Allawi is doctor and long-time opponent to the regime who lived in exile for many years. He was the head of the Iraqi National Accord (INA) since 1990, part of the G7, and president of the IGC on October. After working for the IGC, he became Prime minister of the Iraq Interim Administration in 2003. He ran for the January 2005 election as head of the coalition called the Iraqi National List that included Sunnis and Shiites, communist, and democrats as Adnan Pachcachi.</p>
	<p>Muhammad Bahr al-Ulum is a Shiite cleric who returned from exile in London after the fall of the Hussein regime. He played an active role with the Iraqi opposition after the Gulf war (1991), and headed the Ahl al-Bayt Charitable Center in London. He was not part of the G7, and after serving in the IGC.</p>
	<p>Muwaffaq al-Rubay'i is a doctor, human right activist, and a former Iraqi exile. He was not a member of the G7, and after being member of the IGC for a limited period of time; he resigned on April 2004, for a new post offered by Bremer as a Iraq's national security adviser. He adopted a very critical aptitude due to the U.S. led-Coalition forces disproportionate use of force during U.S. military operations in Al-Fallujah and Al-Najaf.</p>
	<p>Raja Habib al-Khaza'i she is a doctor who worked as the head of a maternity hospital in Al-Diwaniyah. She lived in Britain from 1960 to 1977. She was not part of the 'G7.</p>
	<p>Salamah al-Khafaji is a very devoted Shiite and politician that replaced Aqilah al-Hashimi, -assassinated during a car bomb in 2003- After serving in the council she joined the United Iraqi Alliance led by Abdul Aziz al-Hakim. She is very traditional in her approach to politics and the constitution.<sup>708</sup></p>

<sup>707</sup> Asser, Martin. *Ibid.* And, "Iraqi PM rejects calls to resign". BBC News. April, 2006.

[http://news.bbc.co.uk/2/hi/middle\\_east/4878190.stm](http://news.bbc.co.uk/2/hi/middle_east/4878190.stm).

<sup>708</sup>"Iraqi women seek constitutional rights". Article published by MSNBC with the collaboration of Associated Press and Reuters. August, 2005. < <http://www.msnbc.msn.com/id/8799295/>>.

Wa'il Abd al-Latif was born in the southern city of Basrah. After finishing his studies in law in Baghdad during the fifties, he developed a successful career as a judge. He became head judge in Al-Nasiriyah courts. He is actually acting governor of Basrah. He spent some time in jail in 1994.<sup>709</sup>

### Sunni representatives



Adnan Pachachi worked as Iraqi foreign minister and ambassador to the UN before the *Ba'hist's coup d'état* in 1968. He is considered to be an Arab nationalist, secular, and very well know in Iraq because he belongs to a prominent Sunni family. While he was exiled in Abu Dhabi, he worked as adviser for the United Arab Emirates (UAE). Although he is an octogenarian, he is the leader of the Iraqi Independent Democrats (IID) Movement which returned to Iraq after the fall of Saddam. He was member of the G7, and later on became part of the IGC, and served as president during January 2004. He chaired the committee in charge of writing the Administrative Transitional Law (TAL). His party during the 2005 January legislative elections failed to gain any seat in this assembly, but during December 2005 elections he was elected as a member of a list headed by former Prime Minister Iyad Allawi.<sup>710</sup>



Ghazi Ajil al-Yawir is civil engineer, born in Mosul, and he had been living in exile in Saudi Arabia where he served as vice president of Hicap Technology Company. He became later the Prime Minister of the first interim government in the IGC was dissolved.



Muhsin 'Abd al-Hamid was born in Kirkuk 1937. He studied Islamic law in Cairo, and during the eighties he worked as a professor at Baghdad's University. He is an intellectual and a prolific writer on Islamic issues (he published 30 books on the Qur'an), he is secretary-general of the Iraqi Islamic Party. This party is politically affiliated to the Iraqi Muslim Brotherhood.

<sup>709</sup> Raphaeli, Nimrod. "The New Leaders of Iraq (2): Interim Prime Minister Iyad Hashem Allawi and the Interim Government." Middle East Media Research Institute, (MEMRI), June 2004. No. 182.




<<http://www.memri.org/bin/articles.cgi?Page=countries&Area=iraq&ID=IA18204>>.

<sup>710</sup>Please see Adnan Pachachi. "Who's who in Post-Saddam Iraq after Saddam". [BBC News](http://news.bbc.co.uk/2/shared/spl/hi/middle_east/03/post_saddam_iraq/html/secgroups_adnan_pachachi.stm).

<[http://news.bbc.co.uk/2/shared/spl/hi/middle\\_east/03/post\\_saddam\\_iraq/html/secgroups\\_adnan\\_pachachi.stm](http://news.bbc.co.uk/2/shared/spl/hi/middle_east/03/post_saddam_iraq/html/secgroups_adnan_pachachi.stm)

>. Also see Adnan Pachachi. [Wikipedia.org](http://en.wikipedia.org/wiki/Adnan_Pachachi). Last modified on November, 2007.

<[http://en.wikipedia.org/wiki/Adnan\\_Pachachi](http://en.wikipedia.org/wiki/Adnan_Pachachi)>

	<p>Nasir Kamil Chadirchi is leader of the National Democratic Party, and a Baghdad-based lawyer and businessman. He is the son of Kamil al-Chadirchi played a leading role in Iraq's democratic development until the Ba'ath Party came to power in 1968. This political party re-emerged to active politics after the invasion, and is lead by Hodayb al-Hajj Mahmud. The NDP is a secular, pro federal and democratic movement. He was part of the G7. He became part of the Government Council but he not selected to be part of the interim government.</p>
	<p>Samir Shakir Mahmud is native from Baghdad. He was an exile living abroad in Britain where he earned an electrical engineering degree. Although is considered to be an active oppositionist to the regime prior the invasion, he is not affiliate to any major political party. After the fall of Saddam, he returned to Iraq, and worked for the Governing Council as the Chairman of the Media Committee. Also he worked with the IGC in other areas as security, finance, and foreign relations. Later on was appointed Minister of Interior, but in July 2004 he began to work as a permanent representative to the UN. Since 2006 he works as the Iraqi Ambassador in the U.S. Although he lived in exile, he returned to Iraq several times to work for the electricity board of Baghdad, and an Iraqi petroleum company.</p>
<p><b>Kurdish members</b></p>	
	<p>Dara Nur al-Din is a judge who served on the Iraqi Court of Appeals before the occupation. He was imprisoned by Saddam Hussein for eight months in 2002 after daring to declare inadmissible and unconstitutional a Hussein's edict on land confiscation without compensation. He was released in general amnesty in October.</p>
	<p>Jalal Talabani is the secretary general of the Patriotic Union of Kurdistan (PUK). He belongs to a Kurdish Sunni family and, and he has dwell most of his life in the northern city of Kirkuk. During the late fifties began his political career as member of the KDP, but later on abandoned this organization, and founded the PUK which is one the leading political forces in northern Iraq. He was member of the G7, and later on in the IGC.</p>
	<p>Mahmud Uthman is Kurdish from the city of Suleimaniyya. He began to participate in politics with the KDP until he joined the Kurdish Socialist Party (London) in the 1970s. Now he is an independent politician based on Irbil, Northern city near the border with</p>



Iran.



Mas'ud Barzani is the leader of the Kurdistan Democratic Party (KDP) founded by his father Mustafa Barzani in 1946. The KDP is with the KDP one of the most important political parties of Kurdistan. The KDP has a long record of resistance and opposition to Saddam Hussein. He was member of the G7.



Salah al-Din Muhammad Baha al-Din is belongs to a Sunni Kurd family from the town of Halabja in southern Kurdistan, about 240 km from Baghdad. He is a writer and leader of the Kurdistan Islamic Union is the only to challenge the other major Kurdistan parties. The KIU withdrew from the Kurdish Alliance shortly after the December elections 2005.

