

## The Constitution of Iraq: Religious and Ethnic Relations

By Faleh A. Jabar

### Introduction

Constitution-writing has offered a unique opportunity to determine the structure of the Iraqi state, and develop a unified vision to facilitate peace and stability for all groups in Iraq.

On 15 October 2005, following a relatively high turnout (63 per cent of eligible voters), the Constitution was endorsed by 78 per cent of the votes. The massive rejection from the Sunni provinces showed a failure to reach a nationwide consensus, but some willingness to engage with the political process.

The new permanent Constitution of Iraq is the first since 1924 to result from an elected Constituent Assembly and national referendum. The process also marks a turning point in Iraq's beleaguered transition from authoritarian centralized rule and post-US-led-war and mayhem towards constitutional representative government and the retrieval of Iraq's sovereignty.

The Constitution is ahead of many in the region. It recognizes civil rights, decentralization, democratic governance, federalism and freedoms. However, it lacks protection measures for these basic norms and freedoms, and has alarmingly vague or

conflicting Articles on civil society autonomy, minority and women's rights, political freedoms, the role of religion, etc. Further, the Constitution rests on more than 60 yet-to-be-enacted laws and numerous legislative, judicial and other institutions. The Constitution is in a legal and institutional vacuum.

Given the above-mentioned shortcomings, the volatile political context and Iraq's weak judiciary and law enforcement agencies, democratic freedoms, and civil, women's and minority rights, could be threatened. This bodes ill for peaceful transition, and good inter-ethnic and inter-communal relations.

### The constitutional process

The constitutional process in 'post-conflict' Iraq was begun by the Coalition Provisional Authority (CPA) under Ambassador Paul Bremer in August 2003, following the formation of the Iraqi Governing Council (IGC) in July.

The IGC appointed a 25-member Constitutional Preparatory Committee (CPC): 12 Shi'i Arabs, five Sunni Arabs,



Iraqi Christian woman in Baghdad protesting against the lack of polling stations in Christian villages. Sabah Arar/Rex Features

five Sunni Kurds, one Turkmen, and one Assyrian (Christian). Only three women were included (one Turkmen and two Shi'is). The CPC was vaguely mandated to start consultations with community leaders and others. The process polarized Iraq into conflicting blocs over the *method* of selecting drafters rather than on the *principles* of the future Constitution. The CPC left the difficult decisions to the IGC and the CPA.<sup>1</sup>

The United Nations (UN) Resolution 1511 of 16 October 2003 called on the IGC to set a timetable and programme for drafting the Constitution and holding elections. In November 2003, the US administration signed an agreement with the IGC to transfer sovereignty to an appointed government in July 2004. The CPA and the US administration pressurized the IGC on the Constitution, with US Secretary of State Colin Powell issuing an ultimatum for the IGC to draft the Constitution in six months.<sup>2</sup>

The USA's drive for a Constitution and transfer of sovereignty marked a mid-course change to counter a largely Sunni insurgency, and accommodate Shi'i opposition to Constitution-drafting by non-elected drafters.

## Transitional administrative law

The nine-member IGC Presidential Council became the drafting committee, chaired by Adnan Pachechi. A smaller group of technical experts (jurists and judges) drafted the transitional administrative law (TAL). The TAL defined the foundations of a new liberal, consociational<sup>3</sup> and federal polity. The TAL also established the foundations for a democratic, federal and decentralized state structure, with human rights protection, prior to the formation of an elected government, plus some parameters for the future Constitution.

The UN Resolution 1546 endorsed the transitional procedure as stipulated by the TAL, strengthening international support and internal legitimacy. The TAL also established that the ratification of the permanent Constitution would be successful if a majority of voters endorsed it and if two-thirds of voters in any three provinces (or more) did not reject it (Article 61-C). But it also left many issues undecided.<sup>4</sup>

The announcement of the TAL on 8 March 2004 led to fierce reactions from the Sunni radical Muslim Ulama Council (MUC), led by Harith al-Dhari, and the Shi'i radical Muqtada Sadr. Even the moderate Ayatollah Sistani criticized the TAL for 'tying' the hands of future elected legislators. His objections delayed the TAL's signing ceremony.

