

# Iraq's Neoliberal Constitution

By Herbert Docena | September 2, 2005

*Article 25: "The state shall guarantee the reforming of the Iraqi economy according to modern economic bases, in a way that ensures complete investment of its resources, diversifying its sources and encouraging and developing the private sector."*

Last June 30, the Iraqi *Al-Mada* newspaper published the latest draft of the Iraqi constitution that was then being negotiated upon by Iraqi politicians.<sup>1</sup> Its contents would have been enough to give former occupation authority chief Paul Bremer a heart attack.

The Iraqis—even those who were willing to cooperate with the Americans—wanted, at least on paper, to build a Scandinavian-type welfare system in the Arabian desert, with Iraq's vast oil wealth to be spent upholding every Iraqi's right to education, health care, housing, and other social services. "Social justice is the basis of building society," the draft declared. All of Iraq's natural resources would be owned collectively by the Iraqi people. Everyone would have the right to work and the state would be legally bound to provide employment opportunities to everyone. The state will be the Iraqi people's collective instrument for achieving development. (*See key provisions in matrix beginning on Page 5.*)

In other words, the Iraqis wanted a country different from that which the Americans had come to Iraq for. They, or at least those who were involved in drafting the constitution, wanted nothing of the kind of economic and political system that Bremer and other U.S. officials had been attempting to create in Iraq ever since the occupation began. What the occupation authorities wanted was to fulfill "the wish-list of international investors," as *The Economist* magazine had described the economic policies they began imposing in the country in 2003.<sup>2</sup>

As direct occupiers, the United States had enacted laws which give foreign investors equal rights as Iraqis in the domestic market; permit the full repatriation of profits; institute the flat tax system; abolish tariffs; enforce a strict intellectual property rights regime; sell off a whole range of state-owned companies; reduce food and fuel subsidies; and privatize all kinds of social services such as health, education, water delivery, etc.

By the time the next version was leaked in late July, the progressive provisions in the draft constitution had disappeared.

## "Intensive Diplomacy"

Writing Iraq's permanent constitution is the latest step in the political transition process agreed upon by the U.S. administration and the Iraqi political parties that have chosen to cooperate with it since the beginning of the occupation. At every step of that process, the United States has attempted to lock in policies which would advance and protect its fundamental interests in the country by championing and strengthening the hand of those Iraqis committed to defending them even after formal occupation ends.<sup>3</sup>

Even before combat began, the United States had assembled Iraqi exile groups who would not only support the invasion but would also defend free-market policies and tolerate the presence of coalition troops. In July 2003, the United States handpicked the members of what would become Iraq's first political entity during the transition, the Iraqi Governing Council (IGC). American lawyers then worked with the IGC members to draft Iraq's transitional constitution, ensuring that all the laws enacted under occupation would be carried over by the incoming Iraqi interim government.<sup>4</sup> In June 2004, the United States handed "sovereignty" to this interim government, its prime minister, and other officials effectively chosen by the United States.<sup>5</sup> In the elections for choosing Iraq's transitional parliament in January 2004, the United States conducted both overt and covert operations to support former CIA agent Iyad Allawi's party and to reduce the margin of the winning coalition dominated by the Supreme Council for the Islamic Revolution (SCIRI) and the Islamic Da'awa party.<sup>6</sup> While the United States did not succeed in installing Allawi, SCIRI and Da'awa officials subsequently championed the U.S.-preferred agenda on oil, privatization, and the presence of coalition troops.

