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# Constitutional Legitimacy in Iraq

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## What Role Local Context?

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### I. INTRODUCTION

6 There is today a growing consensus amongst policy-makers and international scholars that  
 7 norms relating to human rights and democracy are binding on all nations, as well as a grow-  
 8 ing trend of increased involvement of the international community in internal constitu-  
 9 tional processes with a view to ensuring that such norms are respected. Despite these trends,  
 10 an increasing number of constitutional systems are considered to be legitimate by both the  
 11 international community and by constitutional scholars despite the fact that they do not  
 12 enjoy any form of internal legitimacy within the territory that they are designed to govern.  
 13 The constitution that entered into force in Iraq in 2006 (hereinafter the 2006 Constitution)  
 14 falls under that category: despite clear approbation by the international community of the  
 15 new system of government that came into existence as a result of the 2006 Constitution, the  
 16 text is devoid of any form of internal legitimacy as exemplified in the state's incapacity to  
 17 establish order and to provide basic services to its population and by the fact that a large  
 18 number of its provisions are not being applied.<sup>2</sup>

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<sup>1</sup> From 2005 to 2009, Zaid Al-Ali was a legal adviser to the United Nations, focusing on constitutional and parliamentary reform in Iraq. The views expressed in this chapter are entirely his own. The author is indebted to Faisal Al-Istrabadi, Asanga Welikalaa and Reidar Visser for their comments and criticism, and to Hakan Seckinelgin at the London School of Economics' Department of Social Policy for allowing the author to test many of the ideas set out in this chapter in front of his class.

<sup>2</sup> The Arabic original of the Iraqi Constitution was published in the Iraqi Official Gazette Issue 4012 (December 28, 2005). An official English language translation of the Iraqi Constitution has not been published and is not available online. An unofficial translation of the final draft is available here: [www.uniraq.org/documents/iraqi\\_constitution.pdf](http://www.uniraq.org/documents/iraqi_constitution.pdf), accessed March 15, 2010. All translations contained in this article are the author's own. Note also that the 2006 Constitution came into force by virtue of Art. 144, which provides that "[t]his Constitution shall come into force after the approval of the people thereon in a general

1 The purpose of this contribution is to explore how it can be that, despite the attention  
 2 of international institutions and experts in a particular constitutional process, and despite  
 3 the application of international norms relating to democratic processes and fundamental  
 4 rights, a constitutional process can give rise to a text that is incapable of achieving accep-  
 5 tance within the relevant country's borders. The proposition that is put forth here is that  
 6 local context is the most important factor that should be considered if a constitution is to  
 7 have any chance of acquiring some form of internal legitimacy in the future. And yet, it has  
 8 been given scant attention by comparative constitutional law scholars and international  
 9 organizations such as the United Nations, who have been mostly concerned with issues  
 10 such as the universal application of fundamental rights.

11 This article seeks to demonstrate how local context can impact a text's change of achiev-  
 12 ing internal acceptance. It begins by defining constitutional legitimacy and by arguing that  
 13 although the 2006 Constitution has been endorsed by the international community, it was  
 14 essentially dead on arrival in Iraq (II). An effort is made, through the use of two case stud-  
 15 ies, to explain how this situation was brought about. The first seeks to show how the draft-  
 16 ers' lack of understanding of Iraq's institutional context brought about the collapse of its  
 17 system of parliamentary oversight under the 2006 Constitution (III), while the second  
 18 shows how the constitutional drafters (and the internationals who advised and guided the  
 19 constitutional process) had misjudged the relative popularity of the parties that were  
 20 allowed to control the drafting process and that dictated the final text's content (IV). Finally,  
 21 an effort is made to define what is meant by "local context" and to identify its different  
 22 components, particularly with a view to encouraging greater attention and understanding  
 23 of local considerations and interests by all parties involved in a constitutional process in the  
 24 future (V).

25 **II. CONSTITUTIONAL LEGITIMACY WITHIN**  
 26 **AND WITHOUT IRAQ**

27 **A. Constitutional Legitimacy Defined**

28 Different groups of scholars have been debating the issue of constitutional legitimacy for  
 29 some time, more or less in isolation of each other. For the most part, these debates have  
 30 concerned themselves with discrete factual, historical and legal contexts and fall within the  
 31 following three categories:

- 32 (1) The legitimacy of the U.S. Constitution: This debate is informed by the manner in  
 33 which the U.S. Constitution came into existence, the particular wording that it  
 34 uses, and by the long history of institutional and legal creation and revision that has  
 35 taken place since its ratification;<sup>3</sup>

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referendum, its publication in the Official Gazette, and the seating of the government that is formed pursu-  
 ant to this Constitution." Therefore, although the constitution was drafted, approved in a referendum, and  
 published in the Official Gazette in 2005, the first government that was formed pursuant to the constitution  
 was actually seated in 2006, which means that the final text only entered into force in 2006 and not in  
 2005.

<sup>3</sup> See, for example, Akhil R. Amar, "Philadelphia Revisited: Amending the Constitution Outside Article V" (Fall 1988) 55 *U. Chi. L. Rev.* 1043; Bruce Ackerman, Neal Katyal, "Our Unconventional Founding" (Spring 1995) 62 *U. Chi. L. Rev.* 475.

- 1 (2) The legitimacy of European integration: This debate, which is mostly driven by the  
 2 pace of European integration and by the recent efforts to establish a constitution  
 3 for the European Union, is concerned with a number of distinct issues, most  
 4 notably that these efforts have been taking place in the context of a democratic  
 5 deficit;<sup>4</sup> and  
 6 (3) The legitimacy of constitutions established under the “triumphalist scenario”  
 7 (which more or less corresponds to constitutions drafted after struggles of national  
 8 liberation):<sup>5</sup> Scholars interested in this area are concerned with issues such as  
 9 whether there is a commitment in the new social order to limitations on ordinary  
 10 political power<sup>6</sup> and whether citizens have any faith that the values embodied  
 11 within their particular constitutions will be legitimately pursued.<sup>7</sup>

12 As each of these debates is informed by its own specific context, and is stimulated by  
 13 specific circumstances and concerns, the standards that they establish cannot be automati-  
 14 cally applied to all constitutions or constitutional processes. However, the scholars that  
 15 have engaged in these debates provide us with the tools, the terminology, and the mecha-  
 16 nism to study and evaluate constitutional legitimacy. Indeed, several types of legitimacy can  
 17 be derived from the principles that they established and applied to situations such as the  
 18 Iraqi context. As such, a constitution can be considered to be legitimate where:

- 19 (1) a sufficient number of citizens accept the governmental system that it establishes,  
 20 such that a stable government can be established (legitimacy as stability);  
 21 (2) the constitution accurately reflects the particular political morality, or at least rec-  
 22 onciles the different political moralities that exist within the country in question  
 23 (normative legitimacy); and  
 24 (3) the international community recognizes the system of government that the consti-  
 25 tution sets in place (international legitimacy).

26 The first two of these forms of legitimacy are, for the most part, dependent on internal  
 27 matters. In the case of legitimacy as stability, it would be impossible to expect that a particu-  
 28 lar constitution could be accepted by all the citizens that it is intended to govern. The main  
 29 concern is therefore to obtain either the active or passive approbation of enough citizens to  
 30 allow the system of government that it establishes to function as intended. The concern is  
 31 also to create an environment that will discourage dissenters from expressing their disap-  
 32 proval through violent means, or at least to limit any acts of violence to the extent that  
 33 the state can satisfy its essential functions regardless. In so far as normative legitimacy is

<sup>4</sup> J.H.H. Weiler, “European Neo-constitutionalism: in Search of Foundations for the European Constitutional Order” in Richard Bellamy and Dario Castiglione (eds), *Constitutionalism in Transformation: European and Theoretical Perspectives* (Blackwell, Oxford 1996); Olivier Beaud, *La Puissance de l’Etat* (Leviathan Collection, PUF, Paris 1994); and Olivier Beaud, “Propos sceptiques sur la légitimité d’un référendum européen ou plaidoyer pour plus de réalisme constitutionnel” in Andreas Auer and Jean-François Flauss (eds), *Le référendum européen* (Bruylant, Bruxelles 1997).

<sup>5</sup> Bruce Ackerman, “The Rise of World Constitutionalism” (May 1997) 83 *Va. L. Rev.* 771, 780.

<sup>6</sup> Arend Lijphart, “The Puzzle of Indian Democracy: A Consociational Interpretation” (1996) 90 *Am. Pol. Sci. Rev.* 258; and Heinz Klug, *Constituting Democracy: Law, Globalism and South Africa’s Political Reconstruction* (Cambridge University Press, Cambridge 2000) 18.

<sup>7</sup> Heinz Klug, “Five Years On: How Relevant is the Constitution to the New South Africa?” (Summer 2002) 26 *Vt. L. Rev.* 803.

1 concerned, very few if any states can claim that its entire population shares the same vision  
 2 of how its state should function or what its specific powers should be. The concern is there-  
 3 fore to strike the proper balance between the aspirations of all major social, ethnic, or reli-  
 4 gious groups within that same country.

5 International legitimacy has its own particularities. Its most obvious manifestation is  
 6 membership in the United Nations, while the most obvious manifestation of international  
 7 illegitimacy is expulsion from that same organization. The most prominent precedent of  
 8 this phenomenon is the exclusion of apartheid South Africa and its subsequent readmission  
 9 into the international community in the 1990s.<sup>8</sup> However, despite the increased number of  
 10 international treaties, conventions, and norms relating to democratic and individual rights,  
 11 and despite the growing number of scholars who maintain that such norms should be bind-  
 12 ing on all national constitutional orders, it would appear that apart from a small number of  
 13 extreme examples such as apartheid South Africa, the only genuine requirement for a state  
 14 to acquire international legitimacy is the ability to exercise authority within internationally  
 15 recognized borders.<sup>9</sup>

### 16 **B. The International Legitimacy of the 2006 Constitution**

17 In the case of the Iraqi constitution-making process, the international community played a  
 18 more substantial role than it would normally have done as a result of the internationally  
 19 recognized occupation that was established in 2003.<sup>10</sup> This is to the extent that the United  
 20 Nations Security Council imposed on the Iraqi authorities the requirement that to work  
 21 towards a “federal” Iraq (a departure from Iraqi legal tradition), and provided that “direct  
 22 democratic elections [should be held] by 31 December 2004 . . . to [elect] a Transitional  
 23 National Assembly, which will, inter alia, have responsibility for . . . drafting a permanent  
 24 constitution for Iraq leading to a constitutionally elected government by 31 December  
 25 2005.”<sup>11</sup>

26 During the drafting process itself, the international community was represented by the  
 27 United Nations Assistance Mission for Iraq and by a number of foreign embassies, most  
 28 notably representatives from the U.S. Embassy. The individuals who were providing advice  
 29 on the ground to the Iraqi constitutional drafters (typically referred to as the “Constitutional  
 30 Committee”) disagreed as to the role that they should be playing, and to the type of advice

<sup>8</sup> For the international effort to ostracize apartheid South Africa, see UNGA, “First Report of the Credentials Committee,” U.N.Doc. A/9779 (1974), 29th Sess., Annex, Agenda Item 3, at 2; and UNGA Res 3068, 28 UN GAOR Supp. (No. 30) at 75, UN Doc. A/9030 (1973), *reprinted in* (1974) 13 ILM 56 (entered into force 18 July 1976).

<sup>9</sup> See, for example, the discussion on how the dispute between the People’s Republic of China and the Republic of China (Taiwan) was resolved before the United Nations in Gregory H. Fox, “The Right to Political Participation in International Law” (Summer 1992) 17 *Yale J. Int’l L.* 539, 599.

<sup>10</sup> For an account as to how the constitutional drafting process evolved over time see Feisal Amin Rasoul al-Istrabadi, “A Constitution Without Constitutionalism: Reflections on Iraq’s Failed Constitutional Process” (June 2009) 87 *Tex. L. Rev.* 1627; Noah Feldman and Roman Martinez, “Constitutional Politics and Text in the New Iraq: An Experiment in Islamic Democracy” (November 2006) 75 *Fordham L Rev* 883; Office of Constitutional Support, United Nations Assistance Mission for Iraq, “History of the Iraqi Constitution-Making Process” (December 2005) Unpublished; and Ashley S. Deeks and Matthew D. Burton, “Iraq’s constitution: A drafting history” (2007) 40 *Cornell Int’l L.J.* 1.

<sup>11</sup> UNSC Res 1546 (8 June 2004), S/Res/1546 [www.uniraq.org/documents/Resolution1546.pdf](http://www.uniraq.org/documents/Resolution1546.pdf), accessed March 15, 2010.

1 that should be provided. By and large however, the international community's main con-  
 2 cerns were that: (i) the drafting process should take place within the time frame imposed by  
 3 the Security Council; (ii) international human rights standards should be enshrined in  
 4 some form in the constitution; and (iii) the constitution should allow for the establishment  
 5 of a democratic and functioning system of government. These three goals were pursued  
 6 with varying degrees of determination.

