

Remaking Iraq
Success, Failure, and the Foundation of a New Iraq

Panel 1

Definition of Federalism in the New Constitution

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In October 2002, I had the honor to participate in the Conference held by AEI and called: *“The Day After: Planning for a Post Saddam Iraq.”* I started my speech, as I recall, with a statement by John Lock, “when the tyranny ends, the rule of the law begins.”

After liberating Iraq, the reconstruction phase of the new Iraq started by establishing the institutions of the State of Law in an interim phase headed by Ambassador Paul Bremer, the Governing Council. Another interim period started and will end in December 2005 to mark a new phase with a new constitution representing the main reflection of the Power of Law. The new Law has transformed the State from a simple state into a federal (complex) one. Federalism is based on the idea of dialogue and continuous cooperation among governments in the Federal State in order to serve people.

Federalism means involvement in the political power and responsibilities, distribution of wealth and a just manner that correlates with the needs of people and the extent of damage incurred by the least advantaged areas and groups. All this takes place in line with a constitution that organizes the relations between the Federal Government and the original government(s) with an eye on achieving political and economic development. This cannot be done under a central presidential rule or the one-party rule.

Federalism doesn't mean a division of land, people and the State sovereignty. It is a voluntary federal rule based on common interests to expand involvement in decision

making according to constitutional institutions built up under the permanent Constitution. This Constitution guarantees separation among powers, the rules of democracy, and human right respect. Federalism comprises two or more regions optionally uniting. Mandates of federalism, powers of the Region or regions are provided for in the Federal Constitution. In this sense, Federalism is the best means towards the end of involving all especially in a country with multiple and varied ethnicities with several religions and several thought trends and parties such as Iraq.

The reasons for the revival of federalism idea include the importance of democratic values and respect of the ethnic groups' rights, human rights, failure of individual tyrant regimes; new political and economic variables and the relative concept of sovereignty that are no more the same for all countries.

The Iraqi State was founded in 1921 after the termination of the British occupation of Iraq. It used to be a simple state with a royal parliamentary regime. In 1925, the first Constitution was issued in the history of the Iraqi State; it was the Basic Law. It was issued under constitutional institutions built with the contribution of all ethnic groups, religion followers, and other Iraqis with a great transparency. This Law was the first permanent constitution in Iraq which has witnessed no other constitution afterwards. Since the topple down of the royal regime on July 14, 1958, several constitutions were issued with several amendments introduced thereto; which connotes a state of political chaos and instability, the absence of the rule of the Law in Iraq. The rule of power and force has replaced the rule of the Law.

This Statute or basic law has been the subject of long discussions before issuing it. Those discussions organized the relations among the three powers (legislative, judicial and executive). Mr. Abdul Mohsen Sa'doun was the first Iraqi Premier and he aspired the build up of the State of Law. His ideas were clear and included respect to the Kurds and other ethnic groups' rights.

The Iraq State was unified; its rule was centralized in hand of the power in the Capital-Baghdad. The Royal rule extended from 1921 till July 1958. That era witnessed several disturbances and political problems including the Kurdish revolution led by Barzan Chiefs. It was the revolution by Sheikh AbduSalam Barzani and Sheikh Ahmed Barzani in the early thirties. After that, a revolution by Chief Mustafa Barzani started on 11 September 1961. It was a continuity for the Kurdish revolution that was started with the leadership of Sheikh Mahmoud Hafid after waging World War I. Several attempts were made to build up democracy by means of reaching a fair and peaceful solution for the Kurdish cause. However, all those attempts failed. This affected the status of Iraq in all aspects.

