

# **A Review of the Constitution of Iraq**

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## **I Introduction**

On 28 August 2005 the Draft Constitution of Iraq was read to the members of the Transitional National Assembly (TNA). A few changes were made over the next 10 days and the document was then published as the draft constitution ('DC') to be submitted to the people in a referendum. Shortly before the referendum, further changes were made to the draft, principally for its review within four months of the elections of the National Assembly in mid-December. The constitution making process was governed by the Transitional Administration Law (TAL) under which the TNA had to 'write' a constitution by 15 August 2005 (unless the TNA applied for an extension before 1 August). The constitution had to be referred to a referendum before 15 October, unless a one off extension up to six months was granted (which in the end was not formally requested).

This paper reviews the principal features of the Constitution. We review it from the perspectives of the role of a constitution (and the process whereby it is adopted and enacted) in a country which is deeply divided and has been torn by internal conflicts. But we also examine it to analyse its practicality and effectiveness in providing the framework for government and the pursuit of personal and collective goals. We realize that our analysis and criticism must be tempered by an appreciation of the enormous constraints and stress under which the constitution making process has had to be conducted. There was insufficient time to ensure inclusiveness and for the articulation and resolution of differences; the drafters were under intense pressures to meet deadlines, there was considerable intervention by outsiders (with their own unhelpful agenda), and the security situation did not permit the broadening of the debate and public participation. We have great sympathy for its drafters and have seen at first hand the enormous difficulties they had to overcome to reach where they have. However, we believe that the best contribution we can make to the ongoing debates and the future stability of the country is as honest an analysis of its strengths and weakness as we are capable of (especially as its review will be undertaken by the new National Assembly).

Our general assessment is that the Constitution is a considerable improvement upon the earlier drafts that we had opportunity to study or comment on. There is evidence that the Constitutional Commission has taken account of the many comments made by numerous organizations and individuals on earlier drafts (including those by the United Nations Office of Constitution Support). However, we consider that there are serious flaws in the Constitution which would make the operation of the system of government difficult and controversial. Several critical provisions are incomplete. The Constitution could sharpen even further the divisions within Iraq and pose a serious threat to the unity and territorial integrity of the country. There are also technical deficiencies in the draft which are to some extent tied to key substantive provisions and will be hard to remedy. We have serious reservations whether the Constitution as it stands can be fully and effectively implemented, without grave danger to state and society. Our analysis suggests that Iraqis need to give a great deal more thought to the modalities of its implementation than was possible in the process so far.

Naturally, no Constitution cannot be expected to solve all problems. Any Constitution is part of an overall process, and how it operates depends upon a host of factors, external and internal to the country concerned. These include habits of conciliation, respect for difference, the vigour of civil society, and so on. Our paper is restricted to a consideration of the document itself.

*A Caveat:* we have read a translation, and we are conscious that the quality of translations varies. Even a good linguist may not be able accurately to render complex constitutional ideas in another language. But we have to take it on trust that what we have read reflects accurately the real constitution – the one in Arabic. For example, we assume that when we read ‘a source of law’ in connection with Islam, the Constitution says just that – it is one fundamental source but there can be others. And if the translation says something ‘shall’ be done it imports what lawyers in our tradition mean by shall – an obligation, rather than a simple statement of futurity or even mere aspiration.

### ***The Task of the New Constitution***

The assumption of TAL was that the new constitution would be adopted by the broad agreement of all communities, at least that of the Kurds and Arab Sunnis and Shias. This is obvious from the rules for voting in the referendum which can be read as giving each of these major communities a veto (a negative vote of 2/3rds of the voters in three governorates is sufficient to reject the DC) and the ‘penalty’ of dissolution of the TNA in case of failure. There was also the expectation that people would be consulted during the constitution making process and be informed of the DC before they vote in the referendum, and thus stimulate public knowledge, and legitimacy, of the constitution. The successful adoption of the constitution was seen as an important step towards the normalization of the situation (by having developed a consensus and instituting permanent constitutional arrangements for the governance of Iraq).

The process and the Constitution must therefore be judged partly at least in terms of the participation of the people and its legitimacy. While acknowledging that the Constitutional Committee/Commission of the TNA (‘CC’) made some effort to consult the people and other organizations provided some information on the process and facilitated the submission of people’s views to the CC, there was no wide scale public participation. Many of the views of the people, expressed in numerous meetings throughout the country, did not reach the CC or were considered by it. It is not clear even that the views of the public which have been collated and analysed by the CC’s secretariat received much attention from the CC. To a considerable extent it would seem that the people gave views that were heavily communal. In the end, the process dissolved into a series of negotiations among top communal leaders (few of whom seem to have benefited from earlier detailed discussions and negotiations in the CC, or studied the numerous papers prepared for it). So on the points of both participation and reconciliation among people and communities, the process must be regarded as largely ineffective. And continuing discussions among ethnic leaders on a revision of the Constitution and many calls, at least among the Sunnis, for the rejection of it (and defeat in three Sunni dominant governorates) is evidenced that the Constitution has not won universal legitimacy or provided a basis for unity. The agreement to review the Constitution is indeed acknowledgement of this—and leads to a two-stage process of constitution-making (which is not without precedent). It would have been better to have given the CC more

time to continue its search for a consensus (and consideration of people's views). However, it is not the purpose of this paper to discuss these procedural issues. It is to examine the provisions of the Constitution to see how far it meets the current needs of Iraq.

What are the current needs is a subject on which views might differ, and indeed do differ, among the ethnic leaders. But certain issues are so pressing that by any measure they must count among priorities for the new constitution. They are: (a) agreeing on a vision of Iraq that has wide approval all over the country; (b) enhancing national unity and territorial integrity; (c) assuring people democracy and participation as well as physical and psychological security; (d) ensuring effective and accountable government; (e) the protection of human rights and dignity, including rights of minorities; (f) promotion of social justice and the fair distribution of the benefits of national resources; and (g) renewal of the economy and removal of poverty. All these objectives are interconnected; some of them have to be secured directly, while others would be achieved by creating the right constitutional framework and social ambience.

The events of the last three decades or so in Iraq have put severe strains on national unity. A major cause has been the lack of democracy and inclusiveness. Power was monopolized by a group of persons under the auspices of the Ba'athist Party, led by Saddam Hussein, and exercised in a most brutal way, denying individuals and whole communities their basic rights. The impact on public consciousness of this form of rule was aggravated by the wide perception that the government belonged to and was run for the benefit of Arab Sunnis. Too many groups considered that they had been marginalized or oppressed. Ethnicity became a major issue (and increasingly provided the major source of the identity of people) and to some extent obscured other fundamental social questions. The new constitution has therefore to establish a new vision of Iraq, that of a united people. However, this feeling of unity cannot be secured by the dominance of one group over others, nor by the denial of ethnic identities and aspirations. The constitution must balance national identity and loyalty with the respect for and recognition of ethnic, religious and linguistic diversity. This must be reflected in the ways that state power is distributed and shared, and in particular the respective structures and authorities at the national and regional/governorates levels, and must take account of the importance of effective powers in national authorities to ensure territorial integrity and the security of the people.

National identity and loyalty depend on the vision that people have of themselves and their country. The constitution must spell out fundamental values on which people can agree. The Saddam regime was characterized by the lack of democracy, respect for human rights, and equality and fairness as among individuals and communities. These factors must become the central features of the new constitution. They will do much to assure the people of physical and psychological security.

The constitution must be forward looking, aiming for a future in which values of democracy, human rights and social justice can be combined with the goals of unity and harmony. A country which has been through such a traumatic experience as Iraq cannot, and must not, forget the past. On the other hand, it must not become obsessed with that past, pursuing old vendettas, as that would undermine the vision of the future Iraq.

Because of the difficult and unsettled circumstances under which the Constitution was prepared (which include the impossibility of full participation and adequate opportunities for the resolution of differences), and the fundamental changes that are expected in Iraq, the constitution should be open to amendments as the new forms of consensus emerge and as difficulties in the implementation of the constitution are revealed. The agreement to review it as soon as the National Assembly is elected should have provided for amendments (other than on human rights) under a slightly easier procedures (and perhaps without the need for another referendum).

Through a detailed examination of the approach and contents of the Constitution, we assess it by reference to these objectives..

## **II The Constitution: General Provisions and Rights**

We begin with provisions which relate to the national vision, the nature and purposes of the state, and the rights of citizens.

### ***The Preamble***

The purpose of a preamble is to situate the constitution in its context. The context may consist of independence, or a revolution or the overthrow of the previous regime, or peaceful transition to a new political or social system. The preamble will generally indicate the source of the sovereignty of the state, which today is almost always the 'people'. It may state briefly the principal goals to which the constitution commits the nation (leaving a fuller elaboration in the Fundamental Principles). It is inspirational and symbolic, and reaches out to the people, who may find the document as a whole obscure. The preamble provides guidance to the objectives of the constitution and may be used in the interpretation of the constitution but is not otherwise binding. To be effective for these purposes, the preamble is normally brief.

The preamble sets out the past glories of the people who now inhabit Iraq, recites and condemns sectarian oppression to which many have fallen victim, and commits the state to democracy, equality, inclusiveness, justice and non-violence. The first part is intended to inspire pride in the people and to promote unity. It also sets out clearly the objectives of the constitution. In these respects the preamble is good (if somewhat long). However, there is perhaps too much emphasis on the recent oppression of the people, formulated in ways that seem to blame one community for it ('sectarian oppression'). Although this may not be the intention, the effect of this approach may be to alienate Sunnis who consider that they are being targeted; on the other hand, it must be acknowledged that the preamble does state that members of all communities have been the victims of oppression.

### ***Fundamental Principles***

The first section contains Fundamental Principles which deal with key issues about the identity of Iraq, characteristic and features of the state, and the status of the constitution (which is the supreme law). Fundamental Principles are used in constitutions to express the vision of the country and to prescribe its goals (such as social justice, gender equity,

diversity). They can play a critical role in bringing people around common, national values. Fundamental Principles are to guide the legislature, the executive and other organs of the state as well as individuals and non-state institutions in their conduct and exercise of power. Although they are binding on the state (and others), they are generally not strictly enforceable in the courts. Some Fundamental Principles are dealt with in detail in other chapters where they impose directly enforceable obligations.

In Iraq much controversy has arisen about Fundamental Principles, especially as they touch on identity, language and religion, as well as the structure of the state. The section does not say much about the structure of the state other than to describe it as ‘republican, representative (parliamentary), democratic and federal’ (art. 1). But these elements are the subject of other chapters, and constitute the bulk of the constitution (and will be discussed in our analysis of these chapters). Of these, the most controversial is the federal character of the state and it is useful to comment on it, in general terms, here.

Several countries have used federalism or other forms of autonomy (or self-rule) as a means to recognize and promote the diversity of the people. Federalism can balance national identity and interests with communal or regional identity and interests, and in this way discourage secession and promote national unity (as has been the experience of India, Switzerland, Spain, Malaysia, and Canada). Federalism is a reflection of the tolerance in society and the ability of the people to make compromises. It can also produce greater responsiveness among government authorities to people’s wishes and needs in local situations and increase opportunities for their participation in public affairs. Federalism is thus consistent with other features of the proposed Iraqi state: democratic, representative, united and republican.

But federalism has been opposed by sections of most communities (except the Kurds, many of whom advocate federalism because they realize that their first preference, separate statehood, is not realistic). Those who oppose federalism fear that it would lead to the break up of the country, especially as they believe that federalism would take the form of ethnic regions. Minorities fear federalism because they consider that they would be victims of local majorities.

Our comment is that the federal experience has on the whole been positive, but we also recognize that the fears of federalism are not without some justification (as the example of the former Yugoslavia shows). Iraq itself has been ruled as a highly centralized and unitary state and there is anxiety that a shift to federalism would be disruptive and even dangerous (although it must be acknowledged that the Iraqi experience of centralized government has not been happy). Then there is the record of autonomy in Kurdistan which has led to a near independent status for it. People who live in areas which do not have natural resources (particularly oil and gas) worry that they would be excluded from a share in the country’s wealth.

What effect federalism has depends greatly on how it is structured. Federalism consists of two elements: self-rule in regions and shared rule at the national level. It is critical that a proper balance is struck between them. Too much emphasis on shared-rule would put federal autonomy at risk; too much self-rule could weaken the capacity of national institutions to govern and would destroy the basis of national unity. The links (or the lack of links) between national and regional governments (and the manner in which relations

between them are managed) can also have a major impact on unity and effectiveness. Equally critical is the distribution of resources, including financial resources, between governments at different levels; gross disparities will inevitably create tensions. Our view, which we elaborate in the analysis of sections on federal institutions and powers (see Section IV), is that the DC has failed to find the right balance and that federalism as it is expressed in it does indeed raise serious doubts about its effectiveness and the capacity to promote national unity.

