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Iraq's Constitutional Process Plunges Ahead

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Iraq's National Assembly is scheduled to produce a draft constitution by August 15, 2005, and senior Iraqi leaders have stressed their determination to meet that deadline. U.S. leaders have similarly insisted on the necessity of completing the work on schedule. The U.S. and Iraqi leadership may get their wish in the short term, but even if they do, the constitution is unlikely to be the solution to Iraq's political problems.

Based in part on intensive analysis of the Iraqi press, this examination is divided into five sections that will explore

- how the timetable for the constitution drafting process was established and why Iraqi and American leaders are so anxious to meet its deadlines;
- what steps have been taken to write the constitution;
- how drafting the constitution has been hampered by—and perhaps even aggravated—ethnic and religious divisions within Iraqi society;
- how the committee formed to draft the constitution is addressing the major issues (the structures of government, religion, federalism, rights, gender, and security);
- why the rushed process risks diminishing broad participation in the process;
- what other steps must be taken in order to complete the constitution; and
- why the constitution is unlikely to address Iraq's political crisis.

The constitutional drafting committee aims to present its work to the country's parliament by August 1. This analysis will therefore be updated as events warrant.

Origin of Timetable

The fixation on the August 15 deadline is odd: It was established in the country's interim constitution, the Transitional Administrative Law (TAL), a document that the country's

current prime minister, Ibrahim Al Jaafari, almost refused to sign. And the United States initially hoped that a constitution would be written in a very different manner. The date emerged out of complex political maneuvering in the fall of 2003 and spring of 2004. The U.S. occupation in the spring of 2003 was initially accompanied by a pronounced lack of clarity regarding either goals or timetables. In the fall, when the United States finally decided to hasten what it referred to as the “transfer of sovereignty” to Iraq, it set a deadline for that goal of June 30, 2004. Yet when the United States proposed to convene an unelected assembly to oversee the process, the Shiite leadership in the country (and in particular Grand Ayatollah Ali Al Sistani) objected, insisting on elections as early as possible. The United States dropped its plans for alternatives to elections and the Shiite leaders accepted a postponement of the balloting until early 2005. The compromise was codified in the TAL and a later annex.

A tight timeline for the constitution was established once the elections were set. Mindful of the possibility of delay, the drafters of the TAL were careful to allow the National Assembly to request a short extension. They also laid down clear procedures in case its effort failed or ran out of time. Thus, the National Assembly, elected in January 2005, is to complete a draft by August 15; a referendum on that draft is to be held by October 15. If the referendum is successful, the first elections under the approved constitution (presumably for a parliament) are to occur by December 15. But if the referendum fails—or if the National Assembly does not approve a draft in time—then a new National Assembly is to be elected to start the process over again. Should the current National Assembly decide by August 1 that it needs more time, it may be granted up to six additional months.

The original political logic underlying the timeline has lost much of its relevance and is only dimly remembered, but U.S. and Iraqi leaders subsequently invested it with tremendous importance, partly for separate domestic political reasons.

The various actors do not explicitly justify their haste in terms of domestic or partisan political concerns. They present the process of writing a constitution—as President George W. Bush recently described it—as an opportunity for Iraqis to “bind their multiethnic society together in a democracy.” Iraqis regularly speak of writing a document for “the future generations” that expresses the will of the entire public rather than the short-term political interests of current parties or groups. Prime Minister Al Jaafari has described the political process as “worth a thousand tanks.” And U.S. officials echo such rhetoric. For example, Richard Jones, the Iraq coordinator in the U.S. Department of State, testified before Congress in June that, “Generally speaking, Iraq needs to move from ethnic to issue-based politics. This evolution will require national political dialogue among Shi’a, Sunni, and Kurdish groups and the involvement of other minority populations.”

Although there has been dialogue as part of the constitutional drafting process, it does not seem to be moving Iraqis toward a more unified sense of political community. Since the occupation of the country, just the opposite has occurred. Of course, constitution drafting almost always combines idealistic language about the “public interest” and “future generations” with hard-nosed political bargaining about particular and partisan interests. The problem in Iraq has been that much of the process of constitutional design has aggravated the same political divisions that it is supposed to ease. The three-member Presidency Council, for instance, was designed by the TAL, with Shiite, Kurds, and Arab Sunnis each laying claim to one of the seats. Most of the bargaining over the permanent constitution has been carried out in ethnic, religious, and regional terms, and initial indications are that the

constitution being drafted will reflect the interests of the various groups without resolving the many differences among them—or even provide clear tools for resolution.

Why do participants treat the timetable as sacrosanct? Why are U.S. and Iraqi officials reluctant even to take advantage of the six-month extension allowed by the TAL? The August 15 deadline has become central to the process of political reconstruction in Iraq for U.S. and Iraqi leaders, largely for reasons involving their respective domestic political situations.