## Drafting the permanent Constitution

The 31 January 2005 elections were held to legitimize the constitutional process as envisaged in the TAL. Despite endemic violence, some 58 per cent of eligible voters turned out, with massive voter participation in the Kurdish and Shi'i provinces (88 and 67 per cent respectively), but a very low turnout, 19 per cent on average, in Sunni provinces.<sup>5</sup>

An estimated 80 per cent of all those who voted were thought to be women.

The elections yielded two powerful blocs: the Kurdish Coalition with 27 per cent of the vote and 75 seats, and the United Iraqi Alliance (UIA, the Shi'i Islamic bloc) with 48 per cent and 140 seats. The centrist Iraqi List of ex-Prime Minister Iyad Alawi received only 13 per cent and 40 out of 275 seats. Political entities representing ethnic and religious minorities were marginal.

The elections conferred a degree of legitimacy to transitional politics, but left two glaring gaps: the absence of a moderating centrist bloc, and the lack of any proper representation of the various Sunni groups at a time when the Shi'i-Sunni rift was hardening and ethno-communal identity politics were superseding other forms of mobilization. Women's representation was 22 per cent of the Constituent Assembly (mostly of the conservative Shi'i Islamic affiliation).

Sunni politicians and groups were stunned by the success of the ballot.<sup>6</sup> The elections helped change Sunni positions. Mosque preachers in Sunni areas began to encourage the public to register for the referendum, setting off new political dynamics towards more involvement in institutional and constitutional rather than violent politics.<sup>7</sup>

The US and UK pressure, and the UN mediatory effort, throughout this period focused on: encouraging broader Sunni participation as a political response to ending the insurgency; and moderating the Shi'i Islamic conservative drive in the drafting process to secure basic international norms of democratic rights and liberties.

## The drafting process

The drafting process was constrained by problems of consensus-building, external pressures, inclusion and tight deadlines.

### Forming the Constitutional Commission

A 55-member drafting committee was formed, headed by a cleric, Humam Hamoodi. It included the three key groups in the Constituent Assembly (the Kurds, the Shi'is, and the liberal centrists), plus five (or four)<sup>8</sup> members representing small minorities (Chaldo-Assyrians, Christians, Turkmen and Yazidis). The controversy over Sunni representation took weeks to resolve. The US and UK diplomats insisted on the inclusion of Sunnis from the National Dialogue list (IND), the Constituent Assembly had a different Sunni list.<sup>9</sup> Ahl al-Iraq (AI) and the Iraqi Islamic Party (IIP) were inclined to improve Sunni representation and further peaceable transition. Yet fundamentalists (known as Salafis) from the MUC and ex-Ba'ath figures, nominated by the IND, seemed more interested in delaying or derailing the process.

With the addition of unelected Sunni 'boycotters' the constitutional committee was renamed as the Constitutional Commission, and contained 71 drafters: 28 from the Shi'i UIA, including five women; 15 from the Kurdish Coalition (KC), including two women; eight from the Iraqi List, including one woman; five from minorities, including one woman; and 15 Sunnis (of whom only two were elected).

Constitutional debate among the drafters was kept behind closed doors, mostly to avoid inflaming passions; yet leaks to the press left no detail undisclosed. The process generated lively public debate, and mobilized various groups. Women's organizations were the most vocal: liberal and leftist groups supported equality and opportunities for women, greater representation, and a secular family law. Islamic women's groups staged demonstrations against equality and in favour of a religious-based family law. Iraqi print and electronic media hosted countless debates. Around 450,000 proposals were conveyed to the drafting committee, but the drafters were largely cut off from these debates.<sup>10</sup>

### Diverse perspectives

The constitutional process exacerbated the contest between different groups and communities over the redistribution of political power and economic resources. Drafters were segmented along ethnic, religious and communal lines, and divided by ideology, culture and reciprocal scepticism.

#### The Shi'i view

The UIA, dominated by Islamist groups, focused on simple majority rule (against consociational power sharing), the Islamization of polity and society, conservative family law and enforced rigid public morality.