On other issues, the Fundamental Principles seem to have struck a reasonable balance between opposing views and do provide an appropriate framework for the conduct of public affairs. The first of these issues is the status of Islam, which is made the official religion of Iraq (art. 2(1)). The constitution guarantees the ‘Islamic identity of the majority of the Iraqi people’ (art. 2(2)). It is not clear what this guarantee entails. But the preamble, without using the word Islam, points to the ancient links between the country and Islam. Article 2 itself says that Islam is ‘a fundamental source of legislation’ and article 89 (2) requires that members of the Federal Supreme Court include experts in Islamic jurisprudence. Another article states that Iraq is a ‘part of the Islamic world’ (art. 3).

These provisions are relatively ‘moderate’; there is nothing ‘fundamental’ about them. The statement that Iraq is part of the Islamic world is a declaration of fact, not a normative stipulation. There is nothing unusual in the statement that Islam is a source of law, as it is well known that matters of family law are governed among Muslims by the *Sharia*. It should be noted that Islam is not the only source of law; principles of democracy (however vague that prescription may be) are also a source of law, as are human rights, as also (although not specified) are international norms and treaties, decisions of international and regional organizations (such as the WTO) of which Iraq is a member. The Islamic principles which are a touchstone of the validity of laws have to be ‘established provisions’ (which rules out any particular tradition and values consensus). Nor are Islamic principle the only touchstone of the validity of laws—democracy and rights are also relevant (art. 2(B) and (C)), as indeed is the entire constitution (art. 13).

Similarly, making Islam the official religion does not deny members of other religions the right to their freedom of religious belief and practices (art. 2(2)); in fact the DC explicitly guarantees them this right. Adherence to Islam is not made a qualification for any public office (as in some other Islamic states). The obligation of the state to safeguard the sanctity of holy shrines and religious places would seem to cover shrines of all religions (art. 10). Thus both in law and religion, there is a degree of pluralism which is critical in a multi-religious state. This pluralistic approach is also adopted in relation to status of languages and the rights of linguistic groups.

Both Arabic and Kurdish will be national official languages (art. 4 (1)), and the draft makes a serious effort to provide parity between them (art. 4(2)). Turkmen and Syriac languages will have the status of official languages in administrative units where they represent a ‘density’ of population (art. 10 (4)). There is a procedure for the adoption of other languages as additional official languages in local areas where the people express their preference for this in a referendum (art. 10 (5)). Official languages are those in which the business of the government (including contact with the people) has to be

carried out and public documents published. But it does not mean that languages which are not designated as official languages have no constitutional status. Iraqis have the right to educate their children in their mother tongue (even if a minority language) in government educational institutions ('in accordance with educational guidelines') or in any language in private educational institutions (art. 4(1)).

This pluralistic approach is summed up in the definition of Iraq as a country of 'many nationalities, religions and sects', even though special mention is made of Muslims and Arabs, the latter being described as part of the Arab nation (art. 3), the precise legal significance of which is unclear. Policies of 'racism, terrorism, the calling of others infidels, ethnic cleansing or incitement, glorification, promotion or justification of Saddamist Ba'ath' are prohibited (art. 7). The staffing of the armed forces has to reflect, proportionately, different components of the population (art. 9 (1) (A)).

The pluralistic approach is a manifestation of the goal of democracy. People are described as the source of all authority and legitimacy (art. 5). In this section alone, there are examples of the use of the democratic decision-making: adoption of additional official by referendum (art. 10(5)) and the peaceful changes of government (art. 6), the supremacy of the constitution (art. 13), the sovereignty of the people and the exercise of it through the secret ballot (art. 5), the recognition of minorities and respect for their rights (arts. 2(2), 3, 4, 5, 9(1) (A) and 10), the subordination of armed forces to civilian control and the prohibition of militias outside the framework of the national armed forces (art. 9).

Another dimension of pluralism appears in the bill of rights (art. 43) and concerns the state's commitment to the role of civil society institutions, 'to support, develop and preserve its independence in a way that is consistent with peaceful means to achieve its legitimate goals'. In particular the state shall advance Iraqi clans and tribes, consistently with religious values and human rights.

The DC seeks to commit Iraq to peaceful and mutually beneficial relations also with its neighbours, and non-interference in internal affairs of other states (art. 8).

To sum up, one can say that the Fundamental Principles are appropriate to the context of Iraq, seeking to end internal as well as external conflicts, acknowledging the sentiments of large groups but respecting the rights of minorities, laying the foundations of democracy and the rule of law. It is true that the DC has not met with the complete approval of the Sunnis. They consider that Iraq's identity with Islamic and Arab states, which they value, has been insufficiently recognised. They are also opposed to federalism which they think would destroy the unity of the people and the integrity of the state. But we believe that it is more important for Iraqis to build internal unity than common identities with foreign states. It is clear that some other communities have tried hard to accommodate the concerns of the Sunnis.

Perhaps the Fundamental Principles meet social goals inadequately. There could have been greater mention of human rights, social justice, and fair distribution of resources. There should also have been acknowledgment of the responsibility of the state and citizens to future generations (as in the preservation of the environment and the husbanding of natural resources).

### *Rights and Liberties*

The structure of the ‘bill of rights’ (as we might call the section on ‘Rights and Liberties’) is somewhat unusual. It is divided into two chapters, the first is called ‘Rights’ and is itself divided into two parts, ‘Civil and Political Rights’ and ‘Economic, Social and Cultural liberties’. The second chapter is entitled ‘Liberties’. It is not so easy to divide rights in this way, for they are all interconnected. But perhaps there is no harm in this design, and indeed it shows the care and concern with which the section on rights has been prepared and drafted, and a good understanding of the rationale of rights. The bill of rights sets out, in a fairly comprehensive manner, the rights and liberties to be exercised in Iraq. Except for a few rights which are restricted to Iraqi citizens (personal status, equality, equal opportunities, nationality, political rights, right to own property, basic needs like health, education and shelter), all rights are given to ‘every one’ (and would include non-Iraqi residents). While the restriction of some rights to citizens is justified (such as the right to vote) others may not be.

It is unnecessary to go into all the rights, freedoms and liberties to be protected under the draft constitution. It is one of the most comprehensive bills of rights that we know. It seems that all the usual rights are included. There are strong guarantees of equality, formal and effective, and a commitment to affirmative action (especially art. 16, see also arts. 28, 30 (2), 32). The right to privacy is expressly protected (art. 17). Due process guarantees are set out in detail and conform to international standards (art. 19). The right of public participation in state affairs is well provided for (arts. 20, 36, and 43). The DC is strong in its emphasis on economic and social rights: the right to work, personal as well as public property, freedom of movement, rights of investment, the rights of the family, rights to basic needs such as education, health, safe and clean environment, right of association, peaceful assembly and other forms of expression, and the religious rights are all protected. The rights of minorities are particularly well protected, especially given the fears at one time expressed by minorities that their concerns would receive no attention.

### *Minority rights*

As we have seen, the section on Fundamental Principles defines the state of Iraq in a pluralistic way: ‘many nationalities, religions and sects’. It includes some protections for specific minorities, in relation to the freedom of religion, referring expressly to ‘Christians, Yazedis, and Mandi Sabeans’ (art. 2(2)), but not, significantly, Jews (who, though few now, have long historical connections with the land). Holy places and shrines of all communities and faiths are to be safeguarded (art. 10). National symbols are to be designed in a way that ‘represents the components of the Iraqi people’ (art. 12). The freedom of religion is more specifically guaranteed in the bill of rights: the freedom of worship of all religious communities (art. 41); the right to personal status and law based on religion (art. 39); the management of religious endowments (art. 41 (1) (B)); and (to find the balance between the religious community and the individual), ‘each individual shall have the freedom of thought, conscience and belief’ (art. 40).

Minority languages are recognized and education in these languages is guaranteed, and are also eligible for status as official languages at local levels (art. 4). However, the precise scope of article 4 protection as regards education is unclear. Does it mean that all

minorities can claim that their children are taught in their mother tongue as medium of instruction in public schools (which may be unreasonable and not always feasible) or that they have the right to some arrangements for their children to learn their mother tongue (which is proper and desirable)? It should be noted that this right is to be exercised in accordance with ‘educational guidelines’, and thus may be limited in practice.

Racism, terrorism, ethnic cleansing, religious abuse of a group, or other forms of incitement are outlawed, as is the glorification of the ‘Saddamist Ba’ath’ party (art. 7(1)). The legislature is required to make a law to give effect to this article. The state has also committed itself to combating ‘terrorism’ in all its forms (art. 7(2)). Since terrorism in Iraq (and other places) is closely tied to ethnic oppression (and so much of this kind of oppression takes place in non-state sector), this commitment is an essential component of minority protection. Private militias, which have been the cause of much terror and oppression, are to be outlawed (art. 9(1) (B)). State forces are not to be ‘used as an instrument of oppression against the Iraqi people’ and are to be composed of members of all communities ‘without discrimination or exclusion’ to achieve ‘balance’ (art. 9(1) (A)).

Members of minorities are assured the right to citizenship (art. 18) and the full entitlements of citizenship (for example, art. 14, equality before the law; art. 16, equal opportunities). Minorities have suffered from displacement policies; the constitution seeks to protect them by outlawing ‘ethnic cleansing’ and by preventing the abuse of nationality policies (art. 18(5)).

Minorities should also benefit from state recognition of and support to families and their values and traditions (art. 29), the right to personal laws (art. 39), the recognition of Iraqi clans and tribes, and the role of civic society (art. 43, already mentioned).

Although these are positive provisions, the draft provides inadequately for the participation rights minorities, other than as individual citizens. Although the general protection of participation rights is important, small minorities sometimes need special mechanisms for their participation. The seeds of such protection are indeed to be found in the draft. Article 47 requires the representation in the Council of Representatives (‘CR’) of ‘all components of the people’ (but just what this means and how it would be achieved is unclear). Article 121 (‘Local Administrations’) guarantees the ‘administrative, political, cultural and educational rights for minority nationalities, and indeed ‘all other components’. This provision presumably applies in local administrations where such protection is both important and possible where a minority has substantial presence. Article 9(1) (A) requires the armed and security forces to employ the ‘components of the Iraqi people’, incorporating presumably the proportionality principle—but the DC has no similar provision for other branches of the public service. It is possible that each community is entitled to its own courts for the administration of personal law under article 39. However, the way these provisions are drafted, they do not directly confer these rights on minorities, but require further legislation.

### *Restrictions on rights*

Another positive feature of the bill of rights is the manner in which it provides for the restrictions or limitations on rights and liberties. Rights are seldom absolute and restrictions are sometimes justified. The balance is not easy to strike and all too often it is tilted in favour of restrictions. The DC says that restrictions or limitations must be

specified in the law or ‘on the basis of it’, and must not be so extensive as to ‘violate the essence of the right or freedom’ (art. 44). Some constitutions add another factor: that restrictions must be justifiable or necessary in a democratic society. It is to be hoped that the legislature and the courts will take this factor into account as the DC places great emphasis on democracy.

However, some articles on specific rights contain the scope of restrictions. For example article 17 on personal privacy permits restrictions ‘so long as it does not contradict the rights of others and public morals’). Article 36 guarantees rights of expression, press, and assembly and peaceful demonstration ‘in a way that does not violate public order and morality’. These may give specific grounds for restrictions but they do not obviate the requirement of article 45 at the essence of the right should not be violated.

Similarly, some articles require a judicial decision before a restriction can be imposed (e.g., art. 15 on the right to life, security and liberty, art. 17(2) on sanctity of home). Courts cannot impose restrictions on their own; they can only determine whether the law containing restrictions is valid. The reference here must be to an additional safeguard, that certain types of restrictions can be put into effect in particular cases only after a court conviction or other determination—and this is a good thing.

It will be for the legislature in the first place to determine when a restriction is in breach of these rules, but the ultimate authority to decide on its legality is the Supreme Court (art. 90(1)). This places a heavy responsibility on the courts, and requires for its discharge an independent, courageous and competent judiciary.

### *Assessment of the Bill of Rights*

One purpose of a bill of rights is to provide a vision and goals of society and another is to define the relationships between citizens, communities and the state. It is clear that the drafters of the constitution saw a primary role for human rights in defining Iraqi identity. The Iraqi state comes across as a caring society, trying to ensure for its people their dignity and the fulfilment of their basic needs. The bill of rights tries to come to grips with Iraq’s complexities, ethnic, religious, linguistic, tribal and the place of the individual. On the whole it strikes fair and suitable balances, recognizing the liberties of the individual in a community-oriented society. It acknowledges the importance of economic development to the enjoyment of rights, and commits the state to facilitate economic growth by creating a suitable legal and business environment (art. 25). The bill of rights also responds to the special problems, and recent experiences of governance, of Iraq, and thus locates human rights in a specific context.

