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*f o r I n t e r n a t i o n a l P e a c e*

## **The Final Draft of the Iraqi Constitution: Analysis and Commentary**

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On August 28, 2005, Iraq's constitutional commission approved a draft constitution. The draft was then read in a session of the National Assembly (although no formal vote was taken). The draft will be submitted to a popular referendum on October 15, 2005. A translation of the constitution by the Associated Press (AP) is available at several locations on the Internet.<sup>1</sup> My comments below are designed to be read alongside the draft.

***Update September 16, 2005:*** *On September 13, the deputy speaker of parliament produced a modified draft constitution. He did so in the name of the National Assembly but apparently without its approval; the constitutional committee itself does not appear to have played a role as a body. Thus, it is not clear if this will be the document that Iraqis will vote on. The National Assembly might still be asked to approve (or at least listen to) the revised draft before it can be considered authoritative. And, given the extremely haphazard approach to the end of the drafting process, further changes cannot be ruled out.*

*The September 13 draft introduces two major changes. First, Article 3 on identity has been supplemented. I have adjusted my commentary below. Second, Article 44 has been dropped entirely. As a result, most subsequent articles are renumbered; the article numbers below have been updated to reflect the September 13 draft.*

*In the older draft, Article 44 read:*

*All 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.*

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<sup>1</sup> For example, the August 28 text is available at the *New York Times* website: [http://www.nytimes.com/2005/08/28/international/iraqtext\\_new.html?pagewanted=all](http://www.nytimes.com/2005/08/28/international/iraqtext_new.html?pagewanted=all). The original Arabic is also available in several locations, such as the Iraq Foundation's website: <http://www.iraqfoundation.org/projects/constitution/constitutionindex.htm>.

*The elimination of Article 44 was justified on the grounds that it subordinated human rights treaties to the constitution. Thus, it has been claimed, removing Article 44 actually strengthens the legal position of those treaties that Iraq has signed.*

*This is a highly strained argument. Iraqi political institutions that base their authority on the country's constitution are hardly likely to use the elimination of Article 44 to claim that international human rights treaties take precedence over the constitution. The main effect of Article 44 would have been to transform the rights mentioned in the treaties from promises that Iraq made to other signatory states into rights that individuals could claim directly—with no implementing legislation—in Iraqi courts. It would have made it impossible for a court to deny the relevance of the rights provisions of the treaties to domestic litigation. It is true that some viewed the last phrase in Article 44—that the rights were enjoyed only if they did not “contradict the principles and provisions of this constitution”—as a way of subordinating the human rights treaties to the rulings of Islamic law (mentioned in Article 2). But eliminating Article 44 hardly prevents Iraqi authorities (including Iraqi judges) from taking such an approach. In short, the elimination of Article 44 seems to have the precise opposite effect from the one that has been claimed: it undercuts the human rights protections available to individuals.*

*In addition to changing Articles 3 and 44, some other minor changes were made in the draft. The most significant involved responsibility for water resources, the procedure for approval of treaties.*

## ***Preamble***

Some elements of the preamble were a source of controversy: Although the brief narration of the country's history insists on an ancient Iraqi nationality, it still seems tilted toward Shiite and Kurdish interpretations.

Preambles are almost always extremely general and sometimes quite flowery. In the Iraqi case, however, the vague and hortatory language packs a punch, because it refers to the Iraqi union (*ittihad*, the same word used to mean federation in this text) as voluntary—a major Kurdish demand because it can imply a right of secession. Some participants in the drafting process wanted to insert an explicit provision stating that the preamble was legally binding, and indeed such language was included in some earlier drafts. Such a provision is not unknown internationally, but the usual purpose is to encourage the use of the preamble to guide constitutional interpretation. In the end, the provision for an explicitly binding preamble was dropped, although even after August 28, some sought to revive the idea.

Some versions of the AP translation omit an opening invocation, “In the name of God, the Merciful, the Compassionate,” a Qur'anic formula that is a standard opening for any official text or speech. A very brief Qur'anic quotation follows the invocation again omitted from the AP translation: “We have honored the children of Adam.”

## ***Chapter One: Basic Principles***

### **Article 1: Name and Basic Description**

A reference to Iraq as an Islamic state, proposed by Islamist members of the drafting committee, was dropped in the final draft of the constitution. In the end, the name of the

country is simply the Republic of Iraq, as it has been since the overthrow of the monarchy in 1958.<sup>2</sup>

## **Article 2: Official Religion and Bases of Legislation**

This article attracted the greatest amount of international attention and has widely been termed “contradictory.” That characterization probably goes too far, but there are some tensions in the final language that reflect compromises made among the drafters.

