

Making Federalism Work in Iraq

July 2006

David Cameron
Professor and Chair of the Department of Political Science
University of Toronto

cameron@sympatico.ca

Introduction

In classical liberal theory, individuals escape from the state of nature and enter civil society by agreeing to a social contract which establishes legitimate political power from which all will benefit and by which all will be bound. Similarly, in classical federal theory, autonomous political communities freely join together to form a new, complex polity from which all will benefit and by which all will be bound. The constitution is federalism's social contract.

Contemporary federal experience is rather different. Instead of the image of free peoples coming together to build something better, the picture today is often of warring communities, locked in a political relationship from which they cannot escape. Federalism, in such melancholy situations as these, often presents itself as each community's reluctant second choice – a system designed to make an unsatisfactory situation habitable.

This is a chapter from a book – Iraq: Preventing Another Generation of Conflict – edited by David M. Malone, Ben Rowsell and Markus Bouillon, to be published by Lynne Rienner Publishers, early in 2007.

The challenges confronting the founders of contemporary federations are therefore rather different from what classical theory assumes. Instead of showing the federating communities the mutual benefits that justify coming together in a new federal union, federal lawgivers are often faced with the bleaker task of taking something apart, of replacing an existing political union that has ceased to be just or viable with a more complex political association constructed on the foundation of pluralism. In the contemporary world, the federal moment seems as often as not to arrive towards the end of acute civil conflict, when a grudging realization emerges among the combatants that the old regime cannot stand, but that the utter collapse of the state is not tolerable either. Federalism, then, appeals to a country or an international order that is struggling with ethno-cultural conflict, separatist movements and terrorism. It may be the Sudans, the Sri Lankas and the Iraqs that prove to be the cradles of federalism in the 21st century.

Certainly, Iraq fits neatly into this picture. A unitary state, ruled for decades by a tyrant, Iraq's invasion and the destruction of its dictatorship have exposed deep internal diversities not apparent to the casual outside observer of the former regime. For reasons internal, regional and international, neither the continuation of a centralized, unitary state, nor its replacement by several new sovereign states, is thought acceptable; between the two, federalism beckons, not really the preferred choice of any, but possibly the second choice of all. Given the pluralistic composition of Iraqi society and the goal of introducing a legitimate political order, it is evident that the successful reconstitution of Iraq will necessarily involve a kind of double consent: the consent of individual Iraqi citizens; and the consent of the diverse ethno-religious communities that compose Iraqi society.

Iraqis, operating under the most difficult imaginable circumstances, have traveled part way along this path. They have negotiated a liberal and federal constitution, which, despite its

many flaws, offers the only available footing on which to develop common political institutions and practices. The constitution has received popular consent through a referendum process that, while controversial, nevertheless ultimately attracted broad public participation. The continued strength of the insurgency and the continued presence of the coalition forces, however, reveal the distance yet to be traveled before the emerging constitutional order receives the broadly based acceptance that lies at the foundation of most legitimate political systems.

This chapter addresses the following question: How can Iraqis make use of the federal system created by the 2005 constitution¹ to mediate competing interests in a peaceful manner? Given that the task of establishing an Iraqi federation is in its infancy, our reflections on federalism will not simply relate to how it could be used in the future, but what it may actually become. The 2005 constitution does not, in reality, “create federalism;” it sets the federal process in motion, a process which, it is assumed, will lead to a functioning federal system. Iraq is not in fact a federal country yet: Kurdistan existed before the 2005 federal constitution and it exists today; no other federal regions exist; none of the major federal institutions is up and running. Thus, Iraq’s constitution has a range of alternative, potential federal futures embedded within it; our job in this chapter is to explore what some of these might look like, and how they might contribute to the construction of a peaceful political order.

Iraq has created its foundational document, but how does a political community foster the coming into being of a genuine, living constitution and so, in a sense, create itself? The 144 articles of the 2005 Constitution are the product of tough negotiations and hard-won compromises. But their real meaning is opaque and will only be revealed over time.

- Will the constitution trigger constitutionalism? Will it foster over time the emergence of constitutional norms and practices that will be increasingly accepted as just,

legitimate and authoritative? How might that happen? How might such a sane process of constitutional development be rationally supported and explicitly encouraged?