### Christian member



Yonadam Yousif Kanna he is the secretary general of the Assyrian Democratic Movement or Zowaa.<sup>711</sup> The Assyrian community is mainly located in the north of Iraq, but there is also a broad community living in the U.S. Although he worked as minister of public works and housing, and also as former minister of industry and energy in Iraqi Kurdistan during Saddam Hussein's rule, he is considered to be part of the opposition since the Iraq-Iran war in 1979.

### Turkman members

Sungul Chabuk is the third women of the council. A teacher, engineer, and leader of the Kirkuk-based Women's Organization She is native from the city of Kirkuk. She is the only Turkmen member of the council, and after serving in the IGC, she worked in the Interim Governing Council. Then she became member of National Assembly, and during January 2005 elections she was candidate on the list of the Civil Society Movement.

### Annex 3

Official Constitutional Text. (U.N. Translation). September 16, 2005.

#### The Preamble

*In the name of God, the Most merciful, the Most compassionate*

**{We have honored the sons of Adam}**

We, the people of Mesopotamia, the homeland of the apostles and prophets, resting place of the virtuous imams, cradle of civilization, crafters of writing, and home of numeration. Upon our land the first law made by man was passed, and the oldest pact of just governance was inscribed, and upon our soil the saints and companions of the Prophet prayed, philosophers and scientists theorized, and writers and poets excelled;

Acknowledging God's right over us, and in fulfillment of the call of our homeland and citizens, and in a response to the call of our religious and national leaderships and the determination of our great authorities and of our leaders and politicians, and in the midst of international support from our friends and those who love us, marched for the first time in our history towards the ballot boxes by the millions, men and women, young and old, on the thirtieth of January 2005, invoking 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, the marshes, Al-Dujail and others and articulating the sufferings of racial oppression in the massacres of Halabcha, Barzan, Anfal and the Fayli Kurds and inspired by the ordeals of the Turkmen in Bashir and the sufferings of the people of the western region, as is the case in the remaining areas of Iraq where the people suffered from the liquidation of their leaders, symbols, and Sheiks and from the displacement of their skilled individuals and from drying out of its cultural and intellectual wells, so we sought hand in hand and shoulder to shoulder to create our new Iraq, the Iraq of the future, free from sectarianism, racism, complex of regional attachment, discrimination, and exclusion.

Accusations of being infidels, and terrorism did not stop us from marching forward to build a nation of law. Sectarianism and racism have not stopped us from marching together to strengthen our national unity, following the path of peaceful transfer of

power, adopting the course of just distribution of resources, and providing equal opportunity for all.

We, the people of Iraq, who have just risen from our stumble, and who are looking with confidence to the future through a republican, federal, democratic, pluralistic system, have resolved with the determination of our men, women, elderly, and youth to respect the rule of law, to establish justice and equality, to cast aside the politics of aggression, to pay attention to women and their rights, the elderly and their concerns, and children and their affairs, to spread the culture of diversity, and to defuse terrorism.

We, the people of Iraq, of all components and across the spectrum, have taken upon ourselves to decide freely and by choice to unite our future, to take lessons from yesterday for tomorrow, and to enact this permanent Constitution, through the values and ideals of the heavenly messages and the findings of science and man's civilization. The adherence to this Constitution preserves for Iraq its free union of people, of land, and of sovereignty.

## **Section One**

### **Fundamental Principles**

#### **Article 1:**

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

#### **Article 2:**

**First:** Islam is the official religion of the State and is a foundation source of legislation:

- A. No law may be enacted that contradicts the established provisions of Islam
- B. No law may be enacted that contradicts the principles of democracy.
- C. No law may be enacted that contradicts the rights and basic freedoms stipulated in this Constitution.

**Second:** This Constitution guarantees the Islamic identity of the majority of the Iraqi people and guarantees the full religious rights to freedom of religious belief and practice of all individuals such as Christians, Yazidis, and Mandaean Sabians.

#### **Article 3:**

Iraq is a country of multiple nationalities, religions, and sects. It is a founding and active member in the Arab League and is committed to its charter, and it is part of the Islamic world.

#### **Article 4:**

**First:** The Arabic language and the Kurdish language are the two official languages of Iraq. The right of Iraqis to educate their children in their mother tongue, such as Turkmen, Syriac, and Armenian shall be guaranteed in government educational institutions in accordance with educational guidelines, or in any other language in private educational institutions.

**Second:** The scope of the term “official language” and the means of applying the provisions of this article shall be defined by a law and shall include:

- A. Publication of the Official Gazette, in the two languages;
- B. Speech, conversation, and expression in official domains, such as the Council of Representatives, the Council of Ministers, courts, and official conferences, in either of the two languages;
- C. Recognition and publication of official documents and correspondence in the two languages;

- D. Opening schools that teach the two languages, in accordance with the educational guidelines;
- E. Use of both languages in any matter enjoined by the principle of equality such as bank notes, passports, and stamps.

Third: The federal and official institutions and agencies in the Kurdistan region shall use both languages.

Fourth: The Turkomen language and the Syriac language are two other official languages in the administrative units in which they constitute density of population.

Fifth: Each region or governorate may adopt any other local language as an additional official language if the majority of its population so decides in a general referendum.

Article 5:

The law is sovereign. The people are the source of authority and legitimacy, which they shall exercise in a direct, general, secret ballot and through their constitutional institutions.

Article 6:

Transfer of authority shall be made peacefully through democratic means as stipulated in this Constitution.

Article 7:

First: 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. Such entities may not be part of political pluralism in Iraq. This shall be regulated by law.

Second: The State shall undertake to combat terrorism in all its forms, and shall work to protect its territories from being a base, pathway, or field for terrorist activities.

Article 8:

Iraq shall observe the principles of good neighborliness, adhere to the principle of non-interference in the internal affairs of other states, seek to settle disputes by peaceful means, establish relations on the basis of mutual interests and reciprocity, and respect its international obligations.

Article 9:

First:

- A- The Iraqi armed forces and security services will be composed of the components of the Iraqi people with due consideration given to their balance and representation without

discrimination or exclusion. They shall be subject to the control of the civilian authority, shall defend Iraq, shall not be used as an instrument to oppress the Iraqi people, shall not interfere in the political affairs, and shall have no role in the transfer of authority.

- B- The formation of military militias outside the framework of the armed forces is prohibited.
- C- The Iraqi armed forces and their personnel, including military personnel working in the Ministry of Defense or any subordinate departments or organizations, may not stand for election to political office, campaign for candidates, or participate in other activities prohibited by Ministry of Defense regulations. This ban includes the activities of the personnel mentioned above acting in their personal or professional capacities, but shall not infringe upon the right of these personnel to cast their vote in the elections.
- D- The Iraqi National Intelligence Service shall collect information, assess threats to national security, and advise the Iraqi government. This Service shall be under civilian control, shall be subject to legislative oversight, and shall operate in accordance with the law and pursuant to the recognized principles of human rights.
- E- The Iraqi Government shall respect and implement Iraq's international obligations regarding the non-proliferation, non-development, non-production, and non-use of nuclear, chemical, and biological weapons, and shall prohibit associated equipment, materiel, technologies, and delivery systems for use in the development, manufacture, production, and use of such weapons.

Second: Military service shall be regulated by law.

#### Article 10:

The holy shrines and religious sites in Iraq are religious and civilizational entities. The State is committed to assuring and maintaining their sanctity, and to guaranteeing the free practice of rituals in them.

#### Article 11:

Baghdad is the capital of the Republic of Iraq.

#### Article 12:

First: The flag, national anthem, and emblem of Iraq shall be regulated by law in a way that symbolizes the components of the Iraqi people.

Second: A law shall regulate honors, official holidays, religious and national occasions and the Hijri and Gregorian calendar.

#### Article 13:

First: This Constitution is the preeminent and supreme law in Iraq and shall be binding in all parts of Iraq without exception.

Second: No law that contradicts this Constitution shall be enacted. Any text in any regional constitutions or any other legal text that contradicts this Constitution shall be considered void.

