

IRAQ: JUSTICE AND WITHDRAWAL

Iraq needs a better Constitution on its own terms and timescale

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Civil conflicts can be resolved through war or law. Either one side manages to impose its will through the force of arms, or else the conflicting parties negotiate mutually acceptable terms of coexistence. It is highly unlikely that any Iraqi group or coalition will, in the near future, achieve sufficient military dominance to govern effectively. There are too many potential combatants, too large a stock of munitions, too much reason for external intervention, and too complex a demography to permit any military solution. Therefore, the only real hope for peace in Iraq is negotiation. Unfortunately the best opportunity to achieve this—the drafting of a Constitution in 2005—was undermined (in large part) because of constraints imposed on Iraqis by the occupying Coalition. This mistake is currently being compounded by interference in negotiations on another critical plank of legislation, the Hydrocarbons Law.

Looking ahead into 2009, if Barack Obama wins the elections—the most likely outcome, although of course not certain—there will be a fresh interest in catalysing intra-Iraqi negotiations. However, even if an Obama administration is well-intentioned, there is a danger of repeating some of the mistakes from 2005 by rushing the process in the hope of securing a more rapid drawdown of forces. There may, therefore, be a role for Britain to use its experience in Iraq to advise the incoming Obama administration and ensure the withdrawal provides sufficient space to negotiate a lasting accord between Iraqis. In the unfortunate event of a McCain victory, Britain's role will be more difficult, but arguably even more necessary.

A stillborn Constitution

The Transitional Administrative Law (TAL), written in early 2004 during Paul Bremer's period of authoritarian rule, determined the methodology and framework for the transition process. It allocated just six months after the January 2005 elections in which to draft a constitution (with an optional six months extension, an early admission that the proposed timescale was probably unrealistic). A comparison with constitutional processes in other countries show that 2-4 years would have been a more reasonable timeframe, particularly for a country with such a wide range of constituencies and complex set of issues on which compromise was needed. In South Africa the process took between 3-5 years, depending on how one measures it. In Eritrea, which also has a potentially explosive mixture of religious and tribes, the constitutional process took three years (1994-7). Even the Afghan constitution process, which had just concluded when the TAL was drafted and was clearly an influence on it, lasted for 15 months between the formation of the Afghan Constitutional Commission in October 2002 and the consensus endorsement of a text by the Loya Jirga tribal gathering in January 2004 (there was no popular referendum).

Events following the January 2005 elections in Iraq meant that TAL timescale was even less realistic in practice than it was in theory. It took longer than anticipated to form a government after the elections, with the added complication that Sunnis were seriously underrepresented in the Parliament because of their boycott. As a result, it was not until 10 May that a Constitutional Drafting Committee was formed and not until 5 July that additional Sunni representatives were co-opted onto it. This left only five weeks until the 15 August deadline set by the TAL to present a draft constitutional text to be presented to Parliament. This was a ridiculously short period to

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achieve consensus on such significant issues as federalism and the oil industry, particularly in the context of intense and ongoing civil conflict that overshadowed the drafting process and even claimed the life of Sunni committee member Mijbil Issa on 19 July. The conflict combined with the brief timescale made it impossible for the Drafting Committee to properly consult with the Iraqi public. My own role at the UN was precisely to support initiatives by the Committee and by civil society groups to educate and consult with the public on the contentious issues. If there had been time to do this properly then it could have given a broad section of the Iraqi public a greater sense of ownership in the Constitution and in the new political system and might have helped to mitigate violence.

