

Constituting Democracy in Iraq :

ChaldoAssyrians a Determinant of
Sustainable Iraqi Constitutionalism

August 2005



Note: The views expressed in this and other papers associated with the ISDP do not necessarily represent the views of all the participating organizations.

The Iraq Sustainable Democracy Project (ISDP) is a function of the Assyrian Academic Society. The AAS is a non-profit organization established in 1985 by Assyrian-Americans in Chicago, Illinois. For more information, contact the AAS at:

8324 N. Lincoln Avenue
Skokie, IL 60076
Tel: 847-982-5800 fax: 847-982-1900
<http://aas.net> , info@aas.net



Copyright, ISDP 2005



Iraq Sustainable Democracy Project
444 North Capitol St., NW, Suite 846
Washington, D.C. 20001-1512
isd@aas.net

Project Director
Michael Youash
E-mail: youash@aas.net
Tel. : 202 378 8082
444 North Capitol St. NW
Suite 846
Washington D.C., 20001-1512

Table of Contents

A SYNOPSIS OF PROPOSED CONSTITUTIONAL PROVISIONS..... 3

INTRODUCTION 10

CONTEXT 12

 IRAQ A PREDATORY STATE 12

 SHORT-TERM CALCULATIONS AND COALITION MYOPIA IN TRANSITION 12

IRAQ’S TREATMENT OF THE CHALDOASSYRIANS..... 14

 ETHNIC CLEANSING/DIRECT COMMUNITY VIOLENCE 14

 CULTURAL GENOCIDE..... 15

 RELIGIOUS PERSECUTION AND TARGETING 16

 SUMMARY 16

FEDERALISM..... 17

 TERRITORIAL DEMARCATIONS 17

 DECENTRALIZATION/DEVOLUTION 20

 FISCAL FEDERALISM & DIVISION OF REVENUE SOLUTIONS..... 24

TRANSPARENCY AND ACCOUNTABILITY 27

FORMING LEGISLATURES AND LEGISLATURE DECISION-MAKING:..... 29

 A PARLIAMENTARY SYSTEM IS BEST 29

 FORMING A LEGISLATURE AND TAKING DECISIONS 30

 A BICAMERAL ARRANGEMENT 31

THE EXECUTIVE 33

JUDICIARY AND CONSTITUTIONAL PROTECTION 35

 THE JUDICIARY 35

 THE CONSTITUTIONAL COURT’S REMIT 35

HUMAN RIGHTS 37

 MINORITY AND INDIGENOUS PEOPLES’ RIGHTS..... 37

CONCLUSION 39

WORKS CONSULTED 40

A Synopsis of Proposed Constitutional Provisions

The Iraq Sustainable Democracy Project approaches analysis of Iraq's transition with the premise that the treatment of the country's most vulnerable minorities is the best indication for where the country is heading. It also promotes awareness that Iraq can be made vastly more sustainable as a democracy if its policy challenges are framed to meet the basic needs of these peoples as the lowest common human rights denominator. This paper explores the constitutional provisions required to secure the fundamental interests of these minorities. In so doing, it illustrates the folly of treating them so cursorily, as has been done thus far, and the extent to which securing their basic rights provides a foundation stone for equitable and sustained development for all Iraqis.

These provisions are enumerated here and elaborated upon in the main text of the paper.

Matters of Principle Guiding Constitution Drafting

- 1) Recognize that peoples other than just Shi'a and Kurd suffered under Saddam and are entitled to redress through the constitution drafting process.
- 2) Explicitly declare the importance of seeing the treatment of Iraq's ChaldoAssyrian, Turkmen, Yezidi, Shabak, and Mandaean minorities constitutionally as an indicator of the democratization process.

Preamble

Iraq must be seen as a failed and predatory state in the most classic sense. The Iraqi people and the coalition are not overcoming the legacy of Saddam Hussein, but of every single regime that ruled Iraq since its formation.

- 3) The Preamble used in the TAL must be amended to read: "The people of Iraq, striving to reclaim their freedom, which was usurped by each past regime since the creation of the state of Iraq, rejecting violence [...]."

Federalism

To overcome the extensive centralization of the Iraqi state, and thereby break the cycle of zero-sum control of Baghdad, federalism is the best option for a future Iraq. Defining the specifics of federalism in Iraq must serve three basic, unavoidable requirements: justice, feasibility, and ethnic/sectarian concerns. It is foolish to believe that Iraqi political leaders can set aside their personal motivations and allow federalism to be defined along some objective variables of geography and history.