- Will the country's key federal institutions, yet to be built, contribute to the practical development of a functioning federal system?
- Will the radical decentralization envisaged by most critics of the 2005 constitution in fact be realized in the coming years?
- Will Iraqi federalism moderate or deepen the divisions currently plaguing Iraqi society?

As we speculate about the future role of federalism in this chapter, comparative experience suggests a distinction worth drawing. Students of constitutional government have often remarked on the surprises that the future holds in store for any given set of constitutional arrangements; what the founders of a federation thought they were doing often turns out to have little apparent bearing on the actual shape of the federation generations hence, and it frequently seems clear, looking back, that no one could have successfully forecast the actual evolution of that society at its beginning. The United States began as a decentralized federal system, and is now heavily centralized; Canada, on the other hand, started its federal life with a highly centralized constitution,² and it is now one of the most decentralized federations in the world – or the second most decentralized, after Switzerland. Of one thing we can be certain, then: things will happen in the future in federal Iraq that no one will have predicted today.

Yet an acknowledgement of this reality should not blind us to another, which is analytically distinct. A federal system can take root in a society and can perform its constitutional functions even while the evolution of that society and its federal order follow a

course that was unanticipated and even unwanted at the beginning. Indeed, it may be that it is *because* the federal system is doing its work effectively that the unanticipated and the initially unwanted are brought into being. International security pressures, a changing market place, shifting community aspirations, political leadership, evolving social structures and new technologies will create an environment different from that which prevailed at the founding of a political regime, and to which that regime, if it is to survive, must respond. Thus, the test for Iraq is not whether it follows a specific course, like a railroad track, into the future, but whether – whatever direction Iraq’s journey takes – the federal constitution serves to assist, support and legitimize the public processes by which Iraqis make their collective choices over time.

The 2005 Constitution: An Evaluation

Despite the continuing power of the insurgency and the sectarian violence, Iraq has experienced a deepening constitutional process. The elections of January 2005, the negotiation of the constitution in the summer of that year, the referendum of October 15, which ratified the constitution, and the second general elections in mid-December – all attest to a functioning political and constitutional process, albeit one that is new and raw, and displays many imperfections. The gradual drawing in of Sunni participation is a notable indicator of the growing power of the constitutional and political arena. However, the casual disregard for deadlines during the constitutional talks, the last-minute injection of Article 142 into the constitutional draft (designed to mollify the Sunni community just prior to the referendum), the five months it took to form a government after the December 15, 2005 election, not to mention such things as private militias, clothed in the incipient authority of the state, are all signs that Iraqi constitutionalism is in its earliest stages of development.

The utility of the federal constitution in mediating future conflict will depend on two things: what is in the constitution; and how it is used. While few would contest that the negotiation of the 2005 constitution is an impressive accomplishment, achieved under forbiddingly difficult conditions, equally no one would argue that the constitution is without flaws. Identifying its flaws as well as its formal character is the prelude to reflecting on the role it might play in the country in the years ahead. The following are some of the important federal characteristics of the 2005 constitution. It is: incomplete; unclear in places; decentralist in its formal structure; asymmetrical and, by design, evolutionary.

Incomplete: Much constitutional work remains to be done. The 2005 constitution is a gigantic work site; it sets out a magnificent work plan for future Iraqi legislatures and governments. Clearly, a constitution or basic law cannot be expected to do everything, so it is perfectly appropriate that it should contemplate some future legislative action to flesh out its content and give effect to its general provisions. But there are some things that need to be dealt with as part of the original constitutional settlement, for example: the creation of the Federal Council (Articles 65 and 137); the composition and work of the Federal Supreme Court (Article 92 (2), as well as the Higher Juridical Council (Article 90); and the procedures for the formation of regions (Article 118). All of this remains work yet to be done; all of it arguably should have been done as part of the original drafting; and all of it will be of material significance in defining the future concrete reality of federalism in Iraq.