## Section Two

### Rights and Liberties

#### Chapter One

##### [Rights]

#### First: Civil and Political Rights

##### Article 14:

Iraqis are equal before the law without discrimination based on gender, race, ethnicity, nationality, origin, color, religion, sect, belief or opinion, or economic or social status.

##### Article 15:

Every individual has the right to enjoy life, security and liberty. Deprivation or restriction of these rights is prohibited except in accordance with the law and based on a decision issued by a competent judicial authority.

##### Article 16:

Equal opportunities shall be guaranteed to all Iraqis, and the state shall ensure that the necessary measures to achieve this are taken.

##### Article 17:

First: Every individual shall have the right to personal privacy so long as it does not contradict the rights of others and public morals.

Second: The sanctity of the homes shall be protected. Homes may not be entered, searched, or violated, except by a judicial decision in accordance with the law.

##### Article 18:

First: Iraqi citizenship is a right for every Iraqi and is the basis of his nationality.

Second: Anyone who is born to an Iraqi father or to an Iraqi mother shall be considered an Iraqi. This shall be regulated by law.

##### Third:

- A. An Iraqi citizen by birth may not have his citizenship withdrawn for any reason. Any person who had his citizenship withdrawn shall have the right to demand its reinstatement. This shall be regulated by a law.
- B. Iraqi citizenship shall be withdrawn from naturalized citizens in cases regulated by law.

Fourth: An Iraqi may have multiple citizenships. Everyone who assumes a senior, security or sovereign position must abandon any other acquired citizenship. This shall be regulated by law.



Fifth: Iraqi citizenship shall not be granted for the purposes of the policy of population settlement that disrupts the demographic composition of Iraq.

Sixth: Citizenship provisions shall be regulated by law. The competent courts shall consider the suits arising from those provisions.

Article 19:

First: The judiciary is independent and no power is above the judiciary except the law.

Second: There is no crime or punishment except by law. The punishment shall only be for an act that the law considers a crime when perpetrated. A harsher punishment than the applicable punishment at the time of the offense may not be imposed.

Third: Litigation shall be a protected and guaranteed right for all.

Fourth: The right to a defense shall be sacred and guaranteed in all phases of investigation and the trial.

Fifth: The accused is innocent until proven guilty in a fair legal trial. The accused may not be tried for the same crime for a second time after acquittal unless new evidence is produced.

Sixth: Every person shall have the right to be treated with justice in judicial and administrative proceedings.

Seventh: The proceedings of a trial are public unless the court decides to make it secret.

Eighth: Punishment shall be personal.

Ninth: Laws shall not have retroactive effect unless stipulated otherwise. This exclusion shall not include laws on taxes and fees.

Tenth: Criminal laws shall not have retroactive effect, unless it is to the benefit of the accused.

Eleventh: The court shall appoint a lawyer at the expense of the state for an accused of a felony or misdemeanor who does not have a defense lawyer.

Twelfth:

- A. Unlawful detention shall be prohibited.
- B. Imprisonment or detention shall be prohibited in places not designed for these purposes, pursuant to prison laws covering health and social care, and subject to the authorities of the State.

Thirteenth: The preliminary investigative documents shall be submitted to the competent judge in a period not to exceed twenty-four hours from the time of the arrest of the accused, which may be extended only once and for the same period.

Article 20:

Iraqi citizens, men and women, shall have the right to participate in public affairs and to enjoy political rights including the right to vote, elect, and run for office.

Article 21:

First: No Iraqi shall be surrendered to foreign entities and authorities.

Second: A law shall regulate the right of political asylum in Iraq. No political refugee shall be surrendered to a foreign entity or returned forcibly to the country from which he fled.

Third: Political asylum shall not be granted to a person accused of committing international or terrorist crimes or to any person who inflicted damage on Iraq.

**Second: Economic, Social and Cultural Liberties**

Article 22:

First: Work is a right for all Iraqis in a way that guarantees a dignified life for them.

Second: The law shall regulate the relationship between employees and employers on economic bases and while observing the rules of social justice.

Third: The State shall guarantee the right to form and join unions and professional associations, and this shall be regulated by law.

Article 23:

First: Private property is protected. The owner shall have the right to benefit, exploit and dispose of private property within the limits of the law.

Second: Expropriation is not permissible except for the purposes of public benefit in return for just compensation, and this shall be regulated by law.

Third:

- A. Every Iraqi shall have the right to own property anywhere in Iraq. No others may possess immovable assets, except as exempted by law.
- B. Ownership of property for the purposes of demographic change is prohibited.

Article 24:

The State shall guarantee freedom of movement of Iraqi manpower, goods, and capital between regions and governorates, and this shall be regulated by law.

Article 25:

The State shall guarantee the reform of the Iraqi economy in accordance with modern economic principles to insure the full investment of its resources, diversification of its sources, and the encouragement and development of the private sector.

Article 26:

The State shall guarantee the encouragement of investment in the various sectors, and this shall be regulated by law.

Article 27:

First: Public assets are sacrosanct, and their protection is the duty of each citizen.

Second: The provisions related to the preservation of State properties, their management, the conditions for their disposal, and the limits for these assets not to be relinquished shall all be regulated by law.

Article 28:

First: No taxes or fees shall be levied, amended, collected, or exempted, except by law.

Second: Low income earners shall be exempted from taxes in a way that guarantees the preservation of the minimum income required for living. This shall be regulated by law.

Article 29:

First:

- A. The family is the foundation of society; the State shall preserve it and its religious, moral, and national values.
- B. The State shall guarantee the protection of motherhood, childhood and old age, shall care for children and youth, and shall provide them with the appropriate conditions to develop their talents and abilities.

Second: Children have the right to upbringing, care and education from their parents. Parents have the right to respect and care from their children, especially in times of need, disability, and old age.

Third: Economic exploitation of children in all of its forms shall be prohibited, and the State shall take the necessary measures for their protection.

Fourth: All forms of violence and abuse in the family, school, and society shall be prohibited.

Article 30:

First: The State shall guarantee to the individual and the family - especially children and women – social and health security, the basic requirements for living a free and decent life, and shall secure for them suitable income and appropriate housing.

Second: The State shall guarantee social and health security to Iraqis in cases of old age, sickness, employment disability, homelessness, orphanhood, or unemployment, shall work to protect them from ignorance, fear and poverty, and shall provide them housing and special programs of care and rehabilitation, and this shall be regulated by law.

Article 31:

First: Every citizen has the right to health care. The State shall maintain public health and provide the means of prevention and treatment by building different types of hospitals and health institutions.

Second: Individuals and entities have the right to build hospitals, clinics, or private health care centers under the supervision of the State, and this shall be regulated by law.

Article 32:

The State shall care for the handicapped and those with special needs, and shall ensure their rehabilitation in order to reintegrate them into society, and this shall be regulated by law.

Article 33:

First: Every individual has the right to live in safe environmental conditions.

Second: The State shall undertake the protection and preservation of the environment and its biological diversity.

Article 34:

First: Education is a fundamental factor for the progress of society and is a right guaranteed by the state. Primary education is mandatory and the state guarantees that it shall combat illiteracy.

Second: Free education in all its stages is a right for all Iraqis.

Third: The State shall encourage scientific research for peaceful purposes that serve humanity and shall support excellence, creativity, invention, and different aspects of ingenuity.

Fourth: Private and public education shall be guaranteed, and this shall be regulated by law.

Article 35:

The state shall promote cultural activities and institutions in a manner that befits the civilizational and cultural history of Iraq, and it shall seek to support indigenous Iraqi cultural orientations.

Article 36:

Practicing sports is a right of every Iraqi and the state shall encourage and care for such activities and shall provide for their requirements.

**Chapter Two**  
**[Liberties]**

Article 37:

First:

- A. The liberty and dignity of man shall be protected.
- B. No person may be kept in custody or investigated except according to a judicial decision.
- C. All forms of psychological and physical torture and inhumane treatment are prohibited. Any confession made under force, threat, or torture shall not be relied on, and the victim shall have the right to seek compensation for material and moral damages incurred in accordance with the law.

