

PITT LAW

UNIVERSITY OF PITTSBURGH

Legal Studies Research Paper Series

Working Paper No. 2012-26

September 2012

**Thinking Beyond the Original Bargain: Post Ratification
Constitution Making and the Case of Iraq**

Haider Ala Hamoudi

University of Pittsburgh School of Law

3900 Forbes Avenue

Pittsburgh, Pennsylvania 15260-6900

www.law.pitt.edu

412.624.1055

E-mail: hamoudi@pitt.edu

This paper can be downloaded without charge from the
Social Science Research Network Electronic Paper Collection:
<http://ssrn.com/abstract=2110943>

Thinking Beyond the Original Bargain: Post Ratification Constitution Making and the Case of Iraq

Haider Ala Hamoudi

In his arresting, recent book *Constitutional Theocracy*, Ran Hirschl describes some of the remarkable similarities that exist as between constitutional law and religious law. Among other things, both rely on a sacred text of sorts that serves as an apolitical symbol for the nation, a founding document that grows increasingly difficult to amend over time and whose interpretation is contested and continually evolving.¹ Others have made similar observations with particular reference to the U.S. Constitution. To take but a few examples, George Fletcher describes the U.S. Constitution as a “nearly sacred” text,² Daniel Lazar indicates it is as central to American political culture as the New Testament was to medieval Europe,³ and Sanford Levinson, reciting these familiar arguments, dedicates an entire book to exploring the implications of permitting a legal document to serve as a “constituent agent” of national identity.⁴ At the very least, even if one might hesitate to compare constitution to Qur’an, it might fairly be described as common, perhaps even uncontroversial, to regard it as having some sort of transcendental quality. Put more concretely, a constitution must be understood to serve in some fashion as “constituent agent” of identity, a symbol of the nation, rather than merely a piece of legislation, albeit one supreme to other forms of law.

This short paper describes some of the implications of understanding the constitution in such a fashion. Some of the benefits of a “civic religion” founded on constitutional fidelity might be obvious. Surely, near universal faith in the civic religion helps to ensure national cohesion and avoid resort to violence to further the aims of political competition, for example.

¹ RAN HIRSCHL, *CONSTITUTIONAL THEOCRACY* 210-13 (2010)

² George Fletcher, *Three Nearly Sacred Texts in Western Law*, 54 *ARK. L. REV.* 1, 2-5 (2001).

³ Daniel Lazar, *America the Undemocratic*, 232 *New Left Review* 21 (1998).

⁴ SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 5-6.

Yet in a polity where a new Constitution must be written, such notions surely raise the stakes considerably. It is one thing for disparate interest groups and political competitors to come together to enact an ordinary piece of legislation. It is quite another to draft the nation's premier symbol, the document that will serve as agent for identity, fidelity to which is the yardstick that measures good citizenship. In such circumstances, even proposed provisions of fleeting legal importance become exceedingly controversial, almost existentially so.

Thus, for example, it is hard to believe that reference to Europe's Christian heritage in the preamble of the 2003 Constitutional Treaty of the European Union, as demanded by the Catholic Church, would have had any *legal* effect.⁵ Yet when the document is understood to serve as symbol to European identity, the notion of a reference to Christianity is, to the secularist and the non-Christian alike, deeply offensive. It is not reasonable to expect a person to adhere to a civic religion that explicitly calls upon religious and historical traditions which such a person categorically rejects.

This problem is exacerbated in societies that are deeply divided, where political authority is seriously contested across severe identitarian divides, and where competing identitarian communities have broadly different visions of the ideal state. Merely devising a constitutional formula that involves some modality of power sharing is hardly enough. For if one identitarian community, let us call them the Catalans, seeks a broadly federal state with deep devolution of authority from center to federal region, and if another identitarian community, let us call them the Castilians, seeks a far more centralized form of state order, then the question is not merely how to divide power among Castilians and Catalans, but also how to delineate the respective sovereignties of center and region. Or we might assume one identitarian community, let us call them the Copts, which seeks a highly secular state and another identitarian community, let us call them the Brothers, which wishes for a particular religion to be enshrined as the state's faith, and for the state's laws to derive from that religion's legal and ethical code. Again, power sharing as between Copt and Brother may be important, but so will

⁵ Ronan McCrea, *Religion as a Basis of Law in the Public Order of the European Union*, 16 COLUM. J. EUR. L. 81, 83 (2009).

be the extent to which any particular religion deserves constitutional recognition, and if so, how much. And all of this, I must reemphasize, must be included in a single Constitution which must command each community's respect, and earn its fidelity as the source of civic religion.