For the Bush administration, meeting deadlines (even self-imposed) is the strongest evidence available of political progress. The writing of the TAL, the “transfer of sovereignty,” and the January 2005 elections appear in almost any U.S. list of accomplishments in Iraq. Indeed, since the capture of Saddam Hussein, they constitute the primary achievements. Thus, in his testimony, Jones was explicit that “[U.S.] diplomacy is geared toward helping the Iraqis [to] continue to meet those deadlines.” And the president himself has been even more explicit—even while denouncing any military timetables, he has stressed the importance of the political schedule: “That’s the timetable. And we’re going to stay on that timetable. And it’s important for the Iraqi people to know we are.” Under strong domestic criticism for its failure to manage post-war Iraq effectively, the Bush administration must realize that any delay would add to the impression that Iraq has sunk into a political morass. Leading Democrats, after flirting with calls for a timetable for withdrawal, have begun speaking instead of “bench marks,” and they have followed the Bush administration in identifying adoption of the constitution as the primary bench mark. For instance, Senator Carl Levin (D-MI), while more generous in allowing for use of the six-month extension, has stated that “the United States needs to tell the Iraqis and the world that if that deadline is not met, we will review our position with all options open, including but not limited to setting a timetable for withdrawal.” The insistence on the importance of the deadline has become something of a self-fulfilling prophecy: If the process does not proceed on schedule, it will now be regarded as a failure for the United States—and perhaps even an odd victory for an insurgency that shows little interest in constitutional issues.

Yet why do Iraqi leaders echo this reasoning? Standing next to President Bush last month, Prime Minister Al Jaafari adduced the same sort of argument about progress that is heard from U.S. leaders: “I see from up close what’s happening in Iraq, and I know we are making steady and substantial progress. People said Saddam would not fall, and he did. They said the elections would not happen, and they did. They say the constitution will not be written, but it will.” Back in Iraq, Al Jaafari has continued to insist on meeting the August 15 deadline, as have others involved in the effort. Al Jaafari and members of his coalition have their own domestic political reasons to favor haste: They are anxious to turn the interim government into a regular one, further empower the country’s parliament (which they are likely to dominate even after new elections), and remove all provisional aspects of their current positions. In this sense, many of the country’s Shiite leaders have been fairly consistent, working to empower structures of majority rule (since they are in the majority).

Drafting Process

Although the TAL provided a timetable, it gave little other direction on drafting, leaving the National Assembly almost complete freedom, with only a small number of procedural and substantive guidelines. With a set of other tasks—including electing a presidency council and forming a cabinet—the assembly dawdled in determining how the constitution would be written. Because few Arab Sunnis voted in January 2005, it was clear that any drafting

committee formed exclusively from National Assembly members would not be representative of the population as a whole. Still, acting after considerable delay, the assembly appointed a fifty-five-member committee composed only of its own members, with seats on the committee apportioned according to the size of a bloc's parliamentary representation. With all the delays surrounding its selection, the committee did not meet until May 28, four months after the elections and a scant two and one-half months before the August deadline. And the committee cannot make use of the entire period, since it must forward its draft to the full Assembly in sufficient time to allow for full debate. Recently, the head of the committee has announced that he aims to produce a draft by the beginning of August.

To work as quickly as possible, the constitutional committee rarely meets in plenary session; instead it has divided itself into six substantive subcommittees: basic principles, system of government, federalism and local government, constitutional guarantees, rights and duties, and transitional and amendment provisions. In addition, the committee has also formed a subcommittee that will coordinate among the subcommittees and decide difficult issues. The subcommittees—and the committee as a whole—are to operate by consensus rather than majority rule. When they complete their work and report back to the full committee, the various sections will be assembled into a complete draft. The committee will then consult with outside experts about the content of the draft before turning its attention to legal drafting. Should it become clear that the process cannot be completed in time, the National Assembly has until August 1 to ask for a six-month extension.

Once the National Assembly has the draft, it will have to review it very quickly. It must approve the text that is voted on by all Iraqis, but in order to maintain the schedule, members will have to forego extensive deliberations over the text. Instead the governing coalition will likely push the draft through the parliament—aided by the fact that the drafting committee is composed largely of parliamentary deputies and dominated by leading parliamentary blocs.

A whole host of international actors—governments, international organizations, and nongovernmental organizations—are poised to give the committee any help it wants as well as to encourage broader debate about the constitution. The committee is accepting such help, but it has already shown considerable sensitivity on the subject. With some critics claiming that the constitution has already been drafted in English, and with strong international pressure already having been felt on issues as diverse as the role of Islam, religious freedom, Kurdish autonomy, and women's rights, the committee seems to feel that excessive external assistance risks undermining the document's legitimacy as well as making it more responsive to foreign than domestic concerns. There has been some effort to coordinate international assistance among the various interested actors, but it is not yet clear how much influence they will have.