7 By way of example, Art. 2 of a draft that was circulated by the Constitutional Committee  
 8 on August 11, 2005 (four days before the officially sanctioned deadline for producing a final  
 9 draft) provided that Islam should be the official state religion, and that it should be either  
 10 "the principal source of legislation" or "a principal source of legislation." It also provided  
 11 that "it is forbidden to enact laws which contradict the principles of Islam."<sup>12</sup> Representatives  
 12 from the U.S. Embassy were particularly concerned that Iraq, which had previously been  
 13 considered a relatively secular state, was in the process of becoming an Islamic theocracy  
 14 under its watch. The U.S. Ambassador therefore intervened and forced the adoption of a  
 15 formulation that was more acceptable to the international community. The final version of  
 16 Art. 2 therefore provides not only that "Islam is the official religion of the State and is a  
 17 foundation source of legislation" but also that "[n]o law may be enacted that contradicts the  
 18 principles of democracy." Despite the fact that there is obviously no agreement between  
 19 international or Iraqi scholars as to what "the principles of democracy" actually are, the  
 20 purpose of this particular formulation was to preempt any future interpretation of Islam  
 21 that could bring about the establishment of an Islamic theocracy or that could lead to a  
 22 violation of internationally recognized rights.

23 The international community also intervened to protect the rights of women, a matter  
 24 of great concern. On July 26, 2005, the Constitutional Committee circulated a draft accord-  
 25 ing to which "[t]he state guarantees the fundamental rights of women and their equality  
 26 with men, in all fields, according to the provisions of Islamic Shari'ah, and assists them to  
 27 reconcile duties towards family and work in society."<sup>13</sup> A number of internationals immedi-  
 28 ately protested that this wording, far from establishing gender equality, imposed a certain  
 29 role as well as family duties on women in a way that does not conform with the principle of  
 30 equality. Four days later, that provision was changed to what eventually became Art. 29 of  
 31 the final text, according to which

32 . . . family is the cornerstone of society. The state shall preserve the family's principles  
 33 and religious, moral and national values. The state shall guarantee the protection of  
 34 motherhood and childhood, and oversee minors and adolescents and provide them  
 35 with suitable environment to develop their capacities and capabilities.<sup>14</sup>

36 The advantage that this wording presented was clear: it no longer imposes any obliga-  
 37 tions on women, and merely provides that those women who choose to become mothers  
 38 will have their rights (which in an Iraqi context translates as the right to maternity leave and  
 39 to free health care) protected. The wording has in fact caused consternation amongst some

<sup>12</sup> Draft Constitution (August 11, 2005), Unpublished. The Constitutional Committee had not at that point reached unanimity on the exact wording that Art. 2 should adopt, which explains the fact that it contains different options.

<sup>13</sup> Art. 6, Chapter 3, Draft Constitution (July 26, 2005) Unpublished.

<sup>14</sup> Draft Constitution (July 30, 2005) Unpublished.

1 men that fatherhood (and the corresponding right to paternity leave) is not guaranteed  
2 under the constitution.

3 By contrast, international advisers and observers were far less moved to intervene where  
4 Iraq's governance structure was threatened by poor drafting or by particular political inter-  
5 ests. A striking example is Art. 110 of the 2006 Constitution, which lists the powers that are  
6 to be exercised exclusive by the federal government, combined with Art. 115 which pro-  
7 vides that "[a]ll powers not stipulated in the exclusive powers of the federal government  
8 belong to the authorities of the regions and provinces." The manner in which Art. 110 is  
9 formulated (the federal government has exclusive authority in "formulating fiscal and cus-  
10 toms policy" but no mention is made whether it can actually execute or implement fiscal  
11 policy) has led a number of scholars to conclude that the federal government is prevented  
12 from levying any taxes.<sup>15</sup>

13 That deficiency, combined with the constitution's provisions relating to the formation  
14 of regions (which are so permissive that any number of provinces (also known as governor-  
15 ates), whether contiguous or not, can join together to form a single region), caused a great  
16 deal of consternation amongst some internationals. Nicholas Haysom, former legal adviser  
17 to Nelson Mandela, was appointed by the United Nations in 2005 to serve as the director of  
18 the Office of Constitutional Support in Baghdad. In an internal report written before the  
19 constitutional negotiations were concluded, he wrote that "the provisions for the conver-  
20 sion of governorates into a region outside Kurdistan create a model for the territorial divi-  
21 sion of the State which in our view leaves the central government underpowered and  
22 possibly under-resourced."<sup>16</sup> Professor Yash Ghai, one of the world's leading constitutional  
23 scholars, was also retained by the United Nations to act as Process Adviser to the  
24 Constitutional Committee. In an internal report completed before the referendum date,  
25 later published online, he expressed "serious reservations whether the [draft constitution]  
26 as it stands can be fully and effectively implemented, without grave danger to state and  
27 society."<sup>17</sup> Despite these concerns, and despite the risks that this wording created, the inter-  
28 national community did not mobilize in the way that it did to protect the fundamental  
29 rights of women or to mitigate the influence of religion, and declared that it was satisfied  
30 with the constitution's final text. After the referendum date, and by virtue of another Security  
31 Council Resolution, Iraq was reintegrated into the community of nations.<sup>18</sup>

<sup>15</sup> One account of how the debate around the taxation issue took place can be found in Peter W. Galbraith, *The End of Iraq* (Simon & Schuster, 2006) 199 ("A British treasury official serving as an advisor to his country's embassy nearly derailed the constitution two hours before the final deadline. He was reading an English translation being made as drafts of the Arabic text became available, and realized the federal government had no tax power. He was about to charge into a meeting of Iraq's political leaders when a quick-thinking Kurdish constitutional advisor grabbed an available westerner—me—to explain the situation. The omission, I told him, was no mistake and he might want to consult with his ambassador before reopening an issue that could bring down Iraq's delicate compromise").

<sup>16</sup> See Nicholas Haysom, The United Nations' Office of Constitutional Support, "Summary and Critical Review of the Draft Constitution Presented to the TNA on 28 August 2005" (September 15, 2005), Unpublished; a leaked copy of this paper was quoted in Scott Johnson, Babak Dehghanpisheh and Michael Hastings, "Iraq: Loose Federation or Violent Disintegration?" *Newsweek* (October 10, 2005) [www.msnbc.msn.com/id/9558117/site/newsweek/](http://www.msnbc.msn.com/id/9558117/site/newsweek/), accessed March 15, 2010.

<sup>17</sup> Yash Ghai and Jill Cottrell, "A Review of the Draft Constitution of Iraq" (October 3, 2005) [www.law.wisc.edu/gls/arotcoi.pdf](http://www.law.wisc.edu/gls/arotcoi.pdf), accessed March 15, 2010.

<sup>18</sup> UNSC Res 1637 (November 11, 2005) S/Res/1637 (in which the Security Council welcomed "the drafting of a new constitution for Iraq and the recent approval of the draft constitution by the people of Iraq on

**1 C. The Internal Illegitimacy of the 2006 Constitution**

2 Pursuant to the definition set out above, the 2006 Constitution could be considered to be  
 3 legitimate within Iraq’s borders if it enjoyed a sufficient degree of acceptance among the  
 4 general population to guarantee stable government, or if it resolved Iraqi political morality.

5 The 2006 Constitution was adopted by virtue of a referendum that took place on  
 6 October 15, 2005 and which saw close to 80 percent of voters approve the final text. While  
 7 some commentators have upheld the seemingly overwhelming support that the constitu-  
 8 tion enjoys among the general population as evidence of its internal legitimacy,<sup>19</sup> the issue  
 9 is more complicated than it appears at first reading. Firstly, there is no dispute that the vast  
 10 majority of the Iraqi population never had the opportunity to review the 2006 Constitution’s  
 11 final draft before the referendum date, as a result of the fact that a number of changes were  
 12 introduced two days before the referendum date.<sup>20</sup> Iraqis therefore approved a text that they  
 13 had not seen, let alone read.

14 Secondly, Iraqis voted in favor of the 2006 Constitution on the basis that it was to be  
 15 amended immediately after its passage. Two days prior to the referendum date, in an effort  
 16 to stave off a possible rejection at the polls, the drafters incorporated Art. 142, according to  
 17 which a constitutional revision process should be established immediately after the new  
 18 parliament was to enter into session, with a view to making recommendations for amending  
 19 the constitution which should then be put to another referendum within four months.  
 20 Leading politicians organized a press conference to announce the change on October 13,  
 21 2005 in order to announce that this revision process would take place and to encourage  
 22 Iraqis to vote in favor of the text. Although the process did begin shortly after the 2006  
 23 Constitution entered into force, very little progress has been made and, at the time of  
 24 writing, it has still not ended, in clear violation of Art. 142 and therefore of the will of the  
 25 Iraqi people.

26 Thirdly, a number of commentators have noted that Iraq’s constitutional process was  
 27 instigated by a military invasion and that a large part of the process took place under occu-  
 28 pation, which is what led one of the country’s major communities to vote in its entirety  
 29 against the final text in the referendum.<sup>21</sup> Events since the constitution came into force con-  
 30 firm that a number of the country’s other major political and social groups continue to  
 31 actively reject the new constitutional order,<sup>22</sup> including the Şadrist Movement, which in the

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15 October 2005” and in which it noted “the willingness of the international community to work closely with the Government of Iraq [that was to be elected in application of the recently approved constitution] with respect to efforts to assist the Iraqi people”).

<sup>19</sup> John McGarry and Brendan O’Leary, “Iraq’s Constitution of 2005: Liberal Consociation as Political Prescription” (October 2007) 5 *Int’l. J. Const. L.* 670, 683.

<sup>20</sup> Office of Constitutional Support (n 10) 49.

<sup>21</sup> Andrew Arato, *Constitution Making under Occupation: The Politics of Imposed Revolution in Iraq* (Columbia University Press, New York 2009).

<sup>22</sup> See, for example, Jonathan Morrow, United States Institute of Peace, “Iraq’s Constitutional Process II: An Opportunity Lost” (December 2005) [www.usip.org/files/resources/sr155.pdf](http://www.usip.org/files/resources/sr155.pdf), accessed March 15, 2010 (“The draft constitution attracted criticism from a range of Iraqi groups and parties, and in particular Sunni Arab groups. After the National Assembly adopted the draft constitution on August 28, influential secular and religious Sunni Arab political groups, including the Iraq Islamic Party, the National Dialogue Council, and the Muslim Scholars Association, publicly indicated that they would oppose the draft at the national referendum . . . Significantly, opposition to the text was not confined to Sunni Arab groups. Former Prime Minister Ayad Allawi had also publicly opposed the model of regional federalism in the constitutional draft.

1 March 2010 election was confirmed as one of the country's largest political forces.<sup>23</sup> In fact,  
 2 the 2006 Constitution was regarded with so much suspicion in some quarters that it gave  
 3 new impetus to the civil conflict that had already been raging for some time: the rate of  
 4 monthly attacks on Iraqi security forces more than doubled immediately after the constitu-  
 5 tion entered into force.<sup>24</sup> Many of Iraq's leading politicians had in fact predicted that this  
 6 increased instability would occur months before the event.<sup>25</sup>

7 The constitution's claim to normative legitimacy is equally debatable, given that it makes  
 8 no attempt to resolve Iraqi political morality, particularly in relation to the issues that were  
 9 most important to Iraqis. For example, although Iraqis are overwhelmingly concerned with  
 10 the issue as to whether their country should be transformed into an ethno-sectarian federa-  
 11 tion, the constitution merely provides that the issue will be resolved by future legislation.  
 12 Indeed, Art. 118 of the final Constitution provides that "[t]he Council of Representatives  
 13 shall enact, in a period not to exceed six months from the date of its first session, a law that  
 14 defines the executive procedures to form regions, by a simple majority of the members  
 15 present," therefore leaving open the possibility that federal regions could be formed on the  
 16 basis of religious affiliation, something to which a large segment of the population, perhaps  
 17 even a majority, is completely opposed. Also, in relation to how Iraq's upper chamber should  
 18 be formed, Art. 64 merely provides that "[a] law, enacted by a two thirds majority of the  
 19 members of the [first chamber of parliament], shall regulate the Federation Council forma-  
 20 tion, its membership conditions and its specializations and all that is connected with it." To  
 21 this date, which is to say more than six years since the Constitution entered into force, that  
 22 law (as well as many others that are required under the constitution) has not been passed or  
 23 even debated in the country's parliament. A number of commentators, including partici-  
 24 pants in the constitutional process, maintain that the 2006 Constitution's failure to resolve  
 25 these issues is yet another basis for disagreement and conflict in the country.<sup>26</sup>

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The influential Shia clerics Moqtada al-Sadr and Ayatollah Mohammed al-Yaqoubi indicated their opposi-  
 tion to the draft at the referendum"); Michael Howard, "Moqtada Sadr Throws Iraqi Unity Talks into  
 Disarray" *Guardian* (London February 20, 2006) [www.guardian.co.uk/Iraq/Story/0,,1713411,00.html](http://www.guardian.co.uk/Iraq/Story/0,,1713411,00.html),  
 accessed March 15, 2010 (in which Muqtada al-Sadr, who at the time was arguably the most influential of  
 Iraq's political leaders, is quoted as saying 'I reject this constitution which calls for sectarianism and there is  
 nothing good in this constitution at all').

