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The Guarantor of Unity In a Deeply Divided State: An Analysis of the Iraqi Constitution of 2005

Alyssa C. Casey

University of Pennsylvania, alysacc@sas.upenn.edu

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Abstract

This thesis examines the question: will the 2005 Iraqi Constitution be an effective document for Iraq going forward? To answer this question the necessary parts of a constitution for a deeply divided country are identified creating a rubric with which the 2005 Iraqi Constitution is then analyzed against. This rubric includes the structure and powers of the government, the protections for individuals and the framework of the document. Ultimately, the Constitution's efficacy is determined in light of both the internal and external factors that continue to threaten its success.

Keywords

Iraq, Iraqi Constitution, Social Sciences, Political Science, Brendan O'Leary, O'Leary, Brendan

I. INTRODUCTION

Alexis de Tocqueville made the discouraging observation that “in the transition to democracy the situation will tend to get worse before it gets better- not as a result of strategic choice, but because of the general turmoil created by the lack of stable institutions.”¹ Unfortunately, it seems as though Tocqueville’s observation is all too reminiscent of the insurgency-ridden situation in Iraq, as the country attempts to promote its young constitutional democracy. While the transition has been trying and its critics have all but laid bets on the new government’s imminent end, the Constitution of 2005 has yet to succumb to any of its internal or external challengers. As such, it is important to ask the question: will the 2005 Constitution be an effective document for the country going forward? In order to answer this question I intend to first identify the necessary parts of a constitution for a deeply divided country; including the structure and powers of the government, the protections for individuals and the framework of the document. I will devise this rubric using both political theories and other constitutions; both of which have not only influenced the structure and design of the Iraqi Constitution but of many new constitutional democracies around the world. I will then analyze the 2005 Iraqi Constitution in light of such rubric. Finally, I will determine if the Constitution will be an effective document for Iraq and what outside influences may threaten its stability. However, this thesis will not discuss or analyze either the process of de Baathification or the role of Islam within Iraq and its new government because both of these subjects have already been dealt with extensively in other works.

¹ Jon Elster, “Consequences of Constitutional Choice,” Constitutionalism and Democracy: Studies In Rationality and Social Change, (Cambridge: Cambridge University Press, 1988) 96.

Currently, Iraq is a divided state. In March 2003, the United States, with some international support, invaded Iraq toppling Saddam Hussein's regime, which had been in power for nearly a quarter century. However, this touted victory was only the beginning of what was to become an infamous occupation. In the midst of the rubble the U.S. discovered an impoverished, severely divided country. Since Iraq's artificial birth less than a century before when the British united the three governorates of Mosul, Baghdad and Basra, the minority Sunni Arabs have been in power, to the detriment of both the Shia Arabs and Kurds, not to mention the many other religious and ethnic groups that comprise this truly heterogeneous country. This was by no means the beginning of the intense animosity that today fuels the insurgencies that threaten Iraq's survival. However, the decades following Iraq's founding remain a revealing snapshot as to why there remains such unyielding antagonism between the Sunnis, Shia and Kurds. Consequently, this brief but highly concentrated period in time clarifies for anyone who is unfamiliar with Iraq's history, the experiences, biases and particular aversions each Iraqi brought to the constitutional convention of 2005. It is realistic and to be expected that the Iraqi Constitution reflects the country's recent history and as such, understanding the events that shaped the Constitution is fundamental.

This thesis is not about the events leading up to the summer of 2005, when the Constitution was created. Nor is it really about the crafting of the Constitution itself; instead I am analyzing the Constitution, as it stands today. Therefore, my brief description of Saddam's regime and its enduring effects on the Iraqi people will be just that, brief. Saddam came to power in 1979, eleven years after the Iraqi Ba'ath Party claimed the presidency. Over the next few decades Saddam governed Iraq through fear.

He built a complex patronage system that benefited the few who occupied his inner circle and harmed the rest of the Iraqis.

In 1980 Saddam executed the Shia leader Ayatollah al-Sadr and his sister and subsequently expelled 40,000 Iraqi Shia Arabs to Iran. When the Kurds tried to break away from Saddam's control and gain autonomy for Kurdistan in 1988, Saddam sent his army into the northern region using chemical weapons to execute what is minimally estimated to be 60,000 of his own people.² The Kurdistan Regional Government estimated the number of deaths to be 182,000.³ Over the course of his presidency, hundreds of thousands of Iraqis died either through execution or by starvation and other diseases brought upon by Saddam hoarding all the country's resources, particularly in the early 1990's when Iraq was under UN sanctions. And yet, under Saddam's control, Iraq was stable. He was able to concentrate all power under his control and in so doing prevent successful insurgencies. Consequently, when Saddam was removed in 2003, the country was simultaneously relieved of this malicious dictator and cast into an environment of complete instability. It was under these conditions that the Iraqi Constitution was drafted and the document remains very much a product of its environment.

² Charles Tripp, *A History of Iraq*, (Cambridge: Cambridge University Press, 2000) 245.

³ Brendan O'Leary, John McGarry and Khaled Salih, *The Future of Kurdistan in Iraq*, (Philadelphia: The University of Pennsylvania, 2005) xii.

II. CONSTITUTION FUNDAMENTALS

In order to effectively analyze the Iraqi Constitution of 2005 one must first understand the necessary components that comprise a working constitution. Ultimately, it is a constitution's primary function to establish a government that is unable to violate its constituents' fundamental rights while still having enough power to govern successfully. Therefore, a constitution should create a government that is restricted enough to allow for individual freedom but powerful enough to allow for successful longevity. It is apparent that Iraq is a deeply divided country along both ethnic and religious lines. As such, when determining the necessary provisions of an effective constitution it must be done so with respect to a divided state.

At its most basic level a constitution is a legal document that *creates government* and *restricts its power*. To dissect these two fundamental responsibilities further highlights the specific elements essential to a successful constitution. The first function of a constitution is to define the governmental structure and its institutions. This includes first a framework of the federal government in relation to its regional counterparts. And second, within the federal government, it includes an outline of the branches of government and their specific powers.

A. TYPE OF GOVERNMENT

i. FEDERALISM

The first required step when crafting a constitution is to decide the type of government the document intends to define. The type of government should reflect the needs of the country and not necessarily follow the molds of other state's constitutions.

As Juan Bautista Alberdi, an Argentinean political theorist and constitutional expert, eloquently said: “All constitutions change or succumb when they are but children of imitation; the only one which does not change, the only one which moves and lives in the country, is the constitution which that country has received from the events of its history, that is to say, from those deeds which form the chain of its existence.”⁴ Therefore, the framers of a constitution should define their government in accordance with their country’s political history, current social situation and potential future needs. Iraq, as previously described, is a country that suffers from deeply entrenched religious and ethnic divisions, which are founded in a long history of abuse. As such, for a deeply divided society, federalism has proven to be an effective framework to ensure the protection of all political parties and individuals, regardless of their minority status. Currently, “in a number of deeply divided democracies, such as India, Belgium, and Spain, federalism has been constitutionally embraced as a successful means for maintaining democratic stability.”⁵ However, embracing federalism in and of itself is insufficient, for there are many different forms of federalism and the wrong kind could lead to adverse consequences. Instead, a deeply divided society should adopt a multinational federation, which implies a decentralized structure that incorporates a consociational government.

Multinational federalism is a realistic approach to the deeply entrenched divisions that can plague a country. A multinational federation unites “people who seek the advantages of membership of a common political unit, but differ markedly in descent,

⁴ As quoted in Edward Schneier, *Crafting Constitutional Democracies* (Oxford: Rowman & Littlefield Publishers, Inc., 2006) 35.

⁵ Larry Diamond, *The Spirit of Democracy: The Struggle To Build Free Societies Throughout The World*, (New York: Times Books, 2008) 162.

language and culture.”⁶ More specifically multinational federalists believe “a proper understanding of liberal individual rights requires respect for the culture of individuals, and this means allowing minorities the power to protect and promote their culture.”⁷ A multinational system proposes a compromise solution for a deeply divided country by protecting the minorities, respecting the ethnic conflicts and also keeping the country intact.

John McGarry and Brendan O’Leary argue that there are five conditions that are essential, but not always sufficient, in order for a multinational federation to be successful. The first is that a country that has a “dominant ethno-national community is more likely to be stable than one that does not.” Accordingly, the dominating party will be more likely to make concessions to minority parties because it feels secure in its position of power. The second condition is that the regional governments should be self-governed and the federal government should be consociational. This includes power sharing in the executive branch, proportional representation in both the legislative and judicial branches, cultural ethnic autonomy and minority veto-rights. The third condition requires that the federation is in fact democratic and respects the rule of law. The fourth condition argues that federations that are “consensually established as a result of the elite bargaining, whether of the voluntary or ‘holding’ variety, are more likely to be considered legitimate by their citizens and more likely to survive than those that result from coercion.” And finally when multinational federations are prosperous they have a

⁶ As quoted in John McGarry and Brendan O’Leary, “Federation as a Method of Ethnic Conflict Regulation,” From Power Sharing to Democracy: Post-Conflict Institutions In Ethnically Divided Societies, ed. Sid Noel, (Montreal: McGill-Queen’s University Press, 2005) 272.

⁷ McGarry and O’Leary, “Federation as a Method of Ethnic Conflict Regulation,” 272.

better chance at survival.⁸ As such, a country with well-established divisions should create a federalist system that is consociational, decentralized with autonomous regions, and legitimately democratic. Furthermore, it is helpful if there is a majority party and the country is prosperous.

Recommending a multinational federation is, to be understated, controversial. This inherently consociational structure is criticized by many who tout that it “reinforces what it is supposed to remedy and endangers democracy, liberty, individual rights (including women’s rights).”⁹ However, the alternative option, namely a majoritarian government, does not recognize the extent to which societies are divided and how these divisions cannot realistically be appeased or forgotten. Specifically, consociationalists demonstrate that in certain deeply divided countries “the choice is between consociational democracy and no (worth-while) democracy at all.”¹⁰ This is due to the fact that a:

Majoritarian democracy- especially when it is based on a single-party government rooted in one community – is, consociationalists say, likely to provoke serious communal conflict in territories with two or more significantly sized communities with durable identities differentiated by nationality, ethnicity, language, and religion.¹¹

Conversely, a multinational, consociational federation reflects the realities that plague a divided country and offers the best opportunity to mitigate such and instead create a stable democracy. When a country is divided into subsections based on ethnicity, religion or politics, and these groups have a history of mistreatment and distrust, it would be nearly impossible and definitely unconstructive to force minority groups to submit to

⁸ McGarry and O’Leary, “Federation as a Method of Ethnic Conflict Regulation,” 281-287.

⁹ Brendan O’Leary, “Debating Consociational Politics: Normative and Explanatory Arguments,” From Power Sharing to Democracy: Post Conflict Institutions in Ethnically Divided Societies, ed. Sid Noel, (Montreal: McGill-Queen’s University Press, 2005) 8.

¹⁰ O’Leary, “Debating Consociational Politics,” 9.

¹¹ O’Leary, “Debating Consociational Politics,” 11.

the control of a federal government comprised of their enemies. This would be inevitable, however, in a majoritarian government.

It must be understood that while a multinational federation, with a consociational government has the greatest chance of success; this by no means guarantees success. At times certain countries are so rife with insurgencies and so plagued by hatred between their opposition groups that stability seems more like a naïve dream than an attainable reality. In truth, some of these deeply divided countries may eventually be torn apart by these destructive forces. However, if such a country is to be given a chance at overcoming such obstacles, it must establish a multinational federation to appease its diverse constituents while remaining a single, even if only loosely united, state.

In order to maintain a multinational federation the constitution must be very specific about which rights are allotted to the federal government, which to the regional governments and which are to be shared. A multinational federation, at its most basic level, respects the durable divisions that fracture a country. As such, it proposes that the regions in a deeply divided country, which are generally more homogenous than their state, should be granted a degree of autonomy. In order to have autonomy, regions must be supreme relative to the federal government on most but not all issues. The constitution should grant the federal government with the power to raise and fund an army, make treaties with other countries or international organizations, produce a national currency and define other specific issues that concern the nation as a whole.

The regional governments should share with the federal government the oversight of natural resources. It is crucial that every region is guaranteed by the constitution a fair distribution of natural resources because regional governments that have “autonomy but

lack resources lose credibility.”¹² The distribution and oversight of natural resources remains one of the most important issues for any country because they are absolutely necessary for the survival and prosperity of the people. Therefore, it is crucial that the federal government shares this power with its regional counterparts. The federal government is theoretically more concerned with the country as a whole and less biased towards any particular region. However, in actuality, while it remains true that federal governments are usually less biased than their regional counterparts, they are still comprised of officials who are rooted in a particular region due to their own personal politics, religion, language and ethnicity. Therefore, it can be fairly assumed that in a deeply divided country with a consociational system the majority party will hold a majority of seats within the federal government. As such, it is necessary that the regions also have power to oversee and distribute the natural resources. This ensures that a majority party cannot deprive the minorities of necessary natural resources. Beyond the powers reserved exclusively for the federal government and those shared between the federal and regional governments, the remaining powers should be under the jurisdiction of the regional governments.

The last issue concerning a federalist structure that framers must resolve is how the units that constitute the country are to be defined. If a country’s constituent parts are vastly different then it creates issues like determining representation in the federal government, divvying up natural resources, and specifying how each unit’s power compares relative to the others. Therefore, it is important that there is a common unit with which the country is divided into (i.e. regions or governorates; not both).

Furthermore, according to Henry E. Hale, an ethnofederation, which is “a federal state in

¹² Schneier 188.

which at least one constituent territorial governance unit is intentionally associated with a specific ethnic category,” is “more likely to collapse when they contain a *core ethnic region*- a single ethnic federal region that enjoys dramatic superiority in population.”¹³ Furthermore, Hale finds in his study that all ethnofederations with a core ethnic region have collapsed. It is important to remember that “federal systems that have persisted do so not because they have eliminated conflict, but because they have managed it.”¹⁴ In order to effectively manage conflict, Hale recommends that the majority ethnic party should be divided into at least two regions.

