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## POLICY OUTLOOK

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# Post-Election Iraq

## *Facing the Constitutional Challenge*

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Iraq's newly elected National Assembly (NA) will soon take up its major task—although hardly its only one—of drafting a permanent constitution. The task is to be completed in time to submit the draft constitution to a national plebiscite by October 15, 2005.

Constitutions are rarely written during calm times. Countries rarely feel any pressure to redesign their basic institutions unless they are confronting crisis. There are some exceptions, of course—in fact, one of the major obstacles to the development of constitutionalism in the Arab world is that constitutions were written under conditions of insufficient turmoil. Instead, most were issued by entrenched regimes seeking to restructure themselves or proclaim new ideological directions. Thus, Iraq is departing somewhat from patterns in the Arab world—and instead emulating some broader international patterns—by attempting to write a constitution as an act of political reconstruction. Indeed, with Iraq still under occupation and a violent insurgency in full force, it is difficult to think of more difficult circumstances for deliberating over basic matters of governance, politics, and identity.

Constitutions are often written in troubled times, but they are hardly panaceas. Only one of the first three attempts to write constitutions for a sovereign state—in the United States, Poland, and France at the end of the eighteenth century—outlived its authors, and even that one could not prevent a bloody civil war. The Iraqi NA is not only to draft a constitution but also to do so quite quickly. The first draft is due on August 15, 2005, to allow sufficient time for discussion before Iraqis vote on it two months later. And the draft is to be written while the NA simultaneously serves as the country's interim parliament.

### **The Design of the Constitutional Process in Iraq**

How was Iraq presented with such a difficult task? The constitutional process is fairly clearly defined in the country's interim constitution, the Transitional Administrative Law (TAL). But this clarity is not the product of a single vision. Instead, the TAL's procedures are the outcome of prolonged direct and indirect bargaining among a number of parties, some of which have since dissolved, such as the U.S.-led Coalitional Provisional Authority (CPA), and the Iraqi Governing Council (IGC). By the time the process was designed, in late 2003

and early 2004, the most important parties had very different, although mostly not irreconcilable, agendas. The United States wanted a fairly rapid transition to begin before any permanent constitution was written but were in no hurry to hold elections, much of the Shi'i leadership wished to have elections as early as possible, most parties agreed that any legitimate permanent constitution would require national elections, and international electoral experts advised that it would be difficult to hold national elections before early 2005.

Bargaining and maneuvering among these parties produced the TAL (and a later annex to the TAL, issued in June 2004); those documents spelled out a three-stage process. In the first stage, that of the "Interim Government," the CPA and IGC would dissolve, handing authority to a cabinet, a three-member Presidency Council, and an interim council—all three appointed rather than elected. These bodies were to manage the country until elections could be held (no later than January 31, 2005). At that point, the NA would be elected and seated, and the second stage, that of the "Transitional Government," would begin. As soon as the electoral results are announced and the NA meets, Iraq will have entered the second stage. The NA is to serve as interim parliament, elect a new Presidency Council, approve a cabinet, and write a new constitution, all during the transitional phase. When it produces a draft constitution and obtains popular approval for its work in a plebiscite, the transition will have ended, and, in the third and final stage of the process, authority will be transferred to the structures defined in the permanent constitution.

The NA thus was placed in a critical position: it is to oversee the Iraqi political system while simultaneously (and swiftly) designing the country's fundamental political institutions. Before turning to the issue of constitution-drafting, consider the range of other task that the NA will have before it.

### **The National Assembly: Heavily Burdened from the Start**

Between the time that it first meets in February and the August 15 target date for completing a draft of the permanent constitution, the 275-member NA will find itself charged with an extraordinarily full agenda. Yet the NA is likely to be a fairly inchoate body, at least at first, for several reasons.

First, a large number of parties are likely to be represented. Acting under United Nations advice, Iraq adopted a pure proportional representation system, under which a party's share of seats in the NA is determined by its share of the national vote total. There were strong motivations for adopting such a system: proportional representation allows for the representation of geographically dispersed minorities, encourages parties to cast their appeals in national rather than regional terms, obviates the need for drawing boundaries around electoral districts (always a politically sensitive issue), renders it unnecessary to determine where internally displaced persons should be represented, and is administratively far simpler. Yet proportional representation also often allows a large number of parties to be represented. Under the extreme system of proportional representation adopted in Iraq, a successful party needed approximately 1/275 of the national vote to obtain a representative in the NA.

