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The Constitution as Unfinished Business

The Making and Un-Making of Power Relations in Iraq,

2003-2010

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Thesis submitted for the degree of PhD

2016

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Declaration for SOAS PhD thesis

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Abstract

This thesis adopts what it calls a socially embedded definition of constitutions. It argues that while conventional wisdom views constitution-making as a higher track of law making and emphasises the potential contributions of constitutions to peace, democracy and stability, there are important methodological, theoretical and empirical reasons to evaluate institutional engineering in general and constitution making in particular with caution. The thesis directs analytical attention towards the causal effects of underlying historical and political conflicts, attitudes and commitments of actors involved in the process of constitution making, the strategic context wherein the process occurs, and the ongoing and unfinished aspects of constitution-making. It argues that constitutions are neither causes nor solutions to society's problems. Rather than solving the structural conflicts of a society, constitutions frame them and assist in a key task of the state which is the creation of "zones of relative stability", enabling the society to go on with its political struggle at the expense of future problems. Using a methodology of causal-process observation and in-depth knowledge of Iraq as a case study, through compiling evidence about the links between successive steps in a long causal chain, the thesis shows how the historical legacy of the Iraqi state and the contingent events at the time of constitution-making constrained the available choices for actors involved in the process of constitution-making. It shows how the Iraqi Constitution enabled the continuity of the political community in the teeth of structural conflicts by deferring contradictions in Iraqi society, by invoking constitutional disharmony, by not clearly defining the scope and limits of public organisations' and officials' authority, and by leaving critical matters outside any meaningful mechanism of authority.

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Glossary of Terms

<i>Ahl al-Thiqa</i>	People of trust. In the Iraqi context, referring to a community or people of trust attached to Saddam Hussein, mainly comprising the Sunni Arab families and clans from the hometown of Saddam Hussein, Tikrit.
<i>Anfal</i>	Referring to the genocidal campaign against the Kurdish people (and other non-Arab populations) in northern Iraq, led by Saddam Hussein and headed by Ali Hassan al-Majid in the final stages of Iran–Iraq War.
<i>Asayish</i>	Kurdish secret police.
<i>Ayatollah</i>	Sign of Allah. In a Shia context, it is a high-ranking title given to Usuli Twelver Shia clerics. Those who carry the title are experts in Islamic studies such as jurisprudence, ethics, and philosophy and usually teach in Islamic seminaries.
<i>Badr Brigade</i>	The militia forces of Islamic Supreme Council of Iraq.
<i>Ba`thi</i>	Baathist.
<i>Da`wa</i>	Call. Referring the first Iraqi Shia political party, established at the end of 1950s.
<i>Dustur</i>	Constitution.
<i>Al-`Itilaf al-`Iraqi al-Muwahad</i>	United Iraqi Alliance.
<i>Fadhila</i>	Basra-Based political Party in Iraq.
<i>Fatwa</i>	Legal opinion or learned interpretation that a qualified jurist can give on issues pertaining to the Islamic law.
<i>Goran</i>	Change. A political party in Kurdistan.
<i>Hay`at `Ulama al-Muslimin</i>	Association of Muslim Scholars in Iraq, founded in 2003.

<i>Hawler</i>	City of Erbil.
<i>Hawza</i>	A seminary where Shia Muslim clerics are trained. In Iraqi context, referring to learning institution of Najaf.
<i>Hujjat al-Islam</i>	Authority on Islam. In Shia context, the title is awarded to scholars. It also indicates a status in the hierarchy of the learned below Ayatollah.
<i>Hukumat Harimi</i>	Kurdistan Regional Government.
<i>Kurdistan</i>	
<i>Ijtithath al-Ba`th</i>	Referring to a policy undertaken in Iraq by the Coalition Provisional Authority and subsequent Iraqi governments to remove the Baath Party's influence in the new Iraqi political system.
<i>Iqlim al-Wasat wa-l-Janub</i>	Referring to ISCI desire to create a super region of the nine Shia dominated provinces in Iraq.
<i>Isnads</i>	Referring to Tribal support councils, created by Prime Minister Maliki, throughout much of the south of Iraq. The Isnads were modelled on the Sahwa (awakening) movement in Sunni areas.
<i>Jabhat al-Tawafuq</i>	The Iraqi Accord Front. Also known as Tawafuq, is an Iraqi Sunni political coalition created in 2005, to contest the December 2005 general election.
<i>Jaish al-Mahdi</i>	Mehdi Army. The militia forces of Muqtada al-Sadr.
<i>Lajna al-Dusturiya</i>	Iraqi Constitution Draft Committee.
<i>Lajna al-E'dad Dustur</i>	Iraqi Constitution Revision Committee.
<i>Listi Kurdistan</i>	The Kurdistan List, is the name of the electoral coalition that ran in the Kurdistan Regional Government parliamentary elections in Iraqi Kurdistan in July 2009. The Kurdistan List represented a coalition of the two main ruling parties in Iraqi Kurdistan, namely the Kurdistan Democratic Party and the Patriotic Union of Kurdistan.
<i>Mahkama al-Ittihadiya</i>	Federal Supreme Court of Iraq.

<i>al-‘Ulya</i>	
<i>Majlis al-A’ala</i>	Abbreviation of Islamic Supreme Council of Iraq (ISCI).
<i>Majlis al-Hukm</i>	Referring to the 25-member Interim Governing Council, created in 2003.
<i>Majlis al-Nuwwab</i>	Referring to the Iraqi Council of Representatives (Parliament).
<i>Marja`</i>	In Shia context, a scholar and source of emulation.
<i>al-Matbakh al-Siyasi</i>	Political Kitchen. In Iraqi constitution drafting context, referring to a group of Shia and Kurdish leaders who decided over contested issues without involvement of fifty-five members of Constitution Draft Committee.
<i>Muhasasa</i>	Quota-sharing. In the Iraqi context, it has become associated with the particular formula of ethno-sectarian power-sharing government that was established after 2003.
<i>al-Musalaha al-Wataniya</i>	Referring to reconciliation efforts in Iraq after 2003.
<i>al-Mu’tamar al-Watani</i>	National Congress. Referring to the initiatives of some Iraqi politicians to create a new Iraqi leadership through a national congress.
<i>Party</i>	Abbreviation of Kurdistan Democratic Party (KDP).
<i>Peshmerga</i>	Kurdish security forces.
<i>Qa`ima al-‘Iraqiya</i>	Iraqi List. Political party list in the Iraqi National Assembly election, 2005, consisting of mainly secular Shia, and led by Iyad Allawi.
<i>Qanun ‘Idara al-Dawla</i>	Transitional Administrative Law (TAL).
<i>li-l-fatra al-Intiqaliya</i>	
<i>Raj`iya</i>	Referring to non-progressive forces.
<i>Sahwat</i>	Tribal awakening. Referring to the US sponsored coalitions between tribal Sheikhs as well as former Iraqi military officers that united to maintain security in Sunni provinces of Iraq.

<i>Siyada</i>	Sovereignty. Referring to the discussions of time-line for transfer of sovereignty to Iraqis after 2003.
<i>Shu`ubiya</i>	Populism. In Iraqi context, referring to the use of the Baath Party of the term as a way to describe and discredit Shia political activism in Iraq.
<i>Shuyu`i</i>	Communist.
<i>Sultat al-`Itilaf</i>	The US Coalition Provision Authority, established by Paul Bremer in 2003.
<i>Ta`ifiya</i>	Sectarianism.
<i>Ta`rib</i>	Arabization. Referring to demographic changes and Arabization of the Kurdish areas, particularly in the governorates of Kirkuk, Dayala and Neineva and some areas of Erbil and Dohok, by the regime of Saddam Hussein.
<i>al-Tayar al-Sadri</i>	Referring to Sadrist Islamic national movement in Iraq.
<i>Tazkia</i>	Recommendation. In Iraqi context, after the establishment of Interim Governing Council in 2003, the most straightforward way to get employment with the institutions of, and foreign contracts for, the state was to get a letter of recommendation (<i>tazkia</i>) from one of the IGC parties.
<i>Tawafuq</i>	Consensus. Together with the term <i>Muhasasa</i> , in the Iraqi context, it has become associated with the particular formula of ethno-sectarian power-sharing government that was established after 2003.
<i>Usuli</i>	In Shia context, referring to the majority Twelver Shia Muslims.
<i>Wezarati Samana-Sarwashtiyakan</i>	Ministry of Natural Resources, Kurdistan Regional Government.
<i>Yakyati</i>	Abbreviation of Patriotic Union of Kurdistan (PUK).

Introduction

More than half of all existing constitutions have been written or rewritten in the last three decades.¹ Following what has been called the “seventh wave of constitution making”, which started in 1989 with the adoption of new constitutions in Eastern Europe and South Africa, the literature on constitutions and constitutional design has experienced a resurgence.² As the subject of constitutional design has drawn new attention, scholars have been asked to act as experts and “engineers” in crafting new constitutions around the world. Constitution making has become an international exercise in a way that it rarely was before 1989. As the prominent scholar Donald Horowitz writes: “The involvement of experts and practitioners across state boundaries has been welcomed, indeed encouraged, to the point at which a new democracy that excluded foreigners entirely from its constitutional process might stamp itself as decidedly insular, even somewhat suspect.”³

This development has led to a belief that judicious institutional engineering in general, and constitution making in particular, is the solution to a society’s problems. The claim is made that institutional engineering can overcome economic, political, social, and cultural characteristics that are not conducive to democratic governance in post-conflict, post-totalitarian societies. What matters is to get the institutions, the process of constitution-making and the constitutional provisions, “right”. Wise management of constitutional design will bring about democracy and make agents come together to reach a compromise; while inept management of constitutional design will produce institutions that lack popular legitimacy, and will become the blueprint for a society’s dissolution.

On 15 October 2005, the Iraqi Constitution⁴ was adopted, with 78.4% voting in its favour in a national referendum. The nationwide turnout being 63%, the result also expressed the degree of polarisation in Iraqi society. As many as 96.9% voted “no” to the constitution in the Sunni Anbar province, as compared with 96% approval in the Shia province of Basra, and 99% approval in the Kurdistan province of Erbil.⁵ The making of the Iraqi Constitution brought debates over the merits and demerits of various constitutional designs to the fore of public and scholarly debate. During the process of constitution making in Iraq (2003–2005),⁶ a series of publications appeared with prescriptions for how to build democracy in Iraq.⁷ Policy prescriptions derived from the belief in institutional design were applied to Iraq. Constitutional design experts drew on past experiences of constitutional design from around the world to provide a blueprint for Iraq. Scholars recommended federalism as a state structure for Iraq, and the debate revolved around whether Iraqis should adopt a decentralised or centralised vision of federalism. Some emphasised the importance of creating a viable and strong central state, in

order to preserve the unity of Iraq and promote national cohesion. Others recommended the creation of a decentralised state in order to prevent a recurrence of the past abuse of power by the central state in Iraq.⁸ Some warned that the process of constitution making in Iraq, and the decentralised form of federalism adopted by Iraqis and the occupation regime, was highly ethno-sectarian; polarising ethnic conflicts and promoting the breakup of the country.⁹ A common criticism of the Iraqi Constitution was that its provisions are vague, deferring important issues regarding Iraq's state structure to the future and reflecting the partisan interests of dominant groups at the time of constitution making.¹⁰ Donald Horowitz argued that the Iraqi Constitution represented a "Kurdish agenda to which Shiites signed on".¹¹ Kanan Makiya described it as a "punitive" document that penalises Sunnis;¹² and the Brussels-based NGO, International Crisis Group (ICG), described the constitution as "the prescription and the blueprint" for Iraq's "dissolution"¹³. ICG writes: "The constitutional process was supposed to heal the growing rifts between Iraq's communities, producing a consensus document that would become the nation's political pillar and, as such, help undermine the insurgency's support among Sunni Arabs. Instead, the process rendered the text general and vague and compromise with the Sunnis elusive."¹⁴

The Iraqi Constitution was therefore criticised for failing to "fill in any of the procedures and prerogatives of the future Federation Council (the assembly's upper chamber), the presidential deputies, the Supreme Judicial Council or the Federal Supreme Court", and leaving unresolved "key provisions of the future federal structure, in particular concerning the process by which regions (other than the Kurdish region) are to be formed".¹⁵ Given the way in which Iraqi constitutional provisions inject uncertainty into federal power relationships, critical voices maintained that the Iraqi Constitution is not a unified constitution and does not reflect a coherent political vision. Instead, it is "many constitutions" and many contradictory ideas that tear the society apart. As Dr Mundher al-Fadhil, a legal expert and member of the Iraqi Constitution Drafting Committee, expressed it: "From the very beginning the political nature of the document became evident – against the legal nature that I and many other constitutional experts advocated...What was lost in the process is the identity of the Iraqi state, its coherence and its ability to be a reference point for future generations."¹⁶ Contrary to these views, other scholars regarded the constitution and its federal provisions as a tool to mitigate ethnic-based conflicts in Iraq and to promote peace and democracy.¹⁷

What all these recommendations and prescriptions had in common was a confidence in the democracy-promoting power of institutional engineering and constitution-making. However,

there are important methodological, theoretical, and empirical reasons, to evaluate institutional design and constitution-making with caution. From an empirical point of view, despite the fact that great hopes have been placed in the potential contribution of constitutions to peace, democracy, prosperity, and stability¹⁸, unfortunately, as the bulk of research shows, there is much speculation, but little evidence, about the impact of different constitutional designs and processes.¹⁹ We know neither what process of constitution making is most apt to produce the best configuration of institutions, nor what the best configuration of institutions happens to be.²⁰ Scholars have elaborated on various appropriate constitutional designs to mitigate conflicts in societies.²¹ They have asked how the design of a constitution can achieve the goal of economic prosperity,²² create political stability,²³ respect basic rights,²⁴ and establish democracy.²⁵ Scholars have elaborated on the issues of inclusiveness, representativeness of the process and mechanism used to aggregate the interests of participants to create more “legitimate” and “enduring” constitutions.²⁶ What the evidence provided by these studies suggests is, in fact, that a wide range of constitutional design is compatible with democracy, only, however, if the appropriate background conditions exist.

From a theoretical point of view, a general problem is that the constitution as a political concept, constitutionalism as an ideological construction, and the constitutional state as a modern political formation, have been too often confused with one another in the current constitutional design literature.²⁷ The concept of constitutionalism has locked the constitution into a series of complex relationships with liberal views of the modern nation state, parliamentary democracy, and the rule of law. As such, current literature argues that to create institutions with viable legitimacy, constitutions and the process of making them should be informed by a higher track of law making. That is, the process of constitution making should be separated from “normal politics” and the short-term interests of the social forces engaged in the process. In other words, the constitution, and the process of constitution making, are viewed as autonomous entities and processes; located and occurring outside the realm of society and its inherent tensions.

The methodological implication of this theoretical approach to the study of constitutions is that, while current literature emphasises the causal effects of institutions, constitutions and the process of constitution making, it de-emphasises the causal effects of background conditions: the underlying conflicts that predate the creation of constitutions, the strategic nature of the context where constitution making occurs, and the attitudes and commitments of actors as causal factors. In other words, in current literature a sample of countries studied is selected on a non-random basis, meaning, for example, that a certain number of post-conflict countries are

selected. However, when treated analytically, only the causal effects of institutions are given emphasis, whilst other relevant background conditions that may influence constitution-making are de-emphasised. Democratic failures are simply attributed to bad institutions, and democratic successes, to good institutions. As such, it is unclear whether constitutions are causes of democracy or instability, or whether they are indicators of background and underlying political conflicts; framing these conflicts rather than “solving” them.

To address these shortcomings, this thesis points us in a different analytical direction; towards the causal effects of underlying political conflicts, attitudes, and pre-commitments of actors involved in the process of constitution-making, and the strategic context whereupon constitution-making occurs. Therefore, this thesis adopts what it calls a socially embedded definition of constitutions. This socially embedded definition argues that constitutions and the constitution-making processes, rather than occurring outside and above society and being distinct from normal politics, are a part of, and contribute to, state projects; occurring at the heart of ideological and structural contradictions within the society. Inherent in the object of a constitution are, therefore, the structural conflicts of a society. Consequently, a constitution indicates where the lines of battle lie in the attempted realisation and institutionalisation of the interests of various agents. As such, constitutions are neither the cause of, nor the solution to, society’s problems. Rather than solving these conflicts, a constitution frames them.

Accepting a socially embedded definition of constitutions, this thesis argues that we have to recognise that constitutions can play a meaningful role in the political life of a society without having liberal or democratic constitutional ends. As a matter of fact, this thesis defines the primary function of a constitution as aiding a key task of the state, which is the creation of “zones of relative stability”, facilitating the deferral and displacement of contradictions, conflicts, and crisis tendencies in a society. Constitutions can support state projects by deferring contradictions in a society; by not clearly defining the scope and limits of public organisations’ and officials’ authority, and by leaving critical matters outside any meaningful mechanisms of authority, or by invoking vague and contradictory language. They can thus play a meaningful role in the political life of society – preserving it and being one of the meaningful tools used in the struggle of authorisation and the distribution of power – without playing a meaningful role in changing the behaviour of the rulers or individual members of the society in a liberal constitutional direction.

Theory, Methodology, and Sources

By bringing constitution making back into the realm of politics, the main contribution of this thesis lies in the realm of how we can study and explain the process of constitution making as a part of a wider and more complex social relationship that society is comprised of. In other words, this thesis suggests that constitution making cannot be analysed as an isolated process. Constitution making occurs in the domain of politics, and as such it should be seen as a social arrangement. It should therefore be framed within a wider theory and concept that we can use to understand and analyse society.

Because the subject of constitution making, as well as its object, presupposes a state of, “unified public powers capable of being activated by a people or a nation as a constituent power”²⁸, the idea of constitution should be understood through a socially embedded definition, which links it to the state projects and state transformation within the wider state-society relationship. The thesis will therefore claim that there can be no adequate theory of constitutions, without an adequate theory of state; and there can be no adequate theory of state without a theory of society. As the nature of the state will be treated in chapter one of this thesis, which addresses the theoretical foundations, it will be proposed that a socially embedded definition of the state should start from the proposition that the state is a social relationship.²⁹ This is due to the fact that while the state is but one institutional order among others in a given social formation, it is particularly charged with responsibility for maintaining the integration and cohesion of the wider society. Accordingly, the claim is made that the state and political system are parts of a broader ensemble of social relationship and the elusiveness of state-society relationships should be explored as a clue to the state’s nature.³⁰

A socially embedded definition of the state, therefore, calls for a theoretical approach that accounts both for the historical and institutional specificity of the state as a “distinctive accomplishment of social development” as well as “its role as an important element within the overall structure and dynamic of social formation”.³¹ This theoretical approach has been elaborated by Bob Jessop and Colin Hay, in what is called a strategic-relational approach to structure and agency (hereafter SRA).

SRA is premised on a critical-realist philosophy of social science, which is, to a great extent, associated with the works of the British philosopher Roy Bhaskar.³² Central to critical-realist ontology is the idea that the object of social science is both socially defined and socially produced, but is nevertheless just as real.³³ Further, critical realism proposes that the objects of

social science are relational. That means that an object is what it is by virtue of the relationship it enters into with other objects.³⁴ In this order, critical realism suggests that societies are structures of social relationships, and the context of action within which the actors are positioned is therefore by no means neutral. Within any given society people and political actors occupy different positions within the complex social relationship, not least concerning their access to the resources for interaction with their surroundings. The different locations of people with respect to, among others, power, as well as ideological differences, make interests, problems, and needs very divergent. It makes also the context of action “strategically selective”, meaning that it favours some strategies taken by some actors, but hampers others. The implication of this theoretical approach to study constitutions and constitution-making is that “common interest” is always asymmetrical. It marginalises some interests at the same time as it privileges others. There is never a general interest that embraces all possible particular interests in a society, therefore, constitutions are not neutral documents. What is portrayed as a fundamental norm in a constitution reflects the strategic requirements of differently situated actors within the larger political process at a certain time of a society’s political development. Any attempt to conceptualise constitutions and constitution-making processes as a higher track of law making is therefore illusory.

The methodological implication of this approach is that, in order to understand the process of constitution-making in Iraq, and the role that the Iraqi Constitution plays, instead of assuming that prior conditions do not matter we need to extend our research further back to “path-dependent legacy” of the Iraqi state. Meaning the historical and institutional specificity of the Iraqi state as well as its role as an important element within the overall structure and dynamic of social formation. The term “path dependence“, as used in this thesis, follows the definition given by Andrew Bennet and Colin Elman³⁵. The concept of path dependence is represented in terms of the different content scholars give to four elements: causal possibility, contingency, closure, and constraint. Basically, causal possibility suggests that, over the length of the entire history, there has to be some space for different possible outcomes; that more than one path might have been taken. Contingency implies that there needs to be some contingent element that intervenes in the causal narrative. Closure suggests that, as a result of that influence, some causal paths become less possible, or impossible; some degree of narrowing, a closure of some previously feasible paths. Constraint implies that, once a path is selected, there is some degree of constraint and some processes that operate to keep actors on it; actors are tied to the path that is chosen, or would face high costs in moving off this path once it is established. In other words,

“path dependence” suggests that there is a time during which there are a number of plausible alternatives, followed by a critical juncture, where contingent events lead one of these alternatives to emerge, after which actors are constrained to remain on that path.³⁶

In others words, in the case of Iraq, it is of interest to show historically how modes of domination and asymmetrical power relationships have been produced, upheld, and reproduced; giving way to different narratives of state power, the politicisation of ethno-sectarian groups, different commitments, and consequently, incompatible attitudes and approaches to the future Iraqi state, the idea of what a constitution is and what it can do, as well as a narrowing of Iraqi politics along ethno-sectarian based politics. We also need to analyse the strategic location of different actors within the strategic context at the time of constitution-making, and how it favoured some strategies taken by some agents, but hampered others. By tracing the attitudes and strategies of the different actors involved in the process of constitution-making to historical underlying conflicts, the strategic context at the time of constitution-making, and the unceasing efforts of the actors to modify the context of action, we can therefore get a better understanding of the development of the Iraqi Constitution and the role it plays in Iraqi society.

What is needed is a methodology that involves compiling evidence about the links between successive steps in a long causal chain, and as such, gain insight into the process of constitution-making itself, rather than attributing democratic success or failure to good and bad institution making. This methodology involves tracing the relevant causal events and processes, searching for links between underlying conditions, underlying attitudes, and the subsequent process of constitutional design. It is based on qualitative data and causal-process observations; of great importance to the success of this methodology is the causal sequence in which observations are situated. Furthermore, a successful analysis of trajectories of change and causation requires that the phenomena observed at each step in this trajectory are adequately described. It is, in James Mahoney’s words, a methodology that involves “causal-process observation”; in other words, an insight or piece of data that “provides information about context, process, or mechanism, and that contributes distinctive leverage in causal inference”. The information contained within a “causal-process observation” reflects “in-depth knowledge of one or more particular cases rather than data collected as part of a systematised array of variables.”³⁷ Therefore, a fine-grained case knowledge and careful description is a crucial building block in analysing the processes being studied. A key point that must be underscored is that the focus is on the unfolding of events or situations over time. Grasping this is impossible if one cannot adequately

describe an event or situation at one point in time.³⁸ Therefore, the descriptive component of this methodology begins, not with observing change or sequence, “but rather with taking good snapshots at a series of specific moments.”³⁹ To characterise a process, therefore, what is needed is an ability to characterise the key steps in the process, which in turn permits a good analysis of the change and sequence. What is of interest in this thesis is to trace the attitudes and strategies of the different actors involved in the process of constitution-making, and the subsequent post-ratification of constitutional politics in Iraq; to the historical development and the underlying conflicts of state-society relationships in Iraq, point out critical junctures such as the transformation of the Iraqi state in 2003, its effect in form of closure and constraints on the various state-projects pursued by different actors in Iraq in the aftermath of 2003-occupation, and constitution-making process ratification. What this thesis wants to show is that, due to the history of Iraqi state, and due to strategic-selective context of state transformation and constitution-making process in Iraq (2003-2005), the primary function of the Iraqi Constitution is aiding a key task of the state; which is facilitating the deferral and displacement of contradictions, conflicts and crisis tendencies in Iraqi society.

The key steps in the process identified in this thesis are described as follows, each being addressed in a separate chapter. Chapter 2 examines the path-dependent structural coupling of Iraqi state legacy and development, and competing and incompatible visions of sovereignty and identity among Iraqis. Chapter two’s main argument is that essential features of Iraqi politics and practices used at the time of constitution making, as well as structural tensions and conflicts in Iraqi society, predated the US invasion. In this chapter, it is argued that, at the time of the US invasion of Iraq in 2003, Iraqis faced the regime change while carrying on their shoulders the burden of a legacy of a shadow state, asymmetrical power relationships, violence, and the polarisation of ethno-sectarian communities. The organised opposition to Saddam Hussein was itself fractured along the same ethno-sectarian divisions as Iraqi society. Dominated by the two Kurdish political parties KDP and PUK and the Shia SCIRI, the first battle in the preparation of a new constitution for post-Saddam Iraq had already started before the invasion. During several gatherings in exile, the opposition elevated itself as the true representatives of Iraqi people and reached a general agreement on federalism as the future basis of state structures in Iraq, but no consensus on federalism’s most fundamental features was reached. Furthermore, the opposition also, to a certain degree, institutionalised practices of consensual decision making and ethno-sectarian quotas, *tawafuq* and *muhasasa*, which came to play a key role in post-invasion Iraqi politics. While these factors did not, in a deterministic way, shape the

outcome of post-Saddam Iraq, they did contribute to a “closure”; meaning as a result of the influence of these factors, some causal paths become less possible or impossible. These factors did contribute to the creation of a strategic-selective context that favoured some state projects over others, and thus framed the borders and the terrain of post-Saddam politics. The existence of the factors that contributed to the “closure” is therefore the main challenge of chapter two. Concerned with the history of the Iraqi state, the material used in this chapter is based on diverse primary and secondary sources that shed light on the legacy of Iraqi state-society relationships. These include official publications issued by the Iraqi government, press references, memoirs and publications by Iraqi opposition groups during a series of conferences before 2003 aimed at outlining the main features of the future Iraqi state. These publications indicate the commitments of the agents, the future battle lines of Iraqi politics, and the fact that the process of constitution making predates the US invasion of Iraq.

Chapter 3 deals with the way in which various Iraqi agents, and the occupation regime, viewed the project of state – and constitution making in post-invasion Iraq. It argues that a common interest that could include all these visions did not exist; that because of the path-dependent legacy of the state, Iraqis engaging in constitution making were both positioned differently in terms of access to power and resources, and had incompatible visions regarding the future state and the idea of sovereignty. It also argues that the process of constitution making occurred under conditions of resistance and boycott from a large segment of Iraqi society, of the absence of security and of the fragmentation of political authority. Under these conditions, given the incompatible visions of the Iraqi state among the Iraqis involved in the process of constitution making, to preserve the political community, a compromise had to be reached. Particularly, the issue of federalism was divisive and threatened to tear the political community apart. Accordingly, this chapter, by contextualising competing and incompatible visions of state and constitution in the strategic context of state transformation in post-Saddam Iraq, indicates why the Iraqi Constitution had to leave critical matters outside of any meaningful mechanisms of authority, and inject confusion into Iraqi state-society power relationships. The main challenge of chapter three, and the following two chapters of the thesis, is to show contingent events; the path-dependency of the Iraqi state, followed by the transition process, lead one of many alternatives to emerge, after which the actors were constrained to remain on that path: the creation of a constitution that defers fundamental decisions to the future in order to preserve the political community. Because this chapter aims to explain how the actors understood what a constitution was, and what it could do for them, the material used in this chapter is informed by

the official publications of the main actors, where they outline their perceptions and “remedies“ with regard to the constitution and constitution-making process. Amongst these materials are Paul Bremer’s official diary in Iraq (*My Year in Iraq*), Grand Ayatollah Ali al-Sistani’s fatwas, and Massoud Barzani’s official speeches and comments published in the Kurdistan Democratic Party newspaper, *Al-Taakhi*. This material gives a comprehensive insight into the agents’ perspectives and how their discourses were constructed.

Chapter 4 shows that the Iraqi Constitution aided the process of state making by, on the one hand, insulating fundamental principles that dominant social forces backed, and on the other hand, by deferring contradictions and crisis tendencies in Iraqi society through the injection of confusion in power relationships, and through constitutional disharmony. This is shown through the conduct of the two dominant forces at the time of constitution making; the Kurds and the Shia. This chapter illustrates that the Kurds and SCIRI, the two dominant forces on the Constitution Drafting Committee, tried to modify the selective impact upon themselves, and others of social constraints and opportunities, by reaching an agreement that facilitated the deferral and displacement of contradictions regarding federalism, at the expense of future problems and social forces excluded from these arrangements. Lack of clarity in constitutional provisions regarding federal power relationships and the deferral of a substantial agreement on federalism in Iraq were the very way to reach an agreement and preserve the political community. Injection of confusion in federal relationships served as a way to let the structure of federalism in Iraq develop with time, rather than imposing one view over others. The drafting history of the Iraqi Constitution sheds light on the socially embedded nature of constitution making in Iraq. The material used in this chapter to analyse the making of the Iraqi Constitution is based on different sources. During 2014, the author of this thesis conducted a series of interviews in Iraq with three members of Iraq’s 2005 Constitution Drafting Committee, who also were involved in the negotiations over the interim constitution. Together, their accounts provide a broader picture of the process of constitution making in Iraq; all three maintaining the importance of the “balance of forces against imposition” as a main principle that guided the process. Unfortunately, due to severe security conditions and development in Iraq, several other interviews with Iraqi constitution makers were cancelled. However, this material is combined with accounts of other actors involved in the constitution-making process. Among others, publications and interviews in various forums from Sheikh Humam Hamoudi, the chairman of Iraq’s Constitution Drafting Committee, provides a vital account. Another vital source is the account of Ashley S. Deeks and Matthew D. Burton, who served at the US Embassy in Baghdad

as legal advisor and deputy legal advisor during Iraq's constitution-drafting process, and whose primary role was to advise senior US government officials about this process, and about the draft texts the Iraqi negotiators produced. They managed to record the evolution of the constitution drafts from late June 2005, when the first set of provisions emerged from the committee, until mid-October of the same year, when Iraqi leaders agreed on the final set of changes. A third important source is the account of Haider Ala Hamoudi, a professor of law at the University of Pittsburgh, a relative of Sheikh Humam Hamoudi, and one of the few people beyond the staff of Sheikh Hamoudi who have been permitted to review the invaluable material of constitutional negotiations gathered by Sheikh Hamoudi during the entire process. These sources are combined with the official newspapers of the main Iraqi political parties involved in the process of constitution making. Together with a textual analysis of the Iraqi Constitution, these accounts provide substantial material whereupon the guiding principles of constitution making in Iraq, and the felt need to inject disharmony into the Iraqi Constitution to propel politics forwards, can be analysed.

Finally, chapter 5, through a study of the nature of federalism in Iraq – the most controversial issue during the whole constitution-making process, and remaining so post-ratification – shows that constitutions are not absolute and closed systems, however they tend to reinforce themselves. This is because states never achieve complete separation from societies, and because agents are constantly engaged in creating a “system of strategic selectivity”. Therefore, the ambiguities and the social arrangements coupled to them will operate in unexpected ways in the future, making it possible for competing political forces to look back to the constitution and perform critically important tasks, ranging from collective identity formation to preventing the rise of potentially abusive political power. Thus, it shows that the evolution of conflicts and power relationships after the ratification of a constitution cannot be attributed to a core essence of constitutional provisions or design, as conventional wisdom suggests. Because, inherent in the object of a constitution are the structural conflicts of a society, what post-ratification evolution tells us is, rather, a manifestation of the fact that the constitution is resistant to its own destruction; it reinforces itself, and within the constitutional order, one may find identifiable continuities of meaning within which contradictions play out in a society. The material used in this chapter is based mainly on official documents published by the Federal Government of Iraq and the Kurdistan Regional Government (KRG). In an effort to analyse legislation that may affect the development of federal-provincial-regional relationships, all federal government legislations during the period 2006–2010 available in Arabic at Iraqi Council of Representatives

website were reviewed.⁴⁰ Further, all Federal Supreme Court opinions during the abovementioned period that may affect these relationships were also analysed in Arabic.⁴¹ Accordingly, all legislation made by KRG during the period 2006–2010 that may affect federal relationships in the areas of oil and gas, disputed territories, and security management were also analysed.⁴² Other important sources were the discourses and practices that surrounded these legislative achievements. The chapter has used two main sources: first, interviews that were conducted for this research with Hamid Majid Mousa and Abdel-Khaleq al-Zangena, both members of the Council of Representatives in Baghdad, and second, official statements of the Kurdistan Region president, Massoud Barzani, and the Kurdistan Region minister of natural resources, Dr Ashti A. Hawrami, as well as other relevant players in Kurdistan, issued by KRG and found on KRG's official governmental website. Consequently, this chapter has also tried to analyse the official statements of the Iraqi Prime Minister Nouri al-Maliki and his minister of oil, Hussein Shahrastani. Unfortunately, by the time of Maliki's decline from power, all official statements and the weekly speeches he had made had also been removed from the official website of the Iraqi prime minister.⁴³ The same applies for Shahrastani, who is no longer minister of oil. Thus, this thesis has relied on official statements by Maliki and Shahrastani that were found before the websites were changed, and other statements documented by international, as well as Iraqi, news agencies. Also, an important source is the official newspapers of the main Shia political parties, SCIRI and Da'wa, and the main Kurdish parties, KDP and PUK, as well as other daily Iraqi and Arab newspapers, where speeches of the relevant actors were published during the 2005-2010 period.

In the treatment of actors involved in shaping post-2003 Iraqi politics, two clarifications should be made. The first concerns how this thesis treats the US involvement. Many books and articles have been written on this subject; describing how the US shaped the post-2003 Iraqi politics, with an emphasis on US agency and how the Bush Administration due to lack of planning for the transitional period and also a profound ignorance of the political and social dynamics of Iraqi society, encouraged the spread of sectarianism in Iraq.⁴⁴

This thesis treats the US as one of many actors involved in the process of state and constitution making in Iraq. This is grounded mainly in an attempt to emphasise the role of Iraqi agents – the Iraqi agency - in the process. However, it is also motivated by SRA approach to the strategic-selective context of action. Because the state is strategic-selective and its structures and modus operandi are more amendable to some types of political strategies and intervention than others, SRA allows us to show how actors, including state managers - or those formally in charge - are

constrained in their actions by the state and the context of action. This becomes critical at a time when the state is experiencing a ‘crisis’; when the legitimacy and legality of the state is contested, when it experiences the involvement of many actors both in the form of state-building and state-wrecking, when it has no ‘pre-given national interest’, and is not a ‘unified collective actor’, as one may argue was the case in Iraq after the regime change. As such, this thesis treats the US as one of the actors, interacting within a strategic-selective context of constitution making, facing constraints and opportunities as other actors.

The second concern is related to how this thesis treats ‘Sunnis’ in Iraq. The issue of ‘sectarianism’, and how this thesis, using SRA, treats broader terms and generalisations – Sunni, Shia, and Kurd – and political identity, will be elaborated in the upcoming chapters. It should though be stated that throughout this thesis, and particularly in chapter five, which deals with post-ratification developments, the ‘Sunni issue’ is given less attention than the struggle between Shia Islamist and Kurdish parties. This is motivated by the fact that this thesis has focused on those social forces that were involved in the process of constitution and state-building in post-2003 Iraq, how these forces created a zone of relative stability that excluded ‘unwanted social forces’, and the nature and development of the political struggle between them after the ratification of the Iraqi Constitution.

With regard to the Sunnis, one may argue that at the time of constitution making they were not a defined community, as the other sectarian and ethnic groups were. As scholars have indicated, prior to 2003, Sunnis did not have an active sectarian identity. They did not regard themselves in sectarian terms.⁴⁵ Many Sunnis had a privileged position in the former regime and saw themselves as champions of Iraqi nationalism. However, at the time of constitution making, there was no organisation that could claim to speak on their behalf. Consequently, they were in a vulnerable position and were excluded from the process of state and constitution making.

The Sunni Arabs, making up around one-fifth of Iraq’s population, had dominated Iraqi politics since Iraq’s creation and, as Ahmed Hashim puts it, had built Iraq in their own image.⁴⁶ Though many Sunni Arabs had suffered during Saddam Hussein, the ouster of his regime in 2003 was not seen as a liberation. It was, according to Hashim, the beginning of an identity crisis.⁴⁷ This identity crisis was translated in many Sunni politicians’ perception of the US invasion as a de-Arabisation of Iraq and a threat to the Arabic identity of Iraq; Arabic identity being defined as Sunni identity and the Shia community seen as non-Arabic.⁴⁸ Seeing themselves as the target of the invasion, the Sunnis perceived all subsequent decisions by the US coalition authority, from the dissolution of the Iraqi Army to the de-Baathification process, including the creation

of Iraqi Governing Council and the constitution-making process, as a US-Shia-Kurdish project of de-Arabisation in Iraq and marginalisation of the Sunnis.⁴⁹

The point to be made here, and as Fanar Haddad puts it, “despite Sunni’s long-held aversion to the assertion of subnational identities, Sunni opponents of the post-2003 order had to become as sect-centric as the system they derided”⁵⁰. In absence of a comprehensive analysis of ‘Sunni issue’ in this thesis, it must therefore be stated that the spectrum of Sunni rejection and widespread resentment toward post-2003 order runs from ambivalence, begrudging acceptance, state-wrecking and anti-state violence. The Sunni rejection of the new state-building, the feeling that the new state is not legitimate and not worth defending, and the efforts of state-wrecking, has reached its most extreme expression to date, in the form of the Islamic State.

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- ³ Donald L. Horowitz, "Constitutional Design: Proposals Versus Processes", paper prepared for delivery at the Kellogg Institute Conference, Constitutional Design 2000: Institutional Design, Conflict Management, and Democracy in the Late Twentieth Century (University of Notre Dame, December 9–11, 1999).
- ⁴ See *Iraqi Constitution*, available at the official website of the Iraqi Parliament, <http://parliament.iq/english/index.php?newlang=english>.
- ⁵ "Iraq Voters Back New Constitution", *BBC News*, 25 October 2005.
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- ⁷ See Kanan Makiya, "A Model for Post-Saddam Iraq", *Journal of Democracy* 14, no. 3 (July 2003): 5–12; Aeed Dawisha and Karen Dawisha, "How to Build a Democratic Iraq", *Foreign Affairs* 82, no. 3 (May–June 2003): 36–50; Motala, Ziad "Constitution-Making in Divided Societies and Legitimacy: Lessons from the South African Experience", *Temple Political & Civil Rights Law Review* 15 (2005–2006): 147–64; Makiya, Kanan, "Present at the Disintegration", *New York Times*, 11 December 2005; International Crisis Group, *Unmaking Iraq: A Constitutional Process Gone Awry*, Middle East Briefing 19, 26 September 2005; Hart, Vivien, *Democratic Constitution Making*, United States Institute of Peace: Special Report 107 (July 2003).
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Chapter One

A Socially Embedded Definition of Constitutions

The Weaknesses of Theories of Constitutions as Solutions

How the Concept of the State Has Shaped Our Understanding of Constitutions

Constitutions are seldom made at the “best times”.¹ They are mostly products of, and responses to, crisis and changes. As such, constitution making, and the idea of the constitution, cannot be de-coupled from the urgent political processes and needs of governance, or from the state and the process of state formation. A view postulated by Andrew Arato puts it this way: the subject of constitution making, as well as its object, presuppose a state, “unified public powers capable of being activated by a people or a nation as a constituent power.”²

This thesis proposes that the idea of a constitution should be understood through a socially embedded definition, which links it to the state projects and state transformation within the wider state-society relationship. The postulated idea of Andrew Arato, that the subject of constitution making, as well as its object, presuppose a state, should not be analysed in terms of how one side of the formula affects the other; meaning how changes in the process of constitution making and provision of constitution changes behaviour in a society, as current literature attempts to do. Instead the analysis should explore the issue of how constitutions are a part of, and contribute to, state projects, state formation, and transformations within the wider strategic-selective nature of state-society relationships as defined through a strategic-relational approach to structure and agency, and critical realism. Accepting a socially embedded definition of the state and the constitution means that we have to recognise that constitutions can play a meaningful role in the political life of a society without having liberal constitutional ends. Constitutions can aid the creation of spatio-temporal fixes, deferring contradictions in a society at the expense of other social forces or future problems. Constitutions can support the state projects and the influential social forces in a society by not clearly defining the scope and limits of public organisations and officials’ authority. Constitutions can support the state projects also by leaving critical matters outside of any meaningful mechanisms of authority, or invoking vague and contradictory language, and play a meaningful role in the political life of society without playing a meaningful role in changing the behaviour of the rulers or individual members of the society in a liberal constitutional direction.

There exists nothing that can be described as a compact theory about constitutions. What is out there is a set of ideas drawn from various disciplines that refer to constitutions. However, the constitution as a political concept, constitutionalism as an ideological construction, and the

constitutional state as a modern political formation have been too often confused with one another in the literature.³

To a great extent, our understanding of constitutions is shaped by the formation of the modern liberal states in Europe. As Dario Castiglione writes, the concept of constitutionalism locked the “constitution into a series of complex relationships with liberal views of the modern nation state, parliamentary democracy, the rule of law and the market economy”.⁴ The central idea that emerged, as Edward Crowing has described it, was that man is “the master of his fate” and “able to shape events according to his desire”.⁵ And as Charles Howard McIlwain has put it, a constitution is a “conscious formulation by people of its fundamental law”.⁶

Influenced by the ideas of liberal constitutionalism, and Thomas Paine’s view that the principal function of a constitution is to restrain government,⁷ scholars such as Giovanni Sartori have defined a constitution as a “system of protected freedom for the individual”;⁸ F. A. Hayek, sees it as nothing but a device for limiting the power of government;⁹ and Howard McIlwain, as a combination of “gubernaculum” and “jurisdictio”, power and its control.¹⁰ Accordingly, the driving factor for many modern studies of constitution making has been the need for the constitutionalisation of the government. Seeing constitutions as devices to enable power and to constrain the behaviour of political elites – and indeed altering the behaviour of individual members of the society – has inspired many influential works, including Lijphart’s power-sharing model,¹¹ Linz’s study about the failure of presidentialism,¹² Tseblelis’s theory of veto players,¹³ and Elazar’s federalist hypothesis.¹⁴

A comprehensive review of current literature reveals not only that our conceptualisation of the modern state has shaped our understanding of constitutions, but also that, as this thesis argues, the idea of constitution has to a great extent been related to a specific conceptualisation of the state, one that resembles a statist approach.¹⁵ Too often the state is seen as distinct from society, as an autonomous entity whose actions are not reducible to, or determined by, forces in society.¹⁶ From a theoretical perspective the main obstacle facing any definition of the state is the state’s boundary within society.¹⁷ In its most radical form, the question is: Does the state exist?¹⁸ And if it does, to what extent and how is it separate from society? Mainly, two alternative responses have developed. The first replaces the concept of state with the concept of a political system on the grounds that state is “a concept too vague and too narrow to be the basis of a general science of politics”.¹⁹ However, as Timothy Mitchell writes, the change in vocabulary does not solve the problem, because the boundaries of the political system are even more elusive than the boundary of the state. The second response attempts to “bring the state

back in”. However, rather than accounting for the difficulty in drawing the boundaries between state and society, this approach evades the problem. It does so “by reducing the state to a subjective system of decision making”;²⁰ an autonomous entity whose essence has been defined in terms of the formation and expression of authoritative intentions.²¹ Such a perspective deals with power as a system of authoritative commands backed by force, and conceives the state power in the form of a person “whose decisions form a system of orders and prohibitions that direct and constrain social action. Power is thought of as an exterior constraint: its source is a sovereign authority above and outside society, and it operates by setting external limits to behaviour, establishing negative prohibitions, and laying down channels of proper conduct.”²²

Adopting a statist approach and conceiving the sovereign authority of power as above and outside society, with the aim of setting external limits to behaviour, current constitutional literature has viewed this constitution making process as a “higher track of law-making” with different dynamics to what is conceived as ordinary “normal politics”.²³ Consequently, constitutions have been viewed as instruments for solving perceived conflicts within societies;²⁴ legalistic and institutional devices to be designed by social engineers.²⁵ What has emerged is the idea of “constitutions as solutions”, i.e. that judicious institutional engineering in general, and constitution making in particular, can overcome economic, political, social, and cultural characteristics that are not conducive to democratic governance in post-conflict, post-totalitarian societies; if only we can get the institutions and the process of making them right. This has been translated in unceasing efforts to design and examine theories of how changes in the process of constitution making, and the provision of constitutions, change behaviour in a society.