<sup>23</sup> Anthony Shadid, "Followers of Sadr Emerge Stronger after Iraq Elections" *New York Times* (New York  
 March 16, 2010) [www.nytimes.com/2010/03/17/world/middleeast/17sadr.html](http://www.nytimes.com/2010/03/17/world/middleeast/17sadr.html), accessed March 18,  
 2010.

<sup>24</sup> See U.S. Department of Defense, "Measuring Stability and Security in Iraq" (September 2007) 19 [www.  
 defense.gov/pubs/pdfs/Signed-Version-070912.pdf](http://www.defense.gov/pubs/pdfs/Signed-Version-070912.pdf), accessed March 15, 2010.

<sup>25</sup> Adnan Pachachi, "Delay the Elections" *Washington Post* (Washington DC January 2, 2005) [www.washing-  
 tonpost.com/wp-dyn/articles/A40055-2004Dec31.html](http://www.washing-<br/>
    tonpost.com/wp-dyn/articles/A40055-2004Dec31.html), accessed March 10, 2010..

<sup>26</sup> See Kanan Makiya, "Present at the Disintegration" *The New York Times* (New York 11 December 2005)  
<http://select.nytimes.com/gst/abstract.html?res=FA0913F83A550C728DDDAB0994DD404482>,  
 accessed 10 March 2010 ("All signs suggest that this Constitution, if it is not radically amended, will further  
 weaken the already failing central Iraqi state. In spite of all the rhetoric in that document about the unity of  
 the 'homeland of the apostles and prophets' and the 'values and ideals of the heavenly messages and find-  
 ings of science' that have played a role in 'preserving for Iraq its free union,' it is disunity, diminished sov-  
 ereignty and years of future discord that lie in store for Iraq if the Constitution is not overhauled"); and The  
 International Crisis Group, "Unmaking Iraq: A Constitutional Process Gone Awry" (September 26, 2005)  
*Middle East Briefing* No. 19, [www.crisisgroup.org/home/getfile.cfm?id=1978&tid=3703&l=1](http://www.crisisgroup.org/home/getfile.cfm?id=1978&tid=3703&l=1), accessed  
 March 10, 2010 ("Key passages, such as those dealing with decentralization and with the responsibility for



1 Given all of the above, the question that must be answered is: how did the constitu-  
 2 tional drafters and their international advisers manage to put together a text that both  
 3 fanned the flames of Iraq’s civil conflict and runs contrary to the principles upheld by large  
 4 segments of the country’s population? The following case studies seek to show that the  
 5 drafters’ principal failure was to misunderstand local context. They misunderstood the legal  
 6 and institutional framework that they sought to amend, and the political context in which  
 7 they were operating.

8 **III. CASE STUDY 1: PARLIAMENTARY OVERSIGHT UNDER**  
 9 **THE 2006 CONSTITUTION**

10 However flawed and undemocratic the system of government established by Iraq’s previous  
 11 constitutional order, it remained in place for decades and left an important mark on work-  
 12 ing practices and on institutional relationships (including institutions that are not explicitly  
 13 mentioned in the 1970 Constitution). The purpose of this case study is to show how the  
 14 2006 Constitution modified parts of that culture in ways that were unanticipated. Also, pre-  
 15 cisely because some of these changes were not anticipated, the constitution and the parties  
 16 responsible for its implementation did not provide for the type of measures that were  
 17 needed to ensure effective government. The impact, discussed at the end of this case study,  
 18 is that the new constitutional order has contributed to the general breakdown of the state,  
 19 to a lack of trust amongst the local population in the new constitutional order’s ability to  
 20 engender stability and good government, and to the corresponding sense of constitutional  
 21 illegitimacy in Iraq.

22 **A. Oversight under the 1970 Interim Constitution**

23 Parliamentary oversight, the process through which parliament oversees and monitors the  
 24 performance of the executive branch of government with a view to identifying inefficiency,  
 25 waste or even instances of corruption, depends on a number of factors to function effec-  
 26 tively. Given that parliaments typically do not have the means to investigate the manner in  
 27 which government agencies invest public funds, they increasingly rely on supreme audit  
 28 institutions (SAIs) to act as their eyes and ears for this purpose.<sup>27</sup> SAIs, which are staffed by  
 29 accounting experts who are charged with auditing government accounts, evaluate the effi-  
 30 ciency of the expenditure of public funds and publish their findings in public reports that

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the power of taxation, are both vague and ambiguous and so carry the seeds of future discord. Many vital areas are left for future legislation that will have less standing than the constitution, be more vulnerable to amendment and bear the sectarian imprint of the Shiite community [which forms the majority of the Iraqi population] given its likely dominance of future legislatures”).

<sup>27</sup> Supreme Audit Institutions are defined as “national agencies responsible for auditing government revenue and spending. Their legal mandates, reporting relationships, and effectiveness vary, reflecting different governance systems and government policies. But their primary purpose is to oversee the management of public funds and the quality and credibility of governments’ reported financial data” (The World Bank, “Features and functions of supreme audit institutions” (October 2001) *PREMnotes* Number 59). For more on the functions and workings of supreme audit institutions, see Carlos Santiso, “Eyes wide shut? The politics of autonomous audit agencies in emerging economies” (May 2007) CIPPEC; and Kenneth M. Dye and Rick Staphenurst, “Pillars of Integrity: The importance of Supreme Audit Institutions in Curbing Corruption” (1998) <http://siteresources.worldbank.org/WBI/Resources/wbi37133.pdf>, accessed March 15, 2010.

1 they will then submit to the legislature. Parliament, armed with detailed and expert infor-  
 2 mation, will act by either questioning or sanctioning the government, but rarely by com-  
 3 mending it. One of the difficulties, given that the process is led by such a heavily politicized  
 4 body, is to ensure that the process remains as apolitical as possible.

5 Under its previous constitutional order, Iraq's parliamentary oversight system was led  
 6 by the National Council (1, below), which depended on information provided to it by the  
 7 state's SAI (2, below). The collaboration between the two institutions (3, below) allowed  
 8 for what was said to have been relatively effective parliamentary oversight under difficult  
 9 circumstances (4, below).

10 **1. *The National Council***

11 Iraq's previous constitutional order, which entered into force upon the publication of the  
 12 1970 interim constitution (hereinafter the 1970 Interim Constitution), was dysfunctional.  
 13 It concentrated power in the "Revolutionary Command Council" (hereinafter the RCC), a  
 14 body of up to twelve members that enjoyed both executive and legislative functions. Art. 42  
 15 provided that the RCC has the authority to "issue laws and decrees having the force of the  
 16 law" and "to issue whatever regulations are required in order to ensure the application of the  
 17 laws in force."<sup>28</sup> The RCC's executive authority was strengthened by the fact that its presi-  
 18 dent was also the president of the Republic (Art. 38(a)), who in turn was responsible for  
 19 "directing and supervising the works of the Ministries, public establishments and to coordi-  
 20 nate among them" (Art. 57(i)). The RCC appointed its own members, all of whom had to  
 21 be drawn from the "National leadership of the Socialist Arab Ba'th Party" (Art. 38(c)), and  
 22 was answerable only to itself (Art. 38(f)).

23 Although the 1970 Constitution does provide for the existence of a legislature (referred  
 24 to as the "National Council"), its independence and effectiveness as a separate branch of  
 25 government was seriously compromised as a result of a number of restrictions on its work  
 26 and independence from the RCC. By way of example, the National Council was not permit-  
 27 ted to legislate on "military and financial matters, and matters relating to public security"  
 28 (Art. 53). The constitution deferred matters relating to the National Council's formation to  
 29 future legislation (Art. 46), which could obviously only be passed by the RCC in accor-  
 30 dance with Art. 42. Over the coming three decades, three separate legal frameworks for the  
 31 National Council were established through legislation.

32 Law 228 (1970) was by far the most restrictive of the three.<sup>29</sup> It established that all 100  
 33 members of the National Council should be directly appointed by the RCC (Art. 4) and  
 34 restricted the Council's work to a few discrete areas. Law 55 (1980) established a new  
 35 framework for the National Council, and although it provided that all members should be  
 36 elected (Art. 2), the impact of this new regime was seriously limited by the conditions  
 37 that individuals had to meet in order to be eligible for election.<sup>30</sup> By way of example, an

<sup>28</sup> Note that although an official translation of the 1970 Interim Constitution was published in Issue Number 10 (1971) of the *Weekly Gazette of Iraq*, the language used in that translation is often imprecise. All translations of the 1970 Interim Constitution are therefore the author's own.

<sup>29</sup> Note that all Iraqi laws are published and only enter into force by virtue of their publication in the Official Gazette (see [www.iraqog.org/english/index.asp](http://www.iraqog.org/english/index.asp), accessed March 15, 2010). Access to the Official Gazette outside of Iraq has until recently been problematic. The entire contents of the Gazette can now be accessed and searched (in Arabic only) online at [www.iraq-ild.org](http://www.iraq-ild.org), accessed March 15, 2010.

<sup>30</sup> For the sake of context, and as a historical aside, it is worth noting that in 1970, the Iraqi Communist Party (the "ICP") was a strong political force in the country, and was considered to be capable of mobilizing

1 individual would have to be “a believer in the principles of the national socialist revolution”  
 2 to be eligible to stand for election (Art. 14(1)(c)). Law 26 (1995) confirmed that all of the  
 3 National Council’s members should be elected (Art. 2), but conditions for eligibility were  
 4 restricted even further. Art. 15(3) provided that each candidate must have “contributed to  
 5 the Iraq-Iran war and the 1991 Gulf War either by having participated directly, or through  
 6 the provision of financial and intellectual support.” The impact of these restrictions was to  
 7 deprive the National Council of any meaningful political function, reducing it to the status  
 8 of a bureaucratic institution.<sup>31</sup>

9 As these restrictions were being erected, some of the National Council’s responsibilities  
 10 were expanded. On the issue of parliamentary oversight, the 1970 Interim Constitution  
 11 was amended by Law 385 (1980), according to which the National Council had the author-  
 12 ity to exercise oversight over the council of ministers. Law 55 (1980) added some addi-  
 13 tional detail in relation to how this should take place: it provided that “any member of the  
 14 Council of Ministers could be required by the National Council to provide clarifications or  
 15 in order to be questioned, in accordance with the National Council’s bylaws” (Art. 47(6)).  
 16 Law 55 also provided that the National Council could suggest that “individual members of  
 17 the Council of Ministers should be relieved from their functions” (Art. 57(7)). Law 26  
 18 (1995), which dedicated an entire section to the National Council’s oversight function,  
 19 added that individual members of the Council were entitled to question ministers (Art.  
 20 57), and provided that the President of the Republic could request of the Council that it  
 21 investigate the performance of particular government departments or state-owned enter-  
 22 prises (Art. 59).<sup>32</sup>

## 23 **2. The Board of Supreme Audit**

24 Iraq’s supreme audit institution (known in English as the “Board of Supreme Audit,” or the  
 25 BSA) also underwent a number of fundamental changes that impacted the effectiveness of  
 26 the National Council’s oversight function.<sup>33</sup> The BSA, which was first established by Law 17  
 27 (1927), originally had a limited mandate. Law 194 (1980) introduced a number of wide  
 28 ranging reforms. In particular, it widened the BSA’s scope by requiring that it “evaluate the  
 29 state’s financial and economic policies” and that it “investigate the application of all laws  
 30 relating to financial and economic matters” (Art. 2). It also granted the BSA authority to  
 31 investigate “all governmental agencies that invest public monies” (Art. 3), which is to say, to  
 32 carry out performance evaluation reports for each government ministry and department.  
 33 The BSA was also required to act in the event of financial malfeasance on the part of any  
 34 public entity or employee (Art. 11), including the possibility of referring the matter directly  
 35 to the courts (Art. 12). Finally, it linked the BSA to both the RCC and the National Council  
 36 by providing that it must submit its annual report to both institutions (Art. 23).

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serious opposition to the Ba’th Party. By 1980, the ICP no longer represented a real threat to the Ba’th Party, having lost a significant amount of its members and following to arrests, purges and defections. For more on this issue, see Tareq Y. Ismael, *The Rise and Fall of the Communist Party of Iraq* (Cambridge University Press, Cambridge 2008).

<sup>31</sup> Interview with Muhammad Al-Sa’di, Senior Advisor, Iraqi Council of Representatives (Beirut October 17, 2009).

<sup>32</sup> Chapter 5, Section 2 of the National Council’s Bylaws, dated June 11, 1999, sets out some detail in relation to how the Council’s oversight function should be exercised in practice.

<sup>33</sup> See the BSA’s official website at [www.bsairaq.net](http://www.bsairaq.net), accessed March 15, 2010.

