

Establishing a Stable Democratic Constitutional Structure in Iraq: Some Basic Considerations

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1. INTRODUCTION

As the situation in Iraq continues to stabilize, the people of Iraq will turn to the task of reconstituting an Iraqi state. One of the first steps in this process will be to design, agree upon, and implement a new constitutional structure. While drafting a new constitution is a difficult and contentious process for any country, the challenges are substantially magnified for Iraq given its complex mosaic of ethnic and religious identities, the history of repression under Saddam Hussein, the necessary presence of American forces, and Iraq's complex relations with its neighboring states.

The overriding tension faced by the drafters of the new constitution will be the need to create a representative form of government, which adequately protects the rights and interests of all individuals within the various groups making up the Iraqi nation, while also preserving internal and external stability.

The process of reconstituting Iraq's sovereignty will be highly complex and face many hurdles. The eclectic ethnic and religious make-up of Iraq will require the drafters to develop a sufficiently decentralized unitary state or federal structure that will secure Kurdish participation in the Iraqi state without undermining the functional integrity of Iraq or encouraging further secessionist tendencies. The Kurdish/Arab bargain must be accomplished while accounting for the Sunni/Shi'a split within the Arab community, and without neglecting the needs and aspirations of Iraq's minority populations such as the Turkomans, Chaldeans, Yezidi, and Assyrians. Some of Iraq's numerous neighbors want to be assured of Iraq's territorial integrity, while others must be prevented from actively undermining its integrity or radicalizing its politics. All this must be accomplished while tempering flashpoints such as Mosul, Karbala, Nasiriyah, and Kirkuk, and integrating into the process a politically resurgent Shi'a community.

Agreeing upon a new constitutional structure will be complicated by the already substantially divergent draft constitutions put forward by the Kurdish regional government and the Iraqi exile groups, coupled with the emerging proposals by some of the southern Shi'a groups. The umbrella exile groups have proposed constitutions and principles that embrace democracy and call for a federal Iraq with vaguely defined allocations of responsibility. The Kurds have proposed a loose confederation with near absolute Kurdish authority over historically Kurdish lands and cities currently populated by non-Kurds, and with a bi-modal central government with an equal distribution of power and authority between the Kurds and Arabs. Meanwhile some nascent Shi'a political movements are calling for the creation of a theocracy along the lines of the Iranian model.

The efforts to overcome these hurdles and find common ground among Iraqi political interests will occur in the context of a lack of democratic history in Iraq and the absence of suitable regional models.

This report aims to serve as a constitutional primer. Its purpose is to help navigate the complexities of the constitution building process by providing analysis and recommendations on the various state structures and processes by which states have sought to achieve both stability and democracy when faced with a diversity of ethnic and religious interests. The report is careful to acknowledge that no two situations are the same and tries to take particular care to identify the unique challenges facing Iraq.

The report does not set forth a proposed constitutional structure. Rather, it examines the principal issues that must be addressed in order to craft a viable constitutional framework. The report works from the premise that stability is best preserved by recognizing and protecting the interests of various groups, while also fostering an inclusive national identity.

It is important to note that the process of democratizing Iraq will require not only creating a new constitutional structure, but also will entail holding elections, establishing an independent judiciary and the rule of law, reconstituting the police force and military, and facilitating the growth of civil society. Each of these objectives will be accomplished through different processes and mechanisms that are beyond the scope of this report. This report is limited to addressing questions that are pertinent to the creation of democratic institutions capable of constructively channeling the perpetual political bargaining process that will occur among Iraq's diverse political interests.

The main issues covered are:

- whether the state structure should be unitary or federal;
- whether in a unitary system the Kurdish Region should possess autonomy, or in a federal system an asymmetrical relationship with the central government;
- whether the parliamentary body should be unicameral or bicameral;
- whether the executive should be separate from the legislature as in a presidential system, or fused as in a parliamentary system; and whether the executive should be centralized or pluralistic;
- which electoral system or mix of systems should be employed to select political representatives; and
- which mechanisms should be established to protect minority and human rights.

For each issue addressed, the report summarizes the views of relevant parties to the extent they are known, while recognizing that others are already emerging in Iraq. It identifies issues that must be resolved to construct a viable constitutional structure, and then reviews relevant precedent that may assist in the resolution of these issues. For each issue, the report also considers a variety of options, and attempts to set forth one or more recommended options. Substantial emphasis is placed on constructing options that best reconcile the competing positions of the various interested parties, while effectively balancing the objectives of democracy and stability.

The observations reflected in this report are based on a review of documents presented by some of the known Iraqi parties, such as the Kurdish regional government's draft

constitution, the Declaration of the Shi'a of Iraq, the political statement of the Iraqi Opposition Conference, the report of the Democratic Principles Working Group, and the Iraqi National Congress (INC) draft constitution. It also considers the various reports recently published by NGOs and think tanks as well as scholarly literature on state-building and constitution-making. The analysis and ideas presented in this report were refined during a series of roundtable meetings attended by former senior U.S. government officials, representatives of various Iraqi parties and neighboring states, and legal and foreign policy experts. The roundtables were chaired by Morton Abramowitz, Abraham D. Sofaer, and Paul R. Williams. Nathan Kirschner, Tali Neuwirth, Shiva Aminian, Tim Watkins, Laura Martino, Scott Lyons, Jessica Gingerich, and Francesca Jannotti Pecci served as rapporteurs for the roundtable.

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2. THE POLITICAL CONTEXT

While many Iraqi parties have proclaimed their interest in creating a democratic Iraq, and while President Bush has declared that the nation of Iraq—with its proud heritage, abundant resources and skilled and educated people—is fully capable of moving toward democracy and living in freedom, the hurdles to accomplishing this objective must not be underestimated. The people of Iraq have never operated under a democratic system; civil society and other social institutions have been nearly extinguished by decades of totalitarian rule. There are no useful democratic models in the immediate region, other than Turkey, and there is an as yet undefined Islamist factor that may substantially influence the process of democratic transition. The process for creating a new constitution will take place in a period of confusion and possibly some disorder.

This section briefly reviews some of the main factors that will influence efforts to create a democratic and stable Iraq.

THE DEMOCRATIC CONSENSUS?

Despite their fundamental differences, the Iraqi National Congress (comprised mostly of formerly exiled Iraqis), the Kurdish political parties, and the formerly exiled Shi'a community have all released declarations or draft constitutions calling for a fully democratic Iraq. Crucially, the views of the Iraqi population or key elements of political, tribal, and religious leaders within Iraq are not yet publicly available.

Although broadly committed to a democratic form of government, the known proposals of some of the parties differ quite dramatically in terms of substance. The Kurdish proposal—the only one to date reflective of large populations within Iraq—envisions a near confederal state made up of a Kurdish province and an Arab province with nearly all important powers devolved to these provinces, and with the Kurdish and Arab groups sharing near equal power and responsibilities at the federal level. The INC draft constitution and the Democratic Principles Working Group call for a heavily centralized federal structure, with a general and vague call for the people of Kurdistan to choose an appropriate formula for partnership with the other peoples of Iraq in a unified state. The Declaration of the Shi'a of Iraq only addresses the federal structure in the broadest terms and calls for a government that confirms the unity of Iraq while addressing its diversity and pluralism without promoting sectarianism. More recently, local Shi'a clerics, with support from Iran, have called for a theocratic Iraq. It will require intensive efforts to bridge these differences.

DOMESTIC FACTORS

The Kurdish Factor. Over the past three decades, the Kurdish population in northern Iraq has been subjected to gross and massive violations of human rights, including the attempted genocide known as the Anfal campaigns, which led to the deaths of nearly 200,000 Kurds and which involved the use of chemical weapons against Kurdish civilians. Over the past decade, the Kurdish population has been protected by an American/British no-fly zone and has established a near-independent level of autonomy and quasi democratic state institutions, which they will be reluctant to surrender or dismantle.

Since the mid-1990s, the Kurds have operated under the constitution of the Iraqi Kurdistan Region, and have established a functional Kurdish regional government. The regional government recently proposed a Constitution of the Federal Republic of Iraq. The draft constitution provides for a confederal Iraq comprised of an Arab Region and a Kurdish Region. The Arab Region would consist of the middle and southern territories of Iraq while the Kurdish Region would be made up of historically Kurdish territories in the northeast, including the city of Kirkuk as its capital. This area would roughly account for twice the size of the territory controlled by the Kurds since 1991. Some Kurdish groups appear to call for the redressing of the effects of Saddam's campaign of Arabization with the return of Kurds and removal of Arabs who were forcibly settled in Iraqi Kurdistan since 1957.

The Shi'a Factor. Under the reign of Saddam Hussein, the Shi'a Arabs, who constitute the majority of the Iraqi population, were largely precluded from participating in political organizations. The exiled Shi'a have produced a document entitled the Declaration of the Shi'a of Iraq, which has received wide support outside of Iraq and calls for a secular democracy. The views of the Shi'a in Iraq are to date still largely unknown. Recently, there have been strident calls from some groups within the Shi'a community for the removal of American forces and the establishment of an Islamic state similar to the Iranian model.

The Sunni Factor. Elements of the Sunni Arab minority, which makes up 20 percent of the Iraqi Arab population, have controlled the Iraqi government for decades. While not all Sunni Arabs were Ba'ath party members, the Sunni minority is likely to fear retribution from other ethnic and religious groups and will greet with skepticism all efforts to minimize their exercise of political power.

The Minority Factor. Ethnic Turkomans, Chaldeans, Yezidi, Assyrians, and other minorities, who constitute a substantial portion of the population, will require some form of representation in the Iraqi state and the establishment of mechanisms to protect their interests. The Turkomans are concentrated in the northeastern provinces and constitute the largest minority population after the Kurds. Some Turkoman political parties are allied with Kurdish political groups, while others are more allied with the interests of Turkey and seek official recognition of their distinctive identity and language, while also contesting Kurdish claims to Kirkuk and Mosul. On the whole, the Iraqi minority groups

fear a lack of recognition of their identities and protection of their interests in a state structure focused on resolving tensions between the Kurds and Arabs.

The Iraqi Exile Community. The Iraqi exile community is politically sophisticated and well connected in the United States and Great Britain. Their proposals reflect a commitment to secular democracy and the protection of minority and human rights. While some exiles have returned with substantial international political financial backing and in some instances American-trained militia, their ability to sway the indigenous Iraqi community is as yet questionable.

To date the exile community has produced three major documents concerning the future constitutional structure for Iraq. The Iraqi National Congress has produced a comprehensive draft constitution for the Republic of Iraq. After an opposition conference attended by all the major exile groups in December 2002, the parties agreed to a Political Statement of the Iraqi Opposition Conference setting out a framework of principles for a new Iraqi constitution. In cooperation with the U.S. Department of State, a mix of Iraqi exiles and international experts convened a Democratic Principles Working Group and issued a report addressing many of the key constitutional issues facing a new Iraq.

The Islamic Factor. During the course of Saddam's reign, religious influences were highly monitored and suppressed by state security forces. The extent of religious conviction among the Iraqi people is unknown and the degree of politicization and radicalization among their religious leadership is unclear. Currently, some religious leaders are responding to requests by the American forces to take a civic leadership role and are thereby establishing a prominent position in civil society. Others are taking up leadership positions and organizing bureaucratic infrastructures in opposition to the wishes of the American forces. The degree to which they will continue their involvement in political matters, whether they will evolve into a homogeneous or a pluralistic force, and the extent to which some of them may embrace more radical forms of Islam remains to be seen.

Political Flashpoints. Tikrit, Karbala, Kirkuk, Mosul, Basra, and Baghdad are all political flashpoints that may erupt before or during the constitution-making process and substantially hinder it. Each area also presents special concerns that must be addressed in a new constitutional structure. Kirkuk, for example, is claimed by both the Kurds and the Turkomans as a historic capital, and has been the site of ethnic cleansing and forced Arabization, with recent reports of intimidation against non-Kurds being carried out by some Kurdish groups.

REGIONAL FACTORS

Iranian Interests. The complex and often hostile relationship between Iran and both Iraq and the United States will undoubtedly influence efforts to build a stable democracy in Iraq. While the exact manifestations of Iran's interest are not yet clear, it is reasonable

to assume that Iran will seek to support and align itself with some of the major political factions within the Shi'a community, that it may seek to destabilize the American military presence, and that it will take measures to protect its own regime from the political influence of a potentially democratic and western aligned Iraq. Already a number of clerics in Basra and Nasiriyah are identified as being supported by Iran, and the Supreme Council of Islamic Revolution in Iraq is openly organized and funded by Iran. Iran is also concerned that the continued presence of the United States in Iraq may have a destabilizing effect on the Islamic regime's wavering hold in Iran.

Turkish Interests. Turkey's primary interest is to ensure a stable Iraq that maintains its territorial integrity and represents all of Iraq's constituents. Having recently quelled the activities of the PKK terrorist organization, Turkey is very concerned that Iraq will fragment, or a federal province of Kurdistan would ultimately lead to a resurgence of the PKK. Turkey is further concerned that autonomy for Iraqi Kurds will eventually lead to increased claims for autonomy of its own Kurdish population. Separately, Turkey worries about the need to ensure protection for the human and cultural rights of the Turkoman population in Iraq. To protect its interests, Turkey has previously deployed its military forces into northern Iraq and has declared its intent to do so in the future if it perceives its interests to be threatened.

Syrian Interests. Like Iran, Syria has a complex relationship with both Iraq and the United States. Recent allegations that Syria is both harboring former senior Iraqi officials and that it possesses chemical weapons further complicate its relationship with the United States. While Syria may not seek to actively undermine the democratic transformation in Iraq, the United States will likely continue to apply political and economic pressure until Syria expels members of the former Iraqi regime or precludes them from using Syria as a base from which to destabilize Iraq.