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As the Iraqis huddled to hammer their permanent constitution, U.S. officials were once again with them every step of the way. Outside the Green Zone, the negotiations were protected by 160,000 U.S. and other coalition troops. Playing a central role inside was newly appointed U.S. Ambassador to Iraq Zalmay Khalilzad, a member of the Project for a New American Century who had called for invading Iraq since 1998. Having served as an intermediary for the U.S. government with the Taliban regime, Khalilzad previously worked for UNOCAL in Afghanistan. After the invasion in 2001, he was subsequently appointed to be the United States' first ambassador to Afghanistan. There, he was accused of serving as the "campaign manager" of pro-U.S. candidate Hamid Karzai in that country's presidential elections.<sup>7</sup>

Behind closed doors where real debates took place, according to the *Washington Post*, Khalilzad was described by *Reuters* as being a "ubiquitous presence" and by the *Financial Times* as playing a "big role in the negotiations."<sup>8</sup> One State Department official called Khalilzad's actions "intensive diplomacy."<sup>9</sup> While media spin on the process portrayed U.S. officials as reluctant, impatient intermediaries uninterested in the contents of the constitution—just as long as it gets done on time—at one point, Khalilzad's team of American diplomats offered their own proposed text of the constitution to the Iraqis.<sup>10</sup> Shutting back and forth from constant meetings with the Iraqi president, the speaker, and other high-ranking officials, Khalilzad was backed up by U.S. embassy officials who, according to the *Washington Post*, were working from a Kurdish party headquarters to "help type up the draft and translate changes from English to Arabic for Iraqi lawmakers."<sup>11</sup>

Complained one Kurdish member of the constitutional committee who was involved in the caucuses: "The Americans say they don't intervene, but they have intervened deep. They gave us a detailed proposal, almost a full version of a constitution. They try to compromise the different opinions of all the political blocs. The U.S. officials are more interested in the Iraqi constitution than the Iraqis themselves, because they promised their people that it will be done August 15."<sup>12</sup> And it's not that the officials were acting as neutral mediators, according to Othman. U.S. and UK officials, he said, are "being governed by their domestic agenda." He also lamented how these officials were meeting with Iraqis individually in backroom meetings, saying "It's not right and is counterproductive. If they have something to say, why don't they come and address

the whole committee?"<sup>13</sup> Nechirvan Barzani, the Prime Minister of the Kurdistan regional government in Arbil and one of the United States' closest allies, confirmed Othman's charges. "The United States and the UK are working behind the scenes, dealing with all the groups, saying it should be like this and like that," he said.<sup>14</sup>

Khalilzad was conspicuous not just behind the scenes. Just before the original August 15 deadline, he strode into the halls of Iraq's parliament where he was introduced to the assembly by Iraqi President Jalal Talabani as "dear brother."<sup>15</sup> Iraqi Foreign Minister Hoshiyar Zebari had earlier implored the United States to play a greater role in the drafting of the new constitution—proof that Khalilzad's interventions were not totally unwelcome to everyone.<sup>16</sup> To reinforce Khalilzad's own recommendations, President George Bush personally called up SCIRI leader Abdul Aziz al-Hakim last August 24 to talk about the constitution.<sup>17</sup> Just before the extended deadline August 27, and after working "furiously through the night to broker a deal," Khalilzad once again stood publicly beside Shiite and Kurdish leaders as they announced that they had sealed the draft.<sup>18</sup> Against criticisms, he defended the draft as being "right for Iraq at the present time," without elaborating as to whom it was right for.<sup>19</sup>

While Khalilzad and his team of U.S. and British diplomats were all over the scene, some members of Iraq's constitutional committee were reduced to being bystanders. One Shiite member grumbled, "We haven't played much of a role in drafting the constitution. We feel that we have been neglected. We have not been consulted on important issues."<sup>20</sup> A Sunni negotiator concluded: "This constitution was cooked up in an American kitchen not an Iraqi one."<sup>21</sup>

## A Neoliberal Constitutional Dish

By the time it was served on the table August 28, the final draft of the Iraqi constitution must have tasted very different from the previous servings. Not only were some of the key ingredients of the previous drafts removed outright, new ingredients with distinctly neo-liberal flavors were also added in.