1 The BSA's legal regime was amended by Law 6 (1990), which was itself subsequently  
 2 amended by Coalition Provisional Authority Order 77 (2004).<sup>34</sup> Among other things, Law  
 3 6 (1990), as amended, explicitly linked the BSA to the legislative authority by providing  
 4 that it must "investigate and report on matters relating to the efficient disbursement and use  
 5 of public funds as formally requested by the Coalition Provisional Authority, the Iraqi  
 6 Governing Council or any successor body vested with national legislative authority" (Art.  
 7 2(6)). In a development that is particularly relevant for this case study, Art. 2 of Order 77  
 8 amending Law 6 (1990) abolished the BSA's authority to refer matters relating to financial  
 9 malfeasance directly to the courts. The BSA must now refer all allegations or evidence of  
 10 fraud to the relevant Ministry's Inspector General or to the Commission on Integrity (Arts.  
 11 2(7) and 10).<sup>35</sup>

12 **3. *The Collaboration between the National Council and the BSA***

13 One of BSA's essential roles prior to 2003 was to support the National Council in exercising  
 14 its oversight function. A specific mechanism was established to facilitate the collaboration  
 15 between the BSA and the Council, according to which the BSA would send advance copies  
 16 of its performance evaluation reports to the Council, accompanied by a list of the outstand-  
 17 ing clarifications that the BSA required from the relevant government department. A joint  
 18 committee would then be formed between the authors of the specific report and the rele-  
 19 vant parliamentary committee in order to follow up on the draft report's contents. The rel-  
 20 evant minister or government official would be expected to appear before this joint  
 21 committee and provide testimony in relation to all outstanding issues.<sup>36</sup>

22 This system was obviously imperfect, notably because it could not be applied in relation  
 23 to military issues as well as other matters. However, in areas where the National Council  
 24 was permitted to function by the 1970s Interim Constitution and by the laws in force at the  
 25 time, parliamentary oversight was effective. Although very little hard data on the oversight  
 26 of government activities survived the widespread arson of government buildings that  
 27 followed the war in 2003, a significant amount of institutional memory was retained by the  
 28 staff members that continue to exercise their functions in the Iraqi state. Thus, whereas  
 29 the National Council is now completely defunct, none of its staff having been retained  
 30 in the post-war period, the BSA remains essentially as it was before 2003, and its staff has  
 31 retained the memory of its former collaboration with the National Council, which it  
 32 describes as "effective enough to make ministers tremble with fear in the event they were  
 33 called to provide evidence in relation to a specific audit report."<sup>37</sup>

<sup>34</sup> An official English language version of CAP Order 77 (2004) is accessible at [www.cpa-iraq.org/regulations/20040425\\_CPAORD\\_77\\_Board\\_of\\_Supreme\\_Audit.pdf](http://www.cpa-iraq.org/regulations/20040425_CPAORD_77_Board_of_Supreme_Audit.pdf), accessed March 15, 2010.

<sup>35</sup> The Commission on Integrity, an anti-corruption agency, was established by the Coalition Provisional Authority by virtue of Order 55 (2004). The Inspectors General were established by virtue of Order 57 (2004). Art. 1 of Order 57 (2004) provides that each ministry is to have one Inspector General, who is mandated to "conduct investigations, audits, evaluations, inspections and other reviews in accordance with generally accepted professional standards." Both institutions are said to have been modeled on the U.S.' own anti-corruption framework.

<sup>36</sup> See United Nations Development Programme, "Background Paper, Strengthening the working relationship between the Iraqi Council of Representatives and the Board of Supreme Audit" (March 2009) 8 [www.pogar.org/publications/legislature/2009/bsa/background-e.pdf](http://www.pogar.org/publications/legislature/2009/bsa/background-e.pdf), accessed March 15, 2010.

<sup>37</sup> Interview with Maḥmūd Al-Ṭā'ī, Vice President, Iraqi Board of Supreme Audit (Amman January 2009 and Beirut October 2009); and Interview with Muḥammad Al-Sa'dī, Senior Adviser, Iraqi Council of Representatives (Beirut March 2009). Note, however, that from 1990 to 2003, Iraq was subject to an

1 **4. Local Context Considered**

2 Although the pre-2003 system of parliamentary oversight was clearly imperfect, it was  
 3 deliberately designed to function within Iraq's undemocratic and single party state, and any  
 4 success that it may have had in encouraging the efficient use of public funds depended on  
 5 that framework. More precisely, it depended on a number of factors to function (in the  
 6 areas that it had a mandate to oversee), including but not limited to: (i) the fact that the  
 7 National Council represented the President of the Republic in the implementation of its  
 8 work; and (ii) the National Council's overtly non-political nature, which allowed oversight  
 9 to retain a purely bureaucratic character.

10 In the United Kingdom, parliamentary oversight evolved over a period of more than a  
 11 hundred years within the context of a stable two-party constitutional system, and in order  
 12 to reflect a general concern and desire for fairness among the general public and public  
 13 servants. A number of detailed rules were established in that context. By way of example,  
 14 the House of Commons' Public Accounts Committee (PAC), the preeminent parliamen-  
 15 tary committee in the UK, is responsible for overseeing the government's performance and  
 16 depends on its privileged relationship with the National Audit Office (the UK's SAI) to  
 17 carry out its work. Given the UK's two-party system, and given the PAC's importance in the  
 18 parliamentary system, the PAC is always headed by a senior member of the opposition, usu-  
 19 ally a former minister. Crucially also, in order to avoid acrimonious political argument  
 20 interfering with the effort to exercise effective oversight, the PAC never requires ministers  
 21 to provide evidence (so as to avoid encouraging the ruling party to interfere with the pro-  
 22 cess by defending one of its own) and instead limits its interrogatory sessions to senior  
 23 public servants.<sup>38</sup>

24 The rules and the context in which the Iraqi, the UK, and other oversight systems  
 25 emerged may be different but the point is the same: specific institutional mechanisms are  
 26 most likely to function effectively when they are designed to fit the local context.

27 **B. The Transition to a New Constitutional Arrangement**

28 **1. Parliamentary Oversight Under the 2006 Constitution**

29 The 2006 Constitution institutes a number of important changes to Iraq's framework for  
 30 parliamentary oversight. Firstly, Art. 48 provides for the establishment of an entirely new  
 31 legislative body (referred to in English as the "Council of Representatives," also COR),<sup>39</sup>  
 32 which is to be directly elected by the people with only a few restrictions on membership  
 33 (Art. 49). In a reversal of the restrictions imposed under the 1970 Interim Constitution and  
 34 the legislation in force pursuant to that text, Law 16 (2005), which regulated the elections  
 35 that were to take place pursuant to the 2006 Constitution, imposed as a restriction that  
 36 individuals who fell under the scope of the de-ba'athification law (CPA Order 1 (2003))  
 37 could not be candidates in the national elections. The COR was also granted a wide range  
 38 of powers, establishing what is perhaps the Arab region's strongest parliamentary system

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international embargo (pursuant to UNSC Res 670 (1990)) which distorted all economic activity within the country as well as the state's finances (see Abbas Alnasrawi, *Iraq's Burdens: Oil, Sanctions, and Underdevelopment* (Greenwood Press, Westport 2002)). There is, once again, very little information in relation to how parliamentary oversight was impacted during this period.

<sup>38</sup> For more on parliamentary oversight in the UK, see HM Treasury, "Managing Public Money" (March 2007) [www.hm-treasury.gov.uk](http://www.hm-treasury.gov.uk), accessed March 15, 2010.

<sup>39</sup> See the Council of Representatives' official website at [www.parliament.iq](http://www.parliament.iq), accessed March 15, 2010.

1 of government. By way of example, the constitution explicitly imposes on the COR the  
 2 obligation to exercise oversight over the executive branch of government, and does not set  
 3 out any limitations to that function (Art. 61(2)), therefore extending its mandate to the  
 4 Presidency and to all members of the Council of Ministers, including the ministers of  
 5 defense and of the interior. The COR is also granted strong discretionary powers to with-  
 6 draw confidence from individual ministers or the government as a whole (Art. 61(8)).

7 The COR's by-laws affirm that it is "the highest legislative and oversight authority" in  
 8 Iraq (Art. 1),<sup>40</sup> and, in another innovation, grants the COR authority over not only minis-  
 9 ters, but also to "any other official in the executive branch of government" (Art. 32(1)).  
 10 Finally, the 2006 Constitution recognizes the BSA's status and importance for the first time  
 11 in its history, guaranteeing its "financial and administrative independence" (Art. 103(1)),  
 12 while at the same time recognizing that it is answerable to the COR (Art. 103(2)).

13 In summary, the preexisting relationship between the Iraqi legislature and the BSA has  
 14 now been granted constitutional status, while the COR's mandate to exercise oversight has  
 15 been significantly broadened. The constitution's drafters clearly hoped that the COR's new  
 16 powers, combined with its effective and now unbreakable institutional relationship with  
 17 the BSA, would firmly establish a check on the executive branch of government, particu-  
 18 larly in order to prevent the excesses and abuses of the past, this time in relation to all areas  
 19 involving public expenditure.

20 ***2. Iraq's New Electoral System and Its Impact on Oversight***

21 A number of other changes were provided for under Iraq's new constitutional order, some  
 22 of which were to impact the COR's oversight functions in ways that the Constitutional  
 23 Committee did not anticipate. Law 15 (2005), which was decided upon months before the  
 24 2006 Constitution was completed and approved in a referendum, provided the framework  
 25 for the 2005 parliamentary elections, which, it turns out, is extremely permissive. The Law  
 26 does not impose any thresholds for participation in the COR other than obtaining enough  
 27 votes for a single seat (which do not even need to be obtained in the same constituency).<sup>41</sup>  
 28 The impact was that the December 2005 elections gave rise to a parliament that was popu-  
 29 lated by dozens of political parties, the largest of which enjoyed no more than around 10  
 30 percent of seats and some that had only a single representative.<sup>42</sup> Pursuant to Art. 76(1) of  
 31 the 2006 Constitution, a government was formed by the nominee of the largest bloc within  
 32 the COR, but only after months of tense negotiations that saw nineteen parties, as well as a  
 33 large number of independents, take hold of ministries.

34 Therefore, although government and parliament are inextricably linked under the new  
 35 constitutional order, both institutions were so internally divided that any meaningful col-  
 36 laboration (whether within each institution or between the two) is practically impossible.  
 37 Even the expectation (expressed by a large number of observers and policy makers)<sup>43</sup>  
 38 that the country's politics would split into separate confessional and ethnic groups proved

<sup>40</sup> The Arabic language original of the COR's by-laws are available at <http://parliament.iq/>, accessed March 15, 2010. Note that although an official translation is available on the COR's website, it is unreliable. All translations here are therefore the author's own.

<sup>41</sup> See Arts. 16 [as mentioned in the comment, this provision was amended in 2009] and 17 of Law 16 (2005).

<sup>42</sup> Note that although some of these parties were grouped together in larger electoral alliances, the majority broke down short after the 2005 elections.

<sup>43</sup> See, for example, Galbraith (n 15).

1 misguided, with each individual group breaking down into a plethora of parties that only  
 2 rarely collaborate with each other.<sup>44</sup> Under this system, each political party has a sense of  
 3 fragility that encourages it to place party interests before national concerns. Given the new  
 4 framework, and given the COR's fractious nature, it seemed unlikely at best that the COR  
 5 would be able to organize any meaningful oversight over the executive.

6 The drafters of the 2006 Constitution had ignored two contextual elements that were  
 7 set to undermine their chosen framework for oversight. The first is that said framework was  
 8 merely a replica of the previous system, which itself was designed to function within a larger  
 9 context that no longer existed. The second was that the BSA, which had grown accustomed  
 10 to collaborating with the National Council's bureaucracy within the confines of a one party  
 11 state and of a command economy, was less than tempted to engage with the COR's new  
 12 class of politicians and therefore decided to passively resist their obligations under the 2006  
 13 Constitution by avoiding contact with the COR to the extent possible.<sup>45</sup> Had the drafters  
 14 anticipated that context would play such a determinant role, they could have provided for  
 15 some additional mechanisms to counterbalance the impact that politics was to play on  
 16 oversight. The fact is, however, that it was years before anyone had realized that the COR as  
 17 a whole was not engaged in any oversight whatsoever, despite its expanded powers.

### 18 **C. The Decline of Parliamentary Oversight and Its Impact** 19 **on Constitutional Legitimacy**

#### 20 **1. The Institutional Breakdown**

21 What with the COR's new makeup, and with the tense atmosphere between its members,  
 22 there was little interest in maintaining the relationship with the BSA, or even in making use  
 23 of its services. Parliamentary oversight therefore came to a complete halt. In a country with  
 24 no tradition of judicial review, there remained no check on government apart from elec-  
 25 tions, which in any event were not only years away but were unlikely to produce any real  
 26 change.

27 From 2006 to 2009, virtually none of the COR's members had read any of the BSA's  
 28 reports. The Finance Committee (which should have been the principal beneficiary of the  
 29 BSA's work) was not even certain how many reports it had received during 2008.<sup>46</sup> There  
 30 was also very little understanding within the COR of what the BSA was, and what its respon-  
 31 sibilities were.<sup>47</sup> Most importantly perhaps, during this same time period, officials from the  
 32 BSA only travelled to COR's premises for meetings on a single occasion.<sup>48</sup> As already men-  
 33 tioned, the BSA was content during this same period not to become involved in the COR's  
 34 political difficulties. It continued auditing the state's accounts but did not approach the  
 35 COR (which, it argued, it was not obligated to do anyway) with a view to reinvigorating

<sup>44</sup> Even the traditional union between the two main Kurdish parties has been undermined by the emergence in 2009 of two large opposition parties.

<sup>45</sup> Interview with Maḥmūd Al-Ṭā'ī, Vice President, Iraqi Board of Supreme Audit (Beirut March 2009).

