

Constitution of Iraq: Process, Issues and Pitfalls

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Abstract

The war on Iraq carried out by US-led coalition forces in March 2003 changed the whole political scenario of the Iraqi state. The removal of Saddam Hussein from power was perceived by many, especially by the Shiite and the Kurds, as a positive change in Iraqi state but what followed was the misery and political turmoil affecting millions of people. The purpose of this paper is to understand the new Constitution framed in the New Iraq formed after 2003 and further attempt to understand the flaws within the new Constitution which in a way has hampered the societal structure of the country. In this context, it is important to examine the process of constitution making, the major steps it has taken and how it has aggravated the ethno-sectarian divisions in the society and how successful it was in diminishing and addressing the Iraqi political crisis.

Key words: Iraq, Constitution, ethno-sectarian, Issues, and Process, Sunnis.

Constitution of Iraq: Process, Issues and Pitfalls

The first major task of the new government or the Transitional National Assembly of Iraq was to draft a constitution for the new Iraq. The process of drafting the Iraqi Constitution has its own flaws with political problems which in a way hampered the societal structure of Iraq. The major problem was that, “much of the process of constitutional design has aggravated the same political divisions that it is supposed to ease.”¹ For instance, the three-member Presidency Council designed by the TAL, with Shiite, Kurds and Arab Sunnis each making claim over one particular seat has made the dilemma more perplexed. Moreover, most of the “bargaining over the constitution” has been carried out based on “ethnic, religious, and regional terms”, indicating that the “constitution being drafted will reflect the interests of the various groups without resolving the many differences among them”.²

¹ See Nathan J. Brown, “Iraq’s Constitutional Process Plunges Ahead”, *Carnegie Endowment for International Peace*, 2005, p. 2.

² For details see *ibid.*, pp. 2-3.

In this context, it is important to examine the process of constitution making, the major steps it has taken and how it has aggravated the ethno-sectarian divisions in the society and how successful it was in diminishing and addressing the Iraqi political crisis. Like previous election, the deadlines for referendum of constitution were rushed by both US and TAL, giving very little time for the National Assembly and the drafting committee. The whole process of writing the constitution was presented by President George W. Bush as an opportunity for Iraqis to “bind their multiethnic society together in a democracy.”³ While then Iraqi Prime Minister Al Ja’fari described the drafting of constitution as “worth a thousand tanks.”⁴ The constitution writing of any country can be looked through the prism of the ideal view that it has to set up the country’s political process and structure. In contrast, the Iraqi constitution writing has aggravated the divisions rather than easing the problem to some extent. After much dilly-dallying, the Assembly finally appointed a 55-member committee on 10 May 2005 to draft the constitution and only two Sunni Arabs were represented in the committee.⁵

The ‘Process of Drafting of the Constitution’ is carried on by the National Assembly which has to complete the draft of Constitution by 15 August and it has to be approved by two-third of its population through a nationwide referendum by October 2005. As decided, if it fails to get a successful referendum or if National Assembly disapproves, then the whole process of writing the Constitution has to go through the same procedure again. However, the Constitution of Iraq successfully gained support from National Assembly and got approved.

The TAL did give deadline for the writing of constitution but apart from that, the fifty-member National Assembly was left with itself without any instruction to write the constitution. It is very important to look into the members of National Assembly who were elected through election in which many Sunnis boycotted and therefore, it was not an inclusive and proper representative political institution. The Sunni Arabs minimal participation in 2005 election affected its participation and contribution in drafting of the constitution. Therefore, in the 55-member drafting committee of constitution, Sunnis were underrepresented.⁶ The entire negotiation of constitution was done by Shiite and Kurds where the “Shia Islamists and Kurdish ethno-nationalist” set the tone of the constitution and even portrayed Iraq as a constituent of three separate yet homogenous communities.⁷ This trend of excluding and giving minimal representation was encouraged by the fact that during Saddam’s regime, Shia and Kurds were the victims while Sunni enjoyed the status quo.

³ Quoted in Brown, “Iraq’s Constitutional Process Plunges Ahead”, p. 2.

⁴ Ibid.

⁵ Kenneth Katzman, “Iraq: Politics, Elections, and Benchmarks, *Congressional Research Service: The Library of Congress*, 2010, p. 2.

⁶ See Kenneth Katzman, “Iraq: Politics, Governance, and Human Rights”, *CRS Report for Congress*, Order no: RS21968, 2012.

⁷ See Al-Qarawee, “Iraq’s sectarian crisis: A legacy of Exclusion”, p. 5.

