

مركز البيدر للدراسات والتخطيط

Al-Baidar Center For Studies And Planning



The constitutional experience in the modern Iraqi state

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About Center

Baidar Center for Studies and Planning is a non-governmental and non-profit organization established in 2015 and registered with the NGO Directorate in the General Secretariat of the Council of Ministers in Baghdad.

The Center seeks to contribute to developing the state and its institutions, by proposing ideas and practical solutions to the main problems and challenges facing the state, including improving public sector management, policies and strategic planning, using reliable data and best practices. The Center engages the relevant authorities in the state with regular meetings to support this objective and utilises the support of international organizations dedicated to assisting Iraq's development. The Center also seeks to support economic reforms, sustainable development and provide technical assistance to the public and private sectors. The Center also seeks to support development of the private sector to provide job opportunities for citizens through training and upskilling, in a way that reduces dependence on government institutions and contributes to supporting and diversifying the country's economy.

The Center aims to utilise the vast amount of potential in Iraq's human resources by organizing programs to prepare and develop promising young people, including leaders capable of proposing, adopting and implementing visions and future plans that advance society and preserve its value system based on the commitment to a high moral standard and rejection of all types of corruption.

The constitutional experience in the modern Iraqi state

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The past hundred years of modern Iraq's history, 1921 – 2021, have witnessed many events, fluctuations, and constitutional, political, social and other changes. The developments and changes in the constitutional and legal field have had a clear impact during a century of the history of the modern Iraqi state.

Between 1921 AD and 2021 AD, eight constitutions were issued, whether they were in the monarchy stage or what followed in the stage of republican rule. The first constitutional document was issued in the modern Iraqi state was the Basic Law, in 1925, this was during the British Mandate. The Basic Law was the only constitution during the monarchy, until 1958 AD when the state system and governance changed from monarchy to republican, where many constitutions were issued as a result of coups, political changes and social unrest. Its result was the issuance of five temporary constitutions, until the beginning of the American occupation of Iraq in 2003, the end of the Ba'ath rule and the beginning of a political and constitutional era different from the one that preceded it with all the problems that accompanied it. From here we try to review these events and transformations in their constitutional and political framework, by dividing them into three main stages, as follows:

First: The constitutional situation in the monarchy (1921 – 1958).

The royal period witnessed the beginning of the establishment of the new Iraqi state, and the building of its political, constitutional and legal system. All this happened under the auspices of the British occupation and its mandate imposed on Iraq as a State and institutions. The process of writing a new constitution for Iraq was one of the tasks that the British Mandate took over its management and supervision in full details¹, and a set of formal procedures have been approved for the constitution-writing process and the Constituent Assembly voting, approving

1. The draft basic law was drafted, "Major Yonk", an employee in the British Colonial Ministry, with the participation of "Mr. Drew", an advisor in the Iraqi Ministry of Justice, and with the participation of "Mr. Davidson." The draft basic law was sent to the British Colonial Ministry, which amended it according to see it, for more review: d. Hamid Hanoun Khaled, Principles of Constitutional Law and the Evolution of the Political System in Iraq, Beirut, 2019, p. 210 and beyond.

and ratifying it, all under the full sponsorship of the British government until the Basic Law was issued after its ratification by the King on the twenty-first of March 1925 AD.

The Basic Law has included (125) constitutional articles distributed into an introduction and ten chapters that define the form of the political system, fundamental rights, and key institutions in the State represented by the legislative authority, the executive authority, and the judicial authority, as well as some general articles. The parliamentary democratic basic law was adopted in governance, where sovereignty was made to the nation and submitted in the family of King Faisal and his inherits, by article (19) of the Basic Law. The Basic Law gave wide, large and influential powers to the king, whether those powers were in their executive, legislative and even judicial dimensions.