It is clear of course that a great deal of the bill of rights is largely aspirational, far removed from present realities. As with some other parts of the constitution, great efforts will need to be made, and a strong will manifested, to give life to the bill of rights. We address this general question at the end of this paper. We conclude this section by commenting on some, largely technical, defects which need re-consideration. But we notice first that rights guaranteed under the draft constitution apply throughout the country, not only in respect of federal authorities. Each region or governorate not part of a region is free to make its own constitution, but no region is permitted to derogate from

rights and liberties confirmed in section 3. A region or governorate may of course give additional rights.

*Possible improvements*

(a) Nationality and citizenship provisions are foundational and therefore are best dealt with in a separate section or chapter than as part of the bill of rights.

(b) More specifically, article 18 says nothing about the position of spouses of Iraqis (which we gather was somewhat controversial) and only by implication suggests naturalization is possible.

(c) The scope of equality under article 14 should be expanded to prohibit discrimination on the grounds of disability – persons with disabilities are conceived in the DC as recipients of generosity but not as people with rights in this document (see also art. 32, which is formulated not so much in terms of the rights of the handicapped as the generosity of the state).

(d) On due process, article 19(5) would allow a retrial at the initiative of the prosecution if new evidence comes to light. This is undesirable and inconsistent with international standards. There should be no such re-trial after final acquittal.

(e) Article 19(7) (dealing with open trials) leaves it up to the court to decide whether court proceedings shall be in secret. While there are, very rarely, good reasons for trials in closed sessions, the discretion of the court to do so should be limited in the constitution (e.g., where the security of the state is at stake).

(f) Article 21 prohibits the state from surrendering (that is, extraditing) an Iraqi to foreign entities and authorities. Some constitutions do have such rules to ‘protect’ their citizens, but in our view such rules do not make sense in contemporary, globalised world, and may hinder the state’s capacity to combat terrorism (art. 7(2)). Since extradition agreements are based on reciprocity, Iraq’s ability to have transferred to it and to try nationals of other states may be jeopardized. This becomes an increasing problem as dual nationality becomes more common (someone that Iraq wants extradited as an Iraqi is viewed by the other country as its own citizen)

(g) The formulation of article 36 (freedom of expression, etc.) may give the impression that these rights are conferred by the state; it would be an improvement to state that every one has the right to the freedom of expression, etc.

(h) Article 39 seeks to give individuals the right to choose their personal status (and presumably their personal laws). But it is unclear and in particular it is not clear how individual choose which system they want to be governed by (for example in the case of marriage, at what stage, before marriage, after marriage?). In practice, would women have any choice? The modalities and operation of this principle need to be stated clearly in the law that is necessary to give effect to article 39.

(i) The right regarding health is narrowly defined (article 31). It is restricted to the right to health care as opposed to a right to health.

### **III Structures and Institutions: Especially at the National Level**

We turn to the governmental system, including the executive, the legislature and the court system. Initially we deal with the national level, and then turn to the who issue of the federal nature of the proposed system.

#### ***The electoral system***

Political rights form a convenient point of transition between human rights and the structure of the state. We examine here the right to vote and contest elections and the electoral system. In a representative democracy such as the Fundamental Principles prescribe for Iraq, the people delegate the task of government to elected representatives, as they also do the responsibility for scrutiny of the government especially to delegates who compose the opposition. Article 5 states that the people are the source of authority and they exercise this authority in a ‘direct general secret ballot and through their constitutional institutions’. Article 6 talks of the peaceful transfer of authority in accordance with the constitution. Article 20 assures the right to participate in public affairs and to enjoy political right to ‘voting, election and nomination’. These articles place the right to vote and the right to stand for public office at the centre of the political system.

The details on the electoral system are unclear (at least in the English version). Article 47(1) stipulates that there shall be one member of the CR per 100,000 Iraqi persons ‘representing the entire Iraqi people’. However, the DC does not set out the method of voting or nomination or some other key aspects of the electoral system. It may be that the reference to ‘representing the entire Iraqi people’ means that the entire country will be one electoral constituency (as in the elections to the TAL). If so, the DC creates a controversial system, at least in the present circumstances when the Sunnis feel grossly disadvantaged. The latter might secure larger representation, even if only a small proportion of them vote, in areas where they are concentrated, if a system of multi-member constituencies is adopted. Although a single national constituency can produce full proportionality, it has several disadvantages, particularly in the control it gives political parties and the lack of close, effective connections between the people and their representatives. Alternatively Article 47(1) could be read as setting a target ratio of people to CR members, rather than prescribing an electoral system, but it is certainly unclear.

Article 47 (1) seems to require the representation of ‘all components’, but does not state whether this would be proportional. Article 47(4) states that the electoral law ‘aims’ to achieve not less than 25% women. Neither clause indicates how these forms of representation would be secured, and in the case of women, it is not even clear that a legal obligation has been created in their favour.

Article 99 establishes an Independent Electoral Commission but neither its composition nor its functions are prescribed. These will be dealt with in a law. There are a large number of tasks in the preparation and conduct of elections, and the precise functions vary from country to country. Basically their function is to ensure fair elections, which

can involve the drawing of electoral constituencies (if they exist), registration and supervision of political parties, the preparation of electoral rolls, receiving and scrutinizing nominations for candidates, and the conduct of actual elections. The DC constitution does not give any idea of which of these tasks are the responsibilities of the Electoral Commission, and when they are not, who is responsible for them. This is important because the whole function of an independent electoral commission is to insulate elections from political interference, so the Constitution should ensure that the commission does have the necessary powers.

The DC deals with another aspect of the electoral system, that is, the resolution of electoral disputes. But the exact rules are unclear, at least to us who are not familiar with the legislation on elections in Iraq. It seems that the CR ‘must decide by a two-thirds majority, the authenticity of its members from thirty days from the date of filing an objection’ (art. 50 (1)). This decision can be appealed to the Federal Supreme Court (art. 50(2)). We do not fully understand the procedure (and the DC gives few clues). But it seems clumsy to us to have the CR decide at first instance, and Supreme Court to hear appeals on elections—there may different procedures and burdens of proof. It is also likely that CR will decide on political grounds and perhaps the Supreme Court on legal grounds.

Aside from the doubt about the interpretation of article 47, these provisions give a fairly good idea of the electoral system, although there would be an advantage if they could be brought together under one chapter (which would also highlight the role of elections and the importance of voting). However, these provisions do not tell us who can vote and who can stand for elections, and the procedures for nomination. These are matters for future legislation (art. 47(3)). Nor does the DC say anything about political parties, which not only play a critical role in elections, but also in the performance of democracy, the running of the government as well as mechanisms of scrutiny and accountability. Although detailed specifications on these issues do not belong in a constitution, the general principles could be stated with greater clarity (and act as guidance to the legislature responsible for the legislation).

The method of elections of the president and the appointment of the prime minister are discussed in the next part.

### ***The structure of the state and the political system***

The structure of the state and the system of government are the most important aspects of any constitution. They determine how the power of the state is distributed and will be exercised. Other institutions, however independent, are inevitably influenced by those who control the executive, and to a lesser extent, the legislature. The degree to which human rights are respected and protected will also depend a great deal on the structure of government and the pressures or otherwise than the rulers come under from other sources. The degree of the participation of the people in the affairs of the state as well as the accommodation of a diversity of interests are also dependent on the structure of the government.

The preamble of the DC describes the state as federal, democratic and parliamentary. The last word refers to the system of government, under which the executive is continuously accountable and responsible to the legislature and therefore can be removed by the

legislature at any time by a vote of no confidence. The other important aspect of a parliamentary system is that executive powers are vested in a 'collective' known as the cabinet, in which ministers make decisions together, although the prime minister is the head of government. This allows for the participation in government of a variety of interests and groups than is directly possible in a presidential system. There is some sort of consensus among academics that parliamentary systems of government are more suitable than presidential systems for a transition to democracy.

In the context of Iraq, the parliamentary system is appropriate because unlike in an executive presidential system, the powers of the government are not vested in one person, the president, but is collectively exercised by the prime ministers and the cabinet. This suits the multi-ethnic nature of Iraq, by allowing the participation of various parties or communities to participate in the government, and allows the possibility of inclusive government. However, it must be acknowledged that normally parliamentary systems works on the principle of majoritarianism, and if one community or party can win a majority in the legislature, it has no need to include others in the cabinet or other senior posts. This can lead to the dominance of one ethnic group over others.

While some may object to a rule which requires all communities to be represented in the cabinet (as perpetuating, for example, ethnic divisions), it is important that the government should be inclusive. The best way to achieve this result would be through the emergence of non-ethnic parties. But this may take time and consideration might therefore be given to a provision that obliges the prime minister to compose the cabinet to reflect the diversity of the country. We understand that an amendment to the DC provides for two deputy prime ministers (presumably on the understanding that this would give each major community a senior post in the government), but that this, like the tripartite presidency council, would only operate for the first electoral cycle.

Whether the government consists of one party or more will depend to some extent on the electoral system. Proportional representation systems tend to produce a larger number of parties than the majoritarian system and often no party has a clear majority in the legislature. In that case coalition governments become necessary, and while these may be more inclusive, they may also tend to be fragile. However, we believe that they are better than governments composed of a single or predominantly single party.

In the TAL, while there is no requirement of an inclusive government, the presidency council (which will operate for probably the first 4 years) is designed to check the dominance of one community to the disadvantage of others. It consists of the president and two deputies who take their decisions unanimously (art. 36(C)). Its formal function is to 'oversee the higher affairs of the country' (art. 36 (A)). It has limited powers to veto legislative bills (art. 37). The presidency council nominates the prime minister 'unanimously' (art. 38(A)). The presidency council can thus ensure that no legislation opposed by a major community can be passed, and that the person appointed prime minister is broadly acceptable to all communities. We believe that it is wise not to have such a system in perpetuity; it is not viable in the long run, as it would produce too much tension between the legislature and the government on the one hand and the presidency on the whole, and is bound to result in the weakening of the presidency.

The 'federal' characteristic refers to the division of the powers of the state between a national (or central) government and regional governments. Traditionally federal constitutions concerned themselves with two levels of government, but recent federations also provide for a third level (in the nature of constitutionally protected local authorities). Traditionally all the regions had similar powers and institutions, and had a similar relationship to the central government, but now it is not unusual for one or more regions to have greater powers and different institutional arrangements than others and a different relationship to the centre (such arrangements are often known as 'asymmetrical'). Federalism is therefore often defined as a combination of self-rule at the regional (and local) level, and shared-rule at the national level where all parts of the country participate in government.

### ***The federal (national) government and authorities***

The DC specifies the federal authorities in considerable detail but says little about the organization of regions or governorates. The third section of the DC is headed 'Federal Powers' which deals not so much with powers, as with the structure of federal institutions (and might be better titled 'Federal Government'). The section concretizes the description of Iraq as a federal state. It contains four chapters, each devoted to one of the institutions into which the federal government is divided: the legislature, the executive, the judiciary and independent commissions. The relationship between the three major organs of the state is to be governed by the principle of the separation of powers, although as we show, the parliamentary system does not lend itself to this principle in a strict way.

### ***The legislature***

The federal legislature is to consist of two houses, as is usual in federations, one representing the people directly, in the Council of Representatives ('CR') and the other representing the regions and governorates, called the Federation Council ('FC'). The DC contains considerable detail on the composition of the CR, its functions, and the method of its work. The DC says almost nothing about the functions and precise composition of the FC, the second chamber being clearly an afterthought, although experts had emphasised its importance in a federal system. Thus, for the time being, the CR alone would constitute the federal legislature and it is on that basis that we discuss the legislature, leaving for later the consideration of the question of the FC. We have already discussed the composition of the CR and the method of elections. It is elected for four years (art. 54), although its life can be shortened by earlier dissolution (see discussion below). It regulates its own rules of procedure and mode of working (art. 49), including determining its own immunities and privileges (art. 60). The president convenes the first session of CR within 15 days after general elections are ratified (art. 52), and may convene it at any other time or 'ask' (what does this mean – is it really a request or is it an instruction?) for extension of a sitting (art. 56); but otherwise does not seem to have any control over parliamentary calendar.