Unclear: In many cases, it is simply not clear what is intended by the constitutional text; alternatively, the relationship between one provision and another is ambiguous. For example, the difference between a governorate and a region is not specified. It is apparent that the intention of the drafters is that regions will have higher status, greater powers, and a more senior position in

the federation than will governorates, otherwise why make such a fuss about the difference? The constitutional recognition of Kurdistan as a region, with all its existing authorities, makes it clear that a region is to be very different from a governorate. Yet, in many sections of the constitution, the governorates have a status and authority similar to, or in some cases, the same as regions.³ On the other hand, Article 122, which explicitly deals with the powers of the governorates, suggests an essentially administrative function under the general authority of the federal government.⁴ As for oil and gas, apart from the ringing declaration in Article 111 that they are “owned by all the people of Iraq in all the regions and governorates,” it is by no means clear what the drafters intended with respect to the management of these critical resources.⁵

Then there is Baghdad: Why the distinction between municipal borders-cum-capital on the one hand, and administrative borders-cum-governorate on the other? Article 124 (3) states that the capital cannot merge with a region. But can the governorate of Baghdad, with its administrative borders, form a region on its own or merge with other governorates to form a yet larger region? If so, what does that mean? With about a fifth of the population of the country, it might seem anomalous democratically to insist that Baghdad remain as a governorate in the charge of the national government; on the other hand, as a regional government with the powers available to it under the constitution, it could pose a significant threat to national authority. Baghdad, as the federation’s capital, will be where political, official, business and civil-society leaders of the country’s diverse communities will meet and work together. It is not just another city, but the country’s largest metropolitan centre with a critical national mandate. It is possible that the curious formulation of Article 124 is meant to express the combined national and local realities of Baghdad, but a fuller and clearer articulation of these dual roles is needed, mandating

the city to fashion policies and programs reflecting its national status, for example, in the provision of minority-language education and other public services.

Decentralist: The 2005 constitution exhibits a pronounced decentralist bias. The constitution sets out a relatively short list of exclusive federal powers,⁶ and a list of shared powers. All powers not stipulated as exclusively federal or shared are to be powers of the regions or the governorates. Paramountcy, where powers are shared, goes to the regions and governorates. Giving paramountcy to the sub-national units in a federation is highly unusual. With well over 90% of public revenues in Iraq deriving from the oil and gas industry, permitting regional legislation to trump federal will place great power in the hands of the federation's sub-national units, and raises questions about the redistributive capacity of the national government.

There is also the fact of Kurdistan. The predominantly Kurdish part of northern Iraq is recognized by the constitution as a region, and under Article 141 the legislation, policies, court decisions and contracts passed or approved by Kurdish authorities since 1992 will be considered valid until amended or annulled by the region, "provided that they do not contradict with the constitution." What the Kurds have they will hold. The substantial autonomy that the Kurdish region has achieved will likely become the gold standard for other ambitious Iraqi regional governments.

In addition, setting aside Baghdad, the absence of any constraint on the consolidation of governorates into large regions holds out the possibility that three large, ethno-culturally defined regions, in addition to Baghdad, may emerge, reflecting the basic territorial fault lines dividing the Kurdish, Shi'a and Sunni communities in the country. A Shi'a region, containing over half of the population of Iraq and controlling the richest existing oil fields, would be a force to be reckoned with, for any national government. What is more, comparative experience suggests that

a three-unit federation (plus Baghdad) is likely to be inherently unstable: it would accentuate and reify the division of the Iraqi population into Shi'a, Sunni and Kurd, at the expense of the other forms of diversity and pluralism, and at the expense of national identity; it would exacerbate sectarian tensions, encouraging the flight of minorities from the three main regions and reducing the willingness of regional majorities to protect the remaining minorities within their midst; it would restrict the potential for shifting and cross-cutting political alliances among regional governments; it would make inter-regional resource redistribution more difficult.⁷ Nigeria, for example, began as a three-region federal republic in 1963, but, because of the instability that created, quickly found it necessary to multiply the number of sub-national jurisdictions; today the Nigerian federation is composed of 36 states and a federal capital territory.