Iraq presents a particularly pathological version of this sort of state with identitarian communities divided not only over the means by which to share power, but also by disparate and incompatible versions of state order. There are the Kurds, a relatively secular identitarian community, an ethnic group persecuted throughout the entirety of Iraq's history but suffering particularly acutely during the latter stages of Ba'ath rule.⁶ To describe them as suspicious of Baghdad and its intentions is to understate the matter considerably. In an ideal world, the Kurds would prefer total independence from the state of Iraq, which has proved something of a genocidal catastrophe for them.⁷ But given that circumstances do not favor such a dissolution, the Kurdish leadership was willing to take as extreme a form of autonomy as it might be able to muster.⁸

Then there are the Shi'a, Iraq's majority community who until 2003 had never ruled Iraq, nor been represented in any remotely proportional fashion in the higher echelons of Iraqi society, from the officer corps to the political classes.⁹ The Shi'a are overwhelmingly (though of course not universally) anti-secular, revering a clerical establishment and looking to it for spiritual and temporal guidance.¹⁰ They might not quite expect or desire the clerics to rule the state,

⁶ MARION FAROUK-SLUGLETT AND PETER SLUGLETT, *IRAQ SINCE 1958: FROM REVOLUTION TO DICTATORSHIP* 269-70 (2d. ed. 2003).

⁷ PETER GALBRAITH, *THE END OF IRAQ* 161 (2007).

⁸ Feisal Istrabadi, *A Constitution without Constitutionalism: Reflections on Iraq's Failed Constitutional Process*, 87 *TEX. L. REV.* 1627, 1630-31 (2009).

⁹ P. COCKBURN, *MUQTADA: MUQTADA AL-SADR, THE SHI'A REVIVAL AND THE STRUGGLE FOR IRAQ* 32 (2008). Malcolm Yapp's work demonstrates the relative meager representation of Shi'a in the Iraqi Cabinet throughout the period of the monarchy. MALCOLM YAPP, *THE NEAR EAST SINCE THE FIRST WORLD WAR* 73 (1995) (indicating that only 24% of the Cabinet posts during this period went to Shi'is, and most of these were minor portfolios). Respecting economic discrimination, particularly in the countryside, during this era, see Marion Farouk-Sluglett and Peter Sluglett, *The Transformation of Land Tenure and Rural Social Structure in Central and Southern Iraq, 1870-1958*, 15(4) *INT. J. MID. E. STUD.* 491, 500 (1983). The persecution of the Shi'a during the period of Ba'ath rule is quite well documented. See, e.g., Farouk-Sluglett and Sluglett, *supra* note 6 at ___ (describing the broad slaughter of Shi'i insurrectionists by the Iraqi army in 1991).

¹⁰ I do not discount the substantial numbers of Shi'a who consider themselves secular, nonsectarian and deeply nationalist. Nevertheless, it is fair to note that approximately 48% of the seats in the current lower house of parliament, the Council of Representatives, are occupied by Shi'i Islamist groups who promote their ties to the Shi'i

Iraq's Shi'a understanding well the disaster that befell Iran upon attempting such an experiment, but they certainly do expect them to guide it, and the Shi'a leadership did negotiate with some fervor to secure for clerics a formal role in constraining state activity that violates core religious precepts.¹¹

Finally, the Sunnis are Iraq's historic ruling community. They formed the core of every regime in Iraq, each of which, at least since the 1958 revolution, was to one extent or another deeply nationalist. At times, this nationalism was pan-Arab, as with the Ba'ath, while at other times more uniquely Iraqi, as was the case with Abdul Kareem Qasim, who led the revolution against the monarchy.¹² The parties representing the nation's Sunnis were fiercely nationalist, and firmly believing, as many nationalist groups the world over, that particularist affiliations, be they to a Shi'i clerical hierarchy or to Kurdish ethnicity, pose an existential threat to state unity.¹³ As such, they favored a centralist state and the fostering of a broad, single national identity, as they had throughout Iraq's history.