Second: The State shall guarantee protection of the individual from intellectual, political and religious coercion.

Third: Forced labor, slavery, slave trade, trafficking in women or children, and sex trade shall be prohibited.

Article 38:

The State shall guarantee in a way that does not violate public order and morality:

- A. Freedom of expression using all means.
- B. Freedom of press, printing, advertisement, media and publication.
- C. Freedom of assembly and peaceful demonstration, and this shall be regulated by law.

Article 39:

First: The freedom to form and join associations and political parties shall be guaranteed, and this shall be regulated by law.

Second: It is not permissible to force any person to join any party, society, or political entity, or force him to continue his membership in it.

Article 40:

The freedom of communication and correspondence, postal, telegraphic, electronic, and telephonic, shall be guaranteed and may not be monitored, wiretapped, or disclosed except for legal and security necessity and by a judicial decision.

Article 41:

Iraqis are free in their commitment to their personal status according to their religions, sects, beliefs, or choices, and this shall be regulated by law.

Article 42:

Each individual shall have the freedom of thought, conscience, and belief.

Article 43:

First: The followers of all religions and sects are free in the:

- A- Practice of religious rites, including the Hussein rituals.
- B- Management of religious endowments (waqf), their affairs, and their religious institutions, and this shall be regulated by law.

Second: The State shall guarantee freedom of worship and the protection of places of worship.

Article 44:

First: Each Iraqi has freedom of movement, travel, and residence inside and outside Iraq.

Second: No Iraqi may be exiled, displaced, or deprived from returning to the homeland.

Article 45:

First: The State shall seek to strengthen the role of civil society institutions, and to support, develop and preserve their independence in a way that is consistent with peaceful means to achieve their legitimate goals, and this shall be regulated by law.

Second: The State shall seek the advancement of the Iraqi clans and tribes, shall attend to their affairs in a manner that is consistent with religion and the law, and shall uphold their noble human values in a way that contributes to the development of society. The State shall prohibit the tribal traditions that are in contradiction with human rights.

Article 46:

Restricting or limiting the practice of any of the rights or liberties stipulated in this Constitution is prohibited, except by a law or on the basis of a law, and insofar as that limitation or restriction does not violate the essence of the right or freedom.

### Section Three

## **Federal Powers**

### **Article 47:**

The federal powers shall consist of the legislative, executive, and judicial powers, and they shall exercise their competencies and tasks on the basis of the principle of separation of powers.

## **Chapter one** **[The Legislative Power]**

### **Article 48:**

The federal legislative power shall consist of the Council of Representatives and the Federation Council.

### **First: The Council of Representatives**

#### **Article 49:**

**First:** The Council of Representatives shall consist of a number of members, at a ratio of one seat per 100,000 Iraqi persons representing the entire Iraqi people. They shall be elected through a direct secret general ballot. The representation of all components of the people shall be upheld in it.

**Second:** A candidate to the Council of Representatives must be a fully qualified Iraqi.

**Third:** A law shall regulate the requirements for the candidate, the voter, and all that is related to the elections.

**Fourth:** The elections law shall aim to achieve a percentage of representation for women of not less than one-quarter of the members of the Council of Representatives.

**Fifth:** The Council of Representatives shall promulgate a law dealing with the replacement of its members on resignation, dismissal, or death.

**Sixth:** It is not permissible to combine membership in the Council of Representatives with any work or other official position.

#### **Article 50:**

Each member of the Council of Representatives shall take the following constitutional oath before the Council prior to assuming his duties:

**“I swear by God Almighty to carry out my legal duties and responsibilities with devotion and integrity and preserve the independence and sovereignty of Iraq, and safeguard the interests of its people, and ensure the safety of its land, sky, water,**

**wealth, and federal democratic system, and I shall endeavor to protect public and private liberties, the independence of the judiciary, and pledge to implement legislation faithfully and neutrally. God is my witness.”**

Article 51:

The Council of Representatives shall establish its bylaws to regulate its work.

Article 52:

First: The Council of Representatives shall decide, by a two-thirds majority, the authenticity of membership of its member within thirty days from the date of filing an objection.

Second: The decision of the Council of Representatives may be appealed before the Federal Supreme Court within thirty days from the date of its issuance.

Article 53:

First: Sessions of the Council of Representatives shall be public unless, for reasons of necessity, the Council decides otherwise.

Second: Minutes of the sessions shall be published by means considered appropriate by the Council.

Article 54:

The President of the Republic shall call upon the Council of Representatives to convene by a presidential decree within fifteen days from the date of the ratification of the general election results. Its eldest member shall chair the first session to elect the speaker of the Council and his two deputies. This period may not be extended by more than the aforementioned period.

Article 55:

The Council of Representatives shall elect in its first session its speaker, then his first deputy and second deputy, by an absolute majority of the total number of the Council members by direct secret ballot.

Article 56:

First: The electoral term of the Council of Representatives shall be four calendar years, starting with its first session and ending with the conclusion of the fourth year.

Second: The new Council of Representatives shall be elected forty-five days before the conclusion of the preceding electoral term.

Article 57:

The Council of Representatives shall have one annual term, with two legislative sessions, lasting eight months. The bylaws shall define the method to convene the



sessions. The session in which the general budget is being presented shall not end until approval of the budget.

Article 58:

First: The President of the Republic, the Prime Minister, the Speaker of the Council of Representatives, or fifty members of the Council of Representatives may call the Council to an extraordinary session. The session shall be restricted to the topics that necessitated the call for the session.

Second: The legislative session of the Council of Representatives may be extended for no more than 30 days to complete the tasks that require the extension, based on a request from the President of the Republic, the Prime Minister, the Speaker of the Council, or fifty members of the Council of Representatives.

Article 59:

First:

The Council of Representatives quorum shall be achieved by an absolute majority of its members.

Second:

Decisions in the sessions of the Council of Representatives shall be made by a simple majority after quorum is achieved, unless otherwise stipulated.

Article 60:

First:

Draft laws shall be presented by the President of the Republic and the Council of Ministers.

Second:

Proposed laws shall be presented by ten members of the Council of Representatives or by one of its specialized committees.

Article 61:

The Council of Representatives shall be competent in the following:

First: Enacting federal laws.

Second: Monitoring the performance of the executive authority.

Third: Electing the President of the Republic.

Fourth: Regulating the ratification process of international treaties and agreements by a law, to be enacted by a two-thirds majority of the members of the Council of Representatives.

Fifth: Approving the appointment of the following:

- A. The President and members of the Federal Court of Cassation, the Chief Public Prosecutor, and the President of Judicial Oversight Commission by an absolute majority, based on a proposal from the Higher Juridical Council.
- B. Ambassadors and those with special grades, based on a proposal from the Council of Ministers.
- C. The Iraqi Army Chief of Staff, his assistants, those of the rank of division commander and above, and the director of the intelligence service, based on a proposal from the Council of Ministers.

Sixth:

- A. Questioning the President of the Republic, based on a petition with cause, by an absolute majority of the members of the Council of Representatives.
- B. Relieving the President of the Republic by an absolute majority of the Council of Representatives after being convicted by the Federal Supreme Court in one of the following cases:
  - 1- Perjury of the constitutional oath.
  - 2- Violating the Constitution.
  - 3- High treason.

Seventh:

- A. A member of the Council of Representatives may direct questions to the Prime Minister and the Ministers on any subject within their specialty and each of them shall answer the members' questions. Only the member who has asked the question shall have the right to comment on the answer.
- B. At least twenty-five members of the Council of Representatives may raise a general issue for discussion in order to inquire about a policy and the performance of the Council of Ministers or one of the Ministries and it shall be submitted to the Speaker of the Council of Representatives, and the Prime Minister or the Ministers shall specify a date to come before the Council of Representatives to discuss it.
- C. A member of the Council of Representatives, with the agreement of twenty-five members, may direct an inquiry to the Prime Minister or the Ministers to call them to account on the issues within their authority. The debate shall not be held on the inquiry except after at least seven days from the date of submission of the inquiry.

