

Constitution Drafting Update
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Having passed up the opportunity of requesting a six-month extension, Iraq's National Assembly is required to pass a draft constitution within a week or face dissolution and new elections. Iraq's current leaders, as well as their American backers, have decided to make constitution writing the centerpiece of their efforts at political reconstruction, making the stakes particularly high. In this analysis I will show:

- How much of the international analysis and lobbying distracts from the central issues and provided overly legalistic understandings of how the constitution would operate;
- Why the central purpose of the constitutional process—striking a bargain among Iraq's various groups—is so difficult; and
- Why the drafters as well as external analysts should devote far more attention to practical issues of enforcement rather than general ideological language.

GUIDED AND MISGUIDED ADVICE

The international debate over the Iraqi constitution has consequences. Despite the efforts of some committee members to hold foreign expertise at bay, there is an extraordinary amount of international involvement in the constitution drafting. Constitution drafting in places as diverse as Russia and South Africa has often been partially internationalized, but the degree of foreign involvement and interest in Iraq has only a few parallels. The American role is particularly striking, with the United States weighing in quite heavily on who should write the document, when it should be written, and what it should say. A diverse group of official and unofficial actors have lobbied the American government (in order to pressure the constitution drafters) on a variety of matters related to women's rights, minority rights, religious rights, and Islam. Some have had some success, with various American officials expressing a strong support in particular for women's rights.

Over the past few weeks, a number of drafts and partial drafts have circulated, and some members of the drafting committee have spoken in some detail about the document's provisions as well as the many unresolved issues.¹ The greater amount of information available has not clarified debates, however. Part of the problem is that some accounts of the draft's contents seem contradictory, owing largely to the contested and evolving nature of the document. But a large part of the problem stems from attempts by many

¹ The Iraqi daily *Al-Sabah* published a draft constitution on July 26. That draft consisted of a compilation of the work of various subcommittees of the drafting committee and had not been reviewed by the full committee. It thus should be viewed as a very preliminary product. The best translation to date is available at <http://www.niqash.org/content.php?contentTypeID=81&id=723>.

foreign analysts and activists to focus on specific formulas in an overly legalistic manner, reading a tremendous amount into specific words and phrases but giving little consideration to the social and political context that will determine what those words actually mean.

Iraq is a shattered society with a barely functioning central government and deep ethnic, religious, and regional divisions. Most elements of Iraqi society harbor grievances—many of them very much justified. And violent conflict is not simply a matter of recent history in Iraq—it is a daily reality in parts of the country. The primary task for Iraq’s constitution writers is to construct a political system that will pull the country back from civil war and bloody conflict.

Most of the attempts to influence the content of Iraq’s constitution are indeed well-intentioned, and some are characterized by careful and expert legal analysis. The issues that they raise—religious freedom, women’s rights, and the relationship between religious and political authority—are indeed likely to be shaped by the outcome of the constitutional process. But they often distract from the central focus on political reconstruction. And they proceed without serious attention either to the political context in which constitutional language will operate or the structures that will be established to enforce them.

For instance, most analysts have concentrated much attention on the precise formula used to refer to Islam, concerned that the wrong words might undermine Iraqi freedoms and democracy. But the primary threats to individual freedoms and minority rights in the document come not so much from the clauses cited² or from any dearth of democratic sentiments but from an overdose of democracy: the drafts leaked thus far place tremendous legislative authority in the hands of a parliament in a way that may leave Iraq’s Shi‘i Islamist parties in a powerful position to write Iraq’s laws as they wish.

Thus when enthusiasm for good causes is mixed with an inattention to context (and often with a vague unease about Islam generally), the results can be misleading. This is true even of some expert legal analyses that have already proved influential. Thus, Freedom House wrote a letter to Secretary of State Condoleezza Rice urging her to “work assiduously” to ensure that the Iraqi constitution not proclaim Islam “the fundamental source” of law. The letter confusingly denounced the formulation as both too vague and too specific before settling on the claim that “similarly worded constitutions – in neighboring Iran and Saudi Arabia, for example – have led to disastrous restrictions on the rights of women, ethnic minorities and religious minorities, including some Muslims, to practice their religion – or not to do so – as they choose.” But the comparison to the Iranian and Saudi constitutions, though politically convenient to those who wish to

² Even much of the narrow textual analysis misses some of the most critical wording. For instance, much discussion has focused on whether Islam is “a main source” or “the main source” of law. Yet while concentrating on whether “main source” is preceded by a definite or indefinite article, no analysts noted the introduction of the term *ahkam*, or rulings, of Islam. Such a phrase, borrowed perhaps from the Afghan constitution, is a specific reference to the centuries of Islamic jurisprudence that such commentators find disturbing and is much more concrete than vague reference simply to “Islam.”

denounce the provision in question, is rather far-fetched even from a narrow textual viewpoint. The closest counterpart to the proposed Iraqi formula is the Egyptian constitution, and nobody familiar with Egyptian constitutional jurisprudence would make the claims that Freedom House does about the impact of the phrase in question.