Gone was the article proclaiming adherence to social justice as the basis of the economy. In its place was a provision binding the state to "reforming the Iraqi economy according to modern economic bases, in a way that ensures complete investment of its resources, diversifying its sources and encouraging and developing the private sector." By

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“reforming,” the framers of the constitution could only have meant the usual stock of neoliberal economic “reforms” which have been prescribed or imposed on dozens of developing countries around the world. This includes privatizing state-owned enterprises, liberalizing trade, deregulating the market, and opening it up to foreign investors. Instead of revoking the so-called Bremer Laws, or the decrees enacted by the occupation authority implementing these neoliberal policies, the draft constitution would make Iraqis constitutionally bound to enforce them. Another provision reiterates, “[t]he country shall guarantee the encouragement of investments in different sectors.”

Also gone was the provision affirming the Iraqi people’s collective ownership of Iraq’s oil and other natural resources and obliging the state to protect and safeguard them. Instead, a new article lays the legal ground for selling off Iraq’s oil and putting it under the control of the big multinational oil companies. Article 110 goes so far as to spell out that “the federal government and the governments of the producing regions and provinces together will draw up the necessary strategic policies to develop oil and gas wealth to bring the greatest benefit for the Iraqi people, relying on the most modern techniques of market principles and encouraging investment.”

By “modern techniques of market principles,” the draft is most likely referring to current plans—supported by the interim government’s top leadership—to privatize the Iraqi National Oil Companies and to open up Iraq’s oil reserves to the big oil companies. Referring to such plans, Adil Abdel Mahdi, a senior leader of SCIRI and now Iraq’s vice president, told an audience in Washington, just before the elections: “[T]his is very promising to the American investors and to American enterprises, certainly to oil companies.”<sup>22</sup>

Incidentally, during the course of the negotiations over the constitution, SCIRI’s al-Hakim strongly pushed for the creation of a southern Shiite sub-state with nine of Iraq’s 18 provinces. The draft constitution would allow this sub-state to determine oil policy in its territory, earn a substantial portion of revenues from existing oil fields, and rake up to 100% of revenues in oil fields that are yet to be developed. The United States’ stance towards the question of federalism may have a lot to do with the assurance that the ones who may end up ruling over Iraq’s oil reserves—the Kurds in the north and the Shiite parties in the South—are

people who have gone on record as favoring their privatization.

Contrary to the impression purveyed by the media, federalism is opposed by a clear majority of Iraqis—by a majority of Sunnis and by a majority of Shiites alike. According to a July 2005 survey conducted by the International Republican Institute, the U.S. government-funded entity tasked to build the machinery of pro-free market Iraqi political parties, 69% of Iraqis from across the country want the constitution to establish “a strong central government” and only 22% want it to give “significant powers to regional governments.” Even in Shia-majority areas in the south, only 25% want federalism while 66% reject it.<sup>23</sup>

While the constitution gives oil-producing regions the power to enact oil policy, it also goes out of its way to stipulate that the central state should “guarantee the freedom of movement for workers, goods, and Iraqi capital between the regions and the provinces.” This distinction of roles between the central state and the regions follows the template for the kind of “market-preserving federalism” advocated by neo-liberal constitutionalists: that in which the central state is empowered only to maintain a common market within the territory while the power to regulate the market is relegated to weakened sub-states. For neoliberals, federalism is alright as long as the regions don’t put up walls against free trade and so long as they don’t become powerful enough to implement labor, environmental, and other social policies.<sup>24</sup>

The constitution is also laying the ground for the eventual acquisition of Iraqi assets, in the form of equity, real estate, or other capital, by foreigners or multinational corporations. While the June draft states that “Iraqis have the complete and unconditional right of ownership in all areas without limitation” the final draft drops the words “unconditional” and “without limitation” and adds instead the qualification “except what is exempted by law.”