Eighth:

- A. The Council of Representatives may withdraw confidence from one of the Ministers by an absolute majority and he shall be considered resigned from the date of the decision of withdrawal of confidence. A vote of no confidence in a Minister may not be held except upon his request or on the basis of a request signed by fifty members after the Minister has appeared for questioning before the Council. The Council shall not issue its decision regarding the request except after at least seven days from the date of its submission.
- B.
  - 1- The President of the Republic may submit a request to the Council of Representatives to withdraw confidence from the Prime Minister.

- 2- The Council of Representatives may withdraw confidence from the Prime Minister based on the request of one-fifth of its members. This request shall not be submitted except after an inquiry directed at the Prime Minister and after at least seven days from the date of submitting the request.
  - 3- The Council of Representatives may decide to withdraw confidence from the Prime Minister by an absolute majority of the number of its members.
- C. The Government is deemed resigned in case of withdrawal of confidence from the Prime Minister.
  - D. In case of a vote of withdrawal of confidence in the Council of Ministers as a whole, the Prime Minister and the Ministers continue in their positions to run everyday business for a period not to exceed thirty days until a new Council of Ministers is formed in accordance with the provisions of Article 76 of this Constitution.
  - E. The Council of Representatives may question independent commission heads in accordance with the same procedures related to the Ministers. The Council shall have the right to relieve them by absolute majority.

Ninth:

- A. To consent to the declaration of war and the state of emergency by a two-thirds majority based on a joint request from the President of the Republic and the Prime Minister.
- B. The state of emergency shall be declared for a period of thirty days, which can be extended after approval each time.
- C. The Prime Minister shall be delegated the necessary powers which enable him to manage the affairs of the country during the period of the declaration of war and the state of emergency. These powers shall be regulated by a law in a way that does not contradict the Constitution.
- D. The Prime Minister shall present to the Council of Representatives the measures taken and the results during the period of the declaration of war and the state of emergency within 15 days from the date of its end.

Article 62:

First: The Council of Ministers shall submit the draft general budget bill and the closing account to the Council of Representatives for approval.

Second: The Council of Representatives may conduct transfers between the sections and chapters of the general budget and reduce the total of its sums, and it may suggest to the Council of Ministers that they increase the total expenses, when necessary.

Article 63:

First: A law shall regulate the rights and privileges of the speaker of the Council of Representatives, his two deputies, and the members of the Council of Representatives.

Second:

- A. A member of the Council of Representatives shall enjoy immunity for statements made while the Council is in session, and the member may not be prosecuted before the courts for such.
- B. A Council of Representatives member may not be placed under arrest during the legislative term of the Council of Representatives, unless the member is accused of a felony and the Council of Representatives members consent by an absolute majority to lift his immunity or if he is caught *in flagrante delicto* in the commission of a felony.
- C. A Council of Representatives member may not be arrested after the legislative term of the Council of Representatives, unless the member is accused of a felony and with the consent of the speaker of the Council of Representatives to lift his immunity or if he is caught *in flagrante delicto* in the commission of a felony.

Article 64:

First: The Council of Representatives may be dissolved by an absolute majority of the number of its members, or upon the request of one-third of its members by the Prime Minister with the consent of the President of the Republic. The Council shall not be dissolved during the period in which the Prime Minister is being questioned.

Second: Upon the dissolution of the Council of Representatives, the President of the Republic shall call for general elections in the country within a period not to exceed sixty days from the date of its dissolution. The Council of Ministers in this case is deemed resigned and continues to run everyday business.

**Second: The Federation Council**Article 65:

A legislative council shall be established named the "Federation Council," to include representatives from the regions and the governorates that are not organized in a region. A law, enacted by a two-thirds majority of the members of the Council of Representatives, shall regulate the formation of the Federation Council, its membership conditions, its competencies, and all that is connected with it.

**Chapter Two**  
**[The Executive Power]**

Article 66:

The federal executive power shall consist of the President of the Republic and the Council of Ministers and shall exercise its powers in accordance with the Constitution and the law.

### **First: The President of the Republic**

#### Article 67:

The President of the Republic is the Head of the State and a symbol of the unity of the country and represents the sovereignty of the country. He shall guarantee the commitment to the Constitution and the preservation of Iraq's independence, sovereignty, unity, and the safety of its territories, in accordance with the provisions of the Constitution.

#### Article 68:

A nominee to the Presidency of the Republic must be:

First: An Iraqi by birth, born to Iraqi parents.

Second: Fully qualified and must be over forty years of age.

Third: Of good reputation and political experience, known for his integrity, uprightness, fairness, and loyalty to the homeland.

Fourth: Free of any conviction of a crime involving moral turpitude.

#### Article 69:

First: The provisions for nomination to the office of the President of the Republic shall be regulated by law.

Second: The provisions for nomination to the office of one or more Vice Presidents of the Republic shall be regulated by law.

#### Article 70:

First: The Council of Representatives shall elect a President of the Republic from among the candidates by a two-thirds majority of the number of its members.

Second: If none of the candidates receive the required majority vote then the two candidates who received the highest number of votes shall compete and the one who receives the majority of votes in the second election shall be declared President.

#### Article 71:

The President shall take the constitutional oath before the Council of Representatives according to the language stipulated in Article 50 of the Constitution.

#### Article 72:

First: The President of the Republic's term in office shall be limited to four years. He may be re-elected for a second time only.

Second:

A- The President of the Republic's term in office shall end with the end of the term of the Council of Representatives.

B- The President of the Republic shall continue to exercise his duties until after the end of the election and the meeting of the new Council of Representatives, provided that a new President of the Republic is elected within thirty days from the date of its first convening.

C- In case the position of the President of the Republic becomes vacant for any reason, a new President shall be elected to complete the remaining period of the President's term.

Article 73:

The President of the Republic shall assume the following powers:

First: To issue a special pardon on the recommendation of the Prime Minister, except for anything concerning a private claim and for those who have been convicted of committing international crimes, terrorism, or financial and administrative corruption.

Second: To ratify international treaties and agreements after the approval by the Council of Representatives. Such international treaties and agreements are considered ratified after fifteen days from the date of receipt by the President.

Third: To ratify and issue the laws enacted by the Council of Representatives. Such laws are considered ratified after fifteen days from the date of receipt by the President.

Fourth: To call the elected Council of Representatives to convene during a period not to exceed fifteen days from the date of approval of the election results and in the other cases stipulated in the Constitution.

Fifth: To award medals and decorations on the recommendation of the Prime Minister in accordance with the law.

Sixth: To accredit ambassadors.

Seventh: To issue Presidential decrees.

Eighth: To ratify death sentences issued by the competent courts.

Ninth: To perform the duty of the High Command of the armed forces for ceremonial and honorary purposes.

Tenth: To exercise any other presidential powers stipulated in this Constitution.

Article 74:

A law shall fix the salary and the allowances of the President of the Republic.

Article 75:

First: The President of the Republic shall have the right to submit his resignation in writing to the Speaker of the Council of Representatives, and it shall be considered effective after seven days from the date of its submission to the Council of Representatives.

Second: The Vice President shall replace the President in case of his absence.

Third: The Vice President shall replace the President of the Republic in the event that the post of the President becomes vacant for any reason whatsoever. The Council of Representatives must elect a new President within a period not to exceed thirty days from the date of the vacancy.

Fourth: In case the post of the President of the Republic becomes vacant, the Speaker of the Council of Representatives shall replace the President of the Republic in case he does not have a Vice President, on the condition that a new President is elected during a period not to exceed thirty days from the date of the vacancy and in accordance with the provisions of this Constitution.

### **Second: Council of Ministers**

#### **Article 76:**

First: The President of the Republic shall charge the nominee of the largest Council of Representatives bloc with the formation of the Council of Ministers within fifteen days from the date of the election of the President of the Republic.