Constituting Democracy in Iraq , August 2005

Territorial Federalism

The Kurdish Regional Government's two-state proposal, and those espousing a five to six state model reflects one extreme. Such an arrangement will nurture the polarization of ethnic/sectarian groupings (particularly of Shi'a, Sunni and Kurd). On the other extreme are proposals to sustain the eighteen state model. This maintains a system designed to deliberately divide peoples and is also administratively inefficient, creating far too great a burden on the national fiscus to support. It is fundamentally erroneous to assume that no state can be defined outside of the need to give territorial reflection to Shi'as, Sunnis and Kurds.

- 4) Develop an eleven state model. Baghdad should remain one state. Amalgamate the provinces to the south of Baghdad into four new states. Create three states to the immediate north of Baghdad on an east-west axis (from the Syrian to the Iranian border). Establish three states in the far north.
- 5) One state of the three in the far north should be called Ashur. It comprises Shabak, Yezidis and ChaldoAssyrian populations in roughly equivalent numbers, along with Turkmen, Arab and Kurdish populations.

Decentralization/Devolution

To have real meaning, federalism requires the devolution of powers from the center of the country to the sub-regional spheres of government. Most analyses focus on the national and state spheres of government. This ignores the great potential of local government. It can play an integral role in defining a federal arrangement that ensures all Iraqis they cannot be marginalized by another sphere of government again. State government should involve itself with some key tangible deliverables. Nonetheless, it is best placed to provide overall policy guidance and cohesion on items that are best delivered by local government. The TAL calls for decentralization to the local of government, but the constitution must explicitly declare the jurisdiction of local government in robust fashion and have state government play a supportive role with respect to policy coordination.

- 6) National government should handle: defense, national economic management (including taxation, monetary policy, debt management, etc.), foreign affairs, natural resources, national transportation, customs policy, national policing, social welfare, citizenship and immigration, telecommunications, postal services, broadcasting, fisheries, labor and civil and criminal law, development and local government.
- 7) State Government should support sub-state levels of government in matters of: education, health, social policy, state languages, state policing, agriculture, state economic development, social welfare, state transportation, and regional economic development. There can be several shared areas with the national sphere of government that can be negotiated.
- 8) Local government must be defined and principles guiding the formation of local government laid-out in the constitution.
- 9) Rural local government is responsible for: agriculture, land improvement and land reforms, small scale industries, rural housing, drinking water, roads, bridges, waterways, poverty alleviation programs, primary and secondary education, technical training and vocational training, adult and non-formal education, culture, health and

Constituting Democracy in Iraq , August 2005

sanitation (including hospitals, primary health centers, and dispensaries), family welfare, women and child development, and social welfare.

- 10) Urban local government is to handle: education, social welfare, urban and town planning, building construction, economic and social development, roads and bridges, water supply for domestic and commercial purposes, public health, fire services, urban poverty alleviation, and culture.
- 11) Allow for taxation at all spheres of government with national and local having the greatest reach in this respect.
- 12) Develop a national norms and standards bureau to gauge development in key areas of government delivery with a view to ensuring equitable development for all Iraqis.

Fiscal Federalism

Territorial boundaries for state and municipal government, along with areas of jurisdiction mean nothing if the required resources are not there to facilitate equitable development. Resources to national, state and local spheres of government must be transparent and predictable. This will assuage all parties of the equitable division of resources and reduce tensions leading to zero-sum calculations manifesting in state seizure, graft, and other pernicious forms of governance.

- 13) The constitution must require legislation for a division of revenue process between all three spheres of government.
- 14) The formulae of the division of revenue legislation must take into account, inter alia, demographics, socio-economic indicators, and local economic and infrastructural conditions.
- 15) Oil revenue and natural resources of the country should form part of the national revenue base to be dispersed through the division of revenue process to other spheres of government.

Transparency and Accountability

Building a sustainable democracy will mean allowing for all levels of government in Iraq to be held accountable. To do so, systems of government will need to be completely transparent. Iraq should look at paradigms of financial management reforms across the globe to define these principles constitutionally. The constitution must provide for enabling legislation later to give full effect to the principles of transparency and accountability.

- 16) The best paradigm can be found in South Africa's constitution. It demands the promotion of "efficient, economic and effective use of resources" (Art. 195(1)(b)), and in its section on co-operative governance, it requires provision for, "effective, transparent, accountable and coherent government" (Art. 41(1)(c)).