A constitutional democracy, as the Iraqi Constitution presents, is essentially a limit on majority rule. This is partly achieved by dividing the responsibilities of government between separate branches. Commonly these include the legislative, the executive and the judicial branches. Each of these organs of government must have their individual powers clearly outlined by the constitution. As Walter Murphy asserted, the affect of such fracturing of power would be to impel governmental officials to “link their own interests with those of their office and jealously guard those interests against putative incursions by other officials.”¹⁵ Murphy goes on to draw upon James Madison’s ideas, which he famously proposed in *Federalist 51*, by saying:

By drawing vague divisions of authority, a document can make it likely that no set of officials can do much that is politically important without arousing the territorial imperative of other officials. Thus a constitutional text can disperse power and protect liberty by pitting ambition against ambition and power against power.¹⁶

¹³ Henry E. Hale, “Divided We Stand: Institutional Sources of Ethnofederal State Survival and Collapse,” *World Politics*, (January 2004): 165-193
<http://proxy.library.upenn.edu:2239/journals/world_politics/v056/56.2hale.html>.

¹⁴ Hale 172.

¹⁵ As quoted in Schneier 10.

¹⁶ As quoted in Schneier 10-11.

Therefore, separating governmental power between the three branches is absolutely vital in determining its ability to protect the rights of the people.

ii. LEGISLATURE

The legislative branch is, in many respects, the most important protector of democracy. More so than any of the other two branches, the legislature represents the people and therefore remains their most vocal advocate. As such, “democracy is consolidated to the extent that sovereignty resides in the legislature, endangered to the extent that it is not.”¹⁷ Consequently, many constitutions spend a considerable portion of their text on describing the roles and responsibilities of the legislature, and Iraq’s Constitution of 2005 is no different.

The first and arguably most important function of the legislature is to represent its constituents. This is accomplished through the electoral system used to select the legislators, the stipulated term length, and the transparency of the legislators’ actions while in office. The ability to elect a legislature that is truly representative of its constituents is determined by the legal barriers restricting access to voting as well as the voting system adopted by the country. First, it must be a constitutionally protected right that every citizen be allowed to vote. However, there are some standard exceptions to this rule. Many countries have placed a minimum age requirement for voters, which ranges from Iran’s at 17 to Mongolia’s and El Salvador’s at 25 with most falling somewhere between 18 and 21 years of age. Some nations have restricted the mentally disabled, ex-felons, or even the illiterate from this right. And five countries currently “deny the vote to active members of the military.”¹⁸ Despite these potential restrictions,

¹⁷ Schneier 147.

¹⁸ Schneier 88.

it is absolutely vital to the success of a democracy to allow each eligible citizen an equal vote.

The electoral system determines whether the legislature is truly representative of its diverse constituents. According to Benjamin Reilly electoral systems “fall into three broad families: plurality-majority systems, semi-proportional systems, and proportional representation systems.”¹⁹ Each electoral system has its own set of strengths and weaknesses. As such, it is important to match the electoral system to the individual country’s needs. Accordingly, Reilly highlights the commonly held belief that proportional representation systems are recognized as “essential for divided societies, as this enables all politically significant ethnic groups, including minorities, to ‘define themselves’ into ethnically based parties.”²⁰ However, Reilly’s philosophy ultimately negates this idea, arguing instead for a centripetalist approach, which attempts to make ethnically divided parties cooperate. Reilly’s approach, while in theory sounds most effective, in reality cannot always be realized. Conversely, John McGarry and Brendan O’Leary argue for a consociational approach when dealing with ethnically diverse states, which:

Accommodates groups: (a) by involving all sizable communities in executive institutions provided they wish to participate; (b) by promoting proportionality throughout the public sector, not just in the executive and legislative branch but also in the bureaucracy, including the army and the police; (c) through autonomy of either the territorial or nonterritorial variety; and (d) through minority vetoes, at least in those domains the minority communities consider important.²¹

¹⁹ Benjamin Reilly, Democracy in Divided Societies: Electoral Engineering for Conflict Management, (Cambridge: Cambridge University Press, 2001) 14.

²⁰ Reilly 21.

²¹ John McGarry and Brendan O’Leary, “Iraq’s Constitution of 2005: Liberal Consociation As Political Prescription,” ICON, Vol. 5 No. 4 (London: Oxford University Press, 2007) 671.

Consequently, in order to promote equal representation for all in an ethnically and religiously divided country, like Iraq, the constitution must prescribe a proportional representation electoral system that results in a consociational government.

Particularly in a divided society that is virtually organized by geographic areas like Iraq, a bicameral legislature may foster better cooperation among regions. Bicameralism consists of both a lower house of proportional representation and an upper house of an equal number of representatives from the country's separate regions. As in nearly all modern democracies with a bicameral legislature, the lower house is usually the more powerful and politically significant house. However, the upper house, due to its smaller size, "can conduct their business in a more informal and relaxed manner,"²² which can help to foster cooperation among regions. In terms of relative power, there should be an asymmetric relationship between the two houses where the lower house has significantly more power than the upper house. The rationale for such a recommendation lies in the means by which the representatives for each house are elected. Lower house representatives, as discussed above, should be elected through proportional representation, which essentially gives a voice to every ethnicity and sect proportional to their percent of the population. Conversely the upper house representatives should be elected by the area they represent, with each area getting the same number of representatives. This in turn gives each region a forum in which they have an equal voice. While this asymmetrical power sharing creates a rather weak bicameral system it remains true, according to George Tsebelis and Jeannette Money that "all second

²² Arend Lijphart, Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries, (New Haven: Yale University Press, 1999) 205.

chambers exercise influence even if they are considered weak or insignificant.”²³

Therefore, a weak, asymmetrical bicameral legislature can cultivate better collaboration without significantly threatening the superior power of the lower house

The term length of the legislators plays an important role in determining the extent to which elected officials truly represent the needs and demands of their constituents. The shorter the term length the more focused a legislator will be on following their citizens’ desires. However, if the term length is too short, elected officials will be bound by these desires, unable to make decisions based on the good of the country as a whole. It is important to give legislators the ability to both represent their constituents but not be wholly bound by their biases. According to David M. Olson’s study of modern legislatures term lengths “varies from two years (United States) up to five years (Britain) in the lower house. The U.S. Senate, with individual terms of office of six years, has one of the longest terms in contemporary elected chambers.”²⁴ Therefore, it can be deduced that the appropriate term length falls some where within this range.

It is the role of the legislature to represent the population in government. It is able to effectuate this by passing laws and by shaping governmental policy. Arguably the most important legislative power is its right to both create and enact laws. Through such, legislators are able to attend to the constantly changing needs of the country and their people. Therefore, in order to have a successful constitutional democracy it is crucial that the legislative branch has both the ability to propose laws and has the right to enact them. However, it remains true that most executives are also given the right to present bills

²³ As quoted in Lijphart, *Patterns of Democracy*, 211.

²⁴ David M. Olson, *Democratic Legislative Institutions: A Comparative View*, (Armonk: M.E. Sharpe, Inc., 1994) 15.

before the legislature to be approved as law. This fracture of power allows for no one branch to become either too powerful, or to lose their voice completely.

The second manner in which legislatures are able to vocalize the needs of their constituents is through the “power of the purse.” Legislatures commonly are allotted this power, which essentially gives them the right to define or, at the very least, approve the general budget. Although, “in most systems, the budgetary process begins and ends in the office of the chief executive;”²⁵ the chief executive’s budget must be approved, and potentially amended, by the legislature. It is important that the legislature has the ability to significantly impact the final draft, for it is an important check over the chief executive’s power. Furthermore, it enables the legislature to insure its constituents’ needs are being financially addressed.

The last consideration that should be attended to by the constitution, with respect to the legislative branch, is the transparency of the actions of the legislature as a whole and its individual representatives. Transparency allows constituents to hold their representatives responsible for their actions, which creates an incentive for the legislators to remain true to the wants and needs of their constituents. Therefore, it must be a constitutionally guaranteed right for the public to have access to the legislative proceedings. However, the danger of such publicity is that legislators will be afraid to voice their opinion during legislative hearings. Therefore, it is equally important to protect the legislators from being punished for anything they say during their debates. This immunity allows representatives to argue freely, while still enabling the public access to such debates.

²⁵ Schneier 170.

Constitutions, when outlining their legislative branch, must include the aforementioned ideas in order to have a successful democracy. Therefore, legislators to the lower house should be elected by a proportional representation electoral system that allows every eligible citizen a chance to vote, while the upper house representatives should be elected by the district they represent. The constitution must establish a weak, asymmetric bicameral system. Furthermore, it should detail the term length of the elected officials, as well as the legislature's specific powers. Two important powers that must be included are the oversight of the budget and the right to propose and enact laws. Lastly, the constitution must protect legislators with immunity for statements made during session and protect the citizens by publicizing the transcripts of such debates.

iii. EXECUTIVE

The executive branch, within many modern democracies, is the most powerful branch of government. In the United States, since the creation of the Constitution, the chief executive has dramatically increased its power. And yet, according to Edward Schneier this tendency is not solely found in the U.S. Rather:

‘There is near universal agreement that decision-making in Great Britain is executive-centric.’ ‘Many Asian legislatures have become mere extensions of the executive with little power of their own.’ ‘In Latin America, many casual and academic observers alike assume that legislatures often forgo their constitutional powers, abdicating in favor of the executive.’ In both parliamentary and presidential systems, Madison’s depiction of democracy as a system in which ‘the legislature clearly predominates’ has been superseded by an increasingly powerful executive authority.²⁶

As such, it is absolutely vital that the constitution details the necessary roles and responsibilities of the executive that will enable it to be powerful enough to effectively lead the country, yet prevent the unchecked power of a dictator.

²⁶ Schneier 123.

The first decision facing the framers when drafting the executive section is whether to establish presidential, parliamentary or semi-presidential systems. In a deeply divided society framers should opt for the system that enables a consociational or power-sharing executive. As such, Lijphart recommends a parliamentary model for the following reasons: (a) the parliamentary cabinet is a “collegial decision making body” as opposed to presidential cabinets which are “purely advisory;” (b) there are no presidential elections, which are inherently majoritarian; (c) presidential systems are riddled with legislative-executive stalemates due to the popular election of each body, yet often differing views; and (d) presidential systems impose rigid term limits which cannot be extended or shortened depending on the president’s success or incompetence.²⁷

Therefore, for a deeply divided country a parliamentary system will allow for the most power sharing potential at the executive level.

To further ensure power sharing within the executive branch, different countries have implemented constitutional stipulations that guarantee representation of minorities. Usually, this is accomplished by necessitating the number of legislators who must approve the president, the prime minister and the prime minister’s cabinet. Essentially, if the constitution implements a proportional representation electoral system for the legislature, then a required approval percent by the legislature of the executive nominee promises a power-sharing arrangement within the executive branch. This is absolutely essential in order to allay the fears of minority parties, particularly when there has been a long history of excluding such parties from government.

²⁷ Arend Lijphart, Thinking About Democracy: Power Sharing and Majority Rule In Theory and Practice, (New York: Routledge, 2008) 80-81.

The constitution must specifically outline the responsibilities of the prime minister and his cabinet as well as define the political weight of the president. The prime minister should be given the powers that are generally used and accepted by the modern democracies. These include power over the commander in chief of the armed forces, the ability to shape the nation's general policy, and the confidence of the cabinet. However, each of the aforementioned rights includes certain necessary limitations. While it is important to concentrate the power to command the armed forces with the prime minister, the power to use such should be dispersed throughout the government. Specifically, both the president and the legislature should be required to approve the prime minister's use of force. The prime minister's oversight of the nation's general policy should also be heavily influenced by the legislature. As such, the prime minister is able to address policy questions that affect the nation as a whole, while the legislators introduce issues that are more reflective of their individual constituents. This is an important balance to strike, particularly in deeply divided countries that need to implement a national agenda that is considerate of the major factions.

Lastly, it is crucial that the prime minister retains the support of his cabinet, however, this should not mean the cabinet members are purely yes-men or puppets of the prime minister. This differs from presidential systems where the presidential cabinets are merely a group of advisors, often with political views similar to their chief executive. In parliamentary systems the cabinet commonly includes members from a number of different political parties, each with their own portfolio to oversee. The constitution of a deeply divided place must ensure that a coalition between parties needs to be formed to fill a cabinet. To do so, the constitution should stipulate the legislature's approval of the

prime minister's cabinet. Furthermore, it should give the legislature the power to remove confidence from the prime minister and his cabinet when they are not effectively representing the needs of the people.

The president's role is typically ceremonial with a few important powers. In particular, consociationalist constitutions grant the president or the presidency council the right to nominate the prime minister. While there may be stipulations on this, such as the prime minister must be from the legislature's largest bloc, this presidential right ensures that the prime minister and therefore his cabinet are more moderate and representative of a larger section of the population. This results from the election methods of each component branch. The legislature, being elected by a nation wide proportional representation system will be largely representative of the state. The president or presidency council is then chosen and approved by a larger than absolute majority of the legislators, and thus will also be fairly representative of the state. Therefore, when the president nominates the prime minister, who must then gain approval by the legislature, he will be a more moderate compromise than will often result from a majoritarian, winner takes-all election system. Simply put, the legislature and thus the president are representative of a majority of the people and therefore the choice of prime minister will reflect such broad representation.

Another presidential power that can effectively ensure a consociational government is the need for his approval of the prime minister's use of the armed forces. Beyond these legitimate powers, typically, presidents are only allotted ceremonial rights in parliamentary systems. However, as long as the president is elected and approved by the legislature and not chosen through popular election, it remains more consociational

than majoritarian to balance the powers of the prime minister with those of the president. Yet, doing so can create inefficiencies and has the potential to create an unconstructive race for supremacy between the two executives. As such, the president's power should only be increased if the prime minister and his cabinet fail to be truly consociational.