Second, the nature of the parties involved will compound the inchoate nature of the NA's initial operations. Of course, Iraqi political parties were not oriented toward electoral politics for two generations, but the problems of the newly elected NA go beyond inexperience. Some major electoral lists—such as the United Iraqi Alliance, a leading Shi'i grouping—

consisted of a broad array of political parties who bargained with each other for positions on a common slate. It is not clear how well such groups will cohere—or even if they will try to—once they have taken their seats. Other lists will display almost the precise opposite problem: many are organized more around personalities than platforms. It will be clearer in such cases who is in charge, but often unclear precisely what the party stands for.

Indeed, this points to a third problem related to the nature of the campaign. While many political actors approached the elections with great passion, the electoral platforms of the parties tended to be very vague. This was especially the case regarding the constitution itself, a matter on which parties tended to tip their hands only in the most oblique ways. More political energy was spent on the election itself than on preparing for its aftermath, with the result that only a few political leaders will enter the NA with strong conceptions about the appropriate content for the country's permanent constitution.

Thus, the NA will likely take some time before it is able to act in a coherent and well-directed fashion. Its ability to act may partly be determined by its relationship with the country's executive authority—a group of officials the NA will have a role in selecting. From the minute it opens, the NA will be faced with a series of significant tasks:

- **Getting its house in order.** The NA's first item of business—after it elects a speaker and two deputies—will be to determine its working procedures. This need not take an extended period, but it is not necessarily a simple matter. Many Arab parliaments—including the NA's predecessors in Iraq—have developed their own bylaws, and it seems likely that the NA will simply adopt a modified version of such rules. But parliamentary procedures can be complex, and the NA's members will be adopting rules that few of them have had any experience with using.
- **Electing the Presidency Council.** The NA must elect a three-member Presidency Council to replace the current appointed one by a two-thirds majority. (Formally there will be one president and two deputies, but since the Presidency Council can only act if all its members are in agreement, the distinction between the president and the deputies is not likely to be significant.) They are to do so on a single ticket; that is, the three members of the council are to be elected as a unit.
- **Voting on a cabinet.** The Presidency Council is to designate a new prime minister and a set of ministers nominated by the prime minister-designate. Ministers need not be members of the NA. The entire body is then to be presented to the NA, which must approve it by a simple majority. If the Presidency Council has not presented a prime minister after two weeks, the NA is to name one by a two-thirds majority.
- **Overseeing the executive.** Having selected the members of the Presidency Council and approved the cabinet, the NA will then be responsible for overseeing the executive. Since its creation in June 2004, the appointed Presidency Council and the cabinet have clashed over jurisdiction, and it is likely that such problems will persist even after the NA elects a new Presidency Council and approves a new cabinet. Thus, the NA may find itself drawn into some disputes among members of the executive branch. The NA has authority to question ministers, as is standard for parliamentary bodies; much more unusually, it may summon members of the Presidency Council as well. In addition to its relationship with the executive, it should also be noted that the federal provisions of the TAL are essentially untested. Although the NA has no formal oversight role over regional and provincial governments, it may find itself drawn into turf battles among the various levels of the Iraqi state.

- **Serving as interim legislature.** The NA will have full legislative authority, acting as the country's parliament for the transitional period. Iraq has a pressing legislative agenda—the legal framework now includes a large number of laws written during the Ba'athist era as well as a substantial set of orders issued by the CPA. Both bodies of law have full legal authority but less than full legitimacy. Commissions were formed to examine both Ba'athist and CPA laws, but it will be left to a parliament to sort through Iraq's legal framework in an authoritative manner. This is an important task, although it is not likely to seem a pressing one to an assembly that already has many other items on its agenda. Much will therefore be deferred until after the permanent constitution is written.