Almost everyone in the international policy community in Baghdad in July 2005 expected that there would be an extension to the drafting process; under the terms of TAL this had to be requested by the Committee no later than the 1 August. Sheikh Hammoudi, the Chairman of the Constitutional Committee, a member of SCIRI (a party that had secured many of its preferences in the draft text), nonetheless said on 31 July that he intended to ask Parliament for an extension the next day. However President Bush phoned party leaders the next morning, and in fact there was no extension. A reasonable interpretation of this is that Bush wanted the transition to be complete in time for the 2006 US mid-term elections. Mahmoud Othman, a Committee member from the Kurdish Alliance, warned about this when he told reporters: "If you're talking about a consensus, something on which we all agree, I certainly don't think it can be done on time. This is something too important to rush. We shouldn't be driven by America's domestic agenda."¹ The Chicago Tribune explained that: "The United States is putting intense pressure on all sides to stick to the timetable, which is considered central to plans to start bringing U.S. troops home next year."² Although there was no formal extension under the terms of the TAL, neither was a final Constitutional text approved on schedule by the Parliament. Instead, informal negotiations amongst party leaders, sometimes hosted by the US Ambassador, continued to alter the text until just a few days before the Constitutional referendum. An extension of the more representative and accountable drafting committee would have been greatly preferable to this informal process which left some of the parties, already frustrated at the process up to the 15 August, feeling even more excluded.

The South African alternative

In February 2006 I accompanied a delegation of Iraqi parliamentarians on a study tour in South Africa, meeting with many of the politicians and lawyers who had been instrumental in the transition from Apartheid. It is useful to draw a comparison between the two countries, although recognising that their contexts are very different. In South Africa the negotiated transition from repressive rule, including elections and the approval of a permanent Constitution, took over five years. The first serious negotiations began in December 1991 and produced an Interim Constitution in November 1993. It included provisions such as the protection of White property and language rights for the country's many ethnic groups (there are eight recognised official languages). This reassured most people that their worst fears about the transition would not be realised and therefore it wouldn't be worth taking up arms. The election in April 1994 went ahead peacefully, approving the Interim Constitution and electing President Mandela.

There was the potential for a civil war in South Africa and, if the transition had not taken place under the consensually agreed terms of the Interim Constitution, but instead under a framework

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and timescale dictated by the interests of an occupying power, then perhaps there would have been one. As it was, a permanent Constitution with a bill of rights was adopted in May 1996, following two further years of negotiation,³ and subsequently amended slightly based on recommendations of the Constitutional Court to make sure it cohered with the terms of the Interim Constitution.⁴ It is helpful to remember that South Africa had to deal with sectarian tensions and transitional issues—such as wealth disparities, aspirations for regional autonomy and responses to past crimes—every bit as difficult as Iraq's. South Africa transition was not painless—thousands died in violence in 1992—and is far from perfect today, but it does provide an example of how a difficult transition can be better managed, and it is not too late to apply some of the lessons that can be learned from South Africa and elsewhere. Nepal is a more recent example, where carefully managed constitutionalism has enabled a transition from a long running civil war.

An ineffectual review

The Constitution was approved in the controversial referendum on 15 October 2005. Few Iraqis had seen the text, which was only finalised days before the referendum. Furthermore, many Sunni Arabs believe that the vote in Mosul was manipulated because, without the narrow approval officially recorded in that province, the Constitution would have been vetoed under the terms of the referendum which required a majority approval in 16 out of the 18 provinces. One of the final ad hoc revisions to the Constitution promised a six month process of review, with amendments being submitted to Parliament and then referendum, in order to secure the eleventh-hour support of the (Sunni Arab) Iraqi Islamic Party. Over 30 months later, the Constitutional review process has not yet achieved any results and remains in deadlock. This is because the process is back-to-front. Difficult issues (federalism, Kirkuk, distribution of revenues) cannot be resolved as an afterthought but must be tackled together as part of a grand social contract in which all sides can accept some compromises because the agreement as a whole brings shared benefits and protections which are sufficient to override individual community preferences in particular areas, however strongly held. The South African transition is unlikely to have worked so smoothly if, for example, the status of White-owned land had been left to a review committee. In Iraq, the dominant parties largely secured their preferences in the original Constitution, and so have had little motivation to give ground in the years since.