Constituting Democracy in Iraq , August 2005

A Parliamentary System is Best

A parliamentary system best reduces the zero-sum calculations of stakeholders. Presidentialism is inherently exclusivist. A parliamentary system also allows for immediate and regular accountability of the executive to the National Assembly or state legislature.

- 17) Make Iraq a parliamentary democracy.

Forming a Legislature and Taking Decisions

Given the extensive heterogeneity of Iraq, a proportional representation electoral system is best suited to ensuring robust representation of all communities. For Turkmens, ChaldoAssyrians, Kurds, and others it also offers some redress for ethnic cleansing that dispersed them across the country in policies of Arabization. Also, the national and state spheres of government must reserve seats for ChaldoAssyrians, Turkmens, Yezidis, Shabaks, and Mandaeans. Reserving seats offers representation to peoples such as ChaldoAssyrians that were subjected to the most pernicious forms of repression since the creation of Iraq. This requirement sustains meaningful pluralism in Iraq and reverses the legacy of eight decades of ethnic and sectarian targeting. It is also critical to fill reserved seats with members of these groups that are elected through parties that ran independently. Presently, some minorities are represented by parties that ran on the list of other parties. They cannot demonstrate whom their constituency is, and are recognized as mouthpieces for those other parties.

- 18) Reserve seats for ChaldoAssyrians, Turkmens, Yezidis, Shabaks and Mandaeans in the national and state legislatures.
- 19) The parties able to fill reserved seats with candidates on their list must run independently and not on the list of other parties.
- 20) Members of the National Assembly or state legislature considered to legitimately speak on matters of their ethnic group's interest must be those from parties elected independently.
- 21) Consultations on the appointment of minorities to reserved positions in the executive and other arms of government should only be with those members from parties that were elected independently.
- 22) In the absence of constitutional guarantees of representation in the National Assembly and state legislatures, a system of minority councils must be formed to govern on matters relevant to the minority. These should be consulted when relevant decisions are being taken in either the National Assembly or state legislature.

A Bicameral Arrangement is Best

Although great care must be taken to not create an overly burdensome government framework, it is important to create a Senate in Iraq. It will provide for regional representation and also gives space for more power-sharing arrangements between ethnic and sectarian groups. Fundamentally, it provides another safeguard for

Constituting Democracy in Iraq , August 2005

accountability within the governance system, thereby allaying remaining fears of the potential for marginalization or victimization by the state.

- 23) A Senate must be able to review and report on all decisions and actions of the National Assembly.
- 24) Decisions of the Senate at a high threshold (e.g. sixty-five percent) should result in a return of a bill or budget or other instrument to the National Assembly for its reconsideration.
- 25) A greater amount of seats should be reserved in the Senate along regional lines and for ChaldoAssyrians, Turkmens, Yezidis, Shabaks and Mandaeans.
- 26) As with the National Assembly, only nominations from parties independently elected to the National Assembly should be sought for reserved seats in the Senate.

The Executive

Power-sharing is most commonly understood to mean the representation of groups in the executive arm of government. The excitement and rancor over ministerial appointments in the transitional government of Iraq reflects its importance to all stakeholders. Having a prime minister for Iraq ensures selection from the elected National Assembly and embeds the entire leadership to the elected National Assembly. It also overcomes the presidential 'winner-take-all' arrangement. The reserving of seats in the Executive should be done for all major groups and allow for ethnic and sectarian considerations. If a presidency is sustained, it should remain ceremonial.

- 27) Reserve seats for all major groups and allow for ethnic and sectarian considerations in the formation of the executive.
- 28) Explicitly reserve seats for ChaldoAssyrians and Turkmens, and allow for possible reservations for smaller groups such as Shabaks, and Mandaeans.

Judiciary and Constitutional Protection

A strong judiciary and court system is essential for protecting the constitution and Iraqis. Elections are no longer a guarantee against the abuse of power by any arm of government. An explicit and primary objective of this arm of government is to uphold the primacy of the constitution.

- 29) Declare the upholding of the constitution's articles and principles as an integral element of the role of the judiciary and court system.

The Judiciary

Judges will invariably play a critical role in the maintenance and development of constitutional democracy in Iraq. Therefore, it is important they attain their positions on the dual criteria of merit and also representation of Iraqi society.