Yet the NA may be called to take an early stand in two critical areas. First, the state budget is drafted by the cabinet but needs parliamentary approval. Second, personal status law has already emerged as a sensitive issue. Some parliamentary groups are likely to resume a controversy that broke out under the CPA (and that is, in a sense, decades older) over the body of law that is to govern Iraqis in matters of marriage, divorce, and inheritance. At least one political party (al-Da'wa, a member of the predominantly Shi'i United Iraqi Alliance) mentions the matter prominently in its platform. Prior to 1959, Sunnis and Shi'a had separate courts that issued decisions based on their interpretation of Islamic law. In 1959, a unified law of personal status was passed (although Christians and Jews were exempted, still governed by their own law). The 1959 law was derived from Islamic sources, but it was decreed by the state, did not vary according to sect, and was implemented by specialized sections of the civil court system rather than by religious courts. Many Shi'i groups wish to return to the pre-1959 system and some may press the issue almost immediately.

- **Ratifying a security agreement—if one is negotiated.** The CPA disbanded in June 2004 without concluding a security agreement to govern the presence and operation of foreign forces in Iraq. Some CPA orders as well as the TAL itself prevented a complete legal vacuum, but the matter was largely deferred to the Transitional Government. Any treaty or status of forces agreement will be negotiated with the executive rather than the NA, but the NA will have the authority to approve any agreement. Indeed, the TAL is unusually deferential to such documents, specifically providing that its own provisions will not affect the "rights and obligations" of agreements regarding the multinational force or the implementation of UN Security Council resolutions.

This is an extremely extensive list of responsibilities for a young assembly. Yet it is to carry them out while simultaneously drafting the country's constitution.

## Writing the Constitution: The Process

The TAL spells out the procedure for adoption of the constitution very clearly. It also sets a series of ambitious deadlines. The TAL itself was not signed until after the deadline that was set for it, perhaps motivating its drafters to include provisions to cover failures and delays.

The NA is to complete its draft by August 15, 2005. The TAL then adopts an approach of "do as I say, not as I do": although the TAL was drafted largely in secret, it requires that the draft of the permanent constitution be carried out in public. Not only are NA sessions public, but the final draft is to be published in order to encourage "public debate about it among the people." The referendum on the permanent constitution is to be held by October 15, 2005; if the constitution is approved, then Iraq's third elections of 2005 will be held by December 15 for whatever permanent structures are dictated by the permanent constitutional text.

The first possible delay (and perhaps the most likely) involves the NA itself. It may request an extension, but it must do so by August 1, 2005. The Presidency Council may grant a single, six-month extension. If the NA does not meet these deadlines (the August 15 or the later one if it secures an extension), it is dissolved and a new NA is elected. The requirement that the NA request an extension two weeks before the August 15 deadline, and the bar to a second extension makes it more likely that any final draft will be produced in a feverish burst of last-minute drafting.

Assuming the NA does produce a draft, the document must obtain a majority of those voting in Iraq. The use of the phrase “voters in Iraq” suggests, although perhaps only vaguely, that overseas voters should not be counted toward the majority, unlike the NA elections. A second requirement for ratification has drawn far more attention—the constitution must obtain the approval of at least one-third of the voters in sixteen of Iraq’s eighteen provinces. The original purpose of the requirement was to give Kurdish provinces a virtual veto over the final text. But an important if unintended consequence will be to give Sunni-dominated provinces a similar veto. Because the Sunni population speaks in many voices, its electoral behavior will be difficult to predict. But should the plebiscite over the constitution be carried out in the same atmosphere of boycott, violence, and intimidation as the NA election, Sunni groups that vacillate between endorsing and withholding participation may face a very difficult calculation indeed: those who abstain in provinces where there is strong opposition may effectively be voting in favor of the constitution by making it easier for the number of supporters to pass the one-third threshold.

If the NA fails to write a constitution or finds its work rejected, then a new NA will be elected by December 15, 2005—in this case, Iraq’s third national polling of the year would be for a second transitional body rather than a permanent parliament. The TAL will remain in effect, but the second effort is allowed no more than one year under its provisions. At this point, the TAL falls silent—if the second NA fails to meet the deadline or finds its work rejected, Iraq might avoid a constitutional vacuum only by amending the TAL or taking advantage of its final article which allows it to remain in effect “until the permanent constitution is issued and the new Iraqi government formed in accordance with it.” The TAL strives desperately to stave off such an outcome by barring any amendment that would extend the transitional period.