- The reference to Islam as the official religion provoked little debate. The provision would certainly make it difficult to object to state funding for religious institutions, religious instruction in the schools, and use of Islamic symbols in public life—but such practices would have likely continued even if the clause had been omitted.
- The reference to using Islam as a “basic source” of legislation is a compromise between those who wished it to be mentioned as “a source” and those who wanted it to be “the source.” The significance of the impact of such phrasing was almost certainly exaggerated in much of the discussions that took place both inside Iraq and internationally. Interestingly, this part of the article does not mention Islamic law, only Islam.
- Potentially more significant is the provision that bars passage of any law that contradicts “the fixed elements of the rulings of Islam.” (The translation is my own—less felicitous than the AP reference to the “undisputed rules” but more faithful to the original Arabic.) The formula appears to be an oddly worded compromise between those who wished to make reference to the “fixed elements” (*thawabit*)—which would presumably be very general and fairly few in number, given the diversity of the Islamic heritage—and those who favored protecting “rulings” (*ahkam*), a far more specific—and clearly legal, not only religious—term. It is not clear precisely what the effect of combining these two terms will be. In the short term, the article is likely to have little practical impact. The wording suggests that the provision might only apply to legislation passed after the constitution is adopted (although the opposite interpretation is not implausible either), so that the existing Iraqi legal order is likely to remain intact. The impact on future legislation is completely dependent on who has authority to interpret the article. The primary burden, at least in theory, would seem to fall on the parliament: It is to use Islam as a source for legislation and take care to avoid violating the fixed rulings of the religion. And the parliament is quite likely to be dominated by Islamist parties and influenced informally by leading Shiite clerics. At least at present, such clerics give fairly few specific instructions, but it is clear that when they do so, any government would have difficulty ignoring them (as Paul Bremer discovered). The Supreme Federal Court would probably be called on to play a major interpretive role as well, and the composition of that body is therefore critical for the meaning of Article 2 in the long term.
- The article also prohibits passing laws that violate the principles of democracy and the stipulated rights and freedoms. This provision also gives strong but very uncertain advice to the parliament. In the long term, it might provide a formula for strengthening some of the fairly weak constitutional provisions for rights.

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<sup>2</sup> Some Coalition Provisional Authority (CPA) legal documents restored the pre-1958 name “State of Iraq,” although this seems to have been only the result of sloppy drafting and has not been retained since the dissolution of the CPA in 2004.

### **Article 3: Identity**

The constitution also describes Iraq in multiethnic terms, as did the Baathist constitutions (although those older documents were less detailed and far less credible). The failure to describe Iraq as an Arab state provoked strong objections from some of the Arab Sunni drafters (and even led to talk of suspending Iraq from the Arab League). Compromise wording (such as describing Iraq as a founding member of the Arab League) was carefully negotiated, partially with the Arab League. While the September 13 draft does not describe Iraq as an Arab country, it does describe Iraq as bound by the Arab League Charter. Since describing Iraq as an Arab state is an entirely symbolic step but binding the country constitutionally to an international document could have real practical implications, it is ironic that the final formula was regarded as a compromise.

### **Article 4: Official Languages**

Kurdish is an official language under the Transitional Administrative Law (TAL, the country's interim constitution), but it is rarely used outside of Iraqi Kurdistan. This article leaves many details to ordinary legislation, but it does attempt to provide some real guarantees that Kurdish will be used as an official language at the national level.

### **Article 7: Forbidden Political Ideologies and Practices**

The ban on *takfir* (accusation of apostasy or religious unbelief) is probably a reference to radical Sunni groups, some of which have declared Shiites apostates.

The ban on the "Saddamist Baath" is a concession to Sunnis. Earlier drafts banned even the ideology of the party, seeking to prevent it from emerging under a different name. However, specifying the "Saddamist" Baath leaves open the possibility of establishing a party that claims to be based on Baathist principles prevailing in Syria or in the pre-Saddam Hussein Iraqi branch of the Baath Party.

### **Article 9: Military and Security**

The TAL required the provisions against military intervention in politics.

### **Article 10: Holy Places**

The phrase translated as "holy shrines" by the AP (*atabat*) is one that I believe is generally used for Shiite religious places. The rest of the article is religiously neutral. An earlier attempt to stipulate respect for senior Shiite religious leaders was not included in the final draft.

### **Article 12: Symbols**

The reference to holidays on the Christian calendar might be taken to imply an oblique official status for Christianity. However, the phrasing could also be taken merely to refer to those holidays that are based on the Gregorian calendar, not those that are generally seen as Christian in nature (such as May Day or all Iraqi national holidays).

### **Article 13: Supremacy of Constitution**

This establishment of the constitution as the supreme law of the country may seem implicit in the very idea of a written constitution, but it was probably made explicit to assure those who feared that Iraqi Kurdistan would claim a right to override constitutional provisions. It may have also been an assurance to those who worried that Article 2 implied that Islamic law would prevail over other sources of law.