Some procedural rules are prescribed in the DC itself. Thus the quorum is an absolute majority of members (art. 57 (1) (A)) and its decisions are taken by a simple majority unless otherwise specified (art. 57(1) (B)). The more important decisions are to be made by higher majorities (which may require some support from minority parties). Decisions must be made by an absolute majority in the following cases: election of president and

vice-presidents of the CR (art. 53), withdrawal of confidence from a minister (art. 58(8)(A)), or from the prime minister (art. 58(8)(B)(2), removal of the president (art. 58(6)(B), approving appointments of senior judiciary (art. 58(5)(A)), dismissal of members of independent commissions (art. 58(8)(E)), and the dissolution of the CR (art. 61(1)). And the following decisions must be made by a two-thirds vote: law to establish the FC (art. 62), to determine the ‘authenticity’ of its membership (art. 50), to approve declarations of war and state of emergency (58)(9)(A)), the law to regulate the ratification of treaties (art. 58 (3)), and the election of the transitional presidency council (art. 134). (It is unclear whether the two-thirds vote must be of those members who vote or of the total membership of the CR; in the case of arts. 62 and 58(3)), the reference is to ‘two-thirds of members’, while in the other cases it is simply to ‘two-thirds’ majority—the difference can be decisive and the matter needs to be clarified). A rather complicated system of voting is prescribed for the temporary presidency council. The presidency council is elected and may be dismissed (on specified grounds) by the CR by a two-thirds majority; a single member of the council can only be dismissed by a three-fourths absolute majority vote; the council may exercise limited veto over legislative bill by unanimity and the CR may override the first veto by an absolute majority and the second veto by third-fourths vote (art. 134 (5)—an interesting case not only of the significance of different levels of voting, encouraging or otherwise a compromise, but also of the consociational<sup>1</sup> tendencies of TAL reflected here, and to some extent of the DC.

The CR has the usual powers of a legislature in a federal, parliamentary system: enactment of federal laws, approving financial legislation, electing and removal the president, appointing and dismissing the prime minister and ministers, scrutinising the policies and conduct of government and holding it accountable, approving declarations of war and emergencies, and approving the appointments of senior members of the judiciary, public and diplomatic service, and the armed forces (art. 58). The most important of these functions is law making and the formation and dismissal of government (this latter matter we discuss in the next section). On law making, its capacity is limited for the scope of federal law making powers is severely limited. And with that restriction also come limits on its role in supervising administration or controlling the state’s finances, etc. In most federations federal legislatures have a greater role in national affairs (including aspects of regional governments) through a second chamber which represents the regions and protects their interests, or negotiates with regions, especially on matters of concurrent jurisdiction.

We discuss another, somewhat unusual aspect of the CR: the rules for its dissolution before the expiry of its normal term of four years below under ‘executive’.

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<sup>1</sup> ‘Consociational’ is a term used by political scientists to describe a system in which powers are shared among different communities and each community is represented proportionately in the legislature, the executive and public services.

## *The executive*

### *The Presidency (under the Presidency Council system)*

This system of the executive and its relationship with the legislature will not come into force until the second term of the CR (i.e., normally not before the end of 2009). Article 134 (in the chapter on transitional provisions) sets up a presidency council ('PC') consisting of a president and two vice presidents, elected on a common ticket by a two-thirds in the CR (and removable by a similar vote, although any single member could be removed by a three-fourths vote). The decisions of the PC must be unanimous, thus giving each member a veto.

The presidency council exercises a great deal more power than the president would under the permanent provisions of the DC. In addition to exercising the powers of the president stipulated in the main text of the DC, it has a limited veto over legislative bills. If the PC vetoes the bill, it is sent back to the CR for its re-consideration. If the CR approves it by an absolute majority, the bill is forwarded to the PC. If it is vetoed again, the CR may adopt it (bringing it into force) if three-fourths of the members vote for it.

These provisions of course define a different relationship between the presidency, the council of ministers, and the CR, giving in effect important vetoes to the major communities, continuing for a period the more consociational approach to the presidency of TAL.

### *Presidency (after the initial period when the Presidency Council system will continue)*

The federal executive consists of the president and the Council of Ministers (art. 63). The president is elected by the CR by a two-thirds vote of its members; failing a two-thirds vote, members vote among the two top candidates and the winner becomes president (art. 66). Since the president is the head of state and not merely of the federal authorities, and symbolizes the state, it would have been better if both legislative chambers (the CR and FC) and heads of regional and governorate councils were to form the electoral college for the presidency.

A presidential term is four years, but can be terminated prematurely on an early dissolution of the CR, in this way coinciding the terms of the CR and the presidency (as also in the rule that a person succeeding to the presidency when the office become prematurely is entitled only to the remaining period of the predecessor's office, article 69(C)). The rationale for this is not clear. There may in fact be an advantage in the president staying on in office, to provide continuity and ease the transition to a new government as well as in giving the president a certain degree of autonomy from the CR. No one may be president for more than two terms (art.69). Assuming that the CR is dissolved only a few months after its election, would the president be deemed to have 'used up' one of two possible terms? Similarly, if the successor to a president (under art. 69(C)) enters office (on a vacancy arising) when, say, only two years are left of the predecessor's term are left, will he or she be entitled to two further terms, or will the truncated term count as one term? CR can dismiss the President by an absolute majority after being convicted of 'perjury' of oath, violation of the constitution or high treason (art. 58(6)(B)).

Is there to be a vice-president or not? One or more vice-presidents? And if there is to be one or more vice-presidents, is there to be concept of a 'joint ticket'? There seems to be no article establishing the office of the vice-president; only an indirect reference to the office in article 66. Article 66 leaves only the nomination to the CR, but not the functions etc., while article 72(3) provides for the vice-president to assume duties of the president on a temporary basis (which vice-president if there are two of them?).

The office of the president intersects on various points with the legislature and the government: in its own appointment or the appointment of the government, as check on the prime minister and ministers, as collaborating with or checking the legislature, as a stabiliser of the political system, etc. Indeed a full understanding of a parliamentary system is scarcely possible without an examination of these intersections.

Presidential functions are both ceremonial and substantive. Some of the functions are exercised on the advice of others, or in accordance with stipulations in the constitution, and others in his or her own discretion. The ceremonial functions include representing the sovereignty of the state, symbolising the unity of the country, acting on the advice of others, particularly the prime minister (e.g., in giving pardons, ratifying treaties, awarding honours, accrediting ambassadors), being the commander of the armed forces, convening meetings of the CR after general elections and other specified occasions (art. 61(2)); and giving consent to legislative bills. The substantive powers (meaning those where the President exercises a personal choice) are: calling a special session of the CR or requesting the extension of a session (art. 56), presenting a legislative bill for the consideration of the CR (art. 57(2)), requesting the CR to remove the prime minister (art. 58 (8)(B)(1), declaring war or state of emergency together with the prime minister (art. 58(9)(A)), giving consent to the submission by prime minister to the CR for its dissolution (art. 21 (1)), ratifying death sentences (art. 70(H)), appointing the prime minister-designate (art. 73(1), acting temporarily as prime minister if that office is vacant (art. 78). The president may issue presidential decrees (art. 70(G)). The scope of these decrees is not specified, and it is unclear whether they are of a legislative character.

Some powers exceed those which are usually given to the head of state in a parliamentary system. These powers of the president may be based on the assumption the president needs to be a check on the prime minister and the government, and a guardian of the constitutional order (a position implicit in the presidential symbolic role defined in article 64). There may be some virtue in this, but it affects the overall constitutional allocation of responsibilities and more specifically the prime minister's accountability to the CR, and his or her relationship with it. Sometimes a mainly ceremonial president may be a senior politician who has prime ministerial ambitions, frustrated by the limits on his/her real powers as president, and inclined to intervene in the work of the cabinet. These provisions may well be used by such a person to meddle unduly in national politics, and to politicise the office of the presidency. In fact the more powers that might be exercised for political motive are given to the president the more likely it is that a person with political ambition will seek the presidency.

On the other hand, the President is given no power to return a law to the CR for reconsideration – a power that is exercised by presidents in some parliamentary systems. In the CD a law is automatically treated as approved by the President 15 days after he/she receives it (art. 70).

CR may question the President ‘based on a justifiable petition’ by an absolute majority of CR members (art. 58(6) (A)) and may dismiss him or her by a similar vote after conviction on violating the constitution, high treason or ‘perjury of the constitutional oath’ (art. 58(6)(B)).

#### *Prime Minister and Council of Ministers*

It is the council of ministers which exercises the functions and powers of the executive, that is, the task of carrying on the government and administration of the country (in relation to federal powers). The prime minister is described as ‘the direct executive authority responsible for the general policy of the state and the commander-in-chief of the armed forces’ (art. 75). The prime minister chairs the council of ministers and chairs its meetings. The council has the responsibility to plan and execute the general policy and plans of the state and to oversee the work of government agencies (art. 77 (1)). It proposes legislative bills, ensures implementation of the law, prepares the budgets and manages state finances, nominates to various state offices for approval of the CR and negotiate and sign international agreements and treaties (art. 77).

The government is formed in the following way. The president designates as prime minister a person nominated by the largest ‘bloc’ in the CR and authorises him or her to form a cabinet (art. 73).. The prime minister-designate presents a ministerial programme and the list of ministers to CR for a vote of confidence by an absolute majority. If the vote of confidence is defeated, the president must nominate another person as prime minister-designate. It is not clear but is likely that at this stage the president is no longer bound to accept a nominee from a parliamentary bloc.

The DC is silent on what is to happen if even the second nominee fails to get the vote of confidence. Is the president to go on nominating unless a person does obtain the confidence of the CR? This process may go on for a long time and cause immobility in the government and create a major constitutional crisis. Most constitutions provide that if no government can be formed within a specified time or after a specified number of nominees, the legislature must be dissolved and fresh elections held. Normally this threat is sufficient to persuade parliamentarians to resolve their differences. It is critical that the constitution should specify what is to happen.

The DC does not say whether the nominees for the prime minister or minister should be members of the legislature. Article 74 rather suggests that they would or could be drawn from outside the legislature (it would otherwise be unnecessary to specify that Ministers should have the same qualifications as members of the CR). In most parliamentary systems they would have to be members (or would have to seek membership within a short period). In some systems, however, if ministers are appointed from within the legislature, their membership is suspended for the period they are ministers (as in France). In this variation of the usual parliamentary system, ministers have the right to participate in the proceedings of the legislature even if they cannot vote. There may be advantages in drawing the cabinet from outside the legislature, so that there is no conflict between their duties as representative and as minister. However, it is critical to the parliamentary system that ministers are able to work with parliamentarians and mobilise support for their policies; this often requires that ministers are active politicians and working with political parties. It is an advantage if the prime minister, at least, is a

member of the legislature. Whatever the position intended by the TNA, it would be useful if the constitution were explicit on these matters, and specified the ways in which ministers are able to participate in the proceedings of the CR and FC.

In parliamentary systems, ministerial responsibility is an important aspect of a parliamentary executive for accountability. For that reason, the responsibility is also collective, which means that there must be discipline or solidarity among ministers. Decisions of the council of ministers must bind and be supported by all ministers in public. It is also for this reason that the prime minister is able to choose the ministers and to dismiss them. In the CD the prime minister and ministers are stated to be accountable and responsible to the CR. The responsibility is both individual and collective (art. 80). The CR may remove the prime minister (art. 58(8)(B)) or individual ministers (art.58(8)(A)) on a vote of no confidence by an absolute majority. If the prime minister is removed (art. 58(8)(C), or there is a vote of no confidence in the council of ministers (art. 58)(8) (D)), the entire government falls and the procedure for the appointment of the new government must be commenced. However, the prime minister will have a lesser degree of control over appointments and dismissals than is usual. In particular he cannot dismiss a minister without the consent of the CR (art. 75). While the rules for appointment and dismissal of ministers may be intended to ensure that the council of ministers represent a wide cross section of political (and community) interests, they would greatly weaken the position of the prime minister both vis-à-vis the CR and the council.

We find similar difficulties in the rules governing prime minister's relationship with the president. It is not entirely clear whether the presidential power to submit legislative proposals to the CR (art. 57(2)) can be exercised on his own initiative or jointly with the prime minister (we assume the former). Granting the president the power to initiate legislation is a significant departure from the parliamentary system and has the potential to create conflict with the prime minister or the cabinet who are expected to be responsible for most legislative bills.

The use of presidential power to request the CR to dismiss the prime minister (art. 57 (8) (B)(1)) will undoubtedly cause conflict between the president and the prime minister, politicise the presidential office and could be the source of a major constitutional crisis.

(On the other hand the joint declaration by the prime minister and the president of war or emergency (for approval by the CR (art. 58 (9)) seems well justified as these are serious decisions which can also be motivated by partisan interests).