Asymmetrical and Evolutionary: The constitutional model, as it currently exists, is highly asymmetrical. Kurdistan is currently the only federal region. The rest of Iraq is composed of the administrative governorates which are an inheritance of Iraqi history. However, the constitution contemplates the formation of an unspecified number of regions in the future. It will be possible for a single governorate, or a group of governorates, to form a region by holding a referendum as specified in Article 119.⁸ Interestingly, though, what are called “the executive procedures to form regions” are to be legislated by the Council of Representatives, within six months from the date of its first session. If there are to be constraints or criteria guiding the creation of regions, such as those that shape the establishment of autonomous regions in Spain, they will presumably fall within this federal legislation. This regionalization component of the constitution creates a powerful dynamic that in all likelihood will shape federal Iraq in its early years, and for many years to come. It is likely to be more deeply structural in its impact than most of the other

institutions and legislation that will follow the ratification of the constitution as part of the implementation process.

Turning to the Future: The Shaping of the Federal Idea

If Iraq is to be united and free, it will be federal. Its territorially based communities will permit nothing less. Thus, the federal idea is not so much useful in Iraq, as inevitable. Beneath the needed political balancing of shared and self rule lies Iraqi society itself: what balance will be struck by Iraqis between national patriotism and loyalty to community, tribe and sect?

Much recent political discussion is premised on Iraq being composed of three blocs – Shi'a, Kurd, and Sunni – but of course this is not really true. There are many minorities, some of them mentioned in the constitution,⁹ which do not see themselves as a part of any of these three. As well, there are ideological, tribal, professional, demographic and urban/rural differentiations that shape Iraqi citizenship. There are secularists and Islamists. And there are, inevitably, divisions aplenty *within* the three blocs; the Kurds, for example, spent years fighting one another, as well as Saddam, and the five months the country spent forming a government after the December 2005 elections offer an object lesson to anyone seeking to understand the deep diversities which characterize Iraqi society. Phebe Marr, in Chapter 3, provides a comprehensive survey of the competing views of various political, religious and ethnic groups in Iraq, noting that there is little convergence among the country's political leaders. Roel Meijer traces the influence and relationship between three key currents within the Sunni community in Iraq in Chapter 6, while Juan Cole, in Chapter 7, locates the role of the Badr Corps militia within the landscape and interests of the broader Shi'a community.

Thus it is a mistake to rely reflexively and exclusively on a simple three-community understanding of Iraq. In the further constitutional development of Iraq, it will be useful to adhere to the proposition that there is safety in *diversities*. There are risks associated with the institutionalization of a single pattern of diversity, namely, the three-bloc framework that is so widely utilized. Safety and stability are more likely to be found, not by locking in on and privileging these three communal identities, but by structuring a federation that is, as far as possible, permissive – by building a federal system that permits many forms of identity, including the national, to achieve expression. A unitary political structure is not possible in Iraq, but a rigidly tri-partite federal structure is not desirable.

Fixing the 2005 Constitution

The principal procedural weakness of the 2005 Constitution is that it was formed largely without the participation and consent of the Sunni community. The main substantive deficiency of the 2005 constitution has to do with its provisions on federalism. The Article 142 amending process gives Iraqi lawgivers an opportunity to address both of these issues.¹⁰ Thus, if the constitution is to make a contribution to the moderation of future conflict in Iraq, the first order of business is to broaden its legitimacy and to fix its provisions on federalism. On the substantive side, there are three main areas that require attention. The first is rectifying the imbalance in power between the centre and the regions. This requires clarifying and strengthening the jurisdiction of the federal government, making it clear that it has a central role in national leadership and redistribution, and giving it the explicit authority to raise the revenues, especially from the gas and oil industry, necessary to finance its activities. The second is establishing key federal institutions, in particular the upper house and the Supreme Court. And the third is

clarifying the distinction between regions and governorates, and outlining the procedures by which a governorate or governorates form a region. If the opportunity is creatively seized, the amending process could both extend the national consensus on the constitution to include the disaffected Sunni community and also improve the workability of its federal provisions. These two results would better equip the country to offer effective government and to begin to implant a constitutional culture. The construction of these federal institutions and processes will itself be a significant part of the practical implementation of democratic constitutionalism – or the reverse, if things go badly. Federal institutions and processes will be built and used, at one and the same time, and this process will continue well beyond the 142 amendment period.