## *Chapter Two: Rights and Freedoms*

### **General Comments**

Rights and freedoms provisions have grown very extensive in modern constitutions, but many drafting efforts concentrate far more on naming freedoms rather than developing firm structural guarantees to protect them. This criticism can certainly be made of all Arab constitutions, including the current Iraqi draft. In one sense, this is a surprise, because the Iraqi process was dominated by those who felt themselves (with considerable justification) to have been victims of a regime that showed no respect for fundamental human rights. But many of the drafters also clearly anticipated that their political movements will form part of any majority coalition governing Iraq and therefore left many of the details concerning defining and protecting rights to parliamentary legislation.<sup>3</sup> The section of the final draft has a friendlier title (“Rights and Freedoms”) than intermediate drafts, which spoke of rights, freedoms, and duties. More specifically, there are several noteworthy features:

- Some critical basic freedoms are to be determined by law, a phrasing that many of Iraq’s neighbors have turned into gaping loopholes. The same could happen in Iraq, although there are some limiting factors. First, the formula is not used for a portion of the freedoms, implying that they do not depend on implementing legislation. Second, the specific phrasing used to render freedoms dependent on legislation is sometimes a little less open than is the norm in the region—for instance, instead of saying that freedom to form political parties is “to be guaranteed by law,” the constitution simply states that the freedom is “guaranteed” and then adds that this will be “organized by law.” Third, there are some structures that might be expected to defend rights, such as the Human Rights Commission and the Supreme Federal Court, although almost no details are given on how these structures will operate. Finally, Article 44 expressly prohibits undermining the essence of a right in the guise of defining it, a formula sometimes adopted in other constitutions to help close the loophole of relying on legislation.
- Article 36 provides surprisingly weak support for the very basic freedoms of expression, the press, public meetings, and peaceful demonstration insisting that these rights not be allowed to harm morals and the public order. Almost all restrictions placed by authoritarian governments are justified precisely on such grounds.
- Christian and religious rights activists based in the United States pressed for phrasing religious freedoms in individual terms. In most Middle Eastern constitutions, religious freedom is guaranteed to communities—and indeed, most religious minorities have seemed primarily concerned with communal rights. Communal protections offer little to freethinkers, atheists, and members of unrecognized groups. The Iraqi constitution phrases religious rights in communal rather than individual terms, although Article 40 explicitly places freedom of thought, conscience, and creed on an individual basis.
- The Iraqi constitution explicitly allows women to pass citizenship on to their children, a rare privilege in the region. Earlier drafts had also guaranteed the right

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<sup>3</sup>I have discussed the majoritarianism of the document more generally in a short article entitled “Iraq’s Constitutional Conundrum,” available at [http://www.carnegieendowment.org/files/brown8\\_313.pdf](http://www.carnegieendowment.org/files/brown8_313.pdf).

of Iraqis who had been stripped of citizenship to reclaim it, while trying to prevent those Jews who fled after the creation of the state of Israel from taking advantage of that privilege. The fact that few Israelis of Iraqi origin are clamoring to return escaped the attention of constitution drafters. The final draft does preserve the general principle but leaves implementation to legislation.

- Strong language on positive economic and social rights in initial drafts was substantially scaled back in the final draft.
- A provision in the TAL protecting cooperation with international civil society organizations was not included in the draft permanent constitution.
- A somewhat sinister-sounding citizen obligation to maintain state secrets and national unity was dropped from the final draft.

### **Article 39: Personal Status Law**

Middle Eastern states establish an area of law governing “personal status”—chiefly, marriage, divorce, and inheritance. Personal status law almost always is grounded in religion, although many states have attempted to codify and legislate a specific interpretation of religious teachings. In other states, it remains uncodified. In some states (such as Israel and Lebanon), separate personal status courts exist; in others (such as Egypt and Kuwait), personal status issues are adjudicated by a specialized branch of the regular court system.

As opposed to many constitutional controversies that are largely symbolic, the outcomes of debates over personal status are enormously important on a practical level. Iraqis will encounter the law when they are born, die, marry, or divorce.

In the draft constitution, personal status issues are addressed in the chapter on “rights and freedoms,” a rather telling choice: For the Shiite religious parties that dominated the drafting process, the issue of personal status law is understood as one of religious freedom. Iraq’s current law of personal status—dating back to 1959—is based on Islamic law, but it is also legislated by the state, administered in the secular court system, and applies uniformly to all Iraqis with the exception of specified non-Muslim communities. In the process of legislating the uniform code of 1959, interpretations from the Islamic legal tradition most favorable to women were generally selected, sometimes quite eclectically. Although subsequent governments have tinkered with the 1959 law, most of its provisions remain intact. Shiite religious parties objected that the 1959 law did not allow their own community to practice Shiite law; they also found the transfer of authority from religiously trained judges to secular judges tantamount to a state takeover of religious interpretation.

