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Iraq at a Juncture: Constitution, Referendum and Elections

By Mona Iman
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Just two weeks remain before the deadline for a national referendum on the draft constitution for Iraq. Submitted to the country's transitional parliament in late August amidst American pressures to meet an August 15 deadline, some have welcomed the draft as the product of imperfect but adequate consultation, and others have deeply criticized the draft as a bilateral agreement that has failed to get the political buy-in of one of Iraq's major ethnic groups.

To analyze the latest developments and examine the potential outcomes of Iraq's constitution-making process, the U.S. Institute of Peace convened a series of meetings of the Iraq Working Group on September 13–15, 2005 to discuss "[The Iraqi Constitution, Referendum, and Elections](#)."

Moderated by [Daniel Serwer](#), vice president and director of peace and stability operations for the Institute, the meetings included Hajim al-Hassani, speaker of the Iraq Transitional National Assembly; Laith Kubba, spokesman for Iraqi Prime Minister Ibrahim al-Jaafari; and Peter Galbraith, senior diplomatic fellow at the Center for Arms Control and Non-Proliferation and advisor to the Kurdistan Regional Government during the constitutional negotiations. The speakers discussed the many unknowns that faced the United States in April 2003 and set the tone for what lies ahead in the lead up to the October 15 referendum and ultimately the parliamentary elections in December.

Competing Visions

After the fall of the Saddam Hussein regime, many viewed the Transitional Administrative Law (TAL) and January parliamentary elections as great successes that would pave the road for Iraq's political evolution. Yet as Kubba noted, few realized the competing political and social forces that would soon be unleashed and the impact they would have on the country's social and political development. He described a constitution-drafting process dominated by two visions for the future of Iraq: one of a unitary, sovereign state with a federal system comparable to that in the United States, with decentralized financial and administrative systems; and another depicting a European Union–style confederal arrangement in which autonomous, self-governing regions are knit loosely together under an administrative superstructure.

In the absence of agreement on these competing visions, leaders from the Kurdish and Shia Arab camps negotiated a basic law for Iraq in an imperfect process Galbraith compared to the Dayton Peace Accords. Al-Hassani pointed to the flawed implementation of de-Baathification policies that "hurt [the] blood" of the Sunni Arab population, hinting at a process of dismemberment that experts say can be traced to the first interim government. Though many argue that the current constitutional draft caused heightened ethnic and sectarian conflict, Galbraith suggested that by creating a formula for provinces to join together to form autonomous regions, the draft in effect codifies existing divisions and reflects the reality on the ground. According to the constitutional draft, he asserted, Kurdistan's de facto independence is legitimized, the center remains in the hands of the Sunni Arabs who make up its majority, and the southern region is given the option of creating its own federal unit. The exclusive powers of the federal government will be limited to foreign affairs, national defense (with the exception of regional guards formed from the peshmerga and the Badr Corps), fiscal and monetary policy, broadcast frequencies, weights and measures, water resource management, and control of producing oil fields.

The Issues Are Misunderstood

Al-Hassani and Kubba argued that the proposed constitution is the best expression of Iraqi national will, given the rushed deadline. Yet many Sunni Arabs, secularists, women, and minorities disagree with the fundamental principles enshrined in the text. Most notably contentious are provisions on religion, rights and equalities, federalism, and de-Baathification. Galbraith suggested that the significance of these issues is misunderstood. According to the text, rights and equalities are not exclusive powers of the federal government; through regional constitutions and legislation, regions may choose their own application of the law. The controversial Federal Supreme Court demonstrates such a delineation of powers: Shia leaders initially negotiated for an Iranian-style Guardian Council, despite objections over the use of the court solely as a vehicle to ensure legislative alignment with Islam. As a compromise, Galbraith noted, the Court was stripped of its power to review regional legislation. As such, the concern for rights may lie beyond the scope of the federal court. In a patriarchal society, the federal constitutional guarantee of an individual's right to choose the application of civil or religious personal status law is nullified; moreover, what is written in the federal constitution will be irrelevant to regions that have the right to determine their own legislative framework.

Kubba maintained that the general will for a conservative Islamic republic is absent in Iraq, noting that "there are sufficient social and political forces and now maturity that will act against the drive towards having a religious state" — but also admitted that in a structure where local governments are immune to federal laws, "in parts of Iraq, these might emerge to become more religious states." Galbraith pointed to the south, where he said pro-Iranian religious parties such as the Supreme Council for Islamic Revolution in Iraq are already exercising control. While the Kurdistan Regional Government will likely administer civil law, he noted, evidence suggests that the Shia religious parties, overwhelmingly supported in the January elections, will enforce religious law on women and minorities in the south, leaving them with little choice regarding their personal rights. "Religion and human rights are not bound," he commented.