Given that Bremer’s Order 39 already allows foreign ownership of Iraqi assets and given that this Order will be perpetuated as a law, the constitution in effect removes the restriction giving Iraqis exclusive ownership over assets in Iraq. While oil is not covered yet, it may soon be, judging from Iraqi officials’ pronouncements. The so-called “national patrimony” provision, which reserves certain sectors of a country’s economy such as land or natural resources to that country’s citizens, is a common feature in

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the constitutions of many developing countries. It has been struck off Iraq's. So while the press continues to tell the story of Sunnis, Shiites, and Kurds squabbling over the spoils of oil, they are missing the contest between Iraqis and non-Iraqis. The constitution may yet pave the way for non-Iraqis to have as much right over Iraq's oil as Iraqis.

The June draft promises extensive welfare commitments to Iraqis, including free education and free health care. The International Monetary Fund, which has been insisting on eliminating government subsidies to Iraqis, would have found in these principles serious legal obstacles to their prescriptions. The July draft says welfare services would still be given—but only if the government could afford them. The final draft gives vague assurances that the services will be delivered but this time, it adds new language on the private sector's role in delivering them. These subtle changes are significant because they hint at the coming wholesale privatization of social services in Iraq, as is already being advocated by USAID-funded contractors working to restructure Iraq's educational and health sectors.

One other thing worth mentioning is that Iraq's will probably be the only constitution in the world which enshrines "fighting terrorism" as one of the state's objectives. Given how "terrorism" in Iraqi discourse has been used by pro-occupation Iraqis and U.S. officials to refer to the resistance movement, the clause could be invoked to legally justify continuing military offensives against political forces that refuse to come to terms with the occupation and the political process it has bred. As has happened in other countries, the "war against terror" could also conceivably be used to justify continuing U.S. military presence in Iraq.

## The Rule of Law

The content of Iraq's permanent constitution is of critical interest to those committed to reconstruct Iraq's economy along neoliberal lines. As the basic law of the land, the constitution establishes the fundamental legal foundation on which Iraq's neoliberal edifice is to be built. On it will rise the so-called "rule of law"—a rule which will constantly be invoked to legally defend a reduced role for the government in the economy, liberal trading and investment rules, privatization programs, and other neoliberal economic policies—long after the 160,000 occupation troops withdraw. In this, Iraq is just one front in a global project to eliminate nationalist and progressive economic provisions

in the constitutions or legal systems of dozens of developing countries around the world. Whether or not the "wish-list for international investors" gets granted depends to a large extent on whether the Iraqi constitution provides the legal justification for making these wishes come true.

To get its preferred provisions in the constitution, the United States, as in the previous steps in Iraq's political transition process, once again huddled with those Iraqis who were willing to get along with the United States' wishes; these Iraqis for their part accommodated the United States' demands because this would be the only way they could also get what they wanted for themselves. Other Iraqis who insist on ending the occupation first before writing the constitution refused at the outset to join the process.

The media has tended to focus on the cultural and sectarian provisions of the constitution, ignored the significant insertion of economic provisions, and altogether missed the link between the two. What most likely happened was this: The United States tolerated the adoption of religious provisions in the constitution and agreed to the establishment of a federal system in Iraq, as demanded by the Shia and Kurdish parties, in exchange for the introduction of neoliberal economic provisions in the constitution. In the quid-pro-quo, the investors' rights trumped women's rights. The Bush administration cares little as to what political arrangements the Iraqis chose or which god they preferred to pray to just as long as the wishes in their list get fulfilled.

In the run-up to the negotiations, the Iraqi parliament conducted a massive information campaign, sending out questionnaires and conducting focus group discussions across the country in order to solicit ordinary Iraqis' suggestions for the constitution. At least one suggestion picked up by a *Knight Ridder* reporter supported the ideas articulated in the June draft but that were scrapped in the final text. "Only Iraqis can operate businesses (in Iraq), and if foreign partners are allowed, it should not exceed 49 percent," one respondent wrote.<sup>25</sup> While the June draft was formulated by the same Iraqis who got elected in a process whose legitimacy is widely doubted, it at least gives a hint as to what kind of constitution the Iraqis would have liked if Khalilzad was not inside the room all the time. They have their own wish-list too.

