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Iraq's Constitutional Process: Challenges and the Road Ahead

by Vanessa J. Jiménez

ON OCTOBER 15, 2005, the Iraqi people went forward with a referendum that demonstrated their substantial support for a new Constitution.¹ The success of the referendum means that the Iraqi government must now face the issue of how to implement the document. Many believe the new Constitution can stave off an all-out civil war by laying a framework to resolve some of the most contentious issues in Iraq, including territory, power, the role of religion, and resource allocation. Others fear the Constitution will be another source of sectarian and ethnic violence and will facilitate the disintegration of the Iraqi state.

An evaluation of the Constitution's value as a tool for conflict management is complex. The Constitution represents a delicate balance between Iraq's democratic future and the Islamic heritage celebrated by most Iraqis, as well as a fragile accord between an emerging national unity and an entrenched history of ethnic and sectarian loyalties. Many hoped the Constitution would embody a political compact among Iraq's three principal groups: the Shiites, Kurds, and Sunnis. Unfortunately, although last minute amendments and concessions by the parties moved Iraq closer to this objective,² the groups were unable to achieve a full consensus and Sunni Arab opposition to the Constitution remains significant.

Despite its omissions and flaws, the resulting Constitution provides a legal framework that is largely consistent with international state practice for constitution drafting and progressive for the region in most respects. It also provides an underlying framework for the creation and maintenance of a unified, democratic, and pluralistic Iraq in which the rule of law and the equality of all people is respected. Iraq must still take a number of steps, however, before this constitutional mandate can be fully realized. The draft contains significant ambiguity, and the framers postponed a number of critical decisions,³ which future legislation must address. If the political will exists within Iraq, the Constitution can be implemented, interpreted, enforced, and even amended to realize this mandate. Such a process could help prevent the Islamization of the state, the marginalization of minorities, the feared disparities between regions and provinces, and the dissolution of Iraq. The Constitution's value will therefore depend largely on who interprets its provisions and ensures its implementation, as well as how this implementation is carried out. The issues outlined below will merit special attention.

ISLAM AND THE ROLE OF RELIGION

The international community expected that Islam would be represented in some way in Iraq's new constitution. The legitimacy of the document will be measured, in part, by the manner in which it reflects the history, values, and traditions of the Iraqi people. Early drafts of the Constitution generated speculation as to how the representation of Islam would emerge. There were calls for express references to *sharia* law (Islamic religious law), the descrip-

tion of Iraq as an Islamic state, the subordination of various individual rights to the principles of Islam, and the determination of personal status matters in accordance with religious jurisprudence. There were also requests that certain exalted status and recognition be given to the *Marja'iya* (Islamic religious authority).

In the final draft Iraq is not described as an Islamic state, but Islam is affirmed as "the official religion of the State" and recognized as "a fundamental source of legislation" (art. 2). The latter reference represents a compromise between those who wanted Islam to be a source of law and those who wanted the more expansive application of Islam as *the* source of legislation. The Constitution also mandates that no law may contradict "the established provisions of Islam" (art. 2), and that the judges on the Federal Supreme Court must include "experts in Islamic jurisprudence" (art. 89).⁴

Tempering the possibility that these provisions could be used by a non-secular Shiite-dominated legislature or judiciary to discriminate against religious minorities, the Constitution guarantees to all individuals "the full religious rights . . . to freedom of religious belief and practice" (art. 2) and "freedom of thought, conscience and faith" (art. 40). It also prohibits discrimination based on "religion, creed, belief or opinion" (art. 14) and affirms "freedom of worship" (art. 41).⁵

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Article 2, also known as the “repugnancy clause,” further evidences the drafters’ efforts to find some synthesis of and balance between Islam and democracy. This clause provides that no law may be enacted that “contradicts the established provisions of Islam,” but also declares, with equal weight, that no law can be enacted that contradicts the “principles of democracy” or the “rights and basic freedoms stipulated in this constitution.” Although some will try, it would be inappropriate to narrowly interpret the clause to promote the greater Islamization of Iraq. In fact, the reference to “*established provisions of Islam*” should further limit this possibility. Given the diversity in Islamic beliefs and practices and the lack of agreement as to what tenets and rules of Islam are fixed, the application of Islamic principles and values is difficult. This clause therefore provides an overriding framework that permits respect for Islam and a simultaneous commitment to the rule of law, human rights, and democracy.