As previously described, the executive branch of government within a deeply divided state should follow a parliamentary structure. As such, the president should be chosen by a percentage of legislators so that the nominee is a compromise between a majority of the state's factions. The president should nominate the prime minister from the largest bloc in the legislature. Beyond such, the president should have mostly ceremonial powers, unless the prime minister and his cabinet fail to include all major political groups, in which case the president's powers may be increased. The prime minister should create a cabinet of ministers that must be approved by the legislature and as such is ideally representational of the many different political parties. Furthermore, the prime minister should be the commander and chief of the armed forces as well as have power over the general plan of the state. Both these powers should be checked by the president or the cabinet of ministers. This guaranteed consociational structure in the executive branch enables all the state's divisions to be represented in the arguably most powerful branch of government, which can help to mitigate distrust and promote cooperation between the groups.

iv. JUDICIAL

An independent, powerful judicial branch, it has been argued, is not in accordance with the principles of democracy. Tom Ginsburg outlines this claim saying:

This famous problem focuses on the propriety of unelected judges, who lack democratic legitimacy, overturning duly enacted decisions of

democratic assemblies. This normative challenge has been bolstered by theorists of democracy who argue that judicial power comes at the expense of representative institutions. Judicial review, from these perspectives, is not only unnecessary for democracy, but in fact suspect.²⁸ Such an argument begs the question why would a democracy adopt an independent, powerful judiciary? The reason for creating this third branch of government is because this cynical view stands alone as a theory that has failed to garner evidence from existing democracies to effectuate its claim. In fact, “as the ‘third wave’ of democracy has proceeded around the globe, it has been accompanied by a general expansion in the power of judges in both established and new democracies.”²⁹ A judicial branch with an appropriate allotment of power bolsters the potential success of a democracy and even further, protects the very institutions that ensure democracy. Therefore, it is vital to determine the constitutionally vested power that will allow the judiciary to be strong enough to provide their essential check on the other branches of government, without threatening the very principles of democracy.

The first issue when crafting the constitutional section concerning the judicial branch is to determine what its essential function is or ought to be and from there what powers will best allow the judiciary to fulfill such function. According to Peter Russell, the judiciary is “the officials and institutions that perform the central judicial function of adjudication,” which he defines as “the provision of authoritative settlements of disputes about legal rights and duties.”³⁰ In order to be able to adjudicate fairly the judiciary must be above the influences of politics, factions, government officials and the often fickle

²⁸ Tom Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases, (Cambridge: Cambridge University Press, 2003) 21.

²⁹ Ginsburg 6.

³⁰ Peter H. Russell, “Toward a General Theory of Judicial Independence,” Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World, ed. Peter H. Russell and David M. O’Brien, (Charlottesville: University Press of Virginia, 2001) 9.

popular will. Without such insulation from any or all of these factors, judges would not be able to make decisions based on their interpretation of the law. The danger of such is neatly described through Robert Cooter's economic analysis of judicial independence:

Independent judges are neutral adjudicators, whereas dependent judges are biased adjudicators. So independent judges facilitate bargains, whether in private business or in politics. To illustrate by lawmaking, legislators can reach agreements over bills more easily if they have confidence that an independent adjudicator will interpret that legislation.³¹

Therefore, the constitution must secure the independence of the judicial branch.

In order to effectively grant judicial independence it must first be defined.

Judicial independence "that is realistic and analytically useful cannot be concerned with every inside and outside influence on judges."³² Instead, framers must be aware of the principal ways in which judicial independence is substantially threatened. More specifically, they must be aware of the ways in which a judge is rendered unable to adjudicate fairly and is consequently unable to fulfill his essential function. The potential threats to judicial independence can come from other government branches, bureaucratic institutions and external forces. The judiciary should be well insulated from the other government branches, namely the legislature and the executive. While it is true that the judiciary should not be wholly separate from the clutches of either, judicial independence is at risk when such branches "use or threaten to use their control over structure to shape adjudicative outcomes."³³ Therefore, the structure of the judiciary should be established in the Constitution and beyond the influence of any other governmental organ. Without such separation the other branches could substantially influence, if not wholly determine the court's decisions. Another power that should be out of the reach of either the

³¹ Robert D. Cooter, The Strategic Constitution, (Princeton: Princeton University Press, 200) 196.

³² Russell 12.

³³ Russell 14-15.

legislature or the executive is control over the court's administrative decisions. In particular, the judiciary should be able to choose which cases it will hear, in which order it will hear them and which judges will preside over the case. If such power were allotted to another branch, such branch would be able to essentially control the courts' holdings.

The judiciary should remain basically independent, however there are three issues that may necessarily involve both the executive and legislative branches. These three issues are "the method of appointing, remunerating, and removing judges."³⁴ The proper way to appoint judges is currently an unsettled debate. In theory the appropriate appointment mechanism should "insulate judges from short term political pressures, yet ensure some accountability."³⁵ Democratic countries have implemented a spectrum of different methods all hoping to achieve such a lofty goal. This quagmire of appointment mechanisms can overwhelm any framer. Thankfully, one relatively new system established by South Africa in 1994 shines through as a potential answer. South Africa created the Judicial Service Commission (JSC) to help appoint judges. When a vacancy opens up in the Constitutional Court the JSC creates a short list of nominees that it gives to the president, who then chooses one of these nominees to join the court. The JSC is comprised of the chief justice as its chair, the president of the Constitutional Court, as well as lawyers, legal professors, and members of the National Assembly and Parliament. The heterogeneous makeup of the JSC helps to ensure that it nominates judges based on their ability to uphold the law and adjudicate fairly, and not based on their political leanings. Ultimately, the JSC "has brought a refreshing degree of openness to the judicial

³⁴ Russell 15.

³⁵ Ginsburg 42.

appointment process.”³⁶ Consequently, using a diversely populated organization that includes legal experts as well as government officials protects from a politically unbalanced judiciary.

The remuneration of the judges should be adequate so as to mitigate the potential of a judge taking a bribe. Furthermore, it should not be subject to change based on judicial decisions that are contrary to the views of the holder of the purse strings. Without these protections, whoever is in charge of the paychecks of the judges can maintain significant control over the outcome of a case. The last aspect to be addressed is the manner in which judges are removed from the bench. Not unlike the reasoning behind protecting judges’ salaries, judges should not be removed due to a controversial decision. In fact, judges should only have their position challenged if they prove to be entirely incompetent or incessantly discriminatory. If a judge’s term in office is dependent on the popularity of his decisions then he will be unable to adjudicate fairly.

With these necessary protections woven into the constitution, the judiciary is well equipped to rise above the many political influences and decide cases based on their interpretation of the law. However, it must be understood that in reality it is nearly impossible to fully insulate judges from internal or external influences, nor is it necessarily ideal to aspire to such. Judges, like all humans, bring to the bench their own set of beliefs, morals, experiences and biases. Furthermore, no one can have a mind that is static, completely unaffected by the political, social or economic happenings of the time. Judges live at the center of the political world and at times their decisions will reflect such. But this should not be viewed as failing to fulfill their essential function of

³⁶ Hugh Corder, “Seeking Social Justice? Judicial Independence and Responsiveness in a Changing South Africa,” *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World*, ed. Peter H. Russell and David M. O’Brien, (Charlottesville: University Press of Virginia, 2001) 202.

adjudicating fairly. Nor should it add weight to the argument touted by the cynics who question the democratic legitimacy of the judicial branch. For in reality, government is merely a collection of people and as such it carries with it all the flaws, biases and shortcomings of the constituents it represents. It is impossible to fully remove the flaws that people inherently bring to government, and as such it is a fruitless goal to attempt; it is possible however, to create a structure that realizes these truths and protects against their negative effects to the largest extent possible.

Judicial independence fosters just adjudication; however, such decisions can only provide a necessary check over legislative and executive power if the constitution allots to the judiciary the power of judicial review. This concept, made famous by the U.S. Supreme Court case *Marbury v. Madison*, authorizes the court to determine the constitutionality of a law. As such, the judicial branch is able to essentially void legislation it deems unconstitutional. Judicial review remains a fundamental part of a successful democracy, particularly in a divided society, for it provides “insurance” for political parties.³⁷ As Tom Ginsburg explains, during the drafting of a constitution political parties want to “minimize their maximum losses;” and so when “there are no parties that will be confident in their ability to win, all parties will prefer to limit the majority and therefore will value minoritarian institutions such as judicial review.”³⁸ Taking this point further, if a country drafting a constitution does in fact have a majority party yet has strong minority parties, whose support is necessary to ratify the constitution that country will also likely implement judicial review. Furthermore, countries that have been recently dominated by a dictator will likely be more risk adverse to majoritarian

³⁷ Ginsburg 25.

³⁸ Ginsburg 25.

power and therefore will also be partial to guaranteeing judicial review. Broadly speaking,

Uncertainty increases demand for political insurance that judicial review provides. Under conditions of high uncertainty, it may be especially useful for politicians to adopt a system of judicial review to entrench the constitutional bargain and protect it from the possibility of reversal after future electoral change.³⁹

Deeply divided countries, recent memories of harsh dictatorships, and potential future shifts of power all create uncertainty and distrust, which can be mitigated with a constitutional provision for judicial review.

Judicial review is a vital component of a constitutional democracy; yet it is by no means a power that can be defined easily. Instead, it varies dramatically from country to country. Therefore, it is important to define within the constitution judicial review with respect to certain aspects that influence its effective power. The first and arguably most important aspect is the access to the court. This refers to who is allowed to bring cases before the court that question the constitutionality of legislation. Inherently, judicial review is only an effective minoritarian check if it is available to many and is not restricted to a few political elites. Therefore, particularly in a divided society where such a minoritarian check is vital for the interest of the country, it is crucial to allow open access to the court. Specifically, any resident of the country or political institution should have the right to raise a constitutional question before the court. The second dimension of judicial review is the effect of the court's decision on the legislation at bar. In order to empower the court, their decisions must void the law in question either in fact or in essence. Voiding in essence describes the power of the U.S. Supreme Court, where due to the *stare decisis* doctrine even though the law will remain on the books, courts are

³⁹ Ginsburg 30-31.

encouraged to follow precedents and so such a law will become essentially obsolete. Consequently, the constitution must specifically address both who has access to the court and what the effect of a court decision will be in order to determine the extent of the judicial review power.

There seems to persist a common mistake that the judicial branch is secondary to the legislature and the executive in both power and influence. This is a dangerous assumption to make for in the case of newly established democracies the judicial branch can have a profound effect over the direction in which the new government will take. As such, this governmental body can nearly set the course towards success or eventual failure. Consequently, granting the judiciary the appropriate powers and independence will help to ensure that the new government will follow the path of the former and not the latter. Therefore, as recommended above, the constitution should establish the structure of the judiciary and grant the court authority over their administrative decisions. The constitution should prevent the manipulation of their remuneration or removal by other governmental officials. Furthermore, it should include an appointment method that resembles South Africa's; or at the very least, mirrors the outcome that the South African system is able to accomplish. Lastly, and perhaps most importantly, the constitution should establish the power of judicial review, which consists of wide access to the courts as well as extensive jurisdiction.

B. PROTECTION OF INDIVIDUAL CIVIL RIGHTS AND CIVIL LIBERTIES

A constitution is supposed to create government and restrict it, but why? Government provides stability in an otherwise anarchical world and as such people enter

into a contract to both create a government to secure such benefit and simultaneously constrain it, in order to protect their own individual rights from being encroached upon. While it is important to restrict the government from becoming too powerful by structuring it as outlined above, it is equally important to decisively state in the constitution the civil rights and liberties that are to be protected. Particularly in a state that has a history of atrocious violations of individual rights, such a constitutional guarantee becomes an absolute necessity to inspire some degree of confidence in a new government. Furthermore, protecting certain rights and liberties is a fundamental aspect of democracy. As such, it is essential to include a list of individual rights in the constitution that are not to be violated.

i. FUNCTIONAL RIGHTS

There are certain individual rights that are inherent to a democracy. Literally speaking, a democracy is a government by the people. In a sense, the people of a state act as the fourth branch of government, checking its power and restricting any unacceptable increases in that power. Therefore, there must be a protection of the right to participate in formulating and sustaining a democracy. These rights include:

- (1) Freedom to organize;
- (2) freedom of expression;
- (3) the right to vote;
- (4) to run for public office, and
- (5) campaign and compete for voter support;
- (6) access to alternative sources of information about significant issues;
- (7) free and fair elections; and
- (8) the functioning of institutions, such as parties and interest groups, to link government policies to public preferences.⁴⁰

In addition, it is necessary that people have a right to citizenship, which they should not be robbed of without just reason and due process. Different countries determine citizenship in different ways, however, what is important is that these methods are applied equally to everyone and are just and non-discriminatory in nature. All of these

⁴⁰ Schneier 9.

individual rights constitute the *functional rights*, which are necessary for the success of a democracy. Essentially, people must be given the opportunity to voice their opinion without being censored and as such hold the government accountable for its actions.

ii. NEGATIVE AND POSITIVE RIGHTS

In addition to functional rights it is necessary to include both negative and positive rights. Negative rights have a longer tradition of being incorporated into constitutions. Among the most recognizable of these rights are life, liberty and property. Such rights are absolutely essential to the people of any state, however they are no longer sufficient. It is unacceptable to only state what cannot be done, because saying what must be done proves that much stronger of an insurance. Rights that address what must be done are considered positive rights. As Anita Baca remarked in Walter Murphy's dialogue about drafting constitutions:

By listing these negative rights, we perpetuate injustice and social oppression. Government is not the only threat to freedom and happiness, right? If we want a just society, we need positive constitutionalism too. We didn't merely outlaw slavery, we recognized the right of all people to freedom. Let's recognize other rights as well.⁴¹

Positive rights have become more common in newer constitutions.⁴² Such rights include the right to an education, the right to health care, and the right to not be discriminated against based on race, gender, age, sexual orientation, religion, ethnicity or economic standing. Including both negative and positive rights within the constitution offers stronger insurance for the people against any potential governmental abuses.

⁴¹ Walter F. Murphy, Constitutional Democracy: Creating and Maintaining a Just Political Order, (Baltimore: The Johns Hopkins University Press, 2007) 291.

⁴² Jacek Kurczewski, "Parliament and the Political Class in the Constitutional Reconstruction of Poland: Two Constitutions in One," Constitutionalism and Political Reconstruction, ed. Said Amir Arjomand, (Leiden: Koninklijke Brill NV, 2007) 206.

iii. INHERITED RIGHTS

Lastly and perhaps most importantly, it is necessary that the constitution protects the rights and freedoms that resonate in the minds of the people due to historical violations of such rights. It can nearly be assumed that when a country emerges from a malicious dictatorial rule there is almost a one to one parallel between the civil rights ensured in their new constitution and the rights that were consistently violated by their prior leader. This is fundamental to the success of a new constitution and consequently to the legitimacy of the new government because without these protections the people have every reason to cling to their previously cemented suspicions, likely causing the eventual demise of the government.

As such, a constitution, in order to effectively restrict the government it creates, must establish the fundamental individual rights that are not to be violated. Consequently, it must include functional rights, which allow each resident citizen the opportunity to actively partake in the government. Furthermore, it must guarantee both the negative rights that have become almost analogous to constitutionalism and the positive rights that have recently gained popularity among the newer constitutions. Lastly, the constitution must respect the state's history, particularly its history of ignoring individual rights, and firmly establish protections against such abuses under the new regime.