Accordingly, and following what Jon Elster has termed the “seventh wave of constitution-making”, which started in 1989 with the adoption of new constitutions in Eastern Europe and South Africa,²⁶ great hopes have been placed on the potential contribution of post-conflict constitutions for peace, democracy, prosperity, and stability;²⁷ with scholars coining the idea of “constitutional design”,²⁸ giving an impression, and indeed making a claim, that constitutions are social engineering devices to solve the problems of societies. Current literature proposes a participatory and deliberative nature in the process of constitution making where partisan and institutional interests are to be deemphasised.²⁹ Further, influenced by Jon Elster’s “positive, explanatory”³⁰ approach to the study of the mechanics of constitution making, and by Adam Przeworski’s democratisation theory, where the problem of democratisation is seen as consisting of creating viable institutions that can reasonably guarantee the interests of major

forces,³¹ most constitution-making studies³² ask two questions: What is the best configuration of institution that should be adopted to ameliorate the problem of intergroup conflict? What is the process most apt to produce the best configuration of institution?³³

Scholars of “constitutions as solutions” have elaborated on various appropriate institutions to mitigate conflicts in societies,³⁴ proposing one approach against another. Emphasising the need to bring peace and democracy to countries labelled as “divided societies” – a contested term that, according to Sujit Choudhry,³⁵ describes societies where ethnic, linguistic, religious, and cultural differences are persistent markers of political identity, and bases for political mobilisation – two main theories have developed within this context: the accommodationist, represented by Arend Lijphart,³⁶ and the integrationist, represented by Donald Horowitz.³⁷ These theories ask whether constitutional design should aim to institutionalise or transcend differences. Sophisticated institutional mechanisms, such as power sharing, coalition government, and veto rights, most notably advocated by Arend Lijphart’s³⁸ consociational democracy, and the design of electoral rules (Horowitz) have been developed as devices through which constitution engineers can mitigate ethnic conflicts.³⁹ Within this realm a vast range of issues has been tackled. Amongst others, Voigt asks how the design of constitution can achieve the goal of economic prosperity;⁴⁰ Lutz asks how constitutional design can create political stability;⁴¹ Davenport investigates the impact of different designs on respect for rights,⁴² and Elster on stable democracy.⁴³

Scholars have elaborated on the issues of inclusiveness, the representativeness of the process and the mechanism used to aggregate the interests of the participants in order to create more “legitimate” and enduring constitutions.⁴⁴ Amongst comparative attempts to understand the process of constitution making and its outcomes are the works of Hyden and Venter,⁴⁵ and in a similar manner, Samuels’s 12-country study;⁴⁶ both are occupied with constructing frameworks to evaluate popular participation in the process and the mechanisms used to create the document.

Unfortunately, as the bulk of research shows, there is much speculation, but little evidence, about the impact of different constitutional designs and processes.⁴⁷ As Horowitz writes, we know neither what process of constitution making is “most apt to produce the best configuration of institutions” nor what the “best configuration of institutions happens to be”.⁴⁸ For example, Hirschl observes that using common measures of democracy and human development as a yardstick, one could easily conclude that the world’s most successful countries are not distinguished by the presence of rigid written constitutions and active judicial review.⁴⁹ Other

factors such as a large middle class, and investment in education and health, have been of far more importance. When it comes to institutions created to protect rights, the existence of written rights in constitutions, and whether they lead to greater respect for rights in practice, David S. Law concludes that the “quantitative literature that does exist paints, on the whole, a discouraging picture of the efficacy of such provisions”.⁵⁰ This has been confirmed by studies by Blasi,⁵¹ Cross,⁵² Davenport,⁵³ and Keith.⁵⁴ Indeed, a number of studies have actually found a negative relationship between formal rights protection and actual rights observance.⁵⁵ According to Keith, neither is there a correlation between institutional variables, such as federalism, the separation of powers, and respect for some basic rights.⁵⁶ With regard to the debate between the accommodationist and integrationist camps, as Ginsburg notes, in general scholars have been far better at generating hypotheses than testing them.⁵⁷ Sophisticated designs of electoral laws and complicated power-sharing systems have been elaborated.⁵⁸ But what evidence there is cannot, with confidence, be shown. Studies of the process of constitution making, on the other hand, fail to answer the basic question: Under what conditions are inclusiveness and participation valuable?⁵⁹

As David S. Law notes, the very possibility that written constitutions and constitutional processes may lack practical impact – or desired impacts – strikes at the heart of the current literature. This thesis argues that the weaknesses of the “constitutions as solutions” theory is attributed to the fact that, while emphasising the causal effect of institutions, it deemphasises the path-dependent structural coupling of state-society relationships and attitudes, and the commitment of actors as causal factors. This results in the diminishing of the social, political, economic, and cultural factors that predate the creation of constitutions, as well as the fact that, owing to the unceasing efforts of the actors to modify their context of actions, institutions work in unexpected ways. Current constitutional studies have not taken the problem of identifying the state-society boundary seriously: the salience of, and the elusiveness of, the state and the porous and mobile boundary of state-society. Instead, current studies have locked themselves into a statist, narrow, and idealistic definition of the state.

These abovementioned facts will be elaborated in this chapter. However, a brief encounter with the world’s most famous constitution, the US Constitution, provides us some simple but very important conclusions in this direction: Constitutions can be much more or less than what they promise; what becomes of a constitution is an open question; and constitutions should be seen as processes rather than ends.⁶⁰ Briefly, the US Constitution and its making shows that constitutions are rarely designed according to a coherent idea or vision.⁶¹ Rather, as Laurence

H. Tribe⁶² notes, they usually contain different and contradictory visions, ideas and norms. Also the US Constitution shows, as Edward S. Corwin observes, the important role of constitutional interpretation in the evolution of a constitution and “not only in the definition of the rights which thereby recognised, but also for their effect upon the distribution of governmental power among the organs set up by the constitution”.⁶³ Finally, as Ernest A. Young notes, many important institutions and structures of current US government, and many political rights that current Americans enjoy, are “neither mandated nor forbidden by the canonical document”.⁶⁴

What the US constitutional history shows us is the need for a socially embedded conceptualisation of the constitution. The central idea here is, first, that constitutions cannot be studied without taking into account the fact that they evolve within the context of state-society relationships, which itself is a moving target, and second, because constitutions are creations of the interactions of strategically oriented agents within a strategic-selective context, they are not fixed ideas and institutions but rather contradictory discourses, practices, and patterns that can and do work in unexpected ways. Constitutions are unfinished business.

The first step to develop a socially embedded definition of constitutions is to clarify the different ways the idea of a constitution can be understood and studied.

Four Ways to Understand Constitutions

One way to classify constitutions is explained by Hanna Pitkin, who distinguishes between two ideas of a constitution, the first as something “we have” – to regulate the state – and the second as something “we are”, meaning a characteristic way of life of people and “a product of their particular history and social condition”.⁶⁵ Her understanding of the idea of a constitution is one of a living organ and is close to that of Edmund Burke, who argued that constitutions are “made by the peculiar circumstances, occasions, tempers, dispositions, and moral, civil, and social habitudes of the people, which disclose themselves only in a long space of time”.⁶⁶ The central idea here is that constitutions are more like processes, disagreements, and negotiations, rather than fixed ideas and institutions.

A more comprehensive classification that this thesis will adopt is described by Dario Castiglione. This is because Castiglione’s classification emphasises the political ideas behind each meaning of the term constitution. Accordingly, he distinguishes between four ways a constitution can be studied and understood: (i) as a document; (ii) as an embodiment of either

a norm, command, subjective will, or practice; (iii) as an organised form of a political society; or (iv) as a series of devices through which independent normative principles are given institutional support within the political community.⁶⁷

According to Castiglione, first of all a constitution can be seen as a document that includes a number of articles and instructions that define the rules that state activities are supposed to follow. Whether these rules and provisions are followed is another question.⁶⁸ What this view emphasises is the *need* for a constitution in modern societies. It points out the importance of the formal characteristics of a modern written constitution and its text.⁶⁹ As Castiglione writes, since the end of the 18th century, these documents “have become fundamental charters, with both symbolic and normative functions, according to which the basic principal structure of society is given”.⁷⁰ Constitutions came to be identified with charters of rights, upon which monarchical power recognised the liberties of citizens and their participation in public affairs, and the demand for a written constitution over time transcended its formal properties and assumed a particular political meaning. The idea of a constitution as a document highlights two important issues: First, a constitution can explain the preferences, ideals, and reasons why the framers created the constitution – its origin. Second, a constitution can, with time, transcend its formal properties and become a source of legitimacy – it can develop. As Jack M. Balkin⁷¹ and Sanford Levinson⁷² show us, the text of the constitution, by the multiple ways it can be interpreted, has the capability of channelling the conduct of many groups and may develop a common shared language within which political disputes and disagreements are argued, political decisions justified, and society preserved from fracturing.

Second, constitutions can be understood as embodiments of ideas, norms, and practices, providing the basis for a normative order.⁷³ There are mainly three grounds upon which the constitution can be said to obligate, depending on whether appeals are made to normative, voluntarist, or organic ideals.⁷⁴ From a normative point of view, the constitution is understood as a fundamental norm upon which the organisation of sociopolitical life must depend. What justification is given for the basic norm may be based upon different principles.⁷⁵ It may spring from the natural law assumption that all men are, by nature, equally free.⁷⁶ It may rest on utility,⁷⁷ or it may be based on equality and democracy.⁷⁸ From a voluntarist point of view, the stress is made on the “existential origin of the norm itself in the will of the subject of the constitution”.⁷⁹ Here the legitimacy of the constitutional system is understood to rest on the intentions articulated in the original act, or the fundamental decision from which the political association emanates. The founding, as Castiglione observes, can be a voluntary contract

between independent individuals or groups – as formulated by Jürgen Habermas⁸⁰ – or it can be an act of subjugation of the community to the will of the sovereign or a dominant group⁸¹ – as formulated by Carl Schmitt.⁸²

From an organic-normative point of view, a constitution is seen as a living expression of some fundamental principle of people’s relationships and cooperation. As Castiglione writes, the constitution “commands respect because it grows out ‘of the habitual conditions, relationships, and reciprocal claims’ of the people of a country”.⁸³ What these three different forms of understanding of constitutional obligation show, as Hanna Pitkin has claimed, is that “[to] understand what a constitution is, one must look not to some crystalline core or essence of unambiguous meaning but precisely at the ambiguities, the specific oppositions that this specific concept help us to hold in tension”.⁸⁴ This is an important claim indicating that despite the temptation to search for a single unified idea, norm, and practice from which one may extract the lasting meaning of a constitution and constitutional practice, constitutions can rather be seen as unfinished business. What makes a constitution maintain a political community in the teeth of robust disagreement may not be its coherence or its claim to embody a single uniform norm. Rather, it may be its incoherence, its ambiguities, and the disagreements around it.

This has inspired, amongst others, Gary Jacobsohn’s influential work on constitutional identity,⁸⁵ where he argues that “a constitution acquires an identity through experience”,⁸⁶ and Jefferson Powell’s study of how American constitutional law has gained its coherence and integrity over time; he proposes that “American constitutionalism can be read as an ongoing proposal to maintain political community in the teeth of, and indeed through means of, robust disagreement”.⁸⁷ Again, what is stressed here is that the links between state, society, and constitution should not be seen as a formula where changes on one side may bring about desired effects on the other side. Instead, it shows us that we should take the elusive, porous, and ever-changing state-society relationship seriously. But most importantly, what this discussion underscores is the possibility of constitutions to play a significant role in the life of a polity – for example, maintaining the political community – without serving a coherent idea or end, such as liberal democracy.

Third, constitutions can be understood as the organised form of a political society. This idea views a constitution as the basic order of a society, and invokes the idea of regularity and functionality.⁸⁸ One could say that a constitution, viewed in functional terms, can be understood either as a mirror of our political struggle, or as the establishment of social arrangements that

make it possible for us to go on with our struggle.⁸⁹ Therefore, it can refer to the structure and institutions of political governance, or to the general balance of power within society.⁹⁰ However, this view acknowledges that the function of a constitution as organising the distribution and authorisation of power is both embodied in the text, and depends on the interaction of the political forces within the context of action at a given time. In this sense, the constitution is far from a machine or a mathematical formula. It is, as Woodrow Wilson mentioned, “a living thing”.⁹¹ The text, while trying to regulate the authorisation and distribution of power, is constantly evolving within different political settings, and the outcomes of these struggles, whilst in a sense regulated by the constitution, cannot be predicted.

Fourthly, constitutions can be understood as instruments for independent principles. According to this view, constitutions serve as a means for the achievement of autonomously established ends.⁹² These could be, for example, to form a perfect union or to establish justice. In this sense, as William Alstyne writes, “the idea of the constitution is to create such institution and making such alteration in its articles that is deemed necessary to secure those ends”.⁹³ These ends can also be entrenched and fixed in a constitution, given a higher stature and recognised as the framework of the state. What should be emphasised, though, is that according to this view, a constitution as an instrument does not create something new. Rather, it is often understood as an instrument to protect the inherent rights already possessed. Quoting the words of Judge Cooley in Edward Corwin’s article, a constitution “is not the beginning of a community, nor the origin of private rights; it is not the fountain of law, nor the incipient state of government; it is not the cause, but the consequence of personal and political freedom; it grants no rights to the people, but it is the creature of their power, the instrument of their convenience”.⁹⁴

What these four different ways of conceptualising a constitution show is not only the historical, political, and ideological relationship between the state, the process of state formation, and constitution making. More importantly, they also stress the point that constitutions are unfinished business. What emerges is not a statist approach to state-society relationship and constitution making, where the sovereign authority of power is conceived as above and outside society. Instead, what emerges is the socially embedded nature of the constitution, and indeed the state, where the process of constitution making is at the heart of ideological and structural contradictions within the society, and the state provides a moving target with continuing attempts from various agents to transform it. This in turn leaves traces on the forms, functions, and activities associated with the state and the constitution. Finally, what emerges is the need for constitution-making studies to take the boundary of state and society seriously, and

recognise that this boundary is elusive, porous, and mobile;⁹⁵ a crucial point that current constitutional literature has neglected. This task requires a shift in how we conceptualise the state, a shift from current literature that views the state (and the constitution) as distinct and above society, to one where the state is socially embedded.

A Socially Embedded Definition of the State and the Constitution

A socially embedded definition of the state starts from the proposition that the state is a social relationship.⁹⁶ It suggests that the elusiveness of state-society relationships should be explored as a clue to the state's nature.⁹⁷ Therefore, the claim is made that there can be no adequate theory of state without a theory of society. This is because, as Bob Jessop writes, the "state and political system are parts of a broader ensemble of social relationships and one cannot adequately describe or explain the state apparatus, projects, and state power without referring to their differential articulation with this ensemble".⁹⁸ It means that the state is both an autonomous entity and a part of wider social relationships within a society. Bob Jessop has described this as the part-whole paradox of the state, where "the state is but one institutional order among others in a given social formation; and yet it is particularly charged with responsibility for maintaining the integration and cohesion of the wider society".⁹⁹

A socially embedded definition of the state, therefore, calls for a theoretical approach that accounts both for the historical and institutional specificity of the state as a "distinctive accomplishment of social development", as well as "its role as an important element within the overall structure and dynamic of social formation".¹⁰⁰ This theoretical approach has been elaborated by Bob Jessop and Colin Hay in what is called a strategic-relational approach to structure and agency (hereafter SRA).

SRA is premised on a critical-realist philosophy of social science, which is to a great extent associated with the works of the British philosopher Roy Bhaskar.¹⁰¹ Central to critical-realist ontology is that the objects of social science are both socially defined and socially produced, but they are nevertheless just as real.¹⁰² While reality exists and is what it is, independent of our knowledge of it, our knowledge of reality is conceptually mediated; the kind of knowledge that is produced depends on what problems we face and what questions we ask, and this in turn is, to a large extent, an issue of social positions.¹⁰³

Critical realism proposes that the objects of social science are relational. This means that an object is what it is by the virtue of the relationship it enters into with other objects.¹⁰⁴ Therefore it suggests that, in the analysis of society, we cannot begin by describing isolated objects and then go on to define relationships between them. This is because an interactional relationship between the objects is present from the outset. In every concrete situation we aim to study there is a complex set of relationships, and it is up to the social scientist to conduct an abstract study, that is, to isolate a set of internally defined relationships. This set of internally related objects is defined as a structure.¹⁰⁵

The methodological implications of this is that conceptualisation stands as the most central social scientific activity. It is the nature of the object of study that determines what research methods are suitable, and also what kind of knowledge it is possible to have of different phenomena in the world.¹⁰⁶ Further, Bhaskar's switch within ontology from events to mechanisms, therefore, encourages us to pay more attention to what produces certain events – the mechanisms – rather than to the events, or observation of the events, themselves.¹⁰⁷ Here, cause is understood, not as a matter of a relationship between two events, separated from each other, but as what makes something happen, what produces or generates it. Causes are about objects or relationships and their nature: “It is a matter of what causal powers or liabilities there are in a certain object or relationships. In more general terms it is a matter of how objects work, or a matter of their mechanisms.”¹⁰⁸ The objects have the power they have by virtue of their structures, and mechanisms exist, and are what they are, because of this structure. There is therefore an internal and necessary relationship between the nature of an object and its causal powers and tendencies. However, it is important to stress that a generative mechanism operates when it is being triggered.¹⁰⁹ It is the present conditions or circumstances that determine whether a generative mechanism operates.

In this order, critical realism suggests that societies are structures of social relationships. The context of action within which agents are positioned is therefore by no means neutral. It is strategic selective, meaning it favours some strategies taken by some agents and hampers others. This is because it involves what Bob Jessop calls “structural moments and conjunctural opportunities”. Structural moments in social relationships are seen to involve those elements in a given temporal-spatial context that cannot be altered by a given agent (or set of agents) pursuing a given strategy during a given time period. Conjunctural opportunities are seen to comprise of those elements which can, in a given temporal-spatial strategic context, be modified.¹¹⁰ Accordingly, structures should be analysed in terms of structural constraints

operating selectively. These structural constraints are not absolute and unconditional. Rather, they are always temporally, spatially, agency – and strategy – specific. By operating selectively, constraints do favour some strategies and hinder others.¹¹¹ The wider implications of this approach to constraints and opportunities are, amongst others, that people will find themselves in conflicts and that the self-same element(s) in the context of action can operate as a structural constraint for one actor and as a conjunctural opportunity for another actor.

Furthermore, SRA suggests that a short-term constraint facing an agent could become a conjunctural opportunity over time if there is a shift in the strategy taken by the agent. This means that agents, by pursuing different types of alliance strategies, may be able to modify the selective impact of social structural constraints and opportunities upon themselves and others. Agents therefore can, and do, transform social structures by being reflective; reflecting on their identities and interests, and strategically orienting themselves to the structural-conjunctural complexities of action contexts; learning from experience and (re)formulating their alliances and strategies in the light of changing experience and knowledge about the strategic context in which they perform.¹¹²

Thus, to Bob Jessop, agents are constantly engaged in creating a “system of strategic selectivity”, i.e., “a system whose structure and modus operandi are more open to some types of political strategy”, and so, more accessible to some social forces, than others.¹¹³ One way agents can modify the selective impact upon themselves, and others of social constraints and opportunities, is by creating spatiotemporal fixes. Jessop defines these as “zones of stability” that facilitate the deferral and displacement of contradictions at the expense of future problems but also exclude “unwanted” social forces from these relatively stable zones.

Placing the state within this wider theory of society, a socially embedded definition of the state should therefore take into account that, although the state is autonomous due to the fact that the state apparatus has its own distinctive resources and powers, the state’s operations depend also on resources produced elsewhere in its environment. The links between the state and society indicate that a state never achieves complete separation from society. Around the core of the state are institutions and organisations whose precise relationships and boundaries with the state are uncertain and change over time. The nature of the relationships between state ensemble and private organisations and institutions around the state depends on the nature of the social formation and its past history. Meaning, the nature and extent of state power – the extent of the realisation of the abovementioned capacities – “depend on the structural relationships between the state and its encompassing political system, on the strategic ties among politicians and state

officials and other political forces, and on the complex web of structural interdependencies and strategic networks that link the state system to its broader social environment”.¹¹⁴

Furthermore, because the context of action is strategic selective, state structures have a “differential impact on the ability of various political forces to pursue particular interests and strategies in specific context through their control over and/or (in)direct access to these capacities”.¹¹⁵

These remarks indicate that the boundaries and identity of a society whose common interests are administered by the state are not empirically given. They are both reproduced and transformed. There is never a general interest that embraces all possible particular interests in a society. Any attempt to define the common interest or general will of a society “occurs on a strategically selective terrain”.¹¹⁶ It implies that the common interest is always asymmetrical, marginalising some interests at the same time as it privileges others. Indeed, as Jessop writes, “a key statal task is to aid the organisation of spatio-temporal fixes that facilitate the deferral and displacement of contradictions, crisis-tendencies, and conflicts to the benefit of those fully included in the ‘general interest’ at the expense of those who are more or less excluded from it”.¹¹⁷

Accordingly, Bob Jessop has postulated the following definition of the state, which this thesis will adopt, where the state apparatus is identified as “a distinct ensemble of institutions and organisations whose socially accepted function is to define and enforce collectively binding decisions”.¹¹⁸

Relating the above discussion on constitutions, and the process of constitution making, means that any attempt to conceptualise constitutions as neutral documents that represent the will of people, and constitution-making processes as a higher track of law-making, outside and above the society, is illusory in the sense that common interest is always asymmetrical and the context of action is always a strategic-selective terrain. Constitution making is therefore not an apolitical arena. It does not occur above and outside the society, as current literature suggests, but rather at the heart of ideological and structural contradictions in the society, shaping and being shaped by it.

Relating the constitution to the state therefore directs our attention to the key task performed by the state, as formulated by Bob Jessop and mentioned above, “to aid the organisation of spatio-temporal fixes that facilitate the deferral and displacement of contradictions, crisis-tendencies, and conflicts to the benefit of those fully included in the ‘general interest’ at the

expense of those who are more or less excluded from it". It is within this context that the idea of constitution should be examined. It is not about what constitutions do, in terms of how the process, provisions, and institutions postulated in a constitution affect some certain variables, like democracy and human rights. It is rather about what constitutions are in terms of unfinished business, how they aid the key statal task to propel politics forwards and maintain a political community in the face of robust disagreement and contradictions. A key task of the state is to aid the organisation of spatiotemporal fixes. Constitutions aid this process by articulating the notion of the common interest or general will of society by, on the one hand, insulating early the fundamental principles – fundamental for the dominating forces that back the state project and that are included in the notion of common interest – and, on the other hand, deferring contradictions and crisis at the expense of future problems by injecting confusion into power relationships. These two tasks together make it possible for a polity at any given time to remain intact and go forwards, protecting the coherence of the political community and propelling politics forwards.

Accordingly, this thesis proposes the following:

The primary function of a constitution is to propel politics forwards by aiding a key statal function, which is the creation of zones of relative stability, facilitating the deferral and displacement of contradictions, conflicts and crisis tendencies in a society.

Constitutions are not absolute and closed systems. This is because states never achieve complete separation from societies, and because agents are constantly engaged in creating a “system of strategic selectivity”, strategically orienting themselves to the structural-conjunctural complexities of action contexts.

Furthermore, this thesis suggests that, because agents are constantly engaged in creating systems of strategic selectivity, the ambiguities and social arrangements coupled to them will operate in an unexpected way in the future, making it possible for competing political forces to look back to the constitution and perform critically important tasks, ranging from collective identity formation to preventing the rise of potentially abusive political power. Thus, the evolution of conflicts and power relationships after the ratification of a constitution cannot be attributed to a core essence of constitutional provisions. What a post-ratification evolution tells us is rather that the constitution is resistant to its own destruction, and that within the constitutional order, one may find identifiable continuities of meaning within which contradictions play themselves out in a society. It reveals to us how the constitution, through

constitutional disharmony – by meaning many things to many agents – helps social forces to advance one vision of state, sovereignty, and a predominant identity against another, in different spatiotemporal horizons, and how the constitution preserves the political community in the face of fundamental disagreements. It tells us how the constitution sustains different visions of political community, and empowers and limits the articulation of different identities. In this process the constitution both shapes, and is shaped, by politics – where state projects occasionally are understood with reference to the constitution, and the constitution occasionally is understood with reference to the state projects. The central idea here is that constitutional disharmony ensures that the identity of the constitution and the future state evolves within the context of state-society relationships, which itself is a moving target.

Placing constitutions and constitution making within a socially embedded definition of the state directs, therefore, our analytical attention from “constitutions as solutions” and “causes” to a society’s problems, to the causal effects of the strategic context of constitution making, and to the nature of underlying conflicts within a society, and how a constitution frames the contractions in a society. At the time of constitution making Iraqis were sharply divided over the most fundamental issues relating the nature of their future state. At the heart of the discord was the issue of federalism. The discord in Iraq involved the distribution and authorisation of power between the centre and the regions. The strategic selective context of constitution making in Iraq was not only marked by historical and structural tensions in the Iraqi society, the different future states of affairs that the social forces wanted to bring about and the hierarchical access to sources of power. It was also manifested through fragmentation of political authority and the existence of an occupation force that, on the one hand, had the authority to facilitate access to power to the agents, but, on the other hand, could not impose its will. It was within this context that Iraqi political actors conceptualised the idea of what a constitution is and what it can do, and opted to modify the selective impact upon themselves and others of social constraints and opportunities by creating a constitution. As such, rather than being a solution to Iraqi society’s problems, the Iraqi Constitution framed the inherent tensions of Iraqi society.

Constitution-making and Identity Politics in Iraq

The relation between constitutions and unresolved questions regarding national identity has been addressed by many scholars.¹¹⁹ This thesis is rather focusing on the role of constitutions in understanding the state and state formation. It tries to explore what role the Iraqi Constitution

plays in Iraq's political struggle. The focus is on the links between constitutions and state projects, with an emphasis in chapter five on the distribution and authorisation of power between the centre and the regions in Iraq. However, this thesis recognises that due to the legacy of Iraqi state, and events and decisions made in the post-2003 Iraq, the terrain and scope of Iraqi politics became narrow and dominated by ethno-sectarian based political parties. Indeed, a vast majority of the literature about post-2003 Iraq involve the issue of political identity and its role in Iraqi politics, where the 'hegemony' of ethno-sectarian based political parties and ethno-sectarian discourses in post-2003 Iraq are key themes.

A clarification of how this thesis uses the broader terms of 'Shia', 'Sunni', 'Kurd', and how it treats the issue of the relations between state, constitution and identity in Iraq, is necessary. By claiming that a key task of the state is to aid the organisation of spatiotemporal fixes, this thesis argues that constitutions aid this process by articulating the notion of the common interest or general will of society. As argued in this chapter, this is done by, on the one hand, insulating the fundamental principles - for the dominating forces that back the state project and that are included in the notion of common interest - and, on the other hand, deferring crisis at the expense of future problems. These two processes are interwoven. Inherent in this understanding of the role of constitutions is a fundamental principle articulated by critical realism and SRA, which claims that as structures and agents do not exist in isolation, so too the material and the ideational are interwoven and mutually independent.¹²⁰ The state projects are interwoven with articulation and creation of cognitive filters, such as policy paradigms, through which actors interpret the strategic environment, and discursive paradigms that privilege some interests, discursive identities, strategies and tactics, over others. This does not mean that the state is the sole autonomous body that dictates the cognitive filters. Indeed, SRA stresses that the state never achieves complete separation from society. Moreover, SRA also stresses that the boundaries and identity of a society whose common interests are administered by the state are not empirically given. They are both reproduced and transformed. The very reason there is never a general interest that embraces all possible particular interests in a society, is that any attempt to define the common interest or general will of a society occurs on a strategically selective terrain. Accordingly, the interwoven relation between the state projects and cognitive filters is explored in terms of the strategic-selective nature of context of action - the uneven playground that the state is - and the attempts by the agents to strategically orient themselves to complexities of action contexts; learning from experience and within some limits (re)formulate their interests, identities, alliances and strategies.

This is a relational and spatio-temporal understanding of interests and identities, focusing on interaction of strategically oriented actors within a strategic-selective context. It should be stressed that this thesis in its treatment of mobilisation and polarisation of identities, and ethno-sectarian communities, does not focus on daily aspects of sectarian relations. Rather, it focuses on political demands raised by ethno-sectarian communities that the thesis deems to have haunted the rulers of Iraq early on: the first being a Shia demand to be represented according to their numerical weight, and the second being a Kurdish demand for autonomy.

Further, this thesis supports Fanar Haddad's observation that without "taking into account contextual factors and the salience of sectarian identity at a given time, terms as 'sectarianism', 'sectarian identity', and 'sectarian' lose meaning".¹²¹ It also recognises that using a term of reference as broad as 'Shia', 'Sunni', and 'Kurd', means a degree of generalisation, and it stresses Faleh Abdul Jabar's position that these groups should not be viewed as monolithic; rather, they are dissected by various social, economic and political categories that in themselves may for example unite 'Shias', with 'Sunnis'.¹²²

To fully understand the mobilisation of political identities in Iraq, and the creation and power of those able to provide the cognitive filters, it is therefore essential both to identify the constraints and opportunities confronting these agents at a certain spatio-temporal context of action, and the actions they performed which, by realising certain opportunities rather than others, made a difference. One should remember that these structural constraints are not absolute and unconditional. Rather, they are always temporally, spatially, agency – and strategy – specific.¹²³ As such, this thesis supports also Haddad's positions that "it would be inaccurate to simply transpose a standard theory of ethnicity or nationalism onto sectarian relations in Iraq"¹²⁴. Haddad's argument is based on contextualisation of sectarianism where he argues that although the overlap between a standard theory and sectarianism in Iraq may be considerable, "sectarian relations are a unique dynamic that may nestle within Iraqi nationalism whilst retaining its own societal characteristic."¹²⁵ This is a position supported by critical realism and SRA. Critical realism emphasises that in each research process the concrete phenomena must be the starting point of abstraction process. This is due to the emphasis critical realism and SRA give social relations. Critical realism suggests that the social relations – the structure – we seek are constitutive for the social phenomenon we are interested. The social relations are what makes the phenomenon exist. Accordingly, the abstract is to be understood as an extract from reality, an extract consisting of the essence of a phenomenon; what the existence of the object or social phenomena (in this form) presuppose and what forces and mechanisms have

contributed to the building up of the concrete phenomena at hand.¹²⁶ Hence, in the study of ethno-sectarianism in Iraq this thesis argues that what is of interest is to illuminate what has the existence of ethno-sectarianism in Iraq presupposed.

Throughout this thesis the claim is made that in order to understand why sectarian identity attained such ability to influence people's perceptions in post-2003 Iraq, it is not enough to look at events and decisions that was made in post-2003 Iraq. It is not enough to confine ourselves to empirical observations of sectarianism solely. Without doubt, significant decisions made by various actors in post-2003 Iraq did encourage sectarianism. Among these: the disbanding of the Iraqi army, the de-Baathification policy, the dismantling of the welfare state, the formation of Iraq's first post-Saddam government according to ethno-sectarian quotas¹²⁷, the shift of balance of power from the more homogenising and centralising visions of the Iraqi state propagated by the former Baathist regime to the ethno-sectarian conceptions of Iraq advocated by the former regime's Shia-centric and Kurdish opponents, and the creation of a space and political landscape in post-2003, in which attempts to redefine Iraqi state and identity could be made. All of these did encourage sectarianism in Iraq. However, as Fanar Haddad argues, one may ask why these ethno-sectarian actors existed in the first place, and why they were so well-placed to reap the benefits of regime change.¹²⁸

To understand the post-2003 Iraqi politics, one must recognise that the pre-2003 history contained the seeds of what was to follow after regime change. It did not determine the outcome, but it did narrow the terrain of Iraqi politics, and created a new strategic-selective context that favoured some state projects, and hence perceptions of politics and how it should be conducted, and of identities and interests, over others. As such, the 'hegemony' of the ethno-sectarian based political parties and ethno-sectarian discourses in the post-2003 Iraq can be attributed to a range of factors, some of them pre-dating the invasion and some as a result of events and decisions made after the regime change. The legacy of the Iraqi state in terms of polarisation of ethno-sectarian communities, the elevation of exile opposition – fractured along ethno-sectarian lines - as true representatives of Iraqis, the dominance of Kurdish and Shia Islamist political parties, in combination with the events that unfolded after the regime change (as described above), contributed to defining and re-defining the political identity of the social forces in Iraq along ethno-sectarian lines and encouraged the hegemony of a cognitive filter where all significant actors and events rarely escaped sectarian labelling.

According, this thesis while emphasising that throughout the history of Iraqi state the terrain of Iraqi politics has been narrow and that the notions according to which the people have organised

themselves have seldom been shared by a community of citizens, it recognises that sectarian harmony or division, individual, group, and communal political identity, have been negotiable; have been dictated by the interaction of strategically oriented actors within a strategic selective context. In other words, it attributes the advance and decline of sectarian identity to the uneven playing field of the Iraqi state and state-society relations, which has privileged some actors, identities, strategies and actions over others when choosing a course of action. In post-2003 Iraq, this can clearly be seen in changing Sunni political behaviour and participation in the political process; from boycott in 2005, to violence, then participation in 2009-2010, and back to violence 2014-2015. It is within this context that the Iraqi Constitution, by articulating “common interests”, deferring contradiction at the expense of future problems and “unwanted social forces”, has been one of the stages where this struggle for the identity of the Iraqi state has played itself out.

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Chapter Two

The Causal Effects of the Underlying Conflicts

In this chapter the path-dependent legacy of the Iraqi state and its causal effects are outlined. Concerned with the history of the legacy of the Iraqi state, the material used in this chapter is based on two types of sources: first, secondary sources outlining the history of Iraq and the Iraqi state, and second, an analysis of official publications, issued by Iraqi opposition groups during a series of conferences before 2003, aimed at outlining the main features of the future Iraqi state. These publications indicate the commitments of the agents, the future battle lines of Iraqi politics, and the fact that the process of constitution making predates the US invasion of Iraq. Thus, while trying to uncover the structural coupling of the path-dependent legacy of the state, and its impact on state-society relationships and the context of action, as well as the unceasing efforts of strategically oriented agents to modify their context of action, this chapter compares observable events with how the events have been perceived and presented by the agents, and the reaction of the agents – meaning the discourses and practices of the agents.

In this chapter it is argued that, at the time of the US invasion of Iraq in 2003, Iraqis faced regime change while carrying on their shoulders the burden of a legacy of a shadow state, asymmetrical power relationships, violence, and the polarisation of ethno-sectarian communities. The organised opposition to Saddam Hussein was, itself, fractured along the same ethno-sectarian divisions as Iraqi society. Dominated by the two Kurdish political parties, the KDP and the PUK, and the Shia SCIRI, the first battle in the preparation of a new constitution for post-Saddam Iraq had already started before the invasion. During several gatherings in exile, the opposition put itself forward as the true representatives of the Iraqi people, and reached a general agreement on federalism as the future basis of state structures in Iraq, but no consensus on federalism's most fundamental features were reached. Furthermore, the opposition also, to a certain degree, institutionalised practices of consensual decision making and ethno-sectarian quotas, *tawafuq* (consensus) and *muhāsasa* (quotas), which came to play a key role in post-invasion Iraqi politics. While these factors did not, in a deterministic way, shape the outcome of post-Saddam Iraq, they did contribute to the creation of a strategic-selective context that favoured some state projects over others, and thus framed the borders and the terrain of post-Saddam politics.

Consequently, the first part of this chapter deals with the path-dependent legacies of the Iraqi state. It explores how modes of domination and asymmetrical power relationships in Iraq have been produced, upheld, and reproduced; giving way to different narratives of state power and the politicisation of ethno-sectarian groups. The second part deals with the emergence of a new pattern in Iraqi exile-opposition politics which took shape after Saddam Hussein's invasion of

Kuwait in 1990, and, to a great extent, was influenced by international support for the exile opposition's cause. It shows why, and how, the relationships amongst Iraqi opposition groups and their understanding of what politics was about, conformed to and reinforced the legacies of state-society relationships and asymmetrical power relationships in Iraq, and why and how new elements in Iraqi exile-opposition politics emerged; elements that to a great extent would shape post-Saddam Hussein politics in Iraq.

State and Society in Iraq

The Legacies of the Iraqi State

A fundamental historical legacy of the Iraqi state is the subversion of the very idea of an Iraqi national community. As Charles Tripp notes, throughout the history of the Iraqi state, the terrain and scope of Iraqi politics has been narrow. The notions according to which the people have organised themselves have seldom been shared by a community of citizens, but rather by “family and clan members, fellow tribesmen or conspirators”. This fact has also been reflected in the failed attempts of Iraq’s rulers to force the histories of Iraq’s various communities to conform to their own objectives.¹

It should be stated that this thesis does not argue that an attachment to an inclusive Iraqi citizenship never existed. It does not deny the many ways in which the Iraqi regimes co-opted the population to create a historical master narrative, or myth, of the origins and continuity of the Iraqi state.² And, it does not deny that a commitment to Iraqi unity still exist among many ordinary Iraqis, as several opinion polls carried out between 2004 and 2013 have shown.³ Further, this thesis does not argue that the domination of sectarian identity in the post-2003 Iraqi politics was inevitable, nor does it view 2003 as the dividing line separating a non-sectarian Iraq from a sectarian Iraq. What this chapter tries to explore is the mechanisms that have led to narrowing down the scope and terrain of Iraqi politics.

This thesis argues that what has been labelled as “ethno-sectarian state-building” of the post-2003 order, has its roots in the cumulative processes that have unfolded over the course of twentieth century. Throughout the history of Iraq – and early on by among others the Iraqi Nationality Law of 1924⁴ - tools of exclusion which relied on the manipulation of communal identities aided this process. As Fanar Haddad observes, “unity was not to equally embrace difference under an all-encompassing national meta-identity.” Rather, the more commonly seen pattern was “the censorship or suppression of difference; the validation of a dominant group’s sense of entitlement to assert its identity, frames of reference and ownership – culturally and politically – of a country; and a firm expectation that out-groups should accept the status quo and their secondary role in it as an integral part of the natural order of things.”⁵ For example, the Kurds in Iraq⁶ - despite their social, tribal, and linguistic divisions - a combination of heavy-handed confrontation and half-hearted commitment from the rulers of Iraq led some Kurdish leaders, among them Shaikh Mahmoud, early on in Iraq’s history to call for the separation of

Kurdistan from Iraq.⁷ As David McDowall expresses it, one cannot deny that the very essence of Kurdish politics in Iraq has been to exploit the weakness of central government to assert Kurdish political autonomy.⁸ Thus, two political demands raised by ethno-sectarian communities haunted the rulers of Iraq early on: the first being a Shia demand to be represented according to their numerical weight, and the second being a Kurdish demand for autonomy. Accordingly, the argument of this chapter is that while the fact of coexistence and sense of Iraqi nationalism and a viable Iraqi nationalist movement were undeniable features of twentieth-century Iraq, as Eric Davis observes - at least and particularly on a societal level –nevertheless from earliest days the Iraqi state was an uneven playground, and the state-society relation was infected by ethno-sectarian issues the contours of which were related to Kurdish self-rule and Shia political representation.

Under the dominant power of Great Britain in the 1920s⁹, Iraq was created out of the three Ottoman provinces of Basra, Baghdad and Mosul.¹⁰ For the inhabitants of this area, the creation of the Iraqi state obliged them to rethink their identities and alliances. It forced them to make new calculations in order to come to terms with the new order and strategic-selective context. The population that constituted these territories at the turn of 20th century was organised as more or less self-sufficient communities ruled by their own authorities, with a relationship to the Ottoman state marked by predominantly fiscal concern.¹¹ It has been argued that there were at least two overlapping theoretical and actual entities in terms of which they could imagine their inclusion: the caliphate of Islam and the idea of an Arab homeland.¹² In his memoir, Hussein Jamil, secretary general of *Hizb al-Watani al-Dimoqrati* (Patriotic Democratic Party), one the first Iraqi political parties established during the British mandate, argues that early on the idea of an independent Iraqi state ruled by an Arab leader was aroused. He describes the 1920s as the formation years of patriotic movements in Iraq. “Early on the patriotic movement opposed the British mandate, resisted it and demanded full Iraqi independence.”¹³ Also, Zaki Khayri, one of the founders of the Iraqi Communist Party (established in 1934), in his political memoir that spans over five decades of Iraq’s history, supports Hussein Jamil’s observations.¹⁴ Indeed, the resistance towards the mandate in the 1920s, and the wish to create an independent Iraqi state, was reflected in many publications by Iraqi newspapers at the time. For example, this was a common theme in *Al-Istiqlal* (Independence) newspaper. Advocating the creation of a “general congress” that represents Iraqis, *Al-Istiqlal* writes on 27 October 1920 that “the general congress is the entity that truly represents all Iraqi people. It will decide the nature of the future state. It will establish its government and it will choose the King”¹⁵. Another Iraqi

newspaper *Al-Dijla* (Tigris) states on 4 July 1921 that; “We declare that any King who is going to be appointed without taking into account the opinion of the people, will be a King without a legitimacy... The Iraqi people has the right to choose who should be its regent”.¹⁶ Also, a review of the British Newspaper Archive at the time (available at British Library) shows a growing resistance against the British mandate and a refusal to “ratify the Anglo-Iraqi Treaty.”¹⁷ Among others, The Yorkshire Post quotes Jafar Pasha, the Iraq Minister in London, in an interview published on 20 September 1929, stating that: “All Iraqis, without distinction of party, want the Mandate to be replaced by a treaty of friendship with Great Britain, leaving Iraq free to develop her own resources, and particularly her own defence.”¹⁸ This growing sentiment towards independence was also reflected in the plebiscite conducted in some Iraqi cities, as Najaf and Karbala, under the supervision of Great Britain.¹⁹ Also Eric Davis argues that a sense of Iraqi national identity began to develop in the late nineteenth century, stimulated by European encroachment on the Ottoman Empire, and was further strengthened by Young Turks Revolt of 1908 (which disrupted the Ottoman system of self-sufficient communities ruled by their own authorities in hope of creating the sociocultural coherence from which they believed modern European states derived their strength), and by the major uprising of 1920 which was suppressed by the British forces.²⁰

However, despite these indicators, current research shows that the population living within the borders of the new state was made up of various ethno-sectarian groupings, some better defined and more self-conscious than others; these markers of distinction were later used by political powers of one kind or another to produce a certain kind of order.

Early on, a process of politicisation of ethno-sectarian communities in Iraq took place. To create a social order that benefited their interests, the British authorities looked to small cliques of sharifian and ex-Ottoman administrative elites and notables from the minority Sunni Arabs of Iraq.²¹ Many of these Sunni leaders regarded the Shia as an unreliable entity prone to Iranian sympathies, and, like their British supervisors, they had little tolerance for Kurdish leaders’ demands for autonomy; an issue that, according to reports from the British “Civil Administration of Mesopotamia”, was raised formally in June 1918 by General Sharif Pasha – a Kurd - in conversations with Sir Percy Cox.²² Furthermore, the British went on to safeguard this order, notwithstanding general Iraqi opposition to the mandate²³, through a treaty²⁴ that they also managed to link to the constitutional framework²⁵ of the new state. According to Hussein Jamil, based on the negotiated Anglo-Iraqi Treaty, the new Iraqi Constituent Assembly

were given the task to ratify three main issues: The Anglo-Iraqi treaty; Constitution; and, Electoral Law.²⁶

This development sparked one of the first popular uprising with extensive Shia participation. Regarding the Shia and the “Shia issue” in Iraq as treated in this thesis, it must be stressed that using a term of reference as broad as Shia means a degree of generalisation. It is therefore important to stress that whatever measure or variable one may choose - class, geography, or degree of piety - Shia in Iraq²⁷ were and are far from being a single homogeneous community.

Also, it should be clear that the relevance of Iraq’s sectarian Shia issue has varied considerably from time to time; its relevance should be studied through a spatio-temporal approach. Further, the core of Shia sectarian issue has not been about “anti-Sunni”, and it has not been about secession. Rather, it has taken place in the name of Iraq, and as such it never really challenged the nation-state. Nevertheless, from the earliest days of the Iraqi state there was a Shia issue. The contours of this issue, as Fanar Haddad argues, “were essentially related to political representation, the institutional extent of organised Shiism, and the limits of Shia identity in the public space”²⁸. What is important to stress is that significant sections of Shia society had a politically salient and culturally autonomous sectarian identity that demanded recognition and representation.

This did not mean that social and political mobility were not available to Shias. By 1958, fourteen of the eighteen members of Baghdad’s Chamber of Commerce were Shiites.²⁹ Neither did it mean that Shia as community was sectarian and that the feeling of being underrepresented automatically was translated into sectarian demands. Indeed, many leading members of Iraqi Communist Party, which was a key component in the Iraqi nationalist movement, were from Shia background.³⁰ Furthermore, in the 1950s, of the seventeen members of Iraq’s Baath Party leadership, eight were Shiites, including the secretary-general, Fuad al-Rikabi.³¹

What it means, is that there were distinct Shia social and religious structures, some of them even transnational. In the face of the uneven playground of the Iraqi state, which was dominated by forces that were suspicious of the Shia and regarded them as an unreliable entity prone to Iranian sympathies, there were parallel truths regarding the Iraqi nation and the Iraqi self which were, amongst other, translated in demands for fair representation (and in post-2003 Iraq majority representation) of Shia. As Haider Ala Hamoudi argues, looking back into Iraq’s history (pre-2003), what is seen by the Shia of Iraq is that they “have *always* comprised the

majority of Iraq's population, and have *never* enjoyed anything approximating full political equality".³²

It is within this context, this belief of being treated as second-class citizens, and being underrepresented, that significant segments of Shia viewed the Anglo-Iraqi treaty and its institutional arrangements as the establishment of an order over which they had no influence, and which might marginalise them.³³ As early as in April 1932, Mahdi al-Khalisi – a Shia cleric – made a series of demands for both complete Iraqi independence from Great Britain and calls for half the cabinet to be composed of Shias and half of all government officials to be Shias.³⁴ Also, in the 1920s a short-lived Shia-centric party emerged, al-Nahdha, championing the causes of Shia and Shia representation.³⁵

However, these forces remained marginal until 1960s, and were overshadowed by more Iraqi inclusive political movements that operated under the banners of social justice, such as the Iraqi Communist Party³⁶. Eric Davis argues, that early on in the history of Iraqi monarchy, Iraq saw the rise of an Iraqi nationalist movement against the monarchy, its political elite and their British overlords. The main demands of this movement were political freedoms and social justice. The movement included all segments of Iraqi ethno confessional groups and encouraged the creation of many professional associations, formed by engineers, teachers, lawyers, and cultural organisations such as *Ittihad al-Udaba' wa-l-Kuttab* (The Union of Iraqi Authors and Writers).³⁷

Parallel to this development, the Iraqi governments during the monarchy tried to construct a cohesive identity and a sense of Iraqi nationhood. This was for example evident in the fact that state education emphasised nationalism and secularism, and an army was quickly built.³⁸ Iraq's Director General of Education under King Faysal was Sati' al-Husri, an Arab nationalist who disseminated his ideas on nationalism through educational policy, such as shaping school and college curriculum. Husri and his disciples, backed by King Faysal and his Sharifian companions who had fought for the independence of Arab lands from the Ottoman empire, encouraged Iraqi patriotism and tried to mould it into Arab nationalism.³⁹

In 1930-50s, and the beginning of 1960s, the nationalist and anti-monarchy movement gained momentum and a great number of newspapers and journals were published carrying the nationalist banner.⁴⁰ It was mainly from the ranks of the middle class that the anti-monarchy impulse emerged. Urbanisation and education played an essential role in this process.