A final critical factor in determining Islam's impact on Iraq, as well as the rights of minorities and women, concerns who has

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the authority to interpret relevant constitutional provisions. Although Article 90 vests the Federal Supreme Court with this authority, the Constitution includes very little about the composition and operating framework of this constitutional court. It does provide that “the Court shall be made up of a number of judges, experts in Islamic Jurisprudence, and law experts” (art. 89). This Article can be problematic, however, if it is interpreted to authorize the appointment of judges that have *no* civil law training and only expertise in *sharia* and other Islamic jurisprudence. This interpretation would be inconsistent with international state practice, which generally requires that “[p]ersons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law.”⁶ An interpretation and implementation that does not require civil law training for judges to the constitutional court would diminish the integrity of the judiciary by undermining the equality and due process rights otherwise guaranteed by the text.⁷

Other constitutional provisions could further prevent the appointment of judges with no civil law training. For example, the Constitution provides that the members of the Court, their mode of appointment, and the Court’s method of work will be “determined by a law enacted by a two-thirds majority of the members of the Council of Representatives” (art. 89). This requisite supermajority, particularly given the more secular tendencies of the Kurds, the Sunnis, and a notable portion of Shiite leaders, increases the likelihood that the Court will be representative of Iraqi society, not dominated by clerics, and composed solely of individuals with civil law training.

HUMAN RIGHTS PROVISIONS

The Constitution’s human rights provisions evolved significantly over time. The final draft expressly affirms a number of rights and freedoms (Section Two) and confirms a “respect for international obligations” (art. 8). Given the perception among some Iraqis that international instruments reflect only Western values, many were surprised by the inclusion of then-Article 44 in the first draft constitution, released on August 28, 2005. This article provided that “[a]ll individuals shall have the right to enjoy all the rights mentioned in the international treaties and agreements concerned with human rights that Iraq has ratified and that do not contradict with the principles and provisions of this constitution.” Although this provision was removed in last-minute negotiations, the elimination has no technical legal significance because Iraq’s obligations under international law exist independently of any affirmations in the Constitution. These obligations are also already affirmed in Article 8, albeit not as explicitly as some would have preferred. Nevertheless, Article 44 provided a more express confirmation of Iraq’s commitments to international law and human rights — a commitment that could have helped secure fundamental freedoms within Iraq’s new legal and political framework. On the other hand, Article 44 could have been interpreted in an adverse way that subordinated Iraq’s obligations under international human rights law to its domestic legislation and the principles of Islam.

As noted above, Section Two of the Constitution lists a number of political, civil, social, economic, and cultural rights.⁸ Under the Constitution some of these rights and freedoms will be “regulated by law.” This is not an uncommon formulation, as such regulation allows the legislature to further formulate enabling legislation to make these rights effective. This language raises concerns,

however, because authoritarian regimes have used this formula to place significant limits on rights and freedoms. For instance, Article 36 affirms that the state, as regulated by law, will guarantee freedom of expression, press, assembly, and peaceable demonstration such that it does “not disturb public order and morality.” Some believe this may result in the imposition of unreasonable restrictions, particularly given the potentially broad application of “morality” in a country divided along ethnic and sectarian lines. This fear is further heightened by the region’s experience with Islamic morality police, i.e., government authorities tasked with enforcing social mores.

Article 44 of the current Constitution could be interpreted as mitigating this possibility because it provides that “[t]here may not be a restriction or limit on the practice of any rights or liberties stipulated in this constitution, except by law or on the basis of it, and insofar as that limitation or restriction does not violate the essence of the right or freedom.” While international law *does* permit the limitation of non-derogable rights under certain circumstances, Article 44 can be read to guard against the imposition of arbitrary restrictions and overbroad, unreasonable, or illegal limitations.⁹

Lastly, the Constitution does not offer significant detail about the institutions that will protect, promote, and enforce human rights. Article 99 provides for an “independent” High Commission



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Iraqis participate in Constitution voting.

for Human Rights and states that its functions will be regulated by law and subject to monitoring by the Council of Representatives. The text does not, however, specify the scope, competencies, or composition of the institution. To their credit, during constitutional negotiations several Iraqi legislators expressed great interest in such a Commission.¹⁰ These details must be revisited when the government considers amendments and implementing legislation.