Second: The Prime Minister-designate shall undertake the naming of the members of his Council of Ministers within a period not to exceed thirty days from the date of his designation.

Third: If the Prime Minister-designate fails to form the Council of Ministers during the period specified in clause "Second," the President of the Republic shall charge a new nominee for the post of Prime Minister within fifteen days.

Fourth: The Prime Minister-designate shall present the names of his members of the Council of Ministers and the ministerial program to the Council of Representatives. He is deemed to have gained its confidence upon the approval, by an absolute majority of the Council of Representatives, of the individual Ministers and the ministerial program.

Fifth: The President of the Republic shall charge another nominee to form the Council of Ministers within fifteen days in case the Council of Ministers did not win the vote of confidence.

#### **Article 77:**

First: The conditions for assuming the post of the Prime Minister shall be the same as those for the President of the Republic, provided that he has a college degree or its equivalent and is over thirty-five years of age.

Second: The conditions for assuming the post of Minister shall be the same as those for members of the Council of Representatives, provided that he holds a college degree or its equivalent.

Article 78:

The Prime Minister is the direct executive authority responsible for the general policy of the State and the commander-in-chief of the armed forces. He directs the Council of Ministers, presides over its meetings, and has the right to dismiss the Ministers, with the consent of the Council of Representatives.

Article 79:

The Prime Minister and members of the Council of Ministers shall take the constitutional oath before the Council of Representatives according to the language stipulated in Article 50 of the Constitution.

Article 80:

The Council of Ministers shall exercise the following powers:

First: To plan and execute the general policy and general plans of the State and oversee the work of the ministries and departments not associated with a ministry.

Second: To propose bills.

Third: To issue rules, instructions, and decisions for the purpose of implementing the law.

Fourth: To prepare the draft of the general budget, the closing account, and the development plans.

Fifth: To recommend to the Council of Representatives that it approve the appointment of undersecretaries, ambassadors, state senior officials, the Chief of Staff of the Armed Forces and his deputies, division commanders or higher, the Director of the National Intelligence Service, and heads of security institutions.

Sixth: To negotiate and sign international agreements and treaties, or designate any person to do so.

Article 81:

First: The President of the Republic shall take up the office of the Prime Minister in the event the post becomes vacant for any reason whatsoever.

Second: If the event mentioned in "First" of this Article occurs, the President shall charge another nominee to form the Council of Ministers within a period not to exceed fifteen days in accordance with the provisions of Article 76 of this Constitution.

Article 82:



A law shall regulate the salaries and allowances of the Prime Minister and Ministers, and anyone of their grade.

Article 83:

The responsibility of the Prime Minister and the Ministers before the Council of Representatives is of a joint and personal nature.

Article 84:

First: A law shall regulate the work and define the duties and authorities of the security institutions and the National Intelligence Service, which shall operate in accordance with the principles of human rights and shall be subject to the oversight of the Council of Representatives.

Second: The National Intelligence Service shall be attached to the Council of Ministers.

Article 85:

The Council of Ministers shall establish internal bylaws to organize the work therein.

Article 86:

A law shall regulate the formation of ministries, their functions, and their specializations, and the authorities of the minister.

**Chapter Three**  
**[The Judicial Power]**

Article 87:

The judicial power is independent. The courts, in their various types and levels, shall assume this power and issue decisions in accordance with the law.

Article 88:

Judges are independent, and there is no authority over them except that of the law. No power shall have the right to interfere in the judiciary and the affairs of justice.

Article 89:

The federal judicial power is comprised of the Higher Juridical Council, the Federal Supreme Court, the Federal Court of Cassation, the Public Prosecution Department, the Judiciary Oversight Commission, and other federal courts that are regulated in accordance with the law.

**First: Higher Juridical Council**

Article 90:

The Higher Juridical Council shall oversee the affairs of the judicial committees. The law shall specify the method of its establishment, its authorities, and the rules of its operation.

Article 91:

The Higher Juridical Council shall exercise the following authorities:

First: To manage the affairs of the judiciary and supervise the federal judiciary.

Second: To nominate the Chief Justice and members of the Federal Court of Cassation, the Chief Public Prosecutor, and the Chief Justice of the Judiciary Oversight Commission, and to present those nominations to the Council of Representatives to approve their appointment.

Third: To propose the draft of the annual budget of the federal judicial authority, and to present it to the Council of Representatives for approval.

### **Second: Federal Supreme Court**

Article 92:

First: The Federal Supreme Court is an independent judicial body, financially and administratively.

Second: The Federal Supreme Court shall be made up of a number of judges, experts in Islamic jurisprudence, and legal scholars, whose number, the method of their selection, and the work of the Court shall be determined by a law enacted by a two-thirds majority of the members of the Council of Representatives.

Article 93:

The Federal Supreme Court shall have jurisdiction over the following:

First: Overseeing the constitutionality of laws and regulations in effect.

Second: Interpreting the provisions of the Constitution.

Third: Settling matters that arise from the application of the federal laws, decisions, regulations, instructions, and procedures issued by the federal authority. The law shall guarantee the right of direct appeal to the Court to the Council of Ministers, those concerned individuals, and others.

Fourth: Settling disputes that arise between the federal government and the governments of the regions and governorates, municipalities, and local administrations.

Fifth: Settling disputes that arise between the governments of the regions and governments of the governorates.

Sixth: Settling accusations directed against the President, the Prime Minister and the Ministers, and this shall be regulated by law.

Seventh: Ratifying the final results of the general elections for membership in the Council of Representatives.

Eight:

- A. Settling competency disputes between the federal judiciary and the judicial institutions of the regions and governorates that are not organized in a region.
- B. Settling competency disputes between judicial institutions of the regions or governorates that are not organized in a region.

Article 94:

Decisions of the Federal Supreme Court are final and binding for all authorities.

### **Third: General Provisions**

Article 95:

The establishment of special or extraordinary courts is prohibited.

Article 96:

The law shall regulate the establishment of courts, their types, levels, and jurisdiction, and the method of appointing and the terms of service of judges and public prosecutors, their discipline, and their retirement.

Article 97:

Judges may not be removed except in cases specified by law. Such law will determine the particular provisions related to them and shall regulate their disciplinary measures.

Article 98:

A judge or public prosecutor is prohibited from the following:

First: Combining a judicial position with legislative and executive positions and any other employment.

Second: Joining any party or political organization or performing any political activity.

Article 99:

A law shall regulate the military judiciary and shall specify the jurisdiction of military courts, which are limited to crimes of a military nature committed by members of the armed forces and security forces, and within the limits established by law.

Article 100:

It is prohibited to stipulate in the law the immunity from appeal for any administrative action or decision.

Article 101:

A State Council may be established, specialized in functions of the administrative judiciary, issuing opinions, drafting, and representing the State and various public commissions before the courts except those exempted by law.

**Chapter Four**  
**[Independent Commissions]**

Article 102:

The High Commission for Human Rights, the Independent Electoral Commission, and the Commission on Public Integrity are considered independent commissions subject to monitoring by the Council of Representatives, and their functions shall be regulated by law.

Article 103:

First: The Central Bank of Iraq, the Board of Supreme Audit, the Communication and Media Commission, and the Endowment Commissions are financially and administratively independent institutions, and the work of each of these institutions shall be regulated by law.

Second: The Central Bank of Iraq is responsible before the Council of Representatives. The Board of Supreme Audit and the Communication and Media Commission shall be attached to the Council of Representatives.

Third: The Endowment Commissions shall be attached to the Council of Ministers.

Article 104:

A commission named The Martyrs' Foundation shall be established and attached to the Council of Ministers, and its functions and competencies shall be regulated by law.

Article 105:

A public commission shall be established to guarantee the rights of the regions and governorates that are not organized in a region to ensure their fair participation in managing the various state federal institutions, missions, fellowships, delegations, and regional and international conferences. The commission shall be comprised of representatives of the federal government and representatives of the regions and governorates that are not organized in a region, and shall be regulated by a law.