Thus, the TAL lays out elaborate procedures for writing and adopting the permanent constitution. But it is far more modest in dictating the constitution’s content. Indeed, almost all attempts to bind the drafters on content were removed from the final version of the TAL. Only two remain. First, the permanent constitution is vaguely (and probably unenforceably) charged with providing guarantees that “the Iraqi Armed Forces are never again used to terrorize or oppress the people of Iraq.” Second, the Presidency Council is to develop recommendations for the NA to remedy “unjust changes” made by the Ba’thist regime in provincial borders (a reference to gerrymandering to make it more difficult for distinct Kurdish administrative areas to form). These recommendations are for incorporation in the permanent constitution. If the Presidency Council fails to agree, it must appoint an arbitrator. If it fails to agree on an arbitrator, the UN Secretary-General is to select one.

Most constitutions do not define provincial boundaries, so it is likely that any Iraqi constitutional language will describe how to draw provincial boundaries rather than define them directly. Indeed, the TAL seems to anticipate such an approach, deferring the issue of Kirkuk—a city with a mixed ethnic population claimed by Kurds but not part of the Kurdish region—until a procedure is devised for redrawing boundaries. Yet since the January 30,

2005, elections also involved provincial councils, and since Kurds who took advantage of the fall of the Ba'ath to move back to Kirkuk were allowed to cast ballots, jockeying over the city has already begun.

The TAL can be amended—according to its own text—in a relatively simple procedure: three-quarters of the members of the NA and all members of the Presidency Council must approve any change. But a series of areas are entrenched (that is, placed beyond the amendment process): rights and freedoms, the length of the transitional period, the dates for the NA elections, the powers of regional and provincial governments, and Islam and other religions. The refusal of the TAL to countenance a delay in the elections already became an issue, and the tight schedule for the transitional period might become one. But there is no way to extend them without abrogating the TAL itself. The other entrenched provisions—such as those dealing with religion and rights—are unlikely to create controversy in the short run, although there will likely be considerable debate on such topics when drafting the permanent constitution.

In those areas where the TAL can be amended, however, it may be politically difficult to do so. This is especially the case with the three-province veto over the permanent constitution. The NA could vote such a change, but it would likely do so over the strenuous objection of Kurdish members. Even if these voices were outvoted or ignored, the Presidency Council—which presumably will have a Kurdish member—would be unlikely to endorse any amendment. And if somehow the amendment were adopted, it is difficult to imagine the major Kurdish parties continuing to participate in the constitutional process.

Of course, the TAL itself could be abandoned. It was issued under the authority of two bodies that have since disbanded themselves—the CPA and the IGC—in an undemocratic, often secretive, nonparticipatory, and partly externally imposed fashion. Although the U N Security Council gave its blessing to the transitional process, it avoided any direct mention of the TAL. Yet any explicit move away from the TAL would re-open every sensitive transitional issue without providing a clear structure to resolve them. Repudiation of some of the entrenched timetable provisions of the TAL might be contemplated, but wholesale repudiation would be less likely unless the entire transitional process the TAL describes is also abandoned.

### **Arguing over the Constitution: Key Issues**

When the NA begins to draft a constitution, it will first have to decide how to proceed. The size of the body makes it a rather unwieldy instrument for the task, and it is general practice for constituent assemblies to form committees to begin the drafting process. Such committees might not only provide greater efficiency; they also have the potential to include (formally or informally) representatives of critical constituencies not represented in the full NA.

Drafting attempts generally begin with an older text—or set of texts—that is taken as a starting point for revision and negotiation. Alternatively, a group or series of groups often forwards its own comprehensive draft as a beginning point. And indeed, in the 1990s some Iraqi opposition groups began work on such projects and Kurdish leaders show evidence of having given serious thought to constitutional issues. But since the TAL was adopted, the focus on the election campaign itself seems to have prevented—or perhaps momentarily obscured—any drafting efforts thus far.