MINORITY RIGHTS

Iraq’s minorities and their specific vulnerabilities shift according to the particular issue being considered. For instance, on matters of religious significance, there is a minority Christian population (about 5 percent) and a minority Sunni Muslim population (about 25-30 percent) living in a predominantly Shiite Muslim country (approximately 65-80 percent). On issues where ethnic identities still tend to drive decision making, there is a significant non-Arab minority of Kurds, Turkmen, Chaldeans, Assyrians, and others residing in a country that is approximately 80 percent Arab. Consequently, the ability of Iraqi leaders to forge a peaceful future will depend on the manner in which the government ensures that

the unique identities, values, and concerns of its diverse ethnic, religious, and national minorities are respected and given a voice in the governance of the country. The Constitution's framers dealt with this objective principally through the recognition of freedom of religion, the protection of various minority rights, and the establishment of a loose federal structure that emphasizes local self-governance and the equitable distribution of natural resource revenues.

In addition to the provisions relating to freedom of religion, the Constitution provides a number of protections for the rights of minorities. For instance, the text acknowledges that Iraq is "a country of many nationalities, religions and sects" (art. 3), recognizes the Arabic and Kurdish languages as official languages of Iraq, provides for the recognition of other languages in areas densely populated by minorities, and affirms the right of "Iraqis to educate their children in their mother tongue, such as Turkomen, Syriac, and Armenian" (art. 4). The Constitution also states that all Iraqis shall be equal before the law and free from discrimination based on "race, ethnicity, origin, color, religion, creed, [or] belief" (art. 14), and it "guarantees the administrative, political, cultural, educational rights for the various nationalities, such as Turkmen, Caldeans, Assyrians and all other components" (art. 121). This last provision is broad and, if properly implemented in the context of Iraq's existing obligations under international law, can further protect the rights of racial, ethnic, religious, and linguistic minorities..

The Constitution also establishes a loose federal structure that strives to devolve power to local populations as a means of managing Iraq's diversity while addressing the distinct needs of minority groups. This local self-governance also ensures minorities a greater opportunity to influence those decisions that will most affect their political, economic, social, and cultural development. Specifically, the Constitution defines two sub-national levels of governance — regions and governorates not organized in a region. The federal government retains exclusive power over matters such as foreign relations, national security, and monetary policy, but shares power with the regions over matters such as education and health. The regions may exercise powers that are not exclusively held by the federal government, and governorates that are not organized into regions are granted "broad administrative and financial authorities" and may receive additional delegated powers from the central government. Currently, Kurdistan is the only region that exists in Iraq and it retains the autonomous powers it has exercised since 1992. The Constitution does allow, however, that any of Iraq's 18 governorates may also, alone or with other governorates, establish themselves as regions and assume commensurate powers.¹¹

This federal structure can only succeed if each governorate and region has sufficient resources. There are a number of mechanisms in the Constitution to ensure no population or geographic area is denied the benefits of the country's natural resource wealth. Under Articles 108 and 109, "[o]il and gas are owned by all the people of Iraq in all the regions and governorates." The federal government, in cooperation with the oil producing governorates and regions, is charged with managing oil and gas extracted from current fields, provided that it allocates the wealth "in a fair manner in proportion to the population distribution in all parts of the country." Regions and governorates are entitled to "an equitable share of the national revenues sufficient to discharge its responsibilities and duties . . . having regard to its resources, needs and the percentage of its population" (art. 117). If properly implemented and interpreted, these provisions could reduce secessionist tendencies, and would allow Kurds and Shiites to exercise the self-governance

that they desire, while Sunnis Arabs could be assured their fair share of the national wealth and form autonomous regions should they choose to do so.

Nevertheless, some argue that this federal structure will merely solidify the division of Iraq into three separate entities — a Kurdish North, Shiite South, and a Sunni entity in the West and extended center. They claim that the negotiators' failure to create a structure that defines federal units by territory rather than ethnic or sectarian characteristics, will lead to Iraq's dissolution. There is some merit to this argument. Consequently, the legislation drafted by Iraq's new parliament and the initial rulings of the constitutional court will be central in the resolution of this issue. For example, under the Constitution the next legislature has six months to establish the details surrounding the procedures for the formation of new regions (arts. 113-115). This same legislature must agree on detailed revenue allocation formulas and the full manner in which the respective governments will jointly manage and control both developed and unexplored oil and gas resources. If the legislature fails to strike a balance between the country's have and have-nots, and national responsibilities are not considered alongside local allegiances, a stable federal structure will remain elusive.