C. DOCUMENT FRAMEWORK

The last important aspect of a constitution that needs to be addressed, in addition to the government structure it outlines and the civil rights and liberties it protects, is the

logistics of the constitution itself. In particular, this includes the layout of the articles, the length of the document, the coherence of the text, and the ability to amend the constitution. A constitution's framework is equally as important as the government it intends to create or the rights it attempts to protect. A coherent text that is organized in a comprehensible manner is necessary in order to firmly establish that which is intended. Furthermore, if a constitution is too easily amendable it loses stability and yet if it is too difficult to amend it loses relevancy. This issue becomes even more critical for a deeply divided state because it is absolutely necessary that the constitution is a stable document in order to achieve legitimacy. However, it is also essential that as the country matures and old barriers are broken down or new problems arise that the constitution can reflect both these positive and negative changes. Therefore, framers need to focus on crafting a constitution that does not get in its own way. In other words, a constitution must define a government and limit that government in a coherent and sufficiently detailed manner, while including an appropriately defined amendment process.

i. LAYOUT

The framework of a constitution, its basic layout, provides an indication of how to read the document, which articles are most important to the framers, and what the general goals of the government should be going forward. Often constitutions begin with a preamble. Preambles, unless declared otherwise, are not typically enforceable, that is legally binding in a court of law. Rather, they are often emotional reflections on a state's history that offer an explanation for creating the new constitutional government. And while what is included in the preamble cannot be judicially enforced, these words do lay out the overarching ideals of the constitution and what it intends to create. As such,

preambles can help shed light on how specific articles should be interpreted. While preambles are not absolutely essential to the success of a constitution, they can help to garner support for a new government by illustrating the previous regime's atrocities and promising a new order founded on liberty and equality.

ii. LENGTH

In addition to the preamble, the other components included in a constitution are the federal, and sometimes local, government structures, the power allotted to each government official, specifics about how the government functions, and often a bill of rights. All together these component parts determine the length of the constitution, which is not quite as sexy a topic as the type of government, yet it is most definitely a passionate topic for the few political scientists and constitutional experts that realize the importance of this seemingly secondary issue. James Madison argued "that constitutions should be short, sparing in structural detail, and largely free of substantive content."⁴³ Instead of attempting to legislate they should solely define "powers, processes, and limitations on government."⁴⁴ However, the trend among recent constitutions is that they are getting longer, and more particularistic. And this trend may not be as threatening to the longevity and success of constitutions as Madison once proposed. Instead, a recent study comparing the design against the durability of the American state constitutions found "that longer and more particularistic last longer than short, framework constitutions."⁴⁵ This may be due to the fact that "competing groups have a common

⁴³ Schneier 36.

⁴⁴ Schneier 37.

⁴⁵ Christopher W. Hammons, "Was James Madison Wrong? Rethinking the American Preference for Short, Framework Oriented Constitutions," *The American Political Science Review*, Dec (1999): 837-849 <<http://proxy.library.upenn.edu:5549/cgi-bin/jstor/printpage/00030554/di011607/01p0606o/0.pdf?backcontext=page&dowhat=Acrobat&config=jstor&userID=a57b2256@upenn.edu/01c0a8487384821190b65df20&0.pdf>>.

interest in protecting the document in which their programs are institutionalized.”⁴⁶ To take this point further, it can be argued that in a society that was recently subjected to a tyrannical regime, having a longer document that specifically details what a government can and cannot do may be the only way to gain the approval required to ratify the constitution. Consequently, framers should focus on including the necessary protections, procedures, limitations, rights and other articles that will together create a document that best represents the people.

iii. COHERENCE

Diction is always important; within a constitution, however, it is absolutely critical. Word choice determines the flexibility and the scope of protection of a clause. Crafting a clear, unambiguous yet simultaneously adaptable constitution is one of the greatest challenges facing framers. Struggling over the most detailed nuances is commonplace for anyone who has ever partaken in the crafting of a constitution. And while this process may prove to be a trying one, it is none-the-less necessary. As such, in the event that a constitution includes extensively ambiguous articles, this must be remedied. It is true that a constitution’s beauty lies in its ability to be elastic, change with the times and thus slightly ambiguous and able to be interpreted in relation to the current political and social environment. However, when a new democracy is created in an attempt to keep a deeply divided, war torn country from collapsing, it is essential that the constitution provides a source of stability. In order to be stable, the constitution must be understood by the people it attempts to govern and the country it intends to unite. If it proves too ambiguous then it will fail to garner the support of the people. Therefore, the constitution must straddle the infinitely fine line between elastic and ambiguous.

⁴⁶ Hammons 846.

iv. AMENDMENT PROCESS

The constitution's framework must provide for a stable but not static rule of law, which necessitates both a formal and informal amendment process. The formal amendment process is one by which the legislature approves, by a specified percent, to change the constitution. In addition to legislative approval, many countries require either the approval of the executive, the approval of a percentage of the comprising regions of the country, a referendum, a waiting period or a constitutional convention. Generally, amending the constitution is more difficult than passing regular legislation, which acts as a stabilizing force against the constantly changing public opinions. Formal amendments, however, are not the only means of rendering constitutional change. Informal amendments often take the shape of judicial interpretations. As such, the more challenging the formal amendment process is, the more important the judiciary becomes in determining the meaning and scope of the constitution. Therefore, there is an inherent interplay between the formal and informal amendment processes, which must be understood by the framers of any constitution.

Including a formal amendment process within the constitution itself is necessary. As the Indian Supreme Court Justice Khanna remarked "no generation has a monopoly on knowledge that entitles it to bind future generations irreversibly, thus a constitution that denies people the right of amendment invites attempts at extra-legal revolutionary change."⁴⁷ Justice Khanna's insight leads to the natural conclusion that the framers of the constitution are just as legally astute and politically biased as the legislatures that succeed

⁴⁷ John Hatchard, "Perfecting Imperfections: Developing Procedures for Amending Constitutions in Commonwealth Africa," *The Journal of Modern African Studies*, 36.3 (1998): 381-398
<<http://proxy.library.upenn.edu:5549/cgi-bin/jstor/printpage/0022278x/ap010142/01a00020/0.pdf?backcontext=page&dowhat=Acrobat&config=jstor&userID=a57b2256@upenn.edu/01c0a83471102cf1190bc7a694&0.pdf>>.

them. As such, the two should be held to the same standard with respect to ratifying and amending the constitution. In other words, the approval necessary to ratify a constitution should be equal to that necessary to amend the same document. Furthermore, in a deeply divided society that is promoting a consociational government, the necessary approval percent should be great enough to guarantee a minority veto. This ensures that both the original body of and the future amendments to the constitution are representative of the different divisions within a country and as such are inherently consociational. However, making the amendment process this difficult increases the importance of informal amendments and thus increases the role of the judiciary.

Informal amendments play an important role in the evolution of a constitution. However, if not properly checked, they can challenge the very foundations of democracy. This occurs when the formal amending process proves difficult, in which case judicial interpretation becomes the more readily available method of changing the meaning of the constitution. Therefore, there seems to be a positive correlation between a difficult amendment process and the power of the judiciary. Taking into consideration the above recommendation that the formal amendment process should call for a necessary approval percent large enough to provide for a minority veto, it can be assumed that in a deeply divided state this will create a formidable obstacle to amending the constitution. As such, the framers need to realize that by creating such an amendment procedure they are therefore bestowing upon the judiciary an extraordinary, yet unwritten power to informally amend the constitution. Consequently, in a consociational federation, where the regions are autonomous and on most issues supreme relative to the federal government, the federal judicial decisions should only be forced upon the regions when

they concern the aforementioned federal government's exclusive competencies. This issue will be discussed at greater length in the next section.

A constitution will only be a powerful and effective document if it is well organized, coherent and stable. As such, the layout should follow a basic framework that includes a preamble, outlines the structure of government and its allotted powers, and protects individual rights. Furthermore, the individual articles should be relatively clear; meaning they should be interpretable but not confusing. Lastly, the stability of the constitution rests on the formal and informal amendment procedures. In order for it to be stable, the formal amendment procedure should be equivalent to the ratification procedure. This, however, imposes a vast amount of power on the judicial branch, which should be checked through a consociational federation that grants regional judiciary supremacy over all issues not included under the federal government's exclusive authorities.

III. ANALYSIS OF THE IRAQI CONSTITUTION

The Constitution was drafted during the summer of 2005 by the Iraqi Constitutional Committee. It was to replace the Transitional Administrative Law (TAL), which had been written by L. Paul Bremer, three of his advisors, and Salem Chalabi and then modified and eventually approved by the Governing Council. Contrary to the drafting of the TAL, the Iraqis played the central role in creating their Constitution. However, they were not alone in the drafting process, but rather both the Kurds and the Shia opted to bring in outside advisors, including American and European legal and political minds by the Kurds, and Iranian religious leaders by the Shia. What ensued during these hot summer months was a controversial debate over sensitive issues and nuances of phraseology, which led to the consequent extension of the drafting deadline on four different occasions.

The Constitution is not without its faults. On the contrary, the Iraqi Constitutional Committee left numerous controversial decisions unresolved, leaving the door open for the newly appointed legislature and the Constitutional Review Committee to settle the issues that proved too difficult to compromise on. However, this is not to say that all divisive questions went unanswered. Rather the Committee was able to make admirable progression with respect to some of the fundamental contentious issues that had previously plagued Iraq. Ultimately, amidst of the clouds of skepticism, the Iraqi Constitutional Committee produced the final document that was approved by popular referendum on October 15, 2005.

A. GOVERNMENT STRUCTURE

i. FEDERATION

The first article of the Iraq Constitution clearly defines the type of government it intends to create: “The Republic of Iraq is a single, independent federal state with full sovereignty. Its system of government is republican, representative, Parliamentary and democratic. This Constitution is the guarantor of its unity.”⁴⁸ It is clear from the beginning that Iraq is to be a federation. However, as prescribed above, Iraq cannot only embrace a federal system, but rather it must adopt a multinational federalism, which entails a decentralized, consociational structure. In fact, the Constitution outlines just that structure.

A multinational federation protects minorities by decentralizing power. More specifically, the regions must be superior to the federal government, with a few exceptions. These exceptions include raising and funding an army, making international treaties and bargains as well as other foreign policy decisions, producing a national currency and defining weights, measures and other nationally adopted standards. In line with these recommendations the Constitution addresses the exclusive competencies of the federal government in Section 4, Article 107, which includes:

Formulating foreign policy and diplomatic representation; formulating and executing national security policy, including creating and managing armed forces to secure protection; formulating fiscal and customs policy; regulating standards, weights and measures; regulating the issues of citizenship; regulating telecommunications and mail policy; drawing up the general and investment budget bill; planning policy relating to water sources and guaranteeing its fair distribution; organizing the general population statistics and census.⁴⁹

⁴⁸ “Final Draft Iraqi Constitution,” § 1, Art. 1, UN Translation, <http://portal.unesco.org/ci/en/files/20704/11332732681iraqi_constitution_en.pdf/iraqi_constitution_en.pdf>.

⁴⁹ “Final Draft Iraqi Constitution,” § 4, Art. 107 (i-ix).

These listed authorities are the only areas in which the federal government is considered supreme over the regional governments.

The next recommendation is that the oversight of natural resources be shared by both the federal and regional governments. The principal natural resources in Iraq are water, oil and gas; all of which are dealt with in the Constitution. However, many people have misinterpreted the articles that address natural resources and subsequently have criticized the Constitution's supposed unfair treatment toward the Sunni Arabs, in particular, with respect to oil. As such, I believe it is necessary to outline these seemingly confusing articles, and further, discuss why it is that so many people seem unable to comprehend their true meaning. If it is an issue with wording then that must be addressed, however if it is actually due to a politically motivated attempt to garner opposition to the Constitution then that must be ignored.

The first natural resource, and the most fundamental for human survival, is water. Water is the only natural resource that is included under the exclusive competencies of the federal government. Article 107 (8) states: "Plan policies relating to water sources from outside Iraq, and guarantee the rate of water flow to Iraq and its fair distribution, in accordance with international laws and norms."⁵⁰ Accordingly, this Article can be read "as giving Mesopotamia (or predominantly Arab parts of Iraq) a federal stake in the rivers that begin in Kurdistan and as warranting the federation an international lead role in negotiating water responsibilities with Iraq's neighboring states."⁵¹ In addition to this federal exclusive authority, the Constitution grants under Article 110, which includes the

⁵⁰ "Final Draft Iraqi Constitution," § 4, Art. 107 (iix)

⁵¹ Brendan O'Leary, "Federalizing Natural Resources," *Iraq: Preventing a New Generation of Conflict*, ed. David M. Malone, Markus E. Bouillon, and Ben Rowswell, (Boulder: Lynne Rienner Publishers, 2007) 192.

federal and regional government's shared competencies, the power "to formulate and organize the main internal water sources policy in a way that guarantees fair distribution. This will be organized by law."⁵² All shared competencies granted in Article 110 must be read together with Article 111, which declares:

All powers not stipulated in the exclusive authorities of the federal government shall be the powers of the regions and governorates that are not organized in a region. The priority goes to the regional law in case of conflict between other powers shared between the federal government and regional governments.⁵³

Furthermore, shared competencies must be read in conjunction with Article 117, which states:

(First) The regional authorities shall have the right to exercise executive, legislative, and judicial authority in accordance with this constitution, except for those powers stipulated in the exclusive powers of the federal government; (Second) In case of a contradiction between regional and national legislation in respect to a matter outside the exclusive powers of the federal government, the regional authority shall have the right to amend the application of the national legislation within that region.⁵⁴

Therefore, the federal authority to plan policies of water originating outside Iraq is above the influence of the regional governments. However, the regional governments are able to amend or nullify "any application of the law as regards to 'just distribution,' since the determination of 'just distribution' is specified as a shared competence"⁵⁵ under Article 110. This creates essentially a regional veto power over the distribution of water to the regions, which is vital because it respects the "historic distrust of Baghdad governments by Kurdistan."⁵⁶ This consociational agreement as to the planning and distribution of water is a realistic compromise that ensures that all Iraqis have access to water.

⁵² "Final Draft Iraqi Constitution," § 4, Art. 110 (vii).

⁵³ "Final Draft Iraqi Constitution," § 4, Art. 111.