INTERNATIONAL FACTORS

Varied International Commitment. While the Bush administration has publicly called for a fully democratic Iraq, which may initiate a new stage for the Middle Eastern peace process, and set in motion progress toward a truly democratic Palestinian state, there remains substantial division within the American government as to the nature of the new Iraqi state and how best to manage the process of democratic transition. Some American and European policy-makers openly worry that a democratic Iraq with a Shi'a population over 60 percent may rapidly become aligned with Iran. Others caution against the ability of Iraq to make a transformation to democracy, arguing that it is politically dangerous to expect that the United States can rapidly democratize Iraq and unleash a wave of democratic transformation in the Middle East.

The International Track Record. Recent international experience in Bosnia, Kosovo, East Timor, and Afghanistan highlights the difficulty of building a stable democratic structure. For nearly eight years, Bosnia has been effectively administered by the European Union with the financial assistance of the United States and with security

provided by NATO troops. Most observers agree that the international presence will need to continue for the next few years. Kosovo is entering its fourth year of UN administration, with the transference of important democratic responsibilities to the people of Kosovo only occurring this year. The democratic transformations in East Timor and Afghanistan are still in their nascent stages of democracy. The efforts in Iraq will be further complicated by the political dispute among the UN Security Council members as to the appropriate role for the UN in Iraq and a continuing dispute within the EU as to its appropriate role.

THE TRANSITION AND THE CONSTITUTION-MAKING PROCESS

The Interim Authority. As a first step in reconstituting Iraqi sovereignty, it is apparent that the United States will create an interim Iraqi administration. This administration will then establish the process for stabilizing and democratizing Iraq. Predictions regarding the length of the interim authority's mandate run from six months to two years. It should be anticipated that the interim administration will face frequent challenges to its legitimacy from those excluded from its governing council and public calls for early elections and for the transference of substantial power and authority to Iraqi institutions.

Rights Before Institutions. In most states undergoing a transformation to democracy, state institutions gradually allow the population to increasingly exercise basic rights such as free speech and free association. In the case of Iraq, there is a sense of shock liberalism with the people of Iraq being able to almost instantaneously exercise fundamental rights while at the same time almost all state institutions have collapsed. Recent public protests against the American occupation are one example of the immediate exercise of these rights. The widespread exercise of such rights cannot and should not be prevented. Such a situation will, however, promote substantial instability in the absence of mechanisms to appropriately channel and moderate the exercise of these rights so that they do not infringe upon the rights of others.

The Political Bargain. While this report seeks to lay out in an objective manner the options facing the constitutional negotiators and the solutions that may best promote democracy, stability, and the protection of group interests, in reality the new constitution will be created through the process of political bargaining. While the primary negotiators likely will hold democracy and stability as key objectives, they will undoubtedly be interested in securing advantage and guarding against disadvantage for the group they represent. In some, if not most, instances the negotiators also will seek to promote their own personal interests and the creation of opportunities for them to exercise political power in the new regime.

While constitutions emerge from a process of political bargaining, the Iraqi process may create more opportunity for instability than is the norm. In most of the Arab states that have undertaken some form of constitutional reform, the process has been tightly controlled by the existing regime and has taken the form of devolution of limited authority from the existing regime to a newly formed parliament, with the managed

introduction of limited human rights and civil liberties. In post-conflict states such as Bosnia, Kosovo, and East Timor, the bargaining process was mediated by third-party states and provided for substantial international involvement in the implementation of the new constitutional structures, with internationals holding key parallel positions of power in the new state.

Given that in the case of Iraq the previous governmental authority has all but evaporated, and there will likely be limited enthusiasm for substantial international involvement in the long-term operation of Iraqi institutions, stability must be ensured through the integrity of the institutions created by the new constitutional structure. As such, the need to design institutions that can adequately represent the varied Iraqi interests without leading to political gridlock will be paramount. In cases such as Bosnia and Kosovo, the deep flaws in their constitutions do not lead to overwhelming instability only because international forces continue to provide security and control much of the domestic political process. This is not likely to be the case in Iraq.

The Constitutional Committee. Invariably the interim authority will be called upon to establish a process for creating a new constitutional structure for Iraq. In most recent instances of constitution-making, there is a process of elite pact-making, usually in the form of a constitutional convention of sorts, followed by public consultations and some act of ratification, such as a referendum or grand assembly. A special committee of jurists and domestic and international constitutional experts frequently are appointed to prepare a first draft of the constitution. The process is usually established either as part of a peace negotiation or as part of a basic law issued by an interim authority. As noted above, the process itself can be highly animated and a source of instability as parties bargain for advantage in the design of the new constitutional structure.

For the purposes of this report, it is assumed the interim authority or some other legitimate body will issue a basic law or some formal mandate to create a committee or similar mechanism to negotiate and draft a constitution that will then be ratified by the people of Iraq or their designated representatives. Already a process initiated by the United States at Ur has led to a draft declaration of principles, which calls for a federal and democratic Iraq that protects human and minority rights.

It should be noted that in order to avoid a perpetual bargaining process, which may result in the near continuous amendment of the constitution, a high threshold should be set for making changes to the constitution once it is adopted. Most constitutions require a two-third's majority in the legislative chambers and the consent of the executive to amend the constitution. Some additionally require a referendum. If special executive or legislative mechanisms are in place to protect minority interests, they also are generally deemed applicable to efforts to amend the constitution.

The remainder of this report examines the various choices facing the constitutional drafters and seeks to identify pragmatic options that will enable the people of Iraq to create a stable democratic constitutional structure.

When designing new democratic state institutions, it will be necessary to determine whether the state structure should be unitary or federal; whether the Kurdish Region should possess some degree of autonomy; whether the parliamentary body should be unicameral or bicameral; whether the executive should be separate from the legislature as in a presidential system or fused as in a parliamentary system; whether the executive should be centralized or pluralistic; which electoral system or mix of systems should be employed to select political representatives; and which mechanisms should be established to protect minority and human rights.

3. CHOOSING A STATE STRUCTURE

Given the diverse ethnic and religious makeup of Iraq's population, there is substantial debate as to the state structure that would best allow for a democratic, representative administration, while ensuring Iraq's territorial integrity. The two primary options are a unitary state or a federal state. If a federal structure is selected, additional questions must be addressed: the number of federal units; how they are delineated, for example, by ethnicity, geography, and economic viability; and which powers are held by the central government and which are held by the federal units.

Previously, Iraq has operated as a unitary state with administrative authority divided among eighteen provinces. All administrative officials were appointed by the central government.

VARIOUS PERSPECTIVES

Nearly all the various parties support some form of federalism in a new Iraq, though Turkey has cautioned that such a structure will be unstable and has noted that there is no historical precedent in the region. The main point of contention arises in the construction of the federal structure, with some views supporting a very decentralized confederation made up of only two constituent entities, and others indicating support for numerous constituent entities with a limited devolution of authority. Importantly, few of the parties enumerate exactly which powers should be retained by the central government and which should be devolved to possible federal regions.

The Kurdish draft constitution proposes a bimodal confederation that would allow the Kurdish Region to preserve and expand its existing level of self-rule. The delineation of the regions would be based on ethnicity and would be referred to as the Arabic Region and the Kurdish Region. Importantly, the document reaffirms a commitment to the territorial integrity of Iraq. This reaffirmation may, however, be politically contingent on the adoption of this highly decentralized model.

The federal executive authority would be vested in the president and a Council of Ministers, which would consist of members from both regions. Each region would also designate half of the members of the High Court. The draft envisions the substantial devolution of powers from the central government to the regions, with the central government authority limited to that necessary to carry out foreign affairs, defense, international treaties, general economic planning, and management of oil resources. Each region would assume all other responsibilities unless otherwise delegated to the federal government.

The Declaration of the Shi'a of Iraq, adopted in July 2002, stresses the need for national unity, Shi'a participation in the central government, and the establishment of a

democratic, parliamentary constitutional order that carefully avoids the hegemony of one sect or ethnic group over the others.

The declaration proposes a federal state made up of numerous provinces, and in particular a “federal structure for Kurdistan.” While not providing specific criteria for delineating provincial boundaries, the declaration does argue that provinces should be delineated according to administrative and demographic criteria rather than religion or ethnicity. The declaration further argues that any division of political power based on sectarian percentages, such as the Lebanese model, would not be a viable option for Iraq, and calls for the eradication of all sectarian discrimination within the governmental structure.

The declaration urges a high degree of decentralization and the devolution of powers to elected provincial authorities and assemblies, including substantial administrative decentralization. The declaration emphasizes the need to grant the regions legislative, fiscal, judicial, and executive powers.

The Political statement of the Iraqi Opposition Conference does not contain a draft constitution, but it does call for the adoption of a federal system. The conference acknowledged the democratic successes of the Iraqi Kurdistan Region and called for preserving this experiment until a new, federal democratic constitution is legislated for the entire country, but did not provide any further guidance on how best to structure a federal system or divide powers between the central authority and the regions.

The INC draft constitution proposes a federal Iraq. The INC draft does not define the number of provinces or the method for their delineation. The INC has, however, publicly rejected the perpetuation of the current eighteen-province arrangement on the grounds it provides for over-representation of Sunni interests.

The INC draft constitution provides that all power not specifically delegated to the federal government shall be delegated to the regions. The regions in turn are obligated to convey substantial powers to communes. The national government would preside over defense, foreign relations, economic regulations, taxation, the legal code, education, and financial equalization.

The report of the Democratic Principles Working Group assumes that any future Iraq would be federal. Based upon that assumption it lays out national and territorial/administrative federalism as options, and leaves the eventual decision to a yet-to-be-created Constituent Assembly. The report does argue that if constituent units are based on ethnicity, a federation of many constituent national and ethnic groups is less favorable than a federation composed of two large groups. If constituent units are based on territoriality, the report proposes that the existing eighteen provinces should serve as a temporary starting point.

The Turkish government has publicly declared that it supports any state structure as long as it is chosen by all the Iraqi people, but warns against creating a federal state based upon ethnic divisions. Turkey fears that a federal Iraq organized along ethnic grounds

will promote division and instability that could spill over and affect Turkey's Kurdish minority. The Turkish government has also pointed out that there is no historical precedent in the region for a federal state.

STATE STRUCTURE: THEORY AND PRACTICE

States are almost universally structured either according to a unitary or a federal model. It is important to conceptualize the two models as ends of a spectrum of options rather than as two mutually exclusive arrangements. Along the spectrum there are numerous organizational variations designed to meet the particular needs of each state.

Unitary State

A unitary state is organized so that there is a single central source of authority, and administrative units exercise their rights primarily through the common organs of the general government rather than through dual government structures. While regional political mechanisms may be established, they are constitutionally subordinate to and receive all their political authority from the central government. They do not independently represent citizens or undertake independent legislative or executive decisions. Examples include New Zealand, Lebanon, France, Jordan, Saudi Arabia, and Turkey.

To protect minority interests in a unitary state, the central government may grant autonomy to ethnically or religiously defined regions. Autonomous entities within a unitary state may exercise certain rights that enable them to protect and promote a unique culture, religion, or language. Autonomous provinces, however, rarely exercise substantial political power. Unitary states may also seek to protect diverse interests by designing a pluralistic executive structure or establishing set-aside parliamentary seats for minority groups.

Constitutionally Decentralized Unions

Decentralized unions closely resemble a unitary state, but with constituent units. In a decentralized union, the constituent units are subordinate to the central government. While ultimate authority rests with the central government, certain constitutionally identified administrative powers may be devolved to the constituent units, which then exercise functional autonomy. Over time, constituent units may also absorb increasing levels of executive and legislative power from the central government. Examples include Japan, Italy, Macedonia, and Indonesia.

Federations

Federal states are designed to combine the values of unity and diversity within a political union. Federations are multitiered governments that involve a combination of shared-rule through central government institutions for some purposes and regional self-rule through

the governments of constituent units for others within a single political system so that neither is subordinate to the other. As such, federations combine equally authoritative constituent units with a co-equal central government.

In a federation, legislative and executive authority is constitutionally divided between the central government and the constituent units, ensuring political autonomy for each government in defined areas and shared authority in other areas. The constituent units also are represented in the central government at the parliamentary level, sometimes within a pluralistic executive. Both the central government and the constituent units possess executive, legislative, and often judicial powers. There are currently more than twenty-five federal states, and examples include Malaysia, Pakistan, the United Arab Emirates, and South Africa, as well as the United States, Belgium, Canada, and Switzerland.

While federal structures are generally believed to preserve more effectively the territorial integrity of democratic states with diverse ethnic, religious, or linguistic populations, it is necessary to note that over the course of recent history a number of federal states have dissolved, including the first Nigerian federation (1967–70), the Pakistan/Bangladesh federation (1971), the USSR (1991), Yugoslavia (1992), and Czechoslovakia (1992), while others are experiencing substantial pressure, including Belgium, Canada, and Nigeria.

Confederations

Confederations exist when two or more pre-existing units come together to form a common government for limited constitutionally established purposes. The central government is frequently comprised almost exclusively of delegates from the constituent units. The new Union of Serbia and Montenegro is one example of a modern confederation. Confederations tend to be inherently unstable, and often serve only as a phase in the process towards full independence of the parties. In fact, in the case of Serbia and Montenegro, the constitution expressly provides that after three years either of the parties may undertake a referendum to dissolve the confederation.

Note on the Role of the Judiciary

To resolve disputes concerning the allocation of authorities and other matters between the central government and constituent units, as well as among constituent units, it will be necessary to create a constitutional court. Judges for constitutional courts in unitary and federal states are frequently selected according to some formula that seeks to ensure adequate representation of the major constituent peoples in a state. Judges may at times be nominated by constituent units and approved by central authorities, or there may be specific set-asides for judges from certain constituent units or linguistic or religious communities.

SELECTING A STRUCTURAL MODEL

Unitary vs. Federal Iraq

A Unitary Iraq. The primary advantage of a unitary Iraq is that it would substantially further efforts to maintain an Iraqi political identity among the people of Iraq. If the transition to democracy is successful, internal stability will best be preserved where individual Iraqis owe their allegiance to the state of Iraq and not to a local entity. In contrast to federal states, unitary states tend to be more stable political endeavors. As noted above, over the course of recent history a number of federal states have dissolved, while others are under substantial pressure. As will be discussed below, unitary states are increasingly flexible with respect to their internal arrangements and may provide an opportunity to maintain national unity while meeting many of the needs of the distinct ethnic and religious groups in Iraq.