Three Scenarios

Looking ahead, how might the future unfold, and in what way might the federal system exacerbate or, alternatively, relieve the tensions and conflicts Iraq is experiencing? In order to think more critically about what may transpire, we sketch out three alternative scenarios below, not in the belief that one or the other is likely to chart the actual future constitutional development of Iraq, but rather to suggest the range of quite different possibilities the country confronts. Excluded from consideration in what follows are the more doleful possibilities that imply the failure of the constitutional experiment in Iraq: civil war and the break-up of the country; or civil war leading to the emergence of a new dictatorship.

Scenario 1: Partial Federalism

This possible future reflects the present reality: a highly autonomous Kurdish region, whose position and prerogatives are recognized in the constitution, existing in conjunction with

the rest of the country, for which the central state is responsible. The existing governorates outside of Kurdish Iraq continue to exist, but they remain administrative units, not autonomous sub-national jurisdictions in a functioning federation. Baghdad continues to be the political focal point for Arab Iraqis, while Kurds increasingly withdraw into their northern region and occupy themselves with the building of a quasi-sovereign political community. This scenario rests on the fact that what currently exists is in fact the default position: Kurds at present enjoy a highly autonomous regional government; Iraqis elsewhere find it very difficult to agree on reforms and proposals for change. Thus, while the emergence of federal structures in the rest of the country is pre-figured in the constitution, on this scenario it simply does not happen, and the country struggles on in this netherworld, caught between the historical experience of a centralized, unitary state, and the promise of a decentralized federation.

A situation such as this could prevail for some time to come. Traditions of constitutional government are virtually non-existent in Iraq, and we have seen that, in the absence of a shared culture of constitutionalism that can discipline political behavior, Iraqis have done what they have had to do to make the system work. This ‘government by deals’ has filled in the blanks and gaps in the country’s constitutional structure, and, in some cases, has simply supplanted constitutional rules and provisions.

Were this scenario to occur, the nature and character of conflict would be largely determined by the preferences and strategies within the Shi’a community. The Kurds would stand aside from national politics, although the issue of outright secession could arise at a later point. The Sunnis would be comfortable with the concentration of politics in the national capital, at least until they began to experience the reality of minority status in a majoritarian political system. But how would the Shi’a react? Some might discover the pleasures of being a majority

in a quasi-unitary system, and aspire to effectively run the country from Baghdad. To the extent that this occurred, conflict would be mediated in Baghdad through the central political institutions. Other Shi'a, however, might react differently; if the national management of the oil and gas resources concentrated in the south was perceived by the people of the south to be unjust or exploitative, a regional protest movement could arise, insisting on regional decentralization as provided for in the constitution. This would create severe stress within the Shi'a community itself.

Scenario 2: A Radically Decentralized Federation

The second scenario builds on the conventional understanding of the constitution as establishing or prefiguring a highly decentralized federal system with: a limited list of exclusive federal powers; a weak or indeterminate revenue-raising capacity; a regional residual power; regional paramountcy over shared powers, including apparent regional dominance over the management and development of oil and gas; the absence (apart from Baghdad) of any limit on the consolidation of governorates into regions; a federal electoral and party system that seems destined to yield relatively weak coalition governments in Baghdad; the existence and example of a powerful and autonomous Iraqi Kurdistan; and a degree of international representation for the regions and governorates.

In this scenario, Iraqis fulfill the apparent intent of the constitutional drafters. Self-rule trumps shared rule, and the country runs a real risk of fragmentation. What might happen on this scenario? Looking out over the next ten years, there are really two possibilities.

The first has the predominantly Shi'a governorates creating one super-region whose government asserts control over the rich oil and gas fields in the southern part of the country.

Long treated as second-class citizens within their own country, the Shi'a concentrate their energies over the next several years on consolidating their hold over their territory and its resources. The Kurds continue to do the same in the north. The Sunni, without significant resource endowments, are forced in self-defense to create their own region, despite their understandable preference for a strong national government. The sectarian regional consolidation leads to an acceleration of population shifts, as Shi'a and Sunni move to those parts of the country in which members of their community are in a majority. The smaller minority groups feel increasingly marginalized and vulnerable. The federal government, and federal institutions in general, remain weak, and fail to develop as a focus of citizen loyalty, and the country's ablest and most ambitious politicians gravitate to the regions, rather than to Baghdad. In a decade, the country's capacity to survive is in serious question.