⁵⁴ "Final Draft Iraqi Constitution," § 5, Ch. 1, Art. 117 (i-ii).

⁵⁵ O'Leary, "Federalizing Natural Resources," 193.

⁵⁶ O'Leary, "Federalizing Natural Resources," 193.

In addition to water, the other two natural resources addressed by the Constitution are oil and gas. Currently, the debate over these Constitutional provisions rages on with its most intense critics postulating such bogus accusations as: “Baghdad and the non-oil producing regions will be at the mercy of the oil producing ones... the constitution allows the governor of Basra or the president of the Kurdistan regional government to stop transferring money to Baghdad and by extension to non-oil producing regions at a whim.”⁵⁷ This sentiment is not just some radical ranting, but instead is a quote from a research fellow at the London School of Economics. Furthermore, his views have been echoed by many other intelligent economists, political scientists, politicians and educated citizens from around the world. However, to take any belief at face value, not questioning its legitimacy, is dangerous; if that belief is popularly held the danger is only that much more great. With respect to the above quote, and the larger point it highlights, I believe it is not Constitutionally founded but rather grown out of a misinterpretation of the clauses dealing with oil and gas. As such, I will present the oil and gas Articles from the Constitution in hopes of correcting these misinterpretations and allaying the resulting fears.

Throughout the drafting process, the oil and gas provisions were hotly contested and consequently survived numerous changes. The four main points of contention were “(1) ownership, (2) management and revenue distribution, (3) the resources at issue, and (4) development of strategic oil policy.”⁵⁸ Each of these issues was ultimately resolved and specifically addressed in the final draft of the Constitution. The first issue that was

⁵⁷ Yahia Said, “Federal Choices Needed,” *Al-Ahram Weekly*, 2 Mar 2006, Nov 2007
<<http://weekly.ahram.org.eg/2006/784/sc6.htm>>.

⁵⁸ Ashley S. Deeks and Matthew D. Burton, “Iraq’s Constitution: A Drafting History,” *Cornell International Law Journal* Winter (2007): 88pp. 30 Oct 2007
<http://proxy.library.upenn.edu:5591/us/lnacademic/returnTo.do?returnToKey=20_T3387174598>.

dealt with was ownership, which is determined by Article 108: “Oil and gas are the ownership of all the people of Iraq in all the regions and governorates.”⁵⁹ The Kurds, in particular, wanted to weaken this clause in two respects. The first of which limited the ownership to the current fields in Iraq so that Kurdistan would own any future fields. The second involved changing the wording from “the ownership of all the people of Iraq” to “for the benefit of” the Iraqi people.⁶⁰ The Kurds ultimately conceded both of these two requests, leaving the final version of Article 108 to specify that all the people of Iraq own the oil and gas, but in all of the regions and governorates.

An important aspect of the ownership article is its position in the Constitution. It directly follows Article 107, which specifies the federal government’s exclusive authorities, and precedes Article 110, which details the shared competencies of the federal and regional governments. This placement is intentional. Accordingly, the article must be read in conjunction with Article 111 and Article 117, both included above, which grant both regions and governorates with all powers not stipulated to the federal government and give regions supremacy when regional and federal laws come in conflict. As such, because Article 108 does not specifically state what governmental authority shall oversee its regulation it must be assumed that the federal government will only be able to regulate it for the governorates but not for the regions.

The final point concerning Article 108, which has been articulated by Brendan O’Leary, is that bestowing ownership to all Iraqis implies that “there cannot be exclusive non-Iraqi ownership of oil and gas.”⁶¹ O’Leary notes that this may in fact contradict Article 109 (2), which warrants the use of “the most advanced techniques of the market

⁵⁹ “Final Draft Iraqi Constitution,” § 4, Art. 108.

⁶⁰ Deeks 57.

⁶¹ O’Leary, “Federalizing Natural Resources,” 194.

principles and encourages investment.”⁶² If the oil and gas are owned by all the people of Iraq, this would imply that at least a simple majority of the oil and gas are not owned by foreign direct investment. However, this article does not prevent foreign direct investment in its entirety. Rather, it only prevents non-Iraqis from owning more than 49 percent of the oil and gas.

The second point of contention during the constitutional drafting process was management and revenue distribution of the current Iraqi oil fields. The debate was centered on whether the federal government or the regions would be supreme with respect to management and revenue distribution. The Kurds tried to establish a regional veto over federal plans, proposing the phrasing “in partnership with” to describe the working relationship between the federal and regional or governorate governments. The Kurdish proposal implies that the federal government would need regional and governorate support and therefore would grant a minority veto. On the contrary the Shia opted for federal supremacy, and thus wanted to define the federal government’s managerial role as “in consultation with” the producing regions or governorates, which leaves the ultimate decision making authority to the federal government.⁶³ Ultimately, Article 109, which deals with the management and revenue distribution, begins both sub-clauses with: “The federal government with the producing regional and governorate governments.”⁶⁴ While the U.S. Embassy’s legal advisor describes this compromise as leaving “the character of the relationship relatively vague,” O’Leary reads such as a Kurdish victory. O’Leary reasons that this article, like Article 108, does not fall under either the exclusive federal authorities article or the shared competencies article.

⁶² “Final Draft Iraqi Constitution,” § 4, Art. 109 (ii).

⁶³ Deeks 57-58.

⁶⁴ “Final Draft Iraqi Constitution,” § 4, Art 109 (i-ii).

Therefore, when read in conjunction with Articles 111 and 117, as it should be, it clearly grants regional supremacy.

The Constitution further allots the power to manage and distribute revenue in the remainder of Article 109, which specifies:

(First) The federal government with the producing governorates and regional governments shall undertake the management of oil and gas extracted from current fields provided that it distributes oil and gas revenues 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 regulated by law; (Second) The federal government with the producing regional and governorate governments shall together formulate the necessary strategic policies to develop the 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.⁶⁵

The first section of this article clearly articulates that the federal government is in charge of managing the current oil fields in Iraq. While this responsibility is to be shared with the producing regions and governorates, “the Arabic version of this article subtly implies a lead role for the federal government in management as regards article 112 (1).”⁶⁶ This subsection also ensures that the revenues from the current oil fields are to be distributed fairly, with respect to population, to all of Iraq. Furthermore, it includes two important caveats to the revenue distribution. The first being that for a set time, proportionally more revenues can be allocated to the regions deprived of such under Saddam, namely the Kurdish north and Shia south, and to the “regions that were damaged later on.” However, this does not require that such regions are necessarily to be given relatively more funds for it is to be read with the second caveat which stipulates that the revenue distribution is to be done so that it assures balanced development. Therefore, if the

⁶⁵ “Final Draft Iraqi Constitution,” § 4, Art 109 (i-ii).

⁶⁶ O’Leary 196.

Kurdish north and Shia south are both further developed than the Sunni west, then it would be unconstitutional to grant extra revenue to the north and south for it would create an unbalanced development. Furthermore, “regions that were damaged later on” refers to the

Southern governorates that were damaged after a period of development under Saddam (during the Iran-Iraq War and after the Shia intifada) and Kurdistan (which did not get its fair share of Iraq’s revenues during the period between 1992 and 2003, and which was outside the grip of the regime from 1992).⁶⁷

However, it will be up to the government to determine the exact meaning of this phrase, and as such, any regions, including the Sunni west, that were destroyed during the Iraq War could be included as deserving of additional revenue.

The last two contested points were the resources at issue and the development of strategic oil strategy, both of which are ambiguously addressed in Article 109 (1). This section refers specifically to the current oil fields and does not mention anything about future oil fields. Therefore, the federal government only has a managerial role over the currently exploited oil fields in Iraq. However, this may not be as restrictive as it initially seems. While the federal government only has the constitutional authority to manage current oil fields, the second section of Article 109 does not mention this restriction. Instead, Article 109 (2) just says the federal government working together with the regional and governorate governments shall create policies “to develop the oil and gas wealth.” Some have argued that this section must be read in conjunction with the first section, which does specifically state that it only pertains to current fields and as such this implies that the second section only pertains to current fields as well. However, others believe that “because this provision makes no distinction between present and future

⁶⁷ O’Leary 196.

fields, any strategic policy arguably would address both.”⁶⁸ Both interpretations have legitimate evidentiary support and thus the issue lies in the ambiguity of the article. As it currently stands, the judiciary will have the responsibility of deciding which of the two above interpretations of Article 109 (2) is correct, if and when the federal government attempts to create a policy to develop a future field. Unless the legislature adds a clarifying amendment to specifically address this concern before such a case is raised.

Despite this single ambiguity, the articles concerning the natural resources in Iraq prove to be both clear and fair. Furthermore, in light of Iraq’s recent history, in particular Saddam’s disproportionate distribution of wealth and resources, Kurdistan would be unwilling to trust the central government with ensuring just distribution. Therefore, the only reasonable power structure that could realistically be implemented is that put forth by the Constitution. As such, these provisions should be enforced as discussed above, and the ambiguity concerning Article 109 dealt with accordingly.

The federal system proposed by the Constitution accommodates the deeply entrenched divisions that would otherwise threaten Iraq’s stability. By instituting a decentralized structure and allotting significant autonomy to regions minorities are better protected than they would have been in a centralized unitary state. Furthermore, with out such regional autonomy, the Kurds never would have ratified the Constitution, which was necessary in order for it to be adopted. Therefore, this federal system is a necessary component of the Constitution.

ii. LEGISLATURE

The legislature outlined by the 2005 Iraqi Constitution follows the aforementioned recommendations necessary to have a successful constitutional

⁶⁸ Deeks 69.

democracy in an ethnically and religiously divided state. Its only departure from such recommendations lies not in the document itself, but in the Council of Representatives (COR) inaction in terms of establishing the Federation Council as the Constitution stipulates. Apart from such, the legislature put forth by the Constitution allows for power sharing between the three main divisions of Iraq and includes smaller minority parties. As such, every Iraqi citizen is given a political voice, which marks a stark change from the prior regime.

Section 3 of the Constitution, which discusses “Federal Powers,” begins with an outline of the legislative branch. The first article of the legislative section, Article 46, establishes a bicameral legislature: “The federal legislative power shall consist of the Council of Representatives and the Federation Council.”⁶⁹ However, the Constitution only details the COR and merely requires that they establish the Federation Council. According to Article 62, which is the only article to address the Federation Council:

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 formation, its membership conditions and its specializations and all that is connected with it.⁷⁰

As of yet, the COR has not established the Federation Council.

In accordance with Article 137 of the Constitution the COR set up a Constitutional Review Committee (CRC) in October 2006 with the purpose of presenting “a report that includes recommendations for the necessary amendments”⁷¹ to the Constitution. On May 22, 2007 the CRC submitted its report to the COR and included in

⁶⁹ “Final Draft Iraqi Constitution,” § 3, Ch. 1, Art. 46.

⁷⁰ “Final Draft Iraqi Constitution,” § 3, Ch. 2, Art. 62.

⁷¹ “Final Draft Iraqi Constitution,” § 6, Ch. 2, Art. 137 (i).

such was a recommendation for the creation of the Federation Council. The report concluded that the Federation Council be:

Made up of an equal number of representatives per governorate, regardless of population size or prior incorporation into a region. The representatives would be directly elected by the population of each governorate, with an unspecified number of seats reserved for minority groups. The legislative jurisdiction of the Federation Council would extend only to those areas directly within the competence of the federal regions.⁷²

The creation of the Federation council remains a controversial issue because the majority Shia Arabs would be submitting themselves to a forum in which they no longer hold such a stark majority. Another issue that arises with respect to the Federation Council is that there are both governorates and regions; therefore identifying how to elect the representatives and how many seats each governorate or region should have becomes complicated. This issue becomes even more problematic because a region is able to both abolish the governorates that comprise it, leaving just the region, as well as create more governorates out of the existing area. Therefore, to establish a Federation Council whose members are elected by the governorates would fail to address these pressing issues. Such a council would be a far cry from the intended forum of equality for each governorate regardless of population.

The greater issues currently preventing a bicameral legislature from being established are the unsettled debates about region formation and what powers regions have relative to governorates. Until these controversies are resolved the manner in which the Federation Council should be elected is difficult to prescribe. However, there are some overarching recommendations that can, at the very least, provide a foundation for further discussions on the matter. First, each governorate, as they existed at the time the

⁷² Neil J. Kritz, Sermid al-Sarraf, and J. Alexander Their, "Constitutional Reform in Iraq: Improving Prospects, Political Decisions Needed," United States Institute of Peace, Sept 2007, <http://www.usip.org/pubs/usipeace_briefings/2007/0903_constitutional_reform_iraq.html>.

Constitution was adopted, is given an equal number of seats. Second, regions should be given the number of representatives allocated to the governorates that comprise them, regardless of whether they either create more governorates or wholly do away with them. Third, as proposed by the CRC, each area, be it a governorate or region, should directly elect its representatives, with a certain number of seats allotted to the minority parties. The last recommendation depends on whether the government wants to promote region formation or not. If it does then it should give regions the number of representatives from each of their governorates plus an additional number, which would remain the same for all regions. For example, if each governorate were to have 15 representatives, then the Kurdistan region, which consists of three governorates, would have 45 representatives plus five more. All other regions would get five additional representatives as well. Through such, there would be an incentive for both the Shia south and the Sunni west to form into regions.

The current unicameral structure of the legislature is a pressing issue that must be addressed by the Iraqi government by establishing the Federation Council. However, despite such, the Constitution's legislative section follows the necessary framework, which was previously discussed. First, and perhaps most importantly, the legislators are elected through a nationwide proportional representation system. The United Nations' Electoral Assistance Division was invited by the Iraqi Governing Council to help advise the country on its electoral system. The UN offered three potential systems: "(1) a system of small, multi-member majority districts, (2) a PR system using the Iraqi

governorates as districts, and (3) a nationwide PR system.”⁷³ From these three systems the UN “cited drawbacks for each of the first two systems, including the difficulty of drawing electoral districts, the unreliability of population figures on which to base representation, and the problem of dealing with displaced populations and out of country voters.”⁷⁴ As for the nationwide PR system, the UN stated that it would not create any of the issues of the other two systems and it would “be better for women and minorities, would encourage the formation of alliances between parties and groups, and would encourage more moderate positions.”⁷⁵

Two additional problems arise under the first two potential electoral systems proposed by the UN. The first is that the Kurdistan region’s borders cut through governorates, which complicates using Iraqi governorates as districts.⁷⁶ The second issue results from the Constitutional mandate that at least one-quarter of the COR be women. In order to achieve this with a PR nationwide list system, women make up a quarter of the lists, with one women in the top three names, two in the top six and so on. However, in a district based voting system this could only be achieved with an all woman list in every fourth district, which is in violation of equality laws. The issue lies in the fact that each governorate would elect fewer people than the country as a whole; therefore many of the 284 different political parties would win maybe one or two seats. As such, there would have to be extensive cooperation between parties as to which ones would have to put women as the first, second or third name on their list. These complications are not

⁷³ Eric Bjornlund, Glenn Cowan, and William Gallery, “Election Systems and Political Parties in Post-Conflict and Fragile States,” *Governance in Post-Conflict Societies: Rebuilding Fragile States*, Ed. Derick W. Brinkerhoff, (London: Routledge, 2007) 74.