A unitary Iraq also would provide the best assurances to neighboring states for the maintenance of Iraq's territorial integrity. While assuring Turkey that the Kurdish territory would not form an independent Kurdistan that might court the Kurds in Turkey, it also signals to Iran that the southern Shi'a will not be entitled to separate from Iraq and join a greater Iran.

Given that unitary states are rather straightforward to administer, in comparison to federal states, it may be initially more efficient to reconstitute a unitary Iraq and develop democratic institutions. Other advantages of a unitary Iraq include the fact that since its inception Iraq has existed as a unitary state, and that all of the states in the region, except the United Arab Emirates, are unitary states.

The fact that Iraq operated as a unitary state under Saddam is, however, seen as a substantial disadvantage. As explained by one Iraqi commentator, the desire to include federalism in the Ur declaration of principles was all important because a federal system of government would contravene everything for which the highly centralized authority of Saddam Hussein stood.

With a unitary state there is also the risk that a single ethnic or religious group may exercise excessive influence over the interests of other groups, as was the case with the Sunni Ba'ath party. While the Sunnis are unlikely to regain power in the near term, there is substantial concern that if the Shi'a population were to act in a homogeneous fashion—which may be an unlikely prospect—they may express a minimal desire to embrace the Kurds as equal partners in Iraq and may retaliate against Sunnis by discriminating against Sunni towns and villages in the distribution of oil revenue and in the provision of basic services.

An additional disadvantage is that a unitary state may not be able to effectively control the radicalization of politics at the municipal or village level as there are no regional democratic mechanisms to moderate radical interests. Finally, it is important to recall

that the Kurds and all of the expatriate groups have expressly rejected the option of a unitary state.

A Decentralized Iraqi Union. It might be possible to achieve the benefits of both a unitary and federal state by constructing a decentralized union. Here the central government would be democratically elected and designed so that all Iraqi interests were substantially and fairly represented. The constituent units would then be charged with administering laws and regulations promulgated by the central government. It may also be beneficial to delegate certain additional discretionary executive powers to the constituent units.

To ensure democratic control, regional councils could be elected at the constituent unit level. These councils would exercise supervisory control over the administrative agencies in the constituent unit. A formal relationship could also be created between the councils and the central government in addition to other mechanisms such as a pluralistic executive and a bicameral parliament.

An Iraqi Federation. An Iraqi federation may sufficiently allow the Kurds to safeguard their rights through an active role in the central government, without giving rise to many of the concerns associated with confederation.

The primary advantage of a federal system is that it is designed for states in precisely the same set of circumstances that face Iraq—a diverse and pluralistic population with a desire to maintain national unity. In a federal structure made up of numerous constituent units, the diverse groups will have some stake in the central government and may be able to protect and promote their interests through effective representation. Federal structures are more likely to produce moderate political leaders who must appeal to a broad political base because such structures group villages and municipalities into larger constituent units.

One of the concerns expressed is that a federal system might in fact promote separatist tendencies of the Kurds and other groups and lead to a balkanization of Iraq similar to the situation in the former Yugoslavia in the 1990s, which would then substantially destabilize the region. If properly designed and implemented, federalism tends to reduce centrifugal forces by providing an avenue for diverse ethnic, religious, and geographic groups to participate in the regional and national government, and thereby hopefully reduces the grievances that give rise to their desire to separate from the state.

Many commentators argue that disintegration based on ethnicity or religion is unlikely in the Iraqi context. Based upon available reports, the only ethnic group that has the potential to separate is the Kurds, who comprise 15 to 20 percent of the population. The Kurds, for now, have expressed their intent to preserve the territorial integrity of Iraq. Many commentators believe that this commitment does not reflect their true aspirations, but rather only their recognition of current political circumstances. Regional factors, such as the possible reactions of Iran, Syria, and Turkey, may continue to discourage

separatism on the part of the Kurds. Other ethnic groups, such as the Turkomans and the Assyrians are too small and dispersed to seek separation.

Separatism based on religion is equally unlikely. It is questionable whether the Shi'a/Sunni distinction is as pronounced in reality as it is in western perception. Most commentators argue that the Shi'a identify themselves more closely with their Arab ethnicity than their religion. During the Iran/Iraq war, the Shi'a did not align with the Iranian Shi'a majority, but rather fought along side the Sunnis. Although divisions between ethnic and religious groups exist, these communities have mixed over time creating a sense of Iraqi allegiance rather than ethnic allegiance. All this could change rapidly, however, if instability causes groups to engage in conflict along ethnic lines.

A federation will, however, require democratically constituted central government institutions (executive, parliament, judiciary, and administrative agencies) as well as a democratically constituted government for each constituent unit of the federation. As will be noted below, to decrease the likelihood of separatism, it is advisable to have numerous constituent units. The creation of so many governments may be too complex for a nascent Iraqi democracy, and thereby undermine political stability and economic progress. In Bosnia for instance, the Dayton Accords created a situation where there are more than a dozen prime ministers and parliaments, and 40 percent of the GDP is spent on government.

A Kurdish/Arab Confederation. As noted above, the Kurdish proposal (the only one to date emanating from an internal Iraqi party) essentially calls for a confederation. The Democratic Principles Working Group argues that if constituent units are based on ethnicity, then there should be only two constituent units. While a confederation of Kurdistan and an Arab entity might be the political cost for keeping the Kurds within Iraq, it does raise some concerns with respect to the future stability of Iraq.

Although the Kurdish regional government has exercised de facto control over half of what is claimed as Kurdistan since 1991, there is no preexisting political organization within the Arab region—other than the former central government institutions. In fact as the Shi'a majority have been excluded from political life since the inception of Iraq as a state, the Declaration of the Shi'a of Iraq expressly recognizes the lack of leadership and organization among this group. Entering into a confederation would thus require the simultaneous construction of an Arab constituent unit and a central government. It is important to note, however, that any federal structure will require the creation of new executive and legislative units in central and southern Iraq. It may, however, be more efficient to create constituent units that are responsible for smaller areas of territory.

History also may argue for the increase in the number of constituent units. In confederations (and federations) where one entity contains a disproportionate share of the population, the relationship tends to be unstable. Russia/USSR, Prussia/German Confederation, Northern Nigeria/Nigeria (prior to the Nigerian civil war), Czech Republic/Czechoslovakia, Bangladesh/Pakistan, and the current Montenegro/Serbia are all examples where a federation or confederation has dissolved in part because of tension

between disproportionate units. In Iraq the Kurds constitute about 15 to 20 percent while the Arabs constitute 75 to 80 percent.

Allocating Authority

If a federal structure is chosen by the drafters of the new Iraqi constitution, it will be necessary to allocate authority between the central government and the constituent units. While there is no standard formula for the distribution of powers, more homogeneous societies tend to allocate more powers to the central government, while heterogeneous societies generally allocate more to the constituent units.

Generally, the minimal core powers allocated to the central government in federations include defense, foreign affairs, monetary policy, inter-regional transportation, debt management, financial equalization, and management of the national economy. The minimal powers allocated to the constituent units generally relate to education, health, local culture, local language, natural resources, and social policy.

Frequently, powers concerning taxation, environment, immigration, and national language are shared. Other powers that may be shared or allocated to either the central government or constituent entities include maintenance of law and order, policing, agriculture, customs policy and revenue collection, citizenship policy, commercial codes, telecommunications, postal services, broadcasting, fisheries, labor regulation, and civil and criminal law.

Frequently, constitutions specify minimum powers for either the central government or the constituent units and then declare that all other residual powers shall be reserved for the other entity.

In some cases, such as Germany and Austria, the central government may enact framework legislation, which sets forth broad policy objectives, with the constituent units enacting implementing legislation. As noted above, the constitutions may also allocate legislative authority to the central government and decentralize substantial administrative authority to the constituent units.

Substantial political bargaining can be expected with respect to the allocation of powers. As noted above, the INC draft constitution, the Kurdish draft constitution, the Iraqi Opposition Conference, and the Shi'a Declaration all endorse some degree of devolution of power from the center government to the regions. The Kurdish draft constitution, however, seeks to delegate all but the most essential powers to the region, leaving the central government with responsibility only for foreign policy, defense, security affairs, international treaties, general economic planning, and oil resources. The INC draft seeks to devolve more limited powers and retains defense, foreign relations, economic regulations, taxation, and education, and financial equalization for the central government.

In dividing the powers between Iraq's central and regional governments, it is important to consider moderating factors that manifest the need for unity to ease the divisions among the regions. Such factors may include the need for unity in confronting external threats and achieving international leverage in trade relationships, securing international investment, and negotiating treaties. Such powers also should be vested in the federal government. Other powers, such as the conduct of foreign affairs, defense, economic planning, customs policy, monetary policy, financial equalization, telecommunications, and national transportation should be vested with the central government.

A primary concern for Iraq will be the authority for allocating oil revenue—whether this should be done at the federal or at the constituent unit level. In the short term it may be advisable to continue the formula of 26 percent for the Kurdish population and 74 percent for the Arab population. It will be necessary, however, to determine further allocation among the Arab regions of Iraq. It may be useful at some point to establish an interim oil council that makes decisions on the allocation of revenue and the funding of major Iraq-wide projects, such as telecommunications and aviation, with substantial discretion delegated to the constituent units for decisions concerning the bulk of the oil revenue.

Delineating Constituent Units

If a federal model is chosen by the drafters of the new Iraqi constitution it will be necessary to identify the number of constituent units to be created and which criteria should be used in delineating their boundaries. It also may be necessary at the time of the negotiations to delineate those units. This section addresses only the questions of the number and criteria.

Number of Constituent Units. Under the previous regime, Iraq was divided into eighteen administrative units. While these units may serve as a foundation for the delineation of new units, the general anti-Saddam mood has led many commentators to call into question the utility of transforming these eighteen units into new federal constituencies. Some further argue that the eighteen administrative units were delineated in a way to advantage the Sunni minority and the Ba'ath party.

As discussed above, a two-unit confederation or federation may be inherently unstable and may promote secessionist tendencies by the Kurds. Similarly, a federation with eighteen constituent units would require eighteen elected parliaments, and may be too unwieldy and inefficient.

While the determination of the number of constituent units undoubtedly will be the subject of substantial political bargaining, some analysts contend that between eight and ten constituent units might provide for sufficient representation of the diverse Iraqi interests, while not overburdening the nascent democracy with structural complexity.

Criteria. When delineating constituent units, federal states must choose between using objective criteria such as geography and economic viability or subjective criteria such as

ethnicity, language, and religion. While most scholars argue for the adoption of objective criteria, most federations are in fact based on subjective criteria.

The Ur declaration of April 15, 2003, proclaimed that the future government of Iraq should not be based on communal identity. While geographic and economic criteria are the most desirable, the Kurdish drive for ethnically defined constituent units will be difficult to disregard. Important factors against relying on wholly ethnic divisions for the constituent units include the fact that the three ethno/religious communities are not homogenous, and that the three groups, with the exception of the Kurds, have not demonstrated an ability to unite under a single leadership.

The solution may lie in a mix of criteria. It also may be useful to divide ethnic regions into two or more constituent units and designate certain political flashpoints as their own constituent units that exercise special rights and privileges. All such units must be subject to special mechanisms to protect minority rights.

Political Flashpoints

For various reasons, certain cities may require special status within a federal unit. Baghdad, due to its ethnic and religious composition as well as its substantial size, will likely constitute a constituent unit unto itself. With its large size, dense population, and multiethnic, and class-conscious character, it will likely require some degree of special status with unique mechanisms to maintain stability. Other cities, such as Kirkuk and Mosul, that are flashpoint cities because of ethnic and religious tensions, may also merit special status as federal districts. The case of Kirkuk is briefly discussed below.

Kirkuk. Sometimes referred to as “Iraq’s Jerusalem,” Kirkuk is a multiethnic city in Northern Iraq, consisting of Turkomans, Kurds, Arabs, Assyrians, and Armenians. Kirkuk also produces a substantial share of Iraq’s oil, and is claimed by both the Kurds and the Turkomans as their historic homeland. Kirkuk, as well as Mosul, has already suffered some violence between Kurds and Arabs. If not properly managed, Kirkuk could face a threat of large-scale violence between the Turkoman, Kurds, and the Arab majority.

From 1957, the Iraqi government undertook a process of Arabization in traditionally Kurdish-inhabited areas. As a result, in Kirkuk the Arab population rose from 28 to 44 percent between 1957 and 1977. The Kurdish regional government openly argues for the necessity of redressing the effects of Saddam’s campaign of Arabization and has a stated desire to reclaim the city that was once theirs. As such, the Kurdish draft constitution names Kirkuk as the capital of the Kurdish Region, and proposes that deported Kurds from Kirkuk, as well as Makhmoor, Sinjar, Zimar, Sheikhan, Khanaqin, and Mandali return to their respective homes. It also proposes that Arabs who settled in the area since 1957 under orders from Saddam Hussein should return to their original homes.

The political statement of the Iraqi Opposition Conference also addresses Saddam’s manipulation of the demographic reality of the Kurdish areas under Sunni control, and its

solution is similar to the proposal of the Kurdistan regional government. The proposal of the Iraqi Opposition Conference is more detailed though and provides for the return of those evicted to their homes, with the restoration of property and compensation for their losses. It further calls for the resettlement of those brought in by the previous administration to the regions from which they came. Finally, it calls for the return of Faily Kurds and others deported from Iraq, as well as the rescinding of all administrative measures taken since 1968 to change the demographic reality in Iraqi Kurdistan.

The Turkish government worries that any attempt by the Kurds to assert control over Kirkuk may spark nationalist passions within their own Kurdish minority and may disenfranchise the Turkoman population. In addition, while recognition and remediation of past injustices will be essential, the sudden and unregulated return of large numbers of people could be highly destabilizing.