This federalism of sectarian consolidation is probably the worst and most dangerous path Iraq could follow. It pits community directly against community, with little in-built leavening or moderation; it encourages the formation of mutually exclusive identities, buttressed by population shifts; it fosters a kind of zero-sum game, with limited potential for shifting alliances and the expression of diverse interests; it is likely to attract the interest and possibly the involvement of neighboring countries, which see their interests engaged in the playing out of Iraq's sectarian conflict. This is the institutional expression of the single framework of diversity described above.

There is, however, another version of this scenario of radical decentralization that is more benign. It is built on the reality of multiple diversities – ethno-religious, regional, economic, and simply political. The process of region formation in this version reflects these diversities and yields a federation of multiple units, several in each of the Sunni and Shi'a parts of the country.

The Kurdish region remains intact, as it does in all imaginable futures, but it becomes part of a highly decentralized six-, or eight-, or ten-unit federation. The high degree of regional autonomy may foster thoughts of separation in some parts of the country, but these will be counterbalanced by the loose and shifting sets of relationships that offer many different pathways to membership and participation. The main risk for Iraq in this version of Scenario 2 is that the national government may simply be too weak to hold the federation together. If Baghdad's leadership and redistributive capacity are feeble and uncertain, or selectively exercised, the stronger units within the federation may over time lay claim to greater and greater degrees of autonomy.

Scenario 3: The Emergence of a Balanced Federation

The third scenario sketches out a possible future in which the central authority manages to assert and retain control over the national life of Iraq and acts as a forceful counterbalance to the regional tendencies embedded in the society and reflected in the formal structure of the constitution. It could be grounded in possible Article 142 amendments that rebalance federal and regional power, but it does not depend on that. Instead, it relies on a number of other factors, perhaps the most important being the interests and ambitions of politicians and officials committed to careers on the national stage.

The holding of national elections and the drafting of the constitution in 2005 have already produced a generation of political leaders whose experience is national, not regional or local. Except in Kurdistan, they stand alone; there are, as of the moment, no rival regional governments or regional politicians, endowed with popular mandates, leaguings with one another to wrest power from Baghdad. If politicians in the national capital, despite their many differences,

develop a common interest in protecting and developing their power in the federation, what resources do they have at their disposal to pursue this ambition?

One could argue that the authority given to them in Article 109 to “preserve the unity, integrity, independence, and sovereignty of Iraq and its federal democratic system” is sweeping and offers them a solid foundation on which to contest the authority of the regions. Several of the exclusive powers listed in Article 110 – national security, including the armed forces; fiscal policy; the preparation of the “national budget of the State;” drawing up the “general and investment budget bill;” what the Americans call interstate commerce – could, if interpreted expansively, support a national government with considerable clout in the federation.

Then there are some of the things on the Council of Representatives ‘to do’ list: establishing the procedures for the formation of regions; creating the Federation Council; and setting up the Supreme Court.

New regions cannot be formed until the Council of Representatives, under Article 118, passes a law setting out “the executive procedures” to be followed. While this is to be done within six months of the date of the first Council of Representatives session, if one looks at the track record of the legislature so far, and the many other things it has to do, it seems quite likely that that will not happen on schedule. Each month or year of delay permits the federal political leadership to develop a stronger and clearer sense of itself and its own interests and a concomitant caution about the creation of unduly powerful regional governments. Since the Kurds already have their region up and running, and recognized in the constitution, they can afford to be philosophical about the nature and pace of the regionalization process elsewhere.

These procedures could be drafted to facilitate or retard the emergence of the regional level of government in the federation. They could establish conditions relating to size and to

governmental and financial capacity that would delay the move of governorates to regional status. They could equally, if the national government so chose, make the position of governorates more attractive vis-à-vis regions than they might otherwise be. In the absence of sitting regions, the federal government could, in conjunction with the existing governorates, assert vigorous control over the management and development of the oil and gas resources of Iraq.

The Council of Representatives has the entire responsibility for setting up the second chamber – membership, conditions, powers, and “all that is connected with it” (Article 65). What might the legislature choose to do? Let us suppose, under this scenario, that it designed a second house composed of directly elected members from the regions and governorates. If the experience, for example, of the American Senate is anything to go by, these politicians might become competitors of the regional governments, with a mandate to speak for the interests of the region they represent in the national capital. This arrangement would be quite different in its effects than if the representatives were people chosen by regional executive bodies and accountable to them.