The political status has not settled in Iraq since 14 July 1958; the date of the martial rule and the topple of the Royal regime. Several provisional constitutions have been issued. Neither the stipulations of the Constitution nor the valid laws were respected. The independence of the judicial power was not respected. The Ruler acted beyond the rule of the law. Of course, this deterioration and the absence of the law as well as the obvious violation of human rights and the phenomenon of the one-man rule which has dragged all Iraqis into several disasters started with the Ba'ath party assuming power in the Country for the first time in 1963; and the second time in 1968. When Saddam acceded to the

presidential position in 1979. He abandoned the national sovereignty and involved Iraq into a civil war against the Kurdish people. Saddam also deceitfully attacked the neighbors to the East and to the South. He destroyed the country through malicious practices and did not comply with the Constitution or the Law. The impacts of the internal and external wars are still causing suffering for the Iraqis inside and those living abroad. These impacts will exist for a long time despite the liberation of Iraq from the tyrant rule of Saddam.

Liberation of Iraq from Tyranny and Changing the State into a Complex State:

After the liberation of Iraq on April 9, 2003 from the worst fascist apartheid regime since the collapse of the Nazism in 1945, the Law of the State Administration for the interim period TAL on March 8, 2004 was issued by the Governing Council which was formed after the liberation of the purpose of managing the Iraqi State for the interim period which usually precede the build up of constitutional institutions. The said law is deemed as the provisional constitution of the country. It includes the basic rules of the permanent Constitution of the new Iraq alongside the road map of the political and constitutional process for the temporary and interim period as well as the permanent status which will start with the elections in January 2006.

The Transient Administration Law was issued after a laborious process. Its issuance concurred with an international day; namely, March 8, 2004- the International Woman Day. Indeed! an occasion that brings back to our minds the agreement between Saddam and the Shah of Iran on March 6, 1975 when wavering half of the Arabian Gulf for having the Shah cease his logistics' support of Kurdish Liberal Movement in Kurdistan-Iraq. This occasion also reminds us of the eruption of the courage revolution of the Kurds and the people in the South against the tyrant and his regime in 1991. That revolution that resulted in hundreds of thousands of victims among the Iraqis. The "buried" regime bombarded the revolting cities with missiles and buried hundreds of thousands of innocent people and the revolting ones in group tombs or graveyards. The same occasion reminds us of other main events whether on the level of Iraq or on the international level.

The New Constitution Drafted by an constitutional committee elected by a national elected assembly:

In the first half of May, 2005, the Constitutional Committee was established at the General Assembly in order to start with drafting the permanent Constitution of the Democratic Federal Pluralism Iraq . This duty is shouldered by the National Assembly in compliance with the Article (60) of the Transient Administration Law of the State which stipulates: (the National Assembly must draft the permanent constitution of Iraq....).

The first paragraph of Article (61) stipulates: "The National Assembly must draft the permanent Constitution by August 15, 2005." The National Assembly considered the Constitutional Committee as an ad hoc committee; the reason why it was not declared within the by-law of the Assembly which mentions the formation of 27 several committees. There have been three trends in the Assembly in relation with the Constitution drafting. First: it is that supported by the Consolidated Coalition Group

which wants 20% of the committee member to be from the assembly members who seek to head the constitutional committee. The Second: it is supported by the Kurdistan Coalition who want the number to be 10% only of the total number of the Assembly members; i.e. about 27 people.

However, we suggested that a specific number must be assigned for the purpose of drafting the Constitution; this number cannot exceed 7 or 9 Iraqi specialized consultants. These can draft the constitution while soliciting experiences of other peoples in this field. They can be assisted by a group of international consultants from the American Bar Association, the United National and the European Union. However, the first proposal won over upon the voting process at the National Assembly. The Constitutional Committee was formed from 55 people distributed at several groups- 6 groups who drafted 8 chapters of the Constitution. The number was expanded after adding other groups from the Arab Sunnis- 15 members in addition to 10 consultants. Those are not elected and they do not represent all the Arab Sunnis. They reject the Transient Administration Law of the State. They also reject the federal shape of the state in favor of the presidential rule and the Ba'aths restoring the power. They support resistance against the occupation.

On Monday 16 March 2005, the Minister of State Mrs. Condaliza Rice paid a visit to Mr. Mas'oud Barzani and then the government of Dr. Ja'fari. She held discussion of several files including that of involving the Sunni in the Constitutional Committee in order to control the Shiite majority and the over-dominance of the Shiite parties. She urged on holding a "Constitutional Conference" to get all the Iraqis to gather including the Arab Sunni as well as seeking the assistance of the UN, ABA and the EU consultants in order to draft the permanent constitution of the new Iraq.