One option for the status of Kirkuk might be to fully integrate it within one of the Kurdish constituent units. This may, however, be quite destabilizing in the short term, as it may spark an immediate return of Kurds to the city, which may create a high risk of ethnic violence. Many Arabs have lived in the region for more than a decade under Saddam's orders but have not exercised a role in his regime. The influx of displaced Kurds may provoke an anti-Arab backlash and encourage a campaign of reverse ethnic cleansing. Integrating Kirkuk with the Kurdish region also may provoke Turkish military intervention in northern Iraq.

An alternative option would be for Kirkuk to be designated its own constituent unit. This approach might preserve the integrity of Kirkuk's multiethnic population and also may discourage an immediate, massive influx of displaced Kurds into the city, thereby reducing the risk of ethnic violence. Special mechanisms could then be created to manage the return of Kurdish refugees and the construction of additional housing. Local human and minority rights ombudsmen could be appointed and a property commission, similar to the one created for Bosnia, could be developed to manage the return of property, payment of compensation, or resettlement into new homes.

RECOMMENDED OPTIONS

Those drafting the constitution may adopt a unitary state as it provides a relatively quick and efficient means for structuring a highly heterogeneous state. If so, to maintain the integrity of a unitary state it may be necessary to do the following:

- Devolve substantial administrative authority to the administrative regions within the unitary state.
- Implement a pluralistic executive (applicable options discussed below).
- Provide for the creation of autonomous regions to protect language, culture, and local economic interests (applicable options discussed below).

A federal state, whether it is a confederation or federation, may be adopted. Although it is a more complicated undertaking, a federal state provides the most effective means for combining heterogeneous interests into a unified state. To maintain the functionality and integrity of a federal state, it may be necessary to do the following:

- Devolve substantial executive, legislative, and administrative authority to the constituent units in specified areas of responsibility.
- Assign authorities at the constituent level to cover education, health care, culture, language, local transportation, natural resources, economic development, local policing, the protection of human rights, and social policy.
- Retain authority at the central government for the conduct of foreign affairs, defense, economic planning, customs policy, monetary policy, financial equalization, telecommunications and national transportation.
- Consider enacting framework legislation and allowing the constituent units to enact the implementing legislation.
- Establish a structure with between eight and ten constituent units.
- Define units according to a mix of ethnic, geographic, and economic criteria, with two or more units in ethnically homogeneous areas such as Iraqi Kurdistan and the southern Shi'a region.
- Create constituent units with special powers and mechanisms to manage political flashpoints like Kirkuk and Mosul, and extraordinary units like Baghdad.
- Establish an oil council to manage the allocation of oil revenue.

In either a unitary or federal state structure, it will be necessary to create a constitutional court to resolve disputes concerning the allocation of authorities and other matters between the central government and constituent units. Some method will need to be developed to ensure fairness. Judges could, for example, be nominated by the constituent units and approved by the central government, with each constituent unit allocated a specified number of seats on the court. The judges, should not, however, be appointed on the basis of ethnic affiliation.

4. DECIDING ON AUTONOMY—ASYMMETRICAL FEDERALISM

Given past discrimination and human rights abuses coupled with de facto independence for the previous decade, the Iraqi Kurds will undoubtedly demand some form of heightened regional rights within a new Iraqi constitutional structure.

In a unitary state structure, this would take the form of autonomy, while in a federal structure it would take the form of an asymmetrical relationship to the central government and other constituent units. For example, China, Great Britain, Italy, and South Africa provide for autonomy for one or more administrative units, while Belgium, Canada, Malaysia, India, Spain, and Russia all provide for asymmetrical relationships for certain constituent units. For the purposes of this section special status providing for substantial self-rule for an administrative/constituent entity will be referred to as autonomy.

VARIOUS PERSPECTIVES

The various groups that have developed positions on the structure of a new government in Iraq differ sharply on the type of autonomy that they believe should be exercised by the Kurds.

Although in reality the Kurds currently enjoy de facto autonomy, some representatives of non-Kurdish Iraqi political interests are aligned strongly against granting Kurds official autonomy. They believe that granting Iraqi Kurdistan autonomy would lead other groups in Iraq to demand similar arrangements, including the Shi'as and southern Sunnis. Maintaining a unified Iraq in the face of large segments of the nation agitating for greater self-rule would be highly precarious. In fact, many feel use of an autonomous structure is simply planting the seeds for Iraq's ultimate dissolution.

The Kurdish draft constitution does not in fact propose autonomy for Iraqi Kurdistan. Rather, by proposing a bimodal confederation with a significant devolution of powers to the two constituent entities, it creates substantial self-rule without the need for autonomy. Essentially, the draft constitution proposes that each of the two regions establish their own constitution, executive, assembly, council of ministers, and judiciary. As such, the Kurds would be allowed to continue the Kurdistan National Assembly and the Kurdistan regional government, as well as continue to operate universities and Kurdish cultural centers. What power would remain with the central government would be exercised jointly by the Kurdish and Arab entities.

The Declaration of the Shi'a of Iraq does not provide for any degree of Kurdish autonomy within Iraq but as noted above calls for a federal structure.

The political statement of the Iraqi Opposition Conference does not propose special rights for Iraqi Kurdistan but simply takes note of Iraqi Kurdistan's unique circumstances

and calls for the people of Kurdistan to choose “an appropriate formula for partnership with the rest of the sons of the single homeland.”

The INC draft constitution supports a symmetrical federal structure, with no specific grants of asymmetrical power to Iraqi Kurdistan. The draft does, however, generally recognize the rights to national autonomy and self-determination, and to regional and local autonomy for minorities.

The report of the Democratic Principles Working Group includes Kurdish autonomy as an option within some yet-to-be-determined federal structure. The report does not specify the exact parameters of Kurdish autonomy.

The Turkish government is opposed to autonomy for the Kurds, as it fears this may lead to increased pressure by Turkey’s 12 million Kurds for their own autonomy or independence.

FORMS OF AUTONOMY: THEORY AND PRACTICE

In general the purpose of autonomy is to allow for the recognition and efficient integration into a state of constituent units that possess particular social, cultural, religious, or economic differences. Autonomy is designed to allow these relatively unique territorial units to protect and to promote their interests in order to relieve secessionist pressures.

Although there are many variations of autonomous structures, they can generally be divided into territorial autonomy and protective autonomy.

Territorial autonomy is created by providing for a constituent unit to exercise exclusive or shared jurisdiction of matters that would otherwise be within the sole jurisdiction of the central government. Under this approach specified central government powers are devolved to the autonomous unit. The powers and authority over which autonomous units exercise control varies with each country. Areas of devolved authority traditionally include linguistic matters, communications, fisheries, taxation, education, and primary legal codes.

Protective autonomy can be established by requiring the approval of an autonomous unit for the implementation within its territory of laws and regulations relating to specified areas of authority—in essence granting the unit a right of veto to protect its interests. Protective autonomy may also be established by allowing the autonomous entity the sole responsibility for administering the implementation of certain laws and regulations.

More recently, the option of municipal autonomy has been employed in Macedonia to maintain stability while recognizing the interests of various communities. This will be addressed in detail below.

Autonomy is generally more effectively implemented in a federal structure as it causes less disruption in the functioning of the state because a federalist government by its nature aims to diffuse authority from a strong central body of leadership to diverse regions while simultaneously ensuring a unified state. In a federal structure, powers and authorities are already delegated to or shared with the constituent units to some extent, and the additional delegation of powers and authorities to some units does not tend to substantially unsettle the operation of the state. Moreover, the executive, legislative, and administrative institutions already exist at the constituent level to implement these additional responsibilities.

In a unitary state, the creation of an autonomous unit is a more drastic and potentially more destabilizing option. When one unit is granted special powers, it creates a sense of distinctiveness between that unit and the other administrative unit. The distinctiveness is highlighted by the reality that autonomous units must create executive, legislative, and administrative institutions that will be denied to the other units.

STRUCTURING KURDISH AUTONOMY

With respect to the Kurdish question, four options face the drafters of the new Iraqi constitution. They can agree to create a unitary state or symmetrical federation with no autonomy, or a confederation along the lines proposed by the Kurds. In either case, there will be no need to create additional mechanisms. Alternatively, they could agree to create some form of autonomy or asymmetrical relationship for the Kurdish Region, or they could opt for a new form of municipal autonomy. This section addresses how the drafters might structure constitutional provisions to employ either of these options.

Territorial vs. Protective Autonomy

It is important that when structuring Kurdish autonomy to place emphasis on the protective element of autonomy over the territorial element. While autonomy is naturally applied within a defined geographical unit, it need not be so extensive that it allows that unit to create an entity that is so distinct as to undermine the effective operation of the state. The greater the degree of protection and participation afforded to the Kurds in the legislative and executive structures of the central government, the less necessary it becomes for the Kurds to attempt to secure territorial autonomy.

One means for implementing protective autonomy is to create at the national level a Kurdish Council to deal specifically with issues directly affecting the Kurds. The Kurdish Council could have authority to veto the application of national laws in Kurdish areas. Importantly, this veto power would only apply at the regional level, it would not have any authority to scuttle laws applied nationwide. Furthermore, the council's responsibilities and authority could be focused narrowly on a restricted range of responsibilities relating to the protection of culture, language, education, and civil rights. Depending on the nature of the Iraqi legal code, it also may be necessary to grant the

Kurdish constituent entities the right to exempt themselves from Sharia law, if that is made part of the national law.

The Kurdish entities also may reasonably require the authority to implement certain national laws (not vetoed) so as to ensure they are not implemented in a discriminatory fashion. In this case, national laws would apply to the Kurdish Region, but regional Kurdish agencies and bodies would be responsible for their implementation. Therefore, if a national law were found to be in conflict with Kurdish regional interests, the Kurdish Region would have the option of not enforcing the national law, or enforcing it to a minimal extent.

The additional authority to implement laws must be limited to narrowly defined categories so as to not lead to direct conflict with the central government. A region's general ability to choose not to implement or execute national laws, without some sort of specific justification could be looked on as illegitimate by some. This dearth of specific legitimacy could decrease the legitimacy of the regional government as a whole and lead to general instability.

Municipal Autonomy

As noted above, it may be useful to consider the option of municipal autonomy, as is currently practiced in Macedonia. Under this approach, Iraq would maintain a unitary state, with substantial powers delegated throughout Iraq from the central government to municipalities. Local, municipal entities for instance might exercise extensive control over some taxation, resource distribution, healthcare, policing, and judicial functions.

Municipal autonomy also allows for local representation of local interests. The municipalities may choose to form municipal councils, which would address the specific needs of the communities within the municipality. This system might work well for a multiethnic and multireligious community such as Iraq. For example, Baghdad could be considered one or many municipalities because of its large size. Municipalities likely would have different ethno/religious makeups and could thus tailor their administrations to the needs of those groups. Baghdad's municipal council, for example, would likely be more diverse than a more ethno/religiously homogeneous municipality such as Basra or Tikrit.

This option is advantageous because it grants a high degree of autonomy to various municipalities without attaching the specific label of "autonomous." The attachment of the "autonomous" label, much like the use of a federal state structure, may lead some groups toward secession or disintegration. Municipal autonomy, however, allows for the same degree of local autonomy and control, while protecting a united Iraq's territorial integrity.

One important drawback to this alternative, however, is that such a high degree of local autonomy could allow for localized radicalism. For example, it may be possible for fundamentalist groups to gain control of local areas and use them as bases to further their

interests. The past ability of Ansar al-Islam to control territory in Iraqi Kurdistan underlines the seriousness of this possibility.

RECOMMENDED OPTIONS

It will likely be necessary to grant some form of autonomy or asymmetrical relationship for the Kurdish units of Iraq regardless of whether a unitary or federal state structure is adopted. To design an effective autonomy, the following points may be relevant:

- Autonomy is more easily managed and less destabilizing in a federal state.
- If a federal system is developed, the asymmetrical powers delegated to the Kurdish Region need not be as great or as divergent as in a unitary system.
- In a unitary state, autonomy may best be provided by creating a national Kurdish Council with the authority to filter the application of national laws within primarily Kurdish units.
- In a unitary state, substantial administrative authority could be delegated to Kurdish and other specially designated areas for the implementation of national laws and regulations.
- In a federal or unitary state, the areas of delegated responsibility should be precisely and narrowly defined and might encompass language, culture, education, and local legal systems.
- The parties may wish to consider the adoption of Iraq-wide municipal autonomy as an alternative to federalism or autonomy within a unitary state.

5. DESIGNING A PARLIAMENT

A primary question for the drafting committee will be to determine whether the Iraqi parliamentary body should be unicameral or bicameral.

While there is universal consensus that democratic states must have a legislative body, there is no widespread agreement as to whether that entity should be unicameral or bicameral. While unitary states generally are governed by a unicameral parliament and federal states by a bicameral parliament, there are exceptions to this generalization. There is also the additional question of whether the model of government should be parliamentary or presidential, which will be addressed in the next section.

The 1970 Iraq constitution provided for a unicameral parliament called the National Assembly consisting of 250 members, each representing an equal percentage of the population. This body, however, was not established until 1980, and then with added stipulations requiring that candidates must be approved by the government. The 1990 interim constitution did not provide for a National Assembly. Rather, legislative functions were delegated to a nonrepresentative National Council. As a result, there is no strong Iraqi precedent to serve as a model legislature.

VARIOUS PERSPECTIVES

Given the known perspectives of various parties on the governance of Iraq, many are divided on whether the parliament should be unicameral or bicameral depending upon their vision of the future overall structure of Iraq. All the proposals that address the issue advocate regional representation in some form, however there is no common agreement on how best to accomplish this objective.

The Kurdish draft constitution contains a bicameral parliament, with one chamber, the National Assembly, directly and generally elected by the population within each of the two regions. The other chamber, the Assembly of the Regions, would consist of an equal number of representatives from the regions appointed in a manner determined separately by each regional government. The two chambers would have equal authority. Overall the federal parliament would have limited authority to approve the federal budget, levy taxes, ratify international treaties, approve the council of ministers, and enact legislation proposed by the council of ministers.

The Declaration of the Shi'a of Iraq, while not endorsing a specific construction, strongly supports the establishment of a parliament that prevents one sect or ethnic group from having power over other groups.

