

Occidental College Talk Designing a Constitution in Aid of Development: Lessons from Iraq

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Boston University

OCCIDENTAL COLLEGE TALK
DESIGNING A CONSTITUTION IN AID OF DEVELOPMENT:
LESSONS FROM IRAQ

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NOTE: These constitute most of the constitutional provisions to which we will refer.

1. **Vagueness:** Many, perhaps most provisions have little or no content, but require definition by the new Council of Representatives (“COR”) – a matter of poor drafting. For example:
 - a. 67 of 139 Articles in terms require legislation to define their meaning; most do not come into effect until COR enacts a relevant enabling law. (Note that existing law may cover some of these; see Art. 127).
 - i. Art. 48(3) (“3rd - Conditions for candidates and voters and everything connected to elections will be regulated by law”);
 - ii. Art. 61(1) (“The rights and privileges given to the president of the Council of Representatives and his deputies and the members of the council shall be fixed by law ”);
 - iii. Art 63 (“1st - A legislative council called the “Council of Union” will be established and will include representatives of regions and provinces to examine bills related to regions and provinces. 2nd - The makeup of the council, the conditions for membership and all things related to it will be organized by law”);
 - iv. Art. 90(1) (“The Supreme Federal Court is an independent judicial body, financially and administratively, its work and its duties will be defined by law”)
 - v. Art. 95 (“Judges shall not be impeached except in the cases determined by law; the law will also specify the rules pertaining to them and regulate disciplinary actions against them”);
 - vi. Article 100 (“The Supreme Commission for Human Rights and the Supreme Independent Commission for Elections and the Integrity Agency are considered independent associations subject to the supervision of the Council of Representatives. Their work is regulated by law”).
 - vii. Art. 102 (“An agency shall be established called the Institution of the

Martyrs, affiliated to the Cabinet, and its operations and powers will be regulated by law”).

- viii. See especially the provisions concerning the Supreme Judiciary Council – and its enormous power, (including the power to nominate head and members of the Supreme Federal Court and the Federal Cassation Court), as follows:

“FIRST: The Supreme Judiciary Council

Article 88: “The Supreme Judiciary Council will administer judicial affairs in accordance with the law.”

“Article 89: The Supreme Judiciary Council will exercise the following powers:

1st - administering and supervising the federal judiciary system.

2nd - nominating the head and members of the Supreme Federal Court and presenting their names to parliament for endorsement.

3rd - nominating the head of the Federal Cassation Court, the chief prosecutor and the head of the Judiciary Inspection Department, and presenting them to parliament for approval.

4th - proposing the annual budget for the federal judiciary system and presenting it to parliament for approval.”)

(These constitute all the references in the Constitution concerning the Supreme Judiciary Council.)

2. The language of the constitution is so vague (at least in translation) that the official or judge that interprets it has very wide discretion. See, e.g.,
- a. Art. 2(1) (“Islam is the official religion of the state and is a basic source of legislation:
 - i. No law can be passed that contradicts the undisputed rules of Islam.
 - ii. No law can be passed that contradicts the principles of democracy.
 - iii. No law can be passed that contradicts the rights and basic freedoms outlined in this constitution”).
 - b. Art 35 (“ 1st - (a) The freedom and dignity of a person are protected”);
 - c. Art. 36 (“The state guarantees, *as long as it does not violate public order and morality*: 1st - the freedom of expressing opinion by all means. 2nd - the freedom of press, publishing, media and distribution. 3rd - freedom of assembly and

peaceful protest *will be organized by law*" [emphasis added]);

- d. Art. 39 ("Iraqis are free in their adherence to their personal status according to their own religion, sect, belief and choice, and that will be organized by law");
 - e. Art. 52 ("1st - Sessions of the Council of Representatives shall be public unless it is necessary to do otherwise. 2nd - Sessions reports shall be published in the way the council sees fit").
3. Some of the provisions seem to serve wholly symbolic functions; they do not prescribe behavior. See, e.g.,
- a. Art. 2(2) ("This constitution guarantees the Islamic identity of the majority of the Iraqi people");
 - b. Art. 3 ("Iraq is a multiethnic, multi-religious and multi-sect country. It is part of the Islamic world and its Arab people are part of the Arab nation");
4. The principal function of a constitution is to give directions to government about how to behave. Government's principal functions are law-making, law-implementation, and adjudication. How adequate are the provisions for these in the draft constitution?
- a. The legislative function
 - i. Elections: Everything is left to future law. Art. 48(3) ("A law shall regulate the requirements for the candidate, the voter and all that is connected with the elections.")
 - ii. Especially, nothing concerning the basic structure of elections (especially, proportional representation vs first-past-the-post, or party list vs individual candidacy)
 - iii. Public participation:
 - (1) Sessions of COR "shall be public unless it deems otherwise." Art. 52(1). (NB nothing on public inputs to the law-making process).
 - (2) Minutes to be published "in means regarded as appropriate by the Council." Art 52(2).
 - iv. Parliamentary privilege: In general, to be regulated by law. Art 61(1)
 - v. COR is limited to an extent by the provisions of the Human Rights provisions. That is not very much of a limit. Free speech and press, for example:

- (1) Art. 36 “The state shall guarantee in a way that does not violate public order and morality:

“A. Freedom of expression using all the means.
 B. Freedom of press, printing, advertisement, media and publication.
 C. Freedom of assembly and peaceful demonstration and this shall be regulated by law.”