⁷⁴ Eric Bjornlund et al. 74.

⁷⁵ Eric Bjornlund et al. 74.

⁷⁶ Karna Eklund, Brendan O’Leary, and Paul R. Williams, “Negotiating a Federation in Iraq,” *The Future of Kurdistan*, by Brendan O’Leary and John McGarry, (Philadelphia: The University of Pennsylvania Press, 2005) 138.

found in a nation wide PR list system. Consequently, Iraq adopted a nation wide PR electoral system, which has allowed for each minority to have a voice in the legislature.

According to Article 47 the COR “shall be elected through a direct secret general ballot. The representation of all components of the people in it shall be upheld.”⁷⁷ This electoral system was tested in December 2005, when the first elections since the adoption of the Constitution were held to fill the 275 seats for the Council of Representatives. In total around 70 percent of the eligible Iraqi population voted with 10.9 million of the 15.6 million Iraqis participating in the parliamentary elections.⁷⁸ The Sunni Arabs, who had mostly boycotted the January 2005 legislative elections and the October 2005 constitutional referendum, had a higher turnout, and consequently acquired 55 seats in the COR. The Shia Arab block garnered the most votes, earning it 128 seats, while the Kurdish block grabbed 53 seats.

The higher Sunni Arab turnout, however, did not sway some critics who believed that the nationwide PR system was inappropriate for Iraq because it did not protect against this foreseen Sunni under-representation. Such critics have argued that a nationwide PR system only further entrenched ethnic and religious divisions in the country, and that if Iraq had adopted a governorate based system it would not only include more Sunni Arabs in the government but also promote ethnic cooperation. However, as previously described, such an electoral system would create formidable obstacles, making the elected legislature less representative of its constituents. More specifically, a PR system provides most political groups, even relatively small minorities, with a legislative voice equal to their percentage of the total population. Another, and

⁷⁷ “Final Draft Iraqi Constitution,” § 3, Ch. 1, Art. 47 (i).

⁷⁸ Edward Wong, “Iraqi Voter Turnout Was 70%, Early Figures Indicate,” *The New York Times*, Dec 21, 2005 <http://www.nytimes.com/2005/12/21/international/middleeast/21cnd-iraq.html?_r=1&oref=slogin>.

perhaps more important issue with this criticism, is that the Sunni Arabs are not opposed to the PR electoral system, but rather they are opposed to any government that removes them from power. Therefore adopting an electoral system that will result in a greater Sunni Arab representation in the legislature will not appease the Sunnis. However, it will infuriate the Kurds, Shia Arabs and the consequently excluded other minorities like the Yazedis, Turkmen, Christians and Mandi Sabeans, among others, which constitute around 80 percent of the population. The real question that remains is why are so many critics willing to ignore the desires of 80 percent of the population in order to tend to the unreasonable demands of the other 20 percent?

The Constitution allots a four-year term length for the Council of Representatives. As previously discussed, the term length should be long enough to insulate the legislators from their constituents' every popular whim, however, it should also be short enough to make them accountable to the fundamental needs and wants of those they were elected to represent. A four-year term length falls within the prescribed amount and consequently will help to keep legislators primarily focused on their constituents and secondarily aware of Iraq's needs as a state.

In order to effectively represent the Iraqi people, the Constitution empowers the COR with the ability to present and enact laws. These two fundamental responsibilities enable the legislature to promote the needs of its constituents and simultaneously to provide a powerful check on the executive power. While the Constitution grants the President, Prime Minister and COR the right to present bills to the COR; neither of the executive positions are able to pass such bills into law. The right to enact laws remains exclusively with the COR, which is stipulated by Article 57: "(A) Bills shall be presented

by the President of the Republic and the Prime Minister; (B) Proposed laws shall be presented by ten members of the Council of Representatives or by one of its specialized committees.”⁷⁹ Article 58 of the Constitution, which delineates the Council of Representatives’ specializations, includes “enacting federal laws,” and “monitoring the performance of the executive authority.”⁸⁰ Through such, the Constitution gives the legislature substantial power to balance and restrain the executive branch.

The second important check on executive power designated to the legislature is the “power of the purse.” The Iraqi Constitution has effectively divided this power between the Council of Ministers and the Council of Representatives. As such, both the executive and the legislative branches have substantial influence over the nation’s budget. Article 77 gives the Council of Ministers the power “to prepare the draft of the general budget, the closing account, and the development plans.”⁸¹ However, Article 59 stipulates that

(First) The Council of Ministers shall submit the draft general budget bill and the closing account to the Council of Representatives for approval;
(Second) The Council of Representatives may conduct transfers between the sections and chapters of the general budget and reduce the total of its sums, and it may suggest to the Cabinet to increase the total expenses, when necessary.⁸²

This interplay between the executive and legislative authorities with respect to the general budget is democracy at its best. Essentially, the national budget plan determines the general policy of Iraq, and therefore the power to establish such is significant, to be understated. Consequently, it is vital that the budget plan reflects the needs of Iraq as a whole and the needs of the different ethnicities and religious sects that comprise the

⁷⁹ “Final Draft Iraqi Constitution,” § 3, Ch. 1, Art. 57 (ii).

⁸⁰ “Final Draft Iraqi Constitution,” § 3, Ch. 1, Art. 58 (i-ii).

⁸¹ “Final Draft Iraqi Constitution,” § 3, Ch. 2, Art. 77 (iv).

⁸² “Final Draft Iraqi Constitution,” § 3, Ch. 1, Art. 59 (i-ii).

diverse state. This difficult task is accomplished by granting the executive branch the authority to write the general budget while allocating to the legislative branch the right to amend, alter and finally approve the plan.

The final aspect of the legislative section that must be addressed by the Constitution is the transparency of the Council of Representatives' actions. The Iraqi Constitution stipulates in Article 51 that "(First) Sessions of the Council of representatives shall be public unless it deems them otherwise; (Second) Minutes of the sessions shall be published in means regarded appropriate by the Council."⁸³ This important article allows the Iraqi constituents to hold their representatives accountable for their actions. By making the meetings and minutes available to the public it forces the representatives to practice what they preach or risk losing the next election. However, the Constitution also offers a vital protection to the legislators. Article 60 declares that "each member of the Council of Representatives shall enjoy immunity for statements made while the Council is in session, and the member may not be prosecuted before the courts for such."⁸⁴ Such a protection grants legislators the ability to argue freely for their constituents without having to worry about legal repercussions. Simultaneously, the publicity of the sessions forces legislators to, at worst, be aware of the needs of their constituents and, at best, argue adamantly for such needs.

iii. EXECUTIVE

The executive branch established by the Constitution follows closely to the recommendations put forth by this thesis. More specifically, the Constitution outlines a parliamentary system, with a President, a Prime Minister and a Cabinet of Ministers.

⁸³ "Final Draft Iraqi Constitution," § 3, Ch. 1, Art. 51 (i-ii).

⁸⁴ "Final Draft Iraqi Constitution," § 3, Ch. 1, Art. 60 (ii) (a).

Furthermore, the methods of choosing each foster a consociational executive. However, the executive as outlined in Section 3, Chapter 2 will not come into effect until after one successive term as stipulated by Article 134 under the Transitional Provisions Section. Instead, during the first term there is a Presidency Council, which includes a President and two Deputy Presidents sharing the powers granted by the Constitution to the President. The Presidency Council is to be chosen and approved by two-thirds of the legislature, which makes it so that a Sunni and Shia Arab and a Kurd will each occupy a position in the council. Furthermore, decisions made by the Presidency Council are to be unanimous which gives each member a veto. Thus making the Presidency Council truly consociational.

After the first term is over in 2009, the permanent executive constitutional provisions will take effect. Under these provisions, the President is to be elected in addition to one or more Vice Presidents in a manner to be determined by law.⁸⁵ Accordingly, to guarantee a consociational government the legislature should enact a law that requires a two-thirds majority approval of a single ticket including the President and two Deputies. This ensures, like the Presidency Council, that each major faction is represented in the executive branch. Furthermore, the legislature must distinguish between the two Deputies because according to Article 72 “The ‘Vice’ President shall assume the office of the President in case of his absence” or when it becomes vacant.⁸⁶ Therefore, the roles of Deputies should be divided into Deputy one and Deputy two, where Deputy one would be next in line for the presidency.

⁸⁵ “Final Draft Iraqi Constitution,” § 3, Ch. 2 (I) Art. 66 (i-ii).

⁸⁶ “Final Draft Iraqi Constitution,” § 3, Ch. 2 (I) Art. 72 (ii-iii).

The Constitution grants the President the power to issue special pardons and award medals in conjunction with the Prime Minister, ratify international treaties and agreements, ratify laws enacted by the COR, to convene the COR, and a few other ceremonial powers. The one seemingly non-ceremonial power from this list is the power to ratify laws enacted by the COR. However, the Constitution reads that “such laws are considered ratified after 15 days from the date of receipt,” which clearly removes veto power. Therefore, the one true power of the President is that of choosing the Prime Minister. This is stipulated in Article 73: “The President of the Republic shall name the nominee of the Council of Representatives bloc with the largest number to form the Cabinet within 15 days from the date of the election of the president of the republic.”⁸⁷ In the case that the Prime Minister and his Cabinet are not truly inclusive of all the three major Iraqi groups, the President could be granted more authority. Along these lines, some Sunni Arabs and Kurds on the Constitutional Review Committee have proposed to make the President more powerful because the Shia Arabs are likely to always hold the position of Prime Minister. However, the United Iraqi Alliance (UIA-main Shia bloc) are only willing to accept this shift in power if the President were to be chosen through popular elections. This however is a majoritarian system that would endanger the consociational government. More specifically, the Shia Arabs constitute around 60 percent of the country, which means they would almost always hold both the President and the Prime Minister positions if the President was popularly elected. Therefore, unless the UIA is willing to increase the President’s power without making it a popularly elected position, the power balance should remain as it stands.

⁸⁷ “Final Draft Iraqi Constitution,” § 3, Ch. 2 (II) Art. 73 (i).

The Prime Minister of Iraq according to the above recommendations, should be the commander and chief of the armed forces, hold power over the state policy and retain the confidence of the Cabinet of Ministers. All these prescriptions are met with Article 75:

The Prime Minister is the direct executive authority responsible for the general policy of the State and the commander in chief of the armed forces. He directs the Council of Ministers, and presides over its meetings and has the right to dismiss the Ministers on the consent of the Council of Representatives.⁸⁸

However, also as prescribed, these powers are not unchecked. In order for the Prime Minister to declare war he and the President together must request the two-thirds majority approval of the legislature.⁸⁹ Furthermore, while the Prime Minister is responsible for the general policy, the Cabinet of Ministers is more specifically granted the power to “plan and execute the general policy and the general plans of the State.”⁹⁰ As for the rest of the Cabinet’s powers, they are to propose bills, issue rules for implementing laws, draft the general budget, recommend nominees for specific governmental positions to be approved by the COR, and negotiate international treaties.⁹¹ These authorities provide for a strong executive and yet granting them to the Cabinet ensures that such power is not concentrated in a single official but rather dispersed among many. Furthermore, the consociational makeup of the cabinet coupled with the legislative check over the executive ensures that this branch does not become too powerful.

As described above, the executive branch should follow a parliamentary system that includes a President, a Prime Minister and a Cabinet of Ministers. The President’s powers should be primarily ceremonial with the exception of nominating the Prime

⁸⁸ “Final Draft Iraqi Constitution,” § 3, Ch. 2 (II) Art. 75.

⁸⁹ “Final Draft Iraqi Constitution,” § 3, Ch. 1 (I) Art. 58 (ix) (a).

⁹⁰ “Final Draft Iraqi Constitution,” § 3, Ch. 2 (II) Art. 77 (i).

⁹¹ “Final Draft Iraqi Constitution,” § 3, Ch. 2 (II) Art. 77 (ii-vi).

Minister. Conversely, the Prime Minister should be powerful, however this power should be checked by the President, the Cabinet of Ministers and the legislature. Furthermore, the methods for choosing these different officials should establish a consociational executive branch.

iv. JUDICIAL

The first recommendation for the judicial branch is to make it largely independent from the influences of both governmental officials and the people of the state. The Iraqi Constitution, in the first article of the judicial section, declares: “the Judicial authority is independent.”⁹² This is followed by: “Judges are independent and there is no authority over them except that of the law. No authority shall have the right to interfere in the Judiciary and the affairs of Justice.”⁹³ In fact, this principle is also stated under the Civil Rights section of the Constitution in Article 19, which states that “The judiciary is independent and no power is above the judiciary except the law.”⁹⁴ However, these declarations are only powerful if they are supported by the articles that succeed them.

As previously discussed, judicial independence is potentially threatened by the legislature, the executive, bureaucratic institutions and external forces. To begin, the court’s structure and administrative duties must be beyond the influence of the other branches of government. The Constitution specifically outlines the structure of the judicial branch in Article 86: “The Federal Judicial Authority is comprised of the Higher Juridicial Council, Supreme Federal Court, Federal Court of Cassation, Public Prosecution Department, Judiciary Oversight Commission and other federal courts that

⁹² “Final Draft Iraqi Constitution,” § 3, Ch. 3, Art. 84.

⁹³ “Final Draft Iraqi Constitution,” § 3, Ch. 3, Art. 85.

⁹⁴ “Final Draft Iraqi Constitution,” § 2, Ch. 1 (I) Art. 19 (i).

are regulated in accordance with the law.”⁹⁵ Following such, the first two and most important of these institutions are then defined. The Higher Juridicial Council “shall oversee the affairs of the Judicial Committees;”⁹⁶ and the Federal Supreme Court “is an independent judicial body, finically and administratively” with the power of judicial review.