Pitfalls: Deep Ethnic and Religious Cleavages

The drafting process has already encountered two of the major fault lines in Iraqi politics: a Kurdish-Arab division that has grown over the past half-century and a Sunni-Shiite split that has been more recently politicized but suddenly shows signs of dramatically worsening. Although makeshift solutions have allowed the process to go forward, the constitutional committee is increasing the site where the two problems are linked, with very serious consequences for the constitution. Indeed, it is difficult to imagine how the constitution can

bridge the tremendous gaps within a few weeks. It is far more likely that the draft will either be delayed or merely paper over the deepening divisions in Iraqi society.

Kurdish Autonomy and Kirkuk

The dispute over the status of the Kurdish areas poses many difficult issues for the constitution drafting committee: Will a federal system be adopted; how will revenues be allocated among the various levels of government; how will appointments be made; what will be the official name of Iraq (that is, will Iraq become a “federal republic” or merely a “republic”); how will regional appointments be made; what oath will officials take; and where will such oaths be sworn (in Baghdad or a regional capital)? The constitution committee, dominated by Shiite and Kurdish leaders, appears to be making some progress on these issues; according to the most recent statements the problem has been solved and all that remains is the legal drafting. Even if that is true, the experience of the TAL suggests that details matter deeply to all participants so there may be much work left to do. Nevertheless, the basic outline of a compromise is clear: Kurds will accept that Iraq will remain a single state and allow some structures of majority rule to arise—including those likely to give the political system an Islamic coloration; and Shiite leaders will accept a very considerable degree of Kurdish autonomy. Symbolic of that compromise was a suggestion by a Shiite member of the drafting committee that Iraq be referred to as a “federal Islamic republic,” allowing the word *federal* in return for including the word *Islamic*. Kurdish leaders sometimes allude publicly to an agreement they made with the Shiite leadership when the current government was formed, but it is not clear what that agreement is or whether all parties understand it the same way. Yet political sensitivities and mistrust have already threatened the spirit of compromise. The most difficult point involves the city of Kirkuk, a problem that may not even be addressed in the constitution at all.

Kirkuk is a city with a mixed population (with Arabs, Kurds, and Turkmen especially numerous). The Baathist government deliberately tampered with the ethnic composition of the city, encouraging Arabs to move in and Kurds to move out. It also redrew provincial boundaries in an effort to make autonomy for the Kurdish provinces less attractive. Kurdish demands are clear: Provincial boundaries must be restored, expelled populations must return, and Kirkuk must be a part of an autonomous Kurdish region. This provokes fears among other Iraqis: some suspect that satisfying Kurdish demands would be tantamount to allowing de facto Kurdish independence; others (such as Kirkuk’s Turkmen population) claim that their desires are not at all addressed by the Kurdish program.

The TAL attempted to address this issue in a phased manner. First, the transitional government is to oversee a “remedy” to “the injustice caused by the previous regime’s practices in altering the demographic character of certain regions, including Kirkuk, by deporting and expelling individuals from their places of residence, forcing migration in and out of the region, settling individuals alien to the region, depriving the inhabitants of work, and correcting nationality.” Second, on administrative boundaries, the three-member Presidency Council is to “make recommendations to the National Assembly on remedying these unjust changes in the permanent constitution.” But the Presidency Council has to act unanimously; if it fails to agree on a solution “it shall unanimously appoint a neutral arbitrator to examine the issue and make recommendations. In the event the Presidency Council is unable to agree on an arbitrator, it shall request the Secretary General of the United Nations to appoint a distinguished international person to be the arbitrator.” Finally, the TAL stated:

The permanent resolution of disputed territories, including Kirkuk, shall be deferred until after these measures are completed, a fair and transparent census has been conducted and the permanent constitution has been ratified. This resolution shall be consistent with the principle of justice, taking into account the will of the people of those territories.

The problem is that the process has not really begun. Those responsible for the first phase—remedying the past population movements—have complained that they have not been given the administrative resources necessary for the task. Nor is there any public evidence of progress on the second part—in which the Presidency Council makes recommendations on boundaries for incorporation into the constitution. The third phase is explicitly to follow the first two; it also requires a census—which the Ministry of Planning has (perhaps overly optimistically) suggested cannot begin before next year.

Kurdish leaders stress the importance of sequencing—the status quo prior to the Baathist regime must be restored before any permanent decisions are made. Other Iraqis suspect this amounts to a proposal to “give us back Kirkuk now so that we can negotiate about it later.” Kurds have their own suspicions: Dawdling on implementation of the TAL has led some Kurds to charge that the current government has no intention of fulfilling its commitments. So when Prime Minister Al Jaafari suggested at the end of June that the matter of Kirkuk would not be addressed until after the constitution had been approved, Kurdish leaders reacted by accusing him of bad faith (with one even suggesting that his transitional government was acting just like its Baathist predecessor). Some even hinted they would withdraw from the constitutional process and transitional government if Kirkuk was postponed. Al Jaafari managed to ride out the storm by insisting that the TAL provisions would be implemented, urging the speedy resolution of property and residency claims, and assuring Kurdish leaders that his statement about the final resolution was meant to be consistent with the TAL rather than an alternative to it. Both sides have thus agreed that the TAL language is to be respected (although interpretations and emphases differ) and that the matter is in one sense resolved: So long as the TAL provisions are regarded as valid, there is no need to mention Kirkuk in the constitution at all. Yet suspicions about the issue run so deep that it might arise again to disrupt the entire process.