Finally, democracy in Iraq must encompass more than free elections to protect the rights of minorities. Sunnis, Kurds, and smaller minority groups must also be guaranteed effective participation in governance through representation in the bicameral legislature and the many committees, agencies, and institutions of the state. With respect to the Iraqi legislature, the Constitution only provides that there shall be "representation of all components of the people" in the Council of Representatives (art. 47), and that the Federation Council will include "representatives from the regions and the governorates that are not organized in a region" (art. 62). The Constitution gives no guidance as to how this representation will be achieved, and there are virtually no details regarding a federal election law.

Despite this omission, the Transitional Government adopted a draft electoral law in mid-September 2005.¹² The elections for the Council of Representatives will be carried out on the basis of proportional representation, which is likely to ensure a fair representation of Shiites, Sunnis, and Kurds. Many have raised doubts, however, regarding smaller minorities' capabilities for independent election to the Council. The Council has no reserved seats for the smaller minority groups, and there is no requirement that candidates from these minority groups be included on party lists.¹³

WOMEN'S RIGHTS

Although most negotiators did not make women's rights a priority, the issue was extremely important during negotiations. The Constitution, which addressed this issue in some detail, ensures that all Iraqis "are equal before the law without discrimination based on gender" (art. 14); guarantees that both male and female citizens have equal rights "to participate in public affairs and to enjoy political rights" (art. 20); prohibits domestic violence (art. 29); and provides for an electoral law that aims to achieve not less than 25 percent representation of women in the Council of Representatives (art. 47).¹⁴

Although these and other provisions provide a substantial foundation for the advancement of women's rights and a strong argument against their limitation, one provision remains particularly controversial. Article 39 states that "Iraqis are free in their commitment to their personal status according to their religions,

sects, beliefs, or choices. This shall be regulated by law.” There is legitimate concern that this provision will diminish the rights previously enjoyed by women in Iraq. Specifically, many fear it will lead to the abolition of Iraq’s 1959 Law of Personal Status, which grants uniform rights to a husband and wife to divorce, receive inheritance, and governs related issues such as child support. Although some argue that Article 39 protects women by providing Iraqis with a choice to adjudicate family matters in a civil or religious court, others contend that given the seriousness of this issue and its repercussions for Iraqi women the provision is too vague and therefore dangerous. Consequently, many have recommended amendments to the article or enabling legislation that provides for the full and informed consent of both parties to submit cases to religious courts, review of rulings from religious courts by the civil courts, and clarification that civil law is the default legal system for personal status matters.

Some believe the current federal system will allow regions, and perhaps governorates, to enact legislation that violates women’s rights while remaining immune from censure by the central government or the Federal Supreme Court. Proponents of this argument point to the diminished powers of the central government and to Article 117(2), which provides that if a “contradiction” exists between regional and national legislation the region may amend the national legislation as long as the subject matter is not within the federal government’s exclusive jurisdiction. Although local attempts to restrict women’s rights are likely to occur, the Constitution provides for quite the opposite because it clearly establishes its own supremacy, including its protections for the rights of women. The text also prohibits regional constitutions and laws that contradict the federal Constitution, ensures that no law in Iraq can contradict the principles of democracy and human

rights, and grants the Federal Supreme Court the authority to review the constitutionality of federal, regional, and governorate laws.¹⁵ Although enhanced autonomy and self-governance provide for greater diversity and accommodate differing values and aspirations, neither is a license to abuse rights and freedoms.

As with the other issues discussed above, this debate will be settled through the implementation, interpretation, enforcement, and possible amendment of the Constitution. The Constitution can thus be an instrument for positive change, positioning Iraq as a leader in the region in advancing women’s rights. This will depend, however, on a legislature with an active political will and a public that holds its representatives accountable.