Iraq's previous constitutions offer few attractive beginning points. The 1925 constitution provided for a constitutional monarchy and was fairly skeletal by current standards. The Ba'athist-era constitutions allowed untrammelled presidential power and are unlikely to be attractive sources.

What remains is the TAL—but the TAL would be a controversial choice as a starting point. Although it addresses many of the sensitive issues that the NA will have to confront, the document is still regarded as explicitly provisional and imposed. Even many who may not object to its contents may still find reliance on it distasteful. Nevertheless, parts of the TAL might well survive: it is likely that any drafting efforts will find themselves recapitulating many of the debates that occurred while writing the TAL, and thus TAL provisions might suggest themselves as potential solutions.

It also seems likely that drafters will turn to neighboring Arab states for some language. Many Arab constitutional provisions are taken from nineteenth century European texts, and Europe continues to be an influential source. Countries drafting constitutions increasingly turn to some other constitutions for procedural ideas and for language (the South African process, for instance, is often held up as a model). United States constitutional language is of limited influence outside the Western Hemisphere, although there was some clear U.S. influence on the TAL.

Judging from the debate over the TAL as well as constitutional controversies in other states in the region, five issues are likely to emerge as central in the negotiation concerning the Iraqi constitution.

### **Islam and Religion**

Over the past few decades, many Arab countries have held noisy debates concerning the constitutional role for Islam and Islamic law (*shari'a*). In such debates, some religious features of the constitution are relatively non-controversial—such as declaring Islam the state religion. More controversial are attempts to provide a role for *shari'a*, in particular proposals to declare it “a major source” or even “the major source” of law.

Such debates have already begun in Iraq. There will probably be little argument about enshrining an official role for Islam, but the precise formula—especially on the *shari'a* has already sparked debate. The TAL introduced complicated new language—making no reference to *shari'a* as such, but stating that Islam would be a source for legislation and that no law could be issued that “contradicted the fixed elements of Islam that are the subject of consensus.” It is likely that the constitutional drafters in Iraq will find themselves wrangling over such provisions at considerable length.

It is not clear that the practical results of such debates will match the passion that will likely go into them. What many debates overlook—both in Iraq and more broadly in the Arab world—is the issue of implementation mechanisms. “Who” rather than “what” is often the critical question: Who may issue authoritative interpretations of *shari'a* can be more important than what the vague constitutional language might suggest. Absent any explicit provision, it is likely that the courts—perhaps a constitutional court—will have to sort out the meaning of using Islam as a source of law, and such courts are generally dominated by secularly trained judges who defer to legislative and executive authorities in such matters. Islamic law is not an easily identifiable set of rules that can be mechanically applied, but a long and varied intellectual tradition. Proclaiming Islam, or the Islamic *shari'a*, a—or even

the—principal source of legislation places an obligation on officials to draw on that tradition in drafting legislation, but it gives them little guidance on how to do so.

There are some models for a more ambitious interpretation of such provisions available in neighboring Iran. One is the current Iranian constitutional order, which gives religious authorities a supervisory role over the political process. But all of Iraq's Shi'i parties—even those with a religious bent—have disavowed this model. Another possible system is one adopted in theory in pre-revolutionary Iran but never fully implemented until after the Islamic revolution: appointing a body of religious authorities to review legislation passed by parliament. There is little evidence to date of Iraqi Shi'i interest even in this more modest approach. Indeed, the Shi'i leadership has been extremely effective in getting its way by mobilizing its supporters rather than enshrining its influence in constitutional terms.

The one matter on which many Iraqi religious leaders are more insistent is personal status law. And indeed, it is likely that the struggle over such law will begin as soon as the NA is seated. However, much of the controversy will focus not on the constitution but on ordinary legislation. Judging from the experience of other countries in the region, the constitution might very well recognize a role for religion in matters of personal status but defer all matters of implementation—which is where all controversy centers—to the legislative process.