Although the Basic Law is the only and permanent constitution during the reign of the King, which lasted about (38) years, we can say that there was a kind of relative political and constitutional stability compared to the constitutional and political reality after the 1958 coup. And if the Basic Law (the 1925 Constitution) was the constitutional and political document that regulated political and constitutional life at the start of the modern Iraqi State, its beginning and looking at the State with its Iraqi identity, it also defined the rights and duties as well as the competencies and powers of the official institutions in the state and the nature of the relationship between them, the legislative, executive and the judicial. This perhaps represents a positive feature in light of the conditions and circumstances that prevailed at the time.

However, the British occupation, and its assignment to the new Iraqi State had the greatest impact on the formation of the features of the constitutional and political system in the State, and the king who was brought to rule Iraq, as well as the rest of the other institutions, such as the government, the Legislative Council and the judiciary, had marginal powers in a way that did not contradicted with the British interests in Iraq.

Second: The constitutional situation in the Republican Covenant (1958–2003)

The fourteenth of July 1958 AD was the beginning of a new history for the Iraqi State, when a group of officers and soldiers eliminated the monarchy by military force and violence, which was manifested by the killing of the royal family and most of those with them, and the transition of Iraq from monarchy to republican rule was announced. That era of the history of the Iraqi State witnessed many events and developments, the most prominent of which was the multiplicity of coups, the rule of violence and military power in overthrowing and changing governments. During forty–five years (1958–2003) five constitutions were issued, the 1958 AD constitution, the 1960 AD constitution, the 1963 AD constitution, the 1968 AD constitution, and the 1970 AD constitution. All of these constitutions were temporary and not permanent, and most were written by a person or a certain group of people and then approved by a Council consisting of a limited number of political or military figures who carried out the coup or change operation².

The character of the constitutional and legal system during that stage, despite the issuance of many different constitutions, the texts of some or many of which came to stipulate a set of principles such as; Rights and freedoms, and that the people are the source of powers, and the distribution of powers to the constitutional authorities. However, these texts were nothing but only ink on paper, and they had little or no practical share in reality. Where the actual authority, whether in its legislative, executive or judicial field, was in the hands of those who held power and authority in every government resulted from a coup or change. Each of them claimed that they represented the public, ruled in the name of the public and worked for the public, but in reality neither they represented the public nor they relied in their judgment, authority and decisions on the public.

Third: the constitutional situation after 2003 AD.

The date of 4-9-2003 was the beginning of a new phase in the history of the Iraqi State, where the American and British occupation forces and the rest of their allies overthrew the Ba’ath regime within weeks, which extended for more than

2.The 1958 constitution, which was issued shortly after the overthrow of the monarchy and the proclamation of the republic, was commissioned to write it by lawyer Hussein Jamil. Review: Dr. Munther Al-Shawi, Constitutional Law and Institutions, Shafiq Press, 2nd Edition, 1966.

three decades in which Iraq was ruled with iron and fire³, as well as wars and the adventures that cost Iraq and its people a lot of material, moral and human losses, which are still going on today, and the Iraqi people and generations pay their taxes. The American forces and their allies that entered Iraq and overthrew the Baathist regime declared that they were liberation forces, but they quickly admitted that they were occupying forces. Unfortunately, the Security Council and the United Nations were unable to take any action against the American occupation, not just that, but were even unable to issue a statement condemning and denouncing the state of American aggression and occupation, and the Security Council legitimized the occupation by its resolution No. 1483 of 2003, in which it called on those concerned to fulfill their international obligations in accordance with the treaties and agreements that organized the state of occupation⁴.

After 2003 and during the existence of the American occupation, two constitutional documents were issued, the first is a temporary constitution called the (State Administration Law for the Transitional Period), and the second is Iraq's permanent constitution for the year 2005. The temporary constitution (the State Administration Law for the Transitional Period) was issued in accordance with the will of the American occupation, which carried out the process of writing and organizing it (the Coalition Provisional Authority headed by Paul Bremer), in consultation with the Governing Council, which included Iraqi political leaders who were opposed to the former Ba'ath regime. Note that the Governing Council and its composition on the basis of sectarian and ethnic quotas was formed by (Paul Bremer), the civil governor representing the occupying State in Iraq.