<sup>46</sup> Interview with Sāmī Aṭrushī, Member of the Council of Representatives' Finance Committee (Beirut April 2009).

<sup>47</sup> Interview with Ḥaydar al-Ābādī, Chairman of the Council of Representatives' Economics Committee (London June 2009).

<sup>48</sup> Interview with Sāmī Aṭrushī, Member of the Council of Representatives' Finance Committee (Beirut April 2009).

1 oversight in Iraq. Finally, from 2006 to 2009, not a single government official was called to  
2 provide evidence before the COR.

3 When, in 2009, after the COR's senior leadership position had fallen under the control  
4 of some of the government's main opponents, it did start calling government officials to  
5 answer allegations of financial improprieties, this was met by strong resistance. A series of  
6 retaliatory threats were made by the government's allies within the COR (notably to lift  
7 individual MPs' immunity and to launch prosecutions before the courts). The government  
8 also used its significant influence within the COR to block any oversight initiatives by  
9 imposing dozens of administrative hurdles, succeeding in some cases to delay the process  
10 by up to six months. The COR did manage to question four senior officials in 2009, three  
11 of whom were ministers close to the Prime Minister, which led to accusations from the  
12 government and from most observers that the process was more the result of a political  
13 vendetta rather than an effort to increase efficiency in government.<sup>49</sup> Perhaps as a result,  
14 the limited oversight that did take place in 2009 did not have any appreciable impact on  
15 government.

16 **2. *The Impact on the State's Delivery of Basic Services***

17 These difficulties are more than mere abstract concerns. The breakdown in parliamentary  
18 oversight in Iraq is one of the factors that contributed to the state's diminished capacity to  
19 deliver basic services, which has caused significant distress to all Iraqi citizens, and which in  
20 turn has contributed to the constitution's general lack of legitimacy.

21 Although access to data on budget execution is, once again, difficult to come by in Iraq,  
22 the U.S. Government Accountability Office (GAO) has produced several reports on the  
23 matter.<sup>50</sup> In January 2008, the GAO concluded that "central ministries had spent only 4.4  
24 percent of their investment budget as of August 2007. The discrepancies between the offi-  
25 cial and unofficial data highlight uncertainties about the sources and use of Iraq's expendi-  
26 ture data."<sup>51</sup> In August 2008, it wrote in another report that "[w]hile Iraq's total expenditures  
27 increased from 2005 through 2007, Iraq spent a declining share of its budget alloca-  
28 tions—73 to 65 percent from 2005 to 2007" and that the investment expenditure ratios of  
29 central ministries "declined from 14 percent in 2005 to 11 percent in 2007."<sup>52</sup>

30 Although Iraq was not a stranger to corruption, it has risen to extraordinary propor-  
31 tions, even by the previous regime's standards. In its January 2008 report, the GAO wrote  
32 that "[w]eak procurement, budgetary, and accounting systems are of particular concern  
33 in Iraq because these systems must balance efficient execution of capital projects while

<sup>49</sup> See Zaid Al-Ali, "Face of corruption, mask of politics" *OpenDemocracy* (London July 2, 2009) [www.opendemocracy.net/article/iraq-acts-on-corruption](http://www.opendemocracy.net/article/iraq-acts-on-corruption), accessed March 15, 2010.

<sup>50</sup> See <[www.gao.gov](http://www.gao.gov)> accessed 15 March 2010. The GAO is the supreme audit institution in the United States of America. As a result of the fact that US public funds have been invested in Iraq since 2003, the GAO has as part of its mandate to ensure that such funds are being properly utilized. This is achieved partly by ensuring that the Iraqi state is not wasting its own funds, which has prompted the GAO to carry out a number of investigations in Iraq in relation to the state of budget execution and on corruption.

<sup>51</sup> See Government Accountability Office, "Iraq Reconstruction—Better Data Needed to Assess Iraq's Budget Execution" (January 2008) GAO-08-153 [www.gao.gov/new.items/d08153.pdf](http://www.gao.gov/new.items/d08153.pdf), accessed March 15, 2010.

<sup>52</sup> See Government Accountability Office, "Stabilizing and Rebuilding Iraq—Iraqi Revenues, Expenditures and Surplus" (August 2008) GAO-08-1031 [www.gao.gov/new.items/d081031.pdf](http://www.gao.gov/new.items/d081031.pdf), accessed March 15, 2010.



1 protecting against reported widespread corruption.”<sup>53</sup> Also, in an untitled report that was  
 2 marked “Sensitive but Unclassified” and that was leaked to various media outlets in  
 3 September 2007, the U.S. Embassy stated that “Iraq is not capable of even rudimentary  
 4 enforcement of anticorruption laws” and that “[i]n addition to the lack of capacity within  
 5 the anticorruption agencies, politicization and fear of accountability are serious impedi-  
 6 ments to the enforcement of anticorruption laws.”<sup>54</sup> Finally, according to the U.S. State  
 7 Department in June 2008, “widespread corruption undermines efforts to develop the gov-  
 8 ernment’s capacity by robbing it of needed resources; by eroding popular faith in demo-  
 9 cratic institutions, perceived as run by corrupt political elites; and by spurring capital flight  
 10 and reducing economic growth.”<sup>55</sup>

11 The combined impact of reduced capacity to invest and increased corruption has had a  
 12 severe impact on the delivery of basic services. To take the electricity sector as one example,  
 13 a household socio-economic survey published by the Iraqi Central Organization for  
 14 Statistics and Information Technology indicates that although

15 . . . [t]he public electrical grid is identified as the main source of electricity for 76.4% of  
 16 individuals, it provides on average only 7.9 hours of power per day. The lowest rate is in  
 17 Baghdad, with only 5.0 hours of power supply per day. Only 22.4% of persons are able to  
 18 rely solely on the public network for electricity to their housing unit. 75% of individuals  
 19 supplement the public network with one or two other power sources. On average, com-  
 20 munity generators provide 6.4 hours and private generators provide 4.0 hours of addi-  
 21 tional power per day.<sup>56</sup>

22 During a six-day period in June 2009, the daily supply of electricity from the grid met  
 23 only 52 percent of demand. In addition, average hours of electricity were 7.8 hours in  
 24 Baghdad and 10.2 hours nationwide, compared to the U.S. 2006 goal of 12 hours of daily  
 25 electricity and the Iraqi Ministry of Electricity goal of 24 hours. Meanwhile, although the  
 26 Iraqi Government had allocated USD4.2 billion for investment in the electricity sector  
 27 from 2005 to April 2008, it had only spent USD0.4 billion of that amount.<sup>57</sup>

28 Government accountability is part and parcel of any constitutional framework. In Iraq,  
 29 a country with a weak tradition of judicial review, the only mechanism that ensured partial  
 30 accountability was parliamentary oversight. And yet, although the constitutional drafters in  
 31 2005 sought to protect and defend that function, they unintentionally caused its decline,  
 32 which in turn contributed to the sense of impunity felt by government ministers and senior  
 33 officials alike.

34 Once again, it is precisely because local context—in particular, the nature of  
 35 institutional relationships in Iraq and the reasons why they function—was not properly

<sup>53</sup> See Government Accountability Office (n 51).

<sup>54</sup> U.S. Embassy, Untitled Report (September 2007) [www.fas.org/irp/eprint/anticorruption.pdf](http://www.fas.org/irp/eprint/anticorruption.pdf), accessed March 15, 2010.

<sup>55</sup> See Government Accountability Office, “Securing, Stabilizing, and Rebuilding Iraq: Progress Report: Some Gains Made, Updated Strategy Needed” (June 2008) GAO-08-837 [www.gao.gov/new.items/d08837.pdf](http://www.gao.gov/new.items/d08837.pdf), accessed March 15, 2010.

<sup>56</sup> See Iraqi Ministry of Planning and Development Cooperation, “Iraq household socio-economic survey 2007” (2008) <http://web.worldbank.org/external/default/main?sortDesc=DOCDT&theSitePK=313105&pagePK=51187344&cntry=82603&menuPK=313133&piPK=51189442>, accessed March 15, 2010.

<sup>57</sup> See Government Accountability Office (n 55).

1 considered that these events transpired and that the current state of affairs emerged. To be  
 2 sure, parliamentary oversight in Iraq could be redeemed and the state of public finances be  
 3 improved, assuming there is enough resolve to do so, and assuming appropriate measures  
 4 are taken. In the meantime however, internal constitutional legitimacy has been under-  
 5 mined and the longer and deeper this illegitimacy, the less likely it can be redeemed in the  
 6 future.

7 **IV. CASE STUDY 2—THE VERTICAL DISTRIBUTION OF POWERS**  
 8 **UNDER THE 2006 CONSTITUTION**

9 Although its supporters continue to argue that the final text of the 2006 Constitution was  
 10 drafted by the representatives of a large majority of the population, that it enjoys wide-  
 11 spread democratic support (given that it was approved by around 80 percent of the popula-  
 12 tion), that it accurately represents the sense of political morality of a large majority of Iraqis,  
 13 and that it provides an adequate basis for functional government and stability,<sup>58</sup> there is a  
 14 growing body of evidence that most if not all of these assumptions are incorrect, with far-  
 15 reaching implications for the constitution’s domestic legitimacy. This second case study will  
 16 show how local context was completely misjudged by a large number of participants to the  
 17 constitutional process, including those internationals who participated through the provi-  
 18 sion of advice, and who sometimes partially administered the process.

19 The 2006 Constitution provides for a federal system of government that guarantees  
 20 weak central government (A, below), which was the product of a particular and political  
 21 alliance between parties that can claim the support of a small proportion of the population  
 22 (B, below). It now turns out that the federal vision that is enshrined in the 2006 Constitution  
 23 is far removed from the type of state that the majority of the population would like to live  
 24 in, to the extent that the constitution’s chances of acquiring popular and moral legitimacy  
 25 have been undermined (C, below).

26 **A. The Transition from a Unitary State to a Federal System of Government**

27 For better or worse,<sup>59</sup> Iraq has long had a tradition of strong central control, from the times  
 28 of the 1925 monarchist Constitution to the 1970 Interim Constitution.<sup>60</sup> By way of exam-  
 29 ple, the manner in which Iraq’s provinces were managed, the specific delimitation of juris-  
 30 diction between its various local administrations, and the functions of all local officials were  
 31 previously set out in Law 159 (1969). Art. 13(1) of Law 159 provided that all governors  
 32 were to be appointed “by virtue of a governmental decree, based on a recommendation of

<sup>58</sup> See McGarry and O’Leary (n 18) 683; and Jonathan Morrow, “Weak Viability, The Iraqi Federal State and the Constitutional Amendment Process” Special Report 168 (United States Institute of Peace July 2006) [www.usip.org/files/resources/Morrow\\_SR168.pdf](http://www.usip.org/files/resources/Morrow_SR168.pdf), accessed March 15, 2010.

<sup>59</sup> Many have argued that Iraq’s strong unitary state was the source of its many policy failings and for the very significant suffering of its population. See, for example, McGarry and O’Leary (n 19) 683 (arguing that “[m]any in the [Shi’ah] community, like the Kurds, have bad memories of Iraq’s last unitary state, and their worst nightmare is a strong Baghdad-centered state once again falling under Sunni Arab or Ba’athist control”).

<sup>60</sup> See Feisal Amin al-Istrabadi, “Reviving Constitutionalism In Iraq: Key Provisions Of The Transitional Administrative Law” (2005–2006) 50 *N.Y.L. Sch. L. Rev.* 269, 275; and Larry Diamond, *Squandered Victory: The American Occupation and the Bungled Effort to Bring Democracy to Iraq* (Times Books, New York 2005) 163.

1 the Minister of the Interior, and pursuant to the acceptance of the Council of Ministers.”  
 2 Meanwhile local officials could be appointed and dismissed merely by ministerial decree  
 3 (Art. 13(2)). The provinces in which Kurds formed a majority constituted an exception to  
 4 this rule firstly in that the central government in Baghdad had agreed in principle to allow  
 5 some form of self-rule (a promise that was actually never kept),<sup>61</sup> and secondly in that in any  
 6 event Baghdad has often been incapable of exerting any authority in the Kurdish north,  
 7 particularly after 1991, when the Kurds acquired quasi-independent status.

8 The departure from this tradition of central control (apart from the *de facto* separation  
 9 of the Kurdish north) took place in 2004, when the Law of Administration for the State  
 10 of Iraq for the Transitional Period (TAL) entered into force.<sup>62</sup> The TAL, which set out  
 11 the process through which the country’s permanent constitution was to be drafted and  
 12 contained a number of provisions that would allow for what was hoped would be the  
 13 proper administration of the country in the meantime, provided for the first time that

14 . . . [t]he system of government in Iraq shall be republican, federal, democratic, and  
 15 pluralistic, and powers shall be shared between the federal government and the regional  
 16 governments, governorates, municipalities, and local administrations. The federal  
 17 system shall be based upon geographic and historical realities and the separation of  
 18 powers, and not upon origin, race, ethnicity, nationality, or confession (Art. 4).

