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Iraq's Constitutional Conundrum

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The Iraqi constitutional process was asked to do too much too quickly. Operating within the boundaries of the Transitional Administrative Law (TAL), it was to build a national consensus that would rob the insurgency of its constituency, foster the development of a democratic political system that respected liberal freedoms, and be completed by August 15. In the end, none of these goals was met. The TAL was violated, no consensus was achieved, the Arab Sunni participants were alienated from the process, and the resulting draft is full of loopholes that emphasize democratic elements at the expense of liberal freedoms. Only the goal of meeting the deadline came close to being met, and that was arguably the least important (although the United States stressed it to an extraordinary degree). Although neither the original deadline of August 15 nor the revised deadline of August 22 was met, the final submission of the constitution did come six days later on August 28.

By insisting that the constitutional negotiations include all parties and that the deadlines be respected as much as possible, the United States encouraged a game of constitutional chicken, but none of the participants blinked. Has the constitution only deepened Iraq's political crisis? Is there any way that the project of political reconstruction through constitution drafting can be rescued?

The Process

In the end, the process of drafting the Iraqi constitution proved problematic for two reasons. First, it violated the rules set down in the TAL, which required that the country's National Assembly write the constitution by August 15. The Assembly earlier entrusted initial drafting to a committee—as was anticipated. Yet the Assembly never passed judgment on the committee's work. First, parliamentarians failed to take advantage of the opportunity to request a six-month extension (allowed by the TAL), and they then amended that document with only minutes to spare before the August 15 deadline to allow for a one-week extension.¹ The Assembly took no action within that week, although a working draft was delivered to the speaker on August 22. Six days later, a different draft was read to the Assembly without a vote being taken. An overly frank government spokesman had explained in advance that the Assembly would “rubber stamp” the document; in the end parliamentarians eschewed even

¹ It is still not clear that the amendment satisfied the provisions of the TAL, which required not only the support of three-quarters of the Assembly but also the unanimous approval of the three-member presidency council. Although all three members of the presidency council were present for the parliamentary session that approved the one-week extension, the Iraqi president's website (www.iraqipresidency.net) makes no mention of formal approval of the amendment.

that step as those in attendance merely listened to it. Some journalistic accounts parroted the argument by some Iraqis involved that the Assembly need not take a vote. But the notion that the TAL's requirement for the Assembly to write the constitution could be satisfied by handing the speaker an incomplete draft minutes before the deadline is beyond implausible.

Such violations of the TAL would frustrate only the legally minded if the outcome attracted the support of all parties. But that leads to the second set of problems surrounding the constitutional process—its failure to operate on the basis of consensus. When the constitutional committee was originally composed solely of parliamentarians, it was able to make considerable progress based on bargaining between the major Shiite and Kurdish parties. But such a constitution was seen by many as the recipe for continued conflict since it sidelined Arab Sunnis and offered little to secularists, minorities (other than Kurds), and Iraqi nationalists. Thus some favored the appointment of additional members to the committee. The Bush administration swung heavily behind the position throughout the process, beginning with a sudden visit by Secretary of State Condoleezza Rice to Iraq in May and ending with a telephone call from President Bush to Abd al-Aziz al-Hakim, the leader of one of the major Shiite parties, on August 25. Arab Sunni participants were added and promised that the committee would operate by consensus so they would not be outvoted.

The inclusion of Arab Sunni participants constituted a gamble: it made a constitution far more difficult to write, but it also made it more plausible that the constitution could serve as the basis for reconstructing the Iraqi polity. The gamble led many (including some key participants) to question the timetable, especially when the newly appointed Sunni representatives objected to almost all elements of the emerging Shiite-Kurdish bargain. The various parties made some forays in the direction of compromise, but the fundamental divisions among them seemed to grow over time rather than diminish. Finally, the drafters took the step they had promised to avoid. On August 28, they voted to approve a text that did not have the support of the Arab Sunni members. A constitutional draft was approved by the committee, but the strategy of building consensus was left in shambles.