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- <sup>3</sup> For a detailed discussion on this process, see Herbert Docena, “‘Shock and Awe’ Therapy: How the United States is Attempting to Control Iraq’s Oil and Pry Open its Economy,” *Focus on Trade* #110, June 2005
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*End Notes Continued on Page 8*

## END NOTES

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### The Evolution of Iraq's Constitution

AREA	1990 CONSTITUTION <sup>26</sup>	6/30/05 DRAFT <sup>27</sup>	7/20/05 DRAFT <sup>28</sup>	8/25/05 FINAL DRAFT <sup>29</sup>
<b>GENERAL PRINCIPLES</b>	<b>Article 12:</b> "The State assumes the responsibility for planning, directing, and steering the national economy for the purpose of (a) establishing the socialist system on scientific and revolutionary foundations and (b) realizing Arab economic unity"	<b>Article 5:</b> 1) "Social justice is the basis of building the society..." <b>Article 18:</b> 1) "The basis of the economy is social justice. It is composed of cooperating between public and private activity. Its goal is economic growth in accordance with a decreed plan and the realization of prosperity for citizens..." 2) "The state shall bear the responsibility for growth, developing production and services, building a solid infrastructure for the economy of the country, and providing services."	No similar provisions.	No similar provisions.
<b>OWNERSHIP OF IRAQ'S RESOURCES</b>	<b>Article 13:</b> "Natural resources and the basic means of production are owned by the People. They are directly invested by the Central Authority in the Iraqi Republic, according to exigencies of the general planning of the national economy."	<b>Article 17:</b> "All natural resources and the [resulting] revenues are owned by the people. The state shall preserve and invest them well."	No similar provision.	<b>Article 109:</b> "Oil and gas is the property of all the Iraqi people in all the regions and provinces."
<b>FOREIGNERS' RIGHT TO OWN IRAQI ASSETS</b>	<b>Article 18:</b> "Immobile ownership is prohibited for non-Iraqis, except otherwise mentioned by law."	<b>Article 8:</b> "Iraqis have the complete and unconditional right of ownership in all areas of Iraq without limitation."	<b>Article 10:</b> "The Iraqi citizen has a complete and unconditional right to ownership in all parts of Iraq without limitation."	<b>Article 23:</b> "An Iraqi has the right to ownership anywhere in Iraq and no one else has the right to own real estate <b>except what is exempted by law.</b> "
<b>TAXES</b>	No similar provision.	<b>Article 17:</b> "The basis for taxes and public expenditures is social justice."	No similar provision	No similar provision

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**The Evolution of Iraq's Constitution (continued from page 5)**