Accordingly, in 1950s, particularly among the educated classes in urban areas, national loyalties were beginning to supplant affiliation to smaller sub-state groups, such as sects and tribes.⁴¹

The anti-monarchy sentiment and the support for an Iraqi republic culminated into 14 July 1958 military coup, led by General Abdel Karim Qasim. During the first week after the coup, huge demonstrations filled the streets of the country's major cities, people proclaiming their commitment for the new republic.⁴² An inclusive cabinet was created by Qasim, comprising four Arab Nationalists, two constitutionalists, two independents, one Kurd, one Communist, and one army officer. The first year of Qasim's rule was marked by the ascendancy of Iraqi Communist Party, which was the backbone of 'Iraqi first' coalition, against those who advocated pan-Arabism. The communists did not so much participate in decision making, but they dominated professional organisations, the streets, and did to show their power by filling the streets of Baghdad with one million people, in order to defend the infant republic. As Adeed Darwisha remarks, at no time since the birth of the Iraqi state did a political group exert so much influence on the political process.⁴³ However, while the initial moves of Qasim and the military did show a goodwill for sharing power with like-minded civilians, in the upcoming years the military and Qasim would hold sway over all institutions of the state. In 1963, Qasim was killed in the first Baathist coup. The Baathist coup is seen by some scholars as the time when Iraqi national movement – adhering to the idea of Iraq as a multicultural, multi-confessional, and multi-linguistic society – was suppressed.⁴⁴

However, throughout Iraq's history the Iraqi state struggled to adequately manage communal pluralism. As Fanar Haddad argues, the "country's ethnic, religious, and sectarian diversity was framed in paradoxical way: state discourse often celebrated it as a defining fact of Iraq while at the same time regarding it with a degree of suspicion as a potential threat to national unity", a relationship that was the "product of a history of exclusionary nation building".⁴⁵ To master the Iraqi state, the tendency of the subsequent Iraqi regimes became to rely on a combination of patrimonialism, use of violence, and attempts to enhance the autonomy of the state from society. Accordingly, a particular perception emerged amongst both Iraq's rulers and opponents as to what politics is about, how it should be conducted, and the narratives of state power. Subsequent Iraqi regimes tried to extend the central state's power and subject people, both by forming and reforming "communities of trust" and by exploring the communal fractures of the Iraqi society; both of which were marked by wariness and suspicion. The desired goal was the dependence of the majority of the Iraqi population on the minority who controlled the state, thus keeping the hierarchies of status intact. The state came, therefore, to be viewed as the guarantor of

different groups' privileges; giving those who ruled the centre advantages over the bulk of the population.⁴⁶ Politics, on the other hand, came to be seen as an instrument of discipline, forcing the population to follow the rulers' vision of the future state of affairs; which was clearly seen in the state's readiness to use coercion.⁴⁷ This process of producing and reproducing modes of dominations, and keeping the asymmetrical power relationships within Iraqi society intact, was further entrenched through the shifting basis of the political economy of Iraq as oil revenues became increasingly important; providing those who controlled state revenues unprecedented financial power, far exceeding any other combination of economic resources in Iraq, and to a great extent, ensuring the political power and autonomy of the state.⁴⁸

These factors together contributed to the creation of what Charles Tripp has called the shadow state⁴⁹ and the politicisation of ethnic and sectarian groups in Iraq, and subsequently, also the fracturing of Iraqi opposition along these ethno-sectarian lines. The term "shadow state" distinguishes the formal public apparatus of the Iraqi state from the less visible networks of privilege and patronage, where real power lies in Iraq, organised along different lines and subject to different dynamics.⁵⁰ This phenomenon can be explained by autocrats' fear that institutional settings will be created with the power to call them to account.

Accordingly, Iraqi leaders created formal, but powerless, public apparatus of the state, justified their creation in various ideologues terms, and even legitimised them through constitutions. Qasim's approach towards the Iraqi Communist Party, which at the time had a large popular power base, and the Kurdish issue clearly illustrates this. Aziz al-Hadj, a leading member of the Iraqi Communist Party, writes in his memoir that, though Qasim to some extent relied on the power base of the Iraqi Communist Party, and needed its support to introduce social reforms, the "real power" remained in Qasim's hand.⁵¹ Also, Zaki Khayri, recounts that in early 1960 Qasim gave all political parties permission to exercise their activities, except for the Iraqi Communist Party. In order to control the Iraqi Communist Party, Qasim gave permission to a former member of the party's central committee to represent the party officially, and forced the rest of party members to accept this condition.⁵² With regard to the Kurdish issue, as Charles Tripp notes, the new Iraqi constitution under General Abdel Karim Qasim (1958–63) "proclaimed Iraq a republic and established a three-man Sovereignty Council to fulfil the ceremonial functions of the head of state. However, no representative institutions were established and Qasim himself filled the posts of prime minister and minister of defence, as well as commander in chief."⁵³ Also, with regard to the Kurdish question, while the constitution

referred to the binational character of the Iraqi state, constituted of Arabs and Kurds, Qasim did not institutionalise this relationship.⁵⁴

As the official publications of the Baath party in Iraq shows, this process of concentration of power and creation of formal, but powerless, public apparatus of the state was further entrenched during the Baath and Saddam Hussein era. Despite the fact that the first charter and constitution of the Baath Party, published in 1941,⁵⁵ did vision a parliamentary democracy, by 1963, when the Baath briefly took power over Iraq for the first time, the party turned its back on the principles of democracy. The sixth congress of the Baath Party in Damascus declared that the party's aim was "to overcome the parliamentary system, due to the fact that the system is benefiting the dominance of landowner and capitalist class over the proletariat"⁵⁶. Furthermore, it stated that "understanding democracy as pluralism is the capitalist interpretation of the democracy"⁵⁷. When the Baath party ascended to power again in 1968, in order to secure its power the leadership of the party turned to "real politics". Amongst others, despite the party's nationalistic rhetoric and its roots in the wider Arab-Nationalist movement against *raj'iya* (non-progressive forces) and *imperialiya* (imperialism), the Baath ideologues considered internal conspiracies within Iraq, and indeed within the ranks of the Baath Party, as the main threat.⁵⁸ Accordingly, the main ideologue of the Baath Party, Michel Aflaq, stated: "In the first stage of the revolution, your foes is not non-progressive forces – though you fight them. It is rather those forces that fight non-progressive forces in order to take your role."⁵⁹

Official publications of the Baath Party and statements from Baath Party regional conferences from 1968 to 1990, reveals that after 1968, the Baath leadership set about to bypass and transform all national institutions and state structures, with the primary purpose of controlling potential centres of power and achieving undisputed power. For each major state institution, a parallel party organisation and structure was set up to control the state, what remained of civil society, and nongovernmental organisation, and to infuse society with Baathist doctrine. For example, Saddam Hussein was authorised by the Baath Regional Command to set up an independent security apparatus with the task of eliminating rival intelligence organisations, dissident Baathists, and all forms of opposition to the Baath. The political statement of the Eight Regional Conference of the Baath Party states that: "The Party has strived to control the security apparatus and the police, and to place patriotic, independent members of the Party in the sensitive positions, and to re-organise and reshape these two organisations according to the visions of the revolution and the needs of the future"⁶⁰. The political statement of the Ninth Regional Conference of the Baath Party states that: "In one of its meetings the Baath Party

decided to create a party security apparatus, and named it “Community Relations Office”, in order to avoid using the sensitive word “security”. The Party appointed the veteran politician, Saddam Hussein, as the apparatus leader”⁶¹. Accordingly, parallel to the state security and intelligence organisations, a Baath Party “Community Relations Office” was created. Parallel to the Defence Ministry, a “Military Office” was created. Parallel to Oil Ministry, a “Committee for Oil Affairs” was created, and parallel to “Information Ministry”, a “Cultural Office” was created.⁶² The Baath Party’s control over the state was symbolically manifested in 1977, when the Baath Regional Command was merged with the ultimate decision-making body in Iraq, the Revolutionary Command Council, RCC, and all RCC members became state ministers.⁶³

Parallel with this development, Saddam Hussein initiated his tribal policy. As Amatzia Baram⁶⁴ has shown, to begin with, despite the Baath Party doctrine, which dictated an elimination of the tribal sheikh as a sociopolitical power, Saddam Hussein strived to manipulate the sheikhs and turn them into instruments in the service of the regime. Further, he turned the tribal sheikhs into legitimate partners for power sharing, introducing tribal values and customs into the Baath Party itself and the state structures. Accordingly, kinship was legitimised as a principle guiding the selection of party leaders, and tribal honour became a legitimate guiding principle behind state policy decisions.⁶⁵ The result was, as Hani al-Fakiki, a former Baath Party member, recognises in his memoir, the creation of a community or people of trust, *ahl al-thiqa*, attached to Saddam Hussein, comprising the Sunni Arab families and clans from the hometown of Saddam Hussein, Tikrit,⁶⁶ and other opportunists who became the backbone of Saddam’s security (the Republican and Special Republican Guards) and regime apparatus, and who thrived through networks of patronage at the cost of discrimination exercised against the majority of the population of Iraq.⁶⁷ Thus, after the Ninth Conference of the Baath Party, and against the 1977 Revolutionary Command Council (RCC) decision to merge Baath Regional Command with the ultimate decision-making body in Iraq, Saddam Hussein issued an order in the name of the RCC to abolish the decision of 1977, and he gave himself the right to independently choose the ultimate state decision-making body.⁶⁸ As such, he filled the sensitive positions with those party comrades that belonged to *ahl al-thiqa*, and who were relatives of first or second degree.⁶⁹

Further, the *Anfal-campaign* against the Kurds at the end of 1980s, did show the extent to which the regime relied on family and tribal relationships. Ali Hasan al-Majid, the mastermind of the brutal campaign, was a relative of Saddam Hussein. Through an order issued on 29 March 1987, Ali Hasan al-Majid was given authority over all military, security, and civilian organisations in

“northern areas”, and it was stated that “his decisions are binding and should be followed by all state institutions, whether military, civilian or security organs”.⁷⁰

The process of concentration of power and creation of formal, but powerless, public apparatus of the state was combined with a rhetoric that aimed to distinguish “real Iraqis” – patriots – from those with “sectarian leaning”. One of the main groups targeted by this policy were the Shia political organisations. Long before they ascended to power, the Baathist had begun using the Arabic word *shu’ubiya* (populism) to attack their opponents. Fadhil Al-Barrak, former head of the *Amn* (Iraqi security service), writes in his memoir that, after the 1960s, and during the conflict with the Shah of Iran and, later, the Islamic Republic of Iran, through a revision of Islamic history the Baath began using the word *shu’ubi* to describe Shia political activism. This was an effort to discredit the national credentials of the Shia in Iraq. The terminology *shu’ubi* invokes the memory of the *shu’ubiya* movement which appeared within Islam in the eighth and ninth century. The majority of the *shu’ubiya* movement were non-Arabs and they protested against the privileged position of the Arabs within Islam. As such, the Baath described the Shia political movements in Iraq as part of the *shu’ubiya* movement that “made a great harm to all Muslims”.⁷¹ Thus, during the Iraq-Iran war, the Baath tied the theme of *shu’ubiya* to the question of who belongs to Iraqi society and the Arab nation, and who does not.⁷² The Iraqi scholar Zohair al-Jaza’ri notes that in the aftermath of 1991 uprising in Iraq against Saddam Hussein, the Iraqi regime published a series of articles under the title “What happened in the end of 1990 and the beginning of 1991 and why did it happen?”. These articles did not only attack Shia political parties, but the Shia as a group. It accused the Shia of being loyal to their sectarian beliefs rather than to the nation.⁷³

The US occupation authority, which set out to build a new Iraqi state out of the ashes of Saddam Hussein’s regime, would realise that, while the United States had easily defeated the Iraqi state, there were far more complicated state-society relationship problems that, to a great extent, would constrain the US authority’s state-transformation efforts and narrow both its, and the Iraqi political forces’, options in a post-Saddam Iraq. There were a shadow state, powerful patronage networks, legacies of discrimination, and asymmetrical power relationships; all translated into a politicisation of ethno-sectarian communities, fears and opportunities associated with a more representative government.

The Iraqi Opposition and the Narrow Scope of Iraqi Politics

As avenues of patronage, coercion, and markers of discrimination, the shadow state and communities of trust narrowed the scope of Iraqi politics along ethno-sectarian and tribal lines. This was evident in the fact that the opposition to Saddam Hussein was hobbled by divisions along the abovementioned lines. Despite the nationalist and patriotic rhetoric of many opposition groups, as Robert G. Rabil has noted, the distribution of Iraqi opposition “conformed to a great extent with the ethnic and sectarian division of the country, with the Sunni Kurds in the north, the mainly Sunni nationalists in the centre, and the Shia Islamists in the south”.⁷⁴ These fault lines were, to a great extent, reflected and reinforced as attempts were made by opposition groups to present a united front during the 1990s.⁷⁵

By the time of Saddam Hussein’s occupation of Kuwait in August 1990, the Iraqi opposition was in disarray. Most of opposition groups – except the Kurds – had been forced into exile; struggling to conduct their activities under the watchful eyes of regional powers, who all had a stake in the future structures of the Iraqi state, and supported various opposition groups to advance their own national interests.⁷⁶

The Kurdish political scene⁷⁷ was dominated by the Kurdistan Democratic Party (KDP), under the leadership of Massoud Barani, and the Patriotic Union of Kurdistan (PUK), under Jalal Talabani. Each had its traditional geographic base of support within Iraqi Kurdistan and with its own Kurdish forces, the peshmerga.⁷⁸ Throughout the history of the Iraqi state, there was a ‘Kurdish issue’, concerned with Kurdish demand for autonomy. However, the tendency of Iraq’s rulers had been to centralise and dominate, by violence but also by exploring the ethno-sectarian fracture lines of the Iraqi society. Consequently, all forms of provincial autonomy that could have institutionalised the representation of Iraq’s plurality had been hampered.⁷⁹

The history of Kurds in Iraq had therefore become one of occasional violent confrontation with the central government, when the central government felt confident, and attempts to negotiate autonomy when the central government felt weak. This relationship was marked by the fact that neighbouring countries supported Kurdish factions against the Iraqi government, and the Iraqi government tried to take advantage of the internal divisions within Kurdish ranks, where the relationship between the KDP and PUK was marked by social and ideological division, mistrust, personal rivalries and attempts to dominate each other.⁸⁰ For example, the official publications of the Baath Party shows that, in the aftermath of 1968 Baathist takeover, and in connection with what senior Baath leaders – as Barzan Tikriti - called “internal conspiracies”

within the Baath,⁸¹ the Baath leadership, in order to secure its power base, made attempts both to reach out to the Kurds – through autonomy negotiations – and to the Iraqi Communist Party.⁸² Accordingly, in 1971 the Baath presented what they called a “framework for national Charter” which invited the “forces against imperialism” to cooperate in order to solve the Kurdish issue.⁸³ However, one feature of the Baghdad-Kurdish negotiations was that, when attempts were made to negotiate autonomy, including the March Manifesto of 1970, which provided for Kurdish autonomy within the framework of unity for Iraq, these attempts failed due to the status of Kirkuk, a multi-ethnic, oil-rich city in northern Iraq which the Kurds wanted to serve as the capital of an autonomous Kurdish region.⁸⁴

The Shia political scene was dominated by the Da’wa Party, founded in Najaf around 1957–58, and the Supreme Council for the Islamic Revolution in Iraq (SCIRI), founded in 1982 in Tehran with the encouragement of the Islamic Republic of Iran, and under the leadership of Ayatollah Muhammad Baqir al-Hakim.⁸⁵

While the formative events of Shiite Islam had taken place in Iraq, where 8 out of 12 holy imams of the Twelver Shia are buried, Shiites became a majority in Iraq only during the nineteenth century. This was a consequence of the country’s nomadic Arab tribes settling down and taking up agriculture. Thus, as reports from British “Civil Administration of Mesopotamia” indicate, before the creation of the Iraqi state, those tribes that converted to Shi’ism in the south, and those who kept to their desert way of life in central Iraq and remained Sunni, were quite similar and shared Arab cultural attributes.⁸⁶ The divisions that arose between them as the modern state of Iraq took shape were therefore primarily of a political nature rather than ethnic or cultural, and as Yitzhak Nakash demonstrates “[reflected] the competition of the two groups over the right to rule and to define the meaning of nationalism in the country”.⁸⁷

Indeed, the creation of Iraq brought about considerable changes in the notions and the basis of political and religious authority within the Twelver Shiite tradition in Iraq. Traditionally, the Twelver Shia in Iraq, and its religious establishment, the hawza⁸⁸ in Najaf, had adopted an approach to politics (called quietist) that is to accept living and suffering under “common law” or the civil state until the Twelfth Imam, who is said to have vanished into a mystical realm in the year 873, returns.⁸⁹ However, religiously inspired Shiite activism, led by prominent figures in the hawza of Najaf, was demonstrated as early as in the 1920s by vigorous opposition to the British mandate and the new political order, which was dominated by the Sunni minority.⁹⁰

In the 1950s, the politicisation of the Shia community was translated into the creation of the Da'wa Party as a Shiite response to the Communists and the Baathists.⁹¹ The Da'wa Party's main ideologue was Ayatollah Muhammad Baqir al-Sadr.⁹² He envisaged the creation of an Islamic republic that would implement Islamic canon law and would have a consultative council, but not one necessarily ruled by clerics.⁹³ The Da'wa referred to itself as a nationalistic party, and aspired to act as the interface between the hawza and the people. However, in reality, for decades it led the Shiite activist community and functioned as the prime conduit for the entry into politics of Iraqi Shiite clerics and students. Further, Zohair al-Jaza'ri states that amid the Iranian revolution in 1979, many Shia in Iraq did view the success of the Iranian revolution as a great promise for all Shia. Thus, Muhammad Baqir al-Sadr sent a letter to the Iranian revolution leader Ayatollah Khomeini, declaring that "the time has come for other tyrants to understand that their days are counted".⁹⁴ By the mid-1980s, and as a consequence of repression at the hands of the regime, including the execution of Baqir al-Sadr, most Da'wa members had been forced into exile. The party lost its organised presence in Iraq and its clerical legitimacy, splintering into rival factions. However, this development also gave its branches in Western Europe an opportunity to distance themselves from the party's original Islamist views, and to play a significant role in the future US-led plans for Iraq.⁹⁵

In 1982, under the leadership of Ayatollah Muhammad Baqir al-Hakim, SCIRI was founded, headquartered in Tehran. It was composed largely from opposition Iraqi Shiites living in Iran and prisoners of the Iraq-Iran War. The party was dependent on Iran; it adhered to the principle of *wilayat al-faqih* (the rule of the Islamic jurist) and recognised the Iranian revolutionary leader Ayatollah Khomeini as possessing authority over Shiites worldwide. With Iran's encouragement and funding, SCIRI had also set up a military unit, the Badr Corps, whose strength by that time was estimated at between 4,000 and 8,000 fighters. The Badr Corps fought alongside Iranian forces in many battles in the war with Iraq. It is presumed that this cost SCIRI popular support inside Iraq.

By the time of Saddam Hussein's occupation of Kuwait, the relationship between Da'wa and SCIRI had been marked both by the attempt to establish a government in exile in the mid-1980s, and by efforts to undermine each other's legitimacy by accusing each other of being the mercenaries of neighbouring countries.⁹⁶

Beyond these dominating forces, which to a great extent were organised along the ethno-sectarian fracture lines of Iraqi society, other opposition forces included the Iraqi Communist Party, the oldest party on the political scene, which was founded in 1934 and had its peak of

support at the end of 1950s and the beginning of 1960s;⁹⁷ the Arab Baath Socialist Party; Iraqi Command, a pan-Arab group of Iraqi Baathists living in exile in Syria; and the Iraqi National Accord (INA), formed with Saudi backing in 1990 and composed largely of military and security officials who defected from Iraq, among them its leader, Ayad Allawi.⁹⁸

The Internationalisation of Iraqi Opposition and the Birth of Federalism

Saddam Hussein's invasion of Kuwait was, in many ways, a turning point in Iraq's history. It helped to introduce a new and distinctive way of conducting politics among Iraqi exile-opposition groups. Furthermore, it loosened the boundaries of traditional ideas regarding the structure and identity of the Iraqi state, and of being Iraqi among various Iraqi opposition groups.

The Iraqi opposition groups correctly believed that Saddam Hussein's invasion of Kuwait was their opportunity to establish themselves as "the true representative" of the Iraqi people and free themselves from the dominant influence of regional powers as well as to bring their cause to the international arena, and so receive support from the international community to dominate any post-Saddam arrangements in Iraq. As Ahmad Chalabi, a prominent opposition figure, put it: "The Iraqi opposition is the true representative of the Iraqi people. We hope that the international community will support the opposition in the establishment of a democratic constitutional regime in Iraq".⁹⁹ This required the unification of opposition forces and an adjustment of their alliances and goals.¹⁰⁰

However, as the opposition groups were still under the influence of Iraq's neighbours, the initial efforts to coordinate the opposition were made by Iran and Syria, who had long hosted most Iraqi opposition groups.¹⁰¹ At the end of December 1990, Iraqi opposition groups held a press conference in Beirut to declare that they had joined forces and formed the Iraqi National Joint Action Committee (JAC) "to topple President Saddam Hussein and save Iraq from war".¹⁰² On 29 December 1990, a statement by the Iraqi opposition groups was read by Hojjat ol-Eslam va al-Moslemin Muhammad al-Haydari, a member of the Central Shura Committee of the Supreme Council of the Islamic Revolution in Iraq. The statement focused on three main topics. First, it declared that various factions of the Iraqi opposition had unanimously agreed on several basic principles, to create a unified political program for joint action and to completely eradicate the "nightmare of dictatorship". Second, it stressed the need to "form a coalition, an interim government grouping all sections of the Iraqi people with all their political forces opposed to

the corrupt regime to succeed the present regime”. Third, it stressed “the Iraqi people’s historic and social reality of two major nationalities, Arab and Kurdish”, and to “find a just solution to the Kurdish problem and give the Kurds their legitimate national and political rights...in letter and spirit and within the framework of Iraqi national unity”.¹⁰³ Within this context Iraqi opposition announced the creation of an opposition broadcasting station, *Voice of Free Iraq*.¹⁰⁴ An analysis of the news coverage of Voice of Iraq, and speeches of Iraqi opposition leaders, during the period 1990-1991, shows that while Iraqi opposition did agree on general principles, there were deep divisions, suspicions, and personal rivalries among opposition groups, which became clearly evident in the first attempt to create the umbrella organisation, the Joint Action Committee (JAC).¹⁰⁵ While Shia parties stressed the “Islamic identity of Iraq” and the violations against the “majority of Iraqis”¹⁰⁶ (meaning Shia), the Kurds stressed ending “arabising Kurdish territory”, the “return of the Kurds to their ancestral village, “autonomy for Kurdistan within Iraq”, and the “participation of the Kurds in the resolutions of the government in Baghdad”.¹⁰⁷

According to one scholar, Ali Al-Shamrani, the distrust among the opposition was so deep that “a whole month of meetings and consultations was spent on whether the communique to be adopted at the conclusion of the gathering should be headed with the Arabic basmala (In the name of Allah, the Merciful, the Compassionate)”,¹⁰⁸ some factions fearing that this might give the impression that the Islamists were in control of the opposition movement. The Beirut conference further confirmed that, beyond the broader slogans, there was no real agenda upon which the opposition could work.¹⁰⁹

However, these conferences indicated early on the nature and future of “new” Iraqi politics. Each opposition group tried to impose its hegemony on the rest, led by narrow considerations reflecting their ethno-sectarian approach.¹¹⁰ This was evident in, for example, the Shia factions’ insistence that the communique of the Beirut conference should make a specific reference to the suppression of the Shias at the hands of Saddam Hussein’s regime. Further, the Shia insisted on recognition of the right of the Shia Islamist parties to be at the forefront of any future leadership of post-Saddam Iraq.¹¹¹ Moreover, the Kurds made it known that they were willing to negotiate with any regime in Baghdad – even that of Saddam Hussein – that recognised their rights to self-determination.¹¹²

Furthermore, the opposition groups insisted on being proportionally represented, at the Beirut conference and all future conferences, according to the size of their respective ethno-sectarian community. This phenomenon became known as the “proportion war”.¹¹³ Also, it became evident that the opposition in exile ignored the realities of Iraq. In fact, in the communique of

the Beirut conference, the opposition groups appealed to the Arab, Islamic, and outside world to recognise the Iraqi opposition in exile as the legitimate representatives of Iraqis, until Iraqis were able to choose their representatives in freely held elections in post-Saddam Iraq.¹¹⁴ Consequently, early on, the Iraqi opposition not only recognised itself as the leading force in any post-Saddam arrangements in Iraq at the cost of Iraqis inside the country, but it also started the practice of proportionality, representation according to the size of ethno-sectarian communities. Another tendency that could be recognised, and became a solid fact in future meetings, was that two voices were heard more than others, those of the Shia Islamists and of the Kurds, at the cost of others.

Two lessons were learned from the Damascus and Beirut conferences. First, the opposition groups realised that, unless they distanced themselves from Syria and Iran, they could not count on substantial support from the international community. The opposition groups had to reassess their alliances and redefine their interests in order to meet the visions of the international community, particularly the West.¹¹⁵ Second, the opposition groups realised the need to bring the opposition movement back to its homeland. This could be provided by the only opposition group that still remained active in Iraq, the Kurds. The advantage the Kurds held was that, since the withdrawal of Saddam Hussein's administration from Kurdistan – after the March 1991 uprising in southern and northern Iraq¹¹⁶ and the failed negotiations between Saddam and the Kurds on autonomy status in 1991¹¹⁷ – they had enjoyed an unprecedented autonomy. For the Kurds, the opposition conference in Beirut, despite its flaws, had achieved one important but not entirely satisfactory objective: the acceptance of the Iraqi opposition of the need for special status for the Iraqi Kurds based on a degree of self-government.¹¹⁸

The Kurds seized the opportunity. They agreed to hold a national conference in Iraqi Kurdistan, provided that the opposition included in its agenda an item specifically referring to the right of the Kurds to federalism as the only acceptable solution to the Kurdish problem in Iraq, and not autonomy as previous conferences had proposed.¹¹⁹ To solidify their position and take advantage of their autonomy, on 19 May 1992, for the first time in their history, the Kurds of Iraq went to the polls to elect a 105-member legislative council; the Kurdish Parliament, the governing body of the autonomous region in northern Iraq.¹²⁰ On 4 June 1992 the Kurdish Parliament convened for the first time. Subsequently, the Kurdistan Regional Government (KRG) was created. Additionally, a special brigade of unified peshmerga from KDP and PUK was formed under the jurisdiction of the Ministry for peshmerga.¹²¹

Despite the elections confirming the territorial divisions within Iraqi Kurdistan,¹²² the elections and the establishment of KRG was a historical moment in Iraq. It established new facts on the ground that neither the Iraqi government, the opposition, nor the international community could ignore. One should bear in mind that, at the time, the international community did not publicly support the idea of federalism. As a statement of the UK's Foreign Secretary, Douglas Hurd, made clear, the international community did support autonomy for the Kurds within the borders of Iraq.¹²³ This is why the election slogan of PUK leader Jalal Talabani, that proclaimed Kurdish self-determination within a federal Iraq, was one of the first official Kurdish calls for federalism to be heard by the international community. Furthermore, as David McDowall writes, the elections demonstrated for the international community the ability of a Middle Eastern electorate outside Israel and Turkey to conduct a peaceful, multiparty election.¹²⁴

But perhaps the most important outcome of the election and the establishment of KRG was one that was felt by the Kurdish population in Iraq. As Gareth Stansfield has suggested, since the creation of KRG many inhabitants of Kurdistan, rightly or wrongly, associated it with a distinctly Kurdish national agenda.¹²⁵

Accordingly, recognising the need to accommodate the Kurds and obtain support from the international community, in March 1992 a number of opposition figures and civil rights activists gathered to call for a conference in Europe, specifically Vienna,¹²⁶ far from the dominant involvement of Iraq's neighbours. A central figure behind this idea was Ahmad Chalabi, an independent politician and merchant who had the support of the US government to coordinate the opposition efforts. This was the beginning of the internationalisation of the Iraqi opposition cause, seeing it become more and more dependent on US government financial and political support. The Kurds, after assurances that the proposed conference in Vienna would endorse self-determination for the Kurds, accepted to join.¹²⁷ The Shia Islamist parties, on the other hand, publicly distanced themselves from these efforts, accusing those who called for the conference of "playing into the hands of certain International powers", meaning US interests.¹²⁸

Around 170 delegates attended the Vienna conference in June 1992. Many of these delegates attended in their personal capacity, not as representatives of the political movements that had formally boycotted the meeting, among them the Shia Islamist parties. The conference used quotas for choosing the delegates.¹²⁹ Once again, the quota system practices reflected the ethno-sectarian composition of Iraqi opposition groups, with Shia Islamists comprising approximately 35% of delegates; Kurds 24%; Turkomans 6%; and democrats, liberals, and independents 35%.¹³⁰ Given the degree to which quotas, power-sharing formulas, and consensus shaped the

post-2003 Iraqi politics and process of constitution making, the importance of quota systems in pre-invasion time cannot be stressed enough. The quota systems was both an expression of the path-dependent legacy of the Iraqi state, and indications of the main battle lines and features of future Iraqi politics. They show that the process of constitution making predates the US invasion of Iraq and that when agents entered the process, they were not neutral in their perception, commitment, and goals; nor acting within a neutral context of action.

At the conference Jalal Talabani demanded the creation of a separate Kurdish entity within a federal Iraq.¹³¹ The final communique of the conference did not endorse federalism, but did recognise the self-determination right of the Kurds within a unified Iraq. Probably the most important decision of the conference was to create a general assembly that would act in the name of the Iraqi people and seek financial support to topple Saddam Hussein, confirming the exile opposition's earlier attempt to lead any future arrangements in Iraq.¹³²

While the Iraqi opposition – now represented by the umbrella organisation Iraqi National Congress (INC) – was preparing for a new conference to be held in October on Iraqi Kurdistan soil, in Salah ad-Din, the Kurdish Parliament became more vociferous about federalism. On 4 October 1992 the Iraqi Kurds went a step further when the Kurdish Parliament issued a communique announcing the formation of a Kurdish federal state, with the aim of becoming incorporated as a member of a future Iraqi federation.¹³³ The reasons for choosing federalism, as pointed out in the communique, were interesting. The Kurds made it clear that the historical goal of the Kurds had been, and still was, their “legitimate right to independence”. However, due to the policies of the Iraqi government and international community, the Kurds were willing to sacrifice their independence and join a federal Iraqi state.¹³⁴ From then on, any discussion conducted by the Iraqi opposition regarding the future structure of the Iraqi state that did not ground itself in the idea of federalism was a nonstarter for the Kurds.

In October 1992, 234 delegates representing almost all the political opposition groups – even Shia Islamists and Arab nationalists – met in Salah ad-Din; for the first time on Iraqi soil. Among the main decisions of the conference was a recognition of federalism as a base for future relationships between Arabs and Kurds in Iraq. However, no further details regarding the form or nature of the federalism were discussed; some opposition groups – Arab nationalists – opposed it, and others – Da'wa – showed their reservations. Also, a specific reference was made to the “Shia Arab majority”.¹³⁵ The conference also elected a three-man presidential council giving equal representation to Shiite, Kurdish, and Sunni elements, a power-sharing arrangement along ethno-sectarian fracture lines of Iraqi opposition and society.¹³⁶

After the Vienna and Salah ad-Din conferences, one could distinguish four points as indicating the new elements in Iraqi exile-opposition politics. First, as Iraqi exile groups had hoped, their cause did receive international attention and came under the support and influence of Western powers, particularly the US government. This, of course, meant that some serious consideration and steps had been taken by Iraqi opposition groups to change alliances, strategies, and rhetoric. Nowhere was this more obvious than in the strategies adopted by Shia Islamist groups. Among others, SCIRI, which had denounced participation in the Vienna conference, suspecting it of benefiting Western and US interests, went on in the 1990s to establish representative offices in European capitals, such as London, Paris, Bonn, Vienna, and Bern. It also managed to accommodate the idea of federalism through a reclassification of the historical experiences of Islamic rule and the use of the term *hukm al-wilayat* (the rule of the province), confirming that federalism, far from being a product imported from abroad, was compatible with Islamic principles and had firm roots in an Islamic form of governance.¹³⁷

Second, by the creation of the umbrella opposition group INC as a “true representative of Iraqi opposition” to Saddam Hussein, the exile opposition gave itself the leading role in any future plans for Iraq. This came at the cost of neglecting the political realities of Iraqi society, with its networks of patronage, and the marginalisation of the Sunnis of Iraq; two features that would reveal themselves in post-2003 Iraq. With regard to the Sunnis, one may argue that at the time of constitution making they were not a defined community, as the other sectarian and ethnic groups were. Many Sunnis had a privileged position in the former regime and saw themselves as champions of Iraqi nationalism. However, at the time of constitution making, there was no organisation that could claim to speak on their behalf. Consequently, they were in a vulnerable position and were excluded from the process of state and constitution making. However, it should be stated that, despite the creation of INC, Iraqi political forces remained very suspicious of each other and claimed the right to operate outside the INC framework.¹³⁸

Third, a mix of quota and proportional representation of the major political forces of Iraq along ethno-sectarian fracture lines was introduced. Notwithstanding that this system confirmed the politicisation of Iraqi communities along ethno-sectarian lines, the Iraqi opposition conferences showed also that the power relationships between these communities were, and would be, asymmetrical. Whilst the “Shia majority” and the “Kurdish minority rights” question were given considerable time and space, other issues got less or no attention.

Fourth, the new Iraqi state that would emerge out of the ashes of Saddam Hussein’s regime would, in some way or other, be federal. However, the two highly controversial issues regarding

the nature of a federal Iraqi state remained unanswered. The first dealt with the nature of the self-rule regional governments in Iraq, meaning whether this “self” would be defined along ethnic/religious or administrative/territorial lines, and how much “rule” should be assigned this self. The second issue dealt with the demarcation of the border of a future Kurdistan region: Would it include Kirkuk? The disagreement among Iraqi opposition groups regarding these two issues would become the centre of gravity in post-2003 constitution-making efforts.

The Preinvasion Context and the Narrow Terrain of Iraqi Politics

In 1998, amid a crisis with Saddam Hussein over UN weapons of mass destruction (WMD) inspections, the Clinton administration stated that the government of the United States would seek to go beyond containment to promoting a change of regime. A regime-change policy was endorsed by the Iraq Liberation Act (PL 105-338, October 31, 1998), which authorised \$97 million to arm and finance Iraqi opposition groups.¹³⁹ However, President Clinton did not specify what kind of future Iraqi state the United States wished to see beyond the following general remark: “What we want and what we will work for is a government in Iraq that represents and respects its people – not represses them. And one committed to live in peace with its neighbours.”¹⁴⁰

Shortly after 11 September 2001, the Bush administration emphasised regime change as the cornerstone of US policy towards Iraq. Much has been written about the reasons, discussions, and ideological views of the inner circle of the Bush administration regarding the invasion of Iraq.¹⁴¹ What is quite evident is that the Bush revolution in foreign policy was not about whether the United States should play an active role in world affairs and promote its interests, but how.¹⁴² Embarking on the idea that “the United States stands as the world’s most preeminent power”,¹⁴³ the task of defending US interests became aggressive; going abroad and searching for monsters to destroy. Saddam Hussein was one of these monsters.

While the Bush administration was pretty clear regarding this issue, it had very little to say regarding the future structure and form of a post-Saddam Iraqi state. Looking at the pre-war speeches of George W. Bush, it is striking how little is said about this subject. The future of Iraq is described in broader visions of “liberty”, “free”, and “prosperous”, where the role of the United States is merely “helping Iraqis achieve a united, stable and free country” and to “restore control of that country to its own people”.¹⁴⁴ Addressing the American Enterprise Institute on 26 February 2003, Bush highlighted the importance of “territorial integrity of Iraq”, but beyond

that he said: “The United States has no intention of determining the precise form of Iraq’s new government. That choice belongs to the Iraqi people.”¹⁴⁵

The fact that Bush avoided this subject can partially be explained by the inability of US officials to develop a plan for federalism in Iraq, despite the fact that federalism for Iraq had been the subject of discussions within the Senate Foreign Relation Committee. Like their Iraqi exile-opposition counterparts, the US government left the most controversial issue, regarding the nature of self-rule in a federal Iraq, unanswered. Also, US officials declined to take a position on whether the Kurds should control the city of Kirkuk.¹⁴⁶ Moreover, they reserved their positions regarding the scope and duration of a US military presence, and the timetable for the transfer of power, to Iraqis. Talk shifted between a swift handover of power to an interim Iraqi authority, staffed mainly from the exiled opposition, and the notion of exclusively US military control.¹⁴⁷

Consequently, the US government did not reveal any coherent vision regarding its plan for a post-Saddam Iraq; a fact that created much distress among Iraqi exile-opposition groups. Fearing that the United States would not give them a leading role in a post-Saddam Iraq, and facing the prospect that potential leaders inside Iraq would emerge and claim their share of power, the Kurds and the Shia, who had dominated opposition conferences in 1991–92, adopted a twofold policy: to reach an agreement, in the face of an imminent regime change, to represent the “true” Iraqi opposition, and to independently assert their particular Shiite and Kurdish interests.

Three major documents were presented in 2002 outlining the visions, goals, and strategies of Iraqi opposition groups in post-Saddam Iraq. The first document was the Declaration of the Shia of Iraq,¹⁴⁸ presented by a broad range of Shia politicians, academics, professionals, and religious leaders in July 2002. While this document expresses its aim as confronting the issue of sectarianism in Iraq, at the same it makes clear that it “aims to elaborate on a Shia perspective on the political future of Iraq”, represents “the rights and demands of the Shia”, and “reflects properly the views of the Iraqi Shia as a whole”. The document explains the sectarian problem of Iraq as entirely political, but at the same time, it views and defines the Shia as a single political community with a distinctive political agenda, stating that “the crystallisation of the Shia as a distinct group owes far more to the policies of discrimination and retribution than to any specifically sectarian or religious considerations”.¹⁴⁹

The Declaration of the Shia of Iraq, while not officially endorsed by the Iraqi opposition, shed some light on the future structure of the Iraqi state as imagined by its authors, who spoke in the name of the Shia. It declared democracy, federalism, and the abolition of the policies of sectarianism, as the main goals of the Shia. While stressing the national unity of Iraq, it endorsed federalism as a solution for the endemic problem of “exclusive concentration of powers in the capital, Baghdad”. Accordingly, it saw the solution as “the devolution of powers and authorities” to the regions “within a framework of broad administrative decentralisation”, and where the “proposed federal system would grant considerable powers to the regions”. However, it also stressed its objection to “the formation of sectarian-based entities that could be the prelude for partition or separation”.¹⁵⁰

What the Declaration of the Shia of Iraq showed above all was the shift in the visions for the future structure of Iraqi state. While in 1991 the idea of federalism mostly made sense and was raised by the Kurds, with Shia opposition parties like Da’wa declaring reservations, in 2002, as the fall of Saddam Hussein’s regime seemed imminent, a broad range of Shia politicians and intellectuals not only made the case for federalism but even supported a loose and decentralised federalism similar to the vision of the Iraqi Kurds.

The second document was a draft constitution for a Kurdish federal region that the Kurds started circulating in August 2002.¹⁵¹ The time of the circulation of this document is of particular interest. Since 1991 the Kurds had enjoyed a de facto autonomous region. They had established a state within a state, performing all governmental responsibilities. However, they had not managed to create a unified administration. As a matter of fact, they had a divided political system, with the government in each administrative region heavily controlled by the dominant political party there, KDP in Erbil and PUK in Sulaimania.¹⁵² Thus, since 1992, when the Kurds made their first effort to present a Kurdish federal constitution to the Iraqi opposition, the two dominant Kurdish parties, each governing its own region relatively independently, had not found adopting and implementing a Kurdish constitution a pressing issue. However, in the face of the demise of Saddam Hussein’s regime and fears that the Kurds might lose the relative freedom they had acquired, a unification of Kurdish forces and goals became very urgent. The draft Kurdish constitution played this role. It facilitated the deferral and displacement of conflicts and crisis tendencies in Kurdish society, united the KDP and PUK, and presented to the Iraqi opposition and the international community the visions and demands of the Kurds by outlining a quite ambitious federal scheme.

The draft constitution that the Kurds started circulating contained a detailed vision of federalism, endorsing a pluralist form of federalism, a vision that made many other Iraqi opposition groups and regional actors, particularly Turkey, uneasy. To understand why, a qualified examination of federalism is needed. A broad and general definition of federalism is based on the idea of self-rule plus shared rule.¹⁵³ Federalism does not simply mean the separation of political authority, distributed in discrete and complete units. It also means that political authority is shared between the central state and its regional units. A central question bothering scholars and policy makers is: Does federalism calm or inflame secession?¹⁵⁴ One group of scholars argues that federalism succeeds in mitigating secession by acting as a compromise between a group's desire for outright independence and an unsatisfactory status quo.¹⁵⁵ In Graham Brown's words, by the federal government giving up considerable political control over local issues, federalism can "placate minority nationalist ambitions, while simultaneously providing sufficient inducement for these minorities to gain the benefits of inclusion in a larger political entity".¹⁵⁶ Another group of scholars sees federalism as the first step towards greater ethnic mobilisation and, ultimately, ethno-regional rebellion and secession. Eric Nordlinger argues that "the combination of territorially distinctive segments and federalism's grant of partial autonomy sometimes provides additional impetus to demands for greater autonomy", which means that "federalism may actually contribute to conflict's exacerbation".¹⁵⁷ While the merits and demerits of the role of federalism and its institutional arrangements are very mixed,¹⁵⁸ what form of federalism that a state should adopt – how much power should be devolved and to what entity – is therefore highly contested. In other words, at the centre of the federal discussion is the definition of self-rule.

There are two polar contrasts in the design and operation of federations.¹⁵⁹ The *integrative* approach is centre oriented. It stresses majoritarian decision making within the federal government, a centralised relationship of powers of the federation versus regions and a national recognition of identities, meaning one nation, one federation. The integrative approach is therefore advocated mainly by those who fear that federalism may lead to secession. The *pluralist* approach, on the other hand, stresses consensual decision making within the federal government, thus giving minorities a central role in the state administration; decentralised relationship of the powers of the federation versus the regions, thus drawing political and economic powers away from the centre to the regions; and plurinational recognition of identities, thus granting territorial powers to more than one nationally, ethnically, culturally, or

linguistically differentiated group, which specifically enables such groups to have regions within which they are the dominant group.

The draft constitution that the Kurds started circulating had a pure pluralist approach and therefore made all groups that feared a breakup of Iraq, or a diminishing of the power of the central state, uneasy.

First, the Kurds asserted that they would join a federal state only if they would be granted a central role in the future administration of Iraq. As the PUK's Barham Salih stated in an interview with the International Crisis Group: "As an Iraqi citizen and a Kurdish citizen of Iraq, I will have the right to participate in such a government along with other Iraqi citizens to guarantee an equitable distribution of resources."¹⁶⁰ And, as article 9 of the Kurdish draft constitution asserted: "The status of Iraqi Kurdistan cannot be abolished by any means whatsoever; neither can any part of it be annexed to another Region except with the approval of two-thirds of the Kurdistan Region's Parliament and that of the people of the Region by a referendum."¹⁶¹

Second, the Kurds aimed to draw political and economic power away from the centre to a Kurdish federal region, significantly more power than the Kurds were nominally granted under the March Manifesto of 1970, an autonomy agreement. Among others, article 10 of the Kurdish draft constitution stated: "Twenty five percent (25%) of the General Federal Budget and other Central Government budgets shall be allocated to the Kurdistan Region. This percentage shall not be reduced by the decisions of the Federal Legislature or Government" and "Fifty percent (50%) of the revenues from oil and minerals extracted from the Kurdistan Region's soil shall be allocated to the Region itself." Furthermore, it stressed that the approval of the Kurdistan Region's authorities was needed for the ratification of any financial agreement, or any other treaties or agreements that the federal government wanted to conclude with other countries or international organisations, that might decrease the authority of KRG or affect its borders.¹⁶²

Third, the Kurds insisted that a federal Kurdish region would cover those areas in which the Kurds constituted the majority, which, according to article 1 of the constitution, "comprises the governorates of Arbil, Dohuk, Sulaimani, and Kirkuk". The plurinationalist nature is further specified by article 3: "The people of Iraqi Kurdistan enter into a voluntary federation with the Arabic part of Iraq within the framework of a Federal Iraqi Republic that will include two Regions enjoying equal rights guaranteed by a Federal Constitution to be enacted by the legislatures of the two Regions and the elected Federal Legislative Assemblies."¹⁶³

What further troubled those who feared a breakup of Iraq or diminishing power of the central government was article 75, which claimed: “The structure of the entity and the political system of the Federal Republic of Iraq cannot be changed without the consent of the Kurdistan Regional Assembly. Action contrary to this shall afford the people of the Kurdistan Region the right of self-determination.”¹⁶⁴

Consequently, by circulating their draft constitution early on – and before any major gathering of Iraqi opposition groups – KDP and PUK not only reflected a united front within Kurdistan, but also marked the redlines that were not to be crossed by the Iraqi opposition or the international community in order to achieve an agreement with the Kurds, narrowing the options available for any future post-Saddam arrangements.