In fact, the constitutional process may have even aggravated divisions it had been expected to help heal. The shift in Iraqi political rhetoric over the past several months has been striking. Although sectarian and ethnic divisions have often been strong in Iraqi society, they have not always been highly politicized. The political division between Kurds and Arabs has been decades in the making and will be overcome with great difficulty if at all. But Sunni-Shi'ite divisions have been more variable. There can be little doubt that they have worsened greatly recently, marked not only by considerable violence but also by increasingly bitter recriminations among political leaders. Although the early constitutional process was marked by very polite—if somewhat tense—public speech, the gloves have come off in recent weeks. When a deputy was evicted from the Assembly by deputy speaker Husayn al-Shahristani (a Shiite), he sarcastically remarked that he had never heard of any place in Iraq called Shahrstan (a location in Afghanistan); another deputy (and former defense minister) lacked even this subtlety when he alluded to an attempt to “Persianize” Iraq—a clear reference to the attitude among some Iraqis that the Shiite parties are not fully Iraqi. Several months ago, political leaders avoided terms like “Sunni” and “Shiite,” referring to such categories obliquely. Now few disguise the sectarian and ethnic divisions that have led to Iraq's constitutional impasse. Almost all other political categories and debates in Iraq have been subordinated to the overriding divisions between Arabs and Kurds and between Sunnis and Shiites.

The “Final” Text

If the process of writing the constitution has not healed Iraq’s wounds, might its content prove more helpful? Some very ambitious claims for the document have been made—one Bush administration official described its protections of some liberties as “among the most far-reaching of any in the region and probably around the world.”

Such a statement cannot survive even a quick glance at other constitutions. The Iraqi draft resembles that of its neighbors in its rights provisions much more than might have been expected. It names many rights but subjects most of them to implementing legislation and pays little attention to implementing structures. An unusual aspect of the Iraqi constitution was that it grew shorter in its final draft rather than longer. Instead of adding clauses to satisfy various groups, the constitution was stripped of some of its provisions; those that were maintained abdicated much of the responsibility of providing strict instructions to future Iraqi political leaders. Critical structures—the federal supreme court, one house of the parliament, the judicial council, an independent commission for human rights—were simply mentioned in a very general way, leaving to the Assembly the ability to construct constitutional institutions as it wished.

Thus, if the final Iraqi constitution stands out from its regional counterparts, it is not for its protection of rights but for its skeletal nature and its majoritarianism. Should the constitution be approved, most of its meaning will be unclear until parliament passes the relevant legislation.

Such a path does have some real virtues. It is certainly democratic (if anything, excessively so, because it offers fewer protections to minorities), and it also may avoid the overweening presidentialism so common in Arab republics. The result may not be to empower the parliament, however. If the experience of the National Assembly is any indication, the constitution will likely result in critical issues being decided by a small group of leaders who then refer their decision to parliament for ratification. In short, the parliament will possess tremendous authority, but it may not exercise most of it directly.

Yet even if Iraq’s constitutional drafters sought to craft a document that would enable government rather than restrict it, they may have gone too far. For instance, emergency rule—the Achilles heel of several Arab constitutional systems—is allowed but almost completely undefined in the final text. The most notable silences, however, cover two of the issues that attracted the most attention in the drafting process—Islam and federalism.

On Islam, enormous Iraqi and international debate focused on whether Islam would be designated as “a source” or “the source” of law. The advocates of the indefinite article won a victory in the final draft (although the word “basic” was inserted so that Islam became “a basic source for legislation”). And many of the proposed references to Islam did not survive the drafting process. Yet many of these debates over wording distracted participants from the fundamental constitutional tool that will likely be used to construct a political and legal order with a strong Islamic coloration—the ballot box. More secular Iraqis often fell back on formulations developed for the TAL in order to forestall Islamist initiatives, apparently forgetting that the TAL’s procedures had delivered the Islamist leadership dominating the constitution drafting in the first place. Although a symbolic reference to senior Shiite religious authorities was deleted from the final draft, it is unlikely that the clause would have had anything approaching the importance of the powerful sway Shiite religious leaders hold over many of Iraq’s leaders and voters.

On federalism, the final draft does draw back from majoritarianism in one important respect: it enshrines the current position of Iraqi Kurdistan as a distinct region. Kurdish leaders were explicit in the drafting process their acceptance of Kurdish autonomy did not imply a disavowal of a right to statehood and their negotiating stance suggested that eventual statehood remains very much a real possibility in the future. Nothing in the final draft undermines an eventual Kurdish drive toward statehood. But when it came to another crucial controversy concerning federalism—the ability of other provinces to combine into regions—the constitution simply refers the matter to regular legislation. Indeed, in order to remove any ambiguity, the constitution expressly states that such a law is to be passed by “a simple majority.” It was probably this clause as much as any other that led to the Sunni rejection of the text because of a strong suspicion that it was merely a constitutional formula for the partition of the country.