When the TAL was written, some U.S. officials—acting under pressure from Christian political groups in the United States—successfully insisted on strong religious freedom provisions. Such language is not unusual in regional constitutional texts and would undoubtedly find its way into the document without external intervention. But U.S. activists were able to introduce one innovation: in the TAL, religious freedom is guaranteed to individuals, not only to religious groups. This would seem—at least to external advocates—to offer protection to those who convert (especially Muslims who take up a new faith) as well as to those who subscribe to no recognized religion. Yet although freedom for various religious groups is widely accepted, placing such freedoms on an individual basis has far less resonance in Iraqi society. (Indeed, religious minorities generally seek group autonomy in the Arab world because it allows them the opportunity to operate their communities in accordance with their distinct personal status laws.) Thus, the cause of individual religious rights came in response to no domestically articulated need (and seems to have provoked little comment inside Iraq).

### **Federalism**

Debates over federalism are likely to be the opposite of those over Islam. On federalism, the principle is not at issue—none of the major groups likely to play an active role oppose the idea. Instead, arguments will focus on substance and detail. The issue is difficult both because of the historical background and the current situation.

Federalism is accepted in principle because it represents a compromise between the country's Kurdish minority, anxious to preserve autonomy it has exercised since Kurdish areas came under international protection in 1991, and the Arab majority (supported in this regard by some of Iraq's neighbors), anxious to prevent Kurdish secession. But federalism is a vague idea and very much at odds with an Iraqi history of increasingly centralized governance. Indeed, in comparative terms, Iraq is approaching federalism from an unusual starting point. Rather than a group of entities forming a federation (as happened in cases like the United States, Germany, and the United Arab Emirates), Iraq is attempting to build a



federal system after experiencing an extremely centralized one. And it is not merely the history of centralization that colors how constitutional drafters will approach the issue: there is also a history of rebellion, brutal repression, and failure to negotiate agreements or implement what was negotiated.

Constitutional negotiations are further complicated by the current situation in which it is not quite clear what the starting point for bargaining might be. Large-scale population movements brought on by rebellion, repression, Ba‘thist policy, an internationally protected Kurdish zone, and the collapse of the Ba‘thist regimes have left a welter of conflicting claims over property and—perhaps even more difficult—over who might legitimately be considered an inhabitant of the various cities, towns, and provinces of northern Iraq.

To make the situation more complicated, the TAL recognized not two levels of government but three: central, regional, and provincial. The middle category—regional government—was created only for the Kurdish region, but other regions are offered the option of emulating the Kurdish example. None has taken advantage of the opportunity (but some Shi‘a leaders have strongly hinted at interest in the idea for their areas of the country).

Kurdish leaders enter the negotiations with some significant cards to play. First, they have strong backing among their constituents—indeed, Kurdish leaders were speaking a far less insistent language than many of their followers. Second, they have over a decade of experience in administering a Kurdish autonomous zone. Third, the institutions of the central government do not operate effectively in the Kurdish zone, despite the federalist provisions of the TAL. Fourth, the current adoption procedures for the permanent constitution allow for the three Kurdish-dominated provinces to veto any final draft. And finally, Kurdish leaders will have a focused agenda, experience, expertise, and likely a set of concrete proposals; their interlocutors are likely to be less organized, more diffuse in their interests, and less prepared.

It is therefore likely that many of the provisions of the TAL on the issue—detailed rules for federalism that were fairly favorable to provincial and regional governments—will be maintained. But the outstanding issues—precise territorial demarcations, the status of the city of Kirkuk, and perhaps the division of oil revenues as well—might be the subjects of extended debate.

## **Security**

Although the security situation may be the most pressing issue in the country, it may not play as direct a role in the constitutional text. Indeed, most constitutions are fairly laconic on security issues. Yet it is still likely that security will enter into constitutional negotiations in two ways.

First, constitutions written in the wake of harsh authoritarianism often devote considerable attention to prevent the recurrence of the abuses of the old regime. This tendency is accentuated when constitutions are drawn up in a public and participatory manner. As a result, there is likely to be a strong impulse in Iraq to insert language and mechanisms that will limit leaders and hold them accountable. But the experience of a steadily escalating insurgency over the past year and a half will lead some others to insist on the need for a strong leadership, less fettered by procedural concerns. Thus, provisions for states of emergency—totally omitted from the TAL—are likely to be raised again in constitutional negotiations.