The third document, “The Transition to Democracy in Iraq”,¹⁶⁵ which was circulated in November 2002, was the work of six opposition groups – among them the Kurds, SCIRI and INC – together with independent jurists and scholars. The preparations had already started in March 2002 under the aegis of the US State Department within what was called the Future of Iraq Project. The task was to hammer out a blueprint for the future structure of the Iraqi state.¹⁶⁶ Also, the document was to serve as the basis for the December 2002 London gathering of the Iraqi opposition.

One of the first and main claims of this document is that Iraqi exile-opposition groups are the legitimate representatives of the Iraqi people. It starts by describing the future US plans for overthrowing Saddam Hussein’s regime as a historic opportunity that calls for extraordinary measures and procedures: “Iraqis abroad, who are in a position to act, are morally obligated to do so and to do so fast.”¹⁶⁷ It expresses concerns for a breakdown of law and order after the fall of the regime, and claims that a “political vacuum will arise during the period of disintegration and following the downfall of the regime”, and that “there are no recognised domestic political institutions, groups or individuals that can step forward, invoke national legitimacy and assume power”. Consequently, the burden lies upon the shoulders of Iraqi exile-opposition groups: “It is therefore paramount that many thousands of Iraqis, currently in exile, begin training for law and order duties to be undertaken jointly with US troops in the immediate aftermath of a change in regime.”¹⁶⁸ Questioning the Iraqi exile oppositions’ legitimacy, the document simply states: “The Iraqi opposition is no less legitimate than the regime of Saddam Hussein.”¹⁶⁹

The next question it tackles is how to ensure that the Iraqi exile opposition takes charge of the future of Iraq. Fearing a prolonged US occupation that may take the initiative from the exile

opposition, and facing the prospect that potential leaders inside Iraq can emerge and claim their share of power, the document stresses that the transitional period should be short, and that the rules and phases of a transitional government should be decided before the fall of Saddam Hussein's regime. It states that to "prevent disarray and a repeat of 1991, a temporary Iraqi authority of some sort (henceforth referred to as the Transitional Authority) must be on the ground and capable of operating as soon as the regime begins to disintegrate", and a "solution to this problem has to be sought in the pre-transition period, by and among Iraqis who have the freedom to operate outside the control of Saddam Hussein's regime". Thus, it proposes a "careful design of the new legal framework of the Transitional Authority". It envisions the basis of "the road to true legitimacy" during the transition period being a repudiation of the constitutional basis of the old regime. In addition, integral to this design is "the idea of an absolute set of time limits governing the transition period which cannot be amended by any decree, proclamation, or law issued by the Transitional Authority".¹⁷⁰ The document makes clear that the future transitional government and assembly will be chosen by the Iraqi exile opposition prior to the transition, and that any eventual expansion of this transitional assembly after the fall of Saddam Hussein's regime will be decided by the exile opposition.¹⁷¹

From a legal-theory perspective, the proposed form of regime change and political transition the exile opposition supported in this document was not a simple reform; defined by János Kis as a continuity of both legitimate authority and legality of the old regime. Neither was it a negotiated transition, defined as a rupture of the legitimacy, but generally with legal continuity (for example by using the existing constitution of the old regime as the legal basis). It was rather a revolution, defined as rupture in both dimensions.¹⁷² The question was, then, what this revolution wanted to bring about. This was the third issue the document tackled. Besides broader issues of protecting basic rights and minority rights, recognition of Islam as the official religion, the binational character of Iraq comprising Arabs and Kurds, and the need to draft a constitution that arises out of a process of debate and discussion, the document proposes an ill-defined federal model for Iraq.

Interestingly, and amid the conflicts over the issue of federalism among the opposition, the document states: "No Iraqi political organisation can afford not to support federalism today, especially not one that calls itself democratic." Furthermore, it claims that two "features unite all definitions in play in the Iraqi political arena at the moment". The first is "the idea that federalism, whatever else it might mean, is the permanent and constitutionally prescribed allocation of certain powers to the provinces (regions or governorates). These powers cannot

then be taken away or diminished once they have been constitutionally established". The second is that "no future state in Iraq will be democratic if it is not at the same time federal in structure".¹⁷³ Besides this general adherence, the document defers to the future the most controversial issue of federalism, the issue of self-rule: what the nature of this self is, and how much rule this self should have. The document includes a brief discussion of whether this self should have a geographical/administrative or an ethnic nature, mixing integrative and pluralist approaches to federalism, but it does not define the nature of the self, or the authorisation or distribution of power in the federal structure of Iraq.

As a matter of fact, "The Transition to Democracy in Iraq" was an early indication of how the process of constitution making and the role of the constitution in a post-Saddam Iraq would unfold. The document elevated the Iraqi exile opposition as the sole and legitimate source of power in post-Saddam Iraq, ignoring Iraqi domestic forces. Since 1992, the exile opposition had been dominated by two groups, the Kurds and the Shia; the latter in 2002 increasingly being represented by SCIRI, as Da'wa was more reluctant to the idea of federalism. Consequently, from a perspective based on the conditions in 2002, under the aegis of the US occupation forces, any future plans to draft an Iraqi constitution needed an agreement on federalism. Without any doubt, federalism had become the focus of discussions about Iraq's future. Thus, an agreement on the nature of federalism was needed between the dominant powers of the Kurds and Shia/SCIRI, who had different and, in the case of SCIRI, not very clear visions. As this thesis defines the primary function of a constitution as being to propel politics forwards by aiding a key statal function, which is the creation of zones of relative stability, facilitating the deferral and displacement of contradictions, conflicts, and crisis tendencies within a society, this condition could be asserted only by early insulation of the most fundamental issues, federalism and the role of Islam, without clearly defining the nature of these issues. As such, the ill-defined federalism in "The Transition to Democracy in Iraq" had less to do with democratic considerations, such as whether a future constitution should be rooted in a national Iraqi debate, and had more to do with a lack of agreement among the dominant forces in the opposition.

"The Transition to Democracy in Iraq" served as the basis for the December 2002 London conference. Asserting the exile opposition's dominating role, during the conference only a handful of participants urged that they take into account those inside the country who were bound to emerge after the fall of the Baath regime. The 300 participants in the London conference allocated responsibility and power among themselves, drawing up a list of 65

persons to form the Committee of Coordination and Follow-Up, which became responsible for matters until a transitional government was established.¹⁷⁴

Although the conference in London rejected a Lebanon-style confessional regime, the program it adopted for a post-Saddam political system was one in which power and resources were allocated according to the (purported) demographic weight of each ethnic or confessional group. The Committee of Coordination and Follow-Up clearly illustrated this approach. Roughly reflecting what was assumed to be the national demographic balance, Kurds were allocated 18.4% of the 65 seats, Turkomans 7.6% and Assyro-Chaldeans 3%. In terms of religious balance, Shiites were allocated 50.7%, Sunnis (Arabs and Kurds) 44.6% and Christians 4.6%. Among Shiites, those close to the Islamist SCIRI came out ahead, with 21 of 33 seats – a share that showed its dominance.¹⁷⁵

Conclusion

This chapter has been concerned with the origin of the Iraqi Constitution. In other words, it has examined both the path-dependent legacy of the Iraqi state and its impact on state-society relationships, and the context of action, as well as the unceasing efforts of strategically oriented agents to modify their context of action, in order to understand the role of the constitution in Iraqi society. It has shown that the process of constitution making predates the invasion of Iraq. Furthermore, it has shown that neither the context of action, nor the agents who entered the process of constitution making, were neutral.

Accordingly, this chapter has examined the nature and terrain of Iraqi politics at the time of the US invasion of Iraq in 2003, exploring the impact of the historical legacy of state-society relationships in Iraq, and the US-led plans for regime change on the development of narratives and conceptions of the idea of an Iraqi national community, and on the understanding of what politics is about. The main conclusion of this chapter is that, by the time of transition or regime change in 2003, the terrain and future of Iraqi politics had narrowed and was dependent on, and informed by, the following factors: first, a history of asymmetrical power relationships, violence, and politicisation of ethno-sectarian communities; second, a dependence on the US future plans for the country; third, an elevation of exile groups as the sole representatives of the Iraqi people at the cost of neglecting the political realities inside Iraq (including two dominant groups: the Kurdish parties KDP and PUK, and the Shia SCIRI); fourth, a representation and, to an extent, institutionalisation of Iraqi politics along ethno-sectarian fracture lines; and fifth,

a general agreement on federalism as the future basis of state structures in Iraq, but no consensus on its most fundamental issues, such as what the nature of that state would be, and how power would be authorised and distributed.

Consequently, in 2002, one could trace the broader lines of the upcoming constitution-making process and the role of the constitution in the post-Saddam era. As this thesis defines the primary function of a constitution as to propel politics forwards by facilitating the deferral and displacement of contradictions, conflicts, and crisis tendencies in a society, this condition could be asserted in Iraq amid contradictory visions of federalism among the Kurds and the Shia only by early insulation of the most fundamental – but highly contested – issues of federalism and the role of Islam, without clearly defining the nature of these issues, leaving critical matters outside of any meaningful mechanisms of authority, and invoking vague and contradictory language.

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- ¹ Charles Tripp, *A History of Iraq* (Cambridge University Press, 2002). See also Charles Tripp, "After Saddam", *Survival* 44, no. 4 (Winter 2002–03): 23–37.
- ² Eric Davis, *Memories of State: Politics, History, and Collective Identity in Modern Iraq*, (Berkeley: University of California Press, 2005).
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Chapter Three

Competing Visions of the Constitution and the Iraqi State

In chapter two of this thesis the path-dependent legacy of Iraqi state was examined. It was proposed that constitutions are the result of interactions between strategically oriented agents within a strategic-selective context of action. The making of a constitution is constrained by the path-dependent legacy of the state, and by competing and incompatible visions of sovereignty among agents that have different locations in a society with regard to access to power resources. Accordingly, it was argued that, at the time of the US invasion of Iraq in 2003, Iraqis faced the regime change while carrying on their shoulders the legacy of a shadow state, asymmetrical power relationships, violence, and polarisation of ethno-sectarian communities. It was also argued that important elements of agent discourses, as well as important practices, came to shape post-2003 Iraqi politics; and so the process of constitution making predated the invasion. While these factors did not shape the outcome of post-Saddam Iraq in a deterministic way, they did contribute to the creation of a strategic-selective context that favoured some state projects over others, and thus framed the borders and the terrain of post-Saddam politics.

In this chapter the structural coupling between the legacy of the state, as well as the attitudes and commitments of the actors at the time of the regime change and constitution making (2003–2005), are outlined. Two main points are stressed: First, it is argued that actors engaged in constitution making – both Iraqi and American – were positioned differently in terms of access to power and resources, as well as having incompatible visions regarding the future state and the idea of sovereignty. The analysis of how the actors understood what a constitution is and what it can do is based on the *four ways* a constitution, which can be understood as outlined in this chapter. Second, the process of state transformation and regime change after the US invasion, and the unceasing efforts of the agents to modify the strategic-selective context of action, is outlined in this chapter. It is argued that, not only did agents have incompatible visions of the future Iraqi state – particularly the issue of federalism was divisive and threatened to tear the political community apart – but the process of constitution making also occurred under conditions of resistance and boycott from a big segment of Iraqi society, of absence of security, and of fragmentation of political authority along many axes, with a vast amount of power lying outside any regulatory mechanism. In other words, the process occurred in the absence of a state that could guide the process through overarching institutions and rules. Consequently, through this process, the nature of dual power in state-society relationships in Iraq – a formal power regulated by the state and a nonregulated power in the hands of dominant forces – and the practices used by actors in pre-invasion times, were entrenched and subsequently became the framework that guided the process of constitution making as well as its final product. Under

these conditions, and given the incompatible visions of an Iraqi state among the Iraqis involved in the process, to preserve the polity and propel politics forwards a compromise had to be reached. Accordingly, this chapter, by contextualising competing and incompatible visions of state and constitution in the strategic context of state transformation in post-Saddam Iraq, indicates why the Iraqi Constitution, to propel politics forwards, had to leave critical matters outside of any meaningful mechanisms of authority, injecting confusion in Iraqi state-society power relationships.

Because this chapter aims to explain how the actors understood what a constitution was and what it could do for them, the material used in this chapter is informed by the official publications of the main agents, where they outline their perceptions and “remedies” with regard to the constitution and constitution-making process. Amongst this material are Paul Bremer’s memoirs of his time in Iraq (*My Year in Iraq*), Grand Ayatollah Ali al-Sistani’s fatwas and Massoud Barzani’s official speeches and comments, as published in the Kurdistan Democratic Party newspaper, *Al-Taakhi*. This material gives a comprehensive insight into the actors’ perspectives and how discourses were constructed.

Competing Visions of the Constitution and Constitution Making in Post-Saddam Iraq

In chapter 1 of this thesis, four different ways of how a constitution can be understood were elaborated: a constitution as a document; a constitution as an embodiment of ideas, norms and practices providing the basis for a normative order; a constitution as an organised form of a political society; and a constitution as an instrument for independent principles. The following analysis of competing visions of constitution in post-Saddam Iraq will be based on the abovementioned ways of understanding what a constitution is.

Non-communal Visions: Constitution as Embodiment of Ideas, Norms and Practices

In post-invasion Iraq the best-organised political parties that participated in the process of constitution making had a communal base. Non-communal voices did participate and had a leading role in drafting Iraq's 2004 interim constitution, TAL, to a great extent as legal experts and advisors to the Iraqi Constitution Drafting Committee.¹

Non-communal voices embraced the idea of a constitution as an embodiment of ideas, norms, and practices providing the basis for a normative order.² In their view, constitutional moments were transformative and foundational moments. Constitution making was viewed as a higher track of law-making, and constitutions were conceptualised as reference points for a future constitutional patriotism, engendering national cohesion, as postulated by Bruce Ackerman.³

Within this understanding of constitution there are three grounds upon which the constitution can be said to obligate, depending on whether appeals are made to normative, voluntarist, or organic ideals. In Iraq non-communal voices embraced a normative and voluntarist vision. The difference between these two is whether or not the norms existed prior to the existence of the political community, and therefore whether the constitution is understood as a fundamental norm upon which the organisation of socio-political life must depend, or whether there is stress on the existential origin of the norm itself in the will of the subject of the constitution, the bearer of the constitution-making power. In the first case, the constitution is sovereign. In the latter case, the legitimacy of the constitutional system is understood to rest on the intentions articulated in the original act, where the foundation can be a voluntary contract between individuals or groups – as formulated by Jürgen Habermas⁴ – or an act of subjugation of the community to the will of the sovereign or a dominant group – as formulated by Carl Schmitt.⁵

Two Iraqi constitutional advisors and drafters who were interviewed for this research reflected the idea of a constitution as being sovereign: Dr Mundher Al-Fadhil,⁶ who was extensively involved in drafting TAL, and Dr Shirzad Ali Al-Najjar,⁷ who was an advisor to the KRG. Both conceptualised constitutions as legalistic devices – the law of the laws – that should be designed by legal experts. Thus, they reflected Roland Dworkin’s idea that apart from legal experts, other government officials are irrelevant to constitutional development.⁸ Al-Fadhil blamed the failure of constitution making in Iraq on “the involvement of politicians with no legal background” and “with no interests other than their own partisan group interests”. According to him: “What was lost in the process is the identity of the Iraqi state, its coherence and its ability to be a reference point for future generations.”⁹

Another voice who supported the idea of the constitution as an embodiment of norms, but who leaned more towards the voluntary vision was Feisal Amin Rasoul al-Istrabadi, who assumed a lead responsibility for drafting TAL. In his view, the role of a constitution should be engendering national cohesion. While stressing the need to codify some fundamental norms prior to the existence of the political community, he also stressed the need for “deliberation” amongst all important social forces to reach a common vision of a social order worth respecting. Istrabadi stated that, due to lack of time and deliberation, “the Iraqi constitutional process, far from engendering national cohesion, very nearly ripped the country apart”.¹⁰

From a philosophical point of view, non-communal legal experts shared the same vision of a constitution as the occupation regime. Both saw the constitution as a social contract translated into “a legal code”¹¹ with the aim of formalising certain norms. Because the organisation of socio-political life must depend on the norms codified in the constitution, both viewed the state as an expression of the norms that existed prior to its existence. Norms and laws rule, not men, and in this sense, norms and laws should be sovereign. Using Carl Schmitt’s terminology, the constitution is sovereign and the “constitution is the state”, because the state is treated as something genuinely imperative that corresponds to norms.¹² Accordingly, both agreed on the substantial content of the Iraqi Constitution, including as many provisions as possible that guaranteed basic rights and separations of powers,¹³ as well as the creation of structures and institutions that preserved the unity of Iraq.¹⁴

Non-communal legal experts and the occupation regime also agreed on the core principles that should guide the process of constitution making. Different visions on who is sovereign implicitly means different understandings of what Jon Elster calls “upstream and downstream” constraints¹⁵ on the process of constitution making: the right to call for a constitutional

convention, the mechanisms for selecting members of the convention, and the mechanisms for ratifying the constitution. Together, upstream and downstream constraints, to a great extent, define, enable, and constrain the power of a constitutional-making body. Accordingly, within constitutional theory, there are two polar visions of how a constitution should be drafted: by constitutional assemblies, as advocated by Bruce Ackerman, or by open-ended parliamentary constitution making, as advocated by Stephen Holmes.¹⁶

Viewing a constitution as foundational moments, non-communal voices in Iraq were supporters of Ackerman's constitutional assemblies. The argument goes that, if a constitution does not embody the constitutional moment then the opportunity for legitimate constitution making may close altogether. The constitutional moment has two primary characteristics: it is legitimated by sustained electoral support, and it is enforced by judicial review. It is a unique moment in a nation's history, when the people come together to try to create a new beginning, a new foundation that serves to engender patriotism for generations to come. Accordingly, such a moment cannot be ruined by the partisan interests of political actors. It must be grounded in a closed system of norms. Therefore the right to call for a constitutional convention, and the mechanisms for selecting members of the convention, as well as ratifying its end product, should be inspired by this system of norms – which allegedly are superior and do not need further justification by virtue of not being “partisan”, as Mundher al-Fadl clearly stressed.¹⁷ Therefore, for the constitution to become a reference point for a future constitutional patriotism, constitutional politics should be separated from normal politics, and constitutions should be made by a separate assembly, in which the everyday political consideration and the institutional interests of already-established political bodies, are not present.¹⁸

These views clashed with powerful Kurdish and Shia-centric political interests.¹⁹ Both – and by different logics – supported Holmes's²⁰ idea that to separate constitutional and normal politics is both unrealistic and undesirable because it may lead to an early insulation of constitutional settlements from change. As the process of constitution making was directed by an occupation regime whose intentions both the Kurdish parties (KDP, PUK) and Shia parties – Da'wa and SCIRI - did not trust, the Kurds and Shia feared what Carl Schmitt had echoed in the early 20th century, that nothing stops a sovereign constituent assembly from practising sovereign dictatorship and imposing a constitution.²¹

The Kurdish parties feared that a constitutional assembly over which the Kurds did not have a feasible influence might undermine the autonomy and self-rule they had enjoyed since 1991. It might have imposed a central rule over the Kurds instead of a decentralised federal structure.

Given the fact that the initial steps to draft TAL – the call for a convention and mechanisms for its selection – were made under the supervision of the occupation regime and led by non-communal legal experts, such as Istrabadi, the Kurds were right to fear the outcome. Resistance against an imposed constitution would be repeated in many speeches by the KDP leader Massoud Barzani, in the following words: “Those days when facts were imposed on the Kurds are long gone.”²² Therefore, the Kurds demanded that “there must be a strong political element” in the constitutional convention, and that “it’s not a matter of lawyers working behind closed doors”.²³

The Shia parties feared that a constitutional assembly that they could not control might impose the view of a minority on the Shia, who composed the majority of the population. Given the secular intentions of the occupation regime and non-communal legal experts, as well as the influence of the prominent secular Iraqi politician Adnan Pachachi²⁴ over drafting TAL, and Pachachi’s insistence on getting Sunni Arabs and Iraqi nationalists on board, the Shia also feared being, once again, denied their right to state power. For the Shia, as will be shown, no one had the right to call for a convention, or to decide the mechanisms of its selection or ratification, other than the people; for the Shia, this meant the *majority* of the people. As Sheikh Humam Hamoudi, a senior SCIRI leader and the head of the Iraq Constitution Drafting Committee, expressed it, democracy “doesn’t mean that the majority is bound to consider all that is demanded by the minority; this would be adverse to democracy”.²⁵ Stressing a majoritarian vision of democracy, the Shia demanded that Iraqis should elect the drafters of the new constitution via general elections to a constituent assembly.²⁶

The Occupying Power: Constitution as Embodiment of Ideas, Norms and Practices

The US military occupation of Iraq was not a classical *occupatio bellica*. It was revolutionary²⁷ and transformative.²⁸ The occupation regime not only ruptured the legality and legitimacy of the previous regime, it also turned itself into the subject of new regime construction.

When Paul Bremer, the US administrator of the Coalition Provisional Authority (CPA), entered the scene of Iraq in May 2003, he did so with an open-ended mandate in terms of the scope and duration of his authority. He assigned himself the right to exercise all executive, legislative, and judicial power in Iraq, as well as to supervise the draft of an Iraqi constitution.²⁹ CPA regulation 1, issued on 16 May 2003, listed the “traditional” obligation of an occupying power to be “to provide for the effective administration of Iraq during the period of transitional administration,

to restore conditions of security and stability, to create conditions in which the Iraqi people can freely determine their own political future”. But it also reflected the transformative nature of the US occupation regime, “advancing efforts to restore and establish national and local institutions for representative governance” where the “CPA is vested with all executive, legislative and judicial authority necessary to achieve its objectives”.³⁰ The very same day, Bremer signed CPA order 1, “De-Baathification of Iraqi Society”.³¹ Commenting on the de-Baathification order in his memoir, *My Year in Iraq*, Paul Bremer states: “It clearly demonstrated that we intended not just to throw out the brutal tyranny of Saddam, but also to establish in its place a new political order.”³²

Recalling a meeting with President Bush before his departure to Iraq, Bremer indicates the *raison d’être* of his mission as “bringing representative government to the Iraqi people”.³³ In his instructions to Larry Diamond, a Stanford University professor who, from January to April 2004 served as a senior advisor to the CPA and the Iraqi Interim Constitution Drafting Committee, Bremer made clear that it “was vital for the future of democracy in Iraq that this law [interim constitution] specify as many principles of democracy as possible”.³⁴

The vision of constitution the occupation regime embraced, using Carl Schmitt’s terminology, can be described as an “absolute concept of the constitution”, where the oath to the constitution is an oath to the “codifications” of the norms that the constitution tries to formalise.³⁵ For the CPA, the Iraqi Constitution was a social contract translated into “a legal code”,³⁶ as Bremer himself puts it, with the aim of formalising some certain norms that should be valid, prior and above every political being. It embraced the idea of a constitution as an embodiment of ideas, norms, and practices, providing the basis for a normative order. It stressed the normative appeals, indicating that the norms it adhered to existed prior to the establishment of the new political community. It viewed constitution making as a transformative and foundational moment, where the norms established in the constitution aimed to engender national cohesion and be a reference point for future patriotism. CPA embraced an idea where the constitution is the state and the constitution is the sovereign. The future Iraqi state, for the CPA, would be an expression of the norms that existed prior to its existence, not the other way around.

Bremer’s insistence on postponing the handover of power and free elections was therefore grounded in his vision of what the constitution was. Upon his arrival in Iraq, Bremer announced that there would be no early transfer of power to Iraqis.³⁷ Having the reassurance of President Bush that the US would “stay until the job is done”,³⁸ Bremer conveyed this message in his first meeting with the Iraqi Leadership Council (ILC),³⁹ a group of prominent Iraqi exile leaders

selected during the London conference of 2002 and who opposed a prolonged occupation. Because the constitution was the sovereign and the state, an expression of the norms codified in the constitution, for Bremer and some other members of Bush administration,⁴⁰ sovereignty could not by any means be handed back to Iraqis before a constitution was drafted. According to Bremer: “The only path to full Iraqi sovereignty is through a written constitution, ratified and followed by free, democratic elections.”⁴¹

Accordingly, for Bremer, Jon Elster’s upstream constraints – the right to call for a constitutional convention and the mechanisms for selecting members of the convention – was never an issue. As the CPA was the effective occupying power, the sovereignty that ultimately was in the constitution was temporarily, and for a period of transition, with the CPA – an administration with the right to exercise all executive, legislative and judicial power in Iraq. Therefore, the CPA should decide when and in which way to call for a constitutional convention.

To ensure that norms and not unwanted partisan interests of Iraqi political forces prevailed in the constitution, Bremer favoured Ackerman’s constitutional assembly as a path to draft the Iraqi Constitution. The Iraqi Constitution, Bremer envisioned, should be drafted by a representative assembly of Iraqis from around the country. However, this assembly should be appointed under the CPA’s supervision, rather than elected by an elected parliament, to ensure early insulation and formalisation of the norms that the CPA adhered to.⁴²

Practically, the CPA’s vision of sovereignty and its relationship to constitution making meant that the CPA had to assume total control over the transition process.⁴³ This was, of course, a paradox. While adhering to the central tenet of democracy, that the people’s consent is the only basis for legitimate government;⁴⁴ the CPA had to rely on undemocratic measures and institutions.⁴⁵ For the CPA, access to, and engagement with, Iraqi society was relevant only if it concluded in bringing aboard social forces that adhered to the norms and the social order that the CPA wished to realise. However, one of the two main characteristics of Ackerman’s vision of a constitutional moment is that a constitution is legitimated by sustained electoral support. In other words, the constitution, by one means or another, has to be ratified by the people at some point, which meant that the CPA could not ignore Jon Elster’s downstream constraints. Realising the importance of electoral support for the legitimacy of a constitution, Bremer insisted on the representativeness of the unelected bodies that the CPA had created to draft the Iraqi Constitution.⁴⁶

This was reflected in the creation of the Interim Governing Council (IGC)⁴⁷, the Interim Constitutional Preparatory Committee,⁴⁸ and the Interim Cabinet,⁴⁹ all under the CPA's supervision and having an overrepresentation of "friendly" or "not hostile" Iraqi politicians – the Kurds and the exile opposition the US had supported in pre-invasion opposition conferences. Upon the establishment of IGC on 13 July 2003 – a body of 25 Iraqi politicians representing Iraq's diverse ethno-sectarian mosaic – Bremer indicated that one of the council's first jobs would be "to help launch the constitutional process". Speaking to Iraqis, he said: "It will be a constitution to cement your freedoms, and to enable...democratic elections to take place."⁵⁰ Accordingly, the CPA tried to make up for the deficit of democracy in the process of constitution making by a surplus of representativeness.

To ensure that norms and not partisan interests prevailed, the CPA also excluded those forces it deemed to be opposing its plans: the Sunni Arab organisations and nationalist forces that started to organise themselves in the aftermath of Saddam Hussein's fall, the insurgency,⁵¹ and the forces of Muqtada al-Sadr.⁵² When asked why the CPA did not include more-radical Shiites or Sunni Arab nationalists, Bremer answered: "It is a fundamental principle of democratic government that people do not shoot their way to power."⁵³

While the CPA managed to ensure international legitimacy for its constitution and state-making project through UN Security Council Resolutions 1483 and 1511,⁵⁴ the CPA's efforts faced resistance in Iraq, causing a sharp U-turn in post-invasion US policy regarding the procedures of change and the nature of constitution making.⁵⁵ The November 15 agreement between the CPA and IGC was one of these key shifts in CPA policy. By the effect of that agreement, the CPA gave up its initial and ultimate plan to conclude the occupation only at the end of the process of permanent constitutional drafting and elections, and agreed to accelerate the transfer of sovereignty back to the Iraqi people.⁵⁶

The U-turn in the CPA's policy can be explained though the socially embedded nature of state and constitution making. As a strategic-relational approach to structure and agency suggests, because power involves an agent's (or set of agents') production of effects that would not otherwise occur, it is therefore essential to identify both the structural constraints and conjunctural opportunities confronting agents, and the actions that these agents performed, which, by realising certain opportunities rather than others, has made a difference.⁵⁷ Thus, power should be understood as a relativised concept. It should be conceptualised in terms of potential for power, which is dependent on multiple factors: spatiotemporal constraints and opportunities that actors face in terms of structurally inscribed constraints, constraints in terms

of relationships to other actors, and constraints in terms of their own precommitments, organisation, modes of calculations, and resources.

The main constraint that the occupation regime faced was that, while the US invasion succeeded in overthrowing the regime of Saddam Hussein, and while the CPA succeeded in destroying Saddam's institutions by, among others, the de-Baathification and dissolution of entities' orders,⁵⁸ the United States did not succeed in destroying Iraqi society with its hierarchies of power, its latent and structural conflicts, and its ideologies, affinities, and social forces ready to fill the void after Saddam Hussein. This point was presented as a key argument in showing that the Iraqi Constitution was made by Iraqis and not imposed by the CPA by two Iraqi politicians and members of the Iraqi Constitution Drafting Committee who were interviewed for this research: Hamid Majid Mousa, leader of the Iraqi Communist Party, and Abed Al-Khaleq Zengena, who represented the Democratic Patriotic Alliance of Kurdistan.⁵⁹

In terms of structurally inscribed constraints, as chapter two of this thesis shows, throughout its history the Iraqi state had remained largely external to Iraqi society in the sense that it derived its power not from its population, and the fact that the real power was rather in the "shadow state". Those social forces that had preserved the apparatus of the state – mostly Sunnis from Tikrit area – did not exist to any substantial degree beyond the immediate self-interests of the ruling clique. That clique was neither large nor stable enough to form a solid base of support for an institutional order. As Herring and Rangwala put it, remove the rulers and the state will collapse.⁶⁰ This is exactly what happened when the United States toppled Saddam. It contributed to the failure of the CPA in its most important obligation as an occupying power – establishing order and public safety.⁶¹

The CPA faced a fragmentation of political authority along many axis, including ethno sectarian, centre-local and tribal lines,⁶² and the rise of militias.⁶³ But also, the CPA's transformative vision and plans to create a new political order, its launch of the de-Baathification policy, its attempt to assume total control over the transition process, and its exclusion of "unwanted" forces, both politically and by use of heavy-handed force, contributed to systematic Sunni Arab guerrilla warfare⁶⁴ against the CPA and its collaborators.

The Sunni Arabs, making up around one-fifth of Iraq's population, had dominated Iraqi politics since Iraq's creation and, as Ahmed Hashim puts it, had built Iraq in their own image.⁶⁵ Though many Sunni Arabs had suffered during Saddam Hussein, the ouster of his regime in 2003 was not seen as a liberation. It was, according to Hashim, the beginning of an identity crisis, a

disruption of the Sunni community's world, the beginning of a new world where they "no longer defined Iraq" and where they had to find out how to "fit in that new world".⁶⁶ This identity crisis had also a broader dimension. It was translated in many Sunni politicians' perception of the US invasion as a de-Arabisation of Iraq and a threat to the Arabic identity of Iraq; Arabic identity being defined as Sunni identity and the Shia community seen as non-Arabic.⁶⁷ Seeing themselves as the target of the invasion, the Sunnis perceived all subsequent decisions by the US coalition authority, from the dissolution of the Iraqi Army to the de-Baathification process, including the creation of IGC and the constitution-making process, as a US-Shia-Kurdish project of de-Arabisation in Iraq and marginalisation of the Sunnis.⁶⁸ One of the first Sunni organisations to rise up after the invasion was the Association of Muslim Scholars (AMS). It strongly denounced the creation of IGC as a "sectarian" project and also castigated IGC for making the day on which Baghdad fell (9 April) a national holiday, arguing that this "decision kills the national pride and patriotic spirit within the Iraqis".⁶⁹ Another Sunni organisation that rose after the invasion was the Iraqi Islamic Party (IIP). It adopted a strategy of cooperation with the occupation regime and became a member of IGC. However, the heavy assault on the Sunni-dominated city of Fallujah in November 2004 by US forces alienated the Sunni community, drove many to support the insurgency, and caused IIP to boycott the January 2005 Transition National Assembly election.⁷⁰ Together, these factors meant that the process of constitution making occurred, not only in the absence of a state and under the fragmentation of political authority, but also in a context of heavy resistance from society; where vast amounts of power sources were out of the reach of CPA, out of the reach of any organs elected or constrained by people, and in the hands of regional and local powers.

It meant that the process occurred in the absence of overarching institutions and rules. In order to create a state that was an expression of the norms codified in the constitution, the CPA not only needed to take control of the transition process; it also needed a state. Without a state, the CPA risked a complete breakdown of the political community and a full-scale uprising (Shia as well as Sunni), as a British government report indicated in November 2003.⁷¹ This meant that in order to fulfil the key task of the state – creating a zone of relative stability and deferring contradictions and crisis tendencies in society – the CPA had to compromise and engage with Iraqi society, and make trade-offs with forces it could no longer ignore, both those the CPA formally collaborated with in IGC and those outside it. The CPA had to accelerate the transfer of political authority and sovereignty to the Iraqis.

In a constitutional theoretical perspective, it meant that the CPA had to abandon its idea that the constitution is the state. Recognising the strategic-selective context of Iraq, the CPA had to change strategy and, to avoid a breakdown of the political community, recognise the nature of dual power in Iraqi state-society relationships – the power that was outside the reach of the state the CPA wished to establish. Thus, the interim Iraqi constitution, TAL – which was created under the supervision of the CPA – not only absorbed contradictions regarding the identity of the Iraqi state; it also insulated and reflected the nature of the dual power in Iraq. TAL aided the key task of the state by avoiding clarity and injecting confusion into power relationships. However, while creating a zone of relative stability, the end result meant that the constitution established and regulated only a small part of the political power in the country, and paved the way for an open-ended political process that risked never coming to a legitimate conclusion.

The Shia: Constitution as Embodiment of Norms through a Fundamental Decision by the People

At the time of the US invasion the Shia of Iraq, as a political community, did not have central leadership and faced an internal power struggle.⁷² The strategic power location of the Shia as a community within state-society relationships had been altered dramatically due to the fall of Saddam Hussein's regime. The Shia were empowered, but they were far from united. Each town in Shia-populated southern Iraq had a different religious and political orientation, with the more nationalistic-oriented al-Da'wa Party having a stronghold in Nasiriyya, while the more Islamic- and Iran-oriented SCIRI had its stronghold in Baquba and Kut.⁷³ Though they were suspicious of each other, what united Da'wa and SCIRI was a set of formal agreements during the opposition conferences, elevating the Iraqi exile opposition as the sole and legitimate source of power in post-Saddam Iraq; a proportional system of power distribution based on the demographic size of each ethno-sectarian group, mandating for Islam a prominent role in society and formal agreement on federalism. Beyond that, there was no coherent vision among Shia exile parties on Iraq's future. There was also a struggle between the "insiders", who had remained in Iraq during Saddam's oppression – such as Muqtada al-Sadr – and the "outsiders", the exile opposition.⁷⁴ Muqtada al-Sadr, who was in effective control of Sadr City, a suburb of Baghdad with a population of two million, denounced the returning exile groups as collaborators with foreign nations.⁷⁵

It is therefore not surprising that one of the most vital forces that emerged as a symbol of order and a source of identity in the post-invasion political vacuum, was the non-state and transnational Shia clergy institution in Najaf, the hawza.⁷⁶ Shiites across Iraq proclaimed “the hawza is our leadership”.⁷⁷ This slogan embraced a range of political views, from support for the establishment of an Islamic state, to an attachment to the hawza as providing moral direction.

One of the hawza’s most senior *marja* (scholar and sources of emulation) was Grand Ayatollah Ali al-Sistani. Sistani’s involvement in Iraqi politics both empowered the Shia political parties and limited the available options for these parties – and others – in the constitution-making process. The unification of the Shia and their participation in the January 2005 election under a unified list – United Iraqi Alliance (UIA) – was due to Sistani. To understand the Shia position in the constitutional debate, one must therefore pay attention to the strategic role that the hawza in Najaf, under Grand Ayatollah Sistani, played in the social formation of Iraq at the time of constitution making. Not only Shia leaders, but Iraqi political leaders from all segments of the population routinely travelled to Najaf to meet with Sistani and discuss constitutional matters. The CPA administrator, Paul Bremer, also tried in vain to meet with Sistani.⁷⁸ One of the very first acts of the Shia political parties involved in the negotiations to shape the transitional administration after the January 2005 elections was to hold meetings with Sistani.⁷⁹ In the words of Ibrahim Bahr al-Ulum, a member of the Coordination Committee of the UIA, who met with Sistani, there were no doubts that Sistani was deeply involved and invested in the current affairs of the Iraqi system, and held firm to his idea of a united Iraq, where the Shia, being a majority, were not bound by minority views but should respect minorities’ rights. In an interview with Radio Free Iraq, Bahr al-Ulum stated that among the most important instructions of Sistani was “his exhortation to keep the unity of Iraqis and to work collectively for the defence of the rights of Iraqis in general. [Al-Sistani said as well] that the law of majority and minority must be given a precise respect. The minority must respect the opinion of the majority and the majority must respect the feelings and rights of the minority. This must become the guarantee of political progress. He also stressed that as there have been some Iraqis suspicious of the participation in the political process, we have to guarantee their rights and to respect them as much as we respect ourselves. In this way, we should secure the cohesion of the Iraqi people.”⁸⁰ Thus, Sistani exercised power over Iraqi politics from outside the system. In practical terms, he exercised a veto power above the law, and was deeply involved in the affairs of the state, yet was a nonstate player par excellence.⁸¹

Initially, Sistani adopted a “wait and see” strategy towards the occupation regime. His first fatwas issued following the invasion were welcoming and authorised contact with the occupation regime.⁸² At the same time, Sistani opposed a prolonged occupation. Ayatollah Baqir al-Hakim, the leader of the most powerful Shia political party at the time, SCIRI, adopted Sistani’s stance⁸³ – as other Shia exile opposition figures would do in the upcoming two years leading to the draft of the Iraqi Constitution. While cooperating with the occupation regime, Hakim stressed his alliance with the hawza by calling for the creation of an Islamic state in Iraq⁸⁴ and denouncing a prolonged occupation, declaring: “The Iraqi nation will resist and use any legitimate means against foreigners’ occupation of Iraq, should they decide to remain.”⁸⁵

As the CPA’s vision for an Iraqi constitution became clearer, Sistani took the lead and united the Shia along a vision that was firmly expressed in his fatwa from 30 June 2003. It read as follows:

“These [occupation] authorities do not have the authority to appoint the members of the constitution writing council. There is no guarantee that this council will produce a constitution that responds to the paramount interests of the Iraqi people and expresses its national identity of which Islam and noble social values are basic components. The [constitution writing] proposal is fundamentally unacceptable. There must be general elections in which each eligible Iraqi can choose his representative in a constituent assembly for writing the constitution. This is to be followed by a general referendum on the constitution approved by the constituent assembly. All believers must demand the realisation of this important issue and participate in completing the task in the best manner.”⁸⁶

As this fatwa shows, Sistani embraced a vision of the constitution as an embodiment of ideas, norms, and practices providing the basis for a normative order. But in contrast to the CPA, Sistani stressed the existential origin of the norm itself in the fundamental decision and the will of the subject of the constitution, the bearer of the constitution-making power: the people. In Carl Schmitt’s terminology,⁸⁷ for Sistani, the constitution was an act of subjugation of the community to the will of the sovereign. In a democracy this will is a fundamental decision made by the people; for Sistani and the Shia, this was a decision made by the *majority* of people.

In Sistani’s view, the constitution, and the norms expressed through it, was valid because it was “positively” established – in other words, by virtue of an existing will. The will, and not the norm, was the original command. The constitution was nothing other than an expression of a people capable of acting politically, as Carl Schmitt has expressed it. The constitutional contract

was *not* the social contract in the sense that the CPA envisioned it. The constitution was rather a political decision by the people.⁸⁸

What is important to stress here is Sistani's understanding of the concept "people". In his fatwa Sistani worded his pronouncement in democratic language devoid of sectarianism. For Sistani the people were a unified entity. When referring to the constitution as an act of subjection to the will of people, Sistani understood people as being one people, of which the Shia composed the majority. For Sistani, the source of legitimate authority was *one* people, not a plurality of people – Kurdish people, Sunni people and so on. Accordingly, the answer to the question "How can people who are the source of legitimate authority exercise sovereignty?" was "through simple majoritarian democracy". The constitution, being a fundamental decision by the people, meant that the participation of Kurds and Sunni Arabs – which Sistani stressed⁸⁹ – in the process of constitution making was vital. However, this participation should not be on the grounds of a minority of the people having the authority to constrain the will of the majority. For example, while Sistani did not protest federalism as such, he did find the effective Kurdish veto of any final constitution – which was expressed in article 61(c) of TAL – offensive on the grounds that the majority should not be bound by a minority. Also, while Sistani did not object to the formation of a presidential council consisting of members from the Shia, Sunni and Kurdish communities, he preferred a five-person presidency with, presumably, three Shia members, and not a three-person presidency as was indicated in TAL.⁹⁰ The fact that Sistani viewed the source of legitimate authority as being one people did not mean that he denied the cleavages in Iraqi society. However, he firmly believed that, in exercising sovereignty, the Iraqi people were one people, and therefore sovereignty could be exercised only through ballots. This was clearly stated by Sistani in his response to CPA-UN deliberations over whether elections could be held in Iraq within the time frame Sistani required. In a statement from 23 February 2004, Sistani claimed: "Elections are the best approach to ensure a government that protects Iraqi people's interests...In a pluralistic country such as Iraq, there is no way to overcome these cleavages and create a government other than through ballots."⁹¹

What Sistani feared was that nothing would stop an unconstrained sovereign constituent assembly created by the occupation regime to practise sovereign dictatorship and impose a constitution on the Shia.⁹² In his fatwa, Sistani expressed these fears: "There is no guarantee that this council will produce a constitution that responds to the paramount interests of the Iraqi people." Therefore, he recommended "general elections in which each eligible Iraqi can choose his representative in a constituent assembly for writing the constitution". To ensure that the

constitution was a fundamental act of the people the process would conclude with “a general referendum on the constitution”.

Sistani reasserted this position once again in his objection to the CPA November 15 agreement, through a document that was made available by the Sistani Foundation in Najaf. Sistani states: “First of all, the preparation of the Iraqi State Law for the transitional period is being accomplished by the Interim Governing Council with the Occupation Authority. This process lacks legitimacy. Rather the [Basic Law] must be presented to the [elected] representatives of the Iraqi people for their approval. Second, the instrumentality envisaged in this plan for the election of the members of the transitional legislature does not guarantee the formation of an assembly that truly represents the Iraqi people. It must be changed to another process that would so guarantee, that is, to elections. In this way, the parliament would spring from the will of the Iraqis and would represent them in a just manner and would prevent any diminution of Islamic law.”⁹³

Interestingly, this originally democratic and non-sectarian approach to constitution making, by virtue of the Shia composing the majority of Iraqi people, was translated into a sectarian and non-liberal Shia principle during the transitional period and the constitution-making process; to make sure that the will of the Shia, the majority, would not be bound by the minorities of Iraq. Another way to put it is following: the focus of Shia-centric political parties became the issue of sovereignty (who is sovereign and how this sovereignty shall be exercised) and state legitimacy (who is legitimate). The answers were: the Shia and by not being bound by majority. Thus, the legitimacy of the state, became the core issue, rather than state-efficiency and viable institutions. In practical terms, it was partially expressed in the Shia aiming for representation according to their demographic strength in all political decision-making bodies created during the transition period leading to a permanent constitution. It was particularly expressed through negotiations over substantive issues, such as the role of Islam and federalism – which will be discussed later in this chapter.

Consequently, the Shia came to represent the majority in IGC, the Interim Constitution Drafting Committee, the Interim Cabinet, and the Interim Iraqi Government that was set up after the formal conclusion of the occupation in 2004. According to Majid Mousa, in order to ensure Shia dominance, Sistani used all the influence he had to establish a united Shia electoral coalition – the UIA – in the lead-up to elections for the Transitional National Assembly, which was charged with drafting the permanent constitution.⁹⁴ As well, the Shia, through senior SCIRI leader Sheikh Humam Hamoudi, came to chair the Constitutional Drafting Committee that was

created after the January 2005 election and responsible for drafting the permanent Iraqi constitution.⁹⁵

While threatening to boycott plans for an interim Iraqi administration if it were appointed by CPA officials rather than elected,⁹⁶ after securing the majority seats in IGC, the Shia members of IGC wanted to prevent its dissolution. Adel Abdul Mahdi proposed: “If the Governing Council or some version of it were to be maintained, then we could be flexible on the committee selection [meaning flexibility over the mechanism for picking a transitional assembly tasked to draft a constitution].” Given no elections, Abdul Mahdi viewed a Shia-dominated IGC as a “guardian” of securing Shia majority interests in the constitution-making process.⁹⁷ As a matter of fact, the Shia political parties who participated in IGC found many ways to advance Shia dominance through IGC. As Herring and Rangwala show, one method was through distributing benefits to supporters and acting as brokers between the local population and the CPA. The political parties in IGC were aided in this process by several factors.⁹⁸ On the one hand, in the absence of a state that could act as a service and security provider, the benefits that could be distributed by the political parties were in great demand. As Herring and Rangwala describe it, the most straightforward way to get employment with the institutions of, and foreign contracts for, the state was to get a letter of recommendation (*tazkia*) from one of the IGC parties. “Such letters could be obtained either by joining the party, or by making a substantial payment to it,”⁹⁹ claim Herring and Rangwala. In the absence of regulations to limit the role of political parties or to restrict their financing, Shia parties within IGC created a patron-client relationship that was not channelled through the Iraqi state, where the benefits went directly to the parties and not the state. This process contributed to shaping of Iraqi politics into one where major deals and political processes occurred outside the power of state. On the other hand, through their participation in IGC, formal state institutions and Iraqi ministries came under the command of IGC members. As Herring and Rangwala show, this process had three main consequences. First, ministries were weakened organisationally and transformed into the agents of political parties rather than neutral bureaucracies. They were packed with party and personal affiliates. Second, this process of party alignment set one ministry against the other, transforming their work from bureaucracies into agents of the wider political battle among political parties. Third, the sum of these developments was an absence of accountability and growing power centres outside the domain of the state.¹⁰⁰ Accordingly, Shia political parties benefited by dominating both the formal power institutions and the power that was outside the realm of the state. Thus, through this process, the nature of dual power in state-society relationships in Iraq was

entrenched, and subsequently became the framework that guided the process of constitution making and its final product.