The UIA was willing to compromise with the Kurds within certain limits to avoid the dissolution of the Assembly, but was unwilling to accept an all-inclusive process. Two grand clerics, Sistani and Mahmood Ya'qubi supported a Shi'i vote in favour of the Constitution; Muqtada Sadr kept his opposition to the Constitution undeclared until the last moment; while Jawad Khalisi of Kazimain called for a no-vote.

#### The Kurdish view

The KC focused on consociational power sharing, the distribution of oil and gas resources, ethnic federalism, liberal civil and women's rights, and moderate secularism.

Given the weakness of the other blocs, the KC felt overburdened with the task of securing its own federal demands, moderating the Islamization forces and securing women's rights. The KC also feared the dissolution of the Assembly might strengthen Islamism among fundamentalist anti-federal Sunni forces. The KC, however, was more flexible than the UIA in accommodating Sunni, in particular some Ba'ath, demands.

#### The centrist view

Centrist groups, including small liberal and leftist organizations, were painfully aware of their relative weakness (gaining just 18 per cent of the vote), but also mindful of the public's need for a trans-ethnic, trans-communal social force. While the bloc advocated a strong central state, it endorsed Kurdish federalism, and was willing to accept a measure of decentralization. This bloc was strongly opposed to Islamization, sectarian concepts, religious-embedded family law, and the *shari'a* law. It was more willing to accommodate Sunni demands. It announced its readiness to endorse the Constitution.

#### The Sunni view

Sunni forces, while diverse, were united in their opposition to the de-Ba'athification code, decentralization, the distribution of resources, federalism (other than ethnic), and Iraq's multi-ethnic/multicultural identity (stressing Iraq's Arab identity). Unlike the UIA and KC, this bloc lacked a unified leadership, and was split into a moderate Islamic group and a fundamentalist Ba'ath wing. The former was inclined to extract as many concessions as possible to amend the draft. The latter wanted to endlessly delay the process.<sup>11</sup> Most Sunni groups support the *shari'a* and conservative family law. Both wings want to end their political marginalization and have announced they will engage in the next general elections.

#### Minorities' views

Prior to the drafting, minority groups displayed concern over their marginalization in the process. In the current Constituent Assembly, the Chaldo-Assyrians have one seat, the Turkmen have three, and the Sabaeans, none.

The Christians constitute an estimated 3 per cent of the population and, like the Turkmen, are spread over several provinces. Small ethnic minorities, including the Chaldo-Assyrians and Turkmen, and the Arabs of Kirkuk, fear marginalization under the Kurdish-federated provinces.<sup>12</sup>

Religious minorities, including the Christians, Sabaeans and Yazidis, are alarmed by the insurgency, Shi'i Islamic conservatism, and the Islamic influence over the Constitution. They fear for their religious freedoms and their welfare.<sup>13</sup>



## The USA, UN and Arab League

The Constitution was also constrained by regional and international concerns: the US brokering was focused on a political strategy to end insurgency and bring stability. The USA was keen to keep to the 'deadline', thereby sacrificing the principle of consensus and to some extent the text of the Constitution.<sup>14</sup> The USA was also keen on civil rights and freedoms. Arab countries were concerned over federalism and Iraq's Arab identity. The Arab League's General Secretary, 'Amr Musa, raised the issue of Iraq's Arab identity with President Talabani.<sup>15</sup>

## Drafting and amendments

The drafting effort largely represented a political pact between the Kurd and Shi'i leaders. To meet the constitutional deadline (15 August 2005) the consensus-building process was moved from the all-inclusive Constitutional Committee to an informal forum of Shi'ite and Kurdish leaders, with some US–UN diplomatic mediation and influence. All other groups, particularly the Sunni community, were, temporarily at least, marginalized.<sup>16</sup> This caused two weeks' delay. The draft Constitution was endorsed by the Transitional Constituent Assembly on 28 August.