The process of constitution making of 2005 was marked by “chaos, controversy and deadlock” and it had to go through a long process of negotiations, debates and non-appearance.⁸ The pressure of deadline and the absence of real Sunni Arabs participation in the drafting of the constitution increased the hostility of Sunnis against the State. This ultimately led US to put pressure in incorporating Sunnis in the Iraqi political process and drafting of the constitution. After mounting US pressure, fifteen of Sunni Arabs were added in the constitutional committee as full voting members on 15 July and this process further proved “controversial” because there were many issues which were “too contentious and the divisions too great to agree”.⁹ Overall, the new constitution provided for a democratic basis of new government which was already laid out in the TAL, apart from that, it outlined for conduction of election process through the regulation as stated in law; a parliamentary form of government with prime minister as key executive; in order to keep the country unified, a strong and symbolic president was also mentioned; separation of powers between and central and regional government; and it also included an independent court system.¹⁰ The issues of human rights were also strongly outlined in the constitution and this was a major achievement for the new Iraq and its people.

Some of the major constitutional issues included the following.

Federalism: It was undoubtedly one of the most contentious issues of the Iraqi state because it talks about the how much authority and power should be given to the central government and how much should go to the regions. In this process of federalism, secular Arabs and Sunnis “opposed strong regions and regionalization of Iraq” and instead favored for a centralized and “unified Iraq with professional army and bureaucracy”, because they feared that, “regionalization would mean the breakup of the state”¹¹ and they were most adamant in “preserving the oneness of Iraq”.¹² On the other hand, majority Shiite and all Kurds supported the idea of “ethno-sectarian federal, even confederal, state.”¹³ Another major issue related to federalism was management and ownership of national resources especially oil and natural gas and distribution of their revenues. The issue of Kurdish autonomy remained a major point to be discussed and in the end, the Kurds “won virtually all their arguments”; Kurds were able to make their autonomy more strong as they managed to get a “weak central government and a highly decentralized polity.”¹⁴ This issue was largely contested by Kurds who were driven by the presence of rich oil resources in Kirkuk and wanted to have sole control over it even though there are also large numbers of Shiites in Kirkuk region. As far as power and authority between the central and regions are concerned, the latter became priority and were given enough power to carry out their task. The final outcome was one central government for the entire country and also a strong regional government for Kurdistan.

⁸ See Pradhan, “Democratising Iraq through Military Intervention”, in Rajendra M. Abhyankar (eds.) *West Asian and the Region: Defining India's Role*.

⁹ See Marr, *The Modern History of Iraq*.

¹⁰ For details see *ibid.*, p. 294.

¹¹ *Ibid.*, p. 293.

¹² See Dawisha, *A Political History from Independence to Occupation*, p. 288.

¹³ For further details see *ibid.*

¹⁴ See Marr, *The Modern History of Iraq*, p. 293.

Role of religion in the new state: The second major issue was related to Islam and the degree to which Islamic practice and *Sharia* should be incorporated into the constitution. Shiite Islamist party like SCIRI, pushed for “greater Islamization” but they were “marginally successful” as the “proposal to make *sharia* [as] the basis of Iraqi law failed.”¹⁵ On the issue of Islam and identity, the constitution in Article 2 declared Islam as “the official religion of the State” and also as “fundamental source of legislation” but it also specified clearly that “no law could contradict established provision of Islam” or the “principles of democracy.”¹⁶

Identity of Iraqi nation: The identity of Iraqi also became a contested issue. Article 1 of the Iraqi constitution defined Iraq as “single, federal, independent and fully sovereign state in which the system of government is republican, representative, parliamentary and democratic” and also highlighted that the constitution will be the “guarantor of its unity.”¹⁷ It also clearly stated that Iraq is a “country of multiple nationalities, regions and sects.”¹⁸ As far as identity is concerned, Sunni Arabs “wanted Iraq to define as an ‘Arab’ state”; Kurds rejected the idea completely as they belong to a different ethnic group.¹⁹ Finally, Iraq was not defined as Arab state but was only “defined as a member of the Arab League.”²⁰ The issue of de-Ba’thification raised by Sunnis was completely rejected by Shiites insisting on “prohibiting ‘Saddamist’ Ba’thism in Iraq”²¹ and this caused major suspicion and distrust among the leaders of both the sects.