Arab Sunni Participation

Even before the January elections, it was clear that Arab Sunni participation in the voting would be far lower than other groups in Iraqi society; with representation in the National Assembly determined by strict proportional representation, Arab Sunnis would therefore be underrepresented in the body responsible for drafting Iraq’s constitution. There was considerable discussion of creation of a constitutional commission that would include those elements underrepresented in the balloting. Yet even though the election results surprised nobody, it took five months, international pressure, and a visit by the U.S. secretary of state before that solution was adopted.

Part of the problem has been that the National Assembly and the political parties that dominate it are not enthusiastic about being joined by unelected leaders not fully committed to the constitutional process, associated with the Baath Party, or perhaps even sympathetic to the insurgency. And when the governing parties did finally come to accept increasing Sunni representation, that did not prevent prolonged haggling about the number of members to be added. But the problems went deeper than reluctance to share power. Iraq’s Sunni Arabs are not simply underrepresented in the National Assembly; they are not clearly

represented by any political group. Although the National Assembly, the constitutional committee, and the cabinet accepted the principle of increasing Sunni participation, it was not clear who would be willing and able to speak for Sunni Arabs. An umbrella group was finally assembled, but rivalries and reluctance made it difficult for them to settle definitively on a list of names.

In the midst of wrangling over the Arab Sunni representatives (or, as they prefer to be called, “representatives of those boycotting the election”), several members of the drafting committee revealed that some of the subcommittees had finished 70 or 80 percent of their work. Although prospective new committee members were quickly assured that they could reopen any issue, even this did not resolve the matter of their participation. The constitutional committee asserted that those unelected Sunnis joining could not have the same status as elected assembly members; it also insisted that any new delegate fulfill all the requirements for membership in the assembly (a device to bar former Baathists). Eventually a way was found around both these objections. First, the constitutional body reformed itself as a commission (and thus no longer formally served as a committee of the National Assembly). But the smaller fifty-five-member committee will be called back into existence to present the final draft formally to the National Assembly. Second, the committee quietly dropped the insistence that the new delegates be approved by the country’s de-Baathification commission.

Although it solved these questions of protocol and procedure, the committee—or, as it officially styles itself now, the commission—found that incorporating the new representatives would pose significant substantive issues. Iraq’s president explained on *Al Jazeera* that the drafting timetable could be met as long as Arab Sunni representatives did not attempt to contest de-Baathification or the reliance on the TAL. But that is precisely what many joined in order to do. The delicate compromise between Shiite and Kurdish drafters was immediately threatened. The new members raised objections to the name of Iraq (suggesting that the word *federal* be dropped), the idea of federalism (preferring at most decentralization), language (allowing Kurdish to have a co-equal status with Arabic), the identity of the country (whether the state as a whole or merely the Arab population is defined as part of the Arab nation), de-Baathification, and the powers of the president.

Most members of the committee have been restrained in their public comments, insisting that differences can be bridged. But one Kurdish member was far blunter: After the first meeting with the new members, he explained that “the Arab Sunni brothers...want to return to the zero point.” The short-term solution to the re-opening of disputes has been to create a more powerful coordination committee. It seems clear, however, that the best the committee might be able to do in a short time (and in the midst of an insurgency) will be to develop formulas with sufficient ambiguity that all parties can represent them as achievements.

Issues for Resolution—or Postponement

The speed with which the constitution is being drafted and the emphasis on consensus suggest that the tactic of papering over differences may become a general one. Three of the subcommittees working on sections of the Iraqi constitution report that they have made considerable progress and are near the point at which they can present their work to the full committee—those dealing with structures of government, rights and duties, and final and transitional matters. For rights and duties, an early text has been leaked, and it is clear that the subcommittee’s inclination is to handle some of the most contentious issues—such as

women's rights and Islam—by including general language designed to meet the demands of diverse constituencies without providing clear guidance on how inevitable clashes are to be resolved.¹ In that sense, the constitution drafting process may turn into a way not of addressing disputes so much as formulating them in constitutional language. This is not to say that the constitution will be a totally vacuous document. Comments by committee members make clear the basic shape the document is taking; what remains less clear is how effectively the drafting process will engage Iraqis in addressing their deep divisions. The process thus far has focused on several different areas: basic structures of government, religion and state, federalism, rights, gender, and security.

Basic Structures

At the beginning of the drafting process, committee members seem to have arrived at a consensus that the TAL would be an important source for writing the permanent constitution. Although many Iraqis complain the TAL is not a legitimate creation, having been written by a combination of foreign occupiers and unelected Iraqis, the document still offers important features to both Kurdish and Shiite leaders: To the Kurds it promises a considerable degree of autonomy; to the Shi'ite it provides for a parliamentary government. Indeed the strongest Shi'ite objection was raised not over any of its governance provisions but over a restriction on the power of the majority in the procedure for adopting a permanent constitution (in which supermajorities in any three Iraqi provinces can block ratification).