The structures seem thoroughly cemented in the Constitution however, there remains a potential threat to the judicial independence. For the Higher Juridicial Council, the Constitution reads: “The law shall specify the method of its establishment, its authorities, and the rules of its operation.”⁹⁷ This grants the legislature substantial power over the structure and administrative duties of the Higher Juridicial Council. What is most worrisome is that once such a law is passed, there is nothing to prevent the next or any future legislature from passing additional laws, which essentially gives each legislature the power to alter this Council so as to effectively control their political leaning. This is most unsettling because the Higher Juridicial Council is responsible for managing “the affairs of the Judiciary” as well as nominating the members of the Federal Court of Cassation, the Chief Public Prosecutor, and the Chief Justice of the Judiciary Oversight Committee and determining its budget.⁹⁸ Therefore, there should be an amendment added to this section of the Constitution declaring that any initial legislation must be agreed upon by a two-thirds vote instead of a simple majority and must not be changed by future legislatures without the consent of the Higher Juridicial Council. This

⁹⁵ “Final Draft Iraqi Constitution,” § 3, Ch. 3, Art. 86.

⁹⁶ “Final Draft Iraqi Constitution,” § 3, Ch. 3 (I) Art. 87.

⁹⁷ “Final Draft Iraqi Constitution,” § 3, Ch. 3 (I) Art. 87.

⁹⁸ “Final Draft Iraqi Constitution,” § 3, Ch. 3 (I) Art. 88 (i-iii).

will ensure that the original legislation will at least be acceptable to two of the three major Iraqi factions and provide more judicial independence.

Besides this single weakness, the Constitution insulates the judicial branch rather effectively. Some important protections included are that the Federal Supreme Court is declared independent both financially and administratively, and the “work of the court shall be determined by a law enacted by a two-third majority of the members of the Council of Representatives.”⁹⁹ The first of these two protections is exactly as recommended; the court is independently in control of its administrative decisions. The second is less than optimal because the legislature is granted the power to decide the work of the court, however this decision must be made with a two-thirds majority, which forces agreement between at least two of the three main Iraqi groups. The danger of having the legislature determine the work of the court lies in their ability to manipulate the decisions of the court, which is vastly diminished when two-thirds of the COR must agree upon the legislation.

The next recommendation addressed the appropriate roles of the legislature and executive with respect to the appointing, remunerating and removing the judges. As for appointing the judges, the best way that offers the least majoritarian outcome is a system resembling South Africa’s, which uses an independent commission full of legal and political minds representing the entire population to nominate a list of judges which the President then chooses from. The Iraqi Constitution has left the method of selection to “be determined by a law enacted by a two-third majority of the members of the Council of Representatives.”¹⁰⁰ Oddly enough, the Constitution does follow the South African

⁹⁹ “Final Draft Iraqi Constitution,” § 3, Ch. 3 (II) Art. 89 (ii).

¹⁰⁰ “Final Draft Iraqi Constitution,” § 3, Ch. 3 (II) Art. 89 (ii).

model with respect to every other judicial appointment. It grants the Higher Juridicial Council the power to nominate the members of the Court of Cassation, the Chief Public Prosecutor and the Chief Justice of the Judiciary Oversight Commission; just not the members on the Supreme Federal Court. Therefore, the legislature should pass a law granting the Higher Juridicial Council the responsibility to nominate the members of the Supreme Federal Court as well. From these nominations the COR would then elect the judge. However, this will only achieve the desired effect if the members of the Higher Juridicial Council are representative of all Iraqis. Therefore, the legislature must also stipulate the method of their selection as resembling South Africa's model for selecting the members of the JSC. Coupled together, these two legislations will create a court that is inherently consociational.

The remuneration of the judges of the Supreme Federal Court is to be determined by the Higher Juridicial Council, which is granted with the authority of drafting the annual budget for the Federal Judiciary Authority.¹⁰¹ This leads to the necessary conclusion that the Higher Juridicial Council will be in charge of determining the judges' pay. While it is important that the purse strings are not wholly under the auspices of the COR, there are no constitutional guarantees that pay will not be altered based on a controversial decision. It may prove that having the Higher Juridicial Council in charge of this responsibility is insurance enough that changes in remuneration will not be used to sway the judges' decisions. However, it is always better, particularly for a country that is still tending to its political wounds accumulated under Saddam's brutal and unjust regime, to use a belt and suspenders approach. Therefore, there should be a guarantee

¹⁰¹ "Final Draft Iraqi Constitution," § 3, Ch. 3 (I) Art. 88 (iii).

added to the Constitution that prevents any governmental institution from using remuneration to manipulate the judges.

The removal of judges is the last issue concerning the overlap of the judiciary with the executive and legislative branches. The Constitution states that “Judges may not be removed except in cases specified by law; such law will determine the particular provisions related to them and shall regulate their disciplinary measures.”¹⁰² Following the previously made recommendations, the legislature should pass a law declaring that judges can only be removed when they prove to be either entirely incompetent or incessantly discriminatory. Each of which should be very clearly defined, and the law should air on being too conservative with respect to removal. While in doing so it creates a danger that the judiciary will incur some less than optimal judges, it is better than allowing for their easy removal and consequently the fall of an independent judiciary.

The most important power that the Constitution should grant to the judiciary is that of judicial review. As previously stated, only through judicial review can the court effectively balance against the legislature and the executive. The Constitution stipulates that the Federal Supreme Court has jurisdiction over the “(First) Oversight of the constitutionality of laws and regulations in effect; (Second) Interpretation of the provisions of the constitution.”¹⁰³ Together these two clauses effectively grant the judiciary with judicial review. However, as discussed earlier, this power is dependent on who has access to the courts and the effect of a court’s decision. In terms of access to the courts it was previously prescribed any resident, business, or political institution in Iraq

¹⁰² “Final Draft Iraqi Constitution,” § 3, Ch. 3 (III) Art. 94.

¹⁰³ “Final Draft Iraqi Constitution,” § 3, Ch. 3 (II) Art. 90 (i-ii).

should be able to bring a constitutional question before the court. The Constitution does grant open access stating that the Federal Supreme Court has jurisdiction over:

(Third) Settle matters that arise from the application of the federal laws, decisions, regulations, instructions, and procedures issued by the federal authority. The law shall guarantee the right of the Cabinet, the concerned individuals and others of direct contest with the Court; (Fourth) Settle disputes that arise between the federal government and the governments of the regions and governorates, municipalities, and local administrations; (Fifth) Settle disputes that arise between the governments of the regions and governments of the governorates; (Sixth) Settle accusations directed against the President, the Prime Minister and the Ministers. That shall be regulated by law.¹⁰⁴

This access is in accordance with the recommendation. The second aspect of judicial review concerns the binding power of the court's decision on the other branches of government. As prescribed, a court decision should void the law in question either in fact or in essence. The Constitution follows such recommendation with Article 91, which reads: "Decisions of the Federal Supreme Court are final and binding for all authorities."¹⁰⁵ The power of judicial review allotted by the Constitution is maintained by allowing wide access to the court and by empowering the court to void legislation.

The last question that must be settled with respect to the federal judiciary is when it conflicts with a regional judiciary who remains supreme? When answering this difficult political question one must remember that a consociational government is the best structure to ensure a stable democracy within a deeply divided state. A consociational government, as previously discussed, demands that regions be given autonomy. Therefore, this leads to the natural conclusion that the regional judiciary would be supreme to the federal, except in the areas of exclusive federal competencies outlined in the Constitution. This recommendation is founded in the Constitution under

¹⁰⁴ "Final Draft Iraqi Constitution," § 3, Ch. 3 (II) Art. 90 (iii-vi).

¹⁰⁵ "Final Draft Iraqi Constitution," § 3, Ch. 3 (II) Art. 91.

Article 111 and Article 117, which together give the regions supremacy over the federal government in respect to all areas outside the exclusive federal competencies.

Accordingly, the regional judiciaries should be supreme when they conflict with the federal judiciary in accordance with the exceptions above.

There is one further issue with respect to regional versus federal judicial supremacy that should be raised. That is the issue of guaranteeing civil rights to all Iraqis. If, as just recommended, the regional judiciary was supreme they would have the authority to interpret their regional constitution's bill of rights and apply such onto their constituents. The danger in this remains that regional constitutions may lack vital protections for certain minorities, genders or other groups; and if this were the case the federal government would have no authority to prevent these essentially authoritarian regimes from abusing their people. Therefore, an answer to such could be the federal government mandate that each region incorporate the federal bill of rights into their own regional constitution and that the regional judiciary would then interpret it accordingly. However, realistically speaking, a regional judiciary could still impinge on certain rights by essentially interpreting such protections away. Without any check by the federal government, forcing the incorporation of the federal bill of rights into the regional constitutions would not be an effective protection of such rights. Ultimately, granting autonomy to the regions is absolutely crucial and will largely determine the success or failure of the Constitution. Therefore, the potential benefits of mandating that each region accept the federal bill of rights do not outweigh the costs of sacrificing autonomy and thus the answer to the initial supremacy question remains the regional judiciary is supreme to the federal.

B. PROTECTION OF INDIVIDUAL CIVIL RIGHTS AND CIVIL LIBERTIES

The civil rights and civil liberties guaranteed in the Iraqi Constitution are, at the risk of being excessively understated, comprehensive. In line with the previously stated recommendations, the Constitution includes extensive protection of functional rights. Furthermore, like many other recently drafted constitutions, it includes both negative and positive rights. Lastly, there are a number of protections that result directly from certain abuses committed by the previous regime. All together these guarantees offer substantial protection, in theory, for the people of Iraq.

i. FUNCTIONAL RIGHTS

The functional rights outlined above are all included and most are even expanded upon in the Constitution. The first few recommended include the freedom to organize and the freedom of expression as well as the right to access alternative sources of information, all of which are secured by the Constitution in Article 36, which reads:

The state guarantees in a way that does not violate public order and morality: A. Freedom of expression, through all means; B. Freedom of press, printing, advertisement, media and publication; C. Freedom of assembly and peaceful demonstration. This shall be regulated by law.¹⁰⁶ Furthermore, Article 37 secures “the freedom of forming and joining associations and political parties” as well as prohibits forcing “any person to join a party, society or political entity or force him to continue his membership in it.”¹⁰⁷ Also, the Constitution expands on the right to access information with Article 38, which insures:

The freedom of communication, and mail, telegraphic, electronic, and telephonic correspondence, and other correspondence shall be guaranteed

¹⁰⁶ “Final Draft Iraqi Constitution,” § 2, Ch. 2, Art. 36.

¹⁰⁷ “Final Draft Iraqi Constitution,” § 2, Ch. 2, Art. 37 (i-ii).

and may not be monitored, wiretapped or disclosed except for legal and security necessity and by a judicial decision.¹⁰⁸ These clauses provide a relatively complete protection of the right to organize, express oneself and access alternative information. However, there is one potential issue with the wording of Article 36, which could cause a substantial reduction of the article's weight. The first line reads "the state guarantees in a way that does not violate public order and morality."¹⁰⁹ The extent to which this line will effectively weaken the rights that follow it will be determined by the judiciary. However, it certainly raises concern as to the true protection of these invaluable rights.

The next four recommended functional rights involve the election process and include the right to vote, run for office, campaign, and the right to free and fair elections; all of which are guaranteed by the Constitution. Stipulated by Article 20, "the citizens, men and women, have the right to participate in public affairs and to enjoy political rights including the right to vote, elect and to nominate."¹¹⁰ There are restrictions on who is eligible for the positions of Council of Representatives, President, Prime Minister and the Cabinet of Ministers. These restrictions include a minimum age requirement, Iraqi citizenship, and no previous criminal record. However, these are the only stipulations and they only pertain to the highest governmental positions. Therefore, Article 20 should be read as allowing any Iraqi the right to run for public office.

The aforementioned recommendation of functional rights to include in the Constitution asserts that the right to promote and partake in civil society institutions is vital and allows for a more representative government. The Iraqi Constitution guarantees such a right in Article 43, which declares "The State shall seek to strengthen the role of

¹⁰⁸ "Final Draft Iraqi Constitution," § 2, Ch. 2, Art. 38.

¹⁰⁹ "Final Draft Iraqi Constitution," § 2, Ch. 2, Art. 36.

¹¹⁰ "Final Draft Iraqi Constitution," § 2, Ch. 1 (I) Art. 20.

civil society institutions, to support, develop and preserve its independence in a way that is consistent with peaceful means to achieve its legitimate goals.”¹¹¹ The last functional right that should be secured by the Constitution is the right to citizenship. The Constitution must first define what it means to be an Iraqi and then protect that citizenship from being unjustly removed. The Constitution defines an Iraqi as being “any person born to an Iraqi father or mother.”¹¹² Furthermore, it grants that an “Iraqi citizen by birth may not have his nationality withdrawn for any reason.”¹¹³ Together these two clauses clarify how Iraq determines Iraqi nationality, which it declares as a basis of citizenship¹¹⁴, and protects both the nationality and the citizenship of an Iraqi from being unfairly taken away.

ii. NEGATIVE AND POSITIVE RIGHTS

The above-mentioned functional rights are well founded in the Constitution and follow the recommendations accordingly, with the one already-discussed potential danger. However, in addition to such the Constitution should protect both negative and positive rights. In fact, it does include both the negative rights of life, liberty and property as well as the positive rights, which are commonly social and economic protections. In particular, liberty and integrity are protected in Article 14 and 15, among others, which say respectively: “Iraqis are equal before the law without discrimination based on gender, race, ethnicity, origin, religion, creed, belief, opinion, or economic and social status;” and “Every Individual has the right to enjoy life, security and liberty.”¹¹⁵ Due process is guaranteed by the Constitution by the rather lengthy Article 19, which

¹¹¹ “Final Draft Iraqi Constitution,” § 2, Ch. 2, Art. 43 (i).

¹¹² “Final Draft Iraqi Constitution,” § 2, Ch. 1 (I) Art. 18 (ii).

¹¹³ “Final Draft Iraqi Constitution,” § 2, Ch. 1 (I) Art. 18 (iii) (a).

¹¹⁴ “Final Draft Iraqi Constitution,” § 2, Ch. 1 (I) Art. 18 (i).