#### *Problems over dissolution of the legislature*

The ability of the prime minister to secure, or at least to request, the dissolution of the legislature is standard in parliamentary systems. But in the DC the position of the Prime Minister is significantly weakened by two unusual rules. Firstly, the prime minister cannot even ask for the dissolution of the legislature without the consent of the president (art. 61 (1)). The president is unlikely to consent to the prime minister's request as the president will lose office if there is a dissolution. There may thus be conflict between what action which may be necessary to resolve a stalemate in the legislature or in legislative-executive relations and the personal interests of the president. The problem would be less severe if criteria were included such as that the PM cannot ask for dissolution if he/she does not command a majority, or in time of national crisis.

Secondly, the CR can dissolve itself, with the approval of an absolute majority of its members, on a request of either one third of its members or the prime minister with the consent of the president (art. 61).

In parliamentary systems generally the legislature may be dissolved earlier than its normal term if it becomes too fragmented to be able to elect or support a government, in the hope that its successor will provide greater stability. In some systems the Prime Minister is able to call a general election at any time (though this gives what is sometimes thought of as excessive power to the Prime Minister to seize what may be an unusually propitious moment). Another occasion for early dissolution may be when the legislature removes the government on a vote of no confidence; this may occur only if no alternative government emerges. And in some constitutions motions of no confidence in the government may only be introduced if an alternative prime minister is nominated in the motion itself. The threat of early dissolution often leads parliamentarians to resolve their differences sufficiently to continue their term. The guiding principle is that differences between the legislature and the executive are best resolved by referring them to the people who express their preference in the following elections.

But under the DC, dissolution can take place only by a decision of an absolute majority of the members of the CR. Since it can remove the government by a vote of no confidence but the government cannot dissolve it, it is unlikely that differences between the two of them would be referred for resolution to the people. The only a mechanism to dissolve the legislature - even if there is no party or coalition with a sufficient majority to elect or support a government - is a decision of the legislature which is unlikely. The effect would be to weaken the government vis-à-vis the legislature, and a tendency to produce fragmentation and political instability. Since only a majority can dissolve the legislature, minority parties can find themselves under pressure from the majority. And if politics becomes ethnicised, then the majority community would have unfair leverage over minorities. All these possibilities suggest the need for reconsideration of the rules governing dissolution. The improbability of dissolution might avoid frequent general elections, but perhaps not political stability and efficiency overall.

### *The Public Service*

Modern constitutions recognise, and regulate, another major component of the state—the public service. With the increase in the role of the state, the public service has become critical to its proper functioning. It is a source of considerable patronage and of power; and is a major employer. Its relationship to the executive is complex. While it must carry out governmental policies and assist ministers, it must also follow the law and exercise its own professional judgement, which necessitates a degree of autonomy. The public service also has the responsibility to serve the people and be accessible to them.

The DC assumes the existence of the public service, and the need for its autonomy. It sets up a Federal Public Service Council to ‘regulate the affairs of the federal public service, including appointment and promotion’ (art. 104). Nothing more is said about the Council or the public service, particularly about the principles governing the organisation and functioning of the public service, these matters being left to legislation. However, the fact that the Council itself appears in the chapter on independent commissions suggests that it must be independent so the process of recruitment into, and the terms of employment, in

the public service are fair and protect public servants from undue pressures, and ensure efficient administration. Equally, the public service has the responsibility to the people. It would have been useful if these basic principles were specified in the DC.

However, one aspect of the public service does receive an extended treatment—the armed and security forces (which is understandable in view of Iraq’s history). The basic principles for the armed forces are that (a) their composition must all reflect all components of the people; (b) recruitment should be without discrimination or exclusion; (c) be under the control of civil authorities; (d) must not take part in politics nor interfere in political affairs, and (d) defend Iraq and ‘shall not be used as an instrument of oppression against the Iraqi people’ (art. 9(1) (A) to (C)).

The National Intelligence Service must also reflect the principle of proportionality of different sections of society. It must be under civilian control and is subject to legislative oversight. It must respect the law and act in accordance ‘with the recognised principles of human rights’ (art. 9). Article 81 substantially repeats the requirements of oversight and respect for human rights, and extends them to ‘security institutions’.

Although the DC insists that the forces ‘shall be subject to the control of the civilian authority’ and in the case of the Intelligence Service also ‘subject to legislative oversight’ it goes into no detail and sets up no institutions to ensure that reality reflects this injunction.

### *The Judiciary*

The DC establishes only federal courts, although it gives regions and governorates the authority to set up its own courts (not inconsistent with the constitution). An important constitutional principle is that the ‘judiciary shall be independent and no power shall be above the judiciary except the Law’ (art. 19). As this principle appears in the section on rights, it presumably applies to both federal and sub-national judiciaries. A number of articles set out the basic principles of the federal judiciary: article 84 says that judicial authority is ‘independent’ and various kinds of courts ‘shall assume this authority and issue decisions in accordance with the law’ (thus perhaps ‘vesting’ judicial authority exclusively in courts); article 85 proclaims the independence of the judiciary and states that there is no authority over them except the law; no authority may interfere in their work or ‘the affairs of Justice; article 94 says that judges may not be removed except in cases specified by the law, which would ‘determine the particular provisions related to them and shall regulate their disciplinary measures’. Article 95 prohibits judges and prosecutors from other jobs, including those in the legislature and the executive, and from joining any political party or organization or engaging in any political activity. The Federal Supreme Court is defined as ‘an independent judicial body, financially and administratively’ (art. 89(1)). Article 92 prohibits the establishment of ‘special or exceptional courts’. Article 97 says that there can be no ousting of the jurisdiction of courts over ‘administrative work or decisions’.

The intention therefore to establish an independent judiciary is clear. But the wording can be improved. The reference in article 85 to only law being above the judiciary seems insufficient protection, for the law itself may set up institutions over the judiciary. Article 94 likewise gives the legislature the power to determine the tenure of judges and how and by whom they may be dismissed—potentially a serious threat to judicial independence.

Judicial tenure and the salaries of judges should be protected in the constitution. Qualifications necessary for appointment to the judiciary, particularly the higher judiciary, should also be specified in the constitution, to ensure a competent and honest judiciary, and to prevent the executive from appointing its supporters with few requisite skills. On a more technical level, it would be useful to bring together all these articles dealing with the vesting of judicial power in the courts and with the independence of the courts and judges, and put them under a separate subchapter.

Again, although it is unlikely to have been the intention, the structure and power of authorities in the judiciary chapter could be read as giving judges insufficient protection for their independence. Judicial and legal institutions (the Supreme Federal Court, the Federal Court of Cassation, Public Prosecution Department, Judiciary Oversight Commission and other federal courts) are to be overseen by the Higher Judicial Council (article 87). The Council is to ‘manage the affairs of the Judiciary and the supervise the Federal Judiciary’; to nominate the Chief Justice and the members of the Federal Court of Cassation, the Chief Public Prosecutor, and the Chief Justice of the Judiciary Oversight Commission for approval by the CR; and to propose the budget for the judiciary to the CR (art. 88). These functions are critical to the independence and efficiency of the judiciary (particularly the way ‘oversight’ will be understood). Yet the DC does not say who will compose the Council, how they will be appointed, what independence they will themselves have, and what is meant by oversight, and whether it would extend to a scrutiny of court judgments. These are left to be determined by law. We believe that on matters of such importance the constitution should itself establish the rules, and it should be made clear that the Council will not interfere in any way with the independence or fairness of judicial proceedings and the making of court decisions.

The powers of the Higher Juridical Council over the Supreme Court are not clearly stated. The composition of the Supreme Court, and the method of their appointment, is to be determined by law (made by the vote of two thirds of the CR) and has to include experts in Islamic jurisprudence (art. 89). Presumably in other respects they are subject to the same rules as applies to ‘judges’. Leaving the qualifications and the mode of appointment of judges out of the constitution diminishes the independence of the Supreme Court. The constitution also fails to specify the method of appointment of lower level federal courts. No principles or guidelines are prescribed for the appointment of regional or governorate courts, a matter left entirely to regions or governorates.

Article 90 sets out the jurisdiction of the Supreme Court, and covers mostly constitutional issues, including the constitutionality of laws and regulations, disputes between different levels of government, questions of the jurisdiction of federal and other courts, accusations against the president, prime minister and ministers. The Supreme Court has jurisdiction over the application of ‘federal laws, decisions, regulations, instructions and procedures issued by federal authority’. Finally it has the jurisdiction to ratify the final results of the general elections for membership in the CR (art. 90 (7))—it is not clear to us whether this means that it decides specific electoral disputes or makes some formal decision on the validity of the electoral process more generally. Nor is it clear how this jurisdiction squares with the authority of the CR to decide the ‘membership authenticity of its members within thirty days from the filing of an objection’ (art. 50). The constitution does not specify whether the different heads of jurisdiction are originating or appellate. It

would certainly be better if some matters of the application of federal laws originate in lower level courts.

The DC says little about other federal court it specifically mentions, the Court of Cassation. We understand that in the previous regime, the Court of Cassation was the court of last resort for all except security cases. It was divided into general, civil, criminal, administrative affairs, and personal status benches. In addition to its appellate function, the Court of Cassation assumed original jurisdiction over crimes committed by high government officials, including judges. The Court of Cassation also adjudicated jurisdictional conflicts between lower courts. These now seem to be the responsibilities of the Supreme Court. It is unclear what its role will be and how it relates to the Supreme Court.

There are no provisions on the Judiciary Oversight Commission or the Public Prosecution Department. It is critical that prosecutorial decisions are insulated from external directives or pressures. Nor does the DC say anything about the provision of legal staff to the government, such as the office of the Attorney General.

In conclusion, our assessment is that the intention of the drafters is commendable in trying to establish the independence of the judiciary and to give it responsibility for the interpretation and safeguarding of the constitution. But the DC does not fully achieve the goals the Constitution Committee may have set itself. There are various technical difficulties, confusion and uncertainties that need to be corrected. The DC provides for a complex political and legal system, with varying levels of authorities, including judicial authorities and it is critical that it has a good judicial system to handle many legal problems that are bound to arise, and to bring cohesion into the constitutional order.

### ***Independent Commissions***

The DC establishes a number of independent or quasi-independent bodies (in Chapter 4 of Section 3). It has become common in contemporary constitutions to establish independent commissions for the discharge of politically sensitive functions and for purposes of accountability of state officials. The intention is to insulate the performance of these functions from political interference or pressures. Sometimes commissions are also set up to assist the government to carry out some functions which require special expertise and in the work of which non-officials can participate. Commissions have also become common in federal states to promote inter-governmental co-operation and manage inter-governmental relations. The DC has examples of all these kinds.

Three commissions are set up for functions where independence is important. These are the High Commission for Human Rights, the Independent Electoral High Commission and the Commission on Public Integrity (art. 99). The draft constitution does not set out their functions or modalities, although their titles give an indication of their tasks. The Integrity Commission, for example, would presumably have the responsibility for implementing article 123 which seeks to set up a code of honest behaviour by senior state officials (but is curiously placed in the chapter on Final Provisions). The Human Rights Commission is a vital institution for the protection of rights, yet there is no detail about it – the CD is even less explicit than the TAL which said that the Commission must comply in composition and operation with the Paris Principles.

Organisations to assist the state in the performance of its duties are the Central Bank of Iraq, the Board of Supreme Audit, Communications and Media Commission, Endowment Commission (art. 100) and the Foundation for Martyrs (art. 101). Here again, the tasks are not specified but can be gleaned from their titles.

The DC establishes the Federal Public Service Council to regulate the affairs of the federal public service, including appointment and promotion (art. 104).

The DC continues in existence the High Commission for De-Ba'athification and the Property Claims Commission (arts. 131 and 132).

Finally there are two commissions which deal with federal relationships (they are not assigned any title). The first, composed of representatives of the federal, regional and governorate governments, is to guarantee 'the rights of the regions and governorates that are not organized in a region of fair participation in managing the various state federal institutions, missions, fellowships, delegations, regional and international conferences (art. 103). The other is 'audit and appropriate federal revenues' (art. 103). Its function is to ensure fair distribution of grants, aid and international loans to regions and governorate; the ideal use and division of the federal financial resources; and transparency and justice in appropriating funds to governments of regions and governorates.

In each case a law will be established to set out their functions, composition, etc. While there is merit in leaving these matters to legislation, essential principles of independence, the mode of appointment of members and the terms of their tenure, and their principal responsibilities should be set out in the constitution.

Although the title of the chapter is 'Independent Commissions', it is clear that not all organizations established in the chapter are really independent. Most are accountable to one or another government body. The CR can interrogate and dismiss heads of independent commissions (art. 58(E))—presumably 'independent commissions' covers all the organizations in this chapter. Dismissal should be possible – but only in case of proven and serious abuse of power or breach of law or the Constitution, and after a fair hearing. Dismissal by the CR alone is likely to be too political.