Thus the drafting committee began work by adopting the basic governmental structures stipulated by the TAL. That will imply a parliamentary structure, with most executive authority vested in a prime minister and cabinet responsible to the parliament. Members do speak of some disagreement over whether the presidency will be strictly ceremonial or instead continue to hold the limited powers awarded by the TAL. Unsurprisingly the current president has expressed an interest in having the position involve more than protocol functions, but it is not clear if his suggestion carries weight with the committee. Nor is it clear if the committee is opting for a multimember presidency council, although it does seem likely that they will recommend that the president be elected by the parliament. The only other area where committee members have tipped their hand in public statements is by reference to a constitutional court (perhaps carrying over the court currently being created under the provisions of the TAL) and to a unicameral legislature.

The entry of the new Sunni Arab members to the committee has complicated matters because they have expressed a preference for a strong, directly elected president, in keeping with their general suspicion of weakening the institutions of the central state. It is not clear that their suggestions will receive any support from other committee members.

The committee is maintaining the basic structures of the TAL, but it has already shown it is not bound by the TAL's language. It is likely that even where similar provisions are adopted they will be written in slightly different form. And in one important matter—the Special Tribunal, unrelated to the permanent constitution—the current National Assembly has shown an interest in shelving the TAL. The Special Tribunal was established by order of the Coalition Provisional Authority in 2003 to try war criminals and leading figures of the old regime, including Saddam Hussein. The TAL affirmed the order establishing the Special Tribunal and placed it outside of the control of other constitutional structures. Yet leading members of the National Assembly have made clear that they wish to write a new statute—to be passed by the assembly itself—to govern the Special Tribunal. Their purpose is partly

to emphasize the Iraqi nature of the proceedings but also to hasten them—with some deputies suggesting that trials should begin as soon as possible (out of a desire not only for justice but also for a display of governmental effectiveness). Such a move would probably be a violation of the TAL (unless the TAL itself were to be amended), but if the advocates of such a measure are successful, it is likely to be the only area where the TAL's provisions are wholly ignored.

Religion and State

The basic compromise of the TAL on Islamic law—acknowledging Islam as a source, but not the primary or only source, of law and barring legislation clearly contradicting Islamic law—is likely to be carried into the final draft. Committee members have been debating specific wording, and it is likely that the formulation in the final document will not copy the TAL provisions precisely. But earlier proposals—to make Islam the main (or even the only) source of law—appear to have been dropped. In return, more secular members have dropped any objections to disallowing legislation contravening Islamic law. There are some signs that the advocates of a more Islamic legal system have focused elsewhere on the text as well, working to insert provisions that would force some rights to work within the bounds of Islamic law and hint (although probably not require) return to the pre-1959 system for personal status law (governing marriage, divorce, and inheritance).² Under that system, members of different communities followed their own law and courts; since 1959 there has been a single set of courts that have operated in accordance with parliamentary legislation. In addition, initial indications are that the TAL's relatively robust provisions for religious freedom will be adopted with little modification.

What remains unclear is whether any attention has been given to determining how the boundaries established by Islamic law will be determined and who will determine them. The TAL followed most Arab constitutions with its conspicuous silence on the issue. And absent any explicit provision, the task is likely to fall primarily to parliament. It is possible that a constitutional court will insert itself into such disputes, although most similar structures in the Arab world have been quite shy about treading on such sensitive turf. But the Islamic parties who have a majority in Iraq's current parliament are likely to be fairly comfortable with a system that allows parliament to implement these constitutional provisions as it sees fit. Once again, the position of the Shiite parties is based on the anticipation of their majority status, and their aim in the constitution seems designed to enable the majority rather than place limits on it.

Federalism

As described above, federalism touches many different areas of the constitution, from the name of the country to the allocation of taxes and revenues. Thus, even if the basic bargain between Shiite and Kurdish parties allowing federalism withstands Sunni opposition, a large number of questions will have to be addressed. Will the federalism include three levels (central government, region, and province), as the Kurds are likely to insist? If so, how will responsibilities and jurisdiction be assigned among the three levels? Will other regions be allowed to form (as some southern Iraqis have suggested)? The basic Shiite–Kurdish bargain involves replicating the TAL provisions in the permanent constitution, but even that compromise leaves tensions. It does not address the issues of Kirkuk and provincial boundaries (as noted above); Kurds also complain that the language provisions (allowing Kurdish full status) have not been fully implemented. Brief disputes have already broken out

over symbolic matters, such as the oath taken by members of the National Assembly (whether it referred to Iraq as federal) and the prime minister's failure to attend the inauguration of the Kurdish regional president. Adding to the strain, some southern political actors have expressed increasing enthusiasm for building their own autonomous region, aggravating fears elsewhere that federalism is merely a polite term for partition.

