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The Need for Reforming the 2005 Iraqi Constitution: Shared Rule v. Self-Rule

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Abstract:

The novelty of any constitution is to create order and clear structures of state operation. It is also ordained to guarantee equality beyond any reasonable doubt while resolving differences within the law. In the event of the Iraqi Constitution, none is achieved, the constitution serves no purpose and relevance.¹ Constitutions are dependent on country and society. For this reason, it works in some countries, but fails in others regardless of the existing structures. In some countries, it is a baseline of peace after serious conflicts, while some have considered it an important transition for the better. The 2005 Iraqi Constitution made such an important step towards regaining self-rule and re-organization. However, it has been under scrutiny for failing to consider inclusivity, improve structure, and foster unity.² Most importantly, notable questions exist on whether to amend the constitution to favor self-rule or shared rule. This paper intends to examine opportunities presented by amending the Iraqi Constitution and the pitfalls if the present situation is left to continue.

Regardless of having the new constitution, the new democratic Iraq has been the subject of ridicule for rampant corruption and embezzlement. This has also been characterized by societal divisions. The politics of everyday life has changed with people questioning the effectiveness of the constitution in addressing their needs. In 2012, Transparency International ranked Iraq 8th with regards to corruption worldwide.³ Despite having more freedom as compared to before, civil liberties have been curtailed by the same constitution that assembled power away from the people. Independent journalists no longer have the freedom to cover anti-government protests and selective justice is the rule of the day.⁴ The chaotic preface has distinctively earmarked the shared rule as a joke only meant to satisfy the American interests when compared to the Kurdish regions that enjoy self-rule.

Regardless of how many systems of government are structured in the constitution, the measure remains in the ability to deliver. The separation of powers doctrine remains a point of attention in the Iraqi Constitution. It is supposed to create a framework where each piece of the

¹ Kritz N. J., al-Sarraf S., and J Alexander (2007) Their. Constitutional Reform in Iraq: Improving Prospects, Political Decisions Needed. U.S. Institute of Peace, 4

² McGarry J. & O'Leary B. (2007). Iraq's Constitution of 2005: Liberal consociation as political prescription. *Oxford journals*, 5(4), pp. 670

³ Jawad, Saad (2013) The Iraqi constitution: structural flaws and political implications. LSE Middle East Centre Paper Series, 01. LSE Middle East Centre, London, UK

⁴ Barzegar, K. (2008). Iran's Foreign Policy in Post-Invasion Iraq. *Middle East Policy*, 15(4), 47

administration balances and assures equality. This means no part of government has excessive control since they require the collaboration of different branches to pass and actualize laws. In the new Iraq, bureaucratic Iraqi states should control all issues unequivocally doled out to the central government.⁵ Government Iraqi states ought to be built up utilizing geographic not ethnic criteria. Since many of these states populated by minorities, the assurance of safety to the individual and of preserving individual rights are basic to intergroup relations. Relying upon the guidelines of decentralization, the Iraqi government's state and neighborhood experts ought to be able to create laws that comply with nearby customs.⁶ This is not what the 2005 Constitution provides.

Iraq is a very different society that does not fit into a federalist system. The US overlooked the historical backdrop of the Iraqi state and Iraqi character. Instead, decreasing the Iraqi state to an accumulation of Shias, Sunnis, Kurds and different minorities.⁷ The process of attack made the new leaders, and Iraq immediately embraced this vision of the Iraqi state. Along these lines, the new constitution underlined contrasts and diverse issues instead of concentrating on joining the components of the Iraqi society. The drafters of this constitution disregarded the principle motivation for its creation. "The fundamental reason for any constitution is to fill in as a contract that fastens various networks into something taking after a brought together state."⁸ The United States Constitution, for instance, focused on solidarity and freedom in spite of the distinctions that existed between the diverse components of US society.

Most Iraqis accept the republican, democratic, federal, and pluralistic systems but also demand separation of powers as well as checks and balances. The fact that Iraqis are mainly Muslim makes the outside world believe that Islam must be the official religion anchored in laws within authority of Islamic law. In as much as one may argue, this does not fit well into the shared or self-rule debate. Similarly, it is one of the principle building blocks, alongside legal assurance of individual rights. This concept of separation of powers, which is incorporated in many national constitutions, is attributed to the works of Montesquieu, an eighteenth Century French political logician.⁹ Montesquieu believed that to keep a legislature from getting to be authoritarian and amassing total power, a framework should exist where distinctive bodies controlled divergent powers. Article 47 of Iraq's Constitution declares that all government powers ought to be held and exercised based on the standard of division of responsibilities.