19 That principle was developed further through the recognition of the Kurdistan Regional  
 20 Government, the authority that has been governing the three northern provinces since  
 21 1991 (Art. 54), and through firm rules which precluded the dismissal of provincial and  
 22 local officials by the central government in Baghdad (Art. 55). Finally, Art. 25 set out a list  
 23 of powers that were to be exercised exclusively by the federal government in Baghdad, while  
 24 Art. 57 provided that all powers not already set out under Art. 25 “may be exercised by  
 25 regional governments and governorates.”

26 The 2006 Constitution confirms Iraq’s federal nature and provides for a number of  
 27 innovations. It establishes three main levels of government: the federal government in  
 28 Baghdad, regional governments (which, for the time being, only includes the Kurdish  
 29 Regional Government in northern Iraq) and provinces (Art. 116). Art. 110 sets out an  
 30 exhaustive list of powers that are to be exercised exclusively by the federal government,  
 31 including foreign policy and diplomatic representation, foreign sovereign economic and  
 32 trade policy, fiscal and customs policy, and commercial policy across regional and gover-  
 33 norate boundaries in Iraq. Art. 114 then sets out the areas in which the federal government  
 34 will share responsibility with regional governments, including areas such as customs, health,  
 35 and education policy. Finally, Art. 115 provides that all matters not included in both Arts.  
 36 110 and 114 shall fall to the regions and the provinces.

37 The effect of this new framework is that many of the powers that are not listed in Arts.  
 38 110 and 114, almost all of which belonged to Baghdad in the past, have now been trans-  
 39 ferred to the regions and provinces. This includes a number of important issues, such as  
 40 control over airspace or the regulation of agriculture, and the power to raise taxes, none  
 41 of which are included under Arts. 110 or 114. The powers of regional and provincial gov-  
 42 ernments were further strengthened by Art. 121(2), which provides that: “[i]n case of a

<sup>61</sup> See, for example, Law 36 (1974) which provided for the establishment of a directly elected legislature in the Kurdistan Region.

<sup>62</sup> Available at [www.cpa-iraq.org/government/TAL.html](http://www.cpa-iraq.org/government/TAL.html), accessed March 15, 2010.

1 contradiction between regional and national legislation in respect of a matter outside the  
 2 exclusive authorities of the federal government, the regional power shall have the right to  
 3 amend the application of the national legislation within that region.”

4 Another innovation for Iraq is that the 2006 Constitution allows for the possibility that  
 5 additional regions (other than the Kurdistan Region) could be formed in the future, should  
 6 one or several provinces decide to organize themselves on that basis (with the possibility  
 7 that different regions could also merge to form a single region). The constitution provides  
 8 that a referendum on the question would have to be organized in each of the relevant prov-  
 9 inces, should one third of council members of each of the relevant provinces (Art. 119(1)),  
 10 or 10 percent of the voters in each of the provinces (Art. 119(2)) express a desire to form a  
 11 new region. Law 13 (2008), which sets out the executive procedures to be followed in order  
 12 to form a region, confirms that a region can consist of “one province or more,” without  
 13 imposing a limit on the number of provinces that can merge to form a region, and without  
 14 even requiring that the provinces that make up a region be contiguous. This mechanism and  
 15 the possibilities provided for in Art. 119 are a matter of significant dispute in Iraq today. The  
 16 fact that the parties responsible for drafting the constitution and that sponsored Law 13  
 17 have called publicly for the formation of a region that would encompass eight out of eigh-  
 18 teen provinces, combined with the federal government’s very limited powers to exercise  
 19 authority, raised the concern that Iraq could one day be composed of three ethno-sectarian  
 20 regions, or that it could break apart altogether.<sup>63</sup> Others maintain that the 2006 Constitution’s  
 21 federal arrangement should be defended on the basis that it is both democratic and the only  
 22 hope for a united state.<sup>64</sup>

23 **B. The Nature of the Political Alliance that Gave Rise to the 2006**  
 24 **Constitution’s Vertical Distribution of Powers**

25 **1. An Imperfect Drafting Process**

26 There is general agreement today that the constitutional drafting process that gave rise to  
 27 the final text in 2005 was less than inclusive.<sup>65</sup> In May 2005, a fifty-five-member Constitutional  
 28 Committee was appointed by the Transitional National Assembly.<sup>66</sup> Given that the Sunni  
 29 community had by and large boycotted the elections that led to the formation of the  
 30 Transitional National Assembly, the Constitutional Committee accepted to expand its  
 31 numbers to allow Sunni negotiators to participate in the drafting process.<sup>67</sup> However, as the  
 32 U.S.-imposed deadline for completion fast approached in mid-August 2005 (and with the  
 33 referendum date set for October 15, 2005), important differences continued to exist  
 34 between the various parties’ positions, particularly in relation to the vertical distribution of  
 35 powers. The Constitutional Committee was therefore essentially disbanded and replaced  
 36 by an ad hoc body (referred to at the time as the “Leadership Council”) that was composed

<sup>63</sup> See Haysom (n 16); and see Ghai and Cottrell (n 17).

<sup>64</sup> See, for example, McGarry and O’Leary (n 19).

<sup>65</sup> See Galbraith (n 15); al-Istrabadi (n 10); and Ashley S. Deeks, “Iraq’s Constitution and the Rule of Law” (Spring 2007) 28 *Whittier L. Rev.* 837.

<sup>66</sup> The Transitional National Assembly was elected pursuant to Art. 30 of the TAL on 30 January 2005 for the purpose of drafting a permanent constitution for Iraq.

<sup>67</sup> Note that the Sunnī community was not alone in boycotting the process, but they were the only group without a significant presence in the Transitional National Assembly that was allowed to join the Constitutional Committee.

1 of only a few members. That Council met continually over the coming weeks (either at the  
 2 Transitional President's [who was a member of said Council] residence or at the U.S.  
 3 Embassy) and agreed upon a final text that was eventually put to a referendum on October  
 4 15, 2005.<sup>68</sup>

5 The Leadership Council came into existence, and its membership was decided, through  
 6 a process of self-selection by some and exclusion of others, through the active endorsement  
 7 by the U.S. Embassy, and through a sense of inevitability and helplessness on the part of  
 8 those representatives of the international community that were participating in some way  
 9 in the negotiations. Its membership essentially represented the interests of three main polit-  
 10 ical parties: the Patriotic Union of Kurdistan, the Kurdistan Democratic Party, and the  
 11 Supreme Council for the Islamic Revolution in Iraq (SCIRI; a Shi'ah-Islamist Party, that  
 12 has since been renamed the Islamic Supreme Council for Iraq). As a result of their domi-  
 13 nance of the Leadership Council, the 2006 Constitution represents a compromise between  
 14 the positions of these three parties in relation to many issues of contention, including fed-  
 15 eralism.<sup>69</sup> Some of the Iraqi elites that had been excluded at the time voiced their  
 16 frustrations,<sup>70</sup> but the general sense of imposed urgency and the threat of violence led to a  
 17 settlement that was put to referendum on October 15, 2005. Some of the constitution's final  
 18 clauses had been agreed upon less than three days before the referendum date, and the gen-  
 19 eral population was kept largely in the dark as to the substance of the agreement that they  
 20 were to vote on. Most voters were not given the chance to comment on the various drafts  
 21 and had little or no knowledge of the text that they were eventually to approve.<sup>71</sup>

<sup>68</sup> See Galbraith (n 15) 192-3 (according to which, within days of taking up his post in early August, U.S. Ambassador Zalmay Khalilzad had summoned Iraq's top leaders to the capital's Green Zone, initiating three weeks of nonstop talks that produced the Kurdish-Shiite deal that formed the basis of Iraq's Constitution; and that, under Khalilzad's leadership, the U.S. Embassy took over responsibility from the Constitutional Committee's secretariat: it recorded agreements, incorporated them into the text, and prepared drafts); and see Feldman and Martinez (n 9) 899 ("Despite the existence of a full draft [in early August 2005], many key issues remained outstanding, including those relating to Islam and federalism. . . . As time grew short, the Iraqis bypassed the TNA drafting committee in favor of smaller, ad hoc gatherings of Shi'i and Kurdish leaders").

<sup>69</sup> See Office of Constitutional Support, United Nations Assistance Mission for Iraq, "The Iraqi Constitution-Making Process—Critical Evaluation" Unpublished (December 2005) ("In the end, the Sunni negotiators were presented with a draft text based on agreements made between the UIA and the Kurdish Alliance. This was justified on the basis of inadequate Sunni response and engagement on the textual issues whenever approached").

<sup>70</sup> See Morrow (n 22) 3 ("Many Iraqi groups and parties criticized the draft constitution. While the reasons for opposition varied, they often included procedural complaints of exclusion from the negotiations and major substantive objections. By the end of August, opposition remained despite efforts to appease the Sunni Arab groups. Some women's groups, the parties of Ayad Allawi and Moqtada Al-Sadr [arguably Iraq's most influential politician at the time], and ethnic minority groups continued to oppose the draft").

<sup>71</sup> See United Nations Assistance Mission for Iraq (n 10) 49-50 ("after the constitution had been printed and distributed to Iraqi citizens, several additional changes were made, such that most Iraqis no longer knew what text they were being asked to approve. Indeed, on October 13, 2005, two days before the referendum in which Iraqi voters were to decide whether or not to grant their approval to the constitution, the document was changed in an agreement between several political parties, including the Iraqi Islamic Party").

1 **2. *The Local Political Context***

2 As already mentioned, two Kurdish groups and only one party from the Shia community  
 3 were allowed to dominate the constitutional process, under the assumption that their views  
 4 adequately reflected the views of their communities, and therefore of the majority of the  
 5 Iraqi population (approximately 80 percent). In 2005, the two Kurdish parties in question  
 6 could be said to represent the Kurdish population of Iraq, although the extent of their pop-  
 7 ularity has been seriously challenged by the emergence in 2008 of a strong opposition that  
 8 enjoys more than 40 percent of the local population's support. SCIRI, one of the country's  
 9 more important Shia political parties, was the other of these three forces. It is also one of the  
 10 few Iraqi parties that called for the establishment of a strongly decentralized state, to be  
 11 made up of a small number of ethno-sectarian regions.<sup>72</sup> As an exile group that was formed  
 12 outside of Iraq in 1982, it benefited from greater political experience (including superior  
 13 internal organization and party discipline) in comparison to Iraq's new home-grown politi-  
 14 cal groups, all of which were much younger as a result of the ban on political activity that  
 15 had been imposed by the Baath party until 2003. The support that it received from outside  
 16 Iraq, namely from the Islamic Republic of Iran, included access to funds and to an interna-  
 17 tional network of advisers, as well as training on the formation and administration of polit-  
 18 ical parties.

19 SCIRI contested the January 2005 elections as a leading member of the United Iraqi  
 20 Alliance, which obtained 48 percent of the vote. The United Iraqi Alliance was made up of  
 21 four main components (SCIRI, the Da'wah Party, the Šadrīst Movement and the  
 22 Independents' List), as well as a number of other smaller parties. SCIRI in particular is said  
 23 to have obtained 28 seats, or just over 10 percent, of the Assembly's 275. However, given  
 24 that the elections were organized on the basis of a system of closed lists, according to which  
 25 Iraqis voted for particular "political entities," without knowing which specific individuals  
 26 made up those same alliances (let alone their positions on some of the major issues of the  
 27 day), and given that many of Iraq's important communities boycotted the elections  
 28 altogether,<sup>73</sup> it is difficult to measure the exact level of popular appeal that SCIRI enjoyed

<sup>72</sup> See Edward Wong, "Top Shiite politician joins call for autonomous south Iraq" *The New York Times* (New York 12 August 2005) [www.nytimes.com/2005/08/12/international/middleeast/12iraq.html](http://www.nytimes.com/2005/08/12/international/middleeast/12iraq.html), accessed March 15, 2010 (quoting 'Abd al-'Aziz al-Ḥakīm, then SCIRI's President, as saying at a political rally that "[t]o keep the political balance of the country, Iraq should be ruled under a federal system next to the central government. . . . We think it is necessary to form one entire region in the south"); and Saad Sarhan and Ellen Knickmeyer, "Shiites call for own state in south" *The Washington Post* (August 12, 2005) [www.washingtonpost.com/wp-dyn/content/article/2005/08/11/AR2005081101791.html](http://www.washingtonpost.com/wp-dyn/content/article/2005/08/11/AR2005081101791.html), accessed March 15, 2010 (quoting Ḥādī Amīrī, leader of the Badr Brigades, described as "an Iranian-trained Shiite militia that is [SCIRI]'s private security contractor," as asking "[w]hat have we gotten from the central government but death?").

<sup>73</sup> Iraq's Sunni community as well as the followers of the influential Muqtadā al-Šadr largely boycotted the polls, thereby greatly reducing their presence in the Transitional National Assembly and in the constitutional process that ensued. See Kenneth Katzman, Congressional Research Service, "Iraq: Politics, elections, and benchmarks" (21 October 2009) 7-5700 RS21968, 1 [www.fas.org/sgp/crs/mideast/RS21968.pdf](http://www.fas.org/sgp/crs/mideast/RS21968.pdf), accessed March 15, 2010 ("According to the 'proportional representation/closed list' election system, voters chose among 'political entities' (a party, a coalition of parties, or persons); 111 entities were on the national ballot, of which nine were multi-party coalitions. Sunni Arabs (20% of the overall population) boycotted, winning only 17 Assembly seats, and only one seat on the 51-seat Baghdad provincial council. That council was dominated (28 seats) by representatives of the Islamic Supreme Council of Iraq (ISCI), led by Abd al-'Aziz al-Hakim. Radical Shiite cleric Moqtada Al Sadr, then at odds with U.S. forces,

1 in 2005. What is certain, however, is that the party never enjoyed a dominant position, even  
2 in its own community.