Al-Hassani expressed his own concerns for the rights of women in the new Iraq. It was a difficult battle, he recalled, even just to secure the permanency of a provision for women's guaranteed participation in parliament. "Iraqi society doesn't give women the right to choose." Kubba observed that adding further human rights provisions in the constitution text would do little to address the concerns of women, noting that "often it is not the text, it is the reality that one needs to look at."

"Yes" or "No" Votes in the Referendum

Despite his concerns, Al-Hassani was confident that it would be better to approve the constitution to "continue building [and] making political progress in Iraq," but noted that the next elections will be more critical to Iraq's future than the constitution. If the constitution passes, Kubba also noted, it would represent the third political landmark in the new Iraq. Yet Kubba acknowledged the view of some that the best outcome for the referendum might be a rejection of the constitution and an opportunity to start over, with the draft rewritten by a new, representative government elected by a politically mature public.

Al-Hassani calculated the odds of success or failure in the referendum as "a 50-50 game," and openly affirmed his support of the draft—if soberly admitting the difficulties that lie ahead in either case. Kubba predicted potential outcomes: if the constitution passes by a thin margin of "yes" votes, the Sunni Arab population would be further disenfranchised, skeptics of the political process would lose hope, and violence would rise; if the draft is defeated at the referendum by a thin layer of "no" votes, the Sunni Arab population might learn the value of cooperation and participation, and the next national elections could result in a more moderate, representative government that is better prepared to tackle the drafting process. Evidence also suggests that by rushing to meet the August 15 deadline, an opportunity was wasted to gain Sunni Arab appreciation for the utility of a federal structure, and that through public education on its practical implications, Sunni Arabs may decide that federalism is in fact the key to preventing Shia Arab domination of Iraq's central government.

Galbraith contended, however, that despite the blatantly exclusive drafting process, the draft constitution "represents the last and best chance for Iraq to move forward, indeed to stay together." The notion of another transitional year nurturing healthy political development in Iraq, he said, is "nonsense." It is inconceivable that the Kurds and Shia Arabs would relinquish powers attained in the current document for the good will of a more representative drafting body, and in fact, he noted, it was precisely because of the Sunni boycott that any type of agreement was reached on the salient issues. If the constitution fails on October 15, the Kurdistan Regional Government, reinforced by a virtually unanimous vote for independence in its January regional referendum, may move toward negotiations for formal independence. A "no" vote may also arouse violent backlashes by the other parties.

In the event of a failed constitution and potential lack of political will to continue operating under the TAL provisions, negotiating the dissolution of the country is a prospective alternative that leaves Kubba worried. While Galbraith contended that a breakdown may be the only "sensible alternative," "the real fear," Kubba commented, is that "it is not going to be a neat process that will lead to stability . . . [The] other option is more appealing, to try to work out procedures on how to coexist within Iraq."

Hope Rests on the Elections

In the midst of civil conflict, there is little consensus on whether the constitutional draft is fueling violence or providing formulas for containment. Kubba identified three issues as potential intensifiers of a civil war in Iraq, including territory, oil, and the control of Baghdad. Galbraith argued that the constitution provides mechanisms to resolve these issues: reversing the policy of "Arabization" in the north and holding a subsequent referendum to settle the ethno-territorial question in Kirkuk and the surrounding area by 2007; devising a strategy for oil management and revenue sharing; and precluding the expected rush for control of the central government by shifting powers to the regions.

In the tumultuous last days before the national referendum, Al-Hassani noted, hope rests on the December elections to produce democratically minded leadership to determine the social and political impact of the draft on Iraq's future. Notably, forty-five articles of the draft constitution refer to future legislation that will implement the new charter and address a variety of points left ambiguous in the constitutional text; and their impact will depend on the identity of the next elected government.

Iraq is at a Juncture

Iraq is at a juncture and the level of violence has everything to do with the political process. Of the insurgents, only approximately twenty percent are "die-hard rejectionist groups with a solid dogmatic line," Kubba claimed. The other eighty percent, he said, have political agendas and have gained momentum over time because of the ineffectiveness of the state. Only force, intelligence, and resistance can defeat the former camp, but it is evident that the strength of the latter will begin to fade if brought into the political process. A positive impact of the draft, Al-Hassani noted, has been to encourage registration for the referendum among many of the marginalized Sunni Arabs—even, he reported, of armed insurgents.

The focus now should be on how to enhance public education on the draft and future participation in the process, Kubba said. One way of doing so is to increase security and extend the registration period in areas like Ramadi, Mosul, and Salahaddin, where insufficient time prevented many willing citizens from registering. A government-sponsored ministerial committee is responding to the public need for constitutional education by organizing debates on television, and nongovernmental organizations are convening conferences and seminars to promote constitutional awareness and discussion. Regardless of whether the constitution passes or fails, what is important now, Kubba emphasized, is that citizens register and vote.

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