## Extension beyond the referendum

The text was left open to final amendments on 12 October to meet basic Sunni demands relative to Arab identity, de-Ba'athification, language and other aspects.<sup>17</sup> The most important of these last-minute amendments is Article 122, which previously barred or restricted any amendment for two sessions. A new Article (137) stipulates the formation of a consociational parliamentary committee to prepare, within four months, a body of amendments that can be endorsed in total by an absolute majority vote in the parliament, followed by a new referendum within two months. This unprecedented extension of the constitutional process has had a positive impact on Sunni participation.

## The Constitution: textual examination of major contentious issues<sup>18</sup>

The Constitution-drafters' guiding principles were: a redistribution of political authority, and of the centrally owned natural resources (oil and gas).

The political system (executive, legislative and judicial) has five layers (Article 113): the federal (central) government; the capital (non-federated entity); the regional (federated provinces, of two or more provinces); the provincial (governorates); and the municipal (local) for Turkmen, Chaldo-Assyrians and other groups (within provinces) (Article 121).

## Majoritarianism versus consociationalism

A major feature in the new Constitution is the shift from consociational to majoritarian rule. The three-member Presidential Council, each with the power of veto, was

envisaged by the TAL as a consociational arrangement to constrain the tyranny of a simple majority. The new Constitution replaced this with a ceremonial presidency with no powers (Articles 64–74). Majoritarianism resonates with the views of the UIA that Shi'is constitute a 'demographic majority' and have the right to rule. This position also resonates with Iraqis' desire to have a strong central authority, but with a broader, multi-communal-based government.

The Kurdish bloc secured the continuation of a consociational Presidential Council for one term of four years (Article 135). The bloc also included a yet-to-be-defined Union Assembly (Article 47), an envisaged second chamber in the parliament to represent regions, provinces and communities. This institution could prove vital to counterbalance the 'tyranny of the majority'.

As it is, simple majoritarianism bears the seeds of authoritarianism – Shi'i Islamic or otherwise – with drastic consequences for civil liberties, democratic freedoms, minorities' and women's rights, and power sharing. The deferral of simple majoritarianism for four years (Article 135) is not enough to establish institutional checks and balances in the future Union Assembly to curb authoritarianism. One solution would be to retain the presidential veto, at least until the Union Assembly is established.

## Federalism: ethnic (the Kurds)

Article 1 of the new Constitution contains a clear definition of federalism as a universal principle of the new Iraq. The TAL recognized only ethnic federalism for the *de facto* autonomous Kurdish region (Arbil, Dahuk and Sulaimaniya provinces) but left federalism undefined (Article 114).

Like the TAL, the new Constitution left the issue of Kirkuk unresolved (until 2007). The Kirkuk issue includes various problems such as: de-Arabization (the fate of Arabs settled in Kirkuk to change its ethnic structure); the future inclusion of Kirkuk in the Kurdish region, which would disturb Kurdish–Turkmen relations (the Kurds say Kirkuk is their Jerusalem, the Turkmen claim it is their historical capital); and property claims (notably by Kurds and Turkmen). These issues could exacerbate inter-ethnic tensions and trigger violent conflict with regional repercussions (Turkey). Article 122 will be a major challenge.

Although many Shi'i and Sunni groups have accepted ethnic federalism, they oppose the wide-ranging powers conferred on regional governments (Articles 110–111); they also have misgivings about the inclusion of Kirkuk in the Kurdish region.

## Federalism: administrative (mid and southern regions)

Article 116 stipulates that any one or more provinces (governorates, or *muhafaza*) of the 18 administrative provinces of Iraq have the right to form a region. This meets an old demand for autonomy by the southern

provinces (Amara-Misan, Basra and Nassiriya-Thi Qar), reflecting grievances over central neglect.

Non-ethnic federalism is advocated by the Shi'i bloc and the UIA, accommodated by the Kurds, but rejected by the Sunnis and most centralist forces. Rejectionists fear that power in the regions would cause the disintegration of Iraq, or the rise of an Iranian-style Islamist region, involving nine Shi'i provinces. The issue is central to Sunni opposition to the Constitution. Sunnis believe decentralization is the remedy to provincial grievances. Unlike decentralization, federation empowers federated regions to have their own Constitution and border guards.