Second, security arrangements will likely enter constitutional negotiations in a less direct manner. Most of the parties competing in the January 30 elections made clear that they see the withdrawal of foreign forces as one of the major tasks facing any Iraqi government. Precise language varied—and often grew more reserved in January as the reality sunk in that an early withdrawal in the midst of a raging rebellion would place the new government in a difficult position indeed. But there appears to be a consensus that foreign forces should leave as soon as circumstances allow. One election advertisement, for instance, showed unidentified troops rolling away, leaving behind an open space where Iraqi boys could begin playing soccer—a scene designed to show Iraqis taking control of their own country.

Such campaign rhetoric is unlikely to lead to an immediate timetable for withdrawal. But the Transitional Government will feel enormous conflicting pressures on this issue. Although the government may conclude it cannot survive without foreign forces at present, it will have to recognize those foreign forces are themselves very much at issue in the insurgency. Indeed, for the purposes of constitutional negotiations, they could emerge as the only issue. Although all sorts of political and economic grievances lie behind the insurgency, rejectionist groups have not called for greater Sunni representation, a different process, or faster job creation; they have attacked the very idea of designing a government while under occupation.

Thus if some of those who boycotted (or worked to sabotage) the elections do take a seat at the table, their main demand may be an early withdrawal of foreign forces. Any consensual process of constitution writing will thus be difficult to separate from security issues. Iraq's newly elected leaders may feel dependent on foreign troops, but they have few other cards to play in any attempt to draw in groups that have excluded themselves.

### **Structures of Authority**

In designing its basic structures of government, Iraq's constitution drafters will likely be pulled in two different directions. On the one hand, strong executives are the norm in the region, and Iraq itself—even under the constitutional monarchy—never had a cabinet or even a minister who fell in a vote of confidence. Thus, when Iraqis turn to their past or to their neighbors, they are likely to find models that centralize authority in the executive.

On the other hand, not only would a strong executive reek of Ba'athist despotism to many participants, it would be unusual for a parliamentary body to write itself a small role in subsequent governance. Indeed, there is almost no formal role for the cabinet and only an incidental one for the Presidency Council in the constitution drafting process.

Relations between the executive and the parliament are extremely hard to predict based solely on constitutional text, because so many nonconstitutional factors (such as the party system) are involved. But it would be a surprise if Iraq's NA denies itself a strong role on paper in the permanent constitutional order of Iraq.

To date the judiciary has attracted far less attention. But the CPA issued an order creating a very strong judicial council, moving control of the judiciary out of executive hands. The TAL had fairly robust guarantees of judicial independence by regional standards. Given the security situation as well as the damage caused by Ba'athist rule, the Iraqi judiciary is only beginning to build the ability to use the autonomy it has gained on paper. The Iraqi NA will have to decide whether to allow it to continue to do so; senior Iraqi judges are likely to be quite insistent in this regard.

## **Rights and Freedoms**

Too often, drafters devote far more attention to listing rights than to designing effective ways of guaranteeing them. This may be one of the most attractive features of the TAL. Despite some enthusiastic claims at the time it was written, the catalogue of rights listed in the TAL was not particularly impressive by regional standards. But the language was carefully crafted to close loopholes and some attention was also given to implementation and oversight structures.

When the NA takes up the task of drafting a constitution, it may be well advised to follow the TAL's example at least in this respect. With many rights provisions, the devil is very much in the details.

Indeed, this point may be made more generally. Small changes in language may have significant and unanticipated effects on questions of immediate political importance. The Special Tribunal—created by the CPA and the IGC to try offenses committed under the Ba'athist regime—offers an example. The TAL barred the construction of special and exceptional courts but also sanctioned the creation of the Special Tribunal, exempting it from any of the TAL's provisions. When the permanent constitution is written, drafters will have to tread carefully. If they do not mention the Special Tribunal they will remove its constitutional basis; if they bar special courts they may render it more clearly unconstitutional. If they follow the path of the TAL by exempting the Special Tribunal from the constitution, they risk communicating that the constitutional protections do not apply to political enemies. Whatever path the Iraqi drafters choose to take will have to be not only carefully considered but also carefully drafted. ■

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