The (State Administration Law for the Transitional Period) was issued on March 8, 2004 AD, and was published in the Official Gazette, Issue 3981 for the year 2004 AD. It contained a preamble and sixty-two articles, then a three-section appendix was added to it. The aforementioned transitional and temporary State Administration Law organized the transitional and temporary phase, its government formation and its official institutions operating during that period, in addition to the specific timings for the constitution-writing process and the formation of a government based on the constitution.

3. The American forces began their attack on Iraq on 3/19-2003, and the Baathist regime, its institutions, and all its military and security forces collapsed on 4/9/2003.

4 Refer to: Dr. Hamid Hanoun Khaled, Principles of Constitutional Law and the Evolution of the Political System in Iraq, previous reference, p. 288.

We can say that (the State Administration Law for the Transitional Period of 2004 AD) is the one that established the basic structure of the political process and the constitutional system in general after 2003 AD. It also charted the way and the mechanism for writing the permanent constitution, determined its timing and outlined the principles of its organization, in accordance with the text of Articles (60 and 61) of the State Administration Law⁵.

Based on the principles set by the Transitional State Administration Law in Articles (60 and 61), for the process of writing a new and permanent constitution for Iraq, the elected National Assembly proceeded to form a committee to draft the constitution that consisted of (55) members and 15 members from outside the

5. Articles (60 and 61) of the Law of State Administration for the Transitional Period for the year 2004 AD stipulate the following: Article (60); The National Assembly should write a draft of the permanent constitution for Iraq. This Assembly will fulfill this responsibility by, inter alia, encouraging discussions on the constitution through regular public meetings in all parts of Iraq and through the media, and receiving proposals from the citizens of Iraq while it is in the process of writing the constitution.

Article (61); A - The National Assembly must write the draft of the permanent constitution no later than August 15, 2005.

B - The draft permanent constitution is presented to the Iraqi people for approval by a referendum. In the period leading up to the referendum, the draft constitution is published and widely distributed to encourage public debate among the people about it. C - The general referendum is successful, and the draft constitution is ratified, upon the approval of the majority of voters in Iraq, and if two-thirds of the voters in three or more governorates do not reject it. D- When the permanent constitution is approved by referendum, elections for a permanent government will be held no later than December 15, 2005, and the new government will assume its duties no later than December 31. E - If the referendum rejects the draft permanent constitution, the National Assembly shall be dissolved. Elections for a new National Assembly shall take place no later than December 15, 2005. The new National Assembly and the Iraqi Transitional Government will then assume their duties no later than December 31, 2005, and will continue to operate in accordance with this law, but the deadlines for drafting the new draft may change in order to establish Permanent constitution for a period not exceeding one year. The new National Assembly will be entrusted with writing a draft of another permanent constitution. F- When necessary, the President of the National Assembly, with the approval of the majority of votes of the members, may confirm to the Presidency Council, within a maximum period of August 1, 2005, that there is a need for additional time to complete the writing of the draft constitution. The Presidency Council then extends the period for writing the draft constitution for six months only, and this period may not be extended again. G- If the National Assembly does not complete writing the draft permanent constitution by the fifteenth of August 2005, and does not request an extension of the period mentioned in Article 61d above, then the text of Article 61c above shall apply.

National Assembly were added to them. The process of writing the constitution was accompanied by conditions and circumstances marred by many negative indicators, both with regard to the short period of the process of writing a permanent constitution for future generations in Iraq, and the principle of consensus adopted by the constitutional dialogues and discussions, which reflected the nature of the political formation established by the American occupation which was based on the principle of quotas, sectarian and ethnic division. The committee charged with writing the constitution formally completed its work, and a date was set for the referendum. In fact, the referendum on the constitution took place on 15-10-2005 AD. The Commission announced the public's approval of the draft constitution. It was approved and published in the Official Gazette.

It is worth noting that the Constitution of Iraq for the year 2005 AD contained many constitutional principles and provisions that should be commended and their theoretical importance at the constitutional and legal level, including those related to rights and freedoms, the principle of separation of powers, the role of the judiciary and affirmation of its independence and provision of constitutional oversight to protect constitutional principles and provisions, and other texts stipulated in the constitutions of a developed country that respects the rights of its public.