In a similar vein, two commissioners from the United States Commission on International Religious Freedom wrote a strongly-worded article for the Washington Post claiming that America “must not settle” for a constitution that adopts certain abstract wording about Islam or deviates from a very specific formula placing religious freedoms on an individual (rather than communal) basis. Without considering how such language might be understood and applied in Iraq, the commissioners posit their demands as necessary for regional security and democracy. The threat to regional security is simply unexplained and might be written off as hyperbolic. But their seemingly sounder claims about democracy rest on a combination of careless reading and incomplete reasoning—they pin much of their criticism on the role they claim the constitution would grant to what they call “unelected Islamic ‘experts.’” Not only do the commissioners irreverently dismiss the qualifications of Islamic scholars by use of quotation marks—an odd gesture for those claiming to speak for religious freedom—but they ignore a provision that specifically requires such experts to be elected by the parliament. Indeed, in the unofficial leaked draft in question, a 2/3 parliamentary majority would be necessary to name such people to the country’s constitutional court. Even brief attention to the social make-up of Iraq would suggest that it would result in the selection of consensual figures unlikely to act as the officials claim.

Overall, what stands out in many of the drafts leaked thus far is how much the proposals favor the majority, not how much they directly empower religious officials. To the extent that unelected religious experts are likely to exercise authority under such formulas, they would do so largely as they have done under the Transitional Administrative Law (the document both Freedom House and the Commission wish to see emulated)—through their influence over large numbers of Iraqis and the dominant Iraqi political parties.

STILL SEARCHING FOR A BARGAIN

The overriding challenge for Iraq’s leaders is to come up with a common understanding of the political system they wish to build. As the constitutional process has proceeded, the deepest fault lines in Iraqi society have been laid bare and even deepened. The three main actors in the constitutional bargaining now—Shi‘i religious parties, Sunni Arab leaders, and Kurdish parties—have very different goals that have already made bargaining quite difficult.

For the Shi‘i religious parties, the overriding goal is to construct an Iraqi political system that accurately reflects their demographic weight. Democratic structures that empower the majority very much serve their interest. They also clearly seek to construct a political system that fits with their understandings of Islam. That means passing some laws that reflect Islamic legal teachings, showing appropriate respect for Shi‘i religious institutions and leaders, and encouraging observance of Islamic norms in public life. It does not mean direct rule by religious authorities (the basis of the political system in neighboring Iran), though political pronouncements from such figures—when they are made—are

treated deferentially. Given their electoral strength, they can afford to achieve their goals most effectively through the regular democratic process.

Sunni Arab leaders now participating in drafting the constitution have focused mainly on reversing their exclusion from the post-2003 political process and ensuring the survival of a viable Iraqi political entity. The first goal suggests that they move towards elections as soon as practicable. Quite possibly overestimating their demographic weight, some Arab Sunnis have seen the constitutional process as a means of creating electoral structures that will aid their return to political influence. But such leaders have also expressed strong concern that the constitutional process might lead to the disintegration of the country. While willing to live with a measure of decentralization for Kurdish areas, they make clear that they will refuse any arrangements that set the stage for partition. And they regard decentralization in other areas—most notably the south, where many Shi‘a have expressed an interest in emulating Kurdish autonomy—as a grave threat to the integrity of the country. Many Arab Sunnis who have taken part in the constitution drafting are Islamists, but they regard Shi‘i religious leaders suspiciously.

Kurdish parties are probably the most direct in describing their aspirations. Iraqi Kurdistan has been effectively autonomous from Iraq since 1991, and Kurdish political leaders clearly wish to maintain that autonomy and extend it geographically (with the city of Kirkuk especially important to them). While they have not asked for an independent state they have not renounced separation as a long-term goal and at times have hinted quite broadly that it remains an option. Support for Islamist movements among residents of Iraqi Kurdistan is very low, and Kurdish leaders show little sympathy with the religious agenda of their Shi‘i coalition partners in Baghdad.

All three actors have an ability to veto any constitutional draft they do not like—either through the committee and the parliament or (should the Shi‘i majority decide to push its own version through) through the plebiscite scheduled for October 15 (in which 2/3 majorities in any three of Iraq’s eighteen provinces can prevent adoption of the constitution). What of advocates of liberal freedoms, human rights, and women’s rights?

Such activists are not shut out of the constitutional process, though their hands are weaker. There is no mass political movement behind them. But they can draw on some assets: the rhetorical commitment of all involved parties to democracies and liberal freedoms is quite strong. The leaders of Iraq’s Shi‘a and Kurds were very much victims of an undemocratic and illiberal regime, so such values have genuine resonance. And liberal, human-rights, and women’s-rights activists can also call on broad international support. Most of that support is quite diffuse and not effectively represented well on the ground in Baghdad, but there is one major exception: the United States government.