3 SCIRI nevertheless managed to control a number of key posts, which skewed the out-  
4 come of the constitutional negotiations in its favor. The Chairman of the Constitutional  
5 Committee was a senior member of SCIRI. Pursuant to Art. 60 of the TAL, according to  
6 which the Transitional National Assembly was responsible for “encouraging debate on the  
7 constitution through regular general public meetings in all parts of Iraq and through the  
8 media, and receiving proposals from the citizens of Iraq as it writes the constitution,” a  
9 Public Outreach Unit was formed which also fell under SCIRI’s control.<sup>74</sup> The Unit, which  
10 had a mandate to engage with Iraqis to discern what their views were in relation to the  
11 major issues at play, only managed to complete its survey of opinion after the Constitutional  
12 Committee was dissolved, thereby rendering the entire operation meaningless.<sup>75</sup> Meanwhile,  
13 SCIRI’s political rivals within the Shi’ah community, particularly those that did not share its  
14 vision of a federation formed along ethno-sectarian lines, failed to participate in the consti-  
15 tutional process in a way that would have counterbalanced SCIRI’s weight in the process.  
16 Some boycotted the process altogether, while others failed to appreciate the new constitu-  
17 tion’s importance, perhaps under the impression that it would only last as long as the U.S.  
18 military occupation of the country. Many were also too disorganized, too consumed by  
19 internal rivalries, or too concerned by an effort to keep a united front during what was then  
20 violent civil conflict, to mount any serious opposition to SCIRI.

### 21 **C. The Result: Weakening of Constitutional Legitimacy in Iraq**

22 The combined impact of all these factors was apparently enough to convince a large number  
23 of observers and policy makers that the 2006 Constitution did enjoy democratic legitimacy

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also boycotted, leaving his faction relatively under-represented on provincial councils in the Shiite south and in Baghdad”).

<sup>74</sup> See Morrow (n 22) 18–19 (according to which “[i]n early June, Chairman Sheikh Hamoudi established, under the management of Dr. Adnan Ali, a skeleton Secretariat for the Committee. The Secretariat was to include an Outreach Unit, responsible for disseminating constitutional information to the public and for receiving and analyzing the public response. . . . Largely because of the SCIRI chairmanship of the Committee, the staff of the Outreach Unit were drawn mainly from religious Shi’ah social networks, and the networks put in place to receive submissions were biased toward Shi’ah areas of Baghdad and other cities”).

<sup>75</sup> See United Nations Assistance Mission for Iraq (n 9) (according to which the Public Outreach Unit “pre-  
pared a formal report, which summarized the content of the submissions that it had received, but it was  
only delivered to the Constitutional Committee and announced to the public at a press conference on  
August 14, 2005—at which point the committee had almost effectively dissolved. It is unclear whether  
Committee members were apprised of the views of the public, or whether the Leadership Council, which  
took over the drafting process from the beginning of August onwards, was informed of the existence of the  
report. . . . [T]he major Iraqi leaders that were involved in the final stage of the drafting process and who  
were responsible for a major rewriting of the draft have not indicated whether or not the views of the public  
in fact affected their constitutional negotiations”) and Morrow (n 22) 19 (“the Outreach Unit did not have  
the ability to circulate a report to the Committee members before August 13. Interviews conducted with  
various Committee members in early August confirmed that they had not received reports from the  
Outreach Unit. This was hardly surprising given the time constraints. This meant that there was little or no  
chance for the views of the public, as expressed to the Committee, to be taken into account in the prepara-  
tion of the constitution”).

1 on the basis that the federal system of government that it provided for was both devised by  
 2 the representatives of the people and was approved by a majority of Iraqis in the referen-  
 3 dum that took place on October 15, 2005.<sup>76</sup> This narrative actually constitutes an important  
 4 misjudgment: the constitution was in fact drafted by parties who today enjoy the support of  
 5 approximately 20 percent of the population and whose radical views on federalism are one  
 6 of the reasons of their lack of popular appeal. This was not only obvious at the time when  
 7 the constitution was drafted, but has been confirmed several times since.

8 From the time that SCIRI made its aspirations for the establishment of one Shī'ah  
 9 region in the center and the south of the country known, a number of political forces  
 10 within the same community expressed strong opposition to the plan, and have continued to

<sup>76</sup> See Roman Martinez, "A working, democratic Iraq" *The National Review* (New York 29 September 2005) [www.nationalreview.com/comment/martinez200509290817.asp](http://www.nationalreview.com/comment/martinez200509290817.asp), accessed March 15, 2010 (in which the author, who was a political adviser to the U.S. Ambassador to Iraq during the 2005 constitutional negotiations, completely misjudges Shī'ah aspirations for the Iraqi state by arguing that "[t]he desire of Iraqi Shia for greater local autonomy will likely to grow over time"); McGarry and O'Leary (n 19) 685 (in which the authors, one of whom has described himself as a "constitutional adviser to the Kurdistan Regional Government in the making of Iraq's Constitution," correctly note that there is no "consensus on collective self-government among Shī'a Arabs" but incorrectly add that "[a]mong the Shi'a, there is a minority that is more centralist than decentralist" and seek to dismiss those in the Shi'a community that hold "centralist" views through the unsupported allegation that "[s]ome Shi'a centralizers aspire to control a centralized Iraq and use it to promulgate Shi'a religious values"); Galbraith (n 14) 203 (in which the author, who was an advisor to the Kurdish Regional Government during the constitutional negotiations, ignores the divisions within the Shī'ah community by arguing that "the constitution is not a national compact. It was made by Shiites and Kurds without the Sunni Arabs"); Feldman and Martinez (n 9) 914–915 (in which the authors, one of whom has described himself as a "Senior Constitutional Adviser to the Iraqi Constitutional Process," correctly acknowledge dissensions within the Shī'ah community, but wrongly and without any support allege that all political parties representing that same community came to support SCIRI's policy: "The official position of the Shi'i Islamists had shifted from passive acquiescence to the status quo regarding Kurdistan to an affirmative desire to create quasi-autonomous federal regions of their own. The most striking evidence of this new outlook was the aggressive position taken by SCIRI leader 'Abd al-'Aziz al-Hakim, who publicly called for the creation of a nine-province Shi'i region in Southern Iraq on August 11. Many of Hakim's Shi'i coalition partners remained highly skeptical of federalism; nonetheless, they went along with Hakim's call for the Iraqi constitution to allow for the development of new regional governments outside of Kurdistan. The Shi'i embrace of federalism and the proposal to create new regions outraged the Sunni Arab members of the Constitutional Drafting Committee"); James A. Baker III and Lee H. Hamilton, United States Institute of Peace, "The Iraq Study Group Report" (December 6, 2006) [www.usip.org/isg/iraq\\_study\\_group\\_report/report/1206/index.html](http://www.usip.org/isg/iraq_study_group_report/report/1206/index.html), accessed March 15, 2010 (in which the authors, who were commissioned by the U.S. government to suggest a strategy on Iraq, describe the possibility of an ethno-religious federal system as being "favored by the Kurds and many Shia (particularly supporters of Abdul Aziz al-Hakim), but it is anathema to Sunnis" but in which the authors discourage U.S. policy makers from pursuing this avenue, on the basis that the cost associated with adopting SCIRI's vision of an ethno-religious federation would be too high); and "Ambassador Khalilzad comments on progress drafting Iraq's constitution" (August 16, 2005) [http://iraq.usembassy.gov/iraq/20050816\\_khalilzad\\_convention\\_center.html](http://iraq.usembassy.gov/iraq/20050816_khalilzad_convention_center.html), accessed March 15, 2010 (in which Zalmay Khalilzad, who was U.S. Ambassador to Iraq during the bulk of the constitutional process, mistakenly attributes all opposition to ethno-religious federalism to the Sunni population by stating "I know that some of the Sunni participants on the outside have spoken out against federalism. People have a right obviously to be for or against what they want, but as far as the constitution is concerned—the draft— there is a broad agreement").



1 do so since.<sup>77</sup> In addition, one opinion poll after another has confirmed that only a small  
 2 minority of the Iraqi population (and of the Shi'ah community) favor the type of decentral-  
 3 ized government that is enshrined by the 2006 Constitution (although it is worth noting  
 4 that the proportion did rise significantly as civil conflict became increasingly violent in  
 5 2007–2008, and then decreased as violence ebbed).<sup>78</sup> The results of those opinion polls  
 6 were confirmed by the January 2009 provincial elections, in which SCIRI performed par-  
 7 ticularly poorly, scoring as low as 5 percent in Baghdad province (Iraq's largest city by far,  
 8 with a population of around seven million), which the party had previously controlled.<sup>79</sup> In  
 9 the March 2010 parliamentary elections, SCIRI obtained only 5 percent of the vote, con-  
 10 firming its marked decline.<sup>80</sup> Finally, the first and only initiative to create a new federal

<sup>77</sup> See Saad Sarhan and Ellen Knickmeyer (n 72) (quoting Laith Kubba, spokesperson for the Islamic Da'wah Party, on the day that SCIRI announced its plans for an ethno-centric division of the state, as saying that "[t]he idea of a Shiite region is unacceptable to us"); see also Michael Howard, "Moqtada Sadr throws Iraqi unity talks into disarray" *Guardian* (London February 20, 2006) [www.guardian.co.uk/Iraq/Story/0,,1713411,00.html](http://www.guardian.co.uk/Iraq/Story/0,,1713411,00.html), accessed March 15, 2010 (in which Muqtada al-Şadr is quoted as saying "I reject this constitution which calls for sectarianism and there is nothing good in this constitution at all"); and "Interview with Iraqi Prime Minister al-Maliki" *USA Today* (October 15, 2006) [www.usatoday.com/news/world/iraq/2006-10-15-al-maliki-full-length\\_x.htm](http://www.usatoday.com/news/world/iraq/2006-10-15-al-maliki-full-length_x.htm), accessed March 15, 2010 (in which the Iraqi Prime Minister, who is Secretary General of the Islamic Da'wah Party, which is perhaps the party with the greatest amount of popular appeal in Iraq, is quoted as saying that "[even though] federalism has been legally established by our law, I believe that if we succeed in restoring security, political and economic powers to the central government, the need for federalism will diminish. And if federalism has to be, it should be a political system, not a national, ethnic or sectarian federalism. It should be an administrative federalism based on geographical considerations.")

<sup>78</sup> See, for example, "A majority reject federalism in Kerbala" *Al-Sabaah* (June 5, 2006) <http://alsabaah.com/paper.php?source=akbar&mlf=copy&sid=24142>, accessed March 15, 2010 [Arabic] (quoting the results of an opinion poll that was carried out in the province of Kerbala, which is the home to one of Shi'ah Islam's most holy shrines, according to which 52 percent are opposed to the establishment of any federal system of government whatsoever, and that of the 48 percent that do approve of some form of federalism, 86 percent reject any redesigning of Iraq's internal borders on an ethno-religious basis); "Poll finds broad optimism in Iraq, but also deep divisions among groups" *ABC News* (New York December 12, 2005) 12 <http://abcnews.go.com/images/Politics/1000a1IraqWhereThingsStand.pdf>, accessed March 15, 2010 (according to which only 18 percent of Iraqis polled favored the establishment of a federal system of government along the lines of what is envisaged in the 2006 Constitution); ABC News/USA Today, BBC/ARD Poll, "Ebbing hope in a landscape of loss marks a National Survey of Iraq" (March 19, 2007) 23 <http://abcnews.go.com/images/US/1033a1Iraqpoll.pdf>, accessed March 15, 2010 (according to which, at a time when the civil conflict was the most violent, 28 percent of those polled favored ethno-religious federalism); ABC News/BBC/NHK Poll, "Iraq's own surge assessment: few see security gains" (September 10, 2007) 21 <http://abcnews.go.com/images/US/1043a1IraqWhereThingsStand.pdf>, accessed March 15, 2010 (according to which, while violence was still raging, 28 percent of those polled continued to favor ethno-religious federalism); and ABC News/BBC/NHK Poll, "Iraq poll February 2009" (February 2009) 10 [http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/13\\_03\\_09\\_iraqpollfeb2009.pdf](http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/13_03_09_iraqpollfeb2009.pdf), accessed March 15, 2010 (according to which, at a time when violent civil conflict was drawing down, 20 percent of those polled favored ethno-religious federalism).

<sup>79</sup> See Doreen Khoury, Heinrich Böll Stiftung, "The 2009 Iraqi Provincial Elections" (2009) 4 [www.boellmeo.org/download\\_en/Iraqi\\_2009\\_Provincial\\_Elections.pdf](http://www.boellmeo.org/download_en/Iraqi_2009_Provincial_Elections.pdf), accessed March 15, 2010; and Reidar Visser, "No longer supreme: After local elections, ISCI becomes a 10 per cent party south of Baghdad" (February 5, 2009) <http://historiae.org/ISCI.asp>, accessed March 15, 2010.