Another dormant conflict is inherent in the rift between Basra and its satellites that embrace southern autonomy, and Najaf led by Aziz al-Hakim, which envisages an all-Shi'i south-middle federated region.

In a regional or provincial context, the Sunnis in Basra and Nassiriya will exist as a minority fearing marginalization and oppression under Shi'i control.

### Administrative decentralization

The Constitution provides each province with broad financial and administrative powers to administer local affairs (the border, customs, education and policing). This is universally acceptable by the main communities, while the centralist forces propose reduced provincial powers.

### Distribution of resources

A basic feature in the system is people's ownership and equitable distribution of resources. Oil and gas are declared the property of the Iraqi people 'in all regions and provinces' (Article 108); proceeds from 'current fields' are to be 'fairly' distributed to the provinces, relative to their demographic size, with an additional 'quota' to more devastated areas (Article 109). The Article fails to refer to 'future fields', igniting fears among the centrist groups and non-oil provinces.

The federal government will administer oil and gas fields, in cooperation with regional and provincial authorities. Strategies to develop these natural resources would be drawn up by the federal authority together with authorities in oil-producing regions and provinces.

Federalists criticize the ambiguity of the term 'fair distribution', its meaning and the agency of distribution are left to a pending law (Article 104).

Those advocating a strong centralized state (centralists) oppose three aspects: the inclusion of non-federal authorities in planning oil and gas developments, the non-inclusion of water resources in the text, and the reference to the distribution of proceeds from 'current oil and gas fields'. They demand the distribution of all natural resources and from all sources and fields, current or future.

### Islam and legislation

The Constitution contains strong Islamic wording, with Articles that could Islamize polity and society, and threaten civil liberties, democratic freedoms and women's rights.

Article 2 refers to Islam as the official religion. This implies 'religious instruction in public schools, and the use

of Islamic symbols in public life, and state funding for religious institutions'. It also refers to Islam as a 'basic source' of legislation, and bars the passage of any law that contradicts 'the fixed elements of the rulings of Islam'.<sup>19</sup> The term 'rulings of Islam' reintroduces the *shari'a*, and indirectly enhances the power of clerics who informally have the authority to issue such rulings. Article 2 also bars the passage of any law contravening the 'principles of democracy'.

The conflict between the 'rulings of Islam' and the 'principles of democracy' triggered concern over future legislation. This conflict will probably be resolved through the Supreme Federal Court (SFC), whose structure and composition will be crucial.

Article 90 requires 'experts of the *shari'a*' to be included in the SFC, along with jurists and judges. Such inclusion has the potential to involve clerics and turn the SFC into an Iranian-style 'Guardians of the Constitution'.

Article 99 allows for the formation of an independent institution, the State Council, which has some judiciary functions, issuing *ifta*, a term referring to 'religious rulings'. This could lead to a judicial duality and the enhancement of clerical authority.

Article 10 refers to holy places in general, and Shi'i holy places. Article 41-A refers to Shi'i rituals, unnecessarily inviting 'sectarian' sentiments.

### Civil liberties and civil society

Article 36 refers to freedoms of expression, press and public meetings, but mentions restrictions by 'morality and public order', the interpretation of which is arguably open to abuse.

Articles 37 and 43 recognize political parties and civil society institutions but they have to be regulated by law, a legal loophole that may be restrictive.

### Women's rights

Article 14 prohibits discrimination in terms of gender, race, ethnicity, religion or creed; Article 17 protects 'the individual's' right to privacy (implying women, since the word 'individual' in Arabic is neutral); Article 16 secures equal opportunities to 'all Iraqis' (no reference to gender); Article 18 recognizes citizenship rights to children born of an Iraqi father or *Iraqi mother*; Article 20 recognizes 'men's and women's' right to participate in public affairs; Article 30 offers social security to mothers and children; lastly Article 48-4 secures 25 per cent representation of women in parliament.

However, in Article 29-A the reference to the preservation of the 'ethical and religious value' of the family is ambiguous and seen by women's groups as potentially oppressive. These values' meaning could be referred to conservative clerics whose interpretation will have the force of law.