After it was passed by the National Assembly on 28 August 2005, the newly-drafted constitution was put in front of Iraqi people for referendum on 15 October. The turnout of people was relatively high at 63 per cent which was a good sign for building a democratic country. Out of all the provinces, two Sunni provinces, almost all the people from Anbar and Salah al-Din, voted against the constitution with 97 and 82 per cent vote, respectively, while in Ninawa, around 55 per cent of population rejected the constitution and thus missed the threshold of a ‘no’ vote by a two-thirds majority in any three provinces.²² Elsewhere, the ‘yes’ vote was over 94 percent and thus the constitution was passed successfully.²³ Since, TAL had clearly stated that only if two-thirds of any provinces voted ‘no’, the referendum would fail and the drafting committee has to go through the constitution again. Iraq did not have to go through another draft constitution but it did leave Sunnis dissatisfied. However, the previous election result and minimal representation in the new government clearly made Sunnis to realize that it was important to participate in the political process of the country which they did so in the December 2005 election and came out as largest party with maximum seats.

¹⁵ Ibid., pp. 293-94.

¹⁶ See Republic of Iraq, Ministry of Foreign Affairs, “Constitution of Iraq”, [Online: web] Accessed on 28 April 2015, URL: <http://www.mofa.gov.iq/en/about-iraq/constitution>

¹⁷ See Constitution of Iraq, URL: <http://www.mofa.gov.iq/en/about-iraq/constitution>

¹⁸ Constitution of Iraq, URL: <http://www.mofa.gov.iq/en/about-iraq/constitution>

¹⁹ Marr, *The Modern History of Iraq*, p. 294.

²⁰ See *ibid.*, p. 294.

²¹ *Ibid.*, p. 294.

²² For details see Katzman, “Iraq: Politics, Elections, and Benchmarks”, p. 2.

²³ Marr, *The Modern History of Iraq*, p. 296.

The US occupation of Iraq which started without any clear goals, and the transfer of sovereignty to Iraqi leaders also lacked clarity regarding the composition of the new governing structure. Yet, when US finally decided to transfer the power to an unelected Assembly, the Shiite leaders in the country objected this proposal and demanded for election at the earliest.²⁴ A compromise between Shiite leaders and US was made and codified in TAL by which elections were to be conducted by early 2005. After the elections, a timeline for drafting the constitution was also made. However, it was strange to see that both US and Iraqi officials treated the timetable as “sacrosanct” and were reluctant to take any extension date as to complete the draft of the constitution.²⁵ The major reasons stated were the “respective domestic political situations”.²⁶ For the Bush administration and US, “meeting the deadlines is the strongest evidence available for political progress” and “any delay would add to the impression that Iraq has sunk into a political morass”.²⁷ Therefore, it became important for the US to live up to its “self-fulfilling prophecy”.²⁸ In the case of Iraqi leaders, meeting the deadline reflected their domestic political reason as Prime Minister Al Ja’fari and his “coalition were anxious to turn the interim government into a regular one” by empowering the Shiite as a majority rule.²⁹ As a result, a rushed constitutional process deepened the rifts between the three principal communities- Shiites, Sunni Arabs and Kurds of Iraq.³⁰

Therefore, one major flaw was the duration of the drafting of the constitution; it was drafted in a time span of less than four-months which is a very short time for a country which has gone through so many tragedies and devastation because of the war, sanctions, occupation and the internal dynamics. The other important issue was the exclusionary nature of the drafting committee. A drafting committee formed exclusively from members of National Assembly cannot claim to represent the whole Iraqi population. As the National Assembly appointed a 55-member drafting committee from its own members which drew criticism from many, particularly from the Sunni Arabs because they did not participated in the 2005 election to be part of the National Assembly. Therefore, after many delays and pressure from US as well as international actors, few Sunnis agreed to be part of the drafting committee. The other important aspect was the “lack of international mediation” and “increased US visibility” so that the “moderate Sunni Arab nationalists would frequently express the fear that the Iraq constitution would be written in Washington, D.C.”³¹

²⁴ See Brown, “Iraq’s Constitutional Process Plunges Ahead” for details.

²⁵ Ibid., p. 3.

²⁶ For details see ibid., p. 3.

²⁷ See ibid , p. 3.

²⁸ Ibid.

²⁹ Ibid., p. 3.

³⁰ See International Crisis Group, “Unmaking Iraq: A Constitutional Process Gone Wary”, *Middle East Report*, no. 19, 2005, p. 1.

³¹ For details see Jonathan Morrow , “Iraq’s Constitutional Process II An Opportunity Lost”, *United States Institute for Peace*, Special Report 155, 2005, pp. 13-14.

Conclusion

Whatever its shortcomings, the newly drafted constitution laid out clear structure for future Iraq with a democratic government with timely election and clearly outlined the civil and political rights guarantying different ethnic and sectarian groups and regions to assert their interest and rights. In this way, the newly drafted constitution became foundation of new Iraq.