

A Constitution of Trouble

Andrew Arato | October 12, 2005

Iraqi negotiators reached a compromise on the constitution on Tuesday bringing the support of at least one major Sunni group before Saturday's vote. But the supposed compromise merely kicks the can down the road, leaving the real questions at hand untouched.

In the new parliament, the Sunnis will not have either the two-thirds majority behind them to amend the constitution, nor even the simple majority needed to control the mechanism of region formation or the membership of the proposed commission to recommend amendments to the constitution. Thus the new commission is a meaningless concession, as they will soon find out. More importantly, the last minute changes reflect the general lack of respect for the constitutional process and content that has been evident all along.

Both the procedure that produced the Iraqi constitutional draft that will be voted on October 15, and its constitutional substance were and are disastrous. As to the procedure, the rules of the pathetic Transitional Administrative Law (TAL) were violated in a routine manner. From the beginning, the U.S. has played an unseemly, illegitimate and probably illegal under the Hague Convention, role in the constitution-making process of an occupied country.

The roots of the current crisis lie in the TAL that was drafted by the U.S. appointed Iraq Interim Governing Council under the watchful eye of the U.S.' Coalition Provisional Authority. A five member "drafting committee" composed of three Americans and two Iraqi-Americans spent many weeks working on the TAL, which was followed by relatively few days of discussion in the Governing Council before its adoption. Other public discussions and projected earlier never took place. Not only was this process questionable under international law, it was undemocratic and even worse, the bar for amending the TAL was set impossibly high.

Throughout the constitutional process, the TAL's rules have been repeatedly violated: there was no public or parliamentary discussion of the constitutional draft, and it was never voted on. The deadline for submission was extended four times, violating the rules of the TAL at least 3 of those times and the text was repeatedly changed even after the deadline for final submission had passed.

Then the National Assembly, fearing a defeat of the constitution tried to change the rules. The letter of the law in the TAL stipulated that a two-thirds rejection vote in three of the country's 18 provinces will require the dissolution of the Assembly. But in an attempt to set the bar much higher, the National Assembly passed a ruling defining that two-thirds of registered voters rather than of actual voters was needed to defeat the constitution. Only international pressure finally kept the National

Assembly from keeping this absurd misinterpretation of the rule of ratification.

As to substance, the constitution does not decide the question of how the second parliamentary chamber is to be organized and elected, leaving the question to a future parliament elected under the new rules. While the makers of the draft decided the structure of the presidency, they immediately replaced this rule for one parliamentary session in favor of the existing structure under the TAL's three person presidential council but this time with rigid vetoes. And, on the question of the organization of regions, they created the foundations of a loose confederal state, again deferring the decision on the exact mechanism to a simple parliamentary majority later.

The same tactic was used regarding issues of the greatest concern to secular Iraqis and advocates of women's rights. The exact number and method of appointment of the Supreme (Constitutional) Court with Sharia judges was to be left to a 2/3 parliamentary vote in the future, with excellent chances that such a court cannot be constituted at all. That will leave plenty of room for the parliament to establish—without any control or review—the exact meaning and mechanism of the laws governing personal status, which the draft leaves up to the majority.

So there are plenty of reasons for voting against the constitution in general but there are even stronger reasons for particular population groups to do so.

Sunni Arabs are likely to vote against a draft that is being imposed by an exclusionary Shi'ite-Kurdish leadership bargain directed against Sunnis, giving them no other choice than accepting either a humiliating subaltern status or supporting the bloody, nihilistic insurrection.

Liberal, secular Iraqis have reason to vote against the draft because it will solidify religious oppression in at least a large part of the country, and over most of their women, and because one cannot begin a system of the rule of law by grievously and repeatedly violating the rule of law in the beginning.

Iraqi patriots of all backgrounds, may also vote against the draft because it follows the recipe of some American advisers of the Kurds that the best way to stop the break up of the country is to break it up on the constitutional level, while the best method to stop Iranian domination is to deliver the nine most important provinces with 2/3 of the oil, half the people and all the ports to Iranian influence.



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Kurds looking a little bit ahead, beyond positions that are fast becoming obsolete should vote no, although of course few in fact will. The new autonomous rights of the Kurds have been conceded by the Sunni negotiators, however reluctantly. But the question of who will dominate both the central state, and the most powerful region, the Prussia of Iraq when the Shi'ite nine province region is formed looms large. In the long term, it may be in the interest of the Kurds to start supporting Sunni aspirations, rather than work toward a "federal" arrangement which may lead to a breakup, but could also lead to a constellation where they may be dwarfed by one powerful partner with the strongest regional state as its supporter.

Shi'ites outside of the nine southern provinces, have strong reasons to vote against this constitution. The oil resources monopolized by the Northern and Southern regions will impoverish them the same way as their Sunni neighbors. Worse, to be a member of the Shi'ite majority in the Sunni region thrown together by default is going to be no picnic for either Shi'ite or Kurdish minorities. Nor would the predictable communal violence and ethnic cleansing that would flow from such arrangement.

Finally, Shi'ites in the South ought to also vote against this constitution, and not only because the Grand Ayatollah Sistani has warned against the breakup of Iraq. The constitution gives too great a victory to Iran and puts it on collision course with the United States. The Americans have already given Iran a very great victory, one that the government in Teheran never could

even imagine on the battlefields of the past. To push this victory to the point where Iran has strong influence in Iraq through its most important part contains the seed of a war with the United States, a war neither side can win. If the Iraqi state stays together, Iran's interests will be well enough represented through the Shi'ite majority of the country. The Islamic Republic cannot long survive a move for much more than that.

Voting against this constitution is no utopia. It merely gives Iraq yet another chance, under the American imposed TAL, at a historical compromise among all groups and factions. This compromise has been repeatedly missed and would be possible only if the United States finally learns to stay out of the Iraqi political process and stops distorting the terms of bargaining, producing for example the absurd illusion that the Sunni representatives are pathetic, unrepresentative, recalcitrant supplicants whereas they are actually the moderate part of a milieu that indeed represents real power in Iraq. Defeating the referendum, and new elections could make just these moderate Sunnis partners in a new constitution making process where the three sides recognize one another as equals.

For the moment, the flag earlier raised by Sistani, the flag of Iraqi integrity in the face of the occupation, has passed on to them.

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p. 2

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