Article 39 does not explicitly overturn the 1959 law, but it could very well require changing very significant parts of it by requiring that Iraqis be free in matters of personal status according to their “religions, sects, beliefs, or choices.” At a minimum, this would seem to suggest that Iraqis who wished to be governed by sectarian law could insist that courts honor that choice. It is less clear what other choices might be presented. Freedom of choice over personal status law could not be boundless (in the sense of allowing each individual to write his or her own law); instead Article 39 would seem to require a menu of choices. There is certainly no explicit requirement that a nonsectarian or civil option be offered or that the 1959 law be maintained for those who wish to use it. Neither would such options be barred should the legislature wish to offer them. Thus, the draft constitution would seem to allow (though not require) continuation of the 1959 uniform code of personal status for those who wish to use it.

Article 39 explicitly requires implementing legislation, and writing that legislation will be a very complex task. Several questions must be addressed:

- Although it is clear that individuals must be offered the option of following sectarian law, it is not clear who has the authority to determine content of that law. Will there be an attempt to legislate separate Sunni and Shiite codes? Or will the law be uncodified, left for individual judges to decide on the basis of their training?
- The text refers to the law but says nothing about the courts that apply it. Will the existing court system be used, with judges expected to be ready and able to apply the appropriate law in accordance with the choice of the litigants? Or will separate sectarian courts be constructed? Both models have been used in the modern Arab world, but the trend in the twentieth century was toward unified courts even when there was variation in the law applied. Iraq took the step of unifying its court system in 1959. No Arab country has ever dismantled a unified system once it constructed one.
- If individuals may choose among different codes or laws, what will happen when litigants disagree over the law to be applied? Will “forum shopping”—in which, for instance, a Sunni temporarily becomes Shiite to escape alimony or allow his daughters to inherit a more generous share—be allowed?

It should be noted that it was precisely these sorts of problems that led many Arab states to adopt uniform codes and unified court systems for matters of personal status in the first place. From a religious standpoint, this was state encroachment on religious freedom, but from an official standpoint, a decentralized system seemed chaotic and confusing.

### ***Chapter Three: The Federal Authorities***

#### ***Part One: The Legislative Authority***

##### ***Council of Representatives***

###### **Article 47: Elections**

The article gives little guidance on how an election law should be written. The transitional parliament is currently working on a draft; the electoral system adopted could have a strong impact on the nature of the parliament elected. It is currently anticipated that the transitional parliament will design a system that departs from the one used for the elections of January 30, 2005 (in which the entire country formed a single electoral district and seats were allotted to each list in accordance with its share of the national vote). Instead, each province will be allocated seats in accordance with its population (although no accurate census figures exist), and proportional representation will be used within each province.

###### **Article 50: Membership**

The requirement that electoral disputes be resolved in 30 days may be a response to an Egyptian problem—in Egypt, complaints are investigated by the courts but referred to the parliament for final decision. The parliament has very often simply ignored a court finding.

Assigning parliamentary decisions in election disputes to be appealed to the Federal Supreme Court would be considered a violation of separation of powers in many Arab states but is probably a healthy move.

## **Article 55: Sessions**

The provisions for meetings of the Assembly seem unnecessarily detailed for a constitutional document, especially one that is relatively difficult to amend.

## **Article 58: Responsibilities**

The article sets a high bar (two-thirds parliamentary majority) for a law governing the approval of treaties. This requirement will likely to give the opposition a voice in the matter (unless the governing coalition controls more than two-thirds of the parliament). This provision is likely to be tested almost immediately, since UN Security Council Resolution 1546 allows the presence of the multinational force only until the completion of the transition. In other words, unless other arrangements are made, the legal basis for the coalition forces will be removed the moment the first cabinet meets under the constitution (which is when the constitution comes into full effect and the transitional process is completed). Although some device might be found to extend the mandate of coalition forces for a short period, the permanent Iraqi government is likely to wish to negotiate an arrangement itself rather than rely on a Security Council resolution. Indeed, the United States will also likely wish to negotiate the status of its forces and bases.

It should be noted that the September 13 draft differs slightly from the August 28 draft in this respect. The September 13 draft makes clear that the two-thirds majority is required for approval of the law that specifies the procedure for ratifying treaties. It lays down no other conditions for approval of treaties (though Article 70 requires parliamentary and presidential approval). The August 28 draft left some ambiguity on this score, leading some (including me) to conclude that the two-thirds requirement applied to the treaties themselves. This was apparently an erroneous reading, but it does seem unusual for a constitution to refer such a matter to legislation.

If the attitude of the transitional parliament is a good indication, the parliament is likely to take its responsibility regarding treaties quite seriously: In May 2005, when the foreign minister in the transitional government reported to the Security Council that Iraq favored a continuation of the mandate of the multinational force, he was greeted with a storm of criticisms from some deputies who claimed that he had violated the TAL's provisions for a parliamentary role in approving international agreements.