The Shia political parties' attempts to dominate both the formal and informal structures of power yet not be bound by a minority were also extended to both entrench the power of the hawza over the state and protect the hawza from the state. This was expressed in the Shia proposal that Islam or sharia should be *the* principal source of legislation. This proposal had as much to do with Shia affection for the tenets of Islam and their attempt to create an Islamic order¹ as with protection of the hawza's independence from the state.² The hawza in Najaf was not only a source of moral inspiration and social guidance, it was a main source of legitimacy. Da'wa, the first Iraqi Shia political party, established at the end of 1950s, had as its main ideologue Ayatollah Muhammad Baqir al-Sadr of Najaf.¹⁰¹ By the time of Saddam Hussein's fall from power the connection between Shia political parties who acted on a state level and the hawza, an independent and non-state organisation that had profound power over the social life of the Shia, was therefore deep. This was demonstrated by Sistani's active involvement in post-Saddam politics. Recalling the deliberations in IGC and over constitution making, Majid Mousa points out: "To begin with the Shia members of Governing Council, following Sistani's position, refused to talk about any interim constitution that was made by an unelected body. They would not recognise its authority. However, when negotiations over the interim constitution started, they joined actively but referred always to the Marja'ia. They had to consult with Sistani before making any difficult choices. For them the opinion of Marja'ia was considered as a veto."¹⁰²

Thus, Shia political parties' demands that Islam should be *the* source of legislation, demands that grew stronger¹⁰³ as the process of constitution making pulled forwards, were also an effort to entrench the power of the hawza over the state, as well as to protect the Shia majority identity and social order – where the hawza is its most vital component – from the future state. By providing a robust role for Islam –thus inviting and granting the hawza juristic authority over the Islamicity of state legislation – the aim of Shia political parties was, as Haider Hamoudi puts it, to create "a state whose institutions and actors would be constrained by non-state forces,

¹ In December 2003, IGC (under the monthly rotating presidency of SCIRI leader Abd al-Aziz al-Hakim) tried to abolish the 1959 personal-status law and replace it with sharia.

² Early on, a number provisions such as references to holy places in Iraq and the sacredness of Marja'ia were proposed. As negotiations over the permanent constitution started, SCIRI pushed to make Islam "the" fundamental source of legislation. By 6 August 2005, a number of competing phrasings had appeared: "the fundamental source", "the first source", "the basic source", "a main source", "a source among sources" and "a fundamental source".

the Najaf jurists”.¹⁰⁴ In such a state, the relative independence of the hawza and the Shia as a community from the state would be assured.

From a constitutional theoretical perspective, Sistani’s demand to elect a constitutional assembly under conditions of the absence of overarching rules and institutions that can guide the process – as was the case in Iraq – meant that this constitutional assembly would only be under rules it chose to impose upon itself. Furthermore, if such an assembly had a narrow Shiite majority – which the demographic distribution of Iraq indicated – such a body, as Andrew Arato puts it, “could enact by simple majority simple majoritarian decision rules both for itself and for the following national referendum over the constitution”.¹⁰⁵ Nothing could stop such a body, as envisioned by Sistani, from arrogating to itself the control over the authorisation and distribution of power. Nothing would stop such a body from becoming a sovereign dictator. That was, of course, not the way that Shia members of IGC perceived themselves. Adel Abdul Mahdi, a senior SCIRI member of IGC, in fact, tried convince other members of IGC that an elected constitutional assembly would not be a threat to minority rights, because – he argued – “decisions would be made by consensus rather than by majority”.¹⁰⁶ Majid Mousa recalls that within IGC, SCIRI members insisted on making decisions by consensus.¹⁰⁷ Accordingly, the Shia self-perceived view was not one of a sovereign dictator, but rather of a tolerant yet unconstrained majority.

The initially democratic Shia approach turned into a sectarian and non-liberal approach to sovereignty. As such, it was strongly opposed by a loose coalition of Kurds, secular and nationalist politicians, and the CPA. In the absence of free elections to a constitutional assembly – a demand that Sistani had to give up after involvement and recommendations from the UN¹⁰⁸ – the Shia had to compromise. In order to avoid a total breakdown of the political community, the Shia reluctantly agreed to sign TAL. After the signing ceremony, Ibrahim Jaafari, a senior Da’wa party leader, read a statement on behalf of 12 of the 13 Shia council members (the 13th member was Majid Mousa, the leader of Iraqi Communist Party).¹⁰⁹ Stating that the document they had signed was “undemocratic”, and that they would seek changes in it, he stated that they “had signed the TAL to preserve the unity of the country”.¹¹⁰ In strategic-relational approach terminology, for the Shia, TAL was the creation of a relatively free zone of stability. It was a necessity in a certain spatiotemporal context to defer crisis tendencies to the future; a future that the Shia as a majority could, and would, seek to change.

The Kurds: Constitution as Instrument for Independent Principles

For the Kurdish parties, the US invasion was a blessing but also a source of anxiety. As they were oppressed and denied their rights as a minority by the central state throughout Iraq's history, the destruction of Saddam Hussein's regime was, indeed, a liberation. As Massoud Barzani, the KDP leader, expressed it in the official Arabic-language newspaper of the party, *Al-Taakhi*: "The Kurds are united in their support for coalition forces viewing them as liberators."¹¹¹

However, enjoying a de facto independence since 1991, the Kurds were worried about any future reconstruction of a strong central state. For Kurds, a strong central state meant imposition on Kurds, something they would not accept any more, as Barzani repeatedly would remark in *Al-Taakhi*.¹¹² During the opposition conferences the Kurds had acted as a united front and a general agreement on federalism as the future basis of state structures in Iraq had been reached. But the Kurds were aware that there was no consensus on the most fundamental issues of federalism,¹¹³ such as, what the nature of that state would be, and how power would be authorised and distributed. As the CPA positioned itself in favour of a federal state with a viable strong central government, and Sistani's majoritarian vision was embraced by SCIRI and Da'wa, the central tenet of Kurdish post-invasion policy became to preserve the autonomy of the Kurds.¹¹⁴

The Kurds embraced a vision of the constitution as an instrument for independent principles. According to this vision, constitutions serve as means for the achievement of autonomously established ends.¹¹⁵ This could be, for example, to form a perfect union – as in the case of the US Constitution¹¹⁶ – or to establish justice. In this sense, as William Alstynne writes, "the idea of the constitution is to create such institution and making such alternation in its articles that is deemed necessary to secure those ends".¹¹⁷ What should be emphasised, though, is that, according to this vision, a constitution does not give something new. A constitution as an instrument, to a great extent associated with the founding fathers of the US Constitution and their desire to protect their rights through a more perfect union, is understood to protect the inherent rights already possessed. As US Judge Cooley puts it, a constitution as an instrument "is not the beginning of a community, nor the origin of private rights; it is not the fountain of law, nor the incipient state of government; it is not the cause, but the consequence of personal and political freedom".¹¹⁸

The right that the Kurds already *had*, and that they wanted to secure through the articles of the Iraqi Constitution, was the right to autonomy. As Barzani would put in *Al-Taakhi*: “We are about drafting a new constitution...a constitution grounded in realities of Iraq today...that guarantees the basic rights of the Kurdish people so that the Kurds do not once again be exposed for the arabisation, Anfal campaign, and suppression.”¹¹⁹ The task for the Kurds was to formulate a closed, systematic unity of principles based on the right to autonomy and self-rule, and entrench it in the future Iraqi constitution. These principles were expressed through concepts of a voluntary union, pluralist federalism, and parliamentary democracy. As the US founders had voluntarily united themselves to secure the rights they already possessed, the Kurds saw the very reason why Iraqis should come together, and why Kurds should join the future Iraqi state, as being to secure the right to autonomy, which Kurds had enjoyed since 1991. Without the acknowledgment of that right there was no union to talk about.

The two main Kurdish parties – KDP and PUK – acted as a united front. This decision was not merely strategic, it was also rooted in the very logic of sovereignty, peoplehood, and the idea of federalism as the Kurds understood it. Upon Bremer’s announcement of creation of IGC, Barzani, in a speech to a conference of the main Kurdish parties, argued: “We face grave challenges today...We need to unite our fronts...We need to solidify the efforts of our struggle into a recognition of federalism and the rights of our people in the basic law and the future Iraqi constitution...With regard to the rights of the Kurds, the citizens of the Kurdistan region have the right to decide their future in Iraq based on a voluntary federalism.”¹²⁰ This was stressed in another article in *Al-Taakhi*, where Barzani claims: “We believe that the new Iraq should be based on voluntary federalism consisting of Iraq’s two main nationalities Kurds and Arabs”¹²¹ and “We need a new formula for the structure of the Iraqi state...where we Kurds decide our own structure of the government...and where the Arabs though being majority of the population do not impose their will on us through the central government.”¹²² The idea that Barzani advances here is that the Kurds are not the KDP and PUK, but one people, and one of Iraq’s two main nationalities; in accordance with the central tenet of federalism,¹²³ which commends a shared and self-government, the Kurds as a regional government are co-sovereign with the federal government.

In a sense, the Kurdish and Shia political parties shared the idea of a constitution as a fundamental act by the people, a political decision made by the people. They both feared that a constitution drafted by legal experts under the supervision of the occupation regime might undermine their goals. A quick handover of power to the Iraqi exile opposition as the sole and

legitimate source of power in post-Saddam Iraq had been a central demand of the Kurds and Shia during the opposition conferences. Therefore the Kurds demanded that “there must be a strong political element” in the constitutional convention, and “it’s not a matter of lawyers working behind closed doors”.¹²⁴ However, as the constitutional debate in post-Saddam Iraq unfolded, the difference between the Kurdish and Shia position became obvious in the very meaning and conceptualisation of the idea of people and sovereignty. Sistani viewed the constitution as a subjection to the will of people; one people, one united entity, of which the Shia composed the majority. Thus, for Sistani, it was “right”, and in accordance with democratic principles, that the Shia should not be bound by a minority. The Kurds, on the other hand, stressed the plurality of the people. For the Kurdish parties, the constitution was a political act and decision made by many peoples, the Kurds and Arabs being the two main nationalities in Iraq. The source of legitimate authority was not one people but many peoples, and sovereignty was exercised by many peoples together, in accordance with federalism, not one people divided between a majority (Arabs) against a minority (Kurds) as had been the case throughout Iraq’s history. The very legitimacy of the constitution and the new political order was therefore to be found in the basic idea that many peoples are the source of authority. In the Kurds’ view, these many people came together voluntarily and exercised co-sovereignty to secure this right. Take away the right of the many as the source of authority, and you have no political union at all.

The Kurds’ vision of sovereignty, and their adherence to voluntary union, co-sovereignty, and plurality of people, made them what Brendan O’Leary has called supporters of pluralist federation.¹²⁵ Practically, as O’Leary states, there are two polar contrasts in the design and operation of federations: integrative and pluralist. At the heart of the dispute is the idea of sovereignty: who is sovereign and how should sovereignty be exercised. The key dispute plays out over three central issues. While the integrative approach commands majoritarian decision making within the federal government, the pluralist adheres to consensual decision making. The integrative supports centralisation in the power relationships between the federation and the regions, the pluralist favours decentralisation. The integrative has a mononational approach to identity; the pluralist has a multinational approach. Non-communal legal experts of the Iraqi Constitution, the CPA, and the Shia, by a very different logic, were supporters of an integrative approach. Legal experts referred to “engendering national cohesion”, the CPA to “viable central government”, and the Shia to “majority not bound by minority”. The Kurds, however, saw the very aim of the creation of the political union to be expressing the plurality and co-sovereignty of the people. While legal experts and the CPA tried to “solve” the problem of sovereignty and

the nature of dual power in state-society relationships within Iraq by integrating people through fundamental democratic norms, and the Shia tried to solve the problem by integrating people through controlling the state, the Kurds explicitly wanted to express the duality, to entrench it in the constitution and make it the very basis of the future state; the starting point from which all other decisions would emerge.

The Kurdish vision of sovereignty and the Iraqi Constitution was underpinned in a series of speeches and articles by the KDP leader Massoud Barzani published in *Al-Taakhi*. Because *Al-Taakhi* is an Arabic-language newspaper, the speeches were therefore, to a great extent, directed to the Arab audience of Iraq and the Arab world.

An illustrative article by Barzani from 21 December 2003¹²⁶ clearly illuminates the Kurdish vision. The article was published under pressure from Sistani, the nationalist members of IGC, and the CPA, who all called for the creation of an administrative federalism, not one based on geography and multinationality, as the Kurds wished.

In the article Barzani states: “The Kurdish issue is not only about state-citizen relationships that could be solved through normal democratic procedures...The Kurdish issue is a political, national and ethnic issue.” Here, the pluralist vision of multi-nationality is outlined.

Furthermore he states: “Subsequent Iraqi regimes have oppressed the Kurds...But today the Kurds live in another condition...The Kurds have managed to create their own state institutions, the Parliament and the Kurdistan Regional Government, and civil society institutions... The Kurds are today expressing their right to self-determinacy and will not accept something less.” Here, the pluralist vision of co-sovereignty as a de facto reality in Iraq that cannot be reversed is outlined.

“We do not accept administrative federalism...because the Kurdish people’s struggle throughout the history has not been to separate Kurdish territories from each other, but unite them and defend the borders of Kurdistan...The respect for the will of the Kurdish people and the idea of a voluntary union of the Kurdish and Arab people, in a united Iraq, is not only a solution to the Kurdish issue but also to the Iraqi issue as well.” Here, the pluralist vision of favouring consensual decision making by the plurality of people is stressed.

“The federalism that Kurds demand is a political federalism expressed in geographical and ethnic terms...where the Kurds have the right to administer their own affairs...and which allows the Kurds to make decisions not only within its own region but also on federal level as

well.” Here the pluralist vision of decentralised federalism based on the co-sovereignty of people is outlined.

Therefore the principle that should guide the process of constitution making was one based on the voluntary union of political communities. For the Kurds, what Jon Elster calls upstream and downstream constraints¹²⁷ – the right to call for a constitutional convention, the mechanisms for selecting members of the convention and the mechanisms for ratifying the constitution – were conditional – as Barzani expressed it in *Al-Taakhi* – on an outcome that could guarantee the future of Iraq as “democratic, parliamentary and federal”.¹²⁸ If a democratic, parliamentary, and pluralist federalism could not be guaranteed, then there was no need at all to call for a constitutional convention.

The Kurdish position developed along a twofold strategy: to have a strong and substantial presence and say in Baghdad to block majoritarian tendencies, to share government and share co-sovereignty, and to seek as much independence as possible with regard to issues that Kurds deemed were of non-business to the central government, such as self-government and self-rule. Hoshyar Zebari, a senior KDP leader, put it this way in *Al-Taakhi*: “The Kurdish political leaders act as a united front...Its presence in Baghdad is a clear message for all those who are sceptical regarding the intentions of the Kurdish leaders...the leadership of the Kurds are genuinely Iraqi...Its presence in Baghdad means that we are full partners in this country and we will not accept to be treated as second hand citizens or half Iraqis. We are Iraqis with full rights and obligations...We will have full and real opportunity in the decision-making of this country.”¹²⁹

This was also expressed in the Kurds’ effort to strongly participate in the political bodies that were created by the CPA.¹³⁰ Barzani’s comments to the pan-Arab newspaper, *Al-Sharq Al-Awsat*, before the first meeting of the newly created IGC are illustrative: “Kurds will participate strongly in the new created governing council...Among the responsibilities of the Governing Council will be organising the process of constitution making...Kurds will not accept once again being treated as second grade citizens and will therefore strongly participate in the new Iraqi government...We will not accept to be excluded from some ministerial post...Kurds should also be given responsibilities in key Iraqi ministries that represents the country abroad and as well in the internal security of the country...We demand that Kurds should be fairly represented according to their share of population size.”¹³¹

While entrenching their influence over decision making in Baghdad, the Kurds kept the issues they deemed to be of Kurdish interest from the negotiation table. Interestingly, those issues were the most fundamental issues related to the nature of their future state. At the heart of the discord of the constitution-making process was the issue of federalism and the concept of self-rule.¹³² Should Iraq be a unitary or federal republic? If the latter, what should the nature, boundaries, and power relationships of the regions and the centre be? In particular, should the Kurdish region be defined ethnically or territorially, and should it include Kirkuk?¹³³ As a matter of fact, the Kurds' position over the issue of federalism created a highly explosive situation risking a total breakdown of the CPA's plans, and forced the CPA to discuss federalism separately with the Kurds in Erbil. Only when an agreement was reached with the Kurds did the CPA return to Baghdad to present it to the other IGC members.¹³⁴

The Kurds also opted to ensure their influence over the downstream constraints of the process of constitution making, the ratification process. They managed to do that through article 61(c) of TAL. TAL stipulated that an Iraq-wide assembly, elected no later than 31 January 2005, would draft a permanent constitution. This Iraqi Constitution would be "ratified if a majority of the voters in three or more governorates do not reject it".¹³⁵ This clause granted a veto right to the Kurds on the nature of the future federation, asserting the co-sovereignty of the people of Iraq. In Liam Anderson and Gareth Stanfield's words: "The knowledge on the part of all parties to constitutional negotiations that the Kurds had the numbers to reject a constitution that did not satisfy their demands left its indelible imprint on the document that eventually emerged."¹³⁶

While advancing their positions in the formal negotiations with other IGC members and the CPA, the Kurds also created facts on the ground. This was visible mostly in their approach to the issue of the Kurdistan Region borders, their claim over the city of Kirkuk, their refusal to demobilise the Peshmerga, and their claim over oil and natural resources.¹³⁷ These issues were interconnected through the very idea of co-sovereignty and the form of federalism the Kurds envisioned. The Kurds would not accept any other form of federalism other than one defined ethnically or territorially. As a co-sovereign people, the Kurds pointed out the exact boundaries of their region and claimed authority over it. Within this territory claimed by the Kurds, and disputed by the central government of Iraq, 23 percent of Iraq's oil reserves, and perhaps as much as 89 percent of its natural gas reserves, are thought to be situated.¹³⁸ Also, Kirkuk was considered by Kurds to be a part of this territory and historically a part of Kurdistan that had been denied to the Kurds through the former regime's Arabisation process. Thus, a reversal

process, a de-Arabisation process of Kirkuk, was necessary.¹³⁹ It was, as Barham Salih, the then prime minister of KRG, described it, “an evil that must be reversed”.¹⁴⁰ The history of violence, the fact that, at the height of Saddam Hussein’s Anfal campaign in 1988, the majority of mass killings of Kurdish women and children involved Kurds from Kirkuk-area villages – a vicious attempt by the regime to reduce the Kurdish population of Kirkuk – made any Kurdish concession on Kirkuk highly difficult.¹⁴¹ Thus, in the immediate aftermath of the invasion, the Kurds seized control of the key directorates (the governorate’s administrative departments) in the city and staffed them with their own civil servants.¹⁴² Further, on 18 May 2003, the Kurdish Parliament decided to annihilate the former regime’s decisions regarding the demographic changes and Arabisation of the Kurdish areas, particularly in the governorates of Kirkuk, Dayala, and Neineva, and some areas of Erbil and Dohok. It stressed that the Kurds who had been forced away should be able to return.¹⁴³

Thus, the Kurds, viewing the constitution as an instrument to secure their rights, saw any attempts to strengthen the power of central government as a threat to their rights and autonomy. As a matter of fact, the very existence of the Iraqi state was conditioned on it. Any future Iraqi state and constitution that aimed not to impose its will had to absorb the Kurdish demands, which were not in the line with the demands of other forces in Iraq. Consequently, the constitution had to reflect these contradictions and defer crisis tendencies in the state-society relationships in Iraq.

Conclusion

This chapter has been concerned with the structural coupling between the path-dependent legacy of the state, the attitudes and commitments of actors at the time of regime change and constitution making (2003–2005). Two main points were initially stressed. First, it was argued that the actors engaging in constitution making – both Iraqi and American – were positioned differently in terms of access to power and resources, and had incompatible visions regarding the future state and the idea of sovereignty. Second, it was argued that not only did agents have incompatible visions of the future Iraqi state – particularly the issue of federalism was divisive and threatened to tear the political community apart – but the process of constitution making also occurred under conditions of resistance and boycott from a big segment of Iraqi society; including the absence of security and the fragmentation of political authority along many axis, with a vast amount of power lying outside any regulatory mechanism. Consequently, through

this process, the nature of dual power in state-society relationships in Iraq – a formal power regulated by the state and a nonregulated power in the hands of dominant forces – and the practices used by actors in pre-invasion times were entrenched, and subsequently became the framework that guided the process of constitution making and its final product.

Furthermore, the incompatible visions of the actors, and their attempts to modify the strategic-selective context, created a situation where compromise was necessary to propel politics forwards. The CPA objective of creating a state based on the norms of democracy and representation was translated into an undemocratic and imposed constitution-making process, which antagonised substantial segments of Iraqi society. The Shia objective of creating a state based on the democratic principle of the will of people was translated into a non-liberal and sectarian demand to control the state. The Kurdish objective of protecting the basic rights of the Kurds was grounded in the idea of co-sovereignty of the people, which was translated into ethno-sectarian demands and policies that threatened the very existence of the political community. Together these competitive and incompatible visions and strategies came to shape the post-Saddam constitution making and its final product. In order to propel politics forwards and aid the key task of the state, to facilitate displacement of crisis tendencies in the society, the Iraqi Constitution had to absorb and reflect the reality of the nature of dual power in state-society relationships by leaving important mechanisms of regulation, authorisation, and distribution of power outside the framework of the constitutional text. This could be achieved by vague language, contradictory principles, and injecting confusion in power relationships.

Hamid Mousa's description of this process – which is fully outlined in the next chapter – is illustrative. When asked by this study, “What did you [members of Constitution Drafting Committee] think when you drafted the Iraqi Constitution?” he replied: “When we drafted the constitution, we did not only look forward. We looked also backward. We looked at the horrible things the former regime had done and we wanted to overcome it. In the past we had imposition and discrimination. We tried to overcome this by creating balance between the social forces and fair representation of all segments of Iraqi society. In political praxis however, our attempts was translated into allocation of power and resources along ethno-sectarian lines. This was not our intention to entrench the cleavages in the Iraqi society. But given our desire to overcome discrimination, and to create balance of forces, and given contradictory vision of the main political forces which had an ethno-sectarian base, our liberal and democratic intentions turned into a political formula that both entrenched the ethno-sectarian cleavages, and created a

constitution that was vague in its language, that was contradictory, and that could be used by many actors to legitimise many and contradictory policies.”¹⁴⁴

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- ¹ Interview with Mundher al-Fadhli, Iraqi constitutional expert and advisor 2003–2004. The interview was conducted on 22 February 2013 in Stockholm. See also Feisal Amin Rasoul al-Istarabadi, "A Constitution without Constitutionalism: Reflections on Iraq's Failed Constitutional Process", *Texas Law Review* 87 (2008–2009): 1627–55.
- ² Dario Castiglione (1996); Carl Schmitt, *Constitutional Theory* (Duke University Press, 2008); Jürgen Habermas, "Citizenship and National Identity", in *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, MA: MIT Press, 1996); Walter F. Murphy, "Constitutions, Constitutionalism, and Democracy", in *Constitutionalism & Democracy – Transitions in Contemporary World*, ed. Greenberg, Katz, Oliviero and Wheatley (Oxford University Press, 1993).
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- ⁶ Interview with Mundher al-Fadhli, Iraqi constitutional expert and advisor 2003–2004. The interview was conducted on 22 February 2013 in Stockholm.
- ⁷ Several interviews were conducted with Dr Shirzad Ali Al-Najjar between 2013 and 2014, the last conducted on 3 September 2014.
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- ¹⁰ Feisal Amin Rasoul Al-Istarabadi, "A Constitution without Constitutionalism: Reflections on Iraq's Failed Constitutional Process", *Texas Law Review* 87 (2009): 1628.
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- ¹² Carl Schmitt, *Constitutional Theory* (Duke University Press, 2008), 63.
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- ¹⁶ Andrew Arato, *Constitutional Learning* (New York: 2004), available at researchgate.net. See also Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (University of Chicago Press, 1997).
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- ¹⁸ Ackerman, Bruce, *We the People: Foundations v. 1* (Harvard University Press, 1993).
- ¹⁹ Radio Free Iraq, Iraq Report: April 19, 2003, <http://www.rferl.org/content/article/1343118.html>; Radio Free Iraq, Iraq Report: April 26, 2003, <http://www.rferl.org/content/article/1343119.html>; Radio Free Iraq, Iraq Report: Maj 7, 2003, <http://www.rferl.org/content/article/1343121.html>; Radio Free Iraq, Iraq Report: July, 2003, <http://www.rferl.org/content/article/1343132.html>; (The articles were accessed on 10 March 2014)
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- ²³ *Financial Times*, 30 June 2003, "Bremer Urges Kurds to Join Council", Gareth Smyth.
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- ³³ *Ibid.*, 12.
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- ¹³⁵ TAL can be found in O'Leary, B., McGarry, J. & Salih, K., *The Future of Kurdistan in Iraq* (University of Pennsylvania Press, 2005).
- ¹³⁶ Liam Anderson and Gareth Stansfield, "Avoiding Ethnic Conflict in Iraq: Some Lessons from the Åland Islands", *Ethnopolitics* 9, no. 2 (2010): 222.
- ¹³⁷ Liam Anderson and Gareth Stansfield, *Crisis in Kirkuk: The Ethnopolitics of Conflict and Compromise* (University of Pennsylvania Press, 2009).
- ¹³⁸ Rex J. Zedalis, *Oil and Gas in the Disputed Kurdish Territories* (Routledge, 2012).
- ¹³⁹ *Al-Taakhi*, 7 August 2003, "President Barzani in an Interview with Al-Jazeera", Page 4.
- ¹⁴⁰ International Crisis Group, *Iraq's Kurds: Toward an Historic Compromise?*, Middle East Report 26 (8 April 2004), 12.
- ¹⁴¹ *Ibid.*, 10.
- ¹⁴² International Crisis Group, *Iraq's Kurds: Toward an Historic Compromise?*, Middle East Report 26 (8 April 2004), 11.
- ¹⁴³ *Al-Taakhi*, 20 May 2003, "The Kurdish Parliament: Annihilation of the Former Regime's Decisions regarding the Demographic Changes and Arabisation of the Kurdish Areas", Front Page.
- ¹⁴⁴ The interviews with Hamid Majid Mousa and Abdel Kaleq al-Zengena were conducted in Baghdad and Erbil, 2–7 September 2014.

Chapter Four

The Making of the Iraqi Constitution

This chapter illustrates that the Kurds and SCIRI, the two dominant forces on the Constitution Drafting Committee, tried to modify the selective impact upon themselves, and others of social constraints and opportunities, by reaching an agreement that facilitated the deferral and displacement of contradictions regarding federalism, at the expense of future problems and social forces excluded from these arrangements. Lack of clarity in constitutional provisions regarding federal power relationships, and the deferral of a substantial agreement on federalism in Iraq, were the very way to reach an agreement and preserve the political community. Injection of confusion into federal relationships served as a way to let the structure of federalism in Iraq develop with time, rather than imposing one view over others.

The drafting history of the Iraqi Constitution sheds light on the socially embedded nature of constitution making in Iraq. The material used in this chapter to analyse the making of the Iraqi Constitution is based on different sources. Three members of Iraq's Constitution Drafting Committee 2005, who also were involved in the negotiations over the interim constitution, TAL, were interviewed for this thesis. Together their accounts provide a broader picture of the process of constitution making in Iraq, all three maintaining the importance of the "balance of forces against imposition" as a main principle that guided the process. This material is combined with accounts of other actors involved in the constitution-making process. Among others, publications and interviews in various forums from Sheikh Humam Hamoudi, the chairman of Iraq's Constitution Drafting Committee, provide a vital account. Another vital source are the accounts of Ashley S. Deeks and Matthew D. Burton, who served at the US Embassy in Baghdad as legal advisor and deputy legal advisor during Iraq's constitution-drafting process. Their primary role was to advise senior US government officials about this process and about the draft texts the Iraqi negotiators produced, about who managed to record the evolution of the constitution drafts from late June 2005, and when the first set of provisions emerged from the committee, until mid-October of the same year, when Iraqi leaders agreed on the final set of changes. A third important source is the account of Haider Ala Hamoudi, a professor of law at the University of Pittsburgh, a relative of Sheikh Humam Hamoudi, and one of the few people beyond the staff of Sheikh Hamoudi who have been permitted to review the invaluable material of constitutional negotiations gathered by Sheikh Hamoudi during the entire process. Also speeches by members of Constitution Draft Committee and key political leaders of KDP, PUK, SCIRI and Da'wa, as published by the official newspapers of these political parties and by leading Iraqi and Arab media outlets, have been used. Together with a textual analysis of the Iraqi Constitution, these accounts provide substantial material whereupon the

guiding principles of constitution making in Iraq and the felt need to inject disharmony into the Iraqi Constitution to propel politics forwards can be analysed.

The Guiding Principles of Constitution Making in Iraq: TAL, the Interim Constitution

A crucial element of the Kurdish-Shia agreement to form a national unity government, following the 30 January 2005 election to the Transitional National Assembly (TNA), was the decision to base the permanent constitution on the principles and institutional mechanisms set forth in the interim constitution of Iraq, the Law of Administration for the State of Iraq for the Transitional Period, known as TAL. This was explicitly and publicly expressed by both Kurdish and Shia leaders, with an emphasis on what the Kurdish PUK leader and interim government president Jalal Talabani called the “administration of Iraq”.¹ Within this regard, Ibrahim al-Ja’fari, senior Da’wa leader and interim government prime minister, officially declared in a press conference on 3 March 2005: “There have been dialogues and a series of detailed dialogues that took place during the Governing Council phase, and these dialogues left their marks in the [TAL]. We will proceed on the basis of that.”²

Critical voices have rightly argued that nothing in TAL states that it must be used as a basis for the permanent constitution.³ TAL stipulates only that it will remain in force for the duration of the transitional period, until after a permanent constitution has been ratified, new elections held and a full-term government formed. At the time, the decision to base the permanent constitution on TAL was criticised because, it was argued, TAL was created during a time when there was a lack of legality, transparency, inclusiveness, and public participation; by what was considered to be the imposition of the US government. Thus, TAL was not considered a legitimate document by some observers.⁴ More importantly, TAL had been criticised by Grand Ayatollah Ali al-Sistani for, among other things, granting the Kurds an effective veto power over the permanent constitution – and thus binding the Shia majority to Kurdish minority views. This concern, and the very issue of the extent to which TAL should bind the makers of the permanent constitution, was raised again by Ali-Safi, aid to Sistani following the 30 January election. Al-Safi stated: “I am not giving a final opinion here, but I say that perhaps the transitional Iraqi State Administration Law is not binding on us. We still do not see a reason for us to abide by this law.”⁵

However, to understand why the Kurds and Shia agreed to base the permanent constitution on the principles and institutional mechanisms set forth in the interim constitution, one must

understand the main reasons for the creation of the interim, and why TAL was overall appealing to Kurds and Shia.

Analysing post-sovereign constitution making⁶ in post-communist Europe, Andrew Arato claims that perhaps “the most important reason interim constitutions have been adopted is the fear of dictatorship, the expectation that in an unstrained revolutionary process one of the sides would dominate and might either make a provisional dictatorship permanent or impose its authoritarian constitution. This can lead to the aspiration to apply the principle of constitutionalism not only to the result but also to the process of making constitutions.”⁷

Indeed, TAL, which was adopted on 8 March 2004, was a compromise among the dominant social forces in Iraq on the rules of the game and the structure of the state during the transitional period. The chosen name, Law of Administration – rather than “interim constitution” – was an indication of the compromise. It was a compromise between at least three philosophical approaches to the idea of sovereignty and constitution making, and a compromise between three political forces that acted from different power positions; a compromise with the aim to avoid the imposition of a constitution and one group’s view over the others. A fourth group was the Sunnis, who to a great extent, were excluded or chose to be excluded from the process of state making. The Sunnis, who had lost their privileged position in the Iraqi state, were fragmented; a fact that further undermined their position in post-invasion Iraq. Thus, it is difficult to talk about the Sunnis as a group in the constitutional process. They chose to not participate in the January 2005 election, which effectively meant that they had no representation in the Constitution Drafting Committee established by TNA. However, while the Sunnis boycotted the elections, they sought to participate in the drafting of the permanent constitution.⁸ In response to pressure from Sistani and the US government, 15 additional Sunni members were included in Iraq’s Constitutional Drafting Committee as full voting members.⁹ However, in the absence of a firm political agenda, and with their rejection of any notion of federalism at the outset of the negotiations,¹⁰ the Sunni members of the committee were pushed aside as the final negotiations and agreements over permanent constitution took form.¹¹ On 28 August 2005, Sunni Arab members withdrew from the negotiations, accusing the Kurds and Shia of seeking to impose a document inimical to their interests.¹²

A compromise had to be reached between these incompatible visions which, while not imposing one view over others, made it possible for the political community to go forwards and create a permanent constitution. In practical terms, TAL was the first step to reach such a compromise, and it is therefore not surprising that it became the basis upon which the permanent constitution

was established. TAL envisioned a federal structure for Iraq. TAL regulated Jon Elster's upstream constraints, defining who has the right to call for a sovereign assembly and the mechanisms for selecting its members. It envisaged the restoration of sovereignty to Iraq on 1 July 2004, and stipulated that an Iraq-wide assembly, elected no later than 31 January 2005, would draft a permanent constitution by 15 August 2005. It also regulated downstream constraints, the ratification process. It stipulated that the constitution would be "ratified if a majority of the voters in Iraq approve and if two-thirds of the voters in three or more governorates do not reject it".¹³ However, when it came to more-substantial issues regarding the incompatible visions of authorisation and the distribution of power, such as the power relationship between the federal government and its regions, TAL simply kept the status quo, deferring contradictions and crisis tendencies to the future and permanent constitution. Thus, the importance of TAL as a document is, to a great extent, to be found in the fact that it avoided the imposition of a constitution by deferring contested issues to the future.

In strategic-relational approach terminology, TAL was the first step to creating a zone of relative stability, aiding the key task of the state to defer crisis tendencies and contradictions to the future at the expense of unwanted social forces. TAL was a reflection of both the strategic requirements of differently situated actors within the larger political process at a certain time of Iraq's history, and the limits of the effort to create a constitutional order in Iraq. The main political idea that was absorbed from the strategic context of Iraq at the time of constitution making, and that TAL reflected and introduced into Iraqi politics during the transition process, was a "balance of forces", which was seen as a way to overcome "practices of imposition". In political praxis, this principle was translated into a balance of forces along ethno-sectarian lines, through quota systems, and the choice of consensus as a principle of decision making – known in Iraq as *tawafuq* and *muhasasa*. In an interview with the Saudi owned newspaper Al-Hayat, PUK leader Jalal Talabani states: "There is a worldwide misconception that I wish to clarify: The constitution does not stipulate that the parliament speaker be a Sunni Arab, that the president of the republic be a Kurd, or that the prime minister be a Shi'i. This arrangement is the result of agreements and understandings that were reached in exceptional circumstances so that the situation in Iraq may stabilise and there can be calm."¹⁴ This is most eloquently put forward by Hamid Majid Mousa, leader of Iraqi Communist Party and member of Constitution Drafting Committee, who was interviewed for this research. According to Mousa: "The making of Iraqi Constitution is a reflection of power struggles in Iraqi society. It was guided by the principle of creating balance of power among social forces such as no social force can impose

its will on others. Therefore, decisions based on consensus became the central principle within constitution drafting committee.”¹⁵

Tawafuq and muhasasa, in order to balance forces and avoid imposition, thus became vital mechanisms in the preservation of Iraqi political unity and politics in a post-invasion Iraq. They became, therefore, the cornerstones of the state project and thus constitution making. Hamid Mousa’s account is confirmed, both by the distribution of posts, and the mechanisms of decision making within the first main Iraqi political body that was created by the CPA after the invasion – the Interim Governing Council (IGC). Nothing in the CPA regulation stipulates that the establishment of IGC¹⁶ bound its members to make decisions according to consensus. It was rather the attempt to balance forces and the fear of imposition that guided the decision. Fearing the imposition of one group over the other, it took IGC two weeks to achieve a consensus on the issue of the IGC presidency. IGC members opted for a nine-member rotating presidency, based on ethno-sectarian division lines of Iraqi society.¹⁷ Tawafuq and Muhasasa, was later extended beyond IGC and became a principle in other major political bodies. The principle was institutionalised when the formal state institutions and Iraqi ministries came under the command of IGC members and were distributed along the principle of Muhasasa.¹⁸

Consensus, rather than voting, became the main principle of decision making in the negotiations over TAL. This principle was therefore also adopted in the negotiations over the permanent constitution. As Hamid Majid Mousa states, all parties agreed that the drafting committee’s work would be based on consensus, and voting would not take place.¹⁹ After the January 2005 elections for TNA, which was assigned the task to draft a permanent constitution, Shia and Kurdish leaders hurried to express their support for consensus and a balance of forces. Ammar al-Hakim, a leading SCIRI/ISCI member, told the London-based Arabic newspaper *Al-Hayat*: “Our political program calls for building bridges with all parties and forces and opposes monopolisation of power.”²⁰ The Kurdish leader Jalal Talabani stated: “We believe there are three basic components of the Iraqi people: Sunni Arabs, Shi’ite Arabs, and the people of Kurdistan, with different ethnic groups living in it. We believe that building new Iraq must be based on consensus, a consensus between these three basic components of the Iraqi people. Without consensus between these three components, no Iraqi unity, which would be viable, persistent, and resistant against the problems threatening Iraq, can be established. We do believe that Kurds, Shi’ite Arabs, and Sunni Arabs must agree on the form, or the formation, of new Iraq, on drafting the constitution, and on the distribution of basic [executive] posts.”²¹ Ibrahim al-Ja’fari, senior Da’wa leader and interim government prime minister, upon announcing an

incomplete list of cabinet ministers, told parliamentarians before the vote on the cabinet list (28 April 2005): “I have worked night and day to form the government which will focus on action and which reflects the ethnic and religious diversity of Iraqi society.”²² As a matter of fact, due to their stress on consensus, it took TNA more than three months to reach a consensus on the 55-member Constitution Drafting Committee and to choose the SCIRI leader, Sheikh Humam Hamoudi, as its head.²³ The KDP leader Massoud Barzani described the negotiations over the establishment of the Constitution Drafting Committee in the following words: “Our meetings are part of consensual steps and to make sure that no party – whether it is Shiite, Sunni or Kurd – monopolises power.”²⁴

Accordingly, to base the making of the permanent constitution on the principles and mechanisms outlined in TAL was therefore not only a strategic attempt by dominant forces to control the outcome of the process of constitution making, but, as the Kurds, the Shia and other parties involved in the decision making saw it, a political necessity. It was a necessity born out of the interaction of strategically oriented political actors within a strategic-selective context. Politics had to be propelled forwards by avoiding the imposition of one view over the others. Thus, the Kurdish-Shia agreement, to base the permanent constitution on the principles and institutional mechanisms set forth in TAL, was as much a reflection of the strategic requirement of the Shia and the Kurds at the time of constitution making as it was a reflection of the limit of effort needed to create a constitutional order.

TAL and Deferral of Contradictions and Crisis Tendencies

Because the permanent constitution was based on the principles and institutional mechanisms of TAL, where federalism as the state structure was recognised, the federalism debate in Iraq during the negotiations over TAL shed light on the various contested issues that had to be deferred to the future. To repeat, the basic principle of federalism has been defined by Elazar as “shared rule plus self-rule”.²⁵ This is a central point: federalism does not simply mean the separation of political authority, distributed in discrete units; it is shared between the central state and its regional political units.²⁶ Thus, in federations, at least two governmental units exist: a federal and a regional. The federal and the regional governments are co-sovereign. Both enjoy separate competencies – self-rule – although they may have concurrent or shared powers – shared rule. The authority of each entity is derived from the constitution, which makes federations, in Elazar’s words, “covenantal”. Further, federations normally have a supreme

federal court charged with upholding the constitution. One last core feature of a federation is a bicameral legislature, with one chamber that represents citizens as whole and one that represents the regions, a senate.

As mentioned in chapter 3, there are two polar contrasts in the design and operation of federations: an integrative and a pluralist. The key dispute plays out over three central issues. While the integrative approach commands majoritarian decision making within the federal government, the pluralist adheres to consensual decision making. The integrative supports centralisation in the power relationships between the federation and the regions; the pluralist favours decentralisation. The integrative has a mononational approach to identity; the pluralist has a multinational approach.²⁷

The history of TAL, and therefore the “serious” negotiations over federalism, started with the November 15 agreement. Shortly after signing the November 15 agreement, IGC established a drafting committee to begin work on the interim constitution. Adnan Pachachi, a Sunni Arab and a member of IGC who had been chosen to chair the committee, and KDP representatives worked on rival drafts of the document.²⁸

A supporter of a noncommunitarian vision of the Iraqi Constitution, Adnan Pachachi and his principal aid, Feisal Amin al-Istrabadi, embraced an integrative approach to federalism. Pachachi’s initial draft of TAL was to create a majoritarian, centralised, and mononational federation. This was expressed in five main principles. First, Pachachi’s draft referred to a national or central government, rather than a federal government. Second, it envisioned that this central government should have supremacy to make law throughout the federation on any matter. Third, it should be in control of integrated armed and intelligence forces. Fourth, it should enjoy exclusive competence in foreign policy, monetary policy, fiscal policy and borrowing. And fifth, it should possess ownership of natural resources. Moreover, Pachachi’s draft declared the KRG to be a subordinate level of the government of Iraq, eliminated the Kurdistan judiciary and envisaged an entirely centralised non-federal judiciary.²⁹

This vision was incompatible with the vision of the Kurds. This created a crisis. In early January the drafting committee adjourned for several weeks. As Hamid Majid Mousa, Mundher al-Fadh and Abdel Khaleq Zangena expressed it, at the urging of Iraqis involved in the process of constitution making, Bremer began a series of side discussions with the Kurds to draft the TAL language on federalism for subsequent consideration by IGC.

The Kurds, embracing a vision of a constitution as an instrument for independent principles, sought to attain maximum autonomy. Because Kurdistan existed as a de facto independent state, the Kurds saw no reason to sacrifice any of its present powers to the federal government. On 13 February 2004 the speaker of the Kurdistan National Assembly, Dr Roj Shaways, submitted a chapter called “Special Provisions for the Kurdistan Region” to be incorporated into TAL.³⁰ The chapter, which consisted of six articles, proposed a pluralist federation with wide autonomy for Kurdistan. The first article, “Continuity of the Kurdistan Region”, declared the Kurdistan Region a self-governing region, proposed legal supremacy within Kurdistan Region and pointed out the borders of Kurdistan. The second article, “Security of Kurdistan Region”, declared that the Kurdistan National Guard would be established from retrained peshmerga and exclude Iraqi armed forces from Kurdistan, save when granted permission. The third article, “Natural Resources in the Kurdistan Region”, proposed exclusive ownership of natural resources within the Kurdistan Region and mandated that petroleum from reservoirs currently in commercial production “may be managed” by federal government. The fourth article, “Fiscal Arrangements”, suggested fiscal autonomy for the Kurdistan Region with the right to raise taxes. The fifth article concerned ratification of the permanent constitution, proposing that it and any law to TAL “shall be valid in the Kurdistan Region only if approved by a majority of the people of the Kurdistan Region voting in a referendum”. The last article declared that TAL would come into effect in the Kurdistan Region when conforming changes were made in the constitution and laws of the Kurdistan Region.

Thus, these were the two polar visions of federalism in Iraq at the time of the making of TAL: centralism against decentralism. The provisions of TAL show us how the idea of avoiding imposition by deferring the contradiction to the future was accomplished.

Article 52 of TAL explicitly refers to preventing past practices of imposition. It states: “The design of the federal system in Iraq shall be established in such a way as to prevent the concentration of power in the federal government that allowed the continuation of decades of tyranny and oppression under the previous regime.”

Articles 53 through 57 preserve the status quo in Iraq (recognising federalism and KRG) and point both ways towards centralism and decentralism. These articles envision both a centralised federation in predominantly Arab Iraq and a decentralised federation as regards the Kurdistan Region. They point towards a centralised federation in the management of natural resources, fiscal policy, foreign policy, federal defence, and security policy, and a decentralised federation if the benefits of the natural resources are equitably distributed; they also entitle Kurdistan to

have its own police and internal security arrangements. To be more specific, to meet Kurdish demands, article 53 (A) recognises KRG “as the official government of the territories that were administered by that government on 19 March 2003 in the governorates of Dohuk, Arbil, Sulaymaniya, Kirkuk, Diyala and Neneveh”. However, to meet the demands of those who feared Kurdish secession, article 53 (B) declares that the “boundaries of the eighteen governorates shall remain without change during the transition period”. And to meet Shia demands for a possible better chance of distribution of power towards the Shia south, article 53 (C) states that any “group of no more than three governorates outside the Kurdistan region, with the exception of Baghdad and Kirkuk, shall have the right to form regions from amongst themselves”.