Article 106:

A public commission shall be established by a law to audit and appropriate federal revenues. The commission shall be comprised of experts from the federal government, the regions, the governorates, and its representatives, and shall assume the following responsibilities:

First: To verify the fair distribution of grants, aid, and international loans pursuant to the entitlement of the regions and governorates that are not organized in a region.

Second: To verify the ideal use and division of the federal financial resources.

Third: To guarantee transparency and justice in appropriating funds to the governments of the regions and governorates that are not organized in a region in accordance with the established percentages.

Article 107:

A council named the Federal Public Service Council shall be established and shall regulate the affairs of the federal public service, including appointments and promotions, and its formation and competencies shall be regulated by law.

Article 108:

Other independent commissions may be established by law, according to need and necessity.

## Section Four

### Powers of the Federal Government

#### Article 109:

The federal authorities shall preserve the unity, integrity, independence, and sovereignty of Iraq and its federal democratic system.

#### Article 110:

The federal government shall have exclusive authorities in the following matters:

First: Formulating foreign policy and diplomatic representation; negotiating, signing, and ratifying international treaties and agreements; negotiating, signing, and ratifying debt policies and formulating foreign sovereign economic and trade policy.

Second: Formulating and executing national security policy, including establishing and managing armed forces to secure the protection and guarantee the security of Iraq's borders and to defend Iraq.

Third: Formulating fiscal and customs policy; issuing currency; regulating commercial policy across regional and governorate boundaries in Iraq; drawing up the national budget of the State; formulating monetary policy; and establishing and administering a central bank.

Fourth: Regulating standards, weights, and measures.

Fifth: Regulating issues of citizenship, naturalization, residency, and the right to apply for political asylum.

Sixth: Regulating the policies of broadcast frequencies and mail.

Seventh: Drawing up the general and investment budget bill.

Eighth: Planning policies relating to water sources from outside Iraq and guaranteeing the rate of water flow to Iraq and its just distribution inside Iraq in accordance with international laws and conventions.

Ninth: General population statistics and census.

#### Article 111:

Oil and gas are owned by all the people of Iraq in all the regions and governorates.

#### Article 112:

First: The federal government, with the producing governorates and regional governments, shall undertake the management of oil and gas extracted from present fields, provided that it distributes its revenues in a fair manner in proportion to the population distribution in all parts of the country, specifying an allotment for a specified

period for the damaged regions which were unjustly deprived of them by the former regime, and the regions that were damaged afterwards in a way that ensures balanced development in different areas of the country, and this shall be regulated by a law.

Second: The federal government, with the producing regional and governorate governments, shall together formulate the necessary strategic policies to develop the oil and gas wealth in a way that achieves the highest benefit to the Iraqi people using the most advanced techniques of the market principles and encouraging investment.

Article 113:

Antiquities, archeological sites, cultural buildings, manuscripts, and coins shall be considered national treasures under the jurisdiction of the federal authorities, and shall be managed in cooperation with the regions and governorates, and this shall be regulated by law.

Article 114:

The following competencies shall be shared between the federal authorities and regional authorities:

First: To manage customs, in coordination with the governments of the regions and governorates that are not organized in a region, and this shall be regulated by a law.

Second: To regulate the main sources of electric energy and its distribution.

Third: To formulate environmental policy to ensure the protection of the environment from pollution and to preserve its cleanliness, in cooperation with the regions and governorates that are not organized in a region.

Fourth: To formulate development and general planning policies.

Fifth: To formulate public health policy, in cooperation with the regions and governorates that are not organized in a region.

Sixth: To formulate the public educational and instructional policy, in consultation with the regions and governorates that are not organized in a region.

Seventh: To formulate and regulate the internal water resources policy in a way that guarantees their just distribution, and this shall be regulated by a law.

Article 115:

All powers not stipulated in the exclusive powers of the federal government belong to the authorities of the regions and governorates that are not organized in a region. With regard to other powers shared between the federal government and the regional government, priority shall be given to the law of the regions and governorates not organized in a region in case of dispute.

## Section Five

### Powers of the Regions

#### Chapter One [Regions]

##### Article 116:

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

##### Article 117:

First: This Constitution, upon coming into force, shall recognize the region of Kurdistan, along with its existing authorities, as a federal region.

Second: This Constitution shall affirm new regions established in accordance with its provisions.

##### Article 118:

The Council of Representatives shall enact, in a period not to exceed six months from the date of its first session, a law that defines the executive procedures to form regions, by a simple majority of the members present.

##### Article 119:

One or more governorates shall have the right to organize into a region based on a request to be voted on in a referendum submitted in one of the following two methods:

First: A request by one-third of the council members of each governorate intending to form a region.

Second: A request by one-tenth of the voters in each of the governorates intending to form a region.

##### Article 120:

Each region shall adopt a constitution of its own that defines the structure of powers of the region, its authorities, and the mechanisms for exercising such authorities, provided that it does not contradict this Constitution.

##### Article 121:

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

Second: In case of a contradiction between regional and national legislation in respect to a matter outside the exclusive authorities of the federal government, the regional



power shall have the right to amend the application of the national legislation within that region.

Third: Regions and governorates shall be allocated an equitable share of the national revenues sufficient to discharge their responsibilities and duties, but having regard to their resources, needs, and the percentage of their population.

Fourth: Offices for the regions and governorates shall be established in embassies and diplomatic missions, in order to follow cultural, social, and developmental affairs.

Fifth: The regional government shall be responsible for all the administrative requirements of the region, particularly the establishment and organization of the internal security forces for the region such as police, security forces, and guards of the region.

## Chapter Two

### [Governorates that are not incorporated in a region]

#### Article 122:

First: The governorates shall be made up of a number of districts, sub-districts, and villages.

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

Third: The governor, who is elected by the Governorate Council, is deemed the highest executive official in the governorate to practice his powers authorized by the Council.

Fourth: A law shall regulate the election of the Governorate Council, the governor, and their powers.

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

#### Article 123:

Powers exercised by the federal government can be delegated to the governorates or vice versa, with the consent of both governments, and this shall be regulated by law.

## Chapter Three

### [The Capital]

Article 124:

First: Baghdad in its municipal borders is the capital of the Republic of Iraq and shall constitute, in its administrative borders, the governorate of Baghdad.

Second: This shall be regulated by a law.

Third: The capital may not merge with a region.

**Chapter Four**  
**[The Local Administrations]**

Article 125:

This Constitution shall guarantee the administrative, political, cultural, and educational rights of the various nationalities, such as Turkomen, Chaldeans, Assyrians, and all other constituents, and this shall be regulated by law.

**Section Six**

**Final and Transitional Provisions**

**Chapter One**  
**[Final Provisions]**

Article 126:

First: The President of the Republic and the Council of the Ministers collectively, or one-fifth of the Council of Representatives members, may propose to amend the Constitution.

Second: The fundamental principles mentioned in Section One and the rights and liberties mentioned in Section Two of the Constitution may not be amended except after two successive electoral terms, with the approval of two-thirds of the members of the Council of Representatives, the approval of the people in a general referendum, and the ratification by the President of the Republic within seven days.

Third: Other articles not stipulated in clause "Second" of this Article may not be amended, except with the approval of two-thirds of the members of the Council of Representatives, the approval of the people in a general referendum, and the ratification by the President of the Republic within seven days.

Fourth: Articles of the Constitution may not be amended if such amendment takes away from the powers of the regions that are not within the exclusive powers of the federal authorities, except by the approval of the legislative authority of the concerned region and the approval of the majority of its citizens in a general referendum.

Fifth:

- A- An amendment is considered ratified by the President of the Republic after the expiration of the period stipulated in clauses "Second" and "Third" of this Article, in case he does not ratify it.
- B- An amendment shall enter into force on the date of its publication in the Official Gazette.