Article 42 refers to the freedom of travel, movement and residence of 'the Iraqi' in the masculine, implying gender discrimination. Denial of freedom of movement, residence and travel has a traditional past; women were required to travel with male family members.

Article 39 on personal status virtually abolishes the family law of 1959, a step backwards from the TAL. Article

39 requires Iraqis (in the masculine plural) to be free in matters of family law (or personal status) according to their sect, religion, beliefs or choices. Family law is now referred to religious courts; freedom of choice over the courts is left open but not clearly defined; the choice of court is not clearly given to both sexes, a loophole that may leave women exposed to an oppressive interpretation of this Article.

Advocates of non-religious family law invoke Article 35 of the Constitution, which prohibits religious coercion, to limit the applicability of Article 39, which may allow them to reject settling family disputes in religious courts. They also invoke the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Constitutional amendments will be necessary to give men and women equal rights in their choice of religious or secular courts for family disputes.

### De-Ba'athification

Article 7 disenfranchises Ba'athists, and prohibits racism, sectarian cleansing, terror and excommunication (*takfeer*). This disenfranchisement of the Ba'ath has an ideological aura (UIA position) against the Ba'ath in general. Kurdish and centrist groups, by contrast, wish to disenfranchise Ba'ath members who committed crimes. The Shi'i position would exclude former Ba'ath members from public employment; the Kurds-centrists would allow their employment in civil (not military) service.

### Iraq's Arab identity

Articles 3 and 4 delete an old constitutional Article that says Iraq is part of the Arab nation. The new Articles recognize Iraq's multi-ethnic, multicultural and multi-linguistic nature. Sunnis extracted concessions to modify it, but the issue is still controversial.

### Legislation and independent agencies

The Constitution relies on some 60-plus areas of yet-to-be-established laws, including crucial areas such as the cultural rights of minorities, distribution of oil proceeds, federal-regional and federal-provincial relations, and freedom of conscience and speech.

Laws will be made by a simple majority vote in the coming parliament. Given the possibility that a Shi'i Islamic majority might emerge, simple majority voting has the potential to allow the passage of Islamic versions of most of these laws. Minority and women's groups call for a two-thirds majority requirement for all laws.

Implementation of the Constitution is also contingent on the creation, structure and functioning of a host of independent state agencies and institutions, which range from the Central Bank to the High Human Rights Commission (Articles 100–106).

### Minorities

Several Articles stipulate the cultural, religious and political rights of religious minorities, such as the Christians, Mandaeans and Yezidis (Article 2); or ethnic minorities, such as the Turkmen and Syrians (Article 4); or the Armenians and Chaldo-Assyrians (Article 121), recognizing

their right to teach their languages in public and private schools, or observe their rituals and practise their beliefs, or enjoy their political and administrative rights.

Minorities fear such cultural and other rights and liberties are contingent on a yet-to-be-enacted law (Articles 119 and 121) over whose formulation they may have little influence.

Minorities also fear that their access to government employment, power and resources will be compromised.

Article 48 allocates one seat in parliament for every 100,000 members of the population, compromising minorities' representation.

Groups such as the Chaldo-Assyrians and Turkmen, and members of the three main communities who will be minorities in provinces dominated by other groups, fear for their fair representation in provincial governments and becoming an oppressed minority. Their status is contingent on the elaboration of Article 121 in the new laws. In its present wording, this Article has little to offer, apart from an empty statement of goodwill.

### Electoral law

National proportionate representation is replaced by local constituencies (each province is a constituency). The law ties competing candidates to local constituencies, making them more accountable, with competition among different blocs and factions, and reducing sectarian tensions in homogeneous provinces, where competition will divide communities along political rather than ethnic or communal lines.

In mixed provinces, the representation of different and ethnic and religious communities will depend on their turnout at the ballot, which may give rise to under-representation. This could be brought about by violence and intimidation (private militias), or by other factors (funding, infrastructure). However the new electoral law would avoid the under-representation of provinces where elections might be delayed or impeded.

A side effect is that the electoral law would curtail the impact of trans-ethnic and trans-communal centrist forces, which do not command enough support to score gains on the local level, but can accumulate small gains nationwide. Geographically dispersed minorities would suffer as a result.