The political statement of the Iraqi Opposition Conference proposes a federal Iraqi state but did not elaborate as to the nature of the legislative body. The declaration does, however, offer the possibility of a Transitional National Assembly during the transition

period. The specific rights, duties, and powers of the Transitional National Assembly are not defined.

The INC draft constitution is not entirely clear on the matter of a unicameral or bicameral parliament. The primary chamber under the constitution is a national parliament consisting of 400 members elected from proportional regional constituencies. The constitution also provides for the creation of a 200-member Regional Council, with each region being represented in proportion to its share of the electorate, with a guaranteed minimum of two members. Members of the Regional Council shall be informed when a bill is introduced into the National Parliament, and its members shall have the same right to be heard during debate as those of the National Parliament.

The report of the Democratic Principles Working Group, while not proposing a final constitutional parliamentary construction, supports a temporary bicameral parliament for the transitional authority, with one chamber equally representing the eighteen current Iraqi provinces, and the other elected directly by the people.

DESIGNING A PARLIAMENT: THEORY AND PRACTICE

The purpose of a parliament is to allow for the recognition and accommodation of the diverse interests of a state and its peoples. A parliament often serves as the primary institution through which mid-level political bargains are negotiated and frequently acts as a counterweight to the executive branch. Each state designs its parliament to protect the interests of diverse groups while enabling the state to develop and implement common solutions to the challenges facing the state. Parliaments may either be unicameral or bicameral.

Unicameral Parliament

Unicameral parliaments consist of a single legislative body that is responsible for enacting legislation. While many unitary states operate with a unicameral parliament, only four federal states—Micronesia, United Arab Emirates, Serbia/Montenegro, and Ethiopia—have unicameral parliaments.

Unicameral parliamentarians generally are not elected based on regional representation, but rather as representatives of the entire state. For instance, Turkey, one of the few democratic countries in the Middle East, has a constitutional structure with a unicameral parliament elected by universal and direct suffrage. Turkish members of parliament are constitutionally considered to be representatives of the nation as a whole, instead of specific constituencies, and are mandated to seek to represent the interests of the entire population. Similar provisions apply to the representatives in Tunisia's National Parliament.

There are some general drawbacks to a unicameral system. Without a second chamber, there are limited opportunities to exercise checks and balances or separation of powers

within the legislature. In these instances, the threat of a tyranny of the majority increases. Unicameral systems also are considered less effective counterweights to the executive branch than bicameral systems.

Bicameral Parliament

As noted above, there is a strong nexus between federalism and bicameralism, with most current federal states having a bicameral legislature. A number of unitary states, including some Middle Eastern states, also have bicameral parliaments.

The rationale for bicameral legislatures is threefold. First, for federal countries (such as Germany and Switzerland), one chamber provides for the representation of the interests of the provinces or territories in addition to the general population. Second, another chamber may also ensure representation of regional interests in addition to the constitutionally constructed territories (as in Belgium, Spain, and Italy). This would result in the entire interests of a particular portion of a country being adequately considered, even if the region is divided into multiple territories or provinces. Finally, a bicameral legislature improves the stability of the constitutional structure and political system and provides an opportunity to structure a system based on checks and balances.

Bicameral systems generally are deemed the most effective for combining proportional representation with recognition of the other internal concerns of governmental territories, geographic regions, ethnic groups, and underrepresented constituencies. It is also argued that bicameral legislatures tend to reduce corruption, even if minimally, because any proposal must be considered openly in two forums, thus providing two opportunities to expose potential misdeeds.

There are also disadvantages to bicameral systems. Legislative and governmental action can be inhibited by checks and balances, which may not only result in inefficiency but also may create impasses or total entropy.

Regional Models. There are a number of Middle Eastern states that utilize bicameral parliaments. For instance, in 2001, Bahrain approved a National Action Charter transforming the country into a constitutional monarchy with a bicameral legislature. The bicameral construction was designed to provide balance between direct free elections by the general population and other interests of the country. In Jordan, one chamber is universally and directly elected, and the other appointed from a select class. In Morocco, one house is elected universally and directly by the citizens, with the second chamber selected from each region by an electoral college. These models may have limited utility for Iraq as they are based primarily on strong centralized monarchical governments. Nonmonarchical bicameral examples, which include Egypt, Yemen, and Algeria, may also not be entirely useful as either the second chamber is fully appointed, or has little power, making it essentially irrelevant to the policy-making process in these heavily presidential systems. Such a system should be avoided in a new Iraqi parliament.

Role of the Second Chamber. Second chambers may be allocated a wide variety of responsibilities and rights in order to protect the diverse interests of a state. Similarly, there is wide variation in the manner in which representatives are selected for the second chamber, and in the composition of the chamber.

In some cases, mostly in presidential systems, the second chamber holds equal legislative power with the first chamber and may exercise an absolute veto over all legislation proposed by the executive or the other chamber. In parliamentary systems, the second chamber usually has less power and may be limited to holding a suspensive veto with a time limit, possessing authority over only matters that affect the constituent units, or having authority only over a narrow number of legislative matters.

Representatives to the second house may be selected in a number of ways. In only three instances, Australia, Switzerland, and the United States, are they directly elected. In other instances the second chamber may be appointed by the federal government based on nominations of the constituent units, appointed *ex-officio* by constituent units, indirectly elected by the constituent units, or some mix of the three.

The composition of the second chamber may also be quite varied. In only two instances, the United States and Australia, are the constituent entities equally represented. In other instances, there may be equal representation for groups of constituent units constituting a region, while in others there may be weighted voting or weighted representation to benefit smaller units, or a set aside for minority or other special interests. Some states combine two or more of the above options.

SELECTING A PARLIAMENTARY MODEL

In selecting a model for Iraq, the primary objectives should be to ensure representation within the state institutions of the unique Iraqi interests, equal treatment of all Iraqi nationals, and a viable process for effective decision-making.

Unicameral Iraqi Parliament

A unicameral parliament in a unitary state of Iraq likely would not be suitable for Iraq as it would not provide an opportunity for the people of Iraq to elect national as well as regional representatives. If Iraq adopts a federal state structure, it may be possible to adopt a unicameral parliament. As noted above, only a few federal states have unicameral parliaments. In the case of Serbia/Montenegro, there are no representatives elected to serve the national interest—rather the members of the single house are elected by the parliaments of each member state and are charged with representing the interests of the member state.

For a unicameral parliament to effectively operate in Iraq either there would have to be substantial devolution of authority to the constituent units and a pluralistic executive so that the voters would be comfortable electing national representatives, or the

representatives would need to be tasked with representing the regional interests as in the case of Serbia/Montenegro. It might also be possible, although somewhat cumbersome, for the national legislature to have one-half of its members elected from the administrative units, and one-half elected in national elections.

In all likelihood, a unicameral parliament may not sufficiently meet the needs of a pluralistic Iraq. Specifically, it may not be able to protect adequately minority or regional interests or prevent tyranny of the majority, or conversely it may not be able to represent adequately the national unifying interests of Iraq.

Bicameral Iraqi Parliament

In the case of Iraq, a bicameral legislature may better protect local and regional interests under a federal form of government. The two key interests of the reconstituted Iraqi state will be to continue to nurture a sense of nationality while protecting the interests of its constituent groups. A bicameral parliament provides an opportunity for the constituent groups to support candidates for a primary chamber who represent their interests in a unified and prosperous Iraq, while also being able to elect representatives to a second chamber who will ensure that local interests are adequately protected.

A bicameral Iraqi parliament, with regional representation in the second chamber, could also alleviate the concern that Iraq may come to be dominated by the Shi'a Arab population as much as it was previously dominated by the Sunni Arab population.

While it is too early to make conclusive observations concerning the responsibilities, selection, and composition of the second chamber, as well as its special authorities, it may be useful to consider the need to balance democratic development with stability and efficiency. In the case of Iraq, the limitation of powers to a veto over matters that may affect the interest of constituent units may be a sufficient level of protection. Similarly, selection by the constituent units themselves may provide for more party or regional control over the representatives. Composition also should be weighted to ensure that the Kurdish minority is not subjected to undue discrimination, and could provide for guaranteed seats for minorities that are too small to "own" a constituent unit.

Initiating Legislation

To ensure the efficiency of the Iraqi constitutional structure, it may be necessary to limit to some extent the authority of the parliament to originate legislation. Recent experiences in post-conflict societies indicate that it is frequently impractical for individual legislators to initiate legislation when newly constituted or reconstituted states are pressed to confront issues of social reform, economic development, and simple administration immediately. Given the necessity of rebuilding Iraqi society and streamlining the development of democracy, it may not be appropriate to tie the new government up in a lengthy consensus-building process. Moreover, many of the nascent parliaments in the Middle East have tended to represent the more radical elements of the state and have

focused less on initiating legislation. It thus may be advisable to vest both the parliament and the executive with the right to initiate legislation.

RECOMMENDED OPTIONS

The legislative body of Iraq can function as either a unicameral or bicameral parliament. A bicameral parliament would provide the most flexibility for ensuring the representation of both regional and national interests. If a unicameral parliament is selected, it likely only would be appropriate in the context of a federal Iraq with a pluralistic executive.

In the event a bicameral parliament is selected:

- one chamber could be elected nationally by all citizens casting individual ballots to reflect the unity of the country;
- the second chamber could be designed to represent the interests of the constituent units;
- the representatives of the second chamber could be appointed by the constituent units or could be elected directly by the population of each constituent unit;
- minorities not constituting a majority in at least one constituent unit could be entitled to a specified number of seats in the second chamber;
- the second chamber could be restricted in its legislative mandate to vetoing legislation that may negatively affect the interests of constituent units; and
- the parliament could have limited authority to originate legislation or shared authority with the executive branch.

6. STRUCTURING AN EXECUTIVE

With respect to structuring an executive branch, the two primary questions that will face the drafters of the new Iraqi constitution will be whether the executive should be parliamentary or presidential and whether the executive should be pluralistic—which can apply to either a parliamentary or presidential arrangement.

Whereas the parliamentary system is based on the fusion of executive and legislative powers, a presidential system is based on the separation of those powers. A pluralistic executive, as opposed to the traditional model, seeks to ensure that all major interests are represented via important positions in the executive branch.

In deciding upon the structure for the executive branch, it will be useful to recall Iraq's previous executive structure, many components of which may directly transfer into a more democratic regime, while others should be eliminated. For instance, under the previous regime, the Iraqi constitution provided for a presidential/vice presidential system with numerous cabinet officials. The former Iraq constitution, however, also consolidated executive power in the Revolutionary Command Council (RCC), an institution that was supreme in the state. The president of the RCC was also president of the country. The council was not subject to elections or any type of popular vote. The president and the RCC were the heart of authoritarian rule in Iraq.

VARIOUS PERSPECTIVES

Most of the Iraqi opposition groups endorse a post-Saddam government that contains some aspects of decentralization and pluralism within the executive branch. However, the proposed draft constitutions differ in substantial ways. Reconciling the needs of the diverse interests may prove to be difficult given the perception that the executive branch is the most important crucible of political power in the new Iraq.

The Kurdish draft constitution proposes a mixed presidential and parliamentary executive with a high degree of separation of powers. Under this system the Council of Ministers, led by the prime minister, would constitute the highest executive authority in Iraq, but would carry out its responsibilities under the supervision and guidance of the president.

The president would be directly and generally elected by the population of Iraq. The president would then appoint the vice president upon the nomination of the Assembly of Regions. The draft does not specifically indicate how the prime minister is selected. The Council of Ministers must be approved by the president and both parliamentary chambers.

The duties of the president would be substantial and would include protecting the territorial integrity and security of Iraq and directing its internal and external security

forces, appointing Iraqi diplomats, declaring states of emergency, and appointing individuals to the judiciary and office of the prosecutor. The duties of the Council of Ministers would include preparing legislation and submitting it to the parliament, carrying out federal legislation once it is adopted, preparing the federal budget, supervising the federal ministries, and incurring international debt.

The draft constitution further provides that these structures will be pluralistic, with the president and prime minister each being from different regions, and with the number of ministers representing both regions in proportion to the regions' populations. The same proportionality principle would apply to the selection of diplomats and the senior positions in all federal ministries, including the police and armed forces. The constitution also provides that each region shall designate half of the members of the High Court.

The Declaration of the Shi'a of Iraq does not make an express recommendation as to the nature of the executive but rather in general terms expresses support for a government that confirms the unity of Iraq, while addressing diversity and pluralism but preventing anti-Shi'a sectarianism. The declaration does call for the separation of powers so that one group will not be able to exercise hegemony over other groups.

The political statement of the Iraqi Opposition Conference calls for the separation of the executive, legislature, and judiciary. It does not directly address the scope and authority of the executive. However, it does propose a pluralistic sovereign council for the transitional period, to be composed of three leaders who have honorable pasts and are known for their integrity to carry out the duties of the head of state.

The INC draft constitution proposes a presidential system with some parliamentary control. While the draft proposes that Iraq shall be founded upon the principle of separate executive, legislative, and adjudicative powers, it provides that the president and vice president shall be elected for fixed terms by the National Parliament. The president and the vice president would then select the national ministers with the approval of the parliament.

The presidential powers include the right to conduct foreign affairs and serve as the commander in chief. The parliament retains the right to introduce legislation. There are no provisions in the INC draft constitution for a pluralistic executive or for the proportional sharing of power.

The report of the Democratic Principles Working Group proposes a transitional executive comprised of a pluralistic council of three members representing the three geographic regions, the north, center, and south respectively. The proposal implies a de facto regional/ethnic veto for executive decisions. The working group does not propose a model beyond the transitional phase.

EXECUTIVE STRUCTURE: THEORY AND PRACTICE

Parliamentary executives or presidential executives may be adopted in either a unitary or federal structure. A pluralistic executive can be crafted into either a parliamentary or presidential executive, and either a unitary or federal structure.

Notwithstanding the model selected, it will be necessary to specify the allocation and division of powers in the executive, especially in relation to the conduct of foreign policy, control of the army and police, and influence over fiscal policy.

Parliamentary Executive

The primary motive behind parliamentary systems is to fuse executive and legislative power to ensure the efficient operation of government. While more efficient, parliamentary systems may be less stable than presidential systems and less subject to checks and balances. Nonetheless, most federations adopt the parliamentary model, while few adopt the separation of powers approach.