Finally, there is the Federal Supreme Court. Its establishment also falls within the purview of the federal Council of Representatives. The Council will decide the composition, nomination and work of the country’s top court, which will oversee the constitutionality of laws, interpret the provisions of the constitution, and settle disputes among governments. The Council of Representatives could decide to reserve the right of appointment to itself in the hope that a court could be created more sympathetic to the requirements of the center. The nature of the appointments, which will be heavily dependent on the nomination procedures, can be expected to

have a material effect on the interpretation of the Iraqi constitution and, in consequence, on the shape of the Iraqi federation itself.

Combined with all the things the federal government can do, or delay doing, there is the emerging regional reality, particularly in the areas of the country in which the Shi'a are a majority. Initial critiques of the 2005 constitution anticipated the possible emergence of a Shi'a super-region, which would assemble all of the predominantly Shi'a governorates into one large, powerful sub-national jurisdiction. Yet opinion within the Shi'a community is diverse and dynamic. Shi'a voices, after all, seemed not to be so sure about the benefits of a decentralized federation at the beginning of Iraq's constitutional talks, thinking, understandably, that as the majority community they would do well for themselves with a controlling position in the national capital of a fairly centralized system. Then, the prospects of a super-region appeared to be attractive to some. At the same time, however, there was discussion in the three southernmost governorates, richly endowed with oil and gas resources, about the merits of forming a single regional government structure.

Thus, there is debate and division within the community about strategy and goals. This suggests that the creation of a single super-region may not be as easy or as unproblematic a process as some imagine. There could, then, be delays and surprises relating to region formation coming from the regional as well as the national side.

At its outer limit, this scenario describes a process in which the federal government delays the creation of regions, while it gathers political and financial strength to itself. It uses its head start over the regions (except for Kurdistan) to assert control over the oil and gas resources in southern Iraq. Supported by the ambitions of national politicians, it aggressively exploits its areas of exclusive jurisdiction, and entrenches its revenue-raising capacity, aided by a

sympathetic court that it has created. In addition, it creates a second chamber designed to act as an alternative and a competitor to regional governments, so that there are significant voices, other than those of the heads of sub-national governments, articulating the regional aspirations of the country at the centre.

In ten years' time, under this scenario, Iraq emerges as a balanced federation. The center is reasonably well equipped with the power and resources to manage Iraq's multiple diversities and to hold the country together. Conflict is dispersed and institutionalized within a complex pattern of intergovernmental relations

Conclusion

We do not know what the future of Iraq holds, or what the character of federalism in that country will be, but the aforementioned scenarios are helpful in sketching out a fairly wide band of potential future constitutional development within which – barring catastrophe – one might expect the federation of Iraq to evolve. One could imagine any of the scenarios unfolding within the framework of the 2005 constitution of Iraq. They help us to understand that Iraqi federalism could develop in quite different ways, depending on circumstances and political will, and on the nature and needs of Iraq's 'federal society.' Pretty clearly, the scenario most likely to lead to deep and unmanageable conflict is the three-unit system with radical decentralization. The scenario most likely to accommodate Iraqi pluralism, maintain national unity, and direct political conflict into constitutional channels, is the third, namely, a federal system similar to other successful decentralized polities in which self rule and shared rule are balanced.

Each of the scenarios assumes that Iraqi Kurdistan will continue as an autonomous region within Iraq. Whether the Kurds are inclined to draw back into their region and minimize contact

with their fellow citizens will likely depend on the extent to which the center performs, or fails to perform, functions that matter for Kurds in the northern part of the country. An energetic federal government will foster active Kurdish participation at the center; a weak and ineffectual federal government will likely accentuate the desire for self-rule. Almost any scenario will have the Sunni community supporting a strong federal government. As things stand, their needs cannot be satisfactorily addressed in the absence of vigorous national leadership and a robust federal capacity for re-distribution. As we have seen, it is the Shi'a population, concentrated in the southern half of the country that will have the most complex strategic decisions to make.