In fact, on May 30, 2005, the UN Consultant and the Constitution expert in Southern Africa attended a meeting with the Constitution Committee. At the meeting, he offered the help of the UN in drafting and formulating the Constitution. However, he mentioned it explicitly that the constitution in new Iraq which is based on an optional federalism ought to be written by all the Iraqis with a desire by them all without any other party. The role of other parties will be only an assisting element. It will never go beyond the consultative role. In addition, there is the role assumed by the American Ambassador- Mr. Zalmi Khalil Zadah, the British Ambassador, the Representative of the US Secretary General Mr. Ashraf Qadi.

At the end of the day, the draft constitution was produced after extending the period set for it. It was set to be produced on August 15, 2005. with the extension, it was produced on August 22. The Constitution draft was delivered on the 22nd with the condition to enter some amendments to it. However, the final draft was delivered only on the 29th. Till the date of writing this paper (September 13,2005) amendments are still being introduced to the draft just to satisfy all the parties. The draft was criticized by the Arab League and objections from the Arab Sunnni and others but the draft was sent to UN on Sept 14 by Iraqi National Assembly to publish 5 Million copy for Iraqis. In terms of the rights of the Kurds and Kurdistan, the rules in the draft are OK for Kurdistan as they mark the first time for the Kurds to have such rights; which they couldn't have at all along all the history of the Iraqi State and its several constitutions.

Federalism and the Kurds Cause in the New Constitution Draft

The principles and basic achievements for Kurdistan can be set as follows:

First: Self-Determination:

The Kurds have the right to self determination and to define the type of their relation with the Headquarters (federal or confederal shape of rule) or to announce their independent state on their territories according to the International Law rules and the International Pact annexed to the Universal Declaration of Human Rights as well as the relevant resolutions. However, the draft constitution has not included a text to express this right due to the objections from other parties in the Constitutional Committee and other political leaderships.

The Constitution, however, includes in its preamble a text that can be interpreted as a reference to the self-determination right for the Kurds and a basic guaranteed for the rights of the Kurds. The text reads as: “The commitment to this Constitution will maintain the free unity of Iraq- people, land and sovereignty. This means that the violation of such a constitution by any party such as rejecting federalism or democracy or even violating the rights of the Kurds will cause prejudice to the unity of Iraq. Then, the Kurdistan Region can declare their separation from Iraq and exercise their right to self-determination in line with the Parliament Resolution in Kurdistan.

Second: Basic Principles of the Constitution:

- 1- The Republic of Iraq is a federalism with a plural, democratic, republican regime.
- 2- The Kurdish and Arabic languages are official languages; this includes printing the official gazette in both languages and the dealings in the State and its institutions will be in both languages as well. All the official documents and correspondence will be in both languages. Schools will be opened to teach both. In addition, the bank notes, stamps and passports will all hold both languages.

Third: Federal Powers

The new Constitution draft stipulates the federal powers in its third chapters as follows:

- 1- The Federal Legislative Power: It includes two councils- The Deputies’ and the Federation Council. If the Federation Council will be organized upon a law, the draft constitution draft has put in details the organization of the deputies’. It consists of a number of members with one seat for every 100,000 people. The representation of all the Iraqi people segments must be represented ; the session of the Council is four calendar years with two legislative terms of 8 months each. This term is to enact the federal laws, proposed laws, and monitoring the executive

- power as well as ratifying the treaties and agreements and appointment of the Senior grade employees; and holding the President of the Republic accountable....etc.
- 2- The executive power including the President of the Republic and the Cabinet:
 - 3- The Legislative power including the Higher Judicial Council and the Supreme Federal Court.