Three groups, three projections of state order. Two are particularist, one deeply nationalist. One is broadly secular, another fiercely religious. One historically ruled the state and was therefore committed to maintaining not precisely a fallen dictatorship, but the mechanisms and means of state organization and bureaucracy. The two others suffered grievously under previous regimes and sought broad removal and replacement of the state's functionaries. How would all of this fit into a single document that was supposed to then serve as the core of the nation's civic religion, the basis of its national identity?

The drafting solution: Embrace ambiguity. Leave gaps. Include contradictory provisions. In short, draft badly to draft well. Specifically, this is a process referred to by Hannah Lerner as "incremental constitution making," where the

clerical elite. Hannah Fairfield & Archie Tse, *The 2010 Iraqi Parliamentary Elections*, N.Y. TIMES (March 26, 2010), <http://www.nytimes.com/interactive/2010/03/11/world/middleeast/20100311-iraq-election.html>. Given that the Shi'a are approximately 55-60% of the population, it is fair to say that Islamism and close affinity to the Shi'i clerical elite is a view that is predominant, though certainly not universal, among the Shi'a.

¹¹ Haider Ala Hamoudi, *Ornamental Repugnancy: Identitarian Islam and the Iraqi Constitution*, 7 U. ST. THOM. L. J. 692, 697-98 (2010).

¹² Farouk-Sluglett and Sluglett, *supra* note 6 at 100-16

¹³ Phebe Marr, *The Development of a Nationalist Ideology in Iraq 1920-41*, 75 THE MUSLIM WORLD 85, 93 (1985); LIORA LUKITZ, *IRAQ: THE SEARCH FOR NATIONAL IDENTITY* 110-12 (1995).

original bargain leaves much to be determined post-ratification.¹⁴ There is little doubt that this was done in Iraq, though it is more often derided than extolled.¹⁵ Yet ambiguousness has tended to work rather well. It has, for example, enabled the Sunni population which once voted against the ratification of the constitution in large numbers to embrace it. Its national leaders accuse the current Prime Minister of violating constitutional dictate through such controversial moves as calling for the arrest of the Sunni Vice President, seeking the removal of the Sunni Minister of Finance, and resisting power sharing arrangements.¹⁶ The Constitution, in other words, *protects* Sunni interests against a potential, incipient dictatorship. This is hardly the only instance to which Sunni leaders have appealed to the Constitution as establishing the basic rules within which political competition should be constrained.¹⁷ In fact, the claim is made so often it is impossible to take seriously any suggestion that even a vestige of the former Sunni opposition to the Constitution remains.

Yet Sunni support has not led to Shi'i or Kurdish denigration of that same Constitution. One single Constitution has become the document to which all pledge fealty. This is not meant to suggest that divisions within Iraq are no longer serious, or lethal. Any who expected Iraq's deep identitarian conflicts to disappear through a constitutional process could only be characterized as hopelessly naïve. It is to say that Iraq's elected leaders have pledged to work

¹⁴ HANNAH LERNER, MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES 12 (2011).

¹⁵ See, e.g., ANDREW ARATO, CONSTITUTION MAKING UNDER OCCUPATION: THE POLITICS OF IMPOSED REVOLUTION IN Iraq 227 (2009) (describing the Iraqi constitution as a "mediocre document full of holes. . . leaving some of the most fundamental constitutional questions for later majorities or qualified majorities to decide.")

