

Dissent and Reform in Iraq: Pluralism—Its Wealth and Its Misery

By Haider Saeed*

Iraq's new permanent constitution—the eighth constitution in the history of modern Iraq—was created in 2005. This is also the second permanent constitution to have been predicated on a moral crisis—quite similar to the crisis spawned by Iraq's first constitution, the 1925 Basic Law. This crisis was similar in that a core Iraqi group—one of Iraq's various ethnic, religious, and sectarian groups which are now referred to in Iraq's political lexicon as the “structures of the Iraqi people”—rejected the constitution. The Shi'ites' rejection of the 1925 constitution paralleled their negative stance toward all political systems that emerged after the dissolution of the Ottoman Empire. This stance also witnessed the Iraqi Shi'ites boycott of the 1923 parliamentary elections. The 2005 constitution, however, was rejected by the Sunni community with an absolute majority in the two Sunni provinces of Anbar and Tikrit, and with a lesser majority in the provinces of Mosul and Diala. In both the 1925 and 2005 cases, there was a basic justification behind this rejectionist stance—that these constitutions were drawn up at the hands of occupiers, or under their mandate.

However, the occupier, in both cases, permitted the public's ratification of the constitution. While the 1925 and 2005 constitutions were both born under the shadow of foreign occupation, they are the only Iraqi constitutions characterized by permanence, not provision. The 1925 Basic Law was approved by an elected parliament, whereas the 2005 constitution was ratified by popular referendum. The liberal concept espoused by the British and Americans—the last two occupiers of Iraq—enshrined the concept of political participation and the individual's voice in these documents. Iraq's other constitutions though, issued under the aegis of nationalistic regimes, were provisionally-based and failed to consider the people's will.

The constitution, in both cases, spurred a conflict between various groups in Iraq, but this rejectionist stance was not a position based on the documents' text or ideas, or the context within which it was written (the context of occupation); rather, the constitution's rejection stemmed from the belief that one of the groups would monopolize power and the entire political process, and in doing so, legitimize such control. Thus, this rejection was a rejection based on perceived dominance.

These two constitutions were created in a volatile context, and served as a new battleground for continued conflict; an old conflict between different factions which were coalesced in a political entity called Iraq. The constitutions were supposed to settle this conflict, in that they should have served as a political agreement for the different groups, while devising a relationship between them based on appropriate power-sharing.

Perhaps this was not the role envisaged for the 1925 Basic Law, which was drawn from a nationalistic model rooted in the nation's unified will, and not on a consociational agreement between different groups' desires and view points. Previously, the weaknesses of the political order, though not visible at the time, did not allow for the embrace of pluralistic societies. The 2005 constitution, one would assume, was created with a basic purpose—to form such a consociational agreement. There were two main views, I believe, that served as a basis for the last constitution:

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The first issue sought reconciliation with the past: The constitution worked to treat the structural crises which were caused by the Iraqi political system, not during the Ba'athist era and the Saddam Hussein regime only, which ended after the fall of Baghdad on April 9, 2003, but in every age of the modern Iraqi state. The political system which was established in the 1920s was transformed into an autocratic regime ruled by an elite from one of Iraq's ethnic groups (i.e. the Sunnis). This group is a demographic minority relative to Iraq's other ethnicities. This monopoly—based on this vision—was made possible because of the centralized nature of the Iraqi ruling order. Thus, the 2005 constitution attempts to prevent such a reoccurrence by formulating a political partnership or consociation, one that reconsiders centralized rule by distributing power through a federal and decentralized system. The constitution also aims to redistribute wealth which was the mainstay of the dictatorial regime.

The Mitigated Theocracy

The other view is the Islamist view. This does not mean that this constitution is an Islamic constitution, or that it legitimizes an Islamic regime like the one in Iran, for example. It does, though, include a certain degree of theocracy, illustrated by:

1. The establishment of a state that is not ruled by clerics but guided by them; thus a nation in harmony with, or content with, religion.
2. The fact that the state works to preserve (by protecting and guarding) the religious community, with all of its historic values, without trying to incorporate modern civil values. Religious values—in the Islamic meaning—are not spiritual and ritual values only, but are also legal and social in nature.
3. The fact that the country is generally defined by an Islamic character, one which is a social characteristic more than an attribute of the state. However, it is the duty of the state to preserve this character as it represents the community's identity. The second article of the constitution states, "This constitution guarantees the preservation of the Islamic identity for the majority of the Iraqi people." The state and the political class that emerged after April 9, 2003 were legitimized by clerics who influence important elements in the current political process. This was evident in the constitution's introduction, which offered a legitimizing framework for the current state. The constitution resulted from the clerics' insistence on including the phrase, "We recognize the right of God upon us, answering the call of our country, citizens, and religious clergy, and the insistence of our great religious *merja'as*, leaders, and politicians to proceed to the ballot box for the first time in our history." Thus, the state becomes a security apparatus that protects the religious community by:

- Preventing any law that can threaten or oppose the religious community by invoking Article 2 of the constitution, which says, "No law contrary to the principles of Islam may be enacted." This is ensured by the participation of

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Islamic jurisprudence experts in the Supreme Union Courts, tasked with monitoring such laws and their adherence to Islamic principals.

- Failing to give legal legitimacy to any possible social phenomenon that can contradict the country's general Islamic character. This character mentioned in Article 2 of the constitution—which is charged with preserving it—is “...the Islamic identity for the majority of the Iraqi people.” These potential social phenomenon mainly concern freedoms, both public and private. This is why the constitution made itself the legal reference for such freedoms, without any recourse to international law, as mentioned in Article 2, “No law contrary to the rights and basic freedoms *mentioned in this constitution* may be enacted (emphasis added).” Thus, the list of freedoms enshrined in the constitution did not permit freedom of religion and the right to choose one's religion—freedoms forbidden under Islam. This was mentioned in a general clause (Article 42): “Every individual has the freedom of thought, conscience, and religion.” Article 43 required the state “...to guarantee the freedom of worship and the protection of holy sites.” These specifications of freedoms illustrate a stance that rejects the global trend in values, but instead revert back to a cultural identity based on Islam as a religion, a history, and a value system. In addition, the constitution is vague (if not contradictory) in its openness toward references of international freedoms—it should not be forgotten that the constitution was written by a board comprised of opposing movements. It was written in Article 46 that “...There will be no restriction on practicing any rights or freedoms mentioned in the constitution except by law, as long as these practices do not violate the core values of rights and freedoms.” However, neither the “law” nor the “core values” referred to in Article 46 are specified.

- The state is obligated to protect religious, social, and ritual values. Article 43 says that “...the state guarantees the freedom of worship and the protection of holy sites.” Article 29 reads, “The family is the basis of society, and the state protects its religious, moral, and national values.”

- The state permits the establishment of a religious society independent of the state, and this is made possible by referring issues of family law to the religious establishment (Article 41). Given that the authors of the constitution paid particular heed to the creation of an independent religious community and establishment, they introduced a special article that says, “Every religion or denomination should adhere to the practice of religious rites, and manage their own religious affairs and establishments.” This article should have been supplemented by referencing the independence of non-governmental organizations (NGOs), considering that the religious establishment is non-governmental in nature. This would have obviated the need to define public freedoms as the freedom to practice

religious rites. It is understood that this text tries to prevent a recurrence of the state's governance of religious institutions as witnessed under the Ba'ath party, and it establishes the independence of the religious establishment from the state. If this was not already evident, Article 41 laid the groundwork for the establishment of religious courts, whose rulings are implemented and imposed through the state's executive apparatus.

From the Consociational Model to the Majority Trend

A comparative study between the 2005 constitution and the Transitional Administrative Law (TAL), which was legalized by the Coalition Provisional Authority (CPA) in March 2004 and resembled a temporary constitution for Iraq during the roughly two year transitional phase following the fall of Saddam's regime, revealed a core transformation in the conception of these two texts. In TAL, the liberal trend attempted to create universal values (codified in charters and international treaties that are legally superior to Iraqi laws and which Iraq should abide by—chief among them, the Universal Proclamation of Human Rights). However, the Islamist trend manifested itself in the 2005 constitution by subjugating such laws to local values.