Allowing the parliament a role in senior appointments—especially in the military, judicial, diplomatic, and intelligence realms—is a marked departure from the norm in the Arab world.

Allowing the interpellation of the president is an odd innovation because the president is not politically responsible to the parliament once elected. He is only accountable to the parliament if he violates the constitution or his oath or commits treason. But the matter is not of tremendous importance, because the president is not likely to be a powerful figure.

Requiring an absolute majority rather than a simple majority to withdraw confidence from a minister is a high bar, although it should be noted that an absolute majority is also required to grant confidence to a minister under Article 73.

The parliament can withdraw confidence from individual ministers, a step likely to wreak havoc on a coalition government.

What the AP translates as “independent associations” are really governmental bodies mentioned in Articles 101-105. Making their heads responsible to parliament will diminish their independence, although much about these bodies is simply unspecified.

## **Article 59: Budget**

This article seems to give the parliament great authority over the budget, especially when combined with Article 28, which requires that taxes be imposed by law. But it may be difficult for the parliament to make much use of its authority, because there is no requirement that the budget be presented in sufficient time to review it. This might be corrected by legislation. But there is also no provision forcing the cabinet to resign if it fails to submit (or obtain approval) of a budget. And because any cabinet will have the support of a majority of the parliament, a full confrontation between the two is unlikely.

## **Article 61: Dissolution and New Elections**

The parliament may dissolve itself, but there is no provision forcing the dissolution of parliament if it fails to approve a cabinet.

## ***Council of the Union***

### **Article 62: Formation and Duties of the Council**

A second parliamentary chamber was originally proposed to allow some representation for the subnational units of the Iraqi state (the regions and provinces). In the end, however, the purpose, prerogatives, duties, procedures, and selection of the Council of the Union have simply been omitted, with the details to be filled in by legislative act of the Council of Representatives. It is absolutely extraordinary for the Council of the Union—an independent chamber of parliament—to be formed by a law written by the other house. In essence, this gives one chamber of parliament absolute authority over the other. This is presumably an effect of the hurried drafting process.

Another odd aspect of the Council of the Union is that Article 133 delays the effect of any provision for the Council of the Union until after the second round of parliamentary elections following promulgation of the constitution. This may be to encourage the parliament writing the legislation to take a longer-term (and not a jealous) view when designing the mechanisms for selecting the body as well as its authorities.

## ***Part Two: The Executive Authority***

### ***The President***

#### **Article 66: Nomination and Deputies**

It is also extraordinary to have all details concerning presidential deputies determined by law.

#### **Article 69: Presidential Term**

By having the president's term end with that of the parliament (or with the first meeting of the new parliament), the newly seated deputies will be forced to make election of a new president one of their very first agenda items—especially since the new president must charge the candidate chosen by the parliamentary majority with forming a cabinet. It is unclear why the drafters chose this arrangement. There is no need for the president's term to end with the parliament's if the office is ceremonial and not political.

#### **Article 70: Authorities**

Although the president must approve laws and treaties, this requirement seems to be designed to be a mere formality rather than a potential presidential veto. However, a very literal reading of the constitution might allow the president to block a law by refusing to sign it.

## ***The Cabinet***

### **Article 73: Formation of the Cabinet**

The article here is written in an unnecessarily confusing way to cover cases in which the cabinet is formed after new elections as well as cases in which it is not. I think the Arabic here could be better translated as: “The president of the Republic charges the nominee of the largest parliamentary bloc with forming the Cabinet within fifteen days from the date of the first meeting of the Council of Representatives, except for the case stipulated in Article 69 (2) (b) of this constitution in which case he shall be charged within fifteen days from the date of the election of the President of the Republic.”

Put more simply, the president has 15 days to name a candidate for prime minister. That candidate must be the nominee of the largest parliamentary bloc. (There is apparently no requirement that the prime minister—or any of the ministers—be a member of parliament.) Should the first candidate fail, the president is free in his selection of a second choice. Ministers have to be approved individually, but if any one of them does obtain parliamentary approval, the cabinet as a whole is considered not to have the confidence of parliament. This provision, combined with the short deadline for obtaining a parliamentary vote of confidence, may make assembling a cabinet a rushed affair. Especially because Iraqi cabinets are likely to be coalitions (either formally in the sense of multiparty governments or effectively in the sense that the only kind of electoral list likely to gain a majority of parliamentarians will itself be a coalition), forming a government will be difficult.

### **Article 78: Succession**

Having the president serve as prime minister on an acting basis is very unusual—generally a deputy prime minister would assume such duties. In a parliamentary system, in which the prime minister is responsible to the parliament, it seems odd to give the post even temporarily to a president who lies beyond parliamentary oversight.