But what indicates the deferral of the future structure of the federal state more than anything else is that TAL is completely silent on the design of a second legislative chamber. As mentioned, a second chamber or a senate is usually designed to protect the interests of the regions. However, this presupposes an agreement on the idea of self-rule; meaning an agreement on the nature of regional government, whether this self would be defined along ethnic/religious or administrative/territorial lines, and how much rule should be assigned this self. Because the actors could not reach an agreement on the concept of self-rule, TAL remained silent on the creation of a second legislative chamber. On this matter, article 4 of TAL indicates: “The federal system shall be based upon geographic and historical realities and the separation of powers, and not upon origin, race, ethnicity, nationality, or confession.” This can be read as seeking solely to prevent the creation of a region where an ethnic or religious group dominates. But the same article mandates the design of a federal system on the basis of geographic and historic realities. As a matter of fact, the Kurds are a dominant group within the geographic region of Kurdistan, which means that at least one region in Iraq is created based on ethnicity.

Thus, whilst preserving the status quo, recognising federalism and the Kurdistan Region, and invoking the practices of consensus in negotiations over constitution, TAL put off the final settlement of the future structure of the Iraqi state.

The Guiding Principles of Constitution Making in Iraq: The Permanent Constitution

Abdel Khaleq Al-Zangena, a member of Iraqi Constitution Drafting Committee 2005, describes the principles that guided the making of Iraqi Constitution in the following words:

“On one side we had the Kurds. They did not want the others to interfere in their affairs. They wanted a decentralised federal state, and they were ready to cooperate with any faction that supported their cause. Then, we had the Sunni Arabs. For them the whole idea of the new Iraq and particularly federalism was unacceptable. They were not willing to discuss. They choose guns. And, then we had the Shia. The Shia saw an opportunity to rule Iraq. As the Kurds, the Shia were willing to negotiate with any faction who supported their cause. It was therefore not surprising that the Kurds and Shia joined forces and came to an understanding that made it possible for them to dominate the process of constitution-making and frame its content... Given the fundamental divisions on the future state among all actors, given a three decade legacy of Saddam Hussein’s dictatorship, and an Iraq that at the time of constitution-making was tearing apart due to insurgency and state collapse, the task to draft a constitution within three months was a mission impossible...As a result, and despite many long nights of discussions within the subcommittees of constitution draft committee, the final shape of the constitution was made by what became known as the ‘political kitchen’, an exclusive group of Shia and Kurdish leaders...This agreement between the Kurds and Shia could not be reached without deferral of many contested issues. There are around 60 articles in the Iraqi Constitution that are deferred to future, and that need to be decided by the Representative Council of Iraq.”³¹

Hamid Majid Mousa claims:

“When consensus among members of Draft Committee could not be reached, decisions were deferred to what became known as ‘political kitchen’ – a group of Shia and Kurdish leaders who decided over contested issues without involvement of fifty-five members of Constitution Draft Committee...The reason why an agreement could not be reached within the constitution draft committee was the very political nature of those issues, for example the issue of control and management of natural resources and the future of the city of Kirkuk. These issues had to be agreed upon in the future parliament...In order to avoid a total breakdown of the process, Kurdish and Shia forces managed to strike a deal that reflected their interests. However, this could not have been possible without invoking a vague language, contradictory provision and deferring important issues to the future.”³²

In his account of constitutional negotiations in Iraq, Mundher Al-Fadhli, a member of the Iraqi Constitution Drafting Committee 2005, describes the principles that guided the making of the Iraqi Constitution in the following words:

“From the very first meeting of the Constitution Draft Committee the incompatible visions became apparent. The discussions became more problematic when Sunni members participated in the committee, due to their nationalistic proposals...and their refusal of the idea of federalism in general and of the rights of the Kurdistan Region in particular...Among the most contested issues were: The meaning of federalism in the constitution, where the Sunni members objected a federal structure; The borders of the Kurdistan Region; The authorities of the Kurdistan Region and the authorities of the federal government; The control and management of oil and gas between the federal government and the Kurdistan Region; The issue of peshmerga, and whether it is considered as part of federal army or national guard, or whether it is considered as a militia, as some members of Constitution Draft Committee proposed; The identity of Iraq and whether it is Arabic, or whether it is pluralistic, Arabic and Kurdish...The Constitution Draft Committee tried to reach an agreement on most of these issues through consensus, however the principal problems were deferred to the political kitchen.”³³

According to al-Fadhil, the contested issues that were deferred to the political kitchen consisted of, among others, peoplehood, language (whether Iraq should be bilingual), the identity of Iraq, natural resources, voluntary federalism, and the right to self-determination, the city of Kirkuk and the borders of the Kurdistan Region.³⁴ These issues were at the heart of the Kurdish demands.³⁵ Among others, on 4 July 2005, PUK and KDP leaders chaired a meeting and speaking to Kurdistan Satellite TV, noted that they both had agreed that any issue that is related to Kirkuk must not be postponed and must be implemented within the framework of the law.³⁶

What these three accounts reveal is that, in order to avoid imposition, Iraqi constitution makers tried to reach consensual agreement. Where agreement could not be reached within the constitutional committee, the issues were deferred to political leaders.³⁷ The political leaders used constitutional disharmony, injecting confusion and uncertainty, as a tool to realise their own political ambitions. Thus, the constitution helped the key task of state to create a zone of stability and defer contradictions to the future. The negotiations over federalism and the deferral of most contested issues regarding the nature of self-rule and shared rule reveal the extent to which constitutional disharmony played this significant role.

The January 2005 election to TNA, charged with drafting a permanent constitution for Iraq, altered the strategic-selective context to the benefit of the Kurdish-Shia alliance. One feature of the result was the near-total absence of Sunni Arabs in TNA, due to the Sunni boycott.³⁸ It took TNA, which was now dominated by Kurds and Shia, three months to form a government and another month before the Constitution Drafting Committee of 55 members was established. The

Kurds secured 15 of the 55 seats on the committee.³⁹ The lion's share of the seats on the committee (28 seats) was taken by UIA, where SCIRI was the dominating force. Subsequently, the draft that emerged in August 2005 more or less involved a package deal of trade-offs between SCIRI and the Kurds.⁴⁰

First on 24 May 2005, the Constitution Drafting Committee held its first formal meeting and selected senior SCIRI leader Sheikh Humam Hamoudi as its chairman.⁴¹ This left less than three months to complete the draft constitution. By the end of June 2005, Fuad Ma'sum, first deputy chairman of Constitution Draft Committee, announced in the Iraqi TV channel Al-Sharqiya that 70 to 80 percent of the constitution has been approved by the parties, but that the remaining parts of the constitution will be the centre of controversy and debate.⁴² By that time it was clear that the committee could not agree on crucial issues and according to the time frame that TAL had prescribed. One crucial decision made by senior Shia and Kurdish leaders was to press forwards with the negotiations, bypassing the committee through the "political kitchen", and not using the provision in TAL that allowed an extension of the constitution-making process by six months. This was a strategic decision made by the Kurds and SCIRI – which dominated the Shia Alliance – based on what can be called the best common understanding regarding federalism reached between these two forces, and which thereby excluded and ignored the Sunni and Shia centralists' objection to federalism. In short, one could describe it as follows: The Kurds were willing to let the rest of Iraq be centralised and Islam play an important role in the affairs of the state, as long as such arrangements did not automatically apply to Kurdistan. The Kurds were willing to allow the Shia a freer hand with regard to a stronger role for the future national assembly, prohibitions on laws contravening Islam, and assurances that any agreement on federalism would not preclude the future formation of additional regions in Shia areas of the country. SCIRI was willing to create a decentralised federal state and let the Kurds have their autonomy, as long as the Shia could enjoy the same rights as the Kurds over their own affairs and possible future Shia regions.⁴³

SCIRI was far from antifederalist or antipluralist. As a matter of fact, while other members of the Shia Alliance were sceptical or rather antifederalists, like certain Da'wa members⁴⁴ and the Sadr movement, SCIRI saw in decentralised federalism an opportunity to advance the Shia vision of sovereignty; the majority not being bound by a minority. What SCIRI saw was the possibility of creating a Shia region in south and hence distributing more power and resources to that region, securing its strength against a future state that may not be under control of a Shia-dominated or Shia-friendly block.⁴⁵ Given the past history of the Iraqi state, and given the

fragmentation of political authority at the time of constitution making, where the nature and extent of state power was severely limited, to defer power from the centre to the regions and local authorities who already possessed it made sense for SCIRI. Thus, at the time of constitution making, the idea of powerful regions and governorates – a Shia region – against a weaker federal state was appealing on two grounds: It could act as a guarantee against a future state that may not be dominated by Shia-friendly forces; and it gave the Shia the same opportunities as the Kurds to create and enhance a region for themselves.

As a matter of fact, the first public announcement of this idea was made by Abdel al-Aziz Hakim, the late SCIRI leader, during a speech in Najaf on 11 August 2005, just a couple of weeks before the conclusion of constitution-drafting process. An analysis of Hakim’s speech makes it easier to understand the SCIRI position regarding federalism. What Hakim actually said was following:

“We believe it is necessary to erect a single region of the centre and the south of Iraq due to the existence of commonalities between the inhabitants of these areas, as well as the singularly oppressive policy with which the former regime confronted them. This opportunity of realising such a holy project must be taken.”⁴⁶

Hakim’s proposal for a single Shia region has been described as a defection from historical ideological trends within Shia currents by, among others, scholars such as Reidar Visser on the basis of Hakim’s reference to “the existence of commonalities between the inhabitants of these areas”. According to Visser, this sectarian view goes against historical currents in Shia ideology, which has been dominated by non-sectarian ideas.⁴⁷ However, in his speech, Hakim legitimises the idea of a single Shia region, not only on sectarian basis, but on a reference to “the singularly oppressive policy with which the former regime confronted them”. Accordingly, the SCIRI vision of decentralised federalism was as much a defection from traditional Shia ideology as an expression of it through the wish to protect the Shia from an abuse of state power, avoiding imposition, and not letting Shia be bound by minority views; the latter view was fully supported by Sistani and the Shia Alliance. Furthermore, in his speech Hakim expresses not only the right to form a region, as did other senior SCIRI members such as Humam Hamoudi,⁴⁸ but also a desire to do so: “This opportunity of realising such a holy project must be taken.” From a strategic-relational point of analysis, SCIRI’s position on federalism can therefore be described as the following: Given that the state is a moving target, and so the identity and boundaries of the society that the state is supposed to administer also is a moving target, the creation of “system of strategic selectivity”, for example, a system whose structure and modus

operandi are more open to the types of political strategy preferred by the Shia and therefore more accessible to the Shia, was essential. By obtaining guarantees that the Shia may create their own region, SCIRI could not guarantee the future identity of the Iraqi state, society, or constitution. However, it could modify the strategic-selective context, such as the creation of a Shia region or strong governorates, and therefore an Islamic identity of the state could be facilitated.

Thus, while SCIRI, a dominant force within the Sistani-sponsored Shia Alliance, pursued a specific Sistani-sponsored⁴⁹ agenda in the constitutional debate and tried to enhance Shia control over the future state and society, it was not only pragmatic but in many cases supportive of Kurdish demands for a decentralised federal structure. Both forces took advantage of the fact that, amid incompatible visions, constitutions can defer contradictions in society at the expense of other social forces, and future problems, by not clearly defining the scope and limits of public organisations' and officials' authority, by leaving critical matters outside of any meaningful mechanisms of authority, or by invoking vague and contradictory language.

Disharmonies in the Iraqi Constitution and Federal Power Relationships

When negotiations over the permanent constitution stalled within the drafting committee and the deadline set forth in TAL had passed, the interim prime minister Ibrahim al-Ja'fari held a press briefing on 16 August 2005, where he described the contested issues the drafters had to reach a final agreement on as: "Details of federalism; details of [the question of sharing natural] resources; a detailed formulation on the balance of authority and the distribution of power [between the centre and federal regions]; details of the representation of [federal] regions abroad [in Iraq's diplomatic mission]; and details of defining the electoral system."⁵⁰

As mentioned before, instead of using another six-month period as stipulated in TAL, the Kurdish-Shia alliance decided to go forwards with the negotiations over federalism, with or without Sunnis, and a draft Iraqi constitution was published on 29 August, then slightly amended on 13 September. To reach this agreement, the Kurds and Shia had to inject uncertainty into federal power relationships and defer important issues to the future, all in order to propel politics forwards. Outlining where uncertainty was injected, and what issues were deferred to the future, is crucial for understanding the limits of efforts to create a constitutional order in Iraq. These disharmonies were born out of the interaction of strategic actors within a strategic context at a certain spatiotemporal horizon. The disharmonies in the Iraqi Constitution

may also indicate where the main frontline of the political struggle and the discourse of post-ratification politics in Iraq may be. Among others, legal ambiguity may aid the task of propelling politics forwards, but it may also allow the federal government in Baghdad, as well as KRG, to selectively implement constitutional requirements. Consequently, by pointing out the disharmonies, one may have a tool to analyse future political disputes in Iraq. However, it should be stressed that, due to the fact that agents are constantly engaged in creating systems of strategic selectivity, these disharmonies may operate in unexpected ways. What is important to note is that what a post-ratification study of federal relationships really tells us is, rather, a manifestation of the fact that the constitution is resistant to its own destruction and, within the constitutional order, one may find identifiable continuities of meaning within which contradictions play themselves out in Iraqi society.

The disharmony and injection of uncertainty in the power relationships of the Iraqi federal state can be divided into three subsections: federal judiciary, distribution of authorities, and powers of the regions.

Federal Judiciary

The jurisdiction of the central government is dealt with in two sections of the Iraqi Constitution. Section 3 of the Iraqi Constitution is entitled “Federal Powers”. Here the relationships within the central government are outlined. Section 4 is entitled “Powers of the Federal Government”. Here the central jurisdiction in relation to that of the regions and governorates is described.

The main disharmony in the federal judiciary is to be found in section 3, chapter 3 of the Iraqi Constitution, which deals with the judicial power. Article 92 of the Iraqi Constitution establishes the Federal Supreme Court.⁵¹ Higher tribunals, whether they are constitutional courts, constitutional councils, federal supreme courts, or a combination of these, are theoretically vested with wide powers. Two important issues are at the stake: What type of judicial institution should safeguard the constitution and what should the jurisdiction of such an entity be? Who should occupy seats in the institution?

The Iraqi Constitution vests the Federal Supreme Court with the powers of overseeing the constitutionality of laws and regulations, in effect interpreting the provisions of the constitution, to settle disputes between the federal government and the governments of the regions and governorates, municipalities, and local administrations; to settle disputes among sub-

governmental entities; and to settle disputes between federal judicial institutions and sub-federal judicial institutions.⁵² Accordingly, from a theoretical institutional point of view, the nature of a higher tribunal, its mandate, how it is supposed to work, and the composition of it matters for federal power relationships.

The Kurdish position on this issue is easy to understand. The Kurds believed in a pluralist federation.⁵³ During negotiations over TAL they supported consensual decision making within the federal government. Consequently, within TAL, they had opted for a federal judiciary that is non-majoritarian and where federative entities play a direct role in the selection of judges. As a matter of fact, article 44(e) of TAL⁵⁴ envisages a pool of regionally representative candidates for the Supreme Court, and article 45⁵⁵ mandates a self-governing and self-appointing judiciary. Consequently, what the Kurds wanted to ensure was legal supremacy within Kurdistan and a federal judiciary representative of Iraq as a whole.

To understand the Shia, and particularly the SCIRI, position two facts should be stressed. First, interestingly, as Heidar Ala Hamoudi, through his access to Humam Hammoudi's archives, has discovered, the leading Shia representatives for section 3 were Thamer Ghadban and Nouri al-Maliki (who later served as Iraq's prime minister); both of them Da'wa members and opponents of the decentralised federalism that the Kurds and SCIRI advocated. Heidar Hamoudi notes that Ghadban and Malilik were "fully aligned with the Sunni nationalists" on the issue of creating a strong central state with broad jurisdiction.⁵⁶ Second, while SCIRI was not the "mouthpiece" of Sistani, by virtue of Sistani's involvement in Iraqi politics and his power over the Shia Alliance, SCIRI adopted an approach to promote the hawza's demands wherever it could in the constitutional negotiations. As mentioned earlier, this strategic relationship was translated politically into efforts to entrench the power of the hawza over the state; to protect the Shia majority identity and social order from minority demands and a from future state that might not be sympathetic to Shia.

Within the constitutional negotiations over the federal judiciary, SCIRI and the Shia Alliance tried to insulate the hawza's dominance and autonomy through two main provisions. First, they endorsed a provision that stipulated that no law could be enacted that would violate the "rulings of Sharia".⁵⁷ It was later changed in the Iraqi Constitution to "No law may be enacted that contradicts the established provisions of Islam."⁵⁸ This provision had a direct impact on the federal judiciary because the burden of interpreting future legislation would fall on the future parliament and future supreme federal court. Second, SCIRI and the Shia Alliance opted for the creation of a higher tribunal – first opting for a constitutional court and then a constitutional

council – with express authority to review legislation before its enactment.⁵⁹ Moreover, they opted for a composition of the higher tribunal that dropped any requirements that it include judges, and therefore made it possible for it to be dominated by Sharia scholars. Instead of requiring a supermajority vote by the future parliament, they envisaged that the higher tribunal would be nominated by a simple majority (which the Shia believed they would acquire in the future parliament).⁶⁰ These initiatives expressed the idea that if there was to be an effective Islamic review over legislative and federal court activity, then that control would need to be located outside the legislature and higher tribunal, and independent of the partisan political interests. Consequently, this was an invitation to grant the hawza juristic authority over state and federal legislation, and to create state and federal power relationships whose institutions and actors would be constrained by non-state forces: the Najaf jurists.

A Najaf-dominated higher tribunal exercising review over Kurdish legislation with the right to strike down Kurdish legislation by reason of unconstitutionality concerned the Kurds. Furthermore, the Shia Alliance insisted not only on post-enactment, but also a review of legislation pre-enactment, for consistency with Islamic law. It heightened the concerns of the Kurds and other secular forces that the Shia sought to ensure the Islamic content of legislation through a supervisory judicial body similar to that in Iran.⁶¹

The final agreement on the nature and composition of the federal judiciary illustrates the extent to which the injection of uncertainty, and deferral to the future, was used to bring about a settlement. While theoretically vesting powers in the future Federal Supreme Court, the most essential issues regarding the composition and how the Federal Supreme Court was supposed to work were deferred to the future. Accordingly, article 92 of the Iraqi Constitution reads: “The Federal Supreme Court shall be made up of a number of judges, experts in Islamic jurisprudence, and legal scholars, whose number, the method of their selection, and the work of the Court shall be determined by a law enacted by a two-thirds majority of the members of the Council of Representatives.”⁶²

Given the vast powers that the Iraqi Constitution vests in the Federal Supreme Court – amongst others, overseeing the constitutionality of laws, interpreting the provisions of the constitution, and settling disputes between the federal government and the governments of the regions and governorates – the fact that Iraqi Constitution does not define the work of the court or its composition opens up the future for a struggle between the supporters of an integrative-centralist approach to Iraqi federalism and pluralist-decentralists. The main area where these conflicts can be pursued regards the exclusive respective competitive authorities of the federal

government's respective regions: the control and management of natural resources, the defence of borders and internal security, and the relationships of regions to the international community.

Another area within the federal judiciary debate where disharmony and deferral to the future played an important role dealt with the checks and balances of the federal government and the creation of a second chamber, the Federation Council, which represents the interests of the regions. The key question was how majoritarian, or consensual Iraqi federalism, should be; how much power should be invested in the federal government, and how strong a voice should minorities have at the federal level?

The Kurds advocating consensual federalism promoted proportional representative arrangements and tried to insulate mechanisms, such as the separation of powers, monetary institutions, and courts, from the immediate power of a federal majority. Consequently, they opted for a strong second chamber. The Shia Alliance, trying to insulate the power of the hawza and following the idea that a majority should not be bound by minorities, were not interested in arrangements that gave minorities a voice that was disproportional to their demographic strength.⁶³

Article 48 of the Iraqi Constitution states, "The federal legislative power shall consist of the Council of Representatives and the Federation Council."⁶⁴ However, other than an agreement that the Federal Council would reject legislation rather than create any of its own, all other issues regarding its competence and composition were deferred to future. Consequently, article 65 of the Iraqi Constitution stipulates: "A legislative council shall be established named the 'Federation Council,' to include representatives from the regions and the governorates that are not organised in a region. A law, enacted by a two-thirds majority of the members of the Council of Representatives, shall regulate the formation of the Federation Council, its membership conditions, its competencies, and all that is connected with it."⁶⁵

What is interesting is that the disharmonies that were injected into the provision of creating a second chamber – and therefore regulating the federal power relationships – played themselves out in the post-ratification period by the decision of political forces not to create a Federation Council. This is one of the many ways in which the Iraqi Constitution has been but one stage in an ongoing political struggle that plays itself out in many different fields, the constitutional being only one of them.

Distribution of Authorities

Section 4 of the Iraqi Constitution deals more straightforwardly with the powers of the federal government.⁶⁶ To a great extent, the constitutional debate involved how to control and distribute oil, gas, water, and other natural resources, as well as the strength of the federal government.

The early draft history, particularly the July 22 draft of the Iraqi Constitution prepared by the Shia-dominated Constitutional Drafting Committee,⁶⁷ revealed internal tensions within the Shia Alliance regarding how power should be distributed in Iraq. Centralist forces within the Shia Alliance were eager to see a strong central government. Therefore, in the first draft of the Iraqi Constitution – July 22 – they addressed the distribution of authority between federal and sub-federal governments by enumerating a list of authorities which were exclusive to the federal government.⁶⁸ The list granted the central government authority in a range of areas much wider than that provided in TAL. Among others, it included the drawing up of policies concerning foreign relationships, the international economic policy, the national security policy, the financial policy, and the management of water resources, electricity, health policy, public education, oil and gas resources.⁶⁹

However, by the end of the process, three important facts were established. First, emphasising the idea of co-sovereignty and pluralist federalism, the Kurds opted for a decentralised relationship of powers for the federation versus the region by simultaneously trying to achieve a larger regional role in managing oil and gas resources, and limiting popular ownership of gas and oil to “current fields”.⁷⁰ What the Kurds wanted to achieve was federal government management of current fields in partnership with the regions, and regional government exclusive control over future discovered fields. By the end of the process the Kurds had secured regional governments’ authority over natural resources beyond what TAL had suggested. Furthermore, the Kurds succeeded in both limiting the scope of exclusive federal government powers, from the earlier 22 July draft that proposed 23 items, to only 9, as well as shifting many of the exclusive authorities of the federal government to the section on joint competencies.⁷¹

Second, the success of the Kurds was, to great extent, possible thanks to SCIRI’s position. Fearing a future powerful federal state that may not be friendly to Shia demands, and aspiring to a political formula where the Shia majority was not bound by minorities, the idea of a future powerful Shia region or powerful Shia governorates was appealing to SCIRI. Therefore, SCIRI, despite resistance from centralist Shia members and Sunni opposition to create regions other than Kurdistan, pushed the Shia Alliance to expand the governmental authority of governorates

not yet organised into a region as a backup against a hostile future state.⁷² The governorates were given concurrent authority in custom management, environmental regulation, the health policy, and the educational policy. Furthermore, article 115 of the Iraqi Constitution stated that all powers not stipulated in the federal government's exclusive authorities "shall be the powers of the regions and the governorates that are not organised into a region".⁷³ One may describe the deal between the Kurds and SCIRI as follows: Kurdistan was willing to let the rest of Iraq be highly centralised and have wide authority as long as such arrangements did not automatically apply to Kurdistan.⁷⁴

Third, where the Kurds and SCIRI could not agree then constitutional disharmony in the form of vague language, injecting uncertainty, and the deferral of contested issues were used. This is clearly illustrated in the way that laws concerning the authorisation and distribution of oil and gas were dealt with. The point is that these provisions can be read in many different ways and thus be politically constructed in various ways in the future. Thus, they are an expression both of specific political requirements at the time of constitution making and of the limits of the effort to create a constitutional order, leaving the regulation of the federal power relationship to play itself out in the future.

One way of reading these provisions is that the Iraqi Constitution makes it clear that natural resources are not an exclusive competence of the federal government. This could be based on the argument that article 111 of the Iraqi Constitution, which states that "Oil and gas are owned by all the people of Iraq in all the regions and governorates",⁷⁵ is deliberately not a sub-clause of article 110, which specifies the exclusive authorities of the federal government. Furthermore, reading article 111 in conjunction with article 115, which states that "All powers not stipulated in the exclusive powers of the federal government belong to the authorities of the regions and governorates that are not organised in a region. With regard to other powers shared between the federal government and the regional government, priority shall be given to the law of the regions and governorates not organised in a region in case of dispute"⁷⁶, and combined with article 121 (second), which stipulates that "In case of a contradiction between regional and national legislation in respect to a matter outside the exclusive authorities of the federal government, the regional power shall have the right to amend the application of the national legislation within that region",⁷⁷ one may conclude that regional or governorate laws can trump federal laws concerning oil and gas regulation in certain circumstances. In addition, reading these articles in conjunction with article 112, which states that "The federal government, with the producing governorates and regional governments, shall undertake the management of oil

and gas extracted from present fields”, and “The federal government, with the producing regional and governorate governments, shall together formulate the necessary strategic policies to develop the oil and gas wealth in a way that achieves the highest benefit to the Iraqi people”,⁷⁸ one may conclude that the federal government’s role in the control of oil and gas is marginal, confined to current fields, shared with the regions and governorates, and subordinated to regions and governorates in the event of clashes. This is a highly decentralised reading of the oil and gas provisions in the Iraqi Constitution based on the Kurdish vision of co-sovereignty and pluralist, consensual federalism. This is but one way the disharmonies created can play out in future politics.

Another way to read it is that regional and governorate law cannot automatically trump federal laws on oil and gas. This reading is based on the argument that articles 111 and 112 are intentionally not a sub-clause to article 114, which specifies what “competencies shall be shared between the federal authorities and regional authorities”.⁷⁹ So, whilst article 111, which states that oil and gas are owned by all the people of Iraq, is not a sub-clause of article 110, which specifies the exclusive authorities of the federal government, neither is it a sub-clause of 114, which specifies the concurrent authorities. This is another way in which the disharmonies created can play out in future politics.

By injecting confusion and the deferral of regulations concerning oil and gas, the Kurds and SCIRI managed to realise their political ambitions. The extent of federal or regional control over these resources will depend on future legislation by the federal government and the producing regions and governorates, the composition of the Iraqi Council of Representatives, and the role played by the Federal Supreme Court, whose work and composition is not defined by the Constitution. Thus, how consensual or majoritarian these provisions will be read is deferred to the future. However, the consequence is that – as Hamid Majid Mousa describes it – important mechanisms of regulation of political authority are outside the constitutional framework, risking an ongoing unconstrained process where the legislation regarding oil and gas does not come to a legal and constitutional conclusion. Hamid Majid Mousa also states:

“Iraqi Constitution is elastic in the sense that it means many different things to many different social forces in Iraq. It can be twisted in many ways. You cannot claim that Iraqi Constitution gives a certain group or fraction of the society more than others. However, it may just do that because it can be interpreted in different ways and political actors can defend many and contradictory positions and decisions on the basis of the text and what has been left out... For example, Iraq’s economy is based on oil. Yet, despite the fact that the constitution was adopted

in 2005, Iraq does not have a hydrocarbon law.”⁸⁰ Accordingly, and as stated earlier, the constitution remains but one stage in an ongoing political struggle that plays out in many different fields.

Powers of the Regions

Section 5 of the Iraqi Constitution is concerned with the powers of the regions and, more specifically, the broader structure of the Iraqi federal system. On the one hand, section 5 deals with one of the most contested issues between supporters of an integrative approach to federalism and those of a pluralist approach: the issue of self-rule – the nature of that “self” that should be given rule, and how much “rule” should be given to that self. On the other hand, as the Kurds and SCIRI were affirmative regarding expanding the powers of the regions and governorates at the expense of the federal government, there was not much need for deferral of constitutional provisions regarding powers of regions in the negotiations between them.⁸¹ As a matter of fact many provision regarding the structure of regions and governorates, as well as formations of new regions, are clearly outlined and articulated in section 5 of the Iraqi Constitution – unlike the vague language elsewhere.

In broader terms, one may describe the attempts of the Kurds and SCIRI as follows: While the Kurds wanted to preserve the autonomy they considered they already had and that had been articulated in TAL, SCIRI insisted on having the same opportunities as the Kurds to form regions and giving those regions the same level of power as the KRG.⁸²

Already in the 22 July draft constitution prepared by the Shia-led drafting committee, provisions granting governorates “authorities that are not within the jurisdiction of the federal authorities” were included by SCIRI.⁸³ On 28 July 2005, the Kurds came out with their own proposal for the draft constitution, outlining the scope and nature of self-rule the Kurds envisioned.⁸⁴ The draft, maintaining the idea of co-sovereignty and pluralist federalism, described Iraq as a “voluntary federation”, gave governorates that border foreign countries the power to maintain “self-defence forces”, established the border of Kurdistan based on a map approved by Kurdistan National Assembly, and gave the people of Kurdistan the right to “determine their destiny”.⁸⁵

According to the three Constitution Drafting Committee members interviewed in this research, resistance to these demands were made by Sunni members and centralist Shia members of the

committee. Disliking the idea of co-sovereignty, centralist-integrative forces regarded Iraq's regions and governorates as subnational units of a unified Iraq and not as co-sovereign entities.⁸⁶ Accordingly, their objections were expressed in several areas. They objected to the idea of a regional constitution, arguing that constitutions belong only to sovereign nation-states.⁸⁷ They demanded the enumeration of the powers of the regional legislature.⁸⁸ They argued against the idea of regions engaging directly with foreign bodies, they demanded to include the right of the regions to request the assistance of federal troops in case of national emergency, and to reinforce the notion of national supremacy, they opted for the chief executive of the region to be formally appointed by the national president.⁸⁹

The Kurds and SCIRI managed to resist all of the abovementioned proposals. Article 116 of the Iraqi Constitution states, "The federal system in the Republic of Iraq is made up of a decentralised capital, regions, and governorates, as well as local administrations."⁹⁰ Article 117 "[recognises] the region of Kurdistan, along with its existing authorities, as a federal region."⁹¹ Article 119 stipulates the right and the procedure by which governorates can organise themselves into regions.⁹² Article 120 states, "Each region shall adopt a constitution of its own that defines the structure of powers of the region, its authorities, and the mechanisms for exercising such authorities, provided that it does not contradict this Constitution."⁹³ Article 121, paragraph 2, states, "In case of a contradiction between regional and national legislation in respect to a matter outside the exclusive authorities of the federal government, the regional power shall have the right to amend the application of the national legislation within that region."⁹⁴ Article 121, paragraph 4, declares, "Offices for the regions and governorates shall be established in embassies and diplomatic missions, in order to follow cultural, social, and developmental affairs."⁹⁵ Paragraph 5 states, "The regional government shall be responsible for all the administrative requirements of the region, particularly the establishment and organisation of the internal security forces for the region such as police, security forces, and guards of the region."⁹⁶ Finally, article 122, paragraph 2, stipulates that "Governorates that are not incorporated in a region shall be granted broad administrative and financial authorities to enable them to manage their affairs in accordance with the principle of decentralised administration, and this shall be regulated by law."⁹⁷

While the provisions in section 5 of the Iraqi Constitution are clear, reading these provisions together with provisions of section 4 – where power relationships are injected with confusion – there are ample opportunities for future political construction and disagreement with regard to the federal power relationships. Section 5 insulates important Kurdish demands regarding a

pluralist federal Iraq. However, the injection of confusion in the power relationships between the government of the region and the federal authorities opens up for an interpretation of key issues associated with a state's activities. The key question is the battle between central-majoritarian forces and supporters of pluralist federalism on the strength and authority of the federal respective regional state. As this thesis will show in chapter 6, this battle has played itself out to great extent on the unresolved issue of self-rule: the nature of the self that regions represent and their powers versus the federal government.

Conclusion

This chapter has tried to explain the limits of efforts to create a constitutional order in Iraq through a socially embedded definition of constitution that links it to state projects and state transformations within a strategic-relational approach to structure and agency. Accordingly, this chapter has established that what is portrayed as a fundamental norm in the Iraqi Constitution – a leaning towards decentralised federalism – reflects the strategic requirements of differently situated actors within the larger political process at a certain time of Iraq's history.

Also, this chapter reveals to us how the Iraqi Constitution, through constitutional disharmony, has helped social forces to advance one vision of state, sovereignty, and a predominant identity against another, in different spatiotemporal horizons, and by doing so has preserved the political community in the face of fundamental disagreements. It tells us how the Iraqi Constitution has acted as both a creator and manager of political conflict, how it has sustained different visions of political community, and empowered and limited the articulation of different identities – how it has shaped and is being shaped by Iraqi politics.

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- ¹ Radio Free Iraq, Iraq Report: March 1, 2005, at <http://www.rferl.org/content/article/1343017.html>; (Accessed on 15 March 2014).
- ² Radio Free Iraq, Iraq Report: March 7, 2005, at <http://www.rferl.org/content/article/1343018.html>; (Accessed on 15 March 2014).
- ³ International Crisis Group, *Unmaking Iraq: A Constitutional Process Gone Awry*, Middle East Briefing 19 (26 September 2005), 6.
- ⁴ *Ibid.*, 7.
- ⁵ Radio Free Iraq, Iraq Report: February 4, 2005, at <http://www.rferl.org/content/article/1343013.html>; (Accessed on 15 March 2014).
- ⁶ Andrew Arato, "Redeeming the Still Redeemable: Post Sovereign Constitution Making", *International Journal of Politics, Culture, and Society* 22, no. 4 (2009): 427–43.
- ⁷ Andrew Arato, "Interim Imposition", *Ethics & International Affairs* 18, no. 3 (Winter 2004–2005): 26.
- ⁸ The Sunni-led Iraqi Islamic Party later expressed regret about its decision to not participate. See, among others, Radio Free Iraq, Iraq Report, February 21, 2005, at <http://www.rferl.org/content/article/1343014.html>; (Accessed on 15 March 2014).
- ⁹ Interview with Hamid Majid Mousa was conducted in Baghdad on 6 September 2014.
- ¹⁰ Interview with Mundher al-Fadhli, Iraqi constitutional expert and advisor 2003–2004. The interview was conducted on 22 February 2013 in Stockholm.
- ¹¹ Interviews with Abdel Kaleq al-Zengena were conducted in Erbil, 2–7 September 2014.
- ¹² International Crisis Group, *Unmaking Iraq: A Constitutional Process Gone Awry*, Middle East Briefing 19 (26 September 2005), 4.
- ¹³ TAL, article 61.
- ¹⁴ Al-Hayat, "Talabani interviewed on neighbouring relations, US, Saddam", (9 June 2007).
- ¹⁵ Interview with Hamid Majid Mousa was conducted in Baghdad on 6 September 2014.
- ¹⁶ Coalition Provisional Authority Regulation Number 6 Governing Council of Iraq, to be found at <http://www.iraqcoalition.org/regulations/>. (Accessed on 12 February 2014).
- ¹⁷ International Crisis Group, *Governing Iraq*, Middle East Report 17 (25 August 2003), 16.
- ¹⁸ Eric Herring and Glen Rangwala, *Iraq in Fragments: The Occupation and Its Legacy* (Hurst & Company, 2006), 131.
- ¹⁹ Interview with Hamid Majid Mousa was conducted in Baghdad on 6 September 2014.
- ²⁰ Quoted in Radio Free Iraq, Iraq Report: February 4, 2005, at <http://www.rferl.org/content/article/1343013.html>.
- ²¹ Radio Free Iraq, Iraq Report: March 1, 2005, at <http://www.rferl.org/content/article/1343017.html>; (Accessed on 15 March 2014).
- ²² Radio Free Iraq, Iraq Report: May 2, 2005, at <http://www.rferl.org/content/article/1343022.html>; (Accessed on 15 March 2014).
- ²³ Haider Ala Hamoudi, *Negotiating in Civil Conflict: Constitutional Construction and Imperfect Bargaining in Iraq* (University of Chicago Press, 2014), 60.
- ²⁴ 10 February 2005, "Kurdish Leader against Sectarian Domination of New Iraq Government", to be found at <http://cabinet.gov.krd/a/d.aspx?s=040000&l=12&a=978>.
- ²⁵ Elazar, D., *Exploring Federalism* (University of Alabama Press, 1992).
- ²⁶ Anderson, Lawrence, "Theorizing Federalism in Iraq", *Regional and Federal Studies* 17, no. 2 (2007): 160.
- ²⁷ O'Leary, Brendan, John McGarry and Khalid Salih, *The Future of Kurdistan in Iraq* (University of Pennsylvania Press, 2005), 52.
- ²⁸ Noah Feldman and Roman Martinez, "Constitutional Politics and Text in the New Iraq: An Experiment in Islamic Democracy", *Fordham Law Review* 75, no. 2, Article 20 (2006): 895.
- ²⁹ *Ibid.*, 59.
- ³⁰ The chapter is published in O'Leary, Brendan, John McGarry and Khalid Salih, *The Future of Kurdistan in Iraq* (University of Pennsylvania Press, 2005).
- ³¹ Interviews with Abdel Kaleq al-Zengena were conducted in Erbil, 2–7 September 2014.
- ³² The interview with Hamid Majid Mousa was conducted in Baghdad on 6 September 2014.
- ³³ Mundher al-Fadhli, *Mushkelat Ad-Dastour Al-Iraqi*, Dar Aras le Tiba'a wa Nashrs, Irbil, 2010, 92–97.
- ³⁴ *Ibid.*
- ³⁵ Al-Quds Al-'Arabi, "Kurds set rules to approve the constitution", (20 July 2005); Al-Sharq Al-Awsat, "Signs of a crisis between the United Coalition and the Kurdish Alliance", (2 August 2005); Al-Ittihad, "Talabani Meets With PUK Political Bureau", (17 August 2005).

³⁶ Kurdistan Satellite TV, (4 July 2005).

³⁷ Al-Hayat, "Iraqi constitution suspended", (15 August 2005); Al-Iraq Al-Yawm, "Constitution negotiations continue", (16 August 2005); Al-Mu'tamar, "Parliament postpones constitution deadline", (16 August 2005); Al-Hayat, "Iraq's Pachachi wants charter delay, rejects Shiite autonomy", (16 August 2005); Al-Sabah Al-Jadeed, "Still no agreement on constitution", (22 August 2005); Al-Hayat, "Iraq's Shiites confirm their support for a united Iraq", (24 August 2005); Al-Hayat, "Consultations continues in hope of reaching agreement on constitution", (2 September 2005); Al-Sabah, "Groups still not in agreement on constitution", (13 September 2005); Al-Sharq Al-Awsat, "Lawmaker unable to agree on constitution amendments", (8 September 2005); Al-Mada, "Committee to consider amendments to draft constitution", (15 September 2005); Al-Ittihad, "Big changes should not be made in constitution", (19 September 2005).

³⁸ Middeastwire.com, Daily Iraq Monitor July 14, 2005, accessed on 14 September 2015; Al-Hayat, "Sunni's boycott constitutional committee in Iraq", (22 July 2005); Al-Sharqiya, "Sunnis to re-join constitution talks after Iraq Mps approve terms", (26 July 2005); As-Safir, "Incomplete Sunni representation on the constitution committee", (3 August 2005); Al-Hayat, "Iraq MP warns of civil war if Sunni demands ignored", (3 August 2005); As-Safir, "Iraqi Sunnis accept federalism under three conditions", (19 August 2005).

³⁹ Liam Anderson and Gareth Stansfield, "Avoiding Ethnic Conflict in Iraq: Some Lessons from the Åland Islands", *Ethnopolitics* 9, no. 2 (2010): 223.

⁴⁰ Ibid.

⁴¹ International Crisis Group, *Don't Rush the Constitution*, Middle East Report 42 (8 June 2005), 3.

⁴² Al-Sharqiya, "Iraqi committee official says 80 percent of the Constitution agreed upon", (28 June 2005).

⁴³ Al-Adala, "Lawmakers read constitution in parliament session", (30 August 2005); Al-Mada, "Ja'afari blames Arab states for silence", (30 August 2005); Al-Ittihad, "Big changes should not be made in constitution", (19 September 2005).

⁴⁴ Among the opponents of a highly confederalized Iraq was Nouri al-Maliki, who together with Thamer Ghadban acted as the leading Shia representatives for section 3 of the Iraqi Constitution, which dealt with jurisdiction of the central government. They preferred a strong central government with broad jurisdiction.

⁴⁵ Middeastwire.com, Daily Iraq Monitor July 12, 2005, accessed on 14 September 2015; Al-Dustour, "Sistani agrees on Federalism", (13 July 2005); Al-Quds Al-Arabi, "Al Hakim demands a Shiite region in the South", (12 August 2005); Al-Furat, "Iraq's Al-Sadr calls for peaceful protests", (17 August 2005); Adda'wa, 18 August 2005, "Federalism dominates constitution talks"; Al-Adala, "Iraqis have faith in constitution", (5 September 2005)

⁴⁶ See, among others, Reidar Visser, "The Two Regions of Southern Iraq", in *An Iraq of Its Regions: Cornerstones of a Federal Democracy?*, eds. Reidar Visser and Gareth Stansfield (Columbia University Press, 2008), 28–29.

⁴⁷ Ibid., 27–50.

⁴⁸ Sheikh Humam Hamoudi, "My Perceptions of the Iraqi Constitutional Process", *Stanford Law Review* 59 (2007): 1317.

⁴⁹ Al-Quds Al-Arabi, "Sistani rejects adding Kirkuk to Kurdistan", (19 August 2005).

⁵⁰ Radio Free Iraq, Iraq Report: August 19, 2005, at <http://www.rferl.org/content/article/1343036.html>; (Accessed on 15 March 2014).

⁵¹ Iraqi Constitution, article 92. Can be found at <http://www.parliament.iq/>; (Accessed on 15 February 2014).

⁵² Iraqi Constitution, article 93.

⁵³ Middeastwire.com, Daily Iraq Monitor July 9-10, 2005, accessed on 14 September 2015; Al-Quds Al-Arabi, "Kurds set rules to approve the constitution", (20 July 2005); Al-Hayat, "Baghdad: Federalism after elections and Rumsfeld confirms Iranian weapons", (10 August 2005); Khabat, "Kurdish women call for constitutional separation of religion and politics", (12 August 2005); Al-Ittihad, "Talabani Meets with PUK Political Bureau", (17 August 2005); Al-Ittihad, "Talabani will try to reach constitution consensus", (24 August 2005); Al-Taakhi, "Kurdistan Parliament to meet on constitution", (24 August 2005); Al-Iraq Al-Yawm, "Stability of Iraq depends on compatibility", (25 August 2005); Al-Taakhi, "Talabani optimistic about constitution prospects", (30 August 2005).

⁵⁴ TAL, article 44.

⁵⁵ TAL, article 45.

⁵⁶ Haider Ala Hamoudi, *Negotiating in Civil Conflict: Constitutional Construction and Imperfect Bargaining in Iraq* (University of Chicago Press, 2014), 65.

⁵⁷ The interview with Hamid Majid Mousa was conducted in Baghdad on 6 September 2014.

⁵⁸ Iraqi Constitution, article 2 (A).

⁵⁹ Ashley S. Deeks and Matthew D. Burton, "Iraq's Constitution: A Drafting History", *Cornell International Law Journal* 40 (2007): 45.

⁶⁰ Ibid., 50–51.

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- ⁶¹ Ibid., 46.
- ⁶² Iraqi Constitution, article 92.
- ⁶³ Haider Ala Hamoudi, *Negotiating in Civil Conflict: Constitutional Construction and Imperfect Bargaining in Iraq* (University of Chicago Press, 2014), 117.
- ⁶⁴ Iraqi Constitution, article 48.
- ⁶⁵ Iraqi Constitution, article 65.
- ⁶⁶ Iraqi Constitution, articles 109–115.
- ⁶⁷ Ashley S. Deeks and Matthew D. Burton, “Iraq’s Constitution: A Drafting History”, *Cornell International Law Journal* 40 (2007): 64.
- ⁶⁸ Ibid., 54.
- ⁶⁹ Haider Ala Hamoudi, *Negotiating in Civil Conflict: Constitutional Construction and Imperfect Bargaining in Iraq* (University of Chicago Press, 2014), 67.
- ⁷⁰ Ashley S. Deeks and Matthew D. Burton, “Iraq’s Constitution: A Drafting History”, *Cornell International Law Journal* 40 (2007): 55.
- ⁷¹ Haider Ala Hamoudi, *Negotiating in Civil Conflict: Constitutional Construction and Imperfect Bargaining in Iraq* (University of Chicago Press, 2014), 67.
- ⁷² Ashley S. Deeks and Matthew D. Burton, “Iraq’s Constitution: A Drafting History”, *Cornell International Law Journal* 40 (2007): 64.
- ⁷³ Iraqi Constitution, article 115.
- ⁷⁴ The interviews with Abdel Kaleq al-Zengena were conducted in Erbil, 2–7 September 2014.
- ⁷⁵ Iraqi Constitution, article 111.
- ⁷⁶ Iraqi Constitution, article 115.
- ⁷⁷ Iraqi Constitution, article 121 (second).
- ⁷⁸ Iraqi Constitution, article 112.
- ⁷⁹ Iraqi Constitution, article 114.
- ⁸⁰ The interview with Hamid Majid Mousa was conducted in Baghdad on 6 September 2014.
- ⁸¹ Haider Ala Hamoudi, *Negotiating in Civil Conflict: Constitutional Construction and Imperfect Bargaining in Iraq* (University of Chicago Press, 2014), 74.
- ⁸² The interviews with Abdel Kaleq al-Zengena were conducted in Erbil, 2–7 September 2014.
- ⁸³ Ashley S. Deeks and Matthew D. Burton, “Iraq’s Constitution: A Drafting History”, *Cornell International Law Journal* 40 (2007): 79.
- ⁸⁴ Ibid.
- ⁸⁵ Ibid.
- ⁸⁶ Mundher al-Fadhil, *Mushkelat Ad-Dastour Al-Iraqi*, Dar Aras le Tiba’a wa Nashrs, Irbil, 2010.
- ⁸⁷ Haider Ala Hamoudi, *Negotiating in Civil Conflict: Constitutional Construction and Imperfect Bargaining in Iraq* (University of Chicago Press, 2014), 73.
- ⁸⁸ Ibid.
- ⁸⁹ Ibid.
- ⁹⁰ Iraqi Constitution, article 116.
- ⁹¹ Iraqi Constitution, article 117.
- ⁹² Iraqi Constitution, article 119.
- ⁹³ Iraqi Constitution, article 120.
- ⁹⁴ Iraqi Constitution, article 121.
- ⁹⁵ Iraqi Constitution, article 121 (fourth).
- ⁹⁶ Iraqi Constitution, article 121 (fifth).
- ⁹⁷ Iraqi Constitution, article 122.