- vi. Provisions to ensure the quality of discussion and information within COR: Nothing requiring a reasoned justification for a bill..
- vii. Nothing requiring local offices for COR members, or requiring regular report-backs to constituency.
- viii. Nothing detailing the procedure by which a bill gets drafted, or public participation in the drafting process.
- ix. Transparency: Nothing explicitly on freedom of information. Sessions of COR to be public “unless it deems them otherwise.” Art. 52(1). See also Arts. 59(7) (on Parliamentary questions), Art.20 (“Citizens, men and women, shall have the right to participate in public affairs and to enjoy political rights including the right of voting, election and nomination.” Art. 36 (free speech guaranteed “in a way that does not violate public order and morality”)
- (1) Nothing on requiring transparency re: conflicts of interest (e.g., a ‘Leadership Code’ or a Declaration of Assets by COR members).
- (2) Zero detail on the Federation Council (Art. 63: “A legislative council shall be established named the ‘Federation Council’ to include representatives from the regions and the governorates that are not organized in a region. A law, enacted by a two third majority of the members of the Council; of representatives, shall regulate the Federation Council information, its membership conditions and its specializations and all that is connected with it.”)
- b. The executive: Nothing to ensure *good governance*.
- i. Provisions ensuring *effective* governance.
- (1) Provisions concerning qualifications for office.
- (a) President: Art. 66 (only provision re: competence states nominee for President must have “a good reputation and

political experience” Some requirements re: integrity – e.g. “god reputation, known for integrity, righteousness, fairness and loyalty to the homeland.”).

(i) NB nomination to be regulated by a law. Art. 67.

(b) Prime Minister: same qualifications as President, (except age). Art. 75(2)

ii. Honesty in government

(1) Art. 100: “The...Commission on Public Integrity are independent commissions, which shall be subject to monitoring by the Council of Representatives. A law shall regulate their function.”

(2) Art. 124. “The President of the Republic, the Prime Minister, members of the Council of Ministers, the Speaker of the House of Representatives, his two deputies and members of the Council of Representatives, members of the Judicial Authority and people of the special grades may not use their influence to buy or rent any of the State properties, or to rent or sell any of their assets to the State, or to sue the State for it or to conclude a contract with the State under the pretense of being building contractors, suppliers or concessionaires.”

iii. Structure and process of Cabinet and ministries: All left to future laws and regs. Arts. 83, 84.

(1) Rule-making: Art. 78(3) Cabinet exercises power “to issue rules, instructions and decisions for the purpose of implementing the law.” NB no further procedures mentioned..

iv. Public administration: Art. 105 is only provision: “A council named the Federal Public Service Council shall be established and shall regulate the affairs of the federal public service, including the appointment and promotion. A law shall regulate its formation and competencies.”

c. Judiciary

i. Higher Juridical Council: all left to future law. (Art. 88: The Higher Juridical Council shall oversee the affairs of the Juridical Committees [apparently means the courts].

(1) Fed Supreme Court: Requires an enabling act that will determine the number of Islamic scholars serving on the court. Art. 90(2)

- d. Independent Commissions
 - i. NB paucity of detail re: independent commissions mentioned.
- e. Addressing peculiarly Iraqi issues:
 - i. Federalism – the chief issue in the power struggle.
 - (1) NB that the power to tax is not mentioned in Art. 108 (exclusive Federal competencies) or in Art.111 (shared competencies). Do only Regions and governorates have the power to tax?
 - (2) See Art 63 (Establishes a ‘Federation Council’, with representatives from regions and governorates not in a Region. The clause then states: “A law, enacted by as two-third majority of the members of the Council of Representatives shall regulate the Federation Council formation, its membership conditions and its specializations and all that is connected with it.” [!!!])
 - (a) Art 115: “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, b y a simple majority.” (I.e., majority – presumably Shia – will determine procedures for forming Regions!)
 - (b) See, e.g., Art. 110(1)(oil to be managed by federal government with “producing governorates and the regional governments” to manage, and distribute oil monies according to the following formula: “In a fair manner in proportion to the population distribution in all parts of the country with a set allotment for a set time for the damaged regions that were unjustly deprived by the former regime and the regions that were damaged later on, and in a way that assures balanced development in different areas of the country, and this will be managed by law.”
 - (c) See also detailed provisions re: regions, Arts. 113-118
 - ii. Also note paucity of details re: municipal government (Art. 122: “This Constitution shall guarantee the administrative, political, cultural and educational rights for the various nationalities, such as Turkmen, Caldeans. Assyrians and all other components. A law shall regulate this.” [That is the only provision concerning local government!])

iii. Economic development:

- (1) Re: oil: Art. 110(2): Fed gov't with the producing regions and governorates together shall "formulate policies to develop oil and gas wealth in a way that achieves the highest benefit to the Iraqi people *using the most advanced techniques of the market principles and encourages investment.*" [emphasis added].
- (2) Re: economic development generally:
 - (a) Art. 25: "The State shall guarantee the reform of the Iraqi economy in accordance with modern economic principles to ensure the full investment of its resources, diversification of its sources and the encouragement and development of the private sector."
 - (b) Art. 26: "The state shall guarantee the encouragement of investments in the various sectors. A law shall regulate this."