## Conclusion

The main casualty of the flawed Constitution-drafting process – which was characterized by haste; pressure from external actors; and the under-representation of Sunni Arabs, women and minority representatives – was the legitimacy of the text itself. Nevertheless, the referendum results indicate that most Iraqis are willing to adopt the text if it means a step on the road towards normality and, above all, stability.

However, flaws entrenched at this stage, if not corrected, could lead to instability, and possibly further conflict. Timing is crucial as urgent amendments can only be made until June 2006, the deadline for the new Amendment Bill envisaged by the Constitution.

One of the key balances to be struck is between majority rule and ensuring a voice for religious/ethnic minority communities. The Constitution combines a relatively majoritarian parliamentary system with a high degree of decentralization. Until the Union Assembly is established, it would be wise to retain the veto-wielding Presidential Council, where the three main communities are represented, but it is important to avoid the entrenchment of ethnic politics, as has happened in Bosnia and Herzegovina.

In the draft Constitution, amendments need to be made to protect the rights of members of all beliefs and denominations, particularly women, in light of the Islamic foundation of the text; to remove ambiguities which limit

women's equality; and to remove ambiguous restrictions on freedom of expression, the press, assembly and civil society organizations.

Other main issues, in terms of avoiding future conflict, include the need for a transparent mechanism ensuring fair access to and distribution of revenues from natural resources, including gas, oil and water; a fair and inclusive process of reconciliation and transitional justice regarding past injustices, including the resolution of property claims; a strong law enshrining minority rights (protecting minorities both within the country as a whole and within provinces); and clarification of the membership, mandate and independence of key structures such as the SFC and High Human Rights Commission.

## Notes

- 1 Interviews and telephone conversations conducted with a number of CPC and IGC members, in September–November 2003.
- 2 *New York Times*, 26 September 2003.
- 3 Here consociationalism refers to the inclusion of representatives of all ethno-religious groups, and the creation of mutual checks and balances to avoid the tyranny of large ethnic or majority groups.
- 4 Such as the final status of Kirkuk, the type of federalism, the distribution of oil revenues, etc. See, Brown, N., *Interim Iraqi Constitution, January 2004 draft, Commentary and Translation*. [www.geocities.com/nathanbrown1/interimiraqi-constitution.html](http://www.geocities.com/nathanbrown1/interimiraqi-constitution.html).
- 5 Anbar 2 per cent, Mosul 16 per cent, Salhudin 27 per cent and Diyala 32 per cent.
- 6 They developed a fourth non-institutional bloc of Sunni groups, *al-mughayaboon* (all forced into absence): the Ahl al-Sunna (renamed Ahl al-Iraq) led by Adnan al-Dulaimi, the moderate Islamic party led by Muhsin Abdul Hamid, the National Dialogue Council led by Salih al-Mutlak, and the MUC. (The MUC does not claim to be a political party, yet it has been the most active and militant of all Sunni groups.)
- 7 In a television interview Adnan al-Dulaimi said 'we need to prove our capability to represent people in the assembly and show our force', 6 October 2005.
- 8 The UN source in Baghdad said four represented minorities, the drafting committee chair said it was five.
- 9 According to President Jalal Talabani, 15 Sunni politicians were selected by a Constituent Assembly committee, but the US and UK ambassadors, plus the US Secretary of State, Condoleezza Rice, asked for the inclusion of another 15-man list presented by the IND group, mainly of ex-Ba'ath and Salafi figures.
- 10 Interviews, Baghdad, August 2005.
- 11 Meeting with President Jalal Talabani, London, 8 October 2005.
- 12 Interviews with community leaders, November 2004 and August 2005.
- 13 Interviews with Chaldo-Assyrian and Sabaeen community leaders, August 2005.
- 14 ICG, 'Unmaking Iraq: a constitutional process gone awry', *Middle East Briefing*, no. 19, 26 September 2005.
- 15 Most Arab countries fear the Shi'i bloc led by Aziz Hakim, and the growing influence of Iran.
- 16 USIP report, 'The Iraqi Constitution: progress, but problems ahead', 23 August 2005.
- 17 *Al-Hayat*, London, 5 October 2005.
- 18 See, Brown, N., 'The final draft of the Iraqi constitution: analysis and commentary', unpublished paper presented at the IIST Workshop on Debating the Iraqi Constitution, London, LMEI, 9–10 September 2005, among others.
- 19 The translation of the Article is from Nathan Brown.