The rush of time may lead to an attempt to find quick solutions: For instance, one committee member suggested that the draft will simply promise the restoration of the provincial boundaries as they existed before the Baathist regime gerrymandered them in the 1970s. And more recently, some committee members have suggested that they do not need a final resolution to the issue of federalism in the constitution at all. The constitution can be amended or simply completed at a later date. One of the Sunni committee members explained on July 10: "It is possible to specify a mechanism for the federalism question in the constitution and change it later because not everything that is written in the world's constitutions is 100% mature."

Bill of Rights

Countries undergoing dramatic political change often write constitutions like generals who fought the last war. Iraqis living under Baathist rule are likely to pay particular attention to the set of rights that are recognized. And the economic upheavals associated with war, sanctions, invasion, and uncertain reconstruction generate their own set of concerns.

The draft bill of rights produced by the subcommittee is therefore unsurprisingly generous in its provisions for political, civil, economic, and social rights. The welfare benefits the subcommittee is contemplating promising to Iraqi citizens are particularly extensive, perhaps reflecting a hope that Iraqis will support a system that promises much more in the future than what the government can currently deliver. And the list of rights reflects two more specific Iraqi concerns as well. First, it is designed to restore citizenship to the large number of Iraqis who lost it under the former regime for political, religious, or ethnic reasons (although some effort is being taken to exclude Israelis of Iraqi origin from taking advantage of such provisions unless they renounce their Israeli citizenship). Second, the bill of rights will likely single out the dissolved Baath Party as a political organization not enjoying the rights accorded other parties. Arab Sunnis joining the committee may challenge such provisions but will likely run into stiff resistance if they do.

One surprising element in the draft prepared by the subcommittee is the large number of freedoms that depend on implementing legislation. The formula that a right exists "as defined by law" was introduced in European constitutions to ensure that only parliament (as the agent of the entire society) would define the way in which a right would operate. This took the task out of the hands of the monarch and the executive and placed it in the hands of those deputized by the nation. But over time, some constitutional architects have worried that defining a right might also mean limiting it. This could occur anywhere but seems especially likely in countries in which the parliament falls under executive domination. In such cases, rights might almost be defined out of existence. Indeed, this is the pattern in much of the Arab world. Again it may be the attractiveness of majoritarianism to the Shiite parties that has led the subcommittee in Iraq to guarantee rights but refer their full definition to parliamentary legislation.

Gender

Gender issues arise in the constitutional discussions in several ways. First, and most prominently, women's groups have pressed for a representation for women in state offices. The TAL required the electoral law to aim for at least one-quarter of the parliamentary seats to go to women, and that provision is likely to be adopted in the permanent constitution (although calls for greater representation—as much as 40 percent—will probably be turned back). There has been some hint that the committee may recommend that this provision be phased out over time (perhaps after two elections). Women's groups have also suggested that the provision extend to other senior offices besides the parliament.

Second, women's groups have sought strong provisions barring discrimination and requiring equal treatment regardless of gender. One issue of particular importance is citizenship: It is generally far more difficult for women in the Arab world to pass citizenship on to spouses and children than it is for men; an early draft of the TAL provided for full equality in this regard, but the provision was dropped in the drafting process. Initial indications suggest that women's groups may be more successful this time.

Third, the lives of most Iraqi women are probably far more deeply affected by the provisions of the personal status law than they are by the constitution because the former determines how they may marry, divorce, and inherit. The constitution may make no provisions for personal status law, but there are some concerns that references to Islamic law or allowing each sect or school to follow its own path will remove some of the fairly generous provisions of Iraq's current personal status law.

Finally, some women's groups have pressed for strong social protection for women, arguing that the constitution should offer protection and social benefits to mothers. Arab constitutions tend to proclaim their respect for motherhood with vague and even bombastic language, but Iraqi women's groups wish to obtain concrete protections as well as hortatory.

Security

Security issues will arise in the new constitution in three ways. First, many of Iraq's civilian leaders are anxious to ensure that the military not intervene in Iraqi politics again. But while this was an overriding concern in the immediate post-Baathist environment, by 2005 civil war seems a more pressing concern than a military coup. Accordingly, the interest in barring military intervention, while still likely to be present, has declined. The TAL requires the constitution to address the issue, however. In the course of drafting the TAL, most restrictions on the substance of the final constitution were dropped (based partly on the realization that an imposed interim document could not place many conditions on the work of an elected body), but one remaining substantive provision in the TAL requires the permanent constitution to “contain guarantees to ensure that the Iraqi Armed Forces are never again used to terrorize or oppress the people of Iraq.”

Second, Iraq's private militias are also likely to be a major issue. But on this matter many of the drafters may be engaging in a conspiracy of silence. The Kurds are not likely to surrender their private militia. Likewise the Badr Brigades—associated with one of the leading Shiite parties—may have renamed themselves the Badr Organization but still seem to operate as something of a party militia. The constitution may follow the TAL in promising that militias will only be able to operate in accordance with the law, but it is unlikely that Iraq's ruling Shiite-Kurdish coalition is interested in more than a cosmetic integration of their separate militias into the regular Iraqi military. The new Sunni drafters will likely raise the issue of

party and regional militias, especially because some Sunni leaders have accused the Badr Organization of targeting Sunni religious figures.