But what is more dangerous in my view—and this is the main thesis of the paper—is the retreat from the consociational model which the administrative law was based on, or to be more specific: the retreat from a principal aspect of the consociational model, and the establishment of a template based on the majority. This model consistently produces a ruling elite from the country's demographic majority. This shift occurred because the conditions for a consociational model were not yet ripe. This consociational model—in one sense—remains a conception, one proposed by the U.S. and legalized by the administrative law without pushing the necessary conditions for its realization. Requisite conditions—including the establishment of a broad-based national coalition, which Iraqi political elites have failed to achieve, and the formation of a broad-based political coalition, which includes a political elite representative of Iraq's different religious, ethnic, and sectarian groups—are the basic conditions required to build a consociational democracy, according to Arned Lijphart.¹ The Iraqi political elite has failed in untangling the complicated interconnectedness between two concepts—the demographic majority and the political majority—which still govern (and will continue to) the course of the Iraqi electoral process. When this elite was charged with drawing the contours of the Iraqi political system in the 2005 constitution, the majority trend, and not the consociational one, grew stronger, due to the latter's immaturity and the sectarian conflict—within which there existed a majority model that legalized political dominance.

This majority tendency appears in the constitution's text:

- The parliamentary system has legislative powers that can centralize authority in the hands of parliament, which is controlled by a political majority (as well as a demographic majority) and the prime minister who is selected by this majority.

¹ See: Arned Lijphart, *Democracy in Plural Societies*, New Haven, Yale University Press, 1977.

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- Doing away with (almost entirely) the concept of reciprocal vetoing, which constitutes one of the basic pillars of the consociational model, and is a weapon employed by minorities to confront any tyrannical overture made by the majority.
- To change the expression of political will, especially in the legislative aspect, from an absolute majority to a simple majority, so that the need to form political coalitions is reduced.
- Most importantly, this constitution—despite the fact that it does not legitimize political sectarianism—does not place restrictions on establishing a form of political sectarianism (in political terms at least). This form of political sectarianism is based on two pillars:
 1. It essentially aspires to distribute power quantitatively based on the demographic, ethnic, and religious blueprint of the country.
 2. It establishes a political practice, similar to that of Lebanon, which distributes three principal offices—the office of prime minister, the speaker of parliament, and the presidency—among Iraq's three major groups, the Shi'ites, Sunnis, and Kurds.

However, such a political system—with this structure and with the failure to untangle the overlapping relationship between the demographic and political majorities, and the failure to form a broad-based political coalition—will only serve to strengthen and revitalize sectarian polarization, enabling the demographic majority to monopolize every power and political institution in Iraq. This will be achieved through several means. The first is through legislative institutions and the parliament, in which the majority rules. Second, it will be facilitated through executive powers and a government formed by a parliamentary majority, which maintains an oversight role. Third, it will be attained through judicial means, where the parliament is charged with legalizing organizations and their management. Fourth, it will be made possible through financial, media-related, and regulatory institutions (such as the Board of Integrity and the High Commission for Human Rights) related to parliament and which serve a supervisory function. The notion of power-sharing cannot accurately be reflected by distributing the three most powerful government posts among citizens representative of Iraq's various factions. The exercise of power, practically speaking, is not limited to such positions and thus this cannot be considered a true distribution of power. It is apparent that the constitution—which permits this political practice—centralizes authority in the hands of parliament and the prime minister, chosen by legislative majority. In addition, the president remains a figurehead, while the speaker of parliament's powers are constrained by the ruling majority in parliament.

The existing Lebanese model has, to a large extent, dictated Iraq's political process and its attempt to build a form of political sectarianism. While it was said to be the only solution for Iraq's woes, the Iraqi political elite failed to notice the real differences between Lebanon and Iraq. There exists no clear-cut demographic majority in Lebanon as there

does in Iraq, and while there is greater sectarian balance in Lebanon, all of its factions are minorities.² This balance does not limit the authority of the Lebanese speaker of parliament by an ethnic or sectarian majority, while the Lebanese president possesses greater latitude in the decision-making process than what is granted to his Iraqi counterpart by the 2005 constitution.