Constituting Democracy in Iraq , August 2005

- 30) Appointing judges must be primarily on the basis of merit.
- 31) The judiciary must also be broadly reflective of Iraqi society at all levels.
- 32) In the constitutional court, there should be a president and vice-president and at no time should these be of the same ethnic or sectarian extraction.
- 33) There should be nine judges of which there should always be one ChaldoAssyrian and one Turkmen judge.
- 34) The appointment of judges to reserved seats should receive the support of a majority of the members of the National Assembly representing the respective ChaldoAssyrian and Turkmen minorities.

The Constitutional Court's Remit

The constitutional court must have a wide remit of investigative and adjudicatory powers. Given the newness of federalism, if it is adopted, there will not only be cases of citizens' rights being violated but also the rights of one arm of government over another. To ensure conflict resolution through dialogue and deliberation and not violence, recourse to the constitutional court is vital.

- 35) Allow a wide array of stakeholders to bring matters before the constitutional court.
- 36) Allow the constitutional court to review decisions with constitutional ramifications of a lower court.
- 37) Allow citizens to bring matters before the court.
- 38) Allow any arm of government to bring matters before the court.

Human Rights

The most public elements of the constitution presently being drafted is of the bill of rights. Analysis of the released drafts suggest that gains for individual and group rights made through the TAL are being reversed. It is essential Iraq respect human rights in a manner commensurate with international human rights legal standards. Iraq is a party to instruments such as the International Covenant on Civil and Political Rights and must enshrine human rights in a manner commensurate with such legal instruments.

- 39) The freedom of, *inter alia*, religion, conscience, expression, opinion, press, assembly, association and gender rights must all be enshrined.
- 40) Iraq must enshrine the rights guaranteed by the main international human rights legal instruments to which it is a signatory.
- 41) A human rights court must be formed.
- 42) If Iraq does become an Islamic state with Shari'a law a primary source of legislation, the constitution must develop means to protect ethnic and religious groups. Territorial

Constituting Democracy in Iraq , August 2005

and non-territorial protections/exemptions of non-Muslims and state and local spheres of government should be provided for constitutionally through opt-out clauses.

Minority Rights

Given the extent of persecution against groups such as ChaldoAssyrians, Turkmen, Yezidis, Mandaeans and others, it is vital that redress take the form of minority rights over and above those covered in the proposals in preceding sections of this paper.

- 43) ChaldoAssyrians, Turkmen, Yezidis, Shabaks, and Mandaeans must receive explicit constitutional guarantees protecting their ethnicity, religion, culture and language.
- 44) Violation of these rights must allow for immediate recourse to the human rights court.
- 45) The language of a general section on these minorities' rights must provide the basis for the right to education in their language and/or in a manner congruent with their religious beliefs.

Introduction

“What of the ChaldoAssyrians and the constitutional process?” asked a meeting attendee. “Who?”, responded the official. The questioner and respondent will remain nameless for the sake of diplomacy, but this question and response are more common than not. This oft heard response reflects two stark realities for ChaldoAssyrians and other Iraqi minorities. First, they are often an after-thought when meta-governance issues are discussed. Second, ChaldoAssyrians are not perceived to be determining variables in Iraq’s transition to democracy. This paper will demonstrate the fallacy of such an appraisal. It will show that ChaldoAssyrians (and other forgotten Iraqi minorities) provide a potential determinant for the likelihood of Iraq’s future constitution founding a path to sustainable democratization in a potentially terminally factionalized society.

This paper marks the first in a series by the Iraq Sustainable Democracy Project. The premise of the project is that the ChaldoAssyrians and along with them the Turkmens, Yezidis, Mandaean, and Shabaks, provide the best litmus test on what direction Iraq is heading in democratically-speaking. The paper will focus on ChaldoAssyrians, but it is to be understood that in highlighting the issues for this one minority, it will also encompass highly transferable arguments for these other minorities in similar circumstances. This paper is limited to the constitution but treats electoral systems cursorily, as this will be the subject of a dedicated forthcoming paper.

The paper is prescriptive in that it provides concrete recommendations on fundamental elements of the constitution. It stops short of providing exact language for the recommendations, however. It provides guiding language on possible text in some places and cites existing paradigms where they exist. The identification of social, economic and political challenges precedes recommendations for each section in order to allow the reader an opportunity to appreciate the viewpoint of ChaldoAssyrians and other minorities. Building acceptance for the soundness of the recommendations is the desired outcome of such a format. In this way, the ultimate result should be an appreciation for the fragility of the ChaldoAssyrian presence in Iraq. Providing the solutions is essential for demonstrating the hopefulness of this community and the concurrence between their basic constitutional needs and the