### **Article 81: Security Services**

Placing the security services under parliamentary oversight and having them operate in accordance with law are welcome innovations. However, a strict reading of Chapter Four—on the duties of the various levels of government—would leave little room for involvement of the central government in matters of internal security.

## ***Part Three: The Judiciary***

### **Articles 87 and 88: Supreme Judicial Council**

Most advocates of judicial independence in the Arab world have focused their energies on creating autonomous judicial councils and giving them oversight over most judicial work (such as hiring, assignments, promotions, and budgets).

The constitution does little to create an autonomous judicial council; it merely defers to legislation on the matter. The current legislative basis for the judicial council—initiated under the U.S.-led Coalition Provisional Authority—does provide for considerable autonomy. The senior leadership of the Iraqi judiciary has emerged as an effective advocate for continued autonomy, although the constitution’s silence on the issue might lead some judges to be nervous.

The constitution does little to protect the autonomy of the judicial council, but it does award it considerable jurisdiction in judicial affairs. The Iraqi judicial council will have

wide authority by regional standards, although a few of its competencies are vaguely defined.

### **Articles 89 through 91: Supreme Federal Court**

The Supreme Federal Court will be a potentially powerful structure, so it is surprising how many details concerning its composition, structure, and operation are deferred to legislation.

The TAL provided for a Supreme Federal Court to handle constitutional disputes as well as those arising between different levels of government. Earlier drafts of the permanent constitution separated these two functions. With an already existing court of cassation--the supreme court for most ordinary cases--Iraq was to have a wealth of high courts. In the final draft the constitutional jurisdiction of the Supreme Federal Court was restored. Many of the most sensitive issues involving federalism and the constitution could easily wind up in this court. It generally takes some time for such courts to establish themselves (with some exceptions), so any critical role may only develop over time.<sup>4</sup>

But there are some remarkable features about this court. First, its composition is left to legislation by a supermajority—although this is not surprising given the potentially critical nature of the body. Second, experts in Islamic jurisprudence are eligible for seats the court. It seems unlikely that any senior Shiite clerics will want to serve, however; most would consider it beneath their dignity. But other clerics might serve. Because the legislation must pass by a two-thirds majority, it is unlikely that the structure will resemble the Iranian Council of Guardians. But some representation of religious figures on the court is quite possible. Finally, the court is assigned some ancillary responsibilities—such as certifying election results—that grant it a status of a symbol of sovereignty over the state.

One legal gap left by the constitution is the role of the current Supreme Federal Court, a body that was recently formed under the provisions of the TAL. Will that court continue operating until the new law is approved? Or will it expire with the TAL? Normally it might be expected that legal and judicial structures would continue until specifically replaced, but in this case, the Supreme Federal Court is given very significant responsibilities; it might not be seen as appropriate to assign them to a caretaker body. And of course the current court would not have the legitimacy gained from being formed in accordance with a law passed by a two-thirds majority under the permanent constitution.

### **Articles 92 and 96: Exceptional and Military Courts**

Barring exceptional courts and preventing trials of civilians in military courts are welcome steps given the common abuse of such mechanisms by authoritarian governments in the Middle East.

### **Article 97: Judicial Review of Administrative Acts**

Political leaders in many different systems have tinkered with the jurisdiction of the courts to avoid losing control over certain kinds of cases. In the Arab world, some governments have tried to remove administrative actions from judicial oversight. This article is designed to prevent such a step.

### **Article 98: State Council**

Iraq has an administrative court system; in civil law countries, such courts generally have jurisdiction over cases in which the state is a party. The constitution allows—but does not require—the establishment of a “council of state,” which generally combines the

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<sup>4</sup> I have examined the role of Arab constitutional courts in “Judicial Review and the Arab World” *Journal of Democracy*, vol. 9, no. 4 (October 1998), 85–99.

administrative courts with advisory functions in legislative drafting. The system was designed first in France and has spread to some other countries; in the Arab world the influential Egyptian system constructed a council of state in 1946. The council of state has no obvious common law counterpart. It is generally regarded as a device for ensuring that official bodies operate within the law and that a court system has the ability to review and overturn administrative acts (rather than merely order compensation for injured parties).<sup>5</sup>

#### ***Part Four: Independent Associations***

##### **General Comments**

What are called “Independent Associations” in the AP translations are probably better termed “Independent Agencies” or “Autonomous Bodies.” They are very much official and governmental but are designed to operate independently of the three branches of government. It has become far more common to establish such bodies in constitutional terms in recent years to govern those areas in order to insulate them from political pressures. This makes moderate use of the device, extending them to three areas (human rights, elections, and integrity). These bodies will not be wholly new, but it is my impression that only the elections commission has played a significant role. Almost all the autonomy that these bodies will enjoy under the constitution must be established by statute.