Chapter Five

Post-Ratification and the Development of Federalism in Iraq

This chapter argues that identifiable continuities of meaning within which the two polar visions of federalism have played out in post-ratification Iraqi politics can be formulated as follows: The Iraqi Constitution has been but one stage in the battle over the authorisation and distribution of power. Much of politics in Iraq, whether on the federal or regional level, is unregulated, particularly when it comes to the relationship between the two governmental entities. While centralist forces have tried to enhance the authority of the central government and introduce integrative measures whenever the circumstances have allowed, the main champions of federalism and pluralism – the Kurds – have been willing to accept the centralised efforts of the government of Baghdad, however, only to the extent it applies beyond the Kurdistan Region and has no real effect in the Kurdistan Region. The Kurds have perceived a voluntary and pluralist federalism both as a precondition for Iraq’s existence (the identity of Iraq) and as a tool to advance their independence from Baghdad. Thus, the lack of formal rules in the game of politics and power relationship has not hampered the different state projects centralists and decentralists have had, and have advanced. It has been as much a constraint as an opportunity, depending on the nature of the projects the actors have pursued, and the conditions under which they have been pursued. In broader terms, the structural conflicts inherent in the Iraqi Constitution and the integrative-pluralist tensions have played out within two arenas of Iraqi politics. The first is marked by an intra-Shia struggle for supremacy and the second by a Baghdad-Erbil conflict over the authorisation and distribution of power.

This chapter will show that after the December 2005 elections to the Council of Representatives, the once-united Shia Alliance created by Ayatollah Sistani disintegrated. The main reason was the issue of federalism. Accordingly, two camps appeared: a centralist camp and a decentralist camp. A turning point in this struggle was when the Shia centralist forces, supported by Sunni nationalists, succeeded in securing a vital centralist position through “The Law of Governorates not Organised in a Region”, Law no. 21 of 2008 (hereinafter the Governorate Law), which was adopted by the Iraqi Council of Representatives on 13 February 2008.¹ The first part of this chapter will focus on an analysis of this intra-Shia struggle over federalism. Its focus on the Governorate Law is grounded in two observations: The Governorate Law alters the constitutional provisions and tries to restructure the federal balance of central-provincial power relationships to the benefit of the centralists. Theoretically speaking, the Iraqi Constitution, by being vague on this issue, gives space to the federal government and provinces beyond Kurdistan to create a highly decentralised, or more centralised relationship, as they prefer. The Iraqi Constitution allows provinces and regions to defer some of their powers to the

federal government and accept federal legislation in areas of shared jurisdiction, if they so wish. However, the Governorate Law asserts central power over provinces by binding the right of provincial councils to enact legislation on local matters to the constitution and the national law and further, by stating, “The provincial council and local councils are subject to the supervision of the Council of Representatives.”² Being a significant alteration to the constitution, it institutionalises the power of the centralists against the decentralists. Moreover, the importance of a focused study of the Governorate Law is also to be found in the process by which it was enacted. This process – from early 2006 to 2008 – signalled the projection of a new strategic-selective context in Iraqi politics to the benefit of the centralist forces. This centralist success cannot be attributed to the constitutional text as such. Rather, it was a combination of constitutional ambiguity on this issue and changes in the strategic-selective context – fragmentation of the Shia Alliance, vulnerability of SCIRI, rise of nationalist sentiments in general, and a Kurdish ambivalence – that made it possible for the centralists to translate the constitutional provisions along a centralist vision. Furthermore, the making of the Governorate Law also confirms the socially embedded nature of constitutions – where state projects are occasionally understood with reference to the constitution and the constitution is occasionally understood with reference to state projects.

The second struggle has been defined by the Baghdad-Erbil relationship. Vital issues concerning the authorisation and distribution of power between Baghdad and Erbil has yet to be regulated. This is evident in the development of the three vital issues that were deferred to the future: control and management of oil and gas;³ the final status of disputed territories, including Kirkuk;⁴ and security arrangements⁵ between Baghdad and the Kurdistan Region. These three issues are interconnected and will be discussed in this chapter, with particular attention to oil and gas. Given that oil is Iraq’s sole source of income, and that both Baghdad’s and Erbil’s economic development depend on it, there is, therefore, no doubt as to why negotiations over a hydrocarbons law has been the defining feature of the Baghdad-Erbil struggle. Despite the vital importance of this law for both parties, there is, as yet no federal hydrocarbons law in Iraq. This chapter will show that the reason for this is underlying historical conflicts within Iraqi society, a competing vision of sovereignty among the political forces, and a general lack of formal rules. What can be stated is that the constitutional text, through its ambiguity, has proven to be a useful tool to legitimise contradictory decisions made by the centralists as well as the decentralists in this regard. Therefore, the inherent disharmonies in the Iraqi Constitution have enabled disagreements, as well as paved the way for ad hoc agreements,

and consequently prevented the political community from falling apart in the face of these contradictions. One may say that the Iraqi Constitution has acted as a spectator, player, and referee in the Iraqi political game.

The material used in this chapter is based mainly on official documents published by the Federal Government of Iraq and the Kurdistan Regional Government (KRG). In an effort to analyse legislation that may affect the development of federal-provincial-regional relationships, all federal government legislations during the period 2006–2010, available in Arabic at Iraqi Council of Representatives website, were reviewed.⁶ Furthermore, all Federal Supreme Court opinions during the abovementioned period that might affect these relationships were also analysed in Arabic.⁷ Accordingly, all legislation made by KRG during the period 2006–2010 that might affect federal relationships in the areas of oil and gas, disputed territories, and security management were also analysed.⁸

Other important sources are the discourses and practices that surrounded these legislative achievements. This chapter has used two main sources: first, interviews that were conducted for this research with Hamid Majid Mousa and Abdel-Khaleq al-Zangena, both members of the Council of Representatives in Baghdad, and second, official statements of the Kurdistan Region President, Massoud Barzani, and the Kurdistan Region Minister of Natural Resources, Dr Ashti A. Hawrami, as well as other relevant players in Kurdistan, issued by KRG and found on KRG's official governmental website. Consequently, this chapter has also tried to analyse official statements of the Iraqi Prime Minister Nouri al-Maliki and his Minister of Oil, Hussein Shahrastani. Unfortunately, by the time of Maliki's decline from power, all official statements and the weekly speeches he had made had also removed from the official website of the Iraqi prime minister.⁹ The same applies for Shahrastani, who is no longer minister of oil. Thus, this thesis has relied on official statements by Maliki and Shahrastani that were found before the websites were changed, as well as other statements documented by international and Iraqi news agencies. Another important source is the official newspapers of the main Shia political parties, SCIRI and Da'wa, as well as other daily Iraqi and Arab newspapers, where speeches of relevant actors were published.

Constitution Shaping and Being Shaped by Competing Shia State Projects

Centralist versus Decentralist

Three features mark the 2006–2010 intra-Shia struggle: the disintegration of the once-united Shia Alliance, the supremacy struggle over the Shia provinces in Iraq, and the rise of centralist forces and their dominance through constitutional and non-constitutional measures.

The Iraqi Constitution stipulated three main facts with regard to the future structure of provinces and regions in Iraq beyond Kurdistan. Influenced by decentralist forces of SCIRI and the Kurds, the constitution, first, allowed any number of governorates to create a region.¹⁰ Second, it gave all regions identical and broad autonomy under the constitution: the right to exercise executive, legislative and judicial powers as well as the power of nullification of national legislation.¹¹ Third, as a way to meet the centralists' forces, the constitution stipulated in article 118: "The Council of Representatives shall enact, in a period not to exceed six months from the date of its first session, a law that defines the executive procedures to form regions, by a simple majority of the members present."¹² Accordingly, while the constitution left the final agreement on how to form a region – beyond Kurdistan – to the elected Council of Representatives, it also provided many options to the competing parties in their supremacy struggle over the authorisation and distribution of power: the centralists, who tried to enhance the federal government's power over provinces; the superregionalists, who aimed to a broader region encompassing all nine Shiite-majority provinces in the south and centre (*Iqlim al-Wasat wal-Janub*)¹³; and the southern regionalists, who advocated the formation of a southern region comprising Basra, Maysan, and Dhi Qar governorates.¹⁴

As the post-ratification period unfolded, the reconstruction of the Shia-dominated provinces in Iraq therefore became the battleground over which Shia political parties within the Sistani-created Shia Alliance, UIA, fought. The previous chapter illustrated that the reason the idea of federal regions beyond Kurdistan made it into the constitution can, to a great extent, be attributed to SCIRI (hereinafter the Islamic Supreme Council of Iraq [ISCI])¹⁵. For ISCI, the idea of powerful regions and governorates – a Shia region – against a weaker federal state was appealing on two grounds. It could act as a guarantee against a future state that may not be dominated by Shia-friendly forces – or ISCI-friendly forces – and it gave the Shia the same opportunities as the Kurds to create and enhance a region for themselves.

The January 2005 elections to the Transitional National Assembly made ISCI the dominant force among the UIA. ISCI also did very well in the provincial elections. Although it did not

win a majority of seats in all provincial councils, it was able to appoint governors in six of the nine southern governorates in Iraq, as well as in Baghdad.¹⁶ Following Sistani's instruction to keep a united Shia front, the centralist forces within UIA – except the Sadrists – therefore did not vigorously oppose ISCI's federalist idea.

The idea of federal regions had also supporters beyond ISCI and ISCI's agenda in southern parts of Iraq. Resenting the central state and blaming the former regime for not investing in local infrastructure and public service, in February 2004 the governor of Basra advocated that Basra and its governorate should create its own region.¹⁷ Given that, according to a study by the International Group Revenue Watch Institute, Basra province alone has approximately 59 percent of Iraq's known petroleum reserves,¹⁸ the idea was appealing, particularly among Basra-based political parties, such as Fadhila,¹⁹ and the Iraq Federal Assembly and the Council for the Southern Region, both of which opened offices in Basra, Maysan, and Dhi Qar in late 2004 and early 2005, with a platform focused almost exclusively on the southern federalist agenda.²⁰

Once the Iraqi Constitution was ratified, and the 15 December 2005 elections for the first Iraqi Council of Representatives held, the divisions among the UIA became significantly visible.²¹ Seeing themselves as entitled to rule Iraq and to have the post of prime minister, on the issue of postelection government formation the UIA tried to keep its ranks united and to capitalise on its election triumph.²² The UIA resisted the Kurds, who advocated consensus rather than election results as a yardstick for forming an all-inclusive government. The UIA kept on insisting that the use of election results, and not consensus, as a yardstick to allocate cabinet portfolios to different political fractions²³ – a policy supported by both ISCI's leader Hakim²⁴ and Ayatollah Sistani.²⁵ However, in its internal deliberations, the UIA reached a deadlock regarding the candidate for the post of prime minister. On 12 February 2006 the UIA held a general meeting and resorted to voting, during which Ibrahim al-Ja'fari from the Da'wa party was selected by a margin of one vote over the ISCI candidate, Abdul Mahdi.²⁶ The closeness of the vote reflected the growing split between the two powerful Shia political parties. But it also reflected a deeper conflict among the Shia, particularly over the issue of federalism. One of the main reasons why Ja'fari was selected was due to the support of the Sadrists, who had gained 30 seats in the Council of Representatives.²⁷ The Sadrists, who were deeply antifederalists,²⁸ had decided to support Ja'fari after the latter agreed to their 14-point demands, among them a postponement of any decisions about creating autonomous federal regions beyond Kurdistan – a key issue that ISCI by no means wanted to postpone.²⁹

But maybe the most remarkable feature of the Shia split was that consensus as the form of decision making within the UIA – a tradition that had been established since 2003 – was abandoned in this intra-Shia battle, marking the beginning of the fragmentation of the Shia Alliance.

Subsequently, federalism became the main obvious question in the intra-Shia battle over the authorisation and distribution of power, on both a local and national level.³⁰ The battle had two main frontlines, the first was among the pro-federalists forces themselves, and the second involving pro-federalists against antifederalists.

The struggle among Shia pro-federalist forces to a great extent revolved around the confrontations between ISCI and the Fadhila party over the southern oil-rich provinces of Iraq.³¹ Being a Basra-based party, Fadhila lacked substantial followers on the national level. Therefore, for Fadhila, the federalism project in general was appealing.³² However, what was more appealing was the notion of a “southern region” (*Iqlim al-Janub*) consisting of three oil-rich provinces in south. As a matter of fact, in the voting held by the UIA, Fadhila had supported the ISCI candidate.³³ This may be explained by the fact that the alternative – a coalition of Sadrists and Da’wa – did not support further decentralisation projects.

The project of constructing Iqlim al-Junub was in conflict with the superregional vision that ISCI advocated.³⁴ The December 2005 parliamentary elections enhanced ISCI’s hold on power. But ISCI had a limited presence in Basra. In the January 2005 governorate council elections, Fadhila had won 12 of 41 seats and had emerged as the strongest party, and Muhammad al-Wa’ili, a Fadhila party member, had been elected to head the governorate.³⁵ ISCI therefore sought to incorporate the southern provinces in its superregion project consisting of nine provinces. Apparently, this was seen by Fadhila as a serious threat since it would significantly dilute its influence. Thus, the confrontation between ISCI and Fadhila took various forms. This has most vividly been expressed in a report by the International Crisis Group from 2007, *Where Is Iraq Heading? Lessons from Basra*. When ISCI lost ground after key governorate positions fell under Fadhila’s control, it used its strength on the national level to strip Fadhila of the Oil Ministry in the central government. Moreover, taking advantage of its influence in Baghdad, ISCI supported the Kurds in opening the oil sector to foreign investment and thus enhancing its own position as a key interlocutor for outsiders. Fadhila tried to counter these efforts, going so far as to cut off electricity to Baghdad in retaliation.³⁶

The second frontline was defined mainly by the old rivalry between ISCI and the Sadrists.³⁷ Having different bases of support and ideologies, the two groups had been locked in a struggle expressed through both discourse and violence, with the militias of each political party regularly clashing.³⁸ Subsequent to elections in January and December 2005 and government formation, the rivalry between these two groups has become “institutionalised”; they controlled different ministries and used their influence in the Council of Representatives to hamper each other’s efforts. The Iraqi Constitution and its ambiguities regarding federalism beyond Kurdistan therefore became a main tool in this struggle between the two old rivals. The Sadrists linked the issue of federalism to the selection of a new prime minister. Only a candidate who agreed to postpone any decisions about creating autonomous federal regions beyond Kurdistan would be supported by the Sadrists – which excluded any ISCI candidates. As a matter of fact, they did succeed in first nominating Ibrahim al-Ja’fari, and later electing Nouri al-Maliki, as prime minister, both of them from Da’wa.³⁹

ISCI, on the other hand, tried to push forward its federalist agenda and tried to come to a conclusion with regard to the law for formation of regions – as the constitution had required – through its influence within the UIA and the Council of Representatives, where ISCI still was a vital force.⁴⁰ This was largely expressed by ISCI’s own news agencies – the Arabic Al-Buratha News and Al-`Adala. ISCI expressed the necessity of upholding the UIA and its method of decision making through consensus.⁴¹ Furthermore, in an effort to strengthen its position as a broker in national politics, and find a compromise candidate for the post of prime minister who would be accepted by Kurds, Shia, and Sunni,⁴² it changed strategy and championed the creation of a national unity government.⁴³ Together with the Kurdish leaders, it restored the tradition of deferring significant political decisions to closed-door decisions made by senior political leaders.⁴⁴ Also, interestingly, and maybe to strengthen its position as a broker in national politics, an analysis of Al-Buratha News and Al-`Adala, reporting during 2006 reveals that, in its communication, while stressing the importance of following the Iraqi Constitution and federalism, ISCI avoids mentioning the superfederal region it envisioned.⁴⁵ These tactics did eventually succeed, and the first reading of the new Iraqi draft law for the formation of regions – also referred to as the Federalism Bill⁴⁶ – took place in the Iraqi Council of Representatives on 26 September 2006. The Sadrists, together with Fadhila and the Sunni Tawafuq party, boycotted the 12 October 2006 vote to approve the law. They did so in the hope that it would leave the Council of Representatives short of a quorum, which required the

representation of 138 delegates. However, 140 members were in attendance to vote in favour of the proposal.⁴⁷

The voting on the Federalism Bill was yet more evidence of the fragmentation of the once-united Shia Alliance, and a sign of change in the strategic political landscape of the Shia and indeed Iraq. The content of the bill itself⁴⁸ – despite the fact that it preserved the unique features of the Iraqi Constitution – also illustrated, and to some extent institutionalised, these divisions. First, the competing interests of Fadhila and ISCI were expressed in article 6 of the bill, which states that the referendum on the formation of federal regions “is successful if passed by a simple majority in each of the governorates that wish to federate as a region provided that participation is not lower than 50% of the registered voters.”⁴⁹ Accordingly, against the top-down approach of ISCI, this article adopted a bottom-up approach and provided improved protection of those provinces that feared absorption into the ISCI-dominated superregion. Second, the competing interests of the centralists and ISCI were expressed in a provision indicating that, under the new law, no regions could be formed for 18 months.⁵⁰

There was another important aspect to the Federalism Bill. The Kurds had no problems with the reconstruction of Iraq’s provinces, as long as these arrangements did not threaten their important interests. The Kurds did, though, have a big stake in the Federalism Bill. Article 140 of the Iraqi Constitution dealt with the fate of “disputed territories”; among others, the city of Kirkuk, claimed by the Kurds as part of the Kurdistan Region. The second paragraph of article 140 states: “The responsibility placed upon the executive branch of the Iraqi Transitional Government stipulated in Article 58 of the Transitional Administrative Law shall extend and continue to the executive authority elected in accordance with this Constitution, provided that it accomplishes completely (normalisation and census and concludes with a referendum in Kirkuk and other disputed territories to determine the will of their citizens), by a date not to exceed the 31st of December 2007.”⁵¹

The Kurds did not want to go forward with the Federalism Bill before a final agreement on the status of the city of Kirkuk and the disputed territories had been reached, fearing that the parts of the disputed territories they deemed to belong to Kurdistan could be taken away from them.⁵² Consequently, the Kurds concentrated their efforts on this single issue and managed, in what has been described as a “backroom deal” between leading Kurdish, Shia, and Sunni political leaders, to strike a deal that there would be a time frame – one year – for the Constitutional Revision Committee to complete its work⁵³ with particular attention to the disputed territories, and that the Federalism Bill must wait 18 months before implementation.⁵⁴

The next phase in the intra-Shia centralist-versus-decentralist struggle for dominance was the adoption of the Governorate Law on 13 February 2008. The significance of the Governorate Law is that it alters the constitutional provisions and tries to restructure the federal balance of central-provincial power relationships to the benefit of the centralists. This law was adopted in a strategic context that, in many aspects, was different from 2006 and that was much more favourable to the centralist forces. It was marked by an increasing resistance to sectarianism and a growing authority of the central government.

First, by 2008 there was a dramatic decline in bloodshed in Iraq due to operations of tribal awakening (Sahwat)⁵⁵ and Muqtada a-Sadr's August 2007 unilateral ceasefire.⁵⁶ Consequently there was a growing confidence in the federal government and a growing nationalism among some sectors of the Iraqi population. As the violence became ebbed, Iraqis blamed sectarian parties for the havoc, as well as for an alarming rise in corruption. This resulted in a new rhetoric, evident in the media and political elites, in which previously prevalent notions of ethno-sectarian 'balance' in government (muhasasa) were replaced with expressions of national unity.⁵⁷ This growing tendency towards nationalism among the Shia was shown in the 31 January 2009 local elections.⁵⁸ During the election campaigns the centralist forces of Prime Minister Maliki and his Da'wa party explicitly emphasised the difference between them and ISCI as being one of Da'wa favouring control by Baghdad and ISCI favouring radical decentralisation. In an interview in the daily pan-Arab newspaper *Al-Hayat*, Nouri al-Maliki largely reiterated his and Da'wa's position on federalism, stating that federalism is a constitutional option but not something that should threaten the potency of the centralised state.⁵⁹ ISCI, on the other hand, tried to reaffirm its position as the defender of the religious authority in Iraq. In a speech to a crowd of supporters in Basra, Abdel Aziz Al-Hakim stated: "Today, just as in the past, you great people of Basra are the supporters of the religious authority. I call on you and through you all of the Iraqis to rally around the religious authority and to be committed to its instructions and obey its orders because the authority is the protective shield for all of us. It is the bond that unifies us and directs us towards prosperity. It is the steering wheel that leads us to the beach of safety."⁶⁰ Furthermore, exchanged accusations about the reasons behind the failure of the reconstruction and development projects in the southern provinces, and the corruption and inefficiency that plagued those projects, with senior ISCI leader Adil Abdel Mahdi accusing the government and central authority of obstructing the "reconstruction of the south".⁶¹ As the election results unfolded, Da'wa were the big winners

everywhere, particularly in Basra and Baghdad, and the federalist forces of ISCI were decimated across the country.⁶²

Second, the growing authority of the central government during this period was also reflected – as an analysis of the legislation history of the Council of Representatives during the first parliamentary session, 2006–2010, shows – in that the central government legislated a series of laws that were not within its specific competence as articulated in article 110 of the Iraqi Constitution.⁶³ There were no significant protests over these laws from Iraqi provinces. As these laws did not affect vital Kurdish interests, the Kurds did not object to the increased legislative power of the federal government. Also, a reading of the Iraqi Supreme Federal Court's opinions conducted for this research shows that the provincial councils have been involved in litigation before the Supreme Court. However, these cases are rather a minority. Moreover, many of these cases did not evolve around the central issue of whether provincial councils are subject to the supervision of the Council of Representatives. Thus, they do not contest the authority of the federal government. Rather, they deal mostly with the legal status of provincial councils⁶⁴ and the means of elections of local provinces.⁶⁵

Third, during this period the central government initiated a series of actions to enhance its power physically, some of these actions being outside any constitutional framework. In March 2008 Maliki authorised a full-scale military assault on Basra and, later, Sadr City⁶⁶ to root out the militia of Jaish al-Mahdi belonging to rival Muqtada al-Sadr.⁶⁷ Simultaneously, Maliki moved to create tribal support councils, *isnads*, throughout much of the south of Iraq.⁶⁸ The *isnads* were modelled on the Sahwa (awakening) movement in Sunni areas, and therefore operated outside any legal or constitutional framework. Furthermore, they received their funding directly from the office of the prime minister.⁶⁹ The *isnads* helped Maliki to acquire the support base in the south that he had previously lacked and, with it, the organisational means with which to challenge the dominance of his main rival in south, and the main ally of the Kurds: ISCI. The effectiveness of this mix of patronage and an iron fist helped Maliki and centralist forces to enhance their dominance.

These changes in the strategic-selective context of Iraq forced ISCI to rethink the validity of its strategy, and the party slightly modified its approach to federalism⁷⁰ by maintaining a low profile on the issue of creating a super-region.⁷¹ However, when the centralist-oriented Governorate Law made it through the Iraqi Council of Representatives, Adil Abdul Mahdi, a senior ISCI leader and a member of the Presidential Council, withheld his signature.⁷² ISCI opposed the draft law on three grounds. First, there was a provision that allowed the Council of

Representatives to remove provincial governors in certain circumstances. Second, there was a provision that gave the Council of Representatives control over aspects of individual provincial budgets. Third, it included a deadline for the provincial elections, set for 1 October 2008.⁷³ For ISCI, the first two provisions meant not only a deferral of power from provinces to the centre but, more explicitly, a strengthening of anti-ISCI forces. Given the new nationalist sentiments in Iraq, the inclusion of a deadline for provincial elections was also not appealing for ISCI.

Given these facts, one may therefore conclude that the process of enacting the Governorate Law during 2006–2008, and indeed the law itself, was both a reflection of the change of balance of forces in Baghdad in favour of centralists and a projection of what was to come: a confrontation between the centralist forces and the Kurds.

Despite the Governorate Law's centralist nature, the Kurds did not put any serious effort into objecting to the legislation per se, as long as it did not affect Kurdish interests in Kurdistan and the governorate of Kirkuk. However, as the Council of Representatives went on to pass a law on Provincial Elections, in accordance with the Governorate Law's deadline for provincial elections, a chain of events that threatened Kurdish interests in the disputed territories, put the Kurds on the defensive and gridlocked the whole legislation process.

In July 2008, when the Council of Representatives tried to pass the Law on Provincial Elections, a group of legislators headed by members of the Turkoman minority inserted an amendment that sought to remove elections for the city of Kirkuk from the bill. Given what they deemed as demographic manipulation of the Kirkuk governorate by the Kurds since 2003, the Arab and Turkoman residents of Kirkuk feared they would lose in any elections held there. Thus, they presented a power-sharing formula, where the main communities would agree to divide provincial council seats equally, setting aside some for the Christians, in what to become known as 32-32-32-4 percent power-sharing formula. When this agreement was reached then the elections for other governorates could be held.⁷⁴ Having dominated the council in Kirkuk since 2003, the Kurds deemed elections to be in their favour and hence supported elections. This was clearly marked by Barzani, who declared in a statement posted on the Kurdistan Region Presidency's website in early August 2008: "We have been clear all along that we support governorate council elections. Let's hold elections tomorrow, including for Kirkuk."⁷⁵ However, the Kurds maintained that they were willing to accept a power-sharing formula on the condition that they would not lose the majority they had gained in the 2005 elections.⁷⁶

What happened next was viewed by the Kurds as an impediment to the implementation of the vital article 140 of the Iraqi Constitution, and was thus described by Barzani as a “conspiracy”⁷⁷ and violation of the Constitution, and indeed Iraq’s, identity. On 22 July 2008, the Council of Representatives passed the law with the Kirkuk amendment as proposed by the Turkoman-headed delegates. The bill postponed elections for Kirkuk and introduced the 32-32-32-4 power-sharing formula. But moreover, it also entrenched a strong centralist demand by mandating that security forces from “the centre and the south” of Iraq would take charge of Kirkuk military in the period while a committee of the politicians would have until the end of 2008 to explore solutions to the conflict over the city.⁷⁸

Barzani strongly condemned the law. In an interview with the Al-`Arabiya TV, Adham Barzani, a member of Kurdistan Parliament stated: “In fact, the decision to exclude the city of Kirkuk and the Kurdistan Region from the Iraqi provincial elections was issued by the Iraqi Council of Representatives, to the dissatisfaction of the Kurds. We hope the Kirkuk issue will not be resolved under an article of the law but under an article of the Iraqi Constitution, for which more than 80 per cent of the people voted, especially since the constitution is above all issues. Article 140 is the best solution to the Kirkuk problem, and the application of this article will keep Iraq strong and unified. Otherwise, Iraq will face many serious problems at present and in the future.”⁷⁹ Two of the three members of the Presidential Council vetoed the law: the Kurdish leader Jalal Talabani, president of Iraq, and the senior ISCI leader Adil Abdul Mahdi.

The Kurds saw the 22 July legislation not simply as a violation of a constitutional provision, but, for them, it was a violation of the very principle of voluntary union and the idea of co-sovereignty – and thus an attack on the sovereignty of the Kurdish people. In a statement, Barzani declared: “It became clear to us that what happened on 22 July in the Iraqi parliament was a full-scale attack on the democratic process; against the constitution; against the people of the Kurdistan Region; and against the gains achieved through the constitution. There was an attempt to annul all these. The law of the governorate council elections is a good law as a whole. But through the addition of an article to this law specific to Kirkuk, and as demonstrated by the means it was carried out, it has become a law detrimental to the people of the Kurdistan Region and their rights. It is targeted against the people of the Kurdistan Region and democracy... If it is still insisted that this has to be written into the law, we will go ahead with it. We will not give anyone the opportunity to accuse us of trying to impede the process. But this law would have to contain two or three points: this law should not in any way obstruct the implementation of

Article 140 of the constitution; and the powers of the Kirkuk governorate, as stipulated in Law No 13, will not be reduced.”⁸⁰

In another statement published on KRG’s website, Massoud Barzani declared: “We will not allow the Kurdish people’s achievements to be wrecked by the Iraqi parliament. Iraq will fall apart if the Iraqi constitution is violated.”⁸¹ Tens of thousands of people in the Kurdistan Region demonstrated against the 22 July ballot. The Kurdish cabinet reported that for “many Kurds the democratically approved Iraqi constitution enshrines the new federal democratic state and a just and equal relationship between all of its peoples. They fear that actions violating the constitution may relegate the Kurds once again to second-class status in Iraq.”⁸² Furthermore, the 22 July ballot was also perceived as a violation of Iraq’s identity. In an interview with pan-Arab newspaper *Al-Sharq Al-Awsat* which was posted on the website of KRG, Barzani stated: “It seems to me that some officials in Baghdad believe that the Kurdistan Region should be a governorate subordinate to Baghdad and that no institutions like the parliament and the ministries should exist. They want the Region to be subordinate to Baghdad and there should be no Kurdistan Region and no gains, rights, or anything...When we agreed to remain within Iraq and contribute to the political process, we did that with the view that we will have a constitution...This constitution defined the identity of Iraq, which is a federal Iraq.”⁸³

The Kurds had joined the Iraqi state to secure the right of autonomy for Kurdistan. According to the Kurds, the borders of Kurdistan included Kirkuk and other disputed areas. In the security vacuum of post-invasion Iraq, Kurdish forces, the peshmerga, had rushed across the de facto boundary separating the Kurdistan Region from the rest of Iraq between 1991 and 2003, also called the Green Line. The Kurds wanted to assert their claim to areas they deemed part of their historic patrimony. These areas include all or parts of the five provinces along the Kurdistan-Baghdad border. Thus, the Kurds claimed all of the province of Kirkuk; Kifri, Khanaqin and Bakadrooz districts in the province of Diyala; Tooz district in Salaheddin province; Badrah district in Wasit province; and Akra, Shekhan, al-Shikhan, al-Hamdaniya, Tel Kaif, Tall Afar and Sinjar in the province of Ninewa.⁸⁴ The Kurds were not willing to allow any legislation by centralist forces in Baghdad to take these areas away from them. For the Kurds, these areas were a part of Kurdistan and Kurdish identity. But it was more to that. To understand the magnitude of interconnection between the issue of the disputed areas and the issue of oil and gas, a reference to a study conducted in 2006 by the Revenue Watch Institute is illustrating. According to the study, of the three provinces subject to undisputed Kurdish control – Dahok, Erbil and Suleimaye – only Erbil was thought to hold oil reserves, 2.9 percent of Iraq’s total

reserves. However, the other five provinces to which the Kurds make total or partial claims were thought to account for around 19.6 percent of Iraq's total oil reserves, with Kirkuk coming in at 12.1 percent.⁸⁵ Consequently, there were big stakes in the conflict over the disputed territories. In the absence of an agreement over the disputed territories, the Iraqi Constitution had deferred the issue to the future. Article 140 of the Constitution mandated to hold a referendum on the status of those provinces by 31 December 2007 and take steps to ameliorate the demographic effect of Baghdad's earlier policy of Arabisation. Accordingly, the Kurds in their discourse repeatedly referred to the implementation of article 140.⁸⁶ Also, playing the role of kingmakers in the government formation after the December 2005 elections, the Kurds had given their support to Maliki,⁸⁷ but only after Maliki agreed to article 22 of the 2006 governing accord, which stipulated that normalisation in the disputed territories should be completed by 31 March 2007, a census held by 31 July of that year, and a referendum organised by 30 November 2007.⁸⁸ However, the Kurds had failed in realising their constitutionally mandated goal of determining the status of the disputed territories.⁸⁹ So they now faced a battle to incorporate these areas into the Kurdistan Region.⁹⁰ The 22 July legislation was therefore seen by the Kurds as an impediment to the resolution to the issue of Kirkuk.

In the autumn of 2008 and early 2009, the conflict between centralist forces in Baghdad and the Kurds, both discursively and on the ground, became alarming.⁹¹ At the height of Baghdad-Erbil tensions in 2008, Maliki used the same unconstitutional *isnad* strategy he had used in the south, to establish *isnads* in governorates of Nineveh, Kirkuk and Diyala – part of which the Kurds claim to be their territory – but also showed his strength by a near military confrontation⁹² with Kurdish forces in the disputed city of Khanaqin in August 2008. As Liam Anderson, Gareth Stansfield, and many other observers have noted, Maliki's access to state resources, both financial and military, was buttressed by a strongly nationalist appeal for a strengthening of the central government at the expense of the governorates and regions.⁹³

Publicly, Maliki attacked the vision of federalism adopted by the Kurds by touting the virtues of a strong state,⁹⁴ declaring, "We must say that the central government is stronger than the federal entities and that the federal entities are not stronger than the central government, as some think, with the central government only collecting and generating revenue and distributing it."⁹⁵ A few weeks later, Maliki criticised the constitution for having been drafted in haste in a time of transition, and declared that it needed to be changed in order to clarify the division of powers between the central government and the governorates. Maliki went on then attacking *muhasasa* and *tawafuq*. In May 2009, he declared in a television interview: "In the beginning,

consensus was necessary for us. In this last period, we all embraced consensus and everyone took part together. We needed calm between all sides and political actors. But if this continues, it will become a problem, a flaw, a catastrophe. The alternative is democracy, and that means majority rule.”⁹⁶ As the provincial elections of 2009 approached, across the airwaves, the dispute over oil revenues and Kirkuk between Maliki and Barzani degenerated into mudslinging. Maliki accused KRG for separatist tendencies. Barzani claimed that Maliki government wished to restore dictatorship. Answering Barzani’s accusation Maliki referred to his attachment to the constitution, saying in an interview: “I want to tell those who have ambitions to create a micro-state that our attachment to constitution has allowed us to unify Iraq”.⁹⁷

To conclude, due to competing visions of the future structure of the Iraqi state, the Iraqi Constitution deferred the settlement of federalism beyond Kurdistan to the future course of Iraqi politics. Thus, the constitution did not “solve” the conflict. Rather, it framed it and indicated where the lines of battle lay in the attempted realisation and institutionalisation of these interests. In the post-ratification period, the issue of federalism beyond Kurdistan therefore became the very tool in the intra-Shia struggle for political control over Iraq. The unceasing efforts of Iraqi Shia actors to modify the strategic-selective context resulted in the creation of a new strategic context, where the very understanding of what the constitution said about federalism changed through the increasing division among the once-united Shia Alliance. Thus, the constitution both shaped and was shaped by post-ratification politics.

Constitution Shaping and Being Shaped by Competing Kurdish and Central State Projects

Politics in Kurdistan

A study of Baghdad-Erbil relationships should be informed by the fact that these relationships are semi-regulated through a formal constitution, but also through the informal rules of the game. The Iraqi Constitution is, and has been, an important stage in the battle for authorisation and distribution of power. But it is only one of many stages upon which this battle between Baghdad and Erbil has occurred. Accordingly, to understand Baghdad-Erbil relationships, one must start by exploring the nature of politics in the Kurdistan Region and how it is related to, and how it affects, politics on national level.

The best starting point for this discussion is the political structure of the Kurdistan Region as mandated by the Iraqi Constitution. One of the most important articles in the Iraqi Constitution in this regard is article 126, paragraph 4: “Articles of the Constitution may not be amended if such amendment takes away from the powers of the regions that are not within the exclusive powers of the federal authorities, except by the approval of the legislative authority of the concerned region and the approval of the majority of its citizens in a general referendum.”⁹⁸ Theoretically, this article institutionalises the Kurdish interests and is a guarantee that immunises the powers of the Kurdistan Region against possible future assaults by the central government.

The powers of the Kurdistan Region, according to the Iraqi Constitution, are extensive and wide. Article 117 “recognises the region of Kurdistan, along with its existing authorities, as a federal region.”⁹⁹ Article 121, paragraph 1, stipulates: “The regional powers shall have the right to exercise executive, legislative, and judicial powers in accordance with this Constitution, except for those authorities stipulated in the exclusive authorities of the federal government.”¹⁰⁰ Paragraph 2 states: “In case of a contradiction between regional and national legislation in respect to a matter outside the exclusive authorities of the federal government, the regional power shall have the right to amend the application of the national legislation within that region.”¹⁰¹ Paragraph 3 states: “Regions and governorates shall be allocated an equitable share of the national revenues sufficient to discharge their responsibilities and duties, but having regard to their resources, needs, and the percentage of their population.”¹⁰² Paragraph 4 states: “Offices for the regions and governorates shall be established in embassies and diplomatic missions, in order to follow cultural, social, and developmental affairs.”¹⁰³ And finally paragraph 5 states: “The regional government shall be responsible for all the administrative requirements of the region, particularly the establishment and organisation of the internal security forces for the region such as police, security forces, and guards of the region.”¹⁰⁴

However, in order to regulate these powers in relation to the federal government, the Iraqi Constitution also requires that the Kurdistan Region should adopt a constitution that does not contradict the Iraqi Constitution. Thus, article 120 of the Iraqi Constitution stipulates: “Each region shall adopt a constitution of its own that defines the structure of powers of the region, its authorities, and the mechanisms for exercising such authorities, provided that it does not contradict this Constitution.”¹⁰⁵ To emphasise this point, article 13, paragraph 2, of the Iraqi Constitution states: “No law that contradicts this Constitution shall be enacted. Any text in any

regional constitutions or any other legal text that contradicts this Constitution shall be considered void.”¹⁰⁶

Yet despite the fact that one decade has passed, the Kurdistan Region has not adopted a constitution. A draft for the Kurdistan Region Constitution was prepared and first published in February 2006.¹⁰⁷ It was approved by the Kurdistan Parliament in June 2009¹⁰⁸ and was meant to be enacted in a regional referendum scheduled at the same time as Kurdistan’s provincial legislative elections on 25 July 2009.¹⁰⁹ However, it was never enacted.

Abdel-Khaleq Zengenah, a member of the Council of Representatives on behalf of the Kurdistan Alliance, in an interview conducted for this research, attributed the failure of enacting a constitution for Kurdistan to “internal affairs” of the Kurdistan Region.¹¹⁰ This explanation to a great extent is valid, but there are also external reasons behind the failure to enact a constitution – the dispute between the Kurdistan Region and the federal government on the core issues regarding federalism.

What supports Zengenah’s statement is that, when the draft constitution was to be enacted by the Kurdistan Parliament in 2009, it met strong obstacles in the form of protests by an emerging opposition party in Kurdistan – Goran (Change). The Goran Party’s roots and demands were grounded in a critique of the whole political framework in the Kurdistan Region. In a sense, as Alex Danilovich from the University of Kurdistan-Hawler, Erbil, rightly describes it, since the start of Kurdish autonomy in 1991 the political system in Kurdistan has been formed on “gentlemen’s agreements”, treaties between the main political parties – KDP and PUK – and legislative acts, executive orders and cabinet edicts.¹¹¹ The two parties have maintained separate administrations in the zones that they controlled since the end of the Kurdistan civil war in 1998. In early 2006 the two parties tried to institutionalise their interests through a formal – but not constitutional – agreement that became known as “PUK-KDP Reunification Accord”.¹¹² The two Kurdish parties described the accord as a step to form a single administration for their autonomous region under a deal that finally would draw a line under the civil war they fought in the 1990s.¹¹³ While the accord formally ended open hostilities between the two main political forces, and was a boost to Kurdistan’s efforts in dealing with the federal government as a united front, it also reduced Kurdish politics to the activities of the two parties, leaving out other small groups. Consequently the accord set detailed terms of sharing executive power between the KDP and PUK.¹¹⁴ According to the power-sharing formula, KDP members would be appointed to head the Agriculture, Culture, Electricity, Finance, External Affairs, Higher Education, Martyrs, Municipalities, and Water Resources Ministries. The PUK would oversee the

Education, Endowments, Interior, Health, Human Rights, Justice, Planning and Reconstruction, Social Affairs, and Transport Ministries. Furthermore, the KDP leader and the Kurdistan President, Masoud Barzani, would retain the presidency, and Nechirvan Barzani would serve as prime minister. The PUK's Adnan Mufti would serve as Parliament speaker. The parties would switch control of the Kurdish presidency and Parliament speaker positions after two years. However, there was no conclusive agreement on which party would control the Peshmerga Affairs Ministry, which would be responsible for managing some 160,000 peshmerga fighters, nor were there clear details of unification of other security forces such as police, military intelligence, external intelligence, and internal security services.¹¹⁵ Due to this power-sharing agreement between KDP and PUK, the Goran Party resisted the adoption of the draft constitution and instead required extensive social and political reforms, such as a parliamentary system in Kurdistan, as opposed to the de facto presidential form of government that existed in Kurdistan, and “demanded the full surrender of the two parties’ security apparatuses to the Kurdistan regional government”.¹¹⁶ This was, of course, not in the interest of KDP and PUK, and accordingly, no constitution was adopted.

The failure to adopt a constitution for Kurdistan was also to a large extent attributable to the development of the relationship between Kurdistan and Baghdad. The failure to reach an agreement on constitutionally mandated issues, such as the fate of the disputed territories and a hydrocarbons law, as well as an agreement on security arrangements, was incitement for the Kurds to not adopt a constitution of their own. As mentioned earlier, article 13 (second) of the Iraqi Constitution states: “No law that contradicts this Constitution shall be enacted. Any text in any regional constitutions or any other legal text that contradicts this Constitution shall be considered void.”¹¹⁷ Many provisions in the draft constitution of Kurdistan did not square with the Iraqi Constitution.¹¹⁸ A brief analysis of the draft of the Constitution of Kurdistan reveals why. Article 1 acknowledges the existence of the Kurdistan Region “within” the federal Iraqi state.¹¹⁹ Article 2 demarks the borders of Kurdistan, including in it Kirkuk and other disputed territories. Thus, article 2, paragraph 1, states: “Iraqi Kurdistan includes: Duhok Governorate with its current administrative border, Kirkuk, Suleimaniyah and Hawler Governorates with the 1968 border; Akre, Shekhan, Sinjar, Tal Afar, Talkeif and Qaraqush Districts; Zumar, Bashiqa and Aski Kalak Subdistricts of Nineveh Governorate; Khanaqin and Mandali districts of Diyala Governorate; Badra district and Jassan Sub-district in Wasit Governorate, with their administrative border before.”¹²⁰ Further, article 2, paragraph 2, invokes article 140 of Iraqi Constitution to return areas formerly considered to lie within Kurdistan.¹²¹ Whilst article 3

prohibits the creation of a new region within the Kurdish region, so nothing can be carved away from the Kurds.¹²² Article 4, paragraphs 1 and 2, are of utmost importance for the regulation of future federal relationships and the conflict over oil and gas between Baghdad and Erbil. It indicates that the “constitution and laws of the Kurdistan Region are more sovereign and supreme than those passed by the Iraqi Government except for those fields related to the authority of the Iraqi Government mentioned in Article 110 of the Iraqi Federal Constitution” and that “if the laws of the Kurdistan Region contradict with other laws, the Courts of Kurdistan should follow the Constitution and laws of Kurdistan, unless the law is abolished or amended by the Parliament or invalidated by the Constitutional Court.”¹²³ As Michael J. Kelly correctly notes, this “emphasis amounts to a reverse supremacy clause and is a key component in the Kurdish gambit to assert control over much of the oil and gas in Kurdistan”.¹²⁴ Moreover, the draft constitution not only gives the Kurdish region the power to enter into agreements with foreign entities on non–article 110 subjects, and the power to sign deals with foreign entities on article 110 subjects if the federal government consents¹²⁵ – both of importance in the context of concluding oil development contracts – it also, under article 104, paragraph 13, gives the president of Kurdistan the power to deploy the Kurdish military beyond the Kurdistan Region with the approval of Parliament.¹²⁶ But perhaps the most important provision is contained within article 8. Institutionalising the Kurdish vision of a voluntary union and the right to cease to be a part of the union if the federal constitution is not respected, article 8 states: “The people of Iraqi Kurdistan have the right of self-determination. Accordingly, they are free in determining their political status and pursuing economic, social and cultural growth. They have freely chosen a union with Iraq and its people, land, and sovereignty while it commits to a Federal Constitution and a federal, parliamentary, plurality, and democratic system that respect the human rights of individuals and the community.”¹²⁷ It continues by stating that the people of Kurdistan reserve the right to leave the federation if the central government either departs from the federal model or abandons the constitutional principles of democracy and human rights, or if the central government fails to effectuate article 140 in the federal constitution.¹²⁸

Given these contradictions and competing visions of state and sovereignty, the absence of an enacted constitution relieved the Kurds of responsibilities, constraints, and sanctions put on them by the Iraqi Constitution with regard to the Kurds’ policy and decision making on core federal issues: oil and gas, disputed territories, and security arrangements. The absence of a regional constitution meant that the Kurds could advance their interests without fearing possible formal breaches of the Iraqi Constitution and sanctions from Baghdad.