The majority trend which is enshrined in the constitution—which centralizes power in the hands of a political and demographic majority, deprives minorities of their leverage over the majority, and permits a political system that continuously reproduces a demographic majority elite—will create a dangerous political game with inherent contradictions. On one hand, this parliamentary system means that Iraq will once again revert back to a classical model of nationalism, based on the idea of a united national will and one national power base. The parliamentary system is defined by electoral competition on the basis of Iraq’s identity, and thus gives authority to victorious parties in this regard, without any consideration to ethnic, religious, and sectarian diversity—and its critical role in electoral politics. This model was the one on which the Iraqi state was based in 1921, and is largely responsible for producing dictatorship, and the country has not benefited from past mistakes in the post-authoritarian era. On the other hand, this trend will create a democratic “game” that resembles a closed system where there is a monopolization of authority which prevents minorities from obtaining power and representation. Consequently, instead of feeling a sense of participation in such a system, minorities will experience a feeling of alienation. This implies that the devolution of power will be among Iraq’s majority elite, not between the various factions that form Iraq. Thus, the concept of power-sharing will be devoid of any meaning, and will instead revert back to a model of political monopolization. In particular, this sensation will be instilled in the Sunni community, because the Kurds, Iraq’s second biggest minority, have been more receptive to federalism than to the distribution of power among different ethnic and sectarian groups. Thus, minorities will not allow themselves to be bound by this constitution and democratic “game,” as it does not reflect their interests or facilitate their taking power.

Thus, the root cause of violence in Iraq—the sense that the Sunni minority has been systematically excluded from power—will continue.

The Sunni Problem, and its Characterization as a Minority Problem

Perhaps, the Sunni problem—the most prominent political issue after April 9, 2003—should have initially been dealt with as a minority problem, which would have given the Sunnis political guarantees that are bestowed upon minorities in other consociational democracies. The Kurdish problem used to be dealt with through the political history of modern Iraq, and was perceived as the only facet of minority issues in the country. While there was limited attention paid to the issues of other minorities (i.e. Turkmen, Christians), it was centered on cultural—and not political—rights. Moreover, these groups did not adopt a violent or confrontational stance. Still, Iraq’s political discourse has only treated the Kurdish problem as a problem of political minorities. On this basis, the Kurds were the only ones given political guarantees granted to minorities (after 2003). These

² Arned Lijphart, *Democracy in Plural Societies*, New Haven, Yale University Press, 1977.

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safeguards were designed to conform with the natural, demographic distribution of Kurds in Iraq. In the CPA, for example, a veto was designed in the draft of the permanent constitution to be a Kurdish “weapon”, in the event that Iraq’s Arab majority did not accept federalism or any other Kurdish demands. Thus, this veto required the backing of two out of any three Iraqi provinces, which happens to be the number of Kurdish provinces.

However, this political arrangement did not characterize the Sunni community as a minority, because they were considered to constitute the majority of Arabs and Muslims in Iraq. Thus, they were not given the same political guarantees as the Kurds, due to the conflation of minority issues in Iraq with the Kurdish problem. The fact that the Sunni political elite did not even consider obtaining minority rights in an comprehensive consociational agreement—and possessed no minority-based agenda—also contributed to this. This thinking did not enter into the Sunni political conscience, and as such, the Sunni community did not treat its problem as a minority problem. Thus, the Sunni intelligentsia still tries to counterbalance Shi’ite claims of majority rule by refuting these assertions. It would have been possible, for example, to incorporate a veto into the permanent draft constitution that would take into account the Sunni’s minority position and demographic distribution. This veto would have been designed to achieve a simple majority of three or four provinces, or two-thirds of two provinces perhaps. It is important that such a veto not be a rigid, sacred, mathematical equation; rather, it should enable Iraq’s various factions, including their minorities, to express their different stances and opinions.

Iraq may be in need of more radical thinking when its comes to creating a political partnership, because forming a parliamentary system and distributing government posts based on the Lebanese model cannot settle internal differences, and has failed in creating a sense of power-sharing among Iraqi factions. This feeling of exclusion still remains. Absent a political, consociational solution, these matters could be settled in a manner similar to the way in which a small Sunni elite ruled Iraq for than eighty years; that is, restoring an authoritarian system. This should not occur under the banner of revolutionary legitimacy and a unified national will, but instead, under a slogan of demographic majority rule. However, the latter slogan is just as dangerous as the previous one. Such an authoritarian regime could be produced through oligarchic rule, one ruled by a small elite from demographic majority, or a sole dictator that could capitalize on existing sectarian differences—as well as the desire of the demographic majority to rule and exact revenge for decades of political exclusion. In either case, the dream of a consociational agreement between Iraq’s various factions will remain a distant hope.

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