Obama's proposals

Barack Obama's plans for withdrawal are positive but far from complete or convincing. His campaign explains that: "Iraq's constitution, approved in an October 2005 referendum, is the product of a Kurdish–Shiite deal. Iraq's government was supposed to immediately revise the constitution to be more inclusive of Sunnis and to develop a more sustainable balance between Baghdad's centralized authority and provincial governments. They never did." The solution proposed is promising: "Barack Obama would have the United Nations convene a constitutional convention in Iraq that would include representatives from all levels of Iraqi society. The convention would not adjourn until national reconciliation is reached and contentious questions such as federalism, oil revenue sharing, and de-Ba'athification are resolved."⁵

Obama recognises that the 2005 Constitution, and the review process that followed, have not built a sufficient foundation for peace in Iraq. His proposal for a UN-led convention, and

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inclusion of people “in and out of government”⁶, is a good one. The danger is that this new process could fail if its structure and timeline is designed to fit US interests rather than to secure the best accord for Iraqis. Just as the 2005 constitutional process was overshadowed by the Bush administration’s desire to show progress before the 2006 US midterm elections, a 2009 constitutional convention could be overshadowed by an Obama administration’s desire to fulfil its election pledges to drawdown US troops. There will be a delicate balance to maintain. If an imminent US drawdown is a reality, this could finally galvanise Iraqi politicians to reconcile, as the Obama campaign argues: “The best way to press Iraq’s leaders to take responsibility for their future is to make it clear that we are leaving.” At the same time, if the process is rushed, unrepresentative and does not fully engage the Iraqi public, then it is likely that it will unravel, just as the bungled 2005 constitutional process arguably sowed the seeds for the dramatically intensified sectarian conflict in 2006.

Britain has a long experience, both positive and negative, of democratic transitions in its former colonies. It also has a long history of involvement in Iraq which should give us a long-term perspective as well as a sense of responsibility. Moreover, Britain remains the US’ strongest ally and the only remaining member of the Coalition with a significant commitment of troops. In the course of the 2005 Constitutional drafting process, FCO representatives played a generally positive role, working closely with the UN, US and the Iraqis themselves. This experience of the negotiation process, and the personal relationships and institutional knowledge developed, should be used productively in the next stage. If Obama’s constitutional convention, or something similar, is initiated, then Britain should work to ensure that the timescale is sufficient and that no external pressure is exerted as regards the details of the contentious issues, aside from encouraging the Iraqis towards international best practice on technical matters and as regards human rights. Furthermore, it is crucial that the policy debate involves and engages Iraqi society as a whole, not just the elite (much of which is not representative). The European Union provided funding to the UN to support a civil-society led consultation process in 2005 (which, as discussed, had little impact because of the foreshortened timescale). In 2009 Britain should provide significant funding through the UN, either bilaterally or as part of a European initiative, for similar work engaging the Iraqi grassroots in the discussions which will shape their collective future.

Recommended further reading:

Constitution-Making Under Occupation, Zaid al-Ali, September 2005

Iraq’s Constitutional Process II: An Opportunity Lost, US Institute of Peace, November 2005

The Making of the Iraqi Constitutional Process, UNAMI, December 2005 (unpublished document)

¹ “Iraqi-constitution writers find time is running out”, Liz Sly, Chicago Tribune, 26 July 2005, http://www.signonsandiego.com/uniontrib/20050726/news_1n26iraq.html

² “Iraqi-constitution writers find time is running out”, Liz Sly, Chicago Tribune, 26 July 2005, http://www.signonsandiego.com/uniontrib/20050726/news_1n26iraq.html

³ Timeline at the University of Bern, http://www.servat.unibe.ch/icl/sf__indx.html

⁴ <http://www.anc.org.za/ancdocs/pubs/cnews07.html>

⁵ Turning The Page In Iraq, Barack Obama, <http://www.barackobama.com/issues/pdf/IraqFactSheet.pdf>

⁶ <http://www.barackobama.com/issues/iraq/#reconcile>