

CONSTITUTION BUILDING AND FEDERAL OPTIONS IN IRAQ: THE KURDISH CHALLENGE

Seminar Report

With Professors Brendan O'Leary and John McGarry



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INTRODUCTION

The institutional rebuilding of Iraq hinges upon the successful negotiation of a workable constitution that is acceptable to the various factions within the country. Drafting a constitution is a delicate, challenging and potentially conflictual process in any setting, but it is particularly difficult in ethnically and religiously divided societies.

Constitution-making began in post-war Iraq in February 2004, as the Coalition Provisional Authority (CPA) embarked on secret inter-party negotiations through the Iraqi Governing Council (IGC). The aim of the negotiations was to draft an interim constitution to be adopted sometime in the future.

Rights & Democracy invited two experts working on these issues to a seminar at its offices in Montreal on 24 September 2004. Professors Brendan O'Leary (University of Pennsylvania, USA) and John McGarry (Queens University, Canada) analyzed the negotiations over the Iraqi Interim Constitution – known as the Transitional Administrative Law (TAL) – as they pertained to the Kurdish region in northern Iraq. The point of reference of the two speakers was Iraqi Kurdistan, and its concerns vis-à-vis the central authorities in Baghdad.

More specifically, O'Leary examined how the Kurds articulated, in terms of constitutional law, their aspirations for self-determination, and the compromises they made in the negotiations. He further explained the failures of the CPA regarding the adoption of the TAL. McGarry drew lessons from the Canadian federal model for Iraq, concentrating on the “lessons learnt” that might be useful for Iraq. Brendan O'Leary and John McGarry, along with Khaled Salih, are the joint editors of the book, *The Future of Kurdistan in Iraq* (in press).

TWO VISIONS FOR FEDERALISM

The Kurds came to the negotiating table with demands for a plurinational federation that recognized Kurdistan as a region, Kurdish as a language and the Kurds as a nation. The Kurdish leaders, having endured discrimination and oppression at the hands of successive Arab governments in Baghdad, insisted on maintaining the autonomy they had enjoyed since the end of the first Gulf war. They called for a highly decentralized federation and negotiated autonomy on fiscal policy, ownership of natural resources, security control, and complete authority over domestic public policy. They also demanded a high level of power sharing within the central government of Baghdad; they asked for a fair share of public portfolios for Kurdistan at the federal level.

This vision was in sharp contrast with the Arab-Iraqi perspective on the nature of the federation. The latter was based on the 18-governorate model, a structure that would allegedly ensure that no unit making up the federation would be dominated by an ethnic group. This was unacceptable to Kurdish leaders. It would have divided Kurdistan and fostered divisions and rivalries amongst the Kurds. Furthermore, the Arab vision for a federation was much more centralized and gave substantial powers to the central state apparatus rather than the provinces.

KURDISH COMPROMISES

Although, the constitutional bargain recognized the Kurds as a nation, recognized Kurdish as an official language in Iraq and gave the Kurds autonomy over Kurdish regions, it entailed compromises for the parties involved. The compromises the Kurds made included the status of Kirkuk, the borders of Kurdistan, the status of the Kurdish militia (the Peshmerga), and the control over natural resources.

TAL kept the borders of Kurdistan vague. It is recognized as a single autonomous federal region, but at the same time the 18 Iraqi governorates are also recognized as administrative units. Consequently, the borders of Kurdistan cut across several governorates. TAL also permitted other governorates to aggregate in order to form regions, with the exception of Kirkuk, thereby preventing it from formally becoming part of Kurdistan in the immediate future.

The Kurdish representatives were adamant during the negotiations not to include the Peshmerga in any future Iraqi Army. Having suffered genocide and expulsion on the hands of the central Arab forces, they insisted on keeping their military power under their direct control. Consequently, the TAL remained vague on the status of the Peshmerga.

Other parties in the negotiations did not accept the Kurdish demand to control the natural resources in their region – oil revenues being at stake. A compromise was reached and the TAL stipulated that revenues from natural resources are to be distributed in an equitable manner proportional to the population throughout the country.

The most contentious area of negotiation proved to be the ratification of the constitution. During the course of the negotiations, the Kurds fought for the right to ratify separately the permanent constitution.

Article 61C, dealing with the ratification of the constitution, stipulated that there must be overall support for the constitution in Iraq as a whole, and that it cannot be ratified if any three governorates with two-third majorities vote against it. This was interpreted by Iraqi Shiites as effectively giving a right to veto on constitutional ratification to the minority Sunnis and Kurds. The Shiites expressed strong reservations regarding this Article; they agreed to sign on very reluctantly, after deliberating with Ayatollah Sistani in Najaf.

Despite these negotiations, and the compromises they entailed, the US authorities failed to ensure the validation of the TAL as an interim constitution, and in the course of handing sovereignty back to the Iraqi people, they abandoned it. This left Iraq in a constitutional vacuum.

THE FUTURE OF KURDISTAN

The US failure to establish a legal basis for ratifying a permanent constitution constitutes a real threat to Kurdish self-determination. There are two perspectives that explain this failure: incompetence or a calculated political move.

The “incompetence” approach maintains that US international law lawyers failed to point out to the Bush administration and the CPA that according to the United Nations conventions, the US – being the lawful occupation authority (which was confirmed after the illegal invasion) – had no right to draft a constitution. By contrast, the “calculated political move” explanation maintains that the US wished to appease Shia public opinion and did not want to defend Kurdistan to the end.