Indeed, the United States is now an active participant in the constitutional negotiations. The Americans were never removed from the process, but their role is increasingly public and forceful, ranging from Secretary of Defense Donald Rumsfeld’s gruff command to Iraqis to “get on with it” to Ambassador Zalmay Khalilzad’s far more genial kibitzing. Yet the Americans have three sets of goals that do not always coincide. First, they are dedicated to using the constitutional process as a device for political reconstruction. And indeed, the United States can take much of the credit for getting the Arab Sunnis to the table, an absolutely critical development for arriving at a genuine bargain. Second, the

Bush administration is interested in seeing a democratic and liberal constitution—motivated partly by principles and partly by a desire not to have a constitution that is politically embarrassing at home. Third, the Americans want a constitution written by the August 15 deadline in order to demonstrate that the process is succeeding and perhaps to allow a partial withdrawal of its forces. In the last two weeks, the Americans have emphasized this third goal to a striking degree. In so doing, however, they have almost certainly undermined the likelihood of striking a genuine (and not merely cosmetic) bargain among the contending parties. This is ironic indeed, since the public American justification for stressing the deadline is that now is the time for Iraqi leaders to make the necessary compromises.³

WHO OR WHAT WILL ENFORCE THE BARGAINS?

The drafters will have trouble developing bargains that will survive. For one of the major stumbling blocks—balancing authority between the central and regional governments—the problem will be developing a solution that has any staying power because of deeply divergent goals and mistrust among the parties. For the second stumbling block—the balance between Islamic and liberal provisions—a lasting bargain might be easier but only if drafters shift attention to a more practical and institutional level.

On federalism, it will be very difficult to design any constitutional arrangements that will satisfy all parties. The various parties are not equally committed to a successful outcome and all three define success quite differently. Indeed, the existence of three parties will make bargaining difficult. Kurds might be willing to grant the Shi‘a majority rule and heavy Islamic symbolism in return for greater autonomy, but Arab Sunnis would object to many aspects of this agreement. Sunni and Shi‘i Arabs might agree on a formula regarding Iraq’s Arab and Islamic identities, but Kurds would disrupt the deal.

Reaching a bargain among the parties would be much easier if it were restricted to the level of symbols and vague formulas that led all to feel that their grievances about the past were acknowledged. But much more than symbols and history are at issue. Almost every practical aspect of the relationship among the various levels of government is in dispute. Any agreement will quickly be tested as various parties scramble to enforce their own interpretation of its provisions. Constitutional negotiators will therefore have to devote considerable attention to mechanisms for settling disputes. And they will have to do so in an atmosphere of mistrust in which such mechanisms have failed in the past. The Transitional Administrative Law carefully designed a solution for Kirkuk (involving a sequence in which people relocated by the Ba‘th would return, the presidency would suggest a solution to border issues, international arbitration would be called upon if necessary, a census would be conducted, and a permanent solution devised). None of the steps it described have been taken, leaving Kurds feeling betrayed.

³ It is true that some Iraqi officials have dropped hints that they might make some political or legal maneuvers to evade the deadline. For instance, the chair of the drafting committee pushed a resolution through parliament last week affirming the August 15 deadline but also explicitly mentioning that some of the clauses that had not been finalized might be added shortly afterwards.

In determining the relationship between the constitution's Islamic and liberal nature, the focus should also be very much on the practical details. Any abstract constitutional provisions for either religious freedom or Islamic law should not be read without considering the structures—if any—that might give such clauses meaning. Mentioning Islam, the Islamic shari'a, or the rulings of the Islamic shari'a as a limitation on rights frightens advocates of those rights, and indeed such provisions could easily promise rights with a liberal hand while taking them away with a religious one. But it is impossible to understand how such language would operate without considering who is authorized to speak for Islam. And here attention should be given to the constitution's many majoritarian provisions (in which the parliament—perhaps led by a strong cabinet—will determine the meaning of rights) as well as the structure the country's constitution court (slated in one draft to have a multiplicity of bodies from the executive, legislative and judicial branches selecting its members). Even the proposal to change personal status law—cast in Iraq as a battle between women's rights and religious freedom—would depend very much on implementing legislation to give it meaning.

Thus, while women's groups have expressed strong disappointment with the drafters' inclinations to endorse women's rights only within the rulings of Islamic law, they may have gained more than they realized if reports are credible that the current draft mandates that a minimum of one-quarter of all decision-making positions go to women (the quota existed only for the parliament in the Transitional Administrative Law).

Given Iraq's composition and the popularity of Islamist parties, any balancing of liberal rights and Islam that presumes a sharp opposition between the two is likely to result in a sharp defeat for the former. Advocates of individual rights, religious rights, and women's rights would be well advised to avoid a quixotic quest to remove Islam and instead focus on the authority and structure of those institutions that are likely to give the constitution meaning. There is no need for their international supporters to abandon their backing for such causes. But they should remind themselves that Iraqis rather than Americans will be operating the institutions that are designed and interpreting the words that are written. And their primary task is to reconstruct a political system that has collapsed and prevent the aggravation of a set of political conflicts that is already extremely violent.

Further background on Iraqi constitution drafting

1. [“Iraq's Constitutional Process Plunges Ahead,”](#) An overview of the issues and process, July 2005
2. [“Constitution of Iraq: Draft Bill of Rights,”](#) a translation and commentary,” July 2005
3. [“Debating Islam in Post-Baathist Iraq,”](#) a consideration of issues related to Islam and politics in Iraq, March 2005
4. [“Post-Election Iraq: Facing the Constitutional Challenge,”](#) an overview of the process, February 2005