Thus, the most important issues dividing Iraqis are not resolved by the final text but merely postponed. Shiite power is enshrined not by specific provisions but by the lack of specificity. Although full partition may not be likely, it is not wholly implausible, and a loose confederal structure is a real possibility. In short, the constitution as drafted is unlikely to unify the country or undermine the insurgency.

Paths Forward: A Final “Final” Text?

With its silent acquiescence in the final constitutional text on August 28, Iraq’s National Assembly seemed to leave Iraqis with two choices, neither of them attractive.

First, the most likely path would be the ratification of the constitution in the referendum scheduled for October 15. Because most of the victors of the January 30 election support the draft, it seems unlikely that a majority of Iraqis will reject it. Should the draft be ratified, Iraq’s third elections of the year will be held in December 2005 for a new parliament. The Assembly is now writing the law under which those elections will be held and the electoral commission is already calling parties to register. In a bid to entice Sunni participation, the law is likely to abandon the pure proportional representation system used in January in favor of one in which seats are allocated by province (so that even if Sunnis turn out less than other groups, provinces in which they predominate will still send their share of deputies). Many Sunni leaders have encouraged participation in the October referendum, but it is not yet clear if they will have any success or if their new enthusiasm for voting will carry over into the subsequent parliamentary elections. If the constitution is approved, however, it is difficult to see how it will diminish support for the insurgency. Indeed, ratification of the constitution may be seen by many Sunnis as simply entrenching Shiite rule and Kurdish separatism.

Second, the constitution might be rejected. If two-thirds majorities in any three of Iraq’s eighteen provinces reject the constitution, then the Assembly will be dissolved and elections for a new assembly will be held, beginning the process all over again. Such an outcome is unlikely and probably depends on an odd alliance of secular Sunnis, religious Sunnis, and the politically mercurial Sadrist movement. It might depend as well on quiet acquiescence by insurgents. In a strange way, those who have attempted to disrupt the constitutional process may ensure its passage unless they hold their fire and allow constitutional opponents to vote. Rejection of the constitution would severely disappoint some actors, including the United States, which has staked so much of its policy on a successful constitutional process. But the deeper danger might be that Kurdish and Shiite leaders would view it as a signal to act unilaterally—the Kurds by moving toward independence, and the Shiites by amending the TAL to make the ratification process less demanding. If they restrain themselves, however,

such leaders might find that given more time and the ability to work with Sunni leaders who are elected rather than appointed, they might be able to succeed where the first drafters fail.

There is a third option, although it is highly dubious from a legal point of view. The final draft may be less final than initially proclaimed. Even when the drafting process was declared over, some Sunni participants made quite clear that they were willing to reopen negotiations. And on August 30, United States Ambassador Zalmay Khalilzad suggested that the “final constitution” may not be the “final final constitution.” The suggestion set off a series of flip-flops among all the leading actors. The United States, who had sworn by the deadline, suddenly claimed that consensus was more important; the timetable emphasized by President Bush himself suddenly was presented as flexible. Sunni negotiators had claimed that the failure of the Assembly to endorse a draft by August 22 represented the end of the effort and required new elections. Yet some quickly shifted to claim that the process could continue as long as negotiations were reopened. Those who had advanced unlikely claims that changes could be made as long as the Assembly speaker had received a rough draft by the deadline suddenly claimed that only technical amendments were permissible.

And indeed, it is absurd to claim that the TAL might have Iraqis voting on a document different from one approved before the Assembly’s deadline. But such an absurd reading of the TAL may make the most political sense. There is no guarantee that reopening negotiations will lead to a more consensual document. But if it does, legal niceties are likely to be forgotten. All parties offered significant concessions in the course of constitutional negotiations, although they remained quite far apart on some issues at the end. The most significant stumbling block was the Sunni rejection of federal arrangements extending beyond Kurdistan and the growing Shiite interest in federalism. Compromise may still be possible. Sunnis have accepted some measure of decentralization and the Shiite position on federalism is evolving. Two years ago, most Shiites were very suspicious of the idea and even with the groundswell of interest in the formation of a southern region, some leaders were far more enthusiastic than others.

The strategy of solving the problems posed by deep ethnic and religious divisions, separatist tension, and raging insurgency through drafting a constitution always seemed a little unlikely. If it is not to prove quixotic, an extension of the process—either through rejection of the constitution or reopening the drafting—would seem to be the most hopeful step to take.