We support the concept of independent commissions, as a means to accountability and public participation. However, a great deal will depend on the legislation establishing them. Given the lack of principles and details in the constitution, it would be very important that the legislation emphasizes the independence of these institutions and sets out their functions with some specificity and clarity, as they are bound to become controversial. Equally, they must be given sufficient financial and other resources.

#### **IV The federal structure**

##### ***The basic structure of the system***

The fourth section ('Powers of the Federal Government') sets out the division of powers between federal and regional/governorate governments. It also deals explicitly and implicitly with economic and financial resources to which each level of government will be entitled.

The DC provides for an asymmetrical federation. It envisages the possibility that some parts of the country will come fully under the federal government and therefore be in a 'unitary' relationship with it. There will also be some differences between those parts which have a federal relationship with the national government. The DC deals principally with two levels of government but guarantees a third level as protection for minorities, although few details are provided (art. 122). Baghdad as the national capital will have its own status, equivalent to a governorate; details are to be specified in legislation (art. 120).

### *Regions and governorates*

The principal sub-national units are regional and governorates. The reference to 'governorates' is to the governorates as presently constituted. It is possible for two or more governorates to come together to form a region, and even for a single governorate to become a region on its own (art. 115). There seems to be no difference between a region made up of two or more regions and a single governorate-region. It is not clear whether governorates which form a region will have a special status within the region or be completely assimilated in the region. Also unclear is whether, if there is to be a special status, it will be determined by the federal government or each regional authority. Nor is it clear what the difference is between a region and a governorate which does not become a region. Some provisions suggest that regions will have a higher form of autonomy, others indicate no difference.

The DC frequently refers to 'governorates which are not incorporated in a region' and sometimes equates them with regions, sometime not. For example article 111 treats them equally, providing that all powers which are not exclusive to the federal government belong to regions or governorates which are not organised in a region. But article 118 (2) contradicts that when it states that a governorate which is not incorporated in a region shall be 'granted broad administrative and financial powers to enable it to manage its affairs in accordance with the principle of decentralised administration'. It seems that article 118 better describes the status of a governorate and article 111 is an inaccurate reflection of the framers' intention. This is borne out by several articles. Article 110 which lists 'competencies which are shared' refers only to the federal and regional governments. Only a region can adopt its own constitution (art. 116). There are separate chapters on regions and on governorates which are not incorporated in a region (chapters 1 and 2 in section 5).

The DC does not provide a clear picture of the status, structure and procedures of the sub-national units, as many matters are left to further federal legislation or the constitutions of regions. Because each region can form its own constitution, there are likely to be regional variations in structures and levels of government. Regional constitutions must be consistent with the national federation (art. 115). It may even be the case that not all regions will have a similar status and powers. But the matter is not clear.

### *The position of Kurdistan*

The situation is that the draft constitution recognises the existing region of Kurdistan, with its existing 'regional and federal authorities' as at the time of its adoption (art. 114). Kurdistan is the only region in Iraq so far and has its own constitution, which gives the region greater powers than are possible for a region under the DC. Is Kurdistan bound by

article 115 that regional constitutions must be consistent with the national constitution, in which case its own constitution will have to be amended? Article 136 maintains the validity of Kurdistan legislation and judicial decisions ‘provided that they do not contradict the constitution’, which suggests that despite the wording of article 114, Kurdistan would have to fall in line with whatever new arrangements are made for regions. This seems consistent with the understanding of the Kurdistan members of the TNA who negotiated hard to get maximum powers for regions, even though they accepted lesser powers than under the present situation (and have now set up a committee to review the regional constitution to bring it into conformity with the DC).

In some ways, it might be better to recognise the status, powers and institutions of Kurdistan as special and exceptional, a product of history and supported by realities on ground. If it is to be brought within a common regime of regions, the Kurds who hold a powerful position in the constitutional negotiations, will push for regions to have maximum powers, so that the centre will be greatly weakened.

#### *New regions*

A critical question thus becomes how new regions may be established? Until recently other governorates have not shown much interest in forming regions. The TAL provides for any group of up to three governorates to form a region, but no legislation has yet been enacted, as was expected, to provide the procedure for doing so (perhaps because of lack of interest among governorates). The DC assumes that no new regions will be formed before it comes into force, for it only recognises the Kurdistan region and other to be formed ‘in accordance with its provisions’ (art. 113(2)). Now some parts of the country have expressed an interest in regions. Article 114 requires the CR to enact a law within six months from its first session to provide ‘executive procedures’ to form a region (and states expressly, although unnecessarily, that the law will only require a simple majority). Such law will have to prescribe for a referendum of the people of the governorate or governorates on the issue at the request either of ‘one third of the council members of each governorate intending to form a region’ or of ‘one-tenth of the voters in each of the governorates intending to form a region’ (art. 115).

This opens up early possibility that new regions could be formed in the life of the first CR (in contrast to the delays in the formation of the FC or the bringing into force the provisions on the presidency), reflecting perhaps that influential groups are now interested in forming regions. It is very doubtful if six months for the legislation is sufficient, unless the scope of the law is restricted to procedures for the initial request and the conduct of the referendum. There will undoubtedly be other matters to resolve, including the pace of the transfer of powers and resources to the region, and many transitional matters. Pressures for the formation of regions may exist but it is important that the process of transition be managed efficiently, without haste which may cause chaos or breakdown in services.

#### *The question of size*

The TAL limits the maximum number of governorates who form a region to 3. This limit is abolished in the DC. At the same time, and perhaps somewhat paradoxically, the DC, unlike the TAL, allows a single governorate acting on its own to become a region (implying that size is irrelevant). The DC may, therefore, on the one hand lead to small

regions with little capacity for the enormous powers given to regions, and on the other hand create large areas negating the federalism benefits of participation, responsiveness and accountability.

The removal of the limit on the number of governorates that may join together may (and it is feared that it would) mean that the country could ultimately be divided into three large regions based on ethnic affiliations. This could have several negative consequences. First, it would reinforce sectarian divisions when the constitution should be finding ways to bring different communities together. The federal device, based on territory, could be used to cut across sectarian divides. A small number does not allow for a balancing of diverse interest, shifting coalitions; it tends instead to solidify differences. It will produce as ‘hostages’ members of communities different from the dominant ethnic community. It will make it harder to ensure basic equality of development and opportunity, and the satisfaction of basic needs of all, for it will hinder redistribution of wealth from the well off to the less well off. It could also encourage the dominant communities in these large blocs to look for support and alliances to neighbouring states with which they might feel some ethnic affiliation. Experience shows that federations with a small number of units are unstable and prone to either the dominance of one region over others or the dissolution of the federation (Nigeria, Czechoslovakia, Pakistan/Bangladesh, Ethiopia/Eritrea, and Yugoslavia. It is not too fanciful to suggest that this provision could spell the end of Iraq. This consequence is more than likely when we consider the division of powers (extremely limited powers to the centre) and the structure of the federal government (a rather shrivelled centre with little authority or institutions to pull the country towards it). It is to these two matters that we now turn.

### ***Division of powers***

The fifth section (‘Powers of the Regions’) deals with the powers of the regions and governorates (in addition to those in section four). It has four chapters, respectively on regions, governorates not incorporated in a region, the capital and local administrations (the last of which is concerned not with local governments but protection for minorities).

The method for the division of powers is as follows: there is an exclusive list of federal powers (art. 107). There are also powers which are shared between federal and regional authorities (art. 110). Unless a power is given exclusively to the federal authorities, regional law prevails over the federal (art. 111). Authority over oil is dealt with separately (arts. 108-109). Governorates outside a region do not seem to have any legislative powers (the wording of art. 111 notwithstanding). Certain other articles give regions additional powers (e.g., art. 4 on language and art. 117 (4) and (5), respectively over foreign affairs and regional security). Some powers appear in chapter 1 of section 5 and some in chapter 2. The formula for the grant of powers does not distinguish between legislative or administrative powers. The way in which powers are formulated, and some repetitions, make it difficult to establish with certainty what level of government can do what.

The exclusive federal powers are the following: (1) foreign affairs (‘formulating foreign policy and diplomatic representation; negotiating, signing and ratifying international treaties and agreements; negotiating, signing and ratifying debt policies and formulating sovereign economic and trade policy’); (2) national security (including creating and

managing armed forces); (3) fiscal and customs policies ('issuing currency, regulating commercial policies across regional and governorate boundaries in Iraq; drawing up the national budget of the State; formulating monetary policy, and establishing and administering a central bank'); (4) regulating standards, weights and measures; (5) regulating the issues of citizenship, naturalisation, residency and the right to apply for political asylum; (6) regulating telecommunication and mail policy; (6) draw up the general and investment budget bill; (7) water externally derived ('plan policies relating to water sources from outside Iraq and guarantee the rate of flow to Iraq in accordance with laws and international conventions, fairly within the country'); and (8) general population statistics and census.

When the word 'planning' or 'policy' is used without 'executing', does this mean that implementation is the responsibility of some other government? What is the difference between 'national budget of the State' (and does State mean federal) and 'general...budget bill'? When we examine the shared list, difficulties of this kind seem compounded.

The shared competencies are as follows: (1) 'to manage and organise customs in co-ordination with the governments of the regions and governorates that are not organised in a region' (this seems to give the basic responsibility to the federal authorities, although not mentioned in the article); (2) 'to regulate the main sources of electric energy and its distribution' (who co-ordinates? How is co-ordination to be secured?); (3) 'to formulate the environmental policy to ensure protection of the environment from pollution and to preserve its cleanness in co-operation with the regions and governorates that are not organised in a region' (does this mean that the primary responsibility is with the federal authorities?); (4) 'to formulate development and general planning policies' (how does this square with art. 107 (3) and (8)?); (5) 'to formulate public health policy in co-operation with the regions and governorates that are not organised in a region' (again, the wording suggests that the primary responsibility is that of federal authorities); (6) 'to formulate the public educational and instructional policy in consultation with regions and governorates that are not organised in a region' (again, federal authorities in charge?); (7) 'to formulate and organise the internal water resources policy in a way that guarantees fair distribution' (here it is not clear who 'formulates'; is this to be a joint effort with all having equal status?).

These powers are sometimes referred to as 'concurrent' and article 111 says that in case of conflict between federal and regional laws (no reference here to 'governorates'), the regional law shall prevail. But most of these powers are not concurrent in the sense that each government is free to make its own laws (subject to the supremacy of the regional). What article 110 aims at is co-operation between different levels of government so that co-ordinated policies can be established (the DC correctly describes them as shared powers). It does not necessarily assume that laws at different levels will be passed; article 110 (1) and (7) expressly state that 'a law' will be passed to regulate the matter in question, and laws are implied in other cases as well. Of course laws could be passed at different levels if discussions lead to a clear division of responsibilities. In some constitutions, the approach adopted is to vest responsibility in one level of government and require it to consult with others; in this way it is clear which institution has the ultimate responsibility.

Article 117 (2) also deals with conflict of laws, and says that if in a matter not exclusively vested in the federal authorities, a national law contradicts regional law, ‘the regional authority shall have the right to amend the application of the national legislation within that region’. How does this relate to article 111? Does this mean that outside of ‘shared competences’ there are areas where both federal and regional governments are able to make law? If this is so, then it implies that the federal government can make law on any subject whatsoever (but that outside of exclusive federal powers, its law can be overridden by regional law). This would give the national government considerably more legislative authority than appears from articles 107 and 110, which would be good. Since governorates have no law making power (as we think), it would be the federal legislature that would make laws for them—and most of them would be on non-exclusive powers. But do these broader law making powers apply also in respect of regions? Such important matters should not be left to implication, but stated clearly.

The formulation of article 117(2) is puzzling, it states that when there is a clash between national and regional law on a matter than an exclusive federal power, a region will have to make a law stating expressly that a federal law does not apply. The normal practice in federal systems is that if two laws conflict, that law which has priority under the constitution, prevails over the other without more (as is assumed in article 111). Because on these matters regional laws prevail, the result could be that a national law applies in different ways and to different extent in different parts of the country.

The other problem with ‘shared powers’ is that some at least of them are already vested ‘exclusively’ in the federal authorities. Regions and governorates will not be able to legislate on them (we have indicated in the previous paragraph what these might be), and therefore the rule that regional laws prevail over federal in these matters becomes problematic. For example, article 107 (3) gives the federal government ‘exclusive powers’ over customs policy; yet to ‘manage and organise’ customs is a shared power (art. 110(1)). And there are some powers which are not in article 110 but which give regions powers over exclusive federal powers. Of particular importance are foreign affairs and security (art. 117 (4) and (5) respectively). The former says that ‘regions and governorates shall establish offices in embassies and diplomatic missions, in order to follow up on cultural, social and developmental affairs’. Is this merely to observe or does it involve agreements with foreign governments? The second is more serious, for it detracts from the principle of a single national armed forces (implicit in articles 9, 106 and 107(2)). What happens if regional legislation or practice is inconsistent with the federal?