<sup>80</sup> Shadid (n 23).

1 region in accordance with Art. 119 of the 2006 Constitution was launched in December  
 2 2008 with a view to transforming Basra province (which is a largely Shi'ah province) into its  
 3 own independent region. Despite the fact that Basra is possibly the province with the most  
 4 to gain from such an initiative, what with its enormous oil wealth and decades of underin-  
 5 vestment from the central government, the initiative collapsed a month later, having failed  
 6 to garner the 10 percent of signatures that was required to even hold a referendum.<sup>81</sup>

7 It has now been clearly confirmed that SCIRI's vision of ethno-sectarian federalism has  
 8 been rejected by Iraqis and by the Shi'ah community that was previously assumed to favor  
 9 that arrangement. There is little question therefore that, in the words of Feisal al-Istrabadi,  
 10 "if the permanent Constitution were being negotiated today, it almost certainly would be a  
 11 very different document," first and foremost because it would have been written by a differ-  
 12 ent group of individuals, and because the additional time would have allowed Iraqis' views  
 13 on matters of major importance to surface.<sup>82</sup>

14 In the meantime, as a result of the fact that the Constitutional Committee, the Leadership  
 15 Council, as well as the other parties that participated in the drafting process disregarded or  
 16 misunderstood the local context in Iraq in 2005, the 2006 Constitution clearly diverges  
 17 from the sense of political morality that is shared by a large majority of the population.

18 One final question has to be addressed, which is whether any of the above matters, given  
 19 that many of the constitution's provisions on federalism are optional. Indeed, some scholars  
 20 have pointed to the constitution's flexible approach towards federalism, which merely  
 21 allows for the possibility of creating additional federal regions while at the same time allow-  
 22 ing for the possibility for each federal region to negotiate its own relationship with the fed-  
 23 eral government, but does not dictate any particular outcome.<sup>83</sup>

24 The answer is that it does matter, for at least two principal reasons. The first is that the  
 25 legitimacy of a constitution does not just depend on the manner in which it is applied.  
 26 Provisions that have no normative value (including declaratory statements within a pre-  
 27 amble) or provisions that are merely optional matter in that they allow (or prevent) a people  
 28 from recognizing their values within the text itself. They also indicate the nature of the par-  
 29 ticular type of political order that the constitution in question seeks to establish. Significantly,  
 30 in Iraq, the civil conflict that started in 2003 reached new levels of brutality only after the  
 31 constitution entered into force in 2006, specifically because many parties to the conflict  
 32 feared that the provisions on federalism would lead to the breaking up of the country. The  
 33 conflict therefore took on a new dimension, with armed groups seeking to establish facts on  
 34 the ground in order to preempt any change in the country's administrative borders before  
 35 any provisions relating to federalism could be applied.<sup>84</sup>

<sup>81</sup> See "Vote on autonomy for Iraq's Basra struck out" *Reuters* (New York January 20, 2009) [www.reuters.com/article/idUSTRE50J4GC20090120](http://www.reuters.com/article/idUSTRE50J4GC20090120), accessed March 15, 2010 (confirming that supporters of the initiative to transform Basra province into its own federal region failed to garner the signatures of 10 percent of the population that were required in order to be able to proceed with a referendum on the issue).

<sup>82</sup> See al-Istrabadi (n 10) 1651.

<sup>83</sup> See, for example, McGarry and O'Leary (n 19) 687 ("while the Constitution allows governorates to become regions, which have more authority and power, it does not require them to do so. Nor is changing from a governorate into a region simply a decision to be made by the governorate politicians, who arguably might have a vested interest in assuming power powers; for such a change to occur, article 119 requires a local referendum and leaves open the possibility of other hurdles to be decided later by Iraq's federal legislature").

<sup>84</sup> See The International Crisis Group, "The next Iraqi war? Sectarianism and civil conflict" (February 27, 2006) Middle East Report N°52, 13 [www.crisisgroup.org/library/documents/middle\\_east\\_north\\_](http://www.crisisgroup.org/library/documents/middle_east_north_)

1 Secondly, many of the 2006 Constitution's provisions on federalism are mandatory in  
 2 their application, and have been a source of tension since they entered into force. By way of  
 3 example, the provisions relating to the exploitation of natural resources have been particu-  
 4 larly controversial. Art. 112 creates a distinction between "current fields," which are to be  
 5 managed jointly by the "federal government, with the producing provinces and regional  
 6 governments." Some policy makers and commentators have taken Art. 112, combined with  
 7 Art. 115 (according to which "[a]ll powers not stipulated in the exclusive powers of the  
 8 federal government belong to the authorities of the regions and provinces"), to mean that  
 9 the federal government has no authority whatsoever in relation to fields that are not "cur-  
 10 rent," presumably fields that are not currently being exploited, or "future fields." The  
 11 Kurdistan Regional Government (KRG) has subscribed to this view, and has entered into a  
 12 number of agreements with international oil companies in line with what it considers to be  
 13 its constitutional right.<sup>85</sup> The difficulty however is that very few policy makers or observers  
 14 in Baghdad seem to agree with the KRG. This has led to longstanding disputes between the  
 15 federal government and the KRG, and also with the companies that are currently engaged  
 16 in work within the Kurdistan Region's borders.<sup>86</sup>

17 The point of this discussion is not to argue in favor of one interpretation or the other.  
 18 The point is merely that the 2006 Constitution's federal arrangement has been a constant

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africa/iraq\_iran\_gulf/52\_the\_next\_iraqi\_war\_sectarianism\_and\_civil\_conflict.pdf, accessed March 15, 2010 ("Rather than dampening sectarian tensions by forging national consensus, the referendum, and the constitution it endorsed, gave new impetus to the centrifugal forces that have been tearing the country apart"); and Zaid Al-Ali, "Iraq's war of elimination" *OpenDemocracy* (London August 20, 2006) [www.opendemocracy.net/conflict-iraq/war\\_elimination\\_3839.jsp](http://www.opendemocracy.net/conflict-iraq/war_elimination_3839.jsp), accessed March 15, 2010 ("[t]errorism has been used in Baghdad for years as a means to drive people from their homes, but recently sophisticated military tactics have been used to take over entire quarters of the city at a time. Baghdad has therefore deliberately been transformed into a battlefield in which each party is attempting to ethnically cleanse the city of all its armed and civilian rivals").

<sup>85</sup> See Law 28 (2007) of the Kurdistan Region (entitled the "Oil and Gas Law of the Kurdistan Region—Iraq"). An English language translation is available at [www.krg.org/uploads/documents/Kurdistan%20Oil%20and%20Gas%20Law%20English\\_\\_2007\\_09\\_06\\_h14m0s42.pdf](http://www.krg.org/uploads/documents/Kurdistan%20Oil%20and%20Gas%20Law%20English__2007_09_06_h14m0s42.pdf), accessed March 15, 2010. Art. 1 defines a "current field" as "a Petroleum Field that has been in Commercial Production prior to 15 August 2005," while a "future field" is defined as "a Petroleum Field that was not in Commercial Production prior to 15 August 2005, and any other Petroleum Field that may have been, or may be, discovered as a result of subsequent exploration." Art. 18 provides that the Kurdistan Regional Government shall "agree with the Federal Government in the joint management of oil and gas extracted from Current Fields in the Region." The Law's Chapter Seven, which relates to cooperation with the federal government, does not contain any provisions relating to the exploitation or management of "future fields."

<sup>86</sup> See Christopher M. Blanchard, "Congressional Research Service, Iraq: Oil and gas legislation, Revenue Sharing, and US policy" (November 3, 2009) 7-5700 RL34064, 6 [www.fas.org/sgp/crs/mideast/RL34064.pdf](http://www.fas.org/sgp/crs/mideast/RL34064.pdf), accessed March 15, 2010 ("Many Iraqi government officials have reacted negatively to the impasse between the national government and the KRG and have condemned the KRG's contracting activities. In November 2007, Oil Minister Al Shahrstani warned international oil companies that the national government would not allow the export of oil produced under KRG contracts, and the export ban persisted until June 2009. The Ministry of Oil has since refined its position slightly to emphasize its firm opposition to contracts signed by the KRG after February 2007, when the initial compromise on hydrocarbon legislation was reached between the KRG and Baghdad. According to Shahrstani, contracts signed before February 2007 with firms currently producing oil for domestic consumption would be considered valid after review and potential amendments").

1 source of tension since its inception, in large part because it was conceived by parties  
 2 who never represented more than 20 percent of the population (despite the apparent  
 3 belief shared by many internationals that they in fact represented closer to 80 percent),  
 4 and whose views on federalism are clearly outside of the Iraqi mainstream. The inescapable  
 5 consequence is that these provisions are a source of continuing illegitimacy for Iraq's  
 6 Constitution.

7 **V. WHAT ROLE LOCAL CONTEXT?**

8 If there is only one lesson that should be derived from all of the above, it is that there is no  
 9 substitute for local knowledge, or expertise in local realities. Another obvious lesson is that  
 10 each constitutional process takes place in a local context that is both specific and unique. As  
 11 a result, the efforts by some international scholars to compile lists of benchmarks that must  
 12 be satisfied in order for a constitutional process to be "successful" are only of limited inter-  
 13 est. Far more useful would be to study each drafting process on its own, to understand the  
 14 particular dynamics of how international best practice in relation to issues such as funda-  
 15 mental rights and the distribution of powers interact with preexisting local realities.

16 For example, it is today impossible to imagine a constitutional process taking place out-  
 17 side the context of a preexisting constitutional or legal order. A new constitution, or more  
 18 specifically, the manner in which a particular constitutional provision is phrased, or even  
 19 the particular choice of words, will necessarily have an impact on that preexisting order.  
 20 Individual institutions may have to be dissolved as a result. Reporting lines between indi-  
 21 viduals or institutions may have to change; regular meetings that have been taking place  
 22 over the course of decades between particular state officials may have to cease; specific  
 23 institutions or officials that have been coordinating for decades may be forced to end their  
 24 communications. Understanding the different components of local context therefore allows  
 25 a constitutional drafter to better understand and foresee the impact of his or her work.  
 26 Conversely, a failure to understand local context means that the likelihood of unintended  
 27 (and usually undesirable) consequences is significantly increased.

28 In that sense, constitutional drafting processes always take place within the context of:

- 29 (1) The political realities that are in play at the time when the initiative to draft the  
 30 constitution is launched, which is to say the reasons for drafting a new constitution  
 31 (revolution, foreign intervention, accession to an international or multilateral orga-  
 32 nization, etc.) and the political actors that have been appointed, elected, or nomi-  
 33 nated to participate in a constitutional process, whether social, ethnic, religious.
- 34 (2) A preexisting constitutional and legal order. Preexisting rules may be rejected, they  
 35 may inform some of the new constitution's provisions or they may be partially  
 36 maintained. Whatever decision is made, the constitutional and legal order should  
 37 at the least be considered before it is changed or even amended.
- 38 (3) A preexisting institutional reality. This includes questions such as which institu-  
 39 tions exist, the relationships that specific institutions have with each other, which  
 40 institutions carry out their constitutional and legal obligations satisfactorily and  
 41 which do not. Obviously, before a specific institution is dissolved, maintained, or  
 42 reformed by a constitutional drafting committee, efforts should be made to under-  
 43 stand how that institution functions in practice, and the reasons for its success or  
 44 lack of success as the case may be.
- 45 (4) A preexisting professional culture (including established economic, administrative,  
 46 and political practices). In countries with a large governmental bureaucracy such as  
 47 Iraq, a number of working practices have been in place for decades, including

1 reporting lines between different institutions, and the relationship between differ-  
 2 ent institutions. The manner in which a constitution is phrased can force these  
 3 working methods to change.

4 How should preexisting political realities be considered and to what extent should they  
 5 be maintained? There is, once again, no magic formula that will answer this question, but  
 6 the one principle that should never be deviated from is that any departure should always be  
 7 carried out knowingly. Where a constitutional principle is adopted without even being  
 8 aware of preexisting conditions, the likelihood that this will accidentally lead to a positive  
 9 result is very low. This is not as obvious as it seems, purely as a result of the fact that consti-  
 10 tutional drafters, or their international advisers, are not always aware of whatever constitu-  
 11 tional and legal traditions may be in existence in the country in question. Before any changes  
 12 are made, questions should be raised about each major aspect of the state's functioning with  
 13 a view to determining where reform is necessary and where it is not. If a specific institution  
 14 functions as it should, efforts should be made to understand the reasons for that success.

15 Finally, and perhaps most importantly, any decision to maintain or depart from preex-  
 16 isting local conditions should be justifiable from the perspective of some form of legitimacy  
 17 (either because the departure will improve the state's performance, or because it will bring  
 18 the state's role more closely in line with the people's sense of political morality). In the case  
 19 of Iraq, a number of departures were made from preexisting conditions. Some were made  
 20 in order to respond to particular political concerns, while others were more technical in  
 21 nature. However, because very little effort was made to understand local context before the  
 22 constitutional draft was finalized, many of the changes had unintended consequences, from  
 23 which the Iraqi people are still struggling to recover from today.