Under a parliamentary system, the legislature elects a prime minister who then appoints a cabinet. In some instances the cabinet is subject to parliamentary approval. The mandate of the government thus stems from the elected members of parliament. As such, parliamentary systems are often plagued by frequently collapsing coalitions and dissolutions of governments when the executive loses the legislature's support.

Parliamentary systems may also provide for a president or monarch to exercise functions as a head of state. In almost all cases, with the notable exception of France, the president has limited, ceremonial power. In a number of Middle Eastern parliamentary systems the monarch continues to exercise substantial power.

Presidential Executive

The primary motive behind the creation of a presidential system is to ensure a separation of powers and thereby to limit the possible abuse of power by any one group or individual. A presidential system builds on the general theme of federal states that the diffusion of power among different political institutions better protects the constituent interests of a state and limits the possibility of a tyranny of the majority. Under a presidential system, power within a federation thus is divided not only between the central government and the constituent units but also among the central government institutions. Officials from one branch are prohibited from simultaneously holding positions in the other branch.

Presidential systems tend to be more stable in that a presidential term is fulfilled regardless of whether or not a particular governing coalition in the legislature fails. Presidential systems may, however, be less efficient if power is too widely dispersed between the executive and the legislative branches, or if they are controlled by groups

with deep political differences. Importantly, the direct election of a president may add legitimacy to the position in a nascent democracy.

Pluralistic Executive

It is common in post conflict states to provide for a pluralistic executive. Both parliamentary and presidential states may involve pluralistic executives. Examples of a pluralistic executive include Bosnia, where the presidency is made up of one Croat, one Bosniac, and one Serb, and the chairmanship of the presidency rotates among the three every six months. Switzerland has a similar rotating federal council. In Serbia/Montenegro, the president and prime minister must be from different member states, and the cabinet positions are allocated among the member states. In Lebanon, the positions of the president, prime minister, and foreign minister are divided among the three primary religious groups.

Pluralistic executives function only where substantial political power is allocated among the positions being filled by the various representatives. There must, however, be a clear chain of command for making immediate decisions, and the executive powers must be clearly allocated and vested within this hierarchical system.

The merits of a pluralistic executive are that it may reduce secessionist tendencies by providing all constituent interests with a stake in the central government. It also may alleviate instability by assuring significant minority populations that they will have sufficient political power to protect and promote their interests. Pluralistic executives also act as a check against the possibility of totalitarian regimes or tyrannies of the majority since it is not possible for one group or individual to monopolize control of the executive.

The disadvantage of a pluralistic executive is that it often lacks the power, legitimacy, and effectiveness of a centralized executive. In the case of rotating positions or ethnic/religious vetoes, political gridlock is a frequent consequence of a pluralistic executive.

SELECTING AN EXECUTIVE MODEL

The new executive structure for Iraq must take into account many factors unique to Iraq, including the need to represent the solidarity and pluralism of the various Iraqi groups in order to maintain territorial integrity, as well as the need to prevent the emergence of another authoritarian regime.

Parliamentary Iraq or Presidential Iraq

The choice between a parliamentary or presidential Iraq is less crucial than many of the other choices faced by the future constitutional drafters. The choice will likely be dictated by whether Iraq pursues a unitary or federal structure.

There are two primary drawbacks to a presidential system. First, a presidential system may be too closely associated with the structure employed by the former regime and thereby lack a degree of credibility with the Iraqi people. Second, it may create too many checks and balances in a system potentially characterized by autonomy with a decentralized federal structure and encumbered with numerous mechanisms to protect minority rights. If a unitary system is adopted, the dispersion of power within a presidential system may well be compensated by the relative efficiency of a unitary system.

A parliamentary system under a unitary structure, however, may not provide sufficient opportunity to employ checks and balances in order sufficiently to meet the concerns of Iraq's constituent interests. The instability associated with a parliamentary system coupled with the complete control over political power by the central government also may generate its own form of political stagnation if coalition governments frequently fail, as in the case of Italy, and there are no federal constituent units capable of continuing on with many of the regular governmental responsibilities. In a federal system, the instability of a parliamentary government may be balanced by the stability of the constituent units, while there may be less of a need for checks and balances at the central government level because of the checks and balances between the central government and the constituent units.

Executive Pluralism in Iraq

In the case of nascent democracies, the political bargain often requires a pluralistic executive, yet such an executive may be substantially less effective at meeting the transitional needs of a new democracy. The following discussion examines the various models in an effort to identify one that may be pluralistic enough while also politically efficient.

Executive Power Sharing Mandated by Ethnicity/Religion. Some countries set aside specific positions or a certain number of positions for different ethnic or religious groups. An example would be the Bosnian tripartite rotating presidency or Lebanese Taif arrangement where power is allocated between religious groups, with the president always being a Maronite Christian, the prime minister a Sunni Muslim, and the speaker of the National Assembly a Shi'a Muslim.

The Lebanon arrangement arguably secures inclusiveness and stability in a country that struggled with decades of interreligious civil war. While it is difficult to determine the extent of the stability created by the power-sharing arrangement in Lebanon since the country has been partially occupied by Syria for decades with Syria exercising consolidated control, the executive structure has certainly provided for continued dialogue between the major ethnic groups of Lebanon.

The mandated inclusion of the major groups in Iraq may create forced solidarity and alleviate the fears that would support demands for separation. It also may provide the major groups with a stake in the continued survival and effectiveness of the central

government. Power sharing, while requiring each group to relinquish the possibility of total executive control, would ensure that no group was excluded as most had been during the rule of the Ba'ath party. This would probably meet the Shi'a community's desire to have executive power in Iraq for the first time, while guaranteeing that the Sunni population would not be "boxed out" as retribution.

Unfortunately, an ethnically/religiously based pluralistic executive cements ethnic and religious characteristics as core political identities and institutionalizes division among the groups. Defining each person by ethnicity and religion for the purpose of political participation may breed further sectarianism.

Importantly, there are many smaller ethnic or religious populations such as Chaldeans, Yezidi, Assyrians, and Turkomans that would probably be excluded from the executive position regardless of qualifications due to their small size, and this would violate certain international legal obligations against discrimination based on ethnicity or religion.

Pluralism by Regional Representation. The Kurdish proposal for the new constitution indirectly proposes a pluralistic executive by requiring that the president and prime minister each be from a different one of two regions. The Democratic Principles Working Group proposal accomplishes the same result, but with the top three executive positions divided among one of three different regions.

While a structure is desirable that creates de facto pluralism by region without specifying a fixed ethnic/religious requirement, this type of power sharing may be unworkable if Iraq is composed of more than two or three constituent units. There also is the concern that fixed regional requirements may not reflect accurately the population distribution of Iraq and indirectly may create territorial and sectarian tensions.

Pluralism by Party Affiliation. Rather than requiring that representatives from different ethnic/religious groups fill the top executive positions, the constitution could require that the positions be filled by Iraqis from different political parties, and that the positions be allocated according to the number of votes received. This approach would likely create de facto ethnic, religious, regional, and political pluralism in the executive structure and prevent one individual or group from monopolizing power.

This structure facilitates a weaker, more diverse executive that could discourage sectarianism in Iraq. It would allow for regional representation and substantial Kurdish and Shi'a influence in the executive without purposefully excluding any group or mandating inclusion. It also creates an opportunity for political parties to be formed on a basis other than ethnicity or religion. This approach can be readily adjusted to meet future needs of the country as democracy becomes more deeply rooted and, if necessary, can be phased out. Finally, this model better reflects the possibility that individual political leaders may emerge before a stable multiparty system takes root.

One potential disadvantage is that this approach also may encourage groups with common political beliefs but different ethnic/religious compositions to create separate political parties in order to dominate executive representation.

Centralized Executive in Iraq Tempered by National Requirements

The 1979 Nigerian constitution instituted an innovative election system to ensure that the president of the country enjoyed national support and was acceptable to most of Nigerian society, not only the most populated regions of the federation. In addition to securing a majority of votes cast in the election, the president must also secure more than 25 percent of the votes cast in at least two-thirds of the provinces in the federation. The result is that the centralized executive theoretically possesses more moderate views and is acceptable to a wider range of disparate groups.

It is difficult to evaluate how successful this model is at balancing the merit of candidates with the needs for minority inclusion or eliminating fears of exclusion. In fact, Nigeria has suffered significant democratic setbacks and continuous coups d'états due to a divided populace, with divisions exacerbated by violation of the rule of law, suppression of political opponents, exclusion of minorities, and manipulation of ethnic identities to maintain control over the machinery of government.

RECOMMENDED OPTIONS

If the constitutional drafters select a unitary structure, the full recognition of Iraq's diverse interests may be accomplished better through a presidential system with a balance of power between the executive and legislature.

If the constitutional drafters select a federal structure, the parliamentary system may produce a more efficient system of government capable of making the necessary decisions in a nascent democracy.

If the constitutional drafters determine it necessary to create a pluralistic executive, the allocation of seats according to party affiliation and share of the vote may best suit the needs of Iraq.

- It may also be necessary to require that the top executive positions be held by representatives from different regions in addition to different political parties.
- There must be a clear allocation of authority among the different executive offices and a clear hierarchy for decision-making.

If the constitutional drafters determine that a centralized executive based on the presidential model best meets their interests, it will be useful to consider a requirement that in order to be elected the candidate must receive a set minimum percentage of the votes in each region of Iraq.

7. BUILDING AN ELECTORAL SYSTEM

Choosing the best electoral system is important, not only for the obvious reason of electing competent representatives but also because electoral systems can determine, among other things, the internal cohesion of a country, the development of political parties, the way political parties campaign, and the way the political elites behave. Moreover, a number of studies indicate that the precise rules for the electoral system may have substantial and varying impacts on the ability of a country to succeed in its democratic transformation and may substantially impact whether the new system undermines or promotes internal stability.

VARIOUS PERSPECTIVES

Under the previous regime there were no true elections in Iraq. In the most recent “elections,” Saddam was the only candidate and he won 100 percent of the vote. Most opposition groups agree that new representatives should be selected by some form of direct elections. The various groups have not, however, specified the exact desired electoral system, nor is there reason to believe that all groups will easily agree to the same electoral design.

The Kurdish draft constitution proposes that the president of Iraq would be elected through direct elections. Within Kurdistan, the proposed constitution for Iraqi Kurdistan suggests that elections for the president and for the Kurdistan Regional Assembly be by direct general ballot. Beyond this the draft does not specify a particular electoral system.

The Declaration of the Shi’a of Iraq does not specifically address the nature of the electoral system but rather expresses the desire for equitable political representation for all Iraqi interests.

The political statement of the Iraqi Opposition Conference provides that Iraq should be a democratic state based on a humanitarian and civilized concept of Iraqi citizenship, without discrimination due to ethnicity, gender, or sect. No electoral system is specified.

The INC draft constitution provides generally that elections should be direct. For the Regional Council and National Parliament, the INC prefers proportional representation, with a minimum set-aside of two delegates per region for the Regional Council and no specified minimum for the National Parliament. As noted above, the president and vice president would be elected by the National Parliament.

The report of the Democratic Principles Working Group provides that the exact electoral system will be a matter for a constitutional convention to decide in consultation with international legal scholars. The working group did mention the need to rely on census figures, which might indicate a preference for some form of proportional representation.

ELECTORAL DESIGN: THEORY AND PRACTICE

The Handbook on Electoral System Design, published by the International Institute for Democracy and Electoral Assistance (IDEA), contains helpful descriptions of electoral systems and guidance for nascent democracies designing a new system. According to IDEA, there are countless electoral system variations, but essentially they can be divided into three broad families: plurality-majority, proportional, and semiproportional.

On the whole, plurality-majority systems produce broad-based moderate parties and stable one-party governments at the expense of full representation for interests not included within those parties.

Proportional systems produce representation for numerous parties and coalition governments, but at the expense of potential political stability and efficiency.

Semiproportional systems yield coalition governments but seek to promote stability by encouraging broad-based parties with multimember districts, thereby limiting the number of smaller, more radical parties in parliament.

To maximize the advantages of the different approaches, many states have created mixed systems.

Plurality-Majority Systems

In plurality-majority systems, the candidate that wins the plurality or majority of votes wins the election and represents the voter district. In almost all cases, the plurality-majority systems use single-member districts. This system is used by the United Kingdom and those countries historically influenced by it.

The advantages of the plurality-majority system include that it provides a clear-cut choice for voters between two or more parties and tends to yield stable single party governments and coherent parliamentary opposition. The system also has the effect of moderating the views of political parties, as they must appeal to a wide base in order to win political contests.

There are important disadvantages as well, including exclusion of minority parties from “fair” representation, for example, a party that wins approximately 10 percent of the votes is unlikely to win any seats unless its members are highly centralized in a particular voting district.

Proportional Systems

Proportional representation seeks to translate a party’s share of the national votes into a corresponding proportion of parliamentary seats. According to IDEA, proportional representation is a common choice in many new democracies, is dominant in Latin America and Western Europe, and makes up one-third of all the systems in Africa.

Most of the seventy-five states that use proportional representation rely on voting lists. In its simplest form, each party presents a list of candidates to the electorate, voters cast a vote for a particular party, and the parties receive seats in proportion to their overall share of the vote. Representatives are then taken from the lists in order of their position on the lists.

A significant advantage to using voting lists is that the technique tends to provide representation for most parties, so long as they meet a minimum threshold of votes—usually from 2 to 5 percent. As a number of the developing world examples demonstrate, for many new democracies, particularly those that face deep societal divisions, the inclusion of all significant groups in the parliament can be a near-essential condition for democratic consolidation.

The disadvantages of the proportional representation system include the tendency to give rise to unstable coalition governments and the failure to provide a strong geographic connection between representatives and the electorate. It also gives a voice to small groups with polarized views and encourages the formation of such groups.

Semiproportional Systems

Semiproportional systems seek to translate a party's share of the national votes into a corresponding proportion of parliamentary seats. They encourage parties to seek broad electoral appeal because they can win more than one seat per district. They discourage small radical parties, however, as they are unlikely to be able to garner sufficient votes to meet the threshold to acquire a seat.