### ***Legal status of governorates***

The position of governorates which are not ‘organised in a region’ appears to be anomalous. Sometimes they are treated on par with a region and sometime as mere administrative units. In relation to the exploitation of oil and gas, they are treated on a par (art. 109) as are they in relation to residual powers (that is, those not given exclusively to the federal government) (art. 111) although as we have suggested this must be a mistake. They are entitled to receive a share of national revenues on same principle as regions (arts. 103 and 117(3)). Governorates can decide on additional official languages in the same manner as regions (art. 4) and have the right to establish offices in embassies (art. 117(4)). Governorates would be represented in the commission with regions and federal

government to ensure fair participation in certain functions (art. 102). On the other hand, governorates do not, as regions do, share some competencies with the federal authorities (art. 110); their laws cannot override federal in cases of inconsistencies in matters not exclusive to the federal authorities (art. 111 and 117); and they are not given power to determine their own constitutions (art. 116). The powers of governorates are not entrenched to the same degree as those of regions (art. 122 (4)), although there are few governorates to be protected. Above all, governorates do not have the wide administrative and security powers of regions (art. 117(5)).

The true nature of governorates is probably revealed in article 119 in chapter 2 of section 5 ('Governorates that are not incorporated in a region') which shows them as the basis of decentralised administration. Such a governorate 'shall be granted broad administrative and financial powers to enable it to manage its affairs in accordance with the principle of decentralised administration' (art. 119(2)). There will be an elected Governorate Council, which will elect the governor whose powers will be authorised by the Council; the governor will be 'the highest executive official in the governorate'. To indicate a true system of decentralisation, article 119(5) says that the Council 'shall not be subject to the control or supervision of any ministry or any institution not linked to a ministry'. It also states that the governorate council shall have 'independent finances'. A law will authorise the federal government to delegate its power to the governorate, and vice-versa, with the consent of both the governments (art. 119)—a provision which surprisingly is not included in relation to regions. The DC does not confer any legislative powers on a governorate. Nor do governorates have their own courts. In these two respects at least, there will be total dependence on federal authorities.

The chapter gives a reasonable picture of the essential principles of the administration of a governorate. A governorate comes directly under the federal authorities and is subject to all laws applicable to or in the governorate. It seems to no taxing powers under the DC (but see discussion below), and would rely on grants from the federal government. Nor does it seem to have any administrative matters over which it has full autonomy. It has no public service of its own (as regions would have) and would rely on federal public service. But it would have considerable control over administration in its area, operating under federal laws, and in particular ministries would have no authority over it. However, the DC does not explain the nature of its relationship with the federal authorities. If federal ministries have no control over its administration, to whom does the governorate relate at the federal level? And how do the federal authorities discharge their national functions in governorates? One could question on the meaning of some phrases, and the feasibility or effectiveness of administration without some involvement of ministries. But no doubt these matters would be addressed in the legislation (for which no deadline is prescribed, as for the regions).

It would seem, however, that given the absence of any real policy making functions, the leaders of a governorate would be greatly tempted to opt to become a region, especially as they could do so without merging with other governorates and without losing its identity. The likely result is (and this proposition is supported by experience elsewhere) that in a short time all governorates would choose to become regions. It is therefore important that in the legislation to be enacted to provide for the change of status, criteria relating to capacity should be established (although whether this would be consistent with

the constitutional promise of a regional status may be debated). But it would be fair to say that the DC can be evaluated, and the federal system analysed, on the assumption that in a short time Iraq would become federal throughout all its territories. And what is more, as we have argued above, that in time, if sectarian sentiments continue to strengthen, that Iraq could end with three or so units.

### ***The capital city***

Baghdad will be the national capital (art. 11). Its status will be that of a governorate, except that it cannot join a region. But could it not claim for itself the status and powers of a region? Since a governorate has no power to make laws, Baghdad will have to depend on federal authorities to make its laws. However, it has been found useful to give the capital its own law making capacity; it is in almost every respect different from other governorates and cannot be dealt with legislation that would be suitable for them.

### ***Local administration***

Local administration as envisaged in the DC is to be deployed as protection of the administrative, political, cultural and educational rights of 'various minorities, such as Turcoman, Caldeans, Assyrians and all other components' (art. 122). A law will give effect to it. There is a similar provision in the TAL; as far as we can tell it has not been implemented. In the section on 'Minorities' in the part dealing with rights and liberties, we have indicated ways in which this article can be implemented. It would be necessary to provide for the relationship of forms of 'local administration' to governorate or regional, and federal, authorities.

### ***Financial and other resources***

How are different levels of government to be financed? Federal authorities are not given any taxing powers which would normally be the principal source of revenue. However, it could be argued that the powers relating to fiscal policy and the obligation to prepare the national budget (art. 107(3)) imply the power to tax. Under the same article it would be possible to charge custom duties on imports and exports. The assumption that the federal authorities can impose taxes can be derived from article 117(3) which obliges them to allocate equitable share of national revenues to regions and governorates. Taxing powers are so critical to functions of a central government and for planning purposes that it would be hard to argue that the federal authorities do not have them (although it would certainly have been helpful if they were explicitly provided). Some taxes are best levied by the federal authorities either for ease of collection or for fairness (e.g., on inter-regional commerce or trade) that it should not lightly be construed that they are not available in Iraq. Governorates are also to be given financial powers to discharge their functions; whether these are to come from the federal authorities or through their own revenue raising powers is not clear (art. 118(2)). No such powers are prescribed in respect of regions. But if taxation powers are not given to federal authorities, they would be available to regions as part of residual authorities to regions. Equally, if the DC allows the federal authorities to legislate on any matter (as we have discussed above), then the federal authorities will be free to tax (even if the final word is not with them).

Iraq has traditionally relied on oil and gas revenues, not taxation, to finance the government. The way the DC deals with the exploitation of oil and gas and the

distribution of income derived from them is fundamental—not only for fiscal purposes, but the very nature of the polity. Unfortunately the DC is less than clear on this matter. It enunciates the general principle that oil and gas belong to the people of Iraq ‘in all regions and governorates’ (art. 108). By itself this seems to take a national view of the resources – that they belong to all.

But the DC then appears to make a distinction between existing (‘current’) oil and gas fields and those that might be developed in the future. As for the former, the federal government shall undertake the management, ‘with the producing governorates and regional governments’, of oil and gas extracted from them (art. 109(1)). However, the revenues from them are to be distributed fairly to all parts of the country in proportion to their population. This general principle is qualified by a special disbursement (for specified period) to areas that were damaged or unjustly deprived by the former regime or subsequently and also to ensure balanced development throughout the country. As for the future, the federal authorities ‘with the producing governorates and regions’ shall formulate necessary strategic policies to develop these resources to ‘achieve the highest benefit to the Iraqi people’ using the ‘most advanced techniques of market principles and investment’ (art. 109 (2)).

As we read the article, the decision on precisely how oil and gas will be exploited and managed has been left for the future, with the federal government and the authorities of the areas where they are located. The formulation indicates a preference for commercial rather than state corporations for the exploitation, with possibly royalties and taxes as the main source of revenue. And we have earlier pointed out that there is no explicit power for the centre to tax. The postponement of the decision is perhaps the best that could be achieved in the circumstances given the volatility of the issue, and not least US interest in the matter. How the decision is made, and what the decision is, will have a profound impact on the future of Iraq. The critical question for now is whether the DC provides suitable mechanisms to reach reasonable decisions. We return to this issue after considering a few remaining provisions dealing with the federal structure.

There seems to be something of a lacuna: what is a ‘producing’ region or governorate? Is it one under the soil of which oil or gas lies? Or a region where it is actually being exploited? And who has the authority to explore for oil and gas in as yet unexplored areas (which may include the largest Sunni province Al Anbar)? If this is an area to which the principle that what is not stated is for the regions applies, then regions would have the power independently of the centre to prospect and exploit in such areas.

### ***Role of independent commissions***

The precise scope of the autonomy of governorates and regions would depend in part on the jurisdiction of ‘independent commissions’. About some of them is little doubt: the Central Bank’s policies and decisions are binding throughout the country, the scope of powers of the Supreme Court is clearly delineated, and the Federal Public Service Council is restricted to the federal public service. But what about the Board of Supreme Audit, the High Commission for Human Rights, and the Commission on Public Integrity?

The audit commission is tied to the CR and presumably concerns itself with federal accounts. The public integrity provision (art. 123) which would presumably fall under the purview of the Integrity Commission is unclear on its scope, but seems to focus primarily

on federal officials. The status of the human rights commission is different. The section on rights and liberties is binding on all state authorities, being inherent in all Iraqis. The commission would undoubtedly have the authority to examine violations of rights by federal authorities and those of governorates, and to ensure that their regulations and practices are compatible with the regime of rights. But would it also be able to examine the conduct of regional authorities? Would regional authorities be free instead to set up their own human rights commissions? The answers are not clear.

### *Institutions for intergovernmental relations*

Either formally or informally constituted, institutions for managing relations between governments at different levels have become critical to the success of federal systems. In part this is because neat divisions between the powers of the federal and regional authorities are breaking down as policies become complex and multi-dimensional and the implementation of policies and laws necessitates action at different levels. The disjunction between resources, responsibilities and needs requires institutions for redistributions. The ability of courts to handle sensitive or difficult differences between governments at different or the same levels, often of a political nature, has prompted the establishment of committees for negotiations and mediation.

Because the CR will be directly elected by the people on a national constituency basis, it will not be seen to represent regions or governorates, even less so than when elections are from more limited electoral constituencies. The electoral system may also lead to unfair and unequal representation from different parts of the country. The Iraqi federal system will therefore suffer from two major problems: there will be no direct links between the regions and governorates and the federal government (usually provided in the second chamber) and there will be in effect unequal 'representation' of regions/governorates or communities in the CR (which a second chamber, based on regional representation with some principle of parity, cannot redress).

The federal system that the DC seeks to set up is in need of a good system of inter-governmental relations. The powers of the federal government are severely limited so that the government will have to rely on co-ordination and persuasion for maintaining uniform laws and policies where necessary for national unity and cohesion. Many matters previously thought of as domestic are now covered by international agreements or legislation and require for their national implementation the co-operation of different authorities in a federation. The concept of shared powers in article 110 is based on the assumption of close consultation and co-operation between different levels of government. And if it is the case that the federal authorities can make laws on any subject, the need for co-ordination becomes even more pressing. Critical questions about the future of the oil and gas industry have been left open, matters for future negotiations..

### *The Federation Council*

Most federal systems depend on a second house of the federal legislature for co-ordination between the centre and regions. The second house also serves the purpose of articulating regional perspectives on policies and laws. In some countries it is used for negotiations between the centre and the regions, and co-ordination between regions; and other ways for associating regions with national policies and initiatives. The DC envisages the establishment of a legislative council to be known as Federation Council

(art. 62). We believe that it is critical that there be a second house in Iraq for the kind of functions mentioned here, but we refrain from suggesting what its precise nature and functions should be. Other institutions for inter-governmental relations could usefully be linked to it in some (loose) ways.

The consequences of these weaknesses could be quite negative from a national point of view. Regions will have little influence on the federal government and may feel alienated from the centre. Given the limited powers of the federal government, they may in fact have little reason to establish links with the federal government. If the basis of shared-rule is so weak in terms both of authority and representation, the centre will lose the ability to cultivate national consensus, co-ordination and ultimately unity.

The establishment of the FC will not reverse all these problems. But what contribution it can make will depend on its composition, functions and powers (particularly in the election of the president and law making). The DC leaves the establishment and function of the FC to be resolved in a law to be passed by the CR (art. 62). This law will have to be passed by a two-thirds vote of the members of the CR (and presumably, although this is not expressly specified, amended by a similar procedure). Such law cannot therefore be made until the first CR is elected. Moreover the law cannot be made or come into effect (the English version is unclear) until the second term of the legislature (art. 133). It is in any case clear that the FC will not be in place when the new constitution comes into effect, and indeed for some years thereafter.

Apart from stating that it would include representatives of regions and governorates, the DC says little about the mode of representation (particularly whether of regional people or regional governments) or functions (although the word 'legislative' indicates that it may have law making functions). The DC provides no guidance on the objectives and principles of the FC to guide the formulation of legislation on the establishment of the FC under article 62. Moreover it is doubtful if the procedure under article 63 allows for a fundamental role for the FC. The chances are that the FC will be given little role: because, unless it is given very few functions and powers, establishing it will inevitably mean changes to the whole chapter (affecting the power of the CR), possibly other chapters (e.g., Powers of Regions), and even the amendment procedure. These changes cannot be achieved without amendments to the constitution which is complicated and difficult (it requires the approval of two thirds of CR members and a referendum, art. 122(3), see below). The reality is that the DC has been designed on the assumption of a unicameral legislature. And the rules and procedure of developing the federal system are unclear, driven by pragmatic considerations and providing no coherent philosophy of federalism.

