

## The Iraqi Constitution

By Phyllis Bennis | March 17, 2004

The signing of the interim Iraqi “constitution” by the Governing Council represents a significant step in U.S. efforts to legitimize its invasion and occupation of Iraq. By achieving the codification in a U.S.-supervised process of an ostensibly “Iraqi” legal document, the U.S. as occupying power is hoping that its planned June 30th “transfer of power” will be accepted globally as the “restoration of sovereignty to Iraq.” In fact, that “transfer of power” will not end the U.S. occupation, will not lead to the withdrawal of U.S. troops, and will not result in any real sovereignty for Iraq. The Constitution itself implies recognition of its impotence, as it recognizes that all “laws, regulations, orders, and directives” issued by the U.S. occupation authorities will remain in force.

**The new Iraqi Constitution lacks legitimacy.** It was drafted under U.S. supervision by a body hand-chosen by the U.S. military occupation authorities, and subject to final approval by the U.S. proconsul, Paul Bremer. Its acceptance by the Iraqi population remains uncertain; its ability to actually set the terms for laws to govern the country during the interim period after June 30 remains unknown; its relevance to any truly independent government created after the interim period remains in doubt. As a result, any examination of the Constitution must include its legitimacy/illegitimacy, as well as the content of its provisions.

**The Constitution describes only a vague process to select the new transitional government** to which the U.S. will “transfer power” on June 30th. It is to be chosen through “a process of extensive deliberations and consultations with cross-sections of the Iraqi people conducted by the Governing Council and the Coalition Provisional Authority and possibly in consultation with the United Nations.” No method of conducting such “extensive deliberations” is included, and given the Governing Council’s failure so far to have engaged in serious, wide-ranging consultations with Iraqi society regarding their own governance, it is unlikely to change any time soon. Crucially, the mandated “consultations” are to be conducted equally between the existing U.S.-appointed Governing Council and the U.S. occupation authority itself—thus insuring that the Governing Council will remain either fully in place or with a self-selected successor body to replace it. The role of the UN is dismissed as “perhaps” being included in consultations.



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**The Iraq Governing Council holds on to power.** Since the Constitution says nothing about how the interim government will actually be selected, the unspoken understanding is that the Governing Council—perhaps enlarged by additional U.S.-selected individuals, perhaps in its current form—will remain the center of Iraqi authority. Many current members of the Council have made clear their desire to hold on to power, knowing that (since most of them spent the past decade or two or three outside of Iraq) they would be unlikely to win any kind of election. As a result, the United Nations and others have suggested that the interim government operate with a very narrow mandate—essentially “keeping the lights on and paying the bills of the street-sweepers.” Specifically, the suggestion was to bar the interim government from making decisions regarding major economic or foreign policy issues. However, the Constitution as drafted provides no limits on what issues the interim government, in whatever form it takes, may decide—including continuing the U.S.-initiated privatization policies, negotiating major replacement oil contracts, and most significantly signing a Status of Forces Agreement with the U.S. to provide an Iraqi “invitation” to the 100,000+ U.S. troops who will remain in Iraq.

**The Constitution calls for a federal system of government,** in which, despite language to the contrary, the sectors are almost certain to be determined by Iraqis’ ethnic and religious identity. The division of Iraqis into Shia’, Sunni, Kurdish, Turkoman, Assyrian, Christian identities is the basis for the U.S.-created Iraqi Governing Council, and is the likely basis of the division of power within a “federal” Iraqi system. This causes three major problems: 1) there is no representation for Iraqis who identify first as Iraqi citizens, and only secondarily as Shia’a, Kurds, or whatever. 2) The ethnic/religious quotas assume that all Kurds, Shia’a, Sunni, Assyrians, or others represent monolithic political blocs. 3) A system based on ethnic or religious sectoral interests is inherently unstable, in most cases giving minority and majority populations too little or too much power, and undermining national identity as Iraqis. Lebanon’s years of confessional (religiously determined) division and war demonstrates the potential dangers.

The Constitution, for example, would give Kurds, who represent about 20% of the population, a veto over acceptance of the future permanent Constitution. This would take place in the context of Kurdish opposition to any future Constitution, since Kurds constitute the majority in three provinces, and the interim Constitution insures that a law, or permanent Constitution, would fail if it is opposed by a majority of people in at least three provinces.

Along with the problem of forcing a religious or ethnic identity for people wanting to assert and build a national Iraqi identity instead, it is not at all clear that most Iraqis support the kind of federal system imposed in the Constitution. There is little indication that any serious effort was made to consult with large sectors of the Iraqi people before determining such a drastic framework.

**The Constitution creates a federal system but leaves vague what powers remain with the national government and what devolves to the regions.** The central government is given responsibility for foreign policy, national security, fiscal and monetary policy, and control of oil and other natural resources. But there is no limit identified as to what powers a “federal region” may assert. The Kurdistan Regional Government, the only federal region identified, is to have broad, yet vaguely defined powers of self-government: legislative and judicial independence, and the Kurdish pesh merga militia to remain in force. The Kurdish government will also “retain regional control over police forces & internal security,” implying that the pesh merga could remain a permanent force independent of the central Iraqi government.

**The Constitution asserts a set of individual political rights, as well as economic and social rights significantly advanced, though not absolutely unprecedented, in the Arab world.** Those rights include freedom of speech and association, assembly, religion, travel, the right to demonstrate and strike, access to the courts, open trials and the presumption of innocence. There are prohibitions against unlawful arrest, slavery, torture, and trying civilians before a military court. However, the prohibition on establishing “special or exceptional courts” is already undermined by the special court established to try Saddam Hussein and other accused war criminals.

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In terms of economic and social rights, the Constitution includes “the right to security, education, health care, and social security,” and states that the government agencies “within the limits of their resources” shall strive to “provide prosperity and employment opportunities to the region.”

The text calls for a “goal of having women constitute no less than one-quarter of the members of the National Assembly” that will be selected [by as-yet-undetermined means] to draft the final Constitution, and states that, “All Iraqis are equal in their rights without regard to gender, sect, opinion, belief, nationality, religion, or origin, and they are equal before the law.”

While the U.S. has launched a major propaganda campaign regarding the “unprecedented in the Arab world” nature of these guarantees, in fact a number of Arab states actually have similar constitutional rights. The problem comes—as is the case in the U.S., Europe, and elsewhere—not so much in the written law as in its implementation. In this regard, Iraq is unlikely to be very different.

**The relationship between religious law and individual liberty remains unclear.** Islam is to be relied on as “a source” for Iraqi laws, and the Constitution states that no law may contradict either Islamic law or the guarantees of individual rights. This was a compromise between those urging that Islam be regarded as “the source,” implying that Islamic sharia law should be the sole basis for new laws, and those, especially women, concerned that Islamic law would undermine the Constitution’s individual rights. Islam was also identified as the state religion of Iraq (similar to most Arab Constitutions), though religious freedom is included in the individual rights. U.S. officials, including Paul Bremer, had already announced they would veto any Constitution that in their view would make Iraq an “Islamic state.”

**Issues missing from the Constitution.** The new document does not address crucial questions even for the interim period itself. It does not identify the means of choosing the new interim government beyond “deliberations and consultations.” It leaves undefined the future legality and power of sectarian militias existing in a legal vacuum. The language

states that militias and armed factions outside of the to-be-created Transitional Government “are prohibited, except as provided by federal law,” implying that a law drafted in the future granting the Kurdish Pesh Merga forces or a Shia’a militia or anything else would be deemed within the constitutional framework.

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