CONCLUSION AND FUTURE STEPS

Iraq’s Constitution is not a perfect document. If interpreted and implemented wisely, however, it could provide a new vision and a sound framework for a unified, democratic and pluralistic Iraq that respects the rule of law and the rights and freedoms of all. The public referendum that ushered in the new Constitution also paved the way for the election of a permanent legislature on December 15, 2005. This body will interpret, implement, and possibly amend the Constitution. The manner in which the candidates and their parties campaign for this national election will provide a forecast of how the subsequent legislature will accomplish its mandate. If parties attempt to reach across ethnic and sectarian lines, it is likely that the Constitution will be used to help manage conflict and prevent civil war. If, however, the December elections serve to further entrench divisions and marginalize citizens from the political process, a stable and peaceful Iraq will remain elusive. In the end, the fate of the Iraqi people rests in their own hands. *HRB*

ENDNOTES: Jiménez

¹ An English copy of the final Constitution of Iraq as subject to the October 15 referendum can be found at <http://www.msnbc.msn.com/id/9719734/> (Oct. 16, 2005).

² Two days before the referendum the parties agreed on four new amendments. One of these calls upon the new legislature to immediately form a committee that will review the constitution and present a package of proposed amendments within four months of its establishment. If adopted by an absolute majority, the amendments will be placed before the Iraqi people in another public referendum within two months. (Iraq Const. at art. 137(1)).

³ Examples of such postponed decisions include the full details regarding the formation of new regions, the allocation of resources, the formation of a second legislative body, and the composition of the constitutional court.

⁴ The “Islamic identity of the majority of the Iraqi people” is also guaranteed by the Constitution. (*Id.* at art. 2(2)).

⁵ The Constitution also affirms that Iraq is a country of “many nationalities, religious and sects” (*Id.* at art. 3); protects all sacred sites without distinction (*Id.* at art. 10); protects individuals from “religious coercion” (*Id.* at art. 35); and guarantees the “practice of religious rites” to the “followers of all religions and sects.” *Id.* at art. 41.

⁶ Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, Italy, Aug. 26 - Sept. 6, *Basic Principles on the Independence of the Judiciary*, art 10, U.N. Doc. A/CONF.121/22/Rev.1 (1985).

⁷ These rights are guaranteed by Section II of the Constitution and Iraq’s existing international obligations expressly respected under Article 8.

⁸ Among others, the Constitution includes the civil and political guarantees regarding the right to enjoy life and security of person; equality and freedom from discrimination; freedom from slavery, forced labor, and torture; a number of due process rights; various rights of citizenship and nationality; and freedom of opinion and expression, assembly, and association. Some of the listed economic, cultural, and social rights include the right to own property, various labor rights, a right to healthcare and safe environmental conditions,

and the right to education for all Iraqis.

⁹ Under international law, certain limitations may be permissible for reasons such as national security, as well as to protect the public safety, order, health, or morals, and general welfare in a democratic society, or the rights or freedoms of others.

¹⁰ While in Iraq international human rights experts provided extensive recommendations regarding how the authority and composition of such a Commission should be defined, if not in the Constitution then in the enabling legislation. These experts also addressed how to ensure the Commission’s fiscal capacity and independence.

¹¹ See Const. of Iraq at arts. 106-19.

¹² Education for Peace in Iraq Center (epic), *The Draft of the Elections Law*, <http://www.epic-usa.org/Portals/1/iraqelectoralenglish.pdf> (Sept. 2005). The law provide that the 275 members of the Council of Representatives will be selected based on a multi-district proportional representation system in which 230 seats will be allocated between the 18 governorates (each governorate being its own electoral district, thereby providing greater representative accountability to particular provinces). Iraq Const. at arts. 15, 16. The remaining 45 seats are deemed compensatory, based on one national district, and allocated to ensure that political parties are represented in the legislature based on their proportionate share of the national vote. *Id.* at arts. 15-17.

¹³ Smaller minorities include such groups as the ChaldoAssyrians, Turkmens, Shabaks, Yazidis, and Mandaeans.

¹⁴ The Constitution also provides “[e]qual opportunities shall be guaranteed to all Iraqis” and requires the state to “take the necessary measures to achieve this” (*Id.* at art. 16); guarantees that Iraqi citizenship can be inherited from the mother as well as the father (*Id.* at art. 18); ensures that education is a right of all Iraqis (*Id.* at art. 34); recognizes freedom of movement (without restrictions as to women) (*Id.* at art. 42); and forbids “tribal traditions that contradict human rights.” *Id.* at art. 43.

¹⁵ See *id.* at arts. 2, 13, 90, 116.