Under this sort of system, each voter has one vote but there are multiple seats in each district to be filled. Those parties or candidates with the highest vote totals fill these positions. For example, in a four-member district, a party would need slightly more than 25 percent of the vote to ensure election. Conversely, a large party with 75 percent of the vote spread equally among three candidates is likely to take three of the four seats.

The *IDEA Handbook* suggests that the semiproportional system encourages broad-based parties, and while giving voters a choice among a party's list of candidates, it fragments the multiparty system less than other systems. The system accomplishes this objective at the expense of ensuring precise proportional representation of all parties in the parliament. Small parties with around 10 percent support, for example, whose votes are widely dispersed, may not win any seats.

Another potential disadvantage is that because voters have only one vote, the system contains few incentives for political parties to appeal to a broad spectrum of voters in an accommodative manner. In areas where one party has a reasonable core vote, it can win seats without needing to appeal to "outsiders." Furthermore, competition for votes among multiple candidates of the same party may accentuate internal party fragmentation and discord.

SELECTING AN ELECTORAL MODEL

Selecting the appropriate electoral model for Iraq will require deciding upon the electoral system to use for national elections and for regional elections if a federal state is chosen. It also will require a decision as to the timing of elections, and whether any restrictions should be put in place concerning the registration of religious or radical parties.

Electoral System

Within the context of Iraq, the plurality-majority system would probably not suffice, as it may not allow for the creation of the necessary number of parties to represent the major Iraqi interests. The system may, however, be effective at moderating political parties within the constituent units, as it is not uncommon to have different electoral systems for different levels of government.

Although the proportional system may appear to be an appropriate choice for Iraq, it contains too many potential pitfalls for a nascent democracy. The danger that the political mechanisms would grind to a halt due to a coalition that cannot agree on any major issues is too great a risk to impose on Iraq. Although the system would most likely provide for the widest possible representation for the various segments of the population, it still cannot guarantee that the smaller groups will have any actual influence in parliament, aside from symbolic representation.

The semiproportional system probably would function well in a federal Iraq. Like more proportionally representative systems, the effectiveness of this system would depend on the ethnic and geographic makeup of the constituent units. However, even in regions where there are minorities who are not likely to receive any seats, it is possible to rectify the problem by increasing the number of seats in order to guarantee some representation, thus encouraging greater proportionality. Therefore, in a region that is, for example, mostly Kurdish but where there are some Turkomans, it seems likely that Turkomans will either receive representation by choosing a Kurdish delegate who is sensitive to their needs, or by actually having a Turkoman candidate elected. As mentioned above, however, this system is dependent on the goodwill of the candidates to represent the needs of all their constituents, and not just their direct voter bases.

In the end, the best model for Iraq may be a mixed model. Majority voting at the constituent unit level in a federation would force the creation of broad-based parties and stable local governments. In monoethnic areas such as Basra, it would give rise to democratic competition among the Shi'a and help to moderate more radical views. In ethnically mixed areas such as Kirkuk or Baghdad, it would require parties to embrace multiethnic alliances in order to secure sufficient votes to win office. Set-asides could be created for very small minorities not likely to be included within a larger party.

At the national level, if the constitutional drafters adopt a unicameral parliament it may be necessary to elect the members based on multimember districts so as to ensure broad

representation and the minimization of radical parties. It also may be necessary to provide set-asides for small minority interests.

If the constitutional drafters adopt a bicameral parliament, the primary chamber could have one-half of its members elected from multimember districts and one-half elected from a national party list. This would ensure representation of all interests within the national parliament, without overaccommodating small or radical interests. The secondary chamber, which is intended to represent the interests of the constituent units, could be elected based on a majority of the votes cast, so as to maintain the broad-based nature of the constituent unit parties.

Electoralism

The success in creating a functional democratic regime rests not only with the selection of an appropriate electoral system, but also with the decision as to the appropriate timing of elections. The three general approaches to elections are: immediate local and national elections (Bosnia model), phased electoralism with local elections followed some time later by national elections (Kosovo model), or a period of democratic institution building followed by national and local elections (Afghanistan model).

Recognizing the potential for instability as a result of the rapid initiation of the process of democratization and the need to ensure democratic consolidation, the United States seems to favor the immediate creation of democratic institutions with phased self-government through rolling elections. The INC asserts that the Iraqi people favor a rapid transition to democracy, with elections quickly following the adoption of a new constitution. These two positions are not irreconcilable given that even under the INC approach it will take some time before elections are possible.

While it will be difficult to ensure the proper balance between institutional capacity and the timing of elections, recent state practice in Croatia, Bosnia, and Pakistan indicate that premature elections may substantially set back efforts to (re)construct a democratic system of government. During the 1990s, democracy was frequently equated with electoralism. As a result of a number of elections in which subsequently indicted war criminals and other radical individuals or parties were elected to office, particularly in Bosnia, it is now generally accepted that early elections may in fact inhibit the transformation to democracy.

It is now widely proposed that elections should be phased, usually starting with municipal elections followed by regional and then national elections. Moreover, there is an increasing trend toward institutional development in parallel or prior to elections. State practices in Montenegro, Kosovo, East Timor, and Afghanistan indicate that the development of democratic institutions with phased self-government through rolling elections may provide a more secure foundation for democracy.

Regulating Political Parties

In Iraq, as in many Middle Eastern states, there is the risk that allowing political parties to form without regulations restricting religious political parties, as might be found in Bosnia or Turkey, will result in the rise of Islamist parties. The instinctual reaction may be for members of the drafting committee to press for legislation outlawing religious political parties. However, an outright ban on religious parties may have the effect of adding to the groups' luster as well as decreasing the legitimacy of the burgeoning democracy. A law that requires all political parties to be secular is not natural to the region and would most likely be seen as forced upon the people by the American government.

In a recent report, the Carnegie Endowment for International Peace suggested that it would be best to differentiate between those political organizations that are committed to violence and those amenable to working within the legal infrastructure to achieve their goals. The report acknowledges that this approach is risky and would require in-depth familiarity with all the various would-be political groups, but according to the authors of the report, it is the only way to contain the more dangerous extremist groups without repressing the political process. Under this approach, groups could be required to accept basic principles of democracy to be eligible to participate in the political process

The obvious downside to allowing moderate religious parties to form is that there is no way of knowing what kind of support these groups will muster or how they will evolve in the future. Experience in other countries, such as Bahrain and Morocco, indicates that allowing free or reasonably free elections can lead to an increase in Islamist party power. One theory regarding the recent rise of Islamists that has been echoed by many commentators is that only in the mosque can citizens of most Middle Eastern countries express their political frustrations. Angry at their own situation, yet unable to express this anger democratically, the citizens are susceptible to the rhetoric of the Imams. In a multiparty system, the importance of the mosque as a place to express frustration may be diminished in that Iraqi citizens will be able to speak their minds anywhere and in any setting they choose. If this theory is correct, then Islamist influence will diminish over time in a democratic Iraq.

RECOMMENDED OPTIONS

While there are advantages and disadvantages to the traditional electoral systems, it may be useful for Iraq, like Germany, Italy, and Australia, to attempt to create a mix of electoral systems to suit its particular needs.

- At the constituent unit level, representatives could be elected according to majority voting to encourage the creation of broad-based parties and stable local governments.

- For a unicameral parliament, the representatives could be elected based on multimember districts in order to ensure broad representation and the minimization of radical parties.
- For a bicameral national parliament, the primary chamber could have one-half of its members elected from multimember districts and one-half elected from a national party list in order to ensure representation of all interests within the national parliament, without overaccommodating small or radical interests.
- The secondary chamber, which is intended to represent the interests of the constituent units, could be elected based on a majority of the votes cast in order to maintain the broad-based nature of the constituent unit parties.
- If and where necessary, set-asides could be created for very small minorities not likely to be included within a larger party.

To secure the democratic transition effectively, implementing a process of phased self-government with rolling elections after adoption of the new constitution probably is necessary.

It also may be necessary to create a mechanism capable of prohibiting or disqualifying radical parties, religious or otherwise.

8. PROTECTING MINORITY/HUMAN RIGHTS

While much of the above discussion relates to the protection of group interests for the major ethnic and religious groups in Iraq, it is important for the purposes of stability and democracy to ensure the protection of individual rights and of minority rights for groups such as the Turkomans, Assyrians, Chaldeans, and Yezidi, who are unlikely to qualify for positions among a pluralistic executive or to establish sizable political parties. This section will briefly review the views of the various parties, the human rights challenges facing a new Iraq, and options for ensuring the protection of those rights.

VARIOUS PERSPECTIVES

All of the various parties favor protecting individual rights, and most favor special protections for minority rights on some level.

The Kurdish draft constitution provides that all citizens shall be equal under the law without discrimination due to sex, race, color, language, religion, or ethnic origin. The constitution then enumerates nearly a dozen very specific rights drawn primarily from the Universal Declaration on Human Rights. The constitution then provides that these rights shall be protected by the judiciary.

The Declaration of the Shi'a of Iraq sets out specific provisions to protect the rights of all Iraqis, including minorities, without granting minorities special provisions. These include: full respect for the national, ethnic, religious, and sectarian identities of all Iraqis, and the inculcation of the ideals of true citizenship amongst all Iraq's communities, and confirmation of the unitary nature of the Iraqi state and people, within the parameters of diversity and pluralism in Iraq's ethnic, religious, and sectarian identities. The declaration also proposes the creation of a federal authority to review all senior governmental posts to ensure the elimination of sectarianism and discrimination.

The political statement of the Iraqi Opposition Conference endorses a democratic Iraq without discrimination due to ethnicity, religion, gender, or sect and endorses, among other agreements, the Universal Declaration of Human Rights. The statement takes particular note of the need to protect the rights of Turkomans and Assyrians and proposes the creation of special constitutional mechanisms to ensure their protection.

The INC draft constitution places heavy emphasis on the protection of individual and group rights. In addition to exhaustively listing basic human rights protected by law, it provides for the creation of a parliamentary ombudsman who would be mandated to review all legislation to ensure that it did not impinge upon any of these fundamental rights or liberties. The ombudsman would also be mandated to ensure that all laws were implemented in a manner consistent with the protection of these rights and liberties, and could challenge the creation or implementation of any law before the Supreme Court.

The report of the Democratic Principles Working Group does not recommend specific mechanisms for the protection of human or minority rights outside the court system, with the judicial branch having the final word on matters concerning civil rights and liberties.

The Turkish government worries that any support of group rights likely would lead to specific protection of Kurdish group rights, which could have direct implications for Turkish national security.

PROTECTING HUMAN AND MINORITY RIGHTS: THEORY AND PRACTICE

There are four main steps for developing an effective structure for protecting human and minority rights. First, the constitution must articulate specific individual rights and the sources from which they are derived. There is wide international agreement on the core individual rights, which can be found in the Universal Declaration on Human Rights and the Covenant on Civil and Political Rights. It may be useful for the constitutional drafters to provide that these instruments are directly applicable in Iraq.

The second step is to ensure the articulation of minority rights. While recognized as equally important, there is less consensus as to the precise nature of these rights, and fewer international instruments. Two useful instruments are the European Charter for Regional or Minority Languages and the Council of Europe's Framework Convention for the Protection of National Minorities. While designed to protect minority rights in Europe, a number of their principles are universally applicable. While these conventions could not be made directly applicable in Iraq, the key principles could be reproduced within the Iraqi constitution.

The third step is to establish mechanisms for the protection of human rights. As noted above, the INC draft constitution calls for the creation of a human rights ombudsman to ensure legislation is not adopted that infringes upon basic human rights. Other useful examples are the human rights ombudsmen created in Bosnia and in Kosovo. These ombudsmen are responsible for the protection of human rights in the province or republic, and have the authority to propose legislation, initiate judicial action, and engage the media. Other peace agreements provide for the establishment of joint commissions that regularly report to the government and advise on the implementation of human rights legislation and administrative procedures. A final option would be to create an administrative agency set up specifically to handle issues of ethno/religious discrimination. This could be modeled on Canada's Commission on Official Languages. Under the Canadian system, any citizen may bring a complaint to the commission if they have had difficulty obtaining services in their official language at a bilingual federal office, obtaining employment, or advancing in employment because of linguistic limitations.

The fourth is to undertake a process of lustration to ensure that those who committed human rights abuses in the previous regime are not allowed to retain their positions of

power. Lustration is not a criminal sanction; being subject to it does not remove rights to vote, travel, or engage in most private professions, as its primary purpose is to eliminate the ability of perpetrators of atrocities to control any part of the country's administration.

While on its face lustration may appear to be antidemocratic, it is accepted in international law and state practice as a legitimate means of securing the transition to democracy. There have been attempts at lustration after most twentieth-century changes from authoritarian regimes. The post-communist Czechoslovakian transformation was greatly facilitated by aggressive lustration programs designed to remove nearly all policy-making members of the former regime from power. A failure to enact and implement similar mechanisms in Serbia has until recently dramatically undermined the democratic transformation in that country.

PROTECTING HUMAN AND MINORITY RIGHTS IN IRAQ

Protecting human and minority rights in Iraq will require the immediate promulgation of a bill of rights, possibly including provisions concerning the separation of mosque and state, the establishment of implementing mechanisms, and the removal and continued exclusion of former high-level government officials.

Bill of Rights

Because the people of Iraq may appropriately demand immediate democratic rights, it may be difficult to wait until the promulgation of the new constitution to specify their rights. It may therefore be useful to promulgate a bill of rights, which might include the following:

- the right to life
- freedom from cruel and unusual punishment
- freedom of religion
- freedom of speech and press
- freedom of association and assembly
- the right to private property
- the right to privacy
- equality under the law (religious, ethnic, and sexual)
- equal protection and due process under the law
- liberty and freedom of movement
- the right to use one's language of choice
- the right to protection of one's culture
- the right to special education in a minority language, history, and culture

Once the bill of rights is promulgated, the drafters of the constitution can focus on a more detailed articulation of human and minority rights and the incorporation of instruments for the protection of international human rights and minorities into Iraqi domestic law.