Article 127:

The President of the Republic, the Prime Minister, members of the Council of Ministers, the Speaker of the Council of Representatives, his two Deputies, members of the Council of Representatives, members of the Judicial Authority, and people of special grades may not use their influence to buy or rent any state properties, to rent or sell any of their assets to the state, to sue the state for these assets, or to conclude a contract with the state under the pretense of being building contractors, suppliers, or concessionaires.

Article 128:

The laws and judicial judgments shall be issued in the name of the people.

Article 129:

Laws shall be published in the Official Gazette and shall take effect on the date of their publication, unless stipulated otherwise.

Article 130:

Existing laws shall remain in force, unless annulled or amended in accordance with the provisions of this Constitution.

Article 131:

Every referendum mentioned in this Constitution is deemed successful with the approval of the majority of the voters unless otherwise stipulated.

**Chapter Two**  
**[Transitional Provisions]**

Article 132:

First: The State shall guarantee care for the families of the martyrs, political prisoners, and victims of the oppressive practices of the defunct dictatorial regime.

Second: The State shall guarantee compensation to the families of the martyrs and the injured as a result of terrorist acts.

Third: A law shall regulate matters mentioned in clauses “First” and “Second” of this Article.

Article 133:

The Council of Representatives shall adopt in its first session the bylaws of the Transitional National Assembly until it adopts its own bylaws.

Article 134:

The Iraqi High Tribunal shall continue its duties as an independent judicial body, in examining the crimes of the defunct dictatorial regime and its symbols. The Council of Representatives shall have the right to dissolve it by law after the completion of its work.

Article 135:

First: The High Commission for De-Ba’athification shall continue its functions as an independent commission, in coordination with the judicial authority and the executive institutions within the framework of the laws regulating its functions. The Commission shall be attached to the Council of Representatives.

Second: The Council of Representatives shall have the right to dissolve this Commission by an absolute majority after the completion of its function.

Third: A nominee to the positions of the President of the Republic, the Prime Minister, the members of the Council of Ministers, the Speaker, the members of the Council of Representatives, the President, members of the Federation Council, their counterparts in the regions, or members of the judicial commissions and other positions covered by de-Ba’athification statutes pursuant to the law may not be subject to the provisions of de-Ba’athification.

Fourth: The conditions stated in clause “Third” of this Article shall remain in force unless the Commission stated in item “First” of this Article is dissolved.

Fifth: Mere membership in the dissolved Ba’ath party shall not be considered a sufficient basis for referral to court, and a member shall enjoy equality before the law and protection unless covered by the provisions of De-Ba’athification and the directives issued according to it.

Sixth: The Council of Representatives shall form a parliamentary committee from among its members to monitor and review the executive procedures of the Higher Commission for De-Ba’athification and state institutions to guarantee justice, objectivity, and transparency and to examine their consistency with the laws. The committee’s decisions shall be subject to the approval of the Council of Representatives.

Article 136:

First: The Property Claims Commission shall continue its functions as an independent commission in coordination with the judicial authority and the executive institutions in accordance with the law. The Property Claims Commission shall be attached to the Council of Representatives.

Second: The Council of Representatives shall have the right to dissolve the Commission by a two-thirds majority vote of its members.

Article 137:

Application of the provisions of the articles related to the Federation Council, wherever it may be cited in this Constitution, shall be postponed until the Council of Representatives issues a decision by a two-thirds majority vote in its second electoral term that is held after this Constitution comes into force.

Article 138:

First: The expression “the Presidency Council” shall replace the expression “the President of the Republic” wherever the latter is mentioned in this Constitution. The provisions related to the President of the Republic shall be reactivated one successive term after this Constitution comes into force.

Second:

- A. The Council of Representatives shall elect the President of the State and two Vice Presidents who shall form a Council called the “Presidency Council,” which shall be elected by one list and with a two-thirds majority.
- B. The provisions to remove the President of the Republic present in this Constitution shall apply to the President and members of the Presidency Council.
- C. The Council of Representatives may remove a member of the Presidency Council with a three-fourths majority of the number of its members for reasons of incompetence and dishonesty.
- D. In the event of a vacant seat in the Presidency Council, the Council of Representatives shall elect a replacement by a two-thirds majority vote of its members.

Third: Members of the Presidency Council shall be subject to the same conditions as a member of the Council of Representatives and must:

- A. Be over forty years of age.
- B. Enjoy good reputation, integrity and uprightness.
- C. Have quit the dissolved (Ba’ath) Party ten years prior to its fall, in case he was a member of it.
- D. Have not participated in suppressing the 1991 and Al-Anfal uprisings. He must not have committed a crime against the Iraqi people.

Fourth: The Presidency Council shall issue its decisions unanimously and any member may delegate to one of the two other members to take his place.

Fifth:

- A- Legislation and decisions enacted by the Council of Representatives shall be forwarded to the Presidency Council for their unanimous approval and for its issuance within ten days from the date of delivery to the Presidency Council, except the stipulations of Articles 118 and 119 that pertain to the formation of regions.
- B- In the event the Presidency Council does not approve, legislation and decisions shall be sent back to the Council of Representatives to reexamine the disputed issues and to vote on them by the majority of its members and then shall be sent for the second time to the Presidency Council for approval.
- C- In the event the Presidency Council does not approve the legislation and decisions for the second time within ten days of receipt, the legislation and decisions are sent back to the Council of Representatives, which has the right to adopt it by three-fifths majority of its members, which may not be challenged, and the legislation or decision shall be considered ratified.

Sixth: The Presidency Council shall exercise the powers of the President of the Republic stipulated in this Constitution.

Article 139:

The Prime Minister shall have two deputies in the first electoral term.

Article 140:

First: The executive authority shall undertake the necessary steps to complete the implementation of the requirements of all subparagraphs of Article 58 of the Transitional Administrative Law.

Second: The responsibility placed upon the executive branch of the Iraqi Transitional Government stipulated in Article 58 of the Transitional Administrative Law shall extend and continue to the executive authority elected in accordance with this Constitution, provided that it accomplishes completely (normalization and census and concludes with a referendum in Kirkuk and other disputed territories to determine the will of their citizens), by a date not to exceed the 31st of December 2007.

Article 141:

Legislation enacted in the region of Kurdistan since 1992 shall remain in force, and decisions issued by the government of the region of Kurdistan, including court decisions and contracts, shall be considered valid unless they are amended or annulled pursuant to the laws of the region of Kurdistan by the competent entity in the region, provided that they do not contradict with the Constitution.

Article 142:

First: The Council of Representatives shall form at the beginning of its work a committee from its members representing the principal components of the Iraqi society with the mission of presenting to the Council of Representatives, within a period not to

exceed four months, a report that contains recommendations of the necessary amendments that could be made to the Constitution, and the committee shall be dissolved after a decision is made regarding its proposals.

Second: The proposed amendments shall be presented to the Council of Representatives all at once for a vote upon them, and shall be deemed approved with the agreement of the absolute majority of the members of the Council.

Third: The articles amended by the Council of Representatives pursuant to item "Second" of this Article shall be presented to the people for voting on them in a referendum within a period not exceeding two months from the date of their approval by the Council of Representatives.

Fourth: The referendum on the amended Articles shall be successful if approved by the majority of the voters, and if not rejected by two-thirds of the voters in three or more governorates.

Fifth: Article 126 of the Constitution (concerning amending the Constitution) shall be suspended, and shall return into force after the amendments stipulated in this Article have been decided upon.

Article 143:

The Transitional Administrative Law and its Annex shall be annulled on the seating of the new government, except for the stipulations of Article 53(A) and Article 58 of the Transitional Administrative Law.

Article 144:

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

## Annex 3

Map 2. Iraq: Oil field Classification<sup>712</sup>.

<sup>712</sup> This map is embedded in an article called: "Iraq: Oil Contracts and the Security Environment". Stratford. Strategic-forecasting. INC. April, 2008.<  
[http://www.stratfor.com/analysis/iraq\\_oil\\_contracts\\_and\\_security\\_environment](http://www.stratfor.com/analysis/iraq_oil_contracts_and_security_environment)>.





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