¹⁶ Ayad Allawi, Osama Nujaifi, Rafe el-Essawi, *How To Save Iraq From Civil War*, N.Y. TIMES (Dec. 28, 2011); Maad Qayadh, *Iraqiya: The End of the Crisis over Hashimi and Mutlaq is a Condition for the Success of any Discussions with the "Rule of Law"*, AL-SHARQ AL-AWSAT 9 (March 15, 2012).

¹⁷ To recite two examples, both by one of Iraq's most beleaguered Sunnis, Vice President Hashimi is reported in May of 2010 to have "reiterated" the Iraqiya position that it be given the first opportunity to form the government, pursuant to *constitutional* mandate. Interview on Radio Sawa, July 18, 2010. Moreover, in November of 2009, Vice President Al-Hashimi used his constitutional veto power rather aggressively to oppose an election law. His statements reflect amply his reliance on the Constitution:

If the law is not amended by the parliament or the electoral commission by reconsidering the distribution of . . . seats, I will definitely use my constitutional right. I will not allow the passage of a law that contradicts the Constitution and the principles of justice, regardless of the price to be paid.

World Briefing, L.A. Times (Nov. 16, 2009) *quoting* interview with T. Hashimi and Al Hurra Satellite Television.

through mechanisms and arrangements established in a single foundational document, and that this is no meager achievement.

To here, I have dealt largely in abstractions, and so concretization is warranted, to demonstrate how the Constitution's ambiguities have worked, and where they have not. Let us begin with a success, that involving the constitutionalization of Islam into the state apparatus. While there were important disputes, too detailed to recount here, as between largely secular Kurds and largely Islamist Shi'a over the extent to which Islam could serve as a constitutional constraint on legislation, ultimately the drafters settled upon a formulation that prohibited the enactment of legislation that "contradicted the settled rulings of Islam."¹⁸ The phrasing is necessarily ambiguous, deliberately stripped of the type of known religious terminology (references to consensus, for example, or fundamentals of Islam) that could provide better definition. It was this deliberate attempt to be ambiguous that led to the final formulation being acceptable to all factions.

More contentious was the institution responsible for determining the constitutionality of legislation alleged to be in violation of Islam's "settled rulings." Islamist Shi'a considered it unimaginable that its own clerical authorities would not have considerable, if not dispositive, input into the matter. Secularists much preferred state judges, with their largely bureaucratized training, their preferences for state institutions and mechanisms of lawmaking and their familiarity with law. Endless discussions led to nothing by way of agreement, and the parties ultimately decided to defer the matter, suggesting that the institution that would ultimately serve as Constitutional Court would be established by supermajority legislation.¹⁹

This deeply divisive area of dispute was therefore handled through two methods of incremental constitution making—the deferral of a problem for future resolution, and the liberal use of ambiguous text. While easy to denigrate from an aesthetic perspective, it has worked remarkably well from a legal one. No legislation creating a constitutional court has ever been enacted (unsurprising

¹⁸ Further exposition on this subject is available at Hamoudi, *Ornamental Repugnancy*, supra note 11 at 697-701.

¹⁹ Id.

given continuing divisions) and hence the current Federal Supreme Court, a thoroughly judicial institution with no clerical representation of any kind, continues to fill the role.²⁰ Secularists for obvious reasons find this comforting, as they find comforting the Court's reluctance to use Article 2 to void any legislation of any kind, much less dismantle the state's secular foundations. The Shi'a Islamists, once insecure given their historic persecution, have become more comfortable in power, as their plurality in the legislature helps to ensure that sufficient heed to Islam is paid. As such, the differing sides are satisfied with the current arrangements. With all the divisions throughout the region in the post-Arab spring that have appeared respecting the role of religion in the state, it is remarkable that of all of Iraq's problems, this is not a significant one.