#### *Commissions on which regions are represented*

The DC provides for two commissions in which representatives of governments of the federation, regions and governorates would meet (arts. 102 and 103). The function of the first (unnamed) commission is 'guarantee participation in managing various state federal institutions, missions, fellowships, delegations, and regional and international conferences'. Apart from facilitating regional and governorate engagements in Iraqi delegations, it is not clear how they might participate in 'federal institutions'. The second commission, which could be called the 'Audit Commission' (which will also include

governments' experts) has a more specific task: audit and appropriation of federal revenues. Its function is also to protect regions and governorates, by ensuring (a) the fair distribution to them of grants, aid, and international loans; (b) 'transparency and justice' in appropriating these funds in accordance with agreed proportions; and (c) the ideal use and division of federal resources. The reference here is perhaps to the article 117(3) mandated allocations to regions and governorates from national revenues as well as article 109 allocations from oil and gas revenues. Incidentally, it is not clear whether this is the same as the 'Board of Supreme Audit' under article 100.

Although not expressly stated, it is clear that the discharge of the shared powers under article 110 will require a host of inter-governmental committees and working groups, for policies relating to water, electricity, education, health, environment and other aspects of planning. No doubt considerable attention will be paid how to co-ordinate these and other responsibilities. These 'informal' bodies and the two commissions will also undoubtedly function to resolve differences and settle disputes.

### *The Supreme Court*

But the ultimate responsibility for settling disputes about governmental jurisdictions, conflict of laws, inter-governmental disputes and the interpretation of the constitution will lie with the independent Supreme Court. Very heavy responsibility will lie on the Supreme Court to elaborate the principles and details of the federal scheme and perhaps even to bring cohesion in the overall system of government. The DC establishes a federal judiciary which should have the capacity to hold the balance fairly between the federal and other sub-national governments in accordance with the law. The Supreme Court may, however, have some difficulties in discovering the intention behind some of the provisions. A critical factor in the performance of its responsibilities will be the legislation that the DC must enact to give effect to the principles of Iraqi federalism—such legislation will require great care and skills to operationalise the system of government.

### *Assessment*

We consider that federalism can play a constructive role in Iraq. But as we have tried to show, there are considerable problems with the scheme established in the DC. To recapitulate, the powers of the federal authorities are extremely limited. They are certainly not adequate for the major responsibility given to in article 106: preserve the unity, integrity, independence, sovereignty of Iraq and its federal character.

There is also considerable lack of clarity about how exactly state powers are divided: as between legislative and administrative powers; as between the federal authorities and sub-national authorities; between regional authorities and their governorates; the jurisdiction of independent commissions;

There is a very distinctive bias in favour of regions, leading to a very decentralised federation. It is also likely that the logic of the scheme for the formation of regions is dissolution of governorates into three or so region, as enclaves for ethnic and religious communities (given the increasing ethnicisation of politics). Regions will be free to design their own constitutions and political structures, which may well be more important than federal authorities. Yet there no provision, which is found implicitly or explicitly in

most federal arrangements, that constitutions of regions must respect national values and objectives—quite a different matter from saying that they must contradict the constitution. These factors could pose a great threat to Iraq’s integration (which a weakened centre may not be able to stop).

There are other reasons why it may be hard to preserve the federal character of Iraq. The absence of provisions for ‘shared rule’ at the centre and other integrative mechanisms will reinforce the tendency towards a split. The lack of effective powers at the centre will mean that all the key leaders will prefer to take office in the region rather than in the federal government, with adverse effects on the legitimacy and capacity of the central authorities.

The DC also does not provide enough guidance on how Iraq will move from a highly centralised and unitary state (with the exception of Kurdistan) to a partially or fully federal state. Most of this is left to future legislation and means that critical issues will not become clear for the time being. There is a possibility that Kurdistan autonomy may become the model (and there have been suggestions that many Shias would prefer that) which would drive communities further apart. Indeed there are many questions about the operationalisation of the federal scheme. The entrenchment provision for regional powers (art. 123(4)) (discussed later) introduces an element of rigidity, especially as the precise scope of regional power is less than clear.

It is clear to us that the federal arrangements as proposed in the draft constitution, without any clear scheme for the gradual assumption of powers by regions and governorates, and the weakness of federal authorities, are simply unworkable and will not be able to sustain the unity of the country.

Another important factor in federal/regional relations is the system for amendment of the constitution, to which we now turn.

## **V Amendment of constitution and transitional provisions**

The final section (‘Final and Transitional Provisions’) consists of two chapters. The first contains provisions for the amendment of the constitution and a few substantive and technical matters. The second chapter deals with a number of transitional matters (concerning continuity of certain institutions) but equally importantly, with the suspension of specified provisions of the new constitution for the period of office of the first term of the president under the new constitution.

### ***Amendment***

The provisions on amendment are complex and intended to make it hard to change the constitution. The general rule is that the constitution can only be changed on the proposal either of the president and the council of ministers jointly or of one-fifth of the CR representatives (art. 122(1)). This rule restricts the initiative to amend to the federal institutions, although the CR would reflect also the concerns of regions and governorates. Since the contours of the constitution, especially as they concern regions and governorates, are still to be refined and since that would in most cases involve changes to

the constitution, there may something to be said for giving the initiative to propose amendments to a specified number of members of the FC.

Secondly, the amendment has to secure the support of two-thirds of the members of the CR (presumably an absolute two-thirds vote, meaning of the total membership, even if not all take part in the voting) (art. 122 (2)). Here again there is no input from regions and governorates, which could have been provided through a role for the FC.

However, there is a safeguard for the protection of the powers of the regions (but not governorates). Powers of regions which are not within the exclusive powers of the federal authorities cannot be removed without the consent of a region, as expressed by its legislature and the majority of 'its citizens' in a referendum (art. 131 (4)). It would seem that each region has a veto, and so the situation can arise where some regions will have more powers than others (this is not necessarily a problem, although it may raise administrative difficulties). However, the article could raise a problem of another kind: Article 131 (4) refers to a 'majority of citizens' in a referendum, not voters in the region. Even if there is a high turnout, a simple majority of 'citizens' would be hard to obtain, as many citizens would include persons under the voting age. It would be better to refer to 'voters in the region', for the article implies that there are citizens of regions, as opposed to citizens of Iraq. Moreover, this provision is incompatible with the spirit of article 128 which refers to voters and not citizens when it defines a referendum. Presumably a national referendum would also be necessary (see the next paragraph).

All amendments have to be approved in a referendum (art. 122(3)) by a simple majority of the voters (art. 127). This form of voting is different from that in TAL where, while a simple majority of voters in the country is necessary, the referendum is lost if in three or more governorates the draft is rejected two-thirds of the voters. There is something to be said for a 'qualified' majority of this kind, for in a state where inter-ethnic relations are competitive and tense, a simple majority enables larger groups to override the deep concerns of minorities. It would also be desirable to specify whether the 'simple' majority is that of persons who turn out to vote or of those who are registered voters—the outcome can be significantly different.

Presidential assent to amendments is required (art. 121(3)), but it seems that it is a formality, as with assent to ordinary legislation.

Sections one (Fundamental Principles) and two (Rights and Liberties) cannot be amended until after two 'successive electoral terms' (art. 131 (2)), meaning presumably the electoral terms of the CR. It is certainly important to give this protection to human rights, (although perhaps it would have been good to allow the rights chapter to be strengthened (but not weakened) by restricting limitations on them or including new rights through amendments). We are less certain that the same rule should apply to Fundamental Principles. They have been adopted without the same kind of broad support as Rights and Liberties, and it may be that some amendment will be necessary to build a true consensus.

It is also worth drawing attention to the impact on amendment procedures of the rule that for the first term of the CR, the president's role will be performed by a presidency council. Since the initiative of the Cabinet to amend the constitution must be endorsed by the president, it may mean that for the first term of the CR, that initiative cannot be taken

unless all communities represented in the presidency are in support. This communal veto may also prevent amendments, since the other route to initiate amendment proposals, by members of the CR, is less likely to happen and even less likely to succeed.

Although one can appreciate the importance of the proper entrenchment of the constitution, there is an argument for an easier process of amendment for the next few years to incorporate a consensus that was not possible this time round.

#### *Amendment of Regional Powers*

It should be noted that the DC also postpones the coming into existence of the second chamber of the federal legislature, the Federation Council ('FC'), until a law is made by the Council of Representatives ('CR') on the composition and powers of this council (art. 62). Additionally, the FC cannot be elected or begin to function until the CR decides so by a resolution of 'a two-thirds majority' vote which it cannot do before its second term (art. 133). We have also referred to the continued existence of the presidency council until the end of the first term. Thus at least two crucial aspects of the system of government are postponed until after the first term which is to be of 4 years. There are both advantages and disadvantages in this postponement. .

#### *Transitional Provisions*

Apart from the usual provisions for the continuity of laws and vested rights, the DC would continue the system of government in Kurdistan even after the new constitution comes into force (art. 113). The implications of this are not clear: there seems to be no qualification that these must be in accordance with the Constitution. On the other hand, article 137 says that existing laws and court decisions of Kurdistan remain in force 'provided that they do not contradict with the constitution'. But the authorities of Kurdistan have been set up by Kurdistan law; are they protected from invalidity by being mentioned specifically in article 113, or affected by article 137? And who is to decide on such contradiction?

The DC will also continue the operation of article 58 of TAL, which relates to dealing with the legacy of the past, through the Property Claims Commission (art. 132).

More importantly it leaves the whole question of Kirkuk (also a subject of article 58 of TAL) with a deadline for resolution of the issues of the end of 2007 (art. 136). What is the significance of the deadline? Of course it could be extended – but this would require an amendment of the constitution, and that requires a referendum. It is clear that these provisions are less transitional than postponement of decisions. It seems likely that any resolution of these issues will have to be reached by a process of negotiation that will involve actors outside the institutions created by the Constitution, for, as we have seen, institutions under the constitution for resolution of differences are weak.

#### *Dilemmas of transition*

There are a few uncertainties. It seems that there is to be a new Presidency Council elected by the CR (art. 134). A procedure for that election will need to be developed, and presumably the existing Presidency will remain in office until the election (or there will be no president). But this is not specified.

Similarly it is presumably the existing Presidency Council that convenes the first CR under the new Constitution.

## **VI Conclusion**

### ***Strengths and weaknesses***

The DC has its undoubted strengths. It does respond to issues of diversity of religion, ethnicity and language. A clear effort has been made to respond to concerns about the potential impacts of Islamic law, and it does articulate a vision of the country as one recognising individual rights, as well as community interests, and one that is to deal with issues of inequality, social justice and the legacy of the past

The price for inclusion and tolerance has been the risk of depriving the national authorities of any real power, and ability to manage national affairs, and maintain territorial integrity or national unity. On any objective evaluation far more has been conceded to Kurdistan than is wise for the rest of the country, in terms of the weakness of the centre. And since it was not possible to decide for the rest of the country how federalism would work in practice, so much has been left undecided that there is almost bound to be serious difficulty in interpreting and applying the provisions on federalism – unless, of course, no real attempt is made to apply them. Because what was given to Kurdistan had to be available for everyone else, there is a grave risk that powers will be given to units without the capacity to exercise them effectively. There is the risk on the other hand of multi-governorate units so large they dominate the country. Because of the problems in deciding over distribution of the national wealth, it is far from clear what resources the national government will command. And at the end of the day it is really not clear how far the constitutional writ will run in the regions.

Some weaknesses may be those of legal technique. At least as we read the translation, there are many uncertainties, gaps and inconsistencies. Some of these relate to the structure and functions of national governmental institutions.

### ***Operationalising the DC***

Bringing a new constitution into force is more than just promulgating the document. Where, as here, many issues have been deliberately left undecided the process of implementation can be very complex. It might have been helpful to establish bodies to deal with some of these issues of implementation. For example a Commission on Devolution could have been set up to refine the details of legislation on the federal system which will be radically different from the existing system. And an Implementation Commission for the other aspects of the constitution could have been set up to review the existing laws that are likely to be affected, to propose amendment to these and the enactment of new laws, and generally to supervise the process of implementation.

A major effort of education of the people, members of the CR, judges, civil servants and other will be needed, not just in the technicalities but in the issues of vision and approach that we indicated at the beginning will be involved.