¹¹⁵ “Final Draft Iraqi Constitution,” § 2, Ch. 1 (I) Art. 14 and 15.

includes the right to a trial, to an attorney, the prevention of enacting retroactive laws, and a protection against unlawful detention, with a maximum of 48 hours before the arrested must be brought before a judge.¹¹⁶

The last negative right is property, which is one of the most fundamental aspects of democracy. According to John Locke, “the great and chief end therefore, of men uniting into commonwealth, and putting themselves under government, is the preservation of their property.”¹¹⁷ Accordingly, the Constitution guarantees this important right with Article 23, which declares:

(First) Personal property is protected. The proprietor shall have the right to benefit from, exploit and utilize personal property within the limits of the law; (Second) No property may be taken away except for the purposes of public benefit in return for just compensation. This will be organized by law; (Third) A. Every Iraqi has the right to own property throughout Iraq. No others may possess immovable assets, except as exempted by law; B. Owning property for the purposes of population change shall be prohibited.

The Constitution’s protection of personal property is rather comprehensive, yet exhibits a potential weakness. This is found at the end of the second sentence in Article 23(1) which restricts the use of personal property to “within the limits of the law.” However, this particular restriction is not too disconcerting because the first sentence establishes that personal property is protected, which is not constrained by the limits of the law. Needless to say, personal property is only valuable if the proprietor is able to utilize it in its entirety. Therefore, it can be argued that because personal property is protected any law that too narrowly restricts the uses of one’s property would be unconstitutional. Ultimately, this additional stipulation increases the power of both the legislature who defines these “limits” and the judiciary who interprets them.

¹¹⁶ “Final Draft Iraqi Constitution,” § 2, Ch. 1 (I) Art. 19 (i-xiii)

¹¹⁷ Murphy 276.

In addition to the more commonly found negative rights, the Constitution, keeping pace with other recently drafted constitutions, guarantees an impressive list of positive rights. The majority of such rights are found within the second part of the Chapter of Rights, which is entitled “Economic, social and cultural liberties.” Included in this section is the right to a decent living, to unionize, to state protection for women, children and the elderly, the right to health care, to a safe and clean environment and to an education. All of these progressive guarantees are a much-needed improvement from the nearly inexistent positive rights under Saddam’s regime.

iii. INHERITED RIGHTS

The last group of rights that should be included in the Constitution is the inherited ones, which directly result from the past atrocities. During Saddam’s nearly quarter-century long rule the blatant lack of civil rights and liberties was appalling. Saddam was directly responsible for murdering his own people and indirectly responsible for the starvation and consequential death of hundreds of thousands of Iraqis. Saddam forced Kurds out of Kirkuk and moved southern Shia Arabs into the governorate in order to prevent Kurdistan from absorbing the oil-rich region. He punished not only those he felt were disloyal or potential threats but at times punished their families as well. The list of human rights abuses goes on and on. Consequently, it seems fair that a majority of Iraqis are, at the very least, skeptical of government. As such, specific guarantees directly addressing Saddam’s many human rights violations will hopefully grant some legitimacy to the new government. The Constitution includes the basic rights of liberty, dignity and equality as well as the more comprehensive clauses that declare “punishment is personal”

and “owning property for the purposes of population change shall be prohibited.”¹¹⁸

These guarantees are absolutely necessary to gain back the trust of the Iraqi people, and give the new government a chance to lead a country that Saddam nearly destroyed.

C. DOCUMENT FRAMEWORK

The framework of the Iraqi Constitution begins with the preamble and is followed by six sections. The first section pertains to the fundamental principles, the second guarantees civil rights and liberties, the third outlines the federal government, the fourth grants the powers of the federal government while the fifth grants those of the regions, and the sixth section includes the final and transitional provisions. Over all there are one hundred and thirty nine articles, many of which contain multiple subsections. While the document is not as short as James Madison would have desired, it is not excessively long either. In fact, the Constitution is a well-organized, generally coherent document.

i. LAYOUT

The Constitution’s preamble tells the story of Iraq starting in ancient times as the beginning of civilization and ending with the modern atrocities that have left permanent scars. The overarching theme that the preamble inspires, above all else, is that despite the past tragedies Iraq is committed to “take lessons from yesterday for tomorrow.” Rising above the sectarian violence that threatens the state, the people of Iraq unite to create a “republican, federal, democratic, pluralistic system” that casts aside the “politics of aggression” in order to establish “justice and equality.”¹¹⁹ These powerful statements highlight the framers’ intentions and should guide the interpretation of the Constitution.

¹¹⁸ “Final Draft Iraqi Constitution,” § 2, Ch. 1 (I) Art. 23 (iii) (b).

¹¹⁹ “Final Draft Iraqi Constitution,” The Preamble.

However, unlike the TAL, this preamble does not specifically state that it is legally enforceable and as such is not.

ii. LENGTH

The length of the Constitution is not inappropriate by any means. If anything the document is too short, in the sense that certain controversial issues were left unresolved. Therefore, had all the contentious points facing the framers been addressed within the Constitution it would have been longer. As previously recommended the Constitution should be more particularistic than purely framework in nature. In fact, it meets this prescription, for while it does provide the powers, processes and limitations of the government it also includes articles that are more legislative in character. Such particularistic provisions may provide more stability to the Constitution for they garner support from the many divisions in Iraq.

iii. COHERENCE

The Constitution, with a few notable exceptions, is a relatively coherent document. Reviewing the many changes in phrasing that were made throughout the drafting process highlights how meticulously each word was chosen. Debates raged over such decisions as which of the two articles *the* and *a* to use. To many these two words may seem nearly interchangeable, however to a constitutional framer the subtle distinction between the two is all the difference. Within the above analysis of the Constitution I have highlighted certain problematic articles, and as such do not see the need to repeat them in this section. These aforementioned articles, however, are the exception, not the rule. In general, the Constitution very clearly conveys the fundamental idea of each article.

iv. AMENDMENT PROCESS

As recommended the Constitution details the formal amendment process. In order to amend the Constitution, either the President and the Council of Ministers together or one-fifth of the COR must propose an amendment, which then must be approved by a two-thirds majority of the COR and with the approval of the people in a general referendum.¹²⁰ The wording proves rather ambiguous as to what percent approval of the people is necessary? Must there also be a two-thirds percent, or is it an absolute majority? This is an issue that must be clarified. Furthermore, there are two caveats to the amendment process. The first is that none of the articles within the first or second section can be amended until after two successive electoral terms. The second is that no regional power can be diminished without the consent of the region. These caveats are important for the first provides stability, while the second creates a decentralized structure that gives the regions the ability to, in the future opt for a more centralized state if desired.

This formal process makes amending the Constitution a difficult task. As such, the judiciary could play a substantial role in informally changing the Constitution. As previously discussed, it is crucial in a consociational federation that the regions are autonomous. Therefore, any federal judicial decision that determines a question falling outside the exclusive federal competencies cannot be forced upon the regions. Rather, in conjunction with Article 111 and 117, the regional legislature will have the right to amend any such federal decisions, and furthermore, the regional judicial decisions will be supreme in the areas not reserved for the federal government. This structure prevents these informal amendments from ruining endangering regional autonomy.

¹²⁰ “Final Draft Iraqi Constitution,” § 6, Ch. 1, Art. 122 (i, iii).

IV. EXTERNAL INFLUENCES ON THE SUCCESS OF THE CONSTITUTION

Iraq is not an isolated state above the influence of the international community. Quite the opposite in fact; because of the American led invasion of 2003, Iraq currently houses around 160,000 international troops. Furthermore, Iraq is geographically located in the center of arguably the most volatile area in the world. Iraq's neighbors all have a vested interest in its future; however finding common ground among them seems more like a pipe dream, or unfounded political rhetoric from James A. Baker III, than a legitimate reality. As such, it remains clear that the success of the Constitution does not rest entirely on the document itself. Instead, its ability to prevail is as much wrapped up in the success of the current war as Bush's presidential legacy. Consequently, highlighting the influential external factors seems necessary in order to fully answer the question of whether the Constitution can be an effective document for Iraq.

A. AMERICAN WITHDRAWAL

Currently there is a passionate debate about the future of the War in Iraq that is on the forefront of the American political scene. The question at the center of it all is should we pull our troops out or keep them in? The supporters of withdrawal are pointing to the rising death toll, the ever-increasing financial debt, and the need for Iraq to become self-reliant, and no longer dependent on the U.S. for military support. The supporters of the latter position are arguing that the recent troop surge resulted in a substantial decrease in sectarian violence and furthermore that if we pull out Iraq will collapse and the lives already lost and money already spent will have been in vain. The difference between the strength of these two arguments is substantial because those in favor of pulling out have

hard evidence to substantiate their claim, while those against troop withdrawal merely have potential scenarios that while dire, are not yet realized. Predictably, the current popular American opinion is that we should end the War in Iraq and bring our troops home.

If the popular American opinion determines this foreign policy decision the question must be asked which side will be right? Will Iraq learn to stand on its own two feet, or will it fall in the wake of a sudden departure? And more importantly, with respect to this thesis, will the Constitution survive? It is impossible to know the future. However, taking into account the current sectarian violence and multiple insurgencies afflicting the country, coupled with the fact that most of the Iraqi army remains ill-equipped and unqualified, the probable outcome of a sudden troop withdrawal would be the collapse of Iraq. Without the support of the American troops, Iraq would be unable to quell the violence. Consequently, the people of Iraq, unable to trust their own government for protection would turn to local militias, or even terrorist groups who could offer a haven amidst the emerging anarchy. The government's impotency would create a power void, causing the Sunni and Shia Arabs to vie for the new stronghold. To do so, each of these sects may call upon their friendly neighboring states, with the Shia Arabs bringing in Iran and the Sunni Arabs turning to Saudi Arabia, Syria and/or Jordan for help. Furthermore, the Kurds could use the failing central government as an opportunity to officially declare independence from Iraq. This move would put Turkey in an interesting position, for the only thing Turkey wants less than an independent Kurdistan is an Iranian controlled Iraq. Ultimately, the country could fall into a wholly consuming civil war that would surely bring about the demise of the Constitution.

This worst-case scenario assessment of Iraq in the aftermath of a sudden troop withdrawal does not pretend to propose the only plausible effect of such action. However, neither is it a fantastic stretch of the imagination. What does seem to be true is that if America is as careless when it departs from Iraq as it was when it invaded Iraq, the Constitution and the country itself will be in serious risk of collapse.

B. NEIGHBORING STATES

Iraq's neighboring states could play a critical role in determining the future of the Constitution. Its six neighbors, Turkey, Iran, Kuwait, Saudi Arabia, Syria and Jordan, each maintain a strategic investment in the future of Iraq. To be certain, each of these states has unique objectives that will influence how they want Iraq to be governed and by whom. Currently, a number of Iraq's neighbors have already played a fundamental role in Iraq's nascent years as a democratic state. Primarily, Iran has been supporting the Shia Arabs of Iraq since the drafting of the Constitution; and Turkey has been in armed conflict with the Kurdish rebels known as the Kurdistan Workers' Party (PKK). However, all of Iraq's neighbors have the potential, and certainly the incentive to be influential in the future.

The Sunni dominated states of Kuwait, Saudi Arabia, Jordan, and Syria are perhaps most concerned with the potential Iranian influence in Iraq. While Kuwait has been mostly supportive of the American invasion of Iraq, they are currently concerned with the Shia Arab run government that seems to be edging closer to its Persian neighbor. Saudi Arabia has been even more vocal about their distrust of the current Iraqi Prime Minister Nuri al-Maliki and his supposed ties to Iran. Jordan's economy is largely

dependent on trade with Iraq and as such it holds an invested stake in the country's reconstruction. Furthermore, Jordan, as well as Syria, house around two million Iraqi refugees that fled during the current war.¹²¹

Turkey's major stake in Iraq is through the Kurds. It is adamantly opposed to Kurdistan gaining independence, or even autonomy. However, despite its secular government, Turkey is also dominated by Sunnis and has historically wanted to build up its own military power to counter that of Iran's. As such, it is difficult to determine the direction the Turkish influence in Iraq will follow. To further complicate the situation, the highest court has unanimously decided to hear a case which requests to shut down the newly elected Justice and Development Party (AKP) government. The uncertainty of Turkey's own political future is all the more worrisome for Iraq.

Iran is the sole Persian, Shia dominated state that borders Iraq. As has already been seen, Iran is in favor of the newly established, Shia Arab-dominated government in Iraq. Its influence will be largely dependent on the Shia Arab's need for support. If they feel secure in their position of power, the connection with Persia will probably begin to fade. On the other hand, if they believe their power is or will be threatened, this connection will potentially become that much stronger.

From the above discussion about the potential roles of each of Iraq's neighbors, it seems clear that, if nothing else, Iraq is and will be largely influenced by these six states. As such, the Constitution's success is somewhat bound to their actions. While it is impossible to predict what each state will do, and furthermore how such actions will either threaten or promote the Constitution, it is important to highlight their overarching

¹²¹ "Syria," The Central Intelligence Agency: World Factbook, updated 20 Mar 2008 <<https://www.cia.gov/library/publications/the-world-factbook/geos/sy.html>>.

influence. Simply put, determining the success of the Constitution merely through an analysis of the document itself ignores the external influences.

V. CONCLUSION

The Iraqi Constitution of 2005 provides a democratic government that can realistically and effectively function in this deeply divided country. It creates a multinational federation with a consociational, decentralized structure. Furthermore, the Constitution proposes a bicameral legislature, that has yet to be instituted, an executive branch that is divided between a strong Prime Minister and a weak President, and a judiciary with the power of judicial review. The included list of protected civil rights and civil liberties is extensive and reflects the country's tormented past. The document proves rather coherent despite the rushed timeframe the drafters were forced to comply with. Ultimately, this Constitution could be effective for Iraq going forward.

Unfortunately, just because the Constitution could be successful doesn't mean it will be. The country is currently riddled with violence and nearly torn apart by its divided population. Furthermore, the major external influences will play a large role in determining the eventual course the country will take. Consequently, they will have a hand in either the ultimate success or failure of the Constitution. One can only hope that the Constitution is not unfairly robbed of its opportunity to bring about a lasting democracy in Iraq. However, the odds of it not being challenged by its internal and external threats are not particularly promising. The one reassuring fact that remains is despite the skepticism that persists around the globe, the Constitution has lasted thus far. In fact, the Iraqi Constitution emerged from the shrapnel-littered country as a symbol for most but not all Iraqis of the new democratic state that could prevail. And while like every other Constitution it falls far short of perfection, it does offer a realistic

compromise and if given the chance, the Constitution may just be Iraq's guarantor of unity as promised.

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