<b>AREA</b>	<b>1990 CONSTITUTION<sup>26</sup></b>	<b>6/30/05 DRAFT<sup>27</sup></b>	<b>7/20/05 DRAFT<sup>28</sup></b>	<b>8/25/05 FINAL DRAFT<sup>29</sup></b>
<b>RIGHT TO WORK</b>	<b>Article 32:</b> Work is a right which is ensured to be available for every able citizen. "The state undertakes to improve the conditions of work, and raise the standard of living, experience, and culture for all working citizens."	<b>Article 12:</b> 1) Work is a right for every citizen and a duty for him. The state and the governments of the regions shall strive to provide work opportunities for every able-bodied citizen. 2) The state is responsible to support the provision of work opportunities for all qualified and pay monthly salaries for all unemployed for any reason until opportunities are provided; in the case of disability, handicap, or illness until the malady ceases.	<b>No similar provisions.</b>	<b>Article 22:</b> 1) Work is a right for all Iraqis in a way that guarantees them a good life. 2) The law regulates the relation between employees and employers on an economic basis, while keeping in consideration rules of social justice.
<b>PRIVATE PROPERTY</b>	<b>Article 16:</b> "Ownership is a social function, to be exercised within the objectives of the Society and the plans of the State, according to stipulations of the Society."	<b>No similar provision.</b>	<b>Article 10:</b> "Private ownership is protected. Nobody may be prevented from using his property except within the boundaries of law."	<b>Article 23:</b> "Private property is protected and the owner has the right to use it, exploit it, and benefit from it within the boundaries of the law."
<b>EDUCATION</b>	<b>Article 27:</b> "The State undertakes the struggle against illiteracy and guarantees the right of education, free of charge, in its primary, secondary, and university stages for all citizens."	<b>Article 6:</b> "The state and regional governments shall combat illiteracy and provide their citizens with the right of free education at the various stages."	<b>Article 25:</b> "Iraqi citizens have the right to enjoy security, education in all its stages, health care, and social insurance. The Iraqi state...shall ensure these rights within the limits of their resources, taking into consideration that the state shall strive to provide prosperity and employment opportunities for all members of the Iraqi people."	<b>Article 24:</b> 1) "Free education is a right for all Iraqis in all its stages." 4) Private and national education is guaranteed and regulated by law.
<b>HEALTH</b>	<b>Article 33:</b> "The state assumes the responsibility to safeguard the public health by continually expanding free medical services, in protection, treatment, and medicine, within the scope of cities and rural areas."	<b>Article 7:</b> "Iraqi citizens have the right to enjoy security and free health care. The Iraqi federal government and regional governments must provide it and expand the fields of prevention, treatment, and medication by the construction of various hospitals and health institutions."	<b>Article 25:</b> "Iraqi citizens have the right to enjoy security, education in all its stages, health care, and social insurance. The Iraqi state ... shall ensure these rights <b>within the limits of their resources</b> , taking into consideration that the state shall strive to provide prosperity and employment opportunities for all members of the Iraqi people."	<b>Article 31:</b> 1) "Every Iraqi has the right to health service, and the state is in charge of public health and guarantees the means of protection and treatment by building different kinds of hospitals and health institutions." 2) Individuals and associations have the right to build hospitals, dispensaries, or private clinics under the supervision of the state."

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**The Evolution of Iraq's Constitution (continued from page 6)**

<b>AREA</b>	<b>1990 CONSTITUTION<sup>26</sup></b>	<b>6/30/05 DRAFT<sup>27</sup></b>	<b>7/20/05 DRAFT<sup>28</sup></b>	<b>8/25/05 FINAL DRAFT<sup>29</sup></b>
<b>AGRICULTURE</b>	No similar provision.	<b>Article 17:</b> "The state shall take the necessary measures to realize the exploitation of land suitable for agriculture, stop desertification, and work to raise the level of the peasant and help farmers and their land ownership in accordance with law."	No similar provision.	No similar provision.
<b>TERRORISM</b>	No similar provision.	No similar provision.	No similar provision.	<b>Article 8:</b> "The state will be committed to fighting terrorism in all its forms and will work to prevent its territory from being a base or corridor or an arena for its activities."
<b>FREE TRADE</b>	No similar provision.	No similar provision.	No similar provision.	<b>Article 24:</b> "The state shall guarantee the freedom of movement for workers, goods, and Iraqi capital between the regions and the provinces."
<b>ECONOMIC REFORMS</b>	No similar provision.	No similar provision.	No similar provision.	<b>Article 25:</b> "The state shall guarantee the reforming of the Iraqi economy according to modern economic bases, in a way that ensures complete investment of its resources, diversifying its sources, and encouraging and developing the private sector."
<b>INVESTMENTS</b>	No similar provision.	No similar provision.	No similar provision.	<b>Article 26:</b> "The country shall guarantee the encouragement of investments in the different sectors."
<b>OIL</b>	No similar provision.	No similar provision.	No similar provision.	<b>Article 110:</b> "The federal government and the governments of the producing regions and provinces together will draw up the necessary strategic policies to develop oil and gas wealth to bring the greatest benefit for the Iraqi people, relying on the most modern techniques of market principles and encouraging investment."

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