Finally, the security relationship with the United States will likely arise in the course of constitutional deliberations, although again the shaky Shiite–Kurdish alliance may wish to glide over the question. Neither Shiite nor Kurdish leaders are ready to join calls for a timetable for withdrawing foreign forces. Both show some embarrassment about the extent of their security dependence on the United States by proclaiming that they want foreign forces to leave as soon as possible, but they also insist that discussion of the subject is premature and that drawing up a timetable is inappropriate in the midst of raging violence. The sensitivity of the subject explains why committee members have given very few public comments on the matter.

But they are not likely to be able to remain silent indefinitely and have already found themselves in the middle of public controversy. When the Iraqi government requested in June 2005 that the Security Council renew the mandate for foreign forces, it did not consult the parliament. Although a full parliamentary majority would presumably have backed the decision, the government seemed not to desire a full public airing of the issue at that time. Yet some parliamentarians were outraged, insisting that the government was not authorized to take such a step on its own. They have been placated by being allowed to form a “sovereignty committee” within the National Assembly that has taken on the task of developing a timetable for withdrawal.

Moreover, even if most Shiite and Kurdish leaders are in no hurry to have the United States leave, virtually all Sunni leaders feel quite differently. Indeed, to the degree that the Sunni opposition has formed a clear demand, it is for the withdrawal of foreign forces. Those Arab Sunnis who have begun to participate in drafting the constitution have obviously dropped their demand that the United States withdraw before the constitution is written, but they have exposed themselves to severe criticism for doing so. And although some Sunni leaders have made clear that they will work for full electoral participation in any future balloting, none has indicated that they are content to have the United States stay, even temporarily.

Thus the presence of foreign forces may be dealt with obliquely (perhaps by having parliament approve treaties), but a clear dynamic has arisen: Those favoring the continued presence of U.S. and other troops are politically dominant but rhetorically on the defensive; they are unlikely to wish to call attention to their position more than is necessary.

Broader Public Debate and the Promise of an Inclusionary Process

The constitution drafting committee and the National Assembly face enormous challenges in maintaining the schedule laid out in the TAL. But besides the timeline, the TAL also imposes the burden of full popular participation in the drafting process. Indeed, the TAL promises Iraqis that they will have a role in two different stages. First, the National Assembly is to draft the constitution “in part by encouraging debate...through regular general public meetings in all parts of Iraq and through the media, and receiving proposals from the citizens of Iraq...” Second, “in the period leading up to the referendum, the draft constitution shall be published and widely distributed to encourage a public debate about it among the people.” Meeting the first condition in more than a formal manner will be more difficult than meeting the second.

To be fair, the committee seems to accept its obligation to stimulate broader public discussion of constitutional issues during the drafting process. The chair of the committee

has spoken of conducting opinion polls and distributing a million copies of a form that simply poses the question: “What do you want from the constitution?” The head of the United Nations assistance mission has offered help with construction of an Internet site where Iraqis can submit their ideas. The cabinet has set up a committee to encourage national dialogue. The problem is that these steps are still being discussed as the drafting moves forward, suggesting that the committee will be more active in soliciting opinions than in incorporating them. Some steps have been taken that move beyond ritualistic participation. But the most public step in this regard—an early July conference in Najaf for Shiite clerics and their students to discuss constitutional issues with committee members and other political leaders—solicited the views of those voices already healthily represented in Iraq’s governing coalition. Some groups—such as women’s associations—have moved on their own to initiate discussion of the constitution. A broader process of consultation and public discussion will be difficult no matter how open the committee members are, however, because of the extremely short drafting period and the perilous security situation.

It is not surprising then that much of the public discussion thus far has been fairly general. Iraqis have been treated to newspaper articles on the importance of a constitution, the necessity to write a document that serves the needs of all the society, and the constitutional history of the country. Most of this discussion is abstract, general, and polite. It is difficult for a more informed or specific discussion to occur in the absence of suggested texts or approaches to analyze and critique. In the past few weeks, comments from committee members have given some indication of the general approaches the draft is likely to take (but with the exception of the bill of rights, no actual draft texts have leaked). The increased level of detail has allowed more specific public debate, but in some ways that may be aggravating rather than alleviating the deep divisions in the society, especially on the federalism issue. Indeed, Kurds have set up a group to monitor the drafting process, ensuring that their negotiators do not give away too much.

The committee may be far more successful in sparking debate in advance of the referendum, assuming it completes the draft on time. The committee’s chair has suggested distributing copies of the proposed constitution with ration cards to ensure that every Iraqi home receives a copy. Although this measure may be successful in sparking national discussion, by that time Iraqis will be left with only the crudest of tools to ensure changes in the document—a “no” vote. Indeed, because the constitution can be approved by a simple majority of those voting (and a minimum of one-third votes positive in at least sixteen of Iraq’s eighteen provinces), even boycotting the elections may not be an effective measure for protesting the document’s contents.