Fourth: the Independent Committees including:

- 1- The Higher Commission of Human Rights
- 2- The Higher Commission of Elections
- 3- The Commission of Integrity
- 4- Commission for the Property Dispute Settlement
- 5- The Central Bank of Iraq
- 6- The Financial Control Bureau
- 7- The Information and Communication Commission
- 8- The Awqaf (religious properties) Bureaus
- 9- The Martyrs' Institution
- 10- The Commission to secure the rights of regions and governorates that are not incorporated in one region. The Commission's role is to put a just contribution in the administration of the several institutions of the Federal State, scholarships and fellowships, delegations and conferences. It comprises representatives from the Federal Government, regions and governorates that are not organized in one region.
- 11- A Public Commission for controlling and appropriation of the federal revenues in order to assure just distribution of international grants, assistance, and loans. It also verifies the optimal use of the federal financial resources and their distribution in a transparent and just manner when allocating money for the governments of the Regions or the Governorates.
- 12- Other independent commissions that can be established on an ad hoc basis.

Fifth: The Powers of the Federal Authority that are exclusively defined for it

The new Federal Authority in the Federal Iraq is specialized in the following according to the Constitution:

- 1- Draw the external policy and diplomatic representation as well as negotiation on the international treaties and agreements, policies of borrowing, their signature and conclusion as well as drawing the economic and external sovereignty commercial policy.

- 2- Set the national security policy and implement it including the establishment of armed forces and managing them to secure the Iraqi borders and defend them.
- 3- Set the financial and customs policy; issuance of currency, organization of trade policies across the regions and governorates in Iraq; produce the balance sheet of the State as well as drawing the cash policy and establish and manage an central bank.
- 4- Organize the issues related to standards, measurements and weights.
- 5- Organize issues related to nationality, nationalization, residence and political asylum.
- 6- Organize the transmission frequencies (bands) and the post.
- 7- Set the general and investment budget.
- 8- Plan policies in relation with water resources from outside Iraq and assure the levels of water flow into Iraq according to the international laws and norms.
- 9- The census of population.

Accordingly, Article 112 stipulates that all things not stipulated in the exclusive specializations of the federal authorities will be within the authority of regions, and governorates not organized in one region. Other authorities that are common to the Federal Government and the Regions will give priority to the Law of the Region in case of dispute over them.

It is worth mentioning that Article 111 of the Draft Constitution stipulates the common specializations between the Federal Authority and the authorities of regions such as the Customs Service, the organization of power (electricity) sources, drawing the environment, public health, educational, and water resources policies.

Division of the oil and gas wealth between the Federal Government and regions and governorates (producing and non-producing)

The division of wealth must be clear and explicit among the governments. Otherwise, it will cause the eruption of disputes and instability. Article 110 of the draft constitution stipulates the division of wealth as follows:

- 1- The current government will manage (oil and gas) extracted from the current fields in cooperation with the producing regions and governorates. This means that the new fields will not be involved in this management which will be limited to the producing regions and governorates. The other natural resources such as water, animal, fish, uranium and others will be for the producing region or governorate only.
- 2- The revenues of oil and gas will be distributed and shared 50:50 according to the population distribution all over the country. A share will be defined for the damaged regions before and after the ex-regime and in a way to achieve the balanced development in the Country. This means Kurdistan and the southern regions in Iraq (Shiite Arabs).

Paragraph two of Article (110) of the constitution draft stipulates that the federal government and the governments of the producing regions and governorates together will be setting the required strategic policies to develop the oil and gas resources. This means that the non-producing regions and governorates will not be involved in setting this policy being non-producing. However, they will have a share of the revenues of oil and gas and will be distributed through the Federal Government.

Sixth: Powers of the Regions

The Constitution Draft organized these powers in the fifth chapter in two sections: Regions and Governorates that are not organized in one region; then the capital and the local administrations. However, what we care for here is the content of the first section of the Regions' Power; specifically what is related with Kurdistan as follows:

- 1- Article 114 of the Constitution draft stipulates: "First: When passed, this Constitution recognizes Kurdistan Region and its powers as a federal region. Second: this Constitution recognizes the new regions that are established according to its provisions." Accordingly, Kurdistan is a region in itself and it is united with Arabstan region on an optional choice according to this Constitution. If this federation is violated by violating the Constitution, this Federation will be dissolved according to the preamble text. The Legislative institution of Kurdistan can take the position which is relevant to the kurds to self determination on its territories including their right to establish their independent state.
- 2- The Region will set its constitution and define the structure of authorities of eh regions and their powers as well as the mechanisms to practices those powers on condition that will not contradict with the Federal Constitution.