The US could have ensured the validation of the TAL by one of two means. By either incorporating it into the UN Security Council Resolution handing formal sovereignty back to Iraqis, or by ensuring that Iyad Allawi, the Interim Prime Minister, legislated the TAL as an interim constitution. Unfortunately the US did neither.

This situation, coupled with the US decision to bar the Kurds from the Presidency, or from holding the position of Prime Minister, threatened Kurdish gains. At this point the Kurds were faced with two options: to either withdraw from the central government or to secede. The Kurdish leadership chose the former.

Once Kurds threatened to withdraw from the central government, the position of Deputy Prime Minister with no portfolio was created for them, and Iyad Allawi promised to apply the TAL during his mandate. This provided a short term compromise solution, but it is deemed to be a pre-

carious situation as it does not make the TAL a formally binding legal document.

In light of the absence of an interim constitution in Iraq, it is likely that the country is heading for collision course in January 2005 when elections are scheduled to take place. This collision can be forestalled if the Iraqi leadership in Baghdad recognizes the importance of the compromises made in negotiating the TAL.

In the likely case of a constitutional breakdown, the Kurds will be tempted to choose secession from Iraq as an option, or to withdraw from Baghdad's institutions without declaring independence. But this will likely have very negative consequences. Neither the Baghdad authorities nor the US will accept the independence of Iraqi Kurdistan, not to mention the neighboring states of Turkey and Iran. It is therefore crucial to revisit the TAL and find a constitutional solution that is based on its principles and the compromises it reached.

CANADA: A FEDERAL MODEL FOR IRAQ?

The concept of federalism is enshrined in the TAL, although the parties to the negotiations did not agree on the type and extent of federalism in Iraq. The Arab parties wanted a federal system (with 18 governorates) that was based on the US model – assuming an ethnically homogenous population, with a strong executive president. The Kurds envisioned a federal setup that took into consideration ethno-national divisions and allowed for strong regional autonomy – a plurinational federation.

There is a fundamental problem in using the US model of federalism in Iraq. No ethnic minority in the United States views itself as a separate nation or “people” (except perhaps some indigenous peoples). In contrast, the Kurds in Iraq view themselves as a separate nation, rooted in their historic territory, with a deep sense of entitlement to self-determination.

It is, however, possible to draw an analogy between the Kurds of Iraq and the Quebecois in Canada, despite fundamental differences in historical experience. This can lead us to the possibility of examining the Canadian federal system as a suitable arena from which lessons can be learnt for other countries. Quebec, after all, is a constitutionally recognized administrative unit as a province, with its unique culture and distinct society. Moreover, the Canadian federal system is highly decentralized, giving a high level of autonomy to the provinces.

For example, federal government revenues are lower proportionally in Canada than any other federation in the world, with the exception of Switzerland. Natural resources, including oil, come under provincial jurisdiction. The federal government taxes income in natural resource-rich provinces and ensures equal distribution through a mutually agreed equalization mechanism. This formula ensures that public services are at

a similar level all over Canada, irrespective of the level of wealth of each province.

The Canadian system also ensures – through laws or informal traditions – the adequate representation of Quebecers at the federal level. For instance, it is widely expected that the Prime Minister be fluently bilingual, although it is not a law. Three of the nine judges sitting on the Supreme Court of Canada must be from Quebec. French is recognized as an official language in Canada, at least at the federal level, and federal public services must be delivered in both English and French. Moreover, it is interesting to note that in the 34 of the last 36 years, the position of Canadian Prime Minister has been held by an individual from Quebec. These are some examples which can provide certain “lessons learnt” to other countries.

Of course, the Canadian system also has many elements which are not suitable in other situations. Many political practices are based on traditions rather than formal laws – and such conventions are not legally binding. Given the lack of trust between Kurds and Arabs, it is highly unlikely that a convention or tradition based approach will be acceptable to Kurds. In such cases, constitutionally entrenched laws are the best guarantees for legal protection.

Opponents of plurinational models argue that such political systems create situations in which the rights of other ethnic minorities are abused. But minority rights can be protected, no matter where an individual lives, if suitable safeguards are put in place. In Canada such mechanisms are ensured at the federal level through the Charter of Rights and the Supreme Court. At the provincial level, Quebec leaders have for example promoted an inclusive type of civic nationalism and have drawn up a Quebec Charter of Human Rights and Freedoms.

The Canadian political system is not being cited here as a “model” to be emulated by Iraqis. No political system can in fact be a simple model for another country with very diverse traditions, history and political culture. However, the Canadian federal system can provide certain guidelines and valuable lessons in the set up of a workable federal system that addresses minority needs in a plurinational or multicultural state.

CONCLUSION

In the Iraqi constitutional negotiations the Kurds forcefully argued for a plurinational and decentralized federation. This went against the centralized vision of the Arab leaders in Baghdad. After much discussion, a compromise was reached in the form of the TAL. It largely favored the Kurds, albeit certain important issues were left ambiguous. The Kurds were able to achieve wide ranging autonomy based on the principle of self-determination.

However, the Transitional Administrative Law was unfortunately not legislated into law as the Interim Iraqi Constitution since the US abandoned the constitution building process by failing to validate the TAL. The result is a dangerous constitutional void in which the future of Iraqi Kurdistan as a separate and autonomous political entity is threatened. The TAL framework remains a viable basis for Iraq's future Constitution.

If Iraq is to emerge as a viable, stable and democratic state after the US invasion, its Constitution – the basic law on which the political system is constructed – must be founded on the principles of decentralized federalism, guaranteeing the rights of the Kurdish minority, and indeed the rights of all Iraqi citizens.