Federalism provides a more nuanced picture. Even the most ardent nationalists were aware of Kurdish passions for autonomy. They were similarly aware that there was no realistic way to assert meaningful national control over the Kurdish region, which had exercised *de facto* independence for over a decade before Saddam fell. Hence the provisions of the Constitution respecting broad autonomy to "regions" were controversial only at the margins, insofar as they referred to Kurdistan.²¹

Much more controversial was the extent to which Iraq's existing provinces should enjoy the same autonomy. To settle the divide as between federalists who wanted to expand such autonomy and centralists who wanted matters to remain as they were, the drafters fell upon a separate tool of incremental constitution making: contradiction. Each side received a provision to its liking. To the federalists, Article 115, suggesting that whenever a provincial law and a national law were in conflict, provincial law would control so long as the province had jurisdiction over the matter in the first place. To the centralists, Article 122(2), which suggested that provinces should enjoy broad fiscal and administrative powers, but left the definition and organization of those powers to the national legislature. Naturally, these hardly fit well, and yet again, it has worked. Perhaps because the provinces are woefully incapable of exercising meaningful legislative

²⁰ Id. at 702.

²¹ Istrabadi, *Constitutionalism*, supra note 8 at 1630.

capacity, perhaps because the provincial councils have other grievances and desires, the provinces have not set out to challenge national legislative authority on the basis of the Constitution. Rather, they have sought to exercise powers granted to them under applicable legislation, including the power to remove Baghdad installed officials with whom they are dissatisfied.²² Praxis has thus settled what drafting negotiations could not. As with Islam and the state, it took time, experience and an opportunity for the various groups to work together in a setting where the stakes were not quite so high to develop the arrangement. But they have worked it out, and the Constitution served its purpose well by not forcing immediate resolution.

Yet the arrangement on distribution of central and regional power is not perfect, and that is, ironically, because of an unusual rigidity. The Constitution makes it relatively easy for a province to form a region, and once formed, the Constitution's text makes it clear that the region in question enjoys the same near-independence that Kurdistan enjoys. This is the possibility, framed once as a demand by a prominent Shi'i party, that led to broad Sunni disenchantment with the Constitution, disenchantment that only dissipated when it became clear that the Shi'a populace in its electoral choices was not terribly interested in regionalization.²³ Ironically, it is outlying Sunni provinces now which have suggested, generally tentatively given the broad and deep nationalist predisposition of Sunni national leaders, that they should be permitted to form regions.²⁴ This has, predictably, created more sectarian tension, as the Shi'a have developed centralist tendencies of their own.²⁵

Incrementalism and flexibility may have worked better. Hence, less controversial would be a constitutional arrangement that, as per the Spanish model, created

²² Haider Ala Hamoudi, *Notes in Defense of the Iraq Constitution*, 32 U. PA. J. INTL. L. 101, 117-18 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1753232.

²³ Id. at 116.

²⁴ Laith Hammoudi, *Saddam's Home Province Declares Regional Autonomy in Iraq*, MCCLATCHY NEWSPAPERS (Oct. 27, 2011), available at <http://www.mcclatchydc.com/2011/10/27/128503/saddams-home-province-declares.html>; *Chairman Of Salahuddin Provincial Council , We Reviewed With P M, Demands Which Led To Declare Salahuddin As A Region*, NAT'L IRAQ NEWS AGENCY (Dec. 26, 2012), available at http://www.ninanews.com/english/News_Details.asp?ar95_VQ=FJHKJH; Dan Morse and Asaad Majeed, *Maliki Says He Will Fight Iraq Breakup*, WASH. POST A16 (Dec. 25, 2011).

²⁵ Id. (describing central government and local Shi'i opposition to the various efforts).

various degrees of autonomy for various parts of Iraq in a manner that would be negotiated subsequent to constitutional ratification. The Kurds would enjoy under any such arrangement immediate near self-rule, and other provinces would be left to work out suitable arrangements with Baghdad in the manner that best befitted them and the needs and desires of the competing constituencies of Iraq. Yet it was not to be, instead the provisions in the Iraq constitution respecting region formation are clear and specific, as are those concerning the jurisdiction of regions. It is an irony, in the end, that the Constitution's greatest weakness, one that is manageable currently but lurks as ever present threat, relates not to the fact that its terms are too ambiguous, but that they are too clear. The Constitution was not, in this single instance, drafted particularly wisely, but too well.