Beshmerga Forces and Representations of Kurdistan Region and the Power of Amending the Federal Law

Article (118) of the Constitution Draft stipulates the following rights that reveal a part of the sovereign powers that enhance the role of the Kurdistan region in the Federal Republic of Iraq as follows:

- 1- The right to exercise legislative, executive and judicial powers and the internal sovereignty on Kurdistan Region except for the exclusive specialties of the Federal Power.
- 2- The right of the region authority to apply the federal law in the region when there is a contradiction except for the exclusive federal power.
- 3- The right to get a just share from the revenues collected on the federal level.
- 4- The right to establish representation units and offices for the regions at the embassies and diplomatic missions.
- 5- The right of the region's government to have their armed and security forces and the police force as their specialty per se. That means the beshmergah and the other armed forces are subject to the region government management. No other military

force can enter into the region unless upon a permit by the legislative power in the region.

The articles of the Constitution cannot be amended in relation with the regions' affairs

No amendment can be introduced to the articles of the Constitution in a manner to cause prejudice to the authorities of the regions that are not included in the exclusive specializations of the Federal Powers unless upon an approval by the Legislative Power in the concerned region and the approval of the majority of its population upon a referendum.

Kirkuk Issue and the areas of dispute (Article 58 of TAL)

The case of Kirkuk and the areas of dispute and which were subjected to the arabicization policy and ethnic merger by the Ba'ath are main issues for the Kurds. Kirkuk is known as the heart of Kurdistan or like Jerusalem for the Arabs). It has not been possible to solve these problems according to TAL. Thus a new commission has been established and chaired by Mr. Hamid Majid Mousa- Secretary of the Iraqi Communist Party to solve the case of Kirkuk and apply the text of Article 58 of TAL.

The aforementioned Law which is a provisional constitution like text for the Country. It did not set a deadline for settling these problems. Thus, the new constitution draft in Article 136 stipulates:

- 1- The Executive Power will take the required steps to complete the implementation of the requirements of Article 58 with all its paragraphs in TAL.
- 2- The Executive power will continue to exercise its responsibilities in the transitional government as stipulated in Article 58 and such power will extend to the elected executive power according to this Constitution. However, they must complete the following:
 - Nationalization
 - Census
 - Referendum in Kirkuk and the areas that are being disputed on to establish the opinions of people in a deadline of 31 December 2007.

Laws of the Region in Kurdistan

The Draft Constitution stipulates that the laws enacted in Kurdistan Region since 1992 will remain to be in practice. The resolutions made by the Government of Kurdistan Region including the courts' decisions and the valid contracts unless amended or cancelled according to the laws in Kurdistan Region and by the competent party therein unless they should be in contradiction with the Constitution.

We think that the federalism is the choice of the Kurds in terms of political participation and in distributing wealth justly and according to the needs of people and the population density taking into consideration the harm caused to Kurdistan Region. In this sense, the federalism lays the ground for the rule of the State of Law, build up of democracy,

respect of human rights in the new Iraq. It cannot be the ultimate aspiration to achieve the rights of Kurds because we believe in the right of the Kurds to self-determination. They have the right to opt for confederalism or to establish an independent Kurdish state as the conditions of the State of Law are available including the existence of people and land, and the political framework including the legislative, executive and judicial powers in addition to the natural wealth.

The Kurdish State is a legitimate goal that the Kurds want to achieve after a long struggle against dictatorship. In order to achieve freedom, the Kurds have offered many victims. One day the Kurds will enjoy total freedom as they are the only nation on earth that does not have an independent state on its own territory. Peoples who sacrifice for peace and democracy must reach their goals one day and build up their state of Law and have a government to serve people.

Eventually, Abraham Lincoln said: “A government from the people and to serve people ought not disappear from earth”.