Sometimes people blame the constitution and call for its amendment when the problem rests with the implementers. The issue with amassing power has been growing since 2006, when Prime Minister Nuri-al-Maliki took power.¹⁰ It is the politics of authoritarianism characterized by the consolidation of power that acts to block rivals. He broadened his power over key state

⁵ Cammett M. Democracy in Post-Invasion Iraq. Brown University, 1-7

⁶ Brahim, L. (2007). State building in crisis and post-conflict countries. In 7th Global Forum on Reinventing Government Building Trust in Government 26

⁷ Billon, P. L. (2015). Oil, secession and the future of Iraqi federalism. Middle East Policy, 22(1), 68

⁸ Ibid Jawad, Saad (2013)

⁹ Barker, M. J. (2008). Democracy or polyarchy? US-funded media developments in Afghanistan and Iraq post 9/11. Media, Culture & Society, 30(1), 109

¹⁰ Rifaat, A. (2007). US-Kurdish relations in post-invasion Iraq. Middle East Review of International Affairs, 11(4), 79

establishments by guaranteeing senior armed force authorities, paramilitary units, and a better life for the inside administrators.. Powers that were beforehand under the purview of the Ministries of Defense and Interior were moved specifically under the Prime Minister's control and were never again subject to parliamentary oversight.¹¹ Indeed, this made the people question the intentions embedded in the Constitution to deliver viable results of change. To the people it was no different when compared to the past; hence the desire for self-rule.

As opposed to the shared rule characterized by the concentration of power at the top, Iraqis believed the constitution presented no meaningful change and love for the people. On the contrary, the Ottoman rule was run through administrative units called "villayets," spreading to the lowest level.¹² As a matter of fact, the Ottomans assigned people all leading positions in overall administration; however, with the modern constitution the major duties and functions of the Arab Sunni elite were eliminated, leading to the rising demand for self-rule as represented by the Kurds. The 1920 Sevres Treaty allowed the Kurds to have the right to independence and the new constitution had no special arrangements for the Kurds.¹³

Iraq's new Constitution operates under federations with limited self-rule opportunities. A nation's people appreciate a specific level of self-rule even as they share in the control of its legislature. Iraqis support mostly self-sufficient regions established on managerial or regional standards, not on ethnic or religious standards and support the existing eighteen governorates.¹⁴ The governorate limits are favored because they are managerial elements, instead of ethnic loyalties. It is trusted that interior limits dependent on governorates would be progressively predictable to Iraqi development. Integrationists additionally contend that it is practically difficult to make ethnically homogeneous government units in Iraq.¹⁵ Additionally, an ethnically based federalism would unavoidably censure nearby ethnic or non-ethnic minorities to segregation and inferior citizenship and consequently would be a wellspring of treachery and flimsiness. Notably, this remains a key driver of amendments to the constitution.

The need for a constitutional amendment is further triggered by the existing structures that seem to be favoring one end while disregarding the other. It deviates from the eighteen governorates previously existing while setting apart Kurdistan for special treatment. The selective application of justice is considered an immovable act. They further consider the provision allowing the Kirkuk to join Kurdistan in the event of a majority decision.¹⁶ Undeniably, this gives the people of these regions more rights to do other things as opposed to the remaining segment of the population. It is better for all people to be independent and make their own decisions. The amalgamation doctrine further draws critical lines of ethnic or communal boundaries, which can lead to associated dangers or dissolution. The primary issue with receiving a regulatory league in

¹¹ Reynolds, A. (2007). Constitutional Design. *Harvard International Review*, 28(4), 50.

¹² Ibid McGarry J. & O'Leary B. (2007). 671

¹³ Ibid Cammett M. Democracy in Post-Invasion Iraq. Brown University, 7

¹⁴ Billon, P. L. (2015). Oil, secession and the future of Iraqi federalism. *Middle East Policy*, 22(1), 76.

¹⁵ Ibid Barker, M. J. (2008) p. 112

¹⁶ Ibid Jawad, Saad (2013)

Iraq is that it would anticipate networks that need to appreciate aggregate self-government from doing as such. Such a methodology dismantles solidarity or harmony and is undemocratic.¹⁷ Kurdistan's experts could never have acknowledged a league dependent on the eighteen governorates, since this would not have perceived Kurdistan.