A key point of contention among those charged with drafting the new constitution that may be addressed in the bill of rights likely will be the relationship between the mosque and the state. While many of the draft constitutions prepared by the exile groups call for the state religion to be Islam, there will likely be substantial disagreement as to the extent to which the mosque and state should be separate, including whether or not religious schools should be permitted. In most nascent democracies, it is generally considered necessary to separate the church/mosque and the state. Given the special circumstances of Iraq and the recent use of religious schools in other states as recruitment centers for radical Islamists, it may be necessary to restrict substantially the operation of private religious schooling in the near term.

The source of law in Iraq may also be highly controversial. It may be necessary therefore for the new constitution to remain silent as to whether Sharia law is applicable throughout Iraq. While it is unlikely that the constitutional drafters would draft an express provision denying the applicability of Sharia law, it would also likely be problematic for many of the drafters to provide expressly that Sharia law is the, or a, basis of the Iraq state and legal code—particularly with respect to human rights and equal status for women. The diplomatic compromise may be to remain silent on the status of Sharia law defined in the constitution and to allow the courts to develop precedent in conformity or distinct from Sharia law where necessary.

Implementing Mechanisms

The proposed ombudsman set forth in the INC draft constitution would be a highly useful provision to include in the Iraqi constitution. It may be advisable to expand the powers of the ombudsman and to provide for an extensive staff. The ombudsman's office should hear and register complaints by Iraqis concerning the violation of human or minority rights and should be able to initiate court proceedings on their behalf as well as to approach and engage the media.

It might also be useful to establish a mechanism similar to the one proposed in the Shi'a declaration and modeled after the Canadian commission. Using this model, the drafters might create a separate annex to the constitution establishing a Special Commission on Minority Groups to adjudicate violations of individual rights allegedly based on minority status. An injured party would need to allege two elements before the special commission: that one of their constitutionally protected individual rights was violated, and that this violation was perpetrated because of ethnic or religious categorization. The extraconstitutional nature of this body would allow the streamlined protection of minority rights.

Lustration

As all the top officials have been removed from office in Iraq, with many of them in the custody of the U.S. military, the question will be at which level to exclude Ba'ath party members and others associated with the regime from holding public positions. While it is necessary to exclude lower level Ba'ath officials from positions where they may exercise

any influence that may inhibit the democratic transformation, the overexclusion of party members may limit the ability of certain public institutions to function properly.

The screening and lustration must include at a minimum all senior government positions, all ministerial department heads, ambassadors, top military and police personnel, decision-makers in radio, television, and general media, judges and prosecutors, all members of the national council, mayors of all cities, Ba'ath party officials, and heads of educational institutions.

The variety of lustration mechanisms available include prohibiting Ba'ath party members from running for elections or holding appointed office, decertifying Ba'ath party judges and lawyers, and creating mechanisms to cull Ba'ath members from the police and military, as well as public service institutions. Importantly, substantial international resources are available for retraining local police and for establishing local infrastructure and election mechanisms.

It is important not only to purge the people of the previous regime but also the institutions that supported the regime. Besides retiring all major military leaders, the Special Republican Guard, the Republican Guard, the Special Security Organization, the Secret Police, and other similar entities need to be completely disbanded with all members retired and immersed into society, lustrated, or prosecuted. Iraq may want to consider banning the Ba'ath party as an organization, but the key is also to prevent a quick conversion or readjustment politically by the members of the old regime.

RECOMMENDED OPTIONS

A new Iraqi administration should articulate the precise human and minority rights applicable in Iraq. Reference to and direct incorporation into the constitution of major international human rights instruments such as the Universal Declaration on Human Rights and the Covenant on Civil and Political Liberties may be useful.

In addition, the following actions may be advisable:

- A bill of rights that sets forth the most basic human and minority rights could be immediately promulgated prior to the adoption of a constitution.
- At some point it will be necessary to deal with the difficult question of the separation of mosque and state and the source of law in Iraq.
- To ensure the implementation of human rights, a special human rights ombudsman could be appointed with the authority to propose legislation, initiate judicial action, and engage the media on behalf of individuals or groups subject to discrimination.

- A minority rights protection commission could be established and charged with adjudicating violations of individual rights allegedly based on minority status.
- An active program of lustration could be undertaken to ensure that those responsible for the commission of human rights and minority rights violations do not return to positions of authority from where they can undermine Iraq's democratic transition.

9. CONCLUDING NOTE ON DEMOCRATIC CONSOLIDATION

It is appropriate to end on a cautionary note. While many states have made a democratic transformation over the past decade, the process of democratic consolidation is complex and fraught with political instability. The case of Iraq will be particularly challenging, as the normally phased process of the breakdown of the authoritarian government, followed by a period of liberalization, and then consolidation of democracy is substantially compressed.

A number of Eastern and Central European countries also recently have undertaken democratic transitions. Most have held elections, protected fundamental freedoms, and established basic democratic institutions. In many of these countries, however, bitter intolerance, polarization, and opportunism are still influential political factors, genuine democratic consolidation has not yet taken hold, formal democratic institutions do not yet function properly, and in some, authoritarian governments are gaining in popularity.

To avoid these consequences in Iraq, it will be crucial to manage carefully the process of democratic consolidation. The process will entail the negotiation of a comprehensive constitutional structure as well as the creation of political parties and the management of free and fair elections, the establishment of an independent judiciary and the effective rule of law, as well as the reconstruction of police and military forces and the initiation of civil society.

While there seems to be a consensus among western experts and exiled Iraqis alike that Iraq is eager for and capable of democracy, it also is important to acknowledge that the Iraqi people have never experienced democratic rule, nor do they have any models in the region after which they may fashion their own government. In essence, the country will be starting from scratch, building a new democratic nation one institution at a time.

We hope that this report may contribute to that process by serving as a primer for the future constitutional negotiations that will create the framework within which Iraq's diverse political interests will come together to reconstitute a stable and prosperous democratic Iraq.

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*The roundtable participants provided useful criticism of successive drafts and helped to formulate the issues that must be addressed in order to build a stable democratic constitutional structure in Iraq. The participants were not asked to endorse the final text.

** The American University rapporteurs participated as part of the University's Public International Law & Policy Program.

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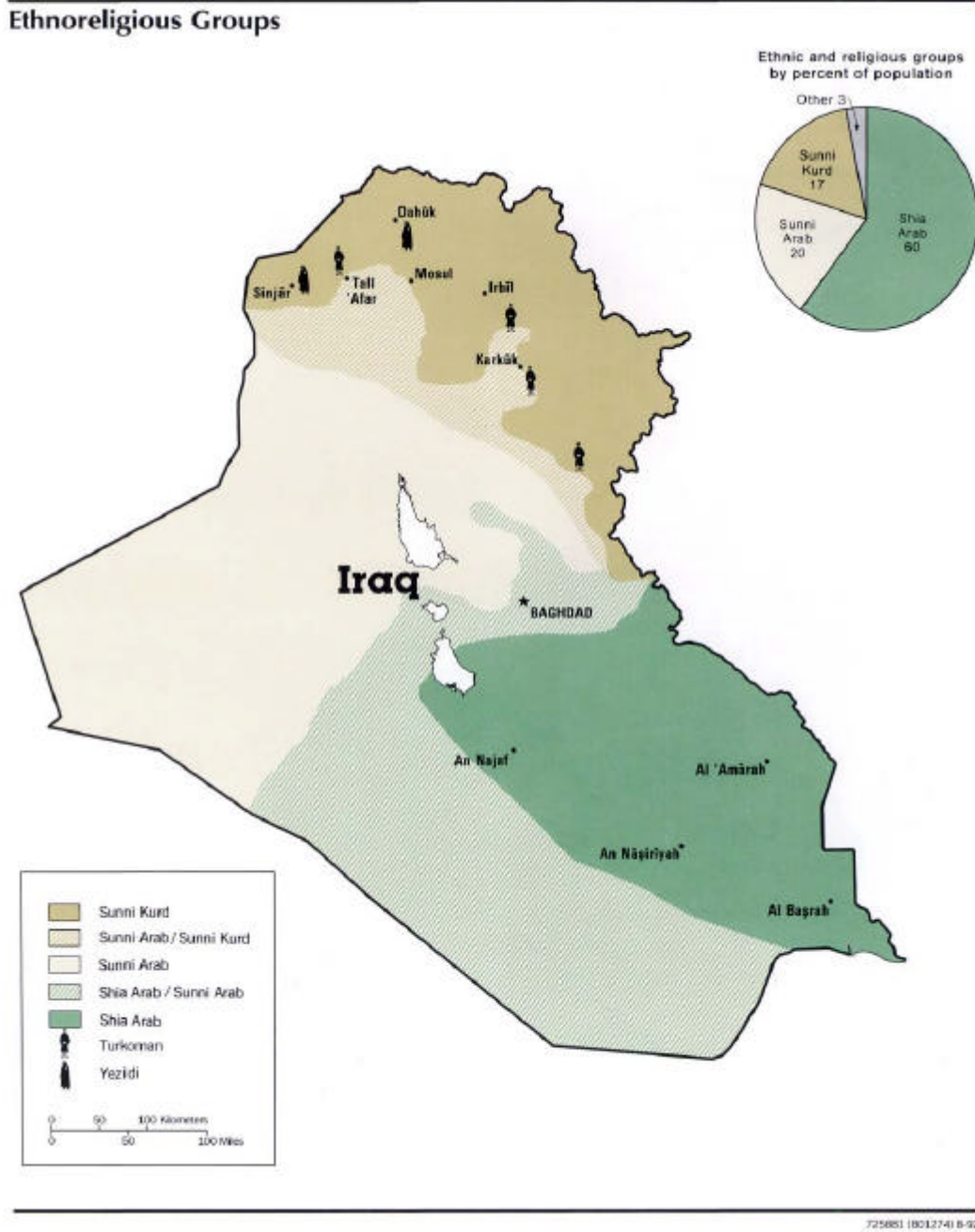


Figure 2: Central Intelligence Agency map provided by Iraq Research, August 1992, available online at <http://www.iraqresearch.com/html/map/8.html>.

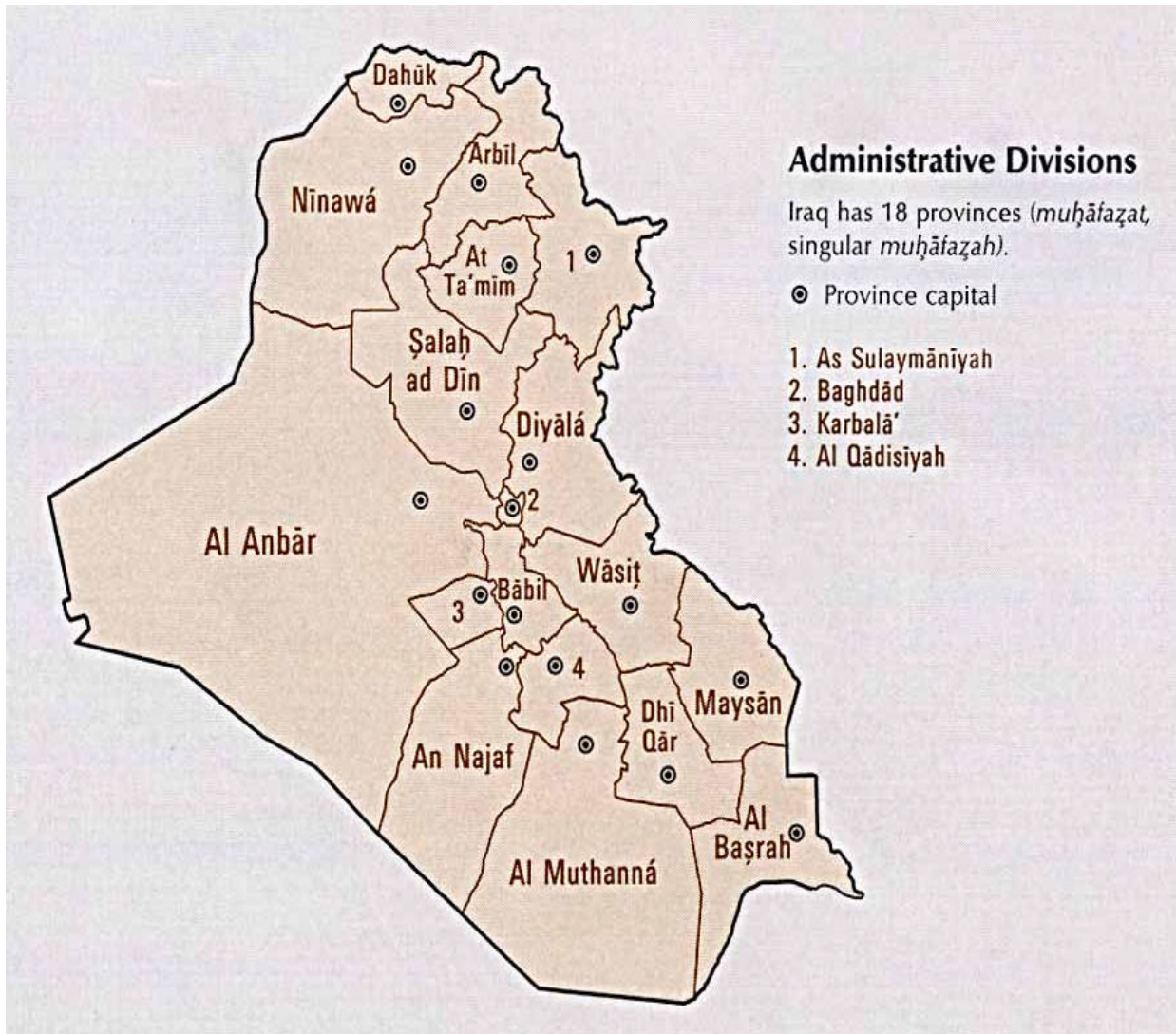


Figure 3: Central Intelligence Agency map provided by Iraq Research, 1993, available online at <http://www.iraqresearch.com/html/map/8.html>.

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