But this does not negate the problems and defects in the draft constitution, whether in terms of structure or meaning, as well as objectively speaking, the active role played by the occupying power in order to complete the draft constitution, and that the constitution was formally established according to the method of constitutional referendum, as well as restricting the National Assembly to the general frameworks stipulated in the State Administration Law for the transitional period, which were literally transferred to the new constitution⁶. If we look at that general constitutional experience in the Iraqi State during a century of history, we can conclude a set of important results in this field, the most important of which are the following:

1. The modern Iraqi State, since the beginning of its establishment in the second decade of the twentieth century, the draft constitution or the Basic Law, was one of the most important first steps in its political and constitutional process within the framework of an Iraqi identity that represents the Iraqi public, after the end of the Ottoman rule, in which Iraq was part of the dependent territories to the Ottoman authority.

6.Review: Dr. Hamid Hanoun Khaled, previous reference, p. 333.

2. The establishment phase of the modern Iraqi State was constitutionally under the auspices of the British occupation, which had a prominent role in advancing the writing of a constitution and approving it, despite all the objections it faced during the discussions, which eventually led to its approval and the issuance of the first constitution in 1925 AD (The Basic Law).
3. The Basic Law, despite all the circumstances that accompanied the royal era and the political and social challenges, was the only constitution at that stage. As for the republican era, which opened from 1958 to 2003, five constitutions were issued – as we mentioned earlier – and all of them were As a result of coups and military violence. Each group that seizes power issues a constitution that represents its political and intellectual orientations and philosophy, which resulted in clear constitutional and legal instability that was reflected in the political, social, economic and other conditions.
4. The post-2003 era, despite the Iraqi people getting rid of the one-party rule and the one person that perched on their chest for nearly thirty years, but the fall of the former regime and the collapse of all the State institutions, resulted in the presence of the American occupation and the imposition of its hegemony on all the joints of the State and its decisions that were in the hands of the civil ruler (Paul Bremer), and that influence and hegemony was also reflected on the constitutional and legal situation, and the Law of State Administration for the Transitional Period of 2004 is only one of the results and effects of the American occupation.
5. The Constitution of Iraq for the year 2005 AD is one of the constitutions that was characterized by a number of basic advantages, albeit at the formal level. A committee was formed to draft it by the National Assembly elected by the public, and the public approved it according to a general referendum, and the various components of the public of Iraq participated in the committee charged with drafting it. Even the component that was poorly represented in the committee was replaced by figures from outside the National Assembly to participate in the drafting of the constitution, in addition to the principles and provisions stipulated in the constitution related to human rights, freedoms, the peaceful transfer of power, the principle of separation of powers, constitutional oversight, and others. However, this does not negate the other negative aspects that accompanied the process of writing the constitution, or some of

the contents it contained, or the weakness and defect that was reflected even on the formal dimension and the linguistic and orthographical formulations. In addition to this, an important point is also represented in the active and influential role of the American occupation in imposing some constitutional contents and formulations, especially the transfer of complete and literal texts from the State Administration Law to the 2005 constitution.

The constitutional experience in the modern Iraqi State in all its stages, whether a monarchy or a republican, and whether the constitutional documents were issued under occupation or as a result of a military coup or with the participation of a popular referendum, it did not witness constitutional stability and many texts and provisions related to the rights of the people and citizens did not find an echo in practice and applied reality, which was reflected on the overall political, social, economic and cultural conditions within the Iraqi State and society. However, there is a favorable opportunity, despite its difficulty, in making a constitutional amendment to the 2005 constitution, based on those previous constitutional experiences and benefiting from them, and addressing the failures and ills that have emerged from political and administrative work since 2003 AD until now, in order to formulate a constitutional document that approximates the Iraqi reality in all its political and social diversity, within the framework of a single Iraqi State governed by law, the standard of which is equality, and the goal is justice and the guarantee of public rights.