At the same time, the convocational approach requires inscriptive communities to adopt self-government with clear evidence from the relevant communities. While the Kurdish political leaders agree on its identity, the collective autonomy is not clear for the Shi'a and Sunni Arabs. This creates another serious problem as the constitution fails to protect the same people it was intended to protect. Similarly, the extent of decentralization remains a critical part of the discussion on whether to amend the constitution. In many instances, decentralization can spread to the lowest levels of responsibility and control, but it may also spread bad vices. The gap definitely points to a significant impetus to change or amend the present constitution.

Interestingly, some would rather have a strong centralized government that can perform vital nation-building tasks. It is also about systems that hold the country together, deal with insurgency and fend off bad neighbors.¹⁸ It is also about protecting minorities as this is politically popular. Notably, it is not clear whether people would prefer being popular to getting the best out of the constitution, but it leaves a lot of questions.¹⁹ Integrationists believe that the Constitution's treatment of resources such as oil and natural gas is partisan as opposed to being decentralized. In principle, constitutions with problems such as this require consultative forums to address the emerging issues and provide long-term solutions.

In any government regardless of its constitution, people need to feel included. In the event, they feel neglected; Article 65 of the 2005 constitution fails to justify existence. The upper house of the parliament was supposed to represent the interest of federal entities offer coordination and debate for governorates.²⁰ It was supposed to be a direct entry into the constitution and allow greater consultation. Nonetheless, only negative results prevailed despite the CRC proposing Federation Council comprised of an identical number of representatives, regardless of population size.²¹ The constitution further remains amorphous in the number of seats reserves for minority groups. Additionally, the failure to specify the type of minorities these groups constitute, creates an interesting platform where given parties can exploit the opportunity for private gains.

Any constitution must have within it the spirit of the majority, and they must identify with it regardless of shared or self-rule. For Iraqis most felt indifferent. The constitution had not brought the hope they demanded. According to them, constitutions were pieces of paper with no effect on binding the leadership. People felt they needed something but could not point in the right direction. Traditionally, the government had the prerequisite authority to cancel and amend the constitution

¹⁷ Ibid Barzegar, K. (2008). P. 49

¹⁸ Brinkerhoff, D. W., & Mayfield, J. B. (2005). Democratic governance in Iraq? Progress and peril in reforming state-society relations. *Public Administration and Development: The International Journal of Management Research and Practice*, 25(1), 59

¹⁹ McGarry J. & O'Leary B. (2007) P. 672

²⁰ Billon, P. L. (2015). Oil, secession and the future of Iraqi federalism. *Middle East Policy*, 22(1), 67.

²¹ Ibid Jawad, Saad (2013)

while the same gave no leverage to the people on what affected their welfare. After years of underground activities, The Kurdistan Democratic Party (1970-1974) got the mandate to act freely, with exception to matters surrounding the Ba'th Party.²² The party further had the final say on which civil societies operated and to what extent. Naturally, any type of rule that follows the steps overrides the basic tenets of leadership and governance, which makes self-rule the ultimate preferred choice.

Many Iraqis comprehended that their rights are limited by the constitution that concentrates power within the upper systems of society. The legal executive is not free and generally, the nation is living in a highly sensitive situation, which implies the suspension of ordinary laws. Kirkuk is an oil-rich, ethnically assorted region in the northern region of Iraq. Pressures over constrained relocation under Saddam's standard; joined with Kurdish aspirations to consolidate it into Kurdistan made Kirkuk a flashpoint of ethnic and partisan clashes.²³ The constitution necessitated that the status of Kirkuk be settled by choice and endeavors of progress on all sides to make statistic "certainties on the ground" ahead of time of the choice. In as much as there are various problems associated with the approach, significant successes have been registered with regards to self-rule.

Getting the Iraq population to agree on a unitary direction of operation has been a difficult experience. Evidently, this leaves people wondering whether they need a constitution or would otherwise prefer the chaotic self-rule characterized by "blame games." The status of Kirkuk is the most genuine of the rest of the obstructions to concurrence on sacred revisions. Arguably, this is in light of the fact that the Kurds made concession to other alteration issues dependent upon positive goals of the Kirkuk issue. Kurdish mediators have proposed a political agreement between the initiative of the Shia, Sunni and Kurdish coalitions to restore the regulatory limits of Kirkuk to the 1970 guide.²⁴ In this way including four Kurdish-larger part regions to Kirkuk and guaranteeing Kurdish achievement in any future choice. The Shia bloc, on the other hand rescinds this point and want Sunni acceptance in the event any structure is to be realized.