Our review of the 2005 constitution in this chapter suggests that in no sense have Iraqis constructed a constitutional straitjacket for themselves. The federal process which the constitution initiates is open and, to a substantial degree, indeterminate; as such, it offers a complex array of political resources and constraints to all of the major players in the country. Much is unresolved; much remains to be done. It is for Iraqis themselves, in succeeding years, to build the future most suited to their interests and aspirations. If the institutions and mechanisms of federalism help them to do that, if they successfully contain Iraq's political development within constitutional channels, they will be doing their job, whatever specific course the country follows. Federalism is, after all, properly understood as an instrument of constitutional government, not as an end of political association.

Bibliography

-Ghai, Yash, and Jill Cottrell, *A Review of the Constitution of Iraq*,

www.law.wisc.edu/ils/glsi/arotcoi.pdf.

Endnotes

¹ I am using the UN/US/UK/NDI consolidated translation of the Constitution (unofficial), 25 January 2006.

² Years ago, K.C. Wheare rated Canada's Constitution, the *British North America Act* of 1867, as at best 'quasi-federal'.

³ Oil and gas are to be managed by the federal government and both producing regions and governorates (Article 112). The same rule applies to the management of antiquities and other national treasures (Article 113). Regions and governorates are equally the subject of national fiscal redistribution (Article 121 (3)). Offices in embassies and diplomatic missions will be established to serve both regions and governorates (Article 121 (4)) All powers not stipulated as exclusively federal belong to the authorities of the regions and governorates, and priority with respect to those powers shared between the two orders of government shall be given to both the regions and governorates (Article 115), and yet, when the shared competencies are described in Article 114, it is said that the sharing is between "the federal authorities and regional authorities." That this ambiguous phrase may be meant to include governorates is suggested by the first and sixth subsections of Article 114, which state that customs and education policy are fields shared between both regions and governorates that are not organized in a region.

⁴ Subsection 2 states: “Governorates that are not incorporated in a region shall be granted broad administrative and financial authorities to enable them to manage their affairs in accordance with the principle of decentralized administration, and this shall be regulated by law.”

⁵ The positioning of the oil and gas clause is of interest. It, and Article 113 relating to antiquities, come immediately after the provision outlining exclusive federal authorities and immediately before the provision detailing competencies that are to be shared between the federal and regional authorities. The structure of the oil and gas provisions might suggest that they should be read as implying exclusive federal authority: the resource is owned by all Iraqis, and the federal government shall undertake its management, along with the producing governorates and regions. On the other hand, the section could be read as describing a shared power: the federal government cannot act alone, as it can with respect to its exclusive authorities, and – as for the development of new fields – the federal government, with the producing regional and governorate governments, *shall together* formulate the necessary strategic policies. If the translation is precise, this formulation is setting out a co-management obligation to which all relevant governments must accede. If the latter interpretation is correct, then presumably the field of oil and gas falls under the regional paramountcy provision of the constitution; regional (and governorate?) legislation will trump federal law in the case of a conflict between the two.

⁶ While most exclusive federal powers assign responsibility for ‘executing’ or ‘regulating,’ some do not, or at least do not do so explicitly. See, for example, parts of Article 110, subsection 3, and subsections 7 and 8. This could be particularly significant with respect to the regulation of the country’s water resources, where there are potential conflicts between Article 110 (8), which speaks of water as an exclusive federal power, and Article 114 (7), which speaks of water as a shared power.

⁷ See the discussion of this issue in Yash Ghai and Jill Cottrell, *A Review of the Constitution of Iraq*, pp. 27-8, www.law.wisc.edu/ils/glsi/arotcoi.pdf.

⁸ Although it is not entirely clear, it would seem to require a single referendum in the interested governorates, not separate referendums in each; “one or more governorates” (plural) would hold “a referendum” (singular), Article 119.

⁹ See, for example, the references in the Preamble and in Articles 2, 3 and 4.

¹⁰ Article 142 requires the new legislature to establish a committee to review the constitution and, within four months of its creation, to recommend amendments. These amendments, as accepted by the Council of Representatives, will be put for approval to the people of Iraq in a referendum, using the same decision rules as applied in the previous constitutional ratification process. A close reading of the 142 provision suggests that the overall process of constitutional amendment might take a good deal longer than originally thought, because there is no time limit on how long the Council of Representatives may take between when it receives the proposed amendments and when it approves them.