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## Recommendations

### 1. Constitutional amendments

#### Human rights

- Remove ambiguous restrictions from Article 36 by guaranteeing the freedoms of expression, media and assembly and stating that any restrictions based on morality, public order, etc. will be clearly defined by law.
- Remove provisions limiting some rights, including health care and education, to citizens only.

#### Women

- Amend Article 39 (family law and other relevant Articles) to involve women's right to choose religious or non-religious courts, and freedom of travel, residence and movement.
- Standardize reference to subjects to remove unintended gender bias: replace the words 'Iraqi', 'Iraqis' or 'citizens' (always in the masculine plural or singular) with 'individuals'.

#### Minorities

- Articles 119–21 relative to local governance require specific details on minorities' rights in the provinces, such as a specific quota of seats on local government relative to demographic size, or some veto powers in decision-making, etc.
- Flesh out Article 47 on the Union Assembly to ensure balanced and fair inclusion for minorities. The yet-to-be-established Union Assembly should counterbalance the National Assembly.

#### The political system

- Retain the Presidential Council's veto powers until the Union Assembly takes effective shape.

#### The judiciary

- Restrict the power of the State Council (Article 99) to issue 'religious *fatwa*'.

### 2. Further Legislation

- It is essential that the process for drafting further legislation required by the Constitution – for example on minority rights, freedoms of expression, media and assembly, private and public education, delegation of power between the provinces and central government, civil society organizations, and establishment of the Union Assembly – be open and transparent and incorporate the concerns of all sectors of society, including women and minority groups. Such legislation must respect international human rights law.
- Ensure the composition of the Supreme Federal Court (SFC) is of lay character. All SFC members should be selected from the Judicial Council, and have 20 years' expertise and high academic qualifications (Article 90).
- Specify the structure of the envisaged High Human Rights Commission to be non-partisan, independent and include fair representation of women, ethnic minorities and

religious groups; its mandate should include monitoring the state's compliance with international human rights obligations.

- Ratify the UN Torture Convention and the statute of the International Criminal Court.

### 3. Constitutional debate and awareness

- Support Iraqi groups' debate to prepare draft laws in major areas that affect the enhancement of democratic principles, civil freedoms, and women's and minorities' rights.
- Encourage the creation of a trans-ethnic, trans-communal, non-partisan Constitutional Advice and Monitoring Bureau.

### 4. Electoral awareness

- Encourage all affected and interested groups to produce literature serving electoral awareness.
- Interested and affected groups should seek to lobby political parties to support their agenda in the parliament.

### 5. Civil society coordination and networking

- Women, trade unions, journalists, ethnic or religious minority groups, and liberal and moderate clerical dignitaries, must pool their efforts through networking and the creation of coordinating forums.

### 6. Conflict prevention

Iraqi civil society, with the support of the government and/or donors, should:

- promote inter-ethnic and inter-religious dialogue, which is necessary to channel grievances, cushion tensions and lobby for compromises;
- establish an inter-ethnic dialogue council in Kirkuk, including women, as a pilot initiative;
- establish an inter-faith dialogue forum between Muslims and non-Muslim minorities, involving moderate clerics, priests, women's representatives, civil society groups and MPs;
- establish an inter-communal Sunni–Shi'i forum, involving moderate and respected lay and clerical personalities, and women.

### 7. International stakeholders

Donors should:

- help fund the preparation of legislation, and press for the implementation of international covenants and agreements protective of democratic freedoms, civil, minority and women's rights;
- press the UN to play an effective monitoring role;
- encourage more effective monitoring of human and minorities' rights by NGOs;
- promote independent institutions and commissions to implement, interpret and protect the Constitution.