The war waged over the constitution's effectiveness extended beyond the document itself. The Kurds felt that they were in a better position than most other ethnic groups and disregarded any proposals meant to create equals or even change their present position. It was proposed that Kurdish delegates might consent to changes, which would permit significant segments of Kirkuk governorate not to be joined into Kurdistan. The process to formulate an answer for the Kirkuk stalemate required key individuals from the CRC initiative. It was felt that more American and UN mediation would have been helpful. As improvements in the political field changed, the concentration for an answer turned out to be increasingly more subject to goals of the general political stalemate confronting the Iraqi government.²⁵ From this perspective, the deeply rooted societal tensions wade off reason and belief for either shared or self-rule.

²² Ibid Rafaat, A. (2007). P. 89.

²³ Ibid McGarry J. & O'Leary B. (2007) p. 673

²⁴ Ibid McGarry J. & O'Leary B. (2007) p. 675

²⁵ Ibid Jawad, Saad (2013)

Despite calling for the intervention of other stakeholders, these efforts eroded, as others had termed them as “useless.” For instance, opponents of change perceive the 2005 constitution as having been written in English and poorly translated. It was allegedly imposed on the people with no significant consultations being done. The CPA, and advisers who participated in the constitutional formulation believed otherwise. The Iraqis considered the constitution a foreign document as it did not address their grievances. Ayatollah Ali Sistani, for example, in June 2003, termed people who wrote the constitution as forces without authority to write a constitution or even appoint the constitution writing council.²⁶ In as much as not all people should agree regarding a particular issue, it is not a ticket to commit intentional wrong doings. Diversity calls for decentralized form of government to allow all people to participate.

Disagreement on things like names of the government, points to how people can be petty. Kurdish members wanted a federal state but the Sunni Arabs felt the inclusion of the term made Iraq appear weak. Instead, they preferred the word ‘united’ that was thought to make all communities part of the country. In essence, the Shia hoped to create a greater southern region translating back to the issue of personal interests. After a concerted effort from the Kurdish parties, Article 142 was introduced, while it retained Article 53(A) and Article 58 of the TAL as part of the agreement, in order to ensure harmony. According to Article 53 (A) The Kurdistan Regional Government remains a recognized territory and a government that administers services to the people of Dohuk, Sulaimaniya, Erbil, Diyala, Kirkuk, and Nineveh’. Subsequently, Article 58 provides clear guidelines on how to deal with disputes within and outside the regions.²⁷ It guides the process of conducting census, referendum, and immigration policies of people willing to join the Kurdish region.

A lot of confusion and divisions in the Constitution’s drafting process has left people wondering what were the intentions of the drafters; with what authority did they undertake such a task; and now how relevant is this constitution to the average Iraqi? It is no surprise that the document created more problems than it solved. The Constitution has been a central point in sustaining the disorganized circumstances that swarms about the greater part of Iraq.²⁸ Over ten years after the attack, and following three rounds of races, Iraq is presently a standout amongst the most risky and degenerated nations on the planet. The security situation is delicate and civil administrations like power, sewage, and clean water are nearly non-existent. The sustenance apportions that Iraqi families got since assents were forced on Iraq in 1990 seldom achieve the population in sufficient amounts. The alliance that shaped the administration in 2010 following a postponement of eight months is still without power. The consolidation of national power has no resistance.

²⁶ Reynolds, A. (2007). Constitutional Design. *Harvard International Review*, 28(4), 50.

²⁷ Rogg, I., & Rimscha, H. (2007). The Kurds as parties to and victims of conflicts in Iraq. *International Review of the Red Cross*, 89(868), 842.

²⁸ Krasner, S. D. (2005). The case for shared sovereignty. *Journal of Democracy*, 16(1), 69-83.

In conclusion, the need for amendment of the 2005 Iraqi Constitution on whether to decentralize the government or maintain a centralized system is hampered by different challenges. Nonetheless, it is only wise to adopt a self-rule agenda considering the serious diversity and leadership issues surrounding the country. It is a non-contested fact that consultation does not guarantee full integration of personal opinion into the final constitutional document; nonetheless, when a majority has a similar opinion, several gaps in the process manifest. By recognizing the Kurdish government while denying other regions, this constitution proves the all-time assertion that it fails to offer equality and inclusivity. Twelve years down the line, Iraq is still forming news headlines for failed elections, corruption scandals, and serious governance issues. Arguably, the question of whether Iraqis should seek a shared rule government or a self-ruled government is one that only we can answer and must decide for ourselves.

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