Consequently, for the two main Kurdish parties – KDP and PUK – the absence of a constitution for Kurdistan made sense in two ways. First, they could advance their interests in regard to the federal government without being accused of formally breaching the constitution. Second, they could uphold their power-sharing system in Kurdistan, excluding other Kurdish forces from real participation. Thus, federalism was used by the two main political forces as a tool to advance their powers, though without a clear legal framework. It is within this context of the duality of existence of a formal constitution and the absence of formal rules of the game in Kurdistan's and Iraq's politic that a study of the development of federal relationships between the Kurdistan Region and the federal government, particularly on the issue of the control and management of oil and gas resources, should be approached. The Iraqi Constitution is, and has been, an important stage in the battle for authorisation and distribution of power. But it is only one of many stages upon which this battle has occurred.

Framing the Baghdad-Erbil Struggle over Authorisation and Distribution of Power

During the negotiations over the Iraqi Constitution and the subsequent government formation in 2006, the Kurds managed to realise many of their pluralist federal goals.¹²⁹ In the words of Michael Gunter,¹³⁰ the Kurds not only obtained their most powerful regional government since the creation of Iraq following World War I, but also played a prominent role in the Iraqi government in Baghdad, holding the posts of president, foreign minister and other senior civil posts, and as well as military commander posts. Furthermore, the Kurds repeatedly played the role of kingmakers in Baghdad.¹³¹ The nine-month-long negotiation over government formation after the election of March 2010, and the secret Erbil agreement of 2011 – in discussions with various political groups, Maliki was chosen as prime minister for a second term, but had to sign a “15-point list of demands designed to place meaningful limits on his ability to exercise personal power while prime minister”¹³² – made it clear that no government could be formed in Iraq without the two main Kurdish political parties, KDP and PUK. Moreover, the Kurds relied not only on institutionalised relationships with Baghdad to advance and secure their interests, but on a federal level, the Kurds repeatedly promoted decision making along the practices of tawafuq and muhasasa. For example, after the December 2005 elections for the Council of Representatives, both Barzani and Talabani – fearing a majoritarian Shia government – repeatedly advocated consensus, rather than election results, as a yardstick for forming an all-inclusive government.¹³³

The increasing tension between Baghdad and Erbil in 2008–2009 focused explicitly on the three main aspects of federalism that the Iraqi Constitution had deferred to future post-ratification politics of Iraq: oil and gas, disputed territories, and security management.¹³⁴ A 2010 “Annual Threat Assessment of the US Intelligence Community” report explicitly pointed out these three issues as a threat to Iraqi security: “Arab–Kurd tensions have [the] potential to derail Iraq’s generally positive security trajectory, including triggering conflict among Iraq’s ethno-sectarian groups. Many of the drivers of Arab–Kurd tensions—disputed territories, revenue sharing and control of oil resources, and integration of peshmerga forces—still need to be worked out, and miscalculations or misperceptions on either side risk an inadvertent escalation of violence.”¹³⁵

There is, as yet no, effective hydrocarbons law in Iraq, nor a viable “solution” to Kirkuk and other disputed territories, or to security arrangements. According to Hamid Majid Mousa, a leading member of the 29-member Constitutional Review Committee (CRC), which began work on amendments of the constitution in November 2006¹³⁶ – and who was interviewed for this research – the negotiations gridlocked on precisely those issues.¹³⁷

Given these high stakes, it is therefore, not surprising that the relationship between Baghdad and Erbil have been uneasy – at some moments confrontational and at others cooperative. It is also not surprising that, for example, unilateral Kurdish deals with international oil companies (IOCs) have triggered the inherent contradictions in the Iraqi Constitution and have been viewed by a centralist government in Baghdad as being a first step towards secession.¹³⁸ There is little surprise, then, that the central government’s refusal to authorise KRG oil exports¹³⁹ has triggered the conflict, as it is viewed by the Kurds as an attack on the very idea of voluntary federalism, resulting in KRG accusing the central government of restoration of the dictatorship.¹⁴⁰

The Conflict over Oil and Gas

The conflict over oil and gas between Baghdad and Erbil can be described as follows: On the one hand, given that Iraq’s economy to a great extent is based on revenue earnings generated by the production and export of oil,¹⁴¹ Baghdad in general has a great interest in controlling as much of those revenues as possible.¹⁴² However, with centralist forces who resist the notion of a more autonomous and independent Kurdistan dominating the government of Baghdad, the tendency of the federal government in Baghdad has been to strive to centralise control over oil production whenever circumstances have allowed.¹⁴³ These demands by Baghdad have to a great extent been formulated in terms of the language of 2005 Iraqi Constitution. On the other

hand, given Erbil's goal to secure its autonomy and their mistrust in the government of Baghdad, Erbil viewed the vast oil resources situated in Kurdistan and in the disputed territories it deemed as belonging to Kurdistan as its main account to develop the economy of Kurdistan and enhance its independence from Baghdad. These demands by Erbil have to a great extent been formulated in terms of the language of the 2005 Iraqi Constitution.

Decentralist versus Centralist Reading of Oil and Gas Provisions¹⁴⁴

Constitutional provisions regarding the control and management of oil and gas can be read through two main polar visions. A decentralist reading of provisions regarding oil and gas is based on the idea of two sovereign entities where constitutional power is vested in both sets of governmental organs to deal with the management and creation of development policies concerning oil and gas. A centralist reading is based on the idea that the federal government plays the initiator role regarding such issues, so as to deal with the management and creation of development policies concerning oil and gas, however with an ear to the views of the sub-central units.

Due to the disharmonies in the Iraqi Constitution, there are ample possibilities for contending actors to make their claims. Both visions, as postulated above, can be grounded in articles 110, 111, 112, 115 and 121, and to some extent 114, of the Iraqi Constitution.

Starting with the centralist reading, article 110 specifies the exclusive authorities of the federal government. In fact, among these exclusive authorities, the management of oil and gas is not mentioned. However, as Zedalis¹⁴⁵ has shown, of most relevance in connection with oil and gas is the language of paragraphs 1, 3 and 8 of article 110. The first paragraph provides the federal government exclusive authority over "Formulating foreign policy and diplomatic representation; negotiating, signing, and ratifying international treaties and agreements; negotiating, signing, and ratifying debt policies and formulating foreign sovereign economic and trade policy".¹⁴⁶ The third paragraph assigns exclusive federal authority over "Formulating fiscal and customs policy; issuing currency; regulating commercial policy across regional and governorate boundaries in Iraq; drawing up the national budget of the State; formulating monetary policy; and establishing and administering a central bank".¹⁴⁷ Paragraph 8 establishes exclusive federal authority over "Planning policies relating to water sources from outside Iraq and guaranteeing the rate of water flow to Iraq and its just distribution inside Iraq in accordance with international laws and conventions".¹⁴⁸ The relevance of these paragraphs to management

and control over oil and gas is that “water can be vital in efforts to exploit oil and gas; shipment, distribution, and transportation of such will undoubtedly involve commerce crossing regional and governorate boundaries, and may even involve negotiation, conclusion, and implementation of commercial commitments international in character.”¹⁴⁹ Accordingly, while article 110 does not mention the control and management of oil and gas as an exclusive federal government authority, centralist forces can still claim it as such due to its interconnected nature to other exclusive powers of the federal government.

The centralists may also have a point in their favour in article 112. The first paragraph of article 112 states: “The federal government, with the producing governorates and regional governments, shall undertake the management of oil and gas extracted from present fields, provided that it distributes its revenues in a fair manner in proportion to the population distribution in all parts of the country, specifying an allotment for a specified period for the damaged regions which were unjustly deprived of them by the former regime, and the regions that were damaged afterwards in a way that ensures balanced development in different areas of the country, and this shall be regulated by a law.”¹⁵⁰ Before showing how this article can be read in a centralist way, a background analysis of how this paragraph came about is necessary. It should be noted that this paragraph, while specifying that the management of oil and gas should be attributed to the federal government with the producing governorates, does not determine which governmental unit is to have determinative or the definitive authority. This vagueness has its roots in the competing visions of Kurds and Shia during the constitution-making process. Emphasising the idea of co-sovereignty and pluralist federalism, the Kurds opted for a decentralised relationship of powers for the federation versus the region by simultaneously trying to achieve a larger regional role in managing oil and gas resources, and limiting popular ownership of gas and oil to “current fields”.¹⁵¹ What the Kurds wanted to achieve was a federal government management of current fields in partnership with the regions, and a regional government’s exclusive control over future discovered fields. As Ashley S. Deeks and Matthew D. Burton¹⁵² have described it, while the Kurds proposed formulations to ensure a Kurdish veto over any management and revenue distribution plans, the Shia, following their vision of “a majority should not be bound by the minority”, countered with language suggesting that the federal government would have the ultimate decision-making power over management and revenue distribution. Thus, the Kurds first proposed that the federal government would manage “in partnership with” the producing regions and governorates. This implied that the federal government could not act without the *consent* of the producing regions.

The Shia countered by “in consultation with”, suggesting that the *agreement of regions and provinces were not needed*. Kurds proposed “together with”, and the Shia countered with “in cooperation with”. The end result was that they deferred the issue to the future by not specifying the ultimate authority and by using the vague word “with”.¹⁵³ Due to this vagueness, the centralists can claim that this paragraph speaks in the favour of the federal government. The argument would be that if the aim of the paragraph was that such power should be *shared* with the sub-central units, then why was that just not expressly stated? Furthermore, the centralists can argue that if the intention was to *share*, then why is article 112 not a sub-clause to article 114, which specifies what “competencies shall be shared between the federal authorities and regional authorities”?¹⁵⁴

As far as the decentralist reading is concerned, decentralists may refer to article 111 of the Iraqi Constitution, which states that “Oil and gas are owned by all the people of Iraq in all the regions and governorates”.¹⁵⁵ The language of this provision does not explicitly specify whether the central, or the sub-central, government should control or manage oil and gas. However, precisely because this is the case, decentralists can argue for their case by pointing out that, despite the fact that section 4 of the constitution is entitled “Powers of the Federal Government”, it does not refer to federal government ownership of oil and gas. Moreover, decentralists may also argue that this article is deliberately not a sub-clause of article 110, which specifies the exclusive authorities of the federal government.

Further, reading article 111 in conjunction with article 115, which states that “All powers not stipulated in the exclusive powers of the federal government belong to the authorities of the regions and governorates that are not organised in a region. With regard to other powers shared between the federal government and the regional government, priority shall be given to the law of the regions and governorates not organised in a region in case of dispute”,¹⁵⁶ and combined with the second paragraph of article 121, which stipulates that “In case of a contradiction between regional and national legislation in respect to a matter outside the exclusive authorities of the federal government, the regional power shall have the right to amend the application of the national legislation within that region”,¹⁵⁷ decentralists may conclude that regional or governorate laws can trump federal laws concerning oil and gas regulation in certain circumstances.

Decentralists may also extensively refer to the limits of the federal government’s authority as specified in article 112’s first and second paragraph. Article 112 states that “The federal government, with the producing governorates and regional governments, shall undertake the

management of oil and gas extracted from present fields” and “The federal government, with the producing regional and governorate governments, shall together formulate the necessary strategic policies to develop the oil and gas wealth in a way that achieves the highest benefit to the Iraqi people”¹⁵⁸. Decentralists may refer to the key words *management*, *present fields*, and *together*. Thus, they can argue that the federal government’s role in the control of oil and gas is marginal, does not extend further than to matters involving *management*, is confined to *current fields*, and shared with the regions and governorates.

The Failure to Enact a Hydrocarbons Law for Iraq

The Kurds need a federal hydrocarbons law mainly for two reasons. First, in the absence of formal rules, they are dependent on the goodwill of Baghdad to get their 17 percent budget allocations from revenue sharing. Second, they need a federal law to gain access to viable export channels. However, they object a law that diminishes their autonomy. Accordingly, the absence of formal rules between Baghdad and Erbil has also functioned as an opportunity that the Kurds have seized by proceeding to adopt their own oil law,¹⁵⁹ and make oil and gas blocks which they deem to be within their borders¹⁶⁰ available to both domestic and international oil companies.¹⁶¹ On the other hand, Baghdad needs a formal law to be able to centralise all oil contracts under its own authority. In absence of a formal law, Baghdad has not been able to stop what it considers to be illegal Kurdish actions¹⁶² and the diminution of the central government’s authority. However, the absence of formal rules has functioned as an opportunity for Baghdad as well. In absence of a hydrocarbons law, Baghdad has maintained that the central government may exploit oil resources by relying on the previous authority granted to the Iraqi government to conclude oil contracts given the general continuity of law from Saddam Hussein’s era, memorialised in article 130 of the Iraqi Constitution.¹⁶³ Therefore Baghdad has both signed its own unilateral contracts for oil and gas fields in the rest of country¹⁶⁴ and repeatedly refused to authorise KRG oil exports,¹⁶⁵ blacklisted all companies that have contracts with Kurds for the exploitation of its oil and gas resources, and delayed the Kurdish budget allocation.¹⁶⁶ While the constitutionality of these practices are far from obvious, they all have been couched in terms of the language of the Iraqi Constitution – through a centralist versus a decentralist reading of the abovementioned constitutional articles regarding management of oil and gas.

Shortly after his appointment as KRG’s Minister of Natural Resources in 2006, and amid negotiations between Erbil and Baghdad on a hydrocarbon law, Ashti Hawrami, in an interview

posted on the website of the Kurdistan Ministry of Natural Resources, expressed Erbil's view on the issue of oil and gas. With regard to central versus sub-central authority and control over oil and gas resources, Hawrami stated: "Article 112 makes it clear that the role of the federal authorities is only an administrative role confined to the handling, i.e. exporting and marketing, of the extracted oil and gas from existing producing fields. This does not entitle the federal authorities to a broader role on operations; otherwise, the word 'extracted' ('produced'), would not have been inserted in the text...The elected authorities of the regions and producing governorates are now entitled to administer and supervise the extraction process; in other words local oilfield managers are answerable to the local authorities."¹⁶⁷ Furthermore, with regard to supremacy of central versus sub-central government, he stated: "Any laws related to Article 112 need to be agreed with the regions and the governorates. Therefore, the only difficulty here occurs if no agreements are reached, in which case the regions and governorates are entitled to create their own laws. These laws will prevail over federal laws by relying on the use of powers per Article 115, which is in their favour. While this would only happen if one of the parties becomes unreasonable, we should remain optimistic that this will not happen."¹⁶⁸ With regard to oil and gas in disputed areas, he claimed: "Anything which is not stated under the federal powers or under the shared powers comes under the absolute authority of the regions and governorates. For example as noted by many, with respect to oil and gas resources no reference has been made to the following and, therefore, these will be exclusive to the regions and governorates: a) Article 112 does not mention anything about discovered undeveloped fields, or about any new fields, or any of the unexplored areas; b) Article 112 does not mention the handling of extracted oil and gas, or related proceeds, from undeveloped fields, or from any new fields resulting from new drilling and further exploration activities; c) Article 112 does not address any of the infrastructure and downstream activities such as refining, storage facilities, pipelines, pumping stations, export terminals, tankers, filling stations and buildings, and thus, these are the property of the regions and governorates."¹⁶⁹ And, finally with regard to contracts with IOCs, he stated: "Again, as these are not defined under the shared powers, the regions and governorates will have all the controls...We just had our first excellent discovery by DNO – A Norwegian Oil Company - earlier this week under the new Constitution and that is good for attracting more investment to the Kurdistan Region and hopefully to all of Iraq in the future."¹⁷⁰

It was within this decentralist reading, and with the aim to develop the economy of Kurdistan and enhance its independence from Baghdad, that Erbil entered negotiations over a hydrocarbons law with Baghdad.¹⁷¹ At the time, there was no severe official condemnation

from the government of Baghdad. This could be attributed to three factors. First, the government of Baghdad was too weak and too busy with the sectarian war and the severe security problems in areas it formally controlled. Second, Prime Minister Maliki did not have a firm support base. He had been a compromise candidate, appointed through Kurdish mediation, and – as mentioned earlier – in return he had made vital concessions to Kurdish demands on a resolution of disputed territories. Third, interested in increasing Iraqi oil exports at the time, Baghdad showed a willingness towards KRG’s efforts to export its IOC-produced products.

Seizing this opportunity, KRG did not waste time and pushed forward with the elaboration of a draft oil law for Kurdistan that could be used as a blueprint for a future negotiation over a hydrocarbons law with Baghdad. On 7 August 2006 the KRG Ministry of Natural Resources announced: “Within the rights set out in the Iraqi constitution, the Kurdistan Regional Government today circulated for discussion the first draft of a new proposed petroleum law.”¹⁷² Legitimising itself on the Iraqi Constitution, the draft law – which went under the name “Act” – not only grounded itself in a pluralist vision of federalism (power sharing at the centre and autonomy at the regional level) and a decentralist reading of the Iraqi Constitution; it also marked the Kurdish redlines with regard to any future negotiated hydrocarbons law with Baghdad. Article 3 of the act, entitled “Territorial scope of Act”, recognised that: “This Act applies to the territory of Kurdistan and Disputed Territories.”¹⁷³ Article 4, sections 2 and 3, define the scope of the act and stress the supremacy of the Kurdistan Region over the federal government: “All activities related to Petroleum Operations in the territory of Kurdistan, and in those Disputed Territories where Kurdistan is a party to the dispute, shall be governed by this Act” and “No law of the Government of Iraq, and no agreement, contract, memorandum of understanding or other instrument concluded by, or issued by, the Government of Iraq, shall have application to Petroleum Operations in Kurdistan or in those Disputed Territories where Kurdistan is a party to the dispute, except with the explicit agreement of the Government [refers to Government of Kurdistan Region] and pursuant to the provisions of this Act.”¹⁷⁴ Article 5 declares that “Petroleum in the territory of Kurdistan is owned by the people of Kurdistan” and gives the government of Kurdistan the rights to “administer” petroleum operations, “license Petroleum Operations under contract to third parties”, engage in “marketing of all extracted Petroleum”, and “receive all revenue derived from all Petroleum Operations”.¹⁷⁵ Article 7, stressing the voluntary, consensual, and decentralised nature of the federalism the Kurds envisioned, is titled “Cooperation with Iraqi institutions”, and it makes clear that cooperation

with any Iraq National Petroleum Committee established by the parliament of the government of Iraq is acceptable “provided that the Committee has representation of regional governments, and unanimous decision-making procedures with regard to allocation of production quotas to producing Regions and Governorates”.¹⁷⁶

Though the act was only a draft law for discussion in the Kurdistan government, it outlined the very vision the Kurds had at the start of negotiation over TAL and the permanent constitution: consensual decision making within the federal government and decentralised powers of the federation versus the regions. To market the act as a viable and legal document on the international arena, and thus explore “investment opportunities” and attract IOCs, KRG went on promoting the act by, among other actions, organising what it called “A Constitutional, Legal, and Investment briefing on the draft KRG Petroleum Act” in London on 20 September 2006.¹⁷⁷ During the briefing, Hawrami said, “We are confident that the draft Petroleum Act is inclusive of all of Iraq, and is fair, clear and investor-friendly. It creates a win-win situation for all of Iraq.”¹⁷⁸ Invited as a speaker was also Magne Normann, senior vice-president for the Middle East at DNO (Det Norske Oljeselskap, a Norwegian oil company that had explored oil in Kurdistan since 2004), who accordingly “spoke of his company’s positive experience on the ground exploring for oil in the Kurdistan Region”.¹⁷⁹

What is important to stress is that throughout the discussions over a hydrocarbon law – from the first draft of the act to the subsequent failure of negotiations over a hydrocarbon law and the unilateral enactment of an oil law by the Kurdistan National Assembly – KRG stressed three vital points that all promoted its vision of a voluntary and pluralist federalism, and its aim to become economically and politically independent from Baghdad. This is clearly put by Hawrami in a comment he made on KRG Ministry of National Resources’ website, titled “Kirkuk Oil and the KRG Final Draft Petroleum Act”. First, Hawrami stresses the legitimacy of the Kurdish oil policy by stating, “It is vitally important to make it clear: this draft Act is entirely consistent with the Iraq constitution... Furthermore, it goes out of its way to maintain a common nationwide approach to petroleum development, and maintains full flexibility for cooperation between the KRG and the federal authorities.”¹⁸⁰ Second, he stresses consensual decision making on a federal level, stating: “It [the Act] is based on a commitment to cooperation with Iraqi federal institutions – cooperation on both petroleum development and on revenue sharing.”¹⁸¹ Third, Hawrami connects the resolution of any viable future oil policy with the government of Baghdad to the resolution of the issue of Kirkuk and other disputed territories. He explains: “This Act will only apply to any ‘Disputed Territories’ where a majority

of the citizens choose to become part of the Kurdistan Region in a free and fair referendum...Even then, the KRG makes no exclusive claim to petroleum revenues from any Disputed Territories, including oil-rich Kirkuk. Those revenues will be shared by the Kurdistan Region throughout Iraq. The Constitution requires it, and indeed our own Petroleum Act, soon to become law, requires it.”¹⁸²

However, as negotiations over a hydrocarbons law started in 2007, changes to the domestic security in Iraq strengthened the hand of Baghdad in its dealings with Erbil. As Rex J. Zedalis notes, while under pressure, Baghdad had shown an interest in stabilising and increasing Iraqi oil exports. Accordingly, Baghdad aided KRG in exporting its IO- produced products. However, changes in the security situation and an increased ability from Baghdad’s side to ramp up its own production could explain the changes in its attitude towards Kurdistan, translated into a general attempt to obstruct Kurdish efforts, hampering access to Baghdad-controlled export pipelines, and formulating an oil and gas policy that disregarded Kurdish aspirations.¹⁸³

On 26 February 2007 KRG’s Ministry of Natural Resources posted an article with comments made by Hawrami on a previous announcement by Barzani, who had proclaimed that an agreement had been reached with Iraq’s prime minister, Nuri al-Maliki, on a draft hydrocarbons law.¹⁸⁴ As a matter of fact, an agreement was not in sight and was never concluded. The content of the article, though, gives a deep insight into the disagreements that counted for the failure of the adoption of a hydrocarbons law. The disagreements were rooted in the same competitive visions of state and sovereignty that the parties had at the time of constitution making. The Kurds, trying to secure their independence from Baghdad, opposed Baghdad’s attempts to establish a federal oil and gas council empowered to veto contracts. Furthermore, they objected to the Iraqi Oil Ministry’s proposed annexes classifying producing and nonproducing oil fields.¹⁸⁵ Both of these demands from Baghdad would surely mean a turn to a more centralist federalism that the Kurds by no means could accept. Baghdad, on the other hand, went “nationalistic” and expressed concerns with regards to two issues: first, that the future law would permit a sell-out of the country’s natural resources to foreign nations and companies through produced sharing contracts (PSCs), and second, that the decentralisation permitted by the constitution would spark unregulated competition between federal regions over oil production for export, and thus undermine Iraq’s unity.¹⁸⁶ In its argument the Oil Ministry in Baghdad relied on laws taken from Saddam Hussein’s era, after the nationalisation of Iraq’s oil industry in 1972, which Baghdad deemed far more favourable for Iraqi people. As a result of

nationalisation the Oil Ministry during Saddam Hussein's rule issued only technical service contracts (TSCs), where foreign companies were paid for their services rather than paid by a share of the oil they pumped, as PSCs in the draft hydrocarbons law suggested.¹⁸⁷ The negotiations continued until the summer of 2007 without any success.¹⁸⁸ When talks over a federal hydrocarbons law broke down in 2007, the Kurdistan National Assembly passed its own oil and gas law, based on the Petroleum Act that Kurdistan Ministry of Natural Resources had issued in August 2006.

In the Absence of a Hydrocarbons Law

The absence of formal rules has not hampered the efforts of Erbil and Baghdad to advance their competing state projects under what they deem to be in accordance with the Iraqi Constitution. At times it has led to tensions – on one occasion almost a military confrontation – and sometimes it has resulted in ad hoc agreements.¹⁸⁹

Beginning in 2007, KRG went on authorising domestic and international oil companies to explore and develop oil and gas blocks within areas that KRG claimed were a part of Kurdistan. Basing the legality of its actions on the Iraqi Constitution and the Kurdistan Oil Law, it started by concluding and signing new contracts with domestic and international oil companies. By October 2008, the indications were that KRG had sealed more than 20 contracts in over 30 separate development blocks. By 2010, Hawrami indicated that 38 firms had oil and gas development contracts involving blocks located in Iraqi Kurdistan. A 2008 map made available by the Norwegian IOC DNO, and represented as sourced from a map published by KRG, showed that while the larger part of the territory divided into exploration and development blocks was inside the three undisputed governorates of Kurdistan, areas coterminous or overlapping into provinces of the disputed governorates of Diala, Salaheddin, Kirkuk and Ninewa were also blocked and had been placed under contract.¹⁹⁰

In June 2009 KRG issued a statement where it proudly presented the successful achievements of Kurdish PSCs and the inferiority of the Iraqi Oil Ministry's TSCs. The statement concluded: "The KRG has continued to be the driver for new oil production in Iraq. On June 1, at a public ceremony in Erbil, the President of Iraq, Mr. Jalal Talabani, and the President of the Kurdistan Region, Mr. Masoud Barzani, inaugurated the first export of Kurdistan Region oil to the Mediterranean via Turkey."¹⁹¹ The Kurdistan Region, which in 2006 had only exploration acreage, is now exporting 100,000 barrels of oil per day, expected to increase to 250,000 barrels

within a year and to 1,000,000 barrels within four years. This will increase Iraq's export by over 50% from its current level with all the risks of finding and producing the oil borne by the investors (international oil companies – IOCs). Revenues from the Region's exports will be shared throughout Iraq in accordance with the Iraqi Constitution. Through contracts, from 2006, the federal Oil Minister has presided over several unsuccessful technical service agreement (TSA) attempts and now inferior model contracts to attract IOCs to the rest of Iraq. Over that period, Iraq's oil exports have fallen, despite billions of dollars of state funding.”¹⁹²

Baghdad has objected to the contractual undertakings by KRG, whether these have been within or outside the boundaries of what Baghdad deems to be Kurdistan. According to Baghdad, the central government has management rights to all fields, and for the Kurds to develop their own field unilaterally without any central government input is a violation of the Iraqi Constitution.¹⁹³ Former Iraqi oil minister Hussain al-Shahristani based his argument on article 111 of Iraqi Constitution, arguing that the fact that oil and gas belong to the Iraqi people means that national authorities have some level of control over the development plans and that regions are not permitted to sign oil contracts without input and approval of the central government – whether the matter is about existing or future fields.¹⁹⁴

In September 2007 Shahristani declared KRG's contracts to be null and void. Furthermore, he blacklisted all those companies that had contracts with KRG for the exploitation of its oil and gas resources, and threatened to do the same with those contemplating similar moves. Shahristani declared: “All these contracts have no legal base and do not fit with the existing laws, nor with the draft [oil law] which has been agreed...We hold these firms to be legally responsible...and we have warned them that they will bear the consequences.”¹⁹⁵ In September 2008, amid the debacle between KRG and Baghdad over the provincial elections law, the Ministry of Oil in Baghdad refused to authorise KRG oil exports.¹⁹⁶ One month later the Oil Ministry announced that it was putting up for tender fields in the disputed areas of the Diyala governorate.¹⁹⁷

To conclude this discussion, one may observe that oil and gas, Iraq's sole source of income, has yet to be regulated by formal laws. What is out there is a confusing mix of Saddam era legislation, the Iraqi Constitution, and the KRG oil and gas law.

The source of this confusion is the underlying historical conflict between Baghdad and Erbil, and the competing visions of the future state among the actors. The Iraqi Constitution did not “solve” these conflicts; rather, it framed them. As stated in the introduction of this chapter,

inherent in the object of a constitution is the structural conflicts of a society, which may be triggered depending on circumstances. As this chapter, and the analysis of Baghdad-Erbil relationship with regard to the conflict over oil and gas, has shown, when these contradictions play out they also manifest the fact that the constitution is resistant to its own destruction. It is evoked by both parties, and it shapes, and is being shaped, by the politics of both parties in the manner of unfinished business.

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- ² Website of Iraqi Parliament, Law no. 21, article 2, <http://www.parliament.iq/>; (Accessed on 15 February 2014).
- ³ Al-Hayat, "Interview with Abdul Aziz Al-Hakim", (22 January 2007); Al-Hayat, "Interview with Iraqi President Jalal Talabani", (23 January 2007); TV Middle East, "Maliki speaks on new security effort", (26 January 2007).
- ⁴ Al-Hayat, "Interview with the Iraqi PM Nouri Al-Maliki", (2 February 2007); Al-Quds Al-`Arabi, "Kurds preparing to deport Arabs and tribes pledge to resort to force", (6 February 2007); Al-Sharq Al-Awsat, "Kurdish Parliamentary Speaker: More than 7000 Arab families left Kirkuk", (7 February 2007); Azzaman, "Sheikh of Al-Obeid to Azzaman: deportation of 300000 Arabs from Kirkuk", (15 February 2007).
- ⁵ Al-Hayat, "Kurdish official denies importing weapons without Baghdad's knowledge", (27 November 2008); Al-Sharq Al-Awsat, "Barzani: we welcome American bases in Kurdistan after Baghdad's approval", (5 November 2008); Al-Hayat, "Iraqi MPs reject Barzani's statements", (3 November 2008).
- ⁶ Website of Iraqi Parliament, <http://www.parliament.iq/>; (Accessed on 15 February 2014).
- ⁷ Website of Iraqi Federal Supreme Court, <http://www.synisys.com/fsc/index.jsp?sid=1&id=519&pid=89>; (Accessed 10 September 2014).
- ⁸ Website of Kurdistan Regional Government, <http://cabinet.gov.krd/?l=12>. See also Website of Kurdistan Region Presidency, <http://www.presidency.krd/english/default.aspx>; Website of Kurdistan Regional Parliament, <http://www.perlemanikurdistan.com/Default.aspx?l=1> (Accessed 10 September 2014).
- ⁹ Website of Iraqi Prime Minister, <http://www.pmo.iq/> (Accessed 10 September 2014).
- ¹⁰ Iraqi Constitution, article 119.
- ¹¹ Iraqi Constitution, article 121 (first and second).
- ¹² Iraqi Constitution, article 118.
- ¹³ See, among others, Reidar Visser, "The Two Regions of Southern Iraq", in *An Iraq of Its Regions: Cornerstones of a Federal Democracy?*, eds. Reidar Visser and Gareth Stansfield (Columbia University Press, 2008), 28–29.
- ¹⁴ See Reidar Visser's article "Basra, the Reluctant Seat of Shiastan", *Middle East Report* 242 (Spring 2007).
- ¹⁵ In an 11 May 2007 statement, SCIRI announced it was dropping the word "revolution" from its name. See Arabic Daily newspaper, *Al-Hayat*, 12 May 2007.
- ¹⁶ International Crisis Group, *Iraq's Provincial Elections: The Stakes*, Middle East Report 82 (27 January 2009), 15.
- ¹⁷ Reidar Visser, *Basra, the Failed Gulf State: Separatism and Nationalism in Southern Iraq* (Münster, 2005).
- ¹⁸ Revenue Watch Institute, at www.iraqrevenuewatch.org/reports/052706.pdf.
- ¹⁹ A Sadrist spinoff, founded in 2003 by the Najaf-based cleric Muhammad al-Ya'qubi.
- ²⁰ International Crisis Group, *Where Is Iraq Heading? Lessons from Basra*, Middle East Report 67 (25 June 2007), 6.
- ²¹ Al-`Adala, "Big states form the new government", (15 February 2006); Azzaman, "Parliament block bigger than coalition", (16 February 2006); Al-Bayan, "Prime Minister receives Arab league envoy", (10 March 2006).
- ²² Al-`Adala, "The guarantee", (17 March 2006).
- ²³ www.krg.org, 28 January 2006, "Barzani in Baghdad Mediating"; (Accessed 10 September 2014).
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- ²⁷ Ibid.
- ²⁸ At the time, the Sadrists officially described their opposition as an unwillingness to allow the country to devolve into further federalism in the south at a time when the country remained under occupation. See Haider Ala Hamoudi, *Negotiating in Civil Conflict: Constitutional Construction and Imperfect Bargaining in Iraq* (University of Chicago Press, 2014), 175.
- ²⁹ Mohammed M. A. Ahmed, *America Unravels Iraq* (Mazda Publishers, 2010), 143.
- ³⁰ Al-Watan, "Conflicts between Shi'i parties and forces to control southern Iraqi cities", (6 October 2006); Al-`Adala, "Al-Hakim interviewed by party newspaper on militias, terrorism", (15 November 2006).

- ³¹ Al-Bayan, "The president in Basra", (5 June 2006); Al-Sharq Al-Awsat, "Basra governor: Al-Fadeela's rejection of southern state behind attacks", (23 April 2007); Azzaman, "Head of Fadila Bloc to Az-Zaman: will not return to Alliance", (8 October 2008).
- ³² Elaph, "Fadhila party deputy head interviews", (15 May 2007).
- ³³ ³³ Mohammed M. A. Ahmed, *America Unravels Iraq* (Mazda Publishers, 2010), 140.
- ³⁴ Al-Sharq Al-Awsat, "British: Competitions between parties, militias reason for Basra unrest", (14 June 2006)
- ³⁵ International Crisis Group, *Where Is Iraq Heading? Lessons from Basra*, Middle East Report 67 (25 June 2007), 6.
- ³⁶ *Ibid.*, 7.
- ³⁷ Al-`Adala, "Situation in Diwaniya back to normal", (31 August 2006).
- ³⁸ On Muqtada al-Sadr, see Cockburn, Patrick, *Muqtada Al-Sadr and the Shia Insurgency in Iraq* (Faber and Faber, 2008).
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- ⁴¹ Buratha news, "Hakim Meets Functionaries of ISCI and Badr", 6 March 2006, at www.burathanews.com/news/106.html.
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- ⁴⁴ Buratha news, "President Talabani: The Upcoming Meeting Should Be Constructive and Lead to Formation of a National Unity Government", 12 March 2006, at www.burathanews.com/news/187.html; Al-`Adala, "Kurd told to fly Iraqi Flag", (5 September 2006).
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- ⁴⁸ Website of Iraqi Parliament, <http://www.parliament.iq/>. (Accessed 10 September 2014).
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¹⁵² Ashley S. Deeks and Matthew D. Burton served at the US Embassy in Baghdad as legal advisor and deputy legal advisor, respectively, during Iraq's constitution drafting process and had the primary role to advise senior US government officials about this process and about the draft texts the Iraqi negotiators produced. In their position, they managed to record the evolution of the constitution drafts from late June 2005, when the first set of provisions emerged from the committee, until mid-October of the same year, when Iraqi leaders agreed on the final set of changes.

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Conclusion

In this thesis I have endeavoured to illustrate how a socially embedded definition of a constitution can further our understanding of the limits of institutional engineering and constitutional design. The thesis emphasises that constitutions are neither the cause or solution to society's problems, as is suggested by conventional constitutional design theories. Rather than being distinct from "normal politics", constitutions are part of, and contribute, to state formation, state transformation, and state projects. The primary function of a constitution is to propel politics forwards by aiding a key statal function, which is the creation of zones of relative stability, facilitating the deferral and displacement of contradictions, conflicts and crisis tendencies in a society. Rather than solving conflicts, a constitution frames them. Consequently, a constitution indicates where the lines of battle lie in the attempted realisation and institutionalisation of these interests.

Constitutions are not "neutral" documents made by "neutral" agents in a "neutral" context. Rather, they are the result of interactions of strategically oriented agents within a strategic-selective context of action. They are informed, mandated, and constrained by the underlying conflicts of a society, the competing visions of the state among the actors participating in the process, and the strategic nature of the context where constitution making occurs. At the time of constitution making, the strategic-selective context limits the alternatives available for the actors, in terms of both what agents believe they can achieve and what they actually can achieve. Interacting with the strategic context, actors modify the selective impact upon themselves and others of social constraints and opportunities by creating social arrangements that facilitate the deferral and displacement of contradictions, crisis tendencies, and conflicts, thereby helping to produce zones of relative stability, at the expense of future problems and social forces excluded from these relatively stable zones.

This thesis has also shown that the evolution of conflicts and power relationships after the ratification of a constitution cannot be attributed to a core essence of constitutional provisions. What a post-ratification evolution tells us is rather a manifestation of the fact that the constitution is resistant to its own destruction, and within the constitutional order one may find identifiable continuities of meaning within which contradictions play out in a society. It reveals to us how the constitution, through constitutional disharmony, helps social forces to advance one vision of state, sovereignty, and a predominant identity against another, and how the constitution preserves the political community in the face of fundamental disagreements. It tells us how the constitution sustains different visions of a political community, and empowers and limits the articulation of different identities. In this process the constitution both shapes and is

shaped by politics – where state projects are occasionally understood with reference to the constitution, and the constitution is occasionally understood with reference to state projects.

Accordingly, this thesis has shown that, in Iraq, the actors engaging in constitution making were both positioned differently in terms of access to power and resources, and had incompatible visions regarding the future state and the idea of sovereignty. At the time of the US invasion of Iraq in 2003, Iraqis faced a regime change while carrying on their shoulders the burden of the legacy of a shadow state, asymmetrical power relationships, violence, and the polarisation of ethno-sectarian communities. The organised opposition to Saddam Hussein – with the exception of the Kurds who had enjoyed de facto autonomy since 1991 – existed in exile and was itself fractured along the same ethno-sectarian divisions as Iraqi society. Dominated by the two Kurdish political parties, the KDP and the PUK, and the Shia SCIRI, the first battle in the preparation of a new constitution for post-Saddam Iraq had already started before the invasion of Iraq. During several gatherings in exile, the opposition elevated itself as the true representatives of the Iraqi people and reached a general agreement on federalism as the future basis of state structures in Iraq, but no consensus on its most fundamental features was reached. Furthermore, the opposition also, to a certain degree, institutionalised practices of consensual decision making and ethno-sectarian quotas, *tawafuq* and *muhasasa*, which came to play a key role in post-invasion Iraqi politics. While these factors did not, in a deterministic way, shape the outcome of post-Saddam Iraq, they did contribute to the creation of a strategic-selective context that favoured some state projects over others and consequently framed the borders and the terrain of post-Saddam politics.

The Iraqis and the United States, represented by the Coalition Provisional Authority, entered the process of constitution making with incompatible visions of constitution and sovereignty. On an ideological level, the occupation regime tried to fundamentally restructure the Iraqi state. The CPA embraced the idea of the constitution as the embodiment of ideas, norms, and practices providing the basis for a normative order. It stressed the normative appeals, indicating that the norms the constitution adhered to existed prior to the establishment of the new political community. It viewed constitution making as a transformative and foundational moment, where the norms established in the constitution aimed to engender national cohesion and be a reference point for future patriotism. In order to ensure that norms, rather than the unwanted partisan interests of Iraqi political forces, prevailed in the constitution, the CPA strove to assume total control of the process of constitution making and envisioned that the constitution should be

drafted by a representative assembly of Iraqis from around the country, appointed under the CPA's supervision.

Under the influence of Grand Ayatollah Sistani, the Shia, who had always composed the majority of Iraq's population, but who had never enjoyed anything approximating full political equality, embraced a vision of the constitution as a fundamental decision by the subject of the constitution, the bearer of the constitution-making power: the people. The constitution was an act of subjugation of the community to the will of the sovereign; in a democracy, this would be a fundamental decision made by the people, and for the Shia this would be a decision made by the majority of Iraqis. Consequently, the main principle the Shia advocated was that a majority should not be bound by minorities.

Enjoying de facto independence since 1991, the Kurds attempted to secure the rights they already perceived they possessed. For the Kurds, in contrast to the Shia, the constitution was a political act and decision made by many peoples, Kurds and Arabs being the two main nationalities in Iraq. The source of legitimate authority was not one people but many peoples, and sovereignty was exercised by many peoples together in accordance with federalism, and not one people divided into a majority (Arabs) against a minority (Kurds) as had been the case throughout Iraq's history. The very legitimacy of the constitution and the new political order was therefore to be found in this idea. In the Kurds' view, these many peoples came together voluntarily and exercised co-sovereignty in a federal pluralist order to secure this right. Take away federalism and the right of many peoples to be the source of authority, and you have no political union at all.

Then there were the Sunni Arabs, who at the time of constitution making really were not a community in the sense of other sectarian and ethnic groups. Many Sunnis had a privileged position in the former regime and saw themselves as champions of Iraqi nationalism. However, at the time of constitution making, there was no organisation that could claim to speak on their behalf. They were, therefore, to great extent in a vulnerable position and were excluded from the process of state and constitution making.

The process of constitution making also occurred under conditions of resistance and boycott by a big segment of Iraqi society, of absence of security and of fragmentation of political authority along many axes, with vast amounts of power lying outside any regulatory mechanism. In other words, the process occurred in the absence of a state that could guide the process through overarching institutions and rules. Under these conditions, and given the incompatible visions

of the Iraqi state among Iraqis involved in the process, in order to preserve the polity and propel politics forwards, a compromise had to be reached. Particularly, the issue of federalism was divisive and threatened to tear the political community apart.

Interacting with the strategic context, the Kurds and SCIRI, the two dominant forces in the Constitution Drafting Committee, tried to modify the selective impact upon themselves and others of social constraints and opportunities by reaching an agreement that facilitated the deferral and displacement of contradictions regarding federalism, at the expense of future problems and social forces excluded from these arrangements. Lack of clarity in constitutional provisions regarding federal power relationships and the deferral of a substantial agreement on federalism in Iraq was the very way to reach an agreement, propel politics forwards, and preserve the political community. Injection of confusion into federal relationships served as a way to let the structure of federalism in Iraq develop with time, rather than imposing one view over others.

The ambiguities and disharmonies of the Iraqi Constitution are not “failures” of the process of constitution making. They are, rather, the product of strategically oriented political actors within a strategic-selective context with the aim of modifying the context of action in such a way as to benefit their interests. They are the outcome and an attempted regulator of severe political conflicts and visions in Iraqi society. However, these ambiguities also play an important role for future politics in Iraq. Because agents are constantly engaged in creating systems of strategic selectivity, the ambiguities and the social arrangements coupled to them will operate in unexpected ways in the future, making it possible for its competing political forces to look back to the constitution and perform critically important tasks, ranging from collective identity formation to preventing the rise of potentially abusive political power.

Therefore, the disharmonies in the constitution do not determine the evolution of politics. Accordingly, we cannot attribute, or predict, the evolution of the federal structure in Iraq by reference to a core essence of the Iraqi Constitution as such. However, the disharmonies help a constitution to be resistant to its own destruction by meaning many things to many people. Thus, within the constitutional order, we may find identifiable continuities of meaning within which contradictions play out in Iraqi society.

This is clearly shown in the case of Iraq. A post-ratification study reveals to us how the Iraqi Constitution, through constitutional disharmony, has helped social forces to advance one vision of state, sovereignty, and a predominant identity against another, in different spatiotemporal

horizons. Inherent in the Iraqi Constitution was the competing vision of federalism between those who advocated an integrative (centralist) approach and those who were committed to a pluralist (decentralist) approach. As the struggle for authorisation and distribution of power unfolded in the post-ratification period, it became obvious that while centralist forces tried to enhance the authority of the central government and introduce integrative measures whenever the circumstances allowed, the main champions of federalism and pluralism – the Kurds – were willing to accept the centralised efforts of the government of Baghdad – however, only to the extent it applied beyond the Kurdistan Region and if had no real effect on the Kurdistan Region itself. Thus, the lack of formal rules of the game and power relationships did not hamper the different state projects that centralists and decentralists advanced. It was as much a constraint as an opportunity, depending on the nature of the projects the actors pursued and the conditions under which they were pursued.

But more importantly, by referring to the constitution, and contextualising and legitimising their struggle over authorisation and distribution of power using constitutional disharmonies, Kurds and different Shia groups have maintained the role of the constitution as an important agent and manager of political events. Whenever competing and contradictory political decisions have been legitimised by the constitution, whenever these contradictions have played out in Iraqi society, they have also manifested the fact that the constitution is resistant to its own destruction. It is within this context that one may refer to the Iraqi Constitution as an important document that has preserved the political community in the face of fundamental disagreements and that has sustained different visions of political community, and has empowered and limited the articulation of different identities. It is within this socially embedded definition of the constitution that we can understand how it has shaped, and is being shaped, by Iraqi politics.

This thesis has confined itself to a study of the making and un-making of power relationships in Iraq, 2003-2010, with a focus on those social forces that were involved in the process of state-building and constitution-making. The years 2010-2015, saw dramatic changes in the political landscape of Iraq, culminating in the rise of the Islamic State and its conquest of most Sunni-majority areas of Iraq in the summer of 2014. The question is: to what extent can the rise of the Islamic State be attributed to the exclusionary nature of Iraqi state-building and constitution-making?

As noted in this thesis, at the time of constitution making the Sunnis were not a defined community, as the other sectarian and ethnic groups were. Prior to 2003, Sunnis did not have an active sectarian identity. They saw themselves as champions of Iraqi nationalism and

therefore at the time of constitution making, there was no organisation that could claim to speak on their behalf; which is one of the reasons why they were in a vulnerable position and were excluded from the process of state and constitution making.

Hence, one may argue that the post-2003 system of ethno-sectarian power sharing not only disadvantaged the Sunnis as a demographic minority devoid of sect-centric organisations, it also made them both reject this system and to become as sect-centric as the system they derided. As some observers put it, after regime change, Sunnis had to imagine themselves as a sectarian group. This was due to a response to what the Sunnis deemed to be a Shia-centric state building, but also in order to be relevant in a system fundamentally based on identity politics.

If one views the Sunni identity that emerged as being founded on a rejection of post-2003 state, the nearly impossible task of Sunni political leaders who seek greater role and representation in a state and system that many of their constituents deem illegitimate, becomes clear. This may shed light on the rise and decline of Sunni acceptance, rejection and violence against the post-2003 order. Therefore, the rise of the Islamic State may be, among others, be attributed to the alienation of Iraqi Sunnis from the Iraqi state.

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