The constitution also mentions some other independent bodies with a less significant potential for independence: the central bank, the financial oversight bureau, the media and communications organization, and the bureaus for religious endowments. These are again preexisting organizations. All but the last are to operate under the parliament. Religious endowments—which are administered by a ministry in most Arab states (including pre-invasion Iraq)—are attached to the cabinet. There are now separate Sunni and Shiite bureaus, a division that was made in the early days of the CPA. That decision now seems enshrined by the constitution’s use of the plural to refer to these bureaus. The current Iraqi cabinet has begun to treat the bureaus as subject to its direct jurisdiction already, most notably by dismissing the director of the Sunni bureau.

Finally, some new agencies are envisioned: for example, martyrs (presumably to assist families of victims of the various waves of violence that Iraqi society has suffered from), and the civil service (awkwardly if accurately translated by the AP as the “federal public service council.” On federalism, the constitution actually establishes two separate bodies. One is to assist the subnational units (provinces and regions) in international representation; the other to “monitor and allocate” the revenues of the central government. Both bodies include representatives from the various levels of government and how they operate could determine whether the Iraqi political system tends more toward federalism or confederalism (a looser kind of association in which constituent parts retain considerably more autonomy and many attributes of sovereignty).

#### ***Chapter Four: Powers of the Federal Authorities***

##### **General Comments**

By regional standards, the list of those areas that are exclusively the responsibility of the central government is remarkably short. In most Arab countries, the central government

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<sup>5</sup> For more on judicial control of the bureaucracy in the Arab world, see my paper available at <http://www.geocities.com/nathanbrown1/SOGpaper.html>.

focuses much of its resources and attention on defense and foreign affairs, internal security, education, economic infrastructure, and health; it is also frequently concerned with supplies of basic commodities. In the draft constitution, only defense and foreign affairs are exclusively assigned to the central government. (And even the monopoly on foreign affairs is undermined by Article 102, discussed above, as well as by the very unusual sharing of responsibility for administering customs and the provisions of Article 117, in the following chapter, allowing for regional and provincial representation in Iraqi diplomatic missions). Education, infrastructure, and health are to be shared between the central government and the subnational units.

It is true that an ambitious central government would have some tools to expand its authority. First, some of the division of responsibilities explicitly requires implementing legislation; the rest implicitly require it. Second, it might be possible to use some of the general language (such as the authority to regulate trade between regions and provinces) very expansively. But Article 111 allocates any unspecified authority to the regional and provincial governments and also adds that in all disputes priority should be given to regional law. And Article 117 in the following chapter allows regional law to trump federal law in areas designated for joint responsibility. Such provisions may cause Iraq to lurch in a confederal direction, especially if the Federal Supreme Court emerges as a powerful body even mildly friendly to the regions. Constitutional provisions for oil resources are fraught with ambiguity and potential conflict. Article 108, covering petroleum and gas, awards ownership to “all the people of Iraq” but then rushes to add “in each of the regions and provinces.” It is unclear whether the latter phrase is intended to ensure that the benefits are distributed equally throughout the country or instead shared with the subnational units. Article 109 does not clarify matters. It first distinguishes between existing oil fields and new ones. Although the central government must coordinate with subnational units for both new and old fields, only the benefits from older fields must be distributed nationally “on the basis of the population distribution in all areas of the country.” The distribution of revenues from new fields is not specified, although there is a reference to “market principles” implying perhaps a degree of privatization.

Article 107 allows the government the right to set fiscal policy. At least one enthusiast for Kurdish independence has argued that this implies no central government authority to levy taxes. I find that interpretation implausible in the extreme. In Article 107 and elsewhere a taxation authority is implied. Indeed, the term used for “fiscal policy” (*siyasa maliyya*) would be taken to include taxation in any Arab country; it is, after all, the Ministry of Finance (*wizarat al-maliyya*) that oversees taxation in Arab states.

## ***Chapter Five: Authorities of the Regions***

### **General Comments**

While the title of this chapter refers only to regions, in fact this chapter covers other levels of government.

The draft constitution confirms the arrangement first designed in the TAL of three levels of Iraqi federalism: central government, regional governments, and provincial governments. The one existing regional government—Kurdistan—is confirmed (Article 113). Other regions may also be formed. Although the process for forming these regions will be governed by a federal law, the constitution stresses that such a law will be passed by a simple parliamentary majority (Article 114) within six months of the parliament’s first meeting. Given the experience with deadlines in the drafting of the constitution, it might be considered mildly surprising that a new deadline has been created—although the result

of failing to meet the date is not specified. More significant than the deadline, however, is that Article 115 provides that the initiative for forming a region can come from a purely local initiative (either from provincial councils or directly from the people) and be approved by a referendum. It is also to be approved by a referendum (implicitly of the people in the prospective region), suggesting that after the parliament passes the relevant law, all power over establishing regions shall pass out of the hands of the central government. It is difficult to imagine a more favorable set of constitutional provisions for creation of a southern region (the main potential region under discussion).