Completing the Process?

In addition to completing the constitution, the National Assembly must undertake two additional tasks to allow the constitutional process to move forward.

First, it must establish a legal framework for the referendum itself and do so in sufficient time for the independent electoral commission—created to oversee the January 2005 elections—to implement it. And indeed, the National Assembly is rushing through such legislation. A very brief draft law, largely fleshing out the TAL provisions for the referendum, has already been presented, and the parliament’s leadership has made clear that it wishes to have the law passed later this month.

Second, the National Assembly will have to pass a far more complicated piece of legislation, an election law. Iraq's current election law was written specifically for the January 2005 balloting. The purpose of that law was to allow immediate and administratively simple elections, but the system it devised became a bone of contention among Iraqi political forces. To avoid the need to carry out a census, draw up electoral districts, and decide among various representation schemes, the law simply treated Iraq as a single electoral district and awarded seats in the National Assembly in accordance with a strict formula of proportional representation. Those areas and segments of Iraqi society that voted in smaller numbers—whether out of fear, lack of interest, or opposition to the process—were represented far less in the parliament.

Arab Sunni participants—who often focus far more on elections rather than the constitution as a device to overcome their weak presence in governing circles—have made changing the formula for representation a primary demand, and the comments of parliamentarians suggested until recently that they would get their way. The Iraqi constitution—like most constitutions—might omit most details on the electoral system, but the matter is still very much part of constitutional bargaining. (The constitution might include more detailed language on elections if Iraq's leaders feel that time is insufficient to write a separate electoral law.) Interested in securing broader participation (and the greater legitimacy that comes with it), the Shi'ite leadership suggested that future parliamentary elections would be held on the basis of a mixed system in which the country is divided up into a number of electoral districts (perhaps along the lines of provincial boundaries), each awarded with a certain number of seats according to its population. Proportional representation would then be applied within each district rather than nationally. Recently, however, a major Shi'ite committee member suggested that the committee had decided to maintain the system used in January 2005 because it is simpler and already in place. It is still unclear if this extremely significant retreat will in fact be the committee's recommendation, and it is not impossible that the widely reported remark was intended simply to pressure Arab Sunni members to make concessions on other fronts.

Is the Constitution the Answer to Iraq's Crisis?

Those leading Iraq's constitutional process are confronted with a very difficult choice: continue to press forward to meet the deadline or deliberately slow the process down, perhaps by taking advantage of the six-month extension granted by the TAL. Their inclination seems to be to follow the first path. The logic behind a swift transition seems powerful, but it may also lead to one of four different kinds of failure. First, the effort could provoke a dramatic political crisis and result in some key parties pulling out or rejecting the constitution. Second, the committee could simply run out of time, forcing new elections. Third, they could find their product finished but rejected in the referendum. Fourth, they could write a constitution that is adopted but does little to bind the country together and merely postpones all difficult issues with vague formulas. Not all of these possibilities would be disastrous—for instance, a constitution that is defeated in the referendum might be politically embarrassing but could also aid in isolating the critical issues and assuring all parties that their concerns will have to be addressed. Nor would a new round of elections (with the prospect of greater Sunni participation) be a wholly negative development.

What seems now to be a likely outcome—adoption of a vague constitution—would not be a problem in many other settings. After all, a constitution is designed to guide but not micromanage the normal political process. It should not resolve every issue. But in Iraq's

case, the entire point of rushing the constitutional process is to enable political and national reconstruction. A document that makes conflicting promises may work in a society that has a strong sense of political community and well-designed and well-established structures for authoritative resolution of constitutional disputes. In Iraq, however, where the different parties have sharply different visions—and the ability to employ armed force—the rushed process places hopes on the constitution that it will be unlikely to be able to bear.

To be fair, there is much in the constitutional process that could have gone badly wrong but has not. This is particularly the case with the Shiite population—the Sadrist movement has not attempted to disrupt constitution drafting, nor has Shiite leadership precipitated a crisis by attempting to modify the ratification process to its advantage (as it had earlier hinted that it might do). After many delays, a considerable number of Sunnis have been brought into the committee. In these ways, the constitutional process has not itself become a deep problem. But neither has it become the solution to Iraq's problems. By using a common technique of postconflict institution building in the midst of a very active conflict, the process of drafting a constitution in Iraq is likely to disappoint many of its participants. ■

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¹ The Iraqi daily *Al Mada* published the text of what it claimed was the draft of the rights and duties subcommittee. I have provided a translation and commentary on that draft; it is available at www.CarnegieEndowment.org/files/BillofRights.pdf.

² This and other issues related to Islam in Iraqi politics are analyzed in an earlier Policy Outlook: Nathan J. Brown, *Debating Islam in Post-Baathist Iraq* (Washington, D.C.: Carnegie Endowment, March 2005), available at www.CarnegieEndowment.org/files/PO13.Brown.final.pdf.