#### **Article 116: Regional Constitutions**

Each region will be responsible for writing its own constitution; as I understand it, the process has already begun for the Kurdish region.

#### **Article 117: Responsibilities of the Regions**

Allowing the regions complete responsibility for internal security will likely turn existing militias into regional security forces. Indeed, Kurdish leaders claim that their militias have already made this transformation. A similar development could easily occur if a southern region is created.

#### **Article 118: Provincial Government**

Placing provincial councils outside the purview of any ministry of the central government is unusual for the Middle East (indeed, several countries have an oddly named “Ministry of Local Government” as part of their central government).

#### **Article 120: Capital**

Baghdad is converted into a province, but it is explicitly barred from joining one of the regions.

#### **Article 121: Local Administration**

It is not clear why the rights of various ethnic minorities are mentioned in this chapter unless it is to imply that the communities are to be viewed as administrative units as well as ethnic categories. Indeed, unspecified administrative rights are mentioned. The purpose might also be to placate those non-Kurds who live in Kurdistan, a region with geographical boundaries but still formed for a specific ethnic group.

### ***Chapter Six: Final and Transitional Guidelines***

#### **General Comments**

The drafters have taken some care to specify transitional provisions that will allow for institutional and legal continuity in the presidency, the parliament, and some other bodies.

#### **Article 122: Constitutional Amendments**

It will be fairly difficult to amend the Iraqi constitution. All amendments must be supported by a two-thirds majority of parliament and a popular majority in a referendum. The first two chapters cannot be amended until two parliamentary terms have been completed. And the consent of regional parliaments and a majority of the population of a region is necessary before regional powers are diminished. This last provision might provoke dispute if a regional parliament claimed its rights were being diminished by a proposed amendment but the national parliament claimed otherwise.

### **Article 126: Continuing Validity of Existing Legislation**

Implicitly the body of legislation issued by decree by the CPA continues in effect until modified, because it is currently treated as valid Iraqi legislation. One could make an argument otherwise based on Article 138 (which repeals the TAL, a document that affirmed the continuing validity of CPA orders). But a more gradual path seems likely; indeed, a committee within the Ministry of Justice has been reviewing CPA legislation and has recently recommended the repeal or amendment of some measures.

### **Articles 130 and 131: Supreme Iraqi Criminal Court and De-Baathification Commission**

Two controversial structures—the tribunal for trying those who committed grave offenses under the Baathist regime and the De-Baathification Commission—are affirmed; the second requires an absolute majority of parliamentarians (not a simple majority) to abolish.

### **Article 134: Presidency Council**

The TAL provides for a three-person presidency council rather than a single president. That system will be retained for the first parliamentary session elected under the draft constitution (the wording seems to suggest that the presidency council will continue to operate throughout the first parliament's term).

### **Article 136: Kirkuk, Other Disputed Areas, and the TAL**

Kirkuk and provincial boundaries have been a major issue of dispute since the drafting of the TAL. Although the TAL did not resolve the issue, it did establish some mechanisms for resolution. None of those mechanisms has been implemented however. The draft constitution affirms those mechanisms and places responsibility in the hands of the executive, implicitly bypassing the parliament. By stressing the continued applicability of “all sections” of Article 58 of the TAL, the constitution creates a mild legal paradox: One of those sections requires the transitional presidency council to recommend mechanisms for changing provincial boundaries in the permanent constitution and specifies some steps for developing such recommendations if the members are unable to agree. The presidency council has neither made recommendations nor set in motion the stipulated alternatives. As a result, the draft constitution affirms a text that has already been violated by the failure to develop recommendations for the permanent constitution.

More significant, Article 136 represents a compromise. Kurdish leaders wished to have the provisions of the TAL's Article 58 implemented before the constitution was adopted, believing that this would further Kurdish claims to Kirkuk. They are probably correct in their political judgment, because Article 58 requires counteracting the population movements implemented by the Baath regime and might result in a Kurdish majority there, depending on how it is implemented. The Kurdish leadership finally gave way in not insisting on immediate implementation, but they gained a promise that it would be implemented expeditiously.

Some guidance is given on how to resolve the status of Kirkuk, but none is given on how to resolve disputes over provincial boundaries and the matter is likely to prove quite contentious.

### **Article 138: Voiding the TAL**

The abolition of the TAL might be considered implicit by the adoption of a new constitution, but this article makes the step explicit. The two TAL provisions that remain in force are Article 58 (discussed above) and Article 53(a), which recognizes the government of the Kurdish region.

### **Article 139: Effective Date of the Constitution**

This article was omitted from the AP translation. My translation of the final article is:

“This constitution is to be considered effective after the people approve it in the general referendum, it is published in the *Official Gazette*, and the government [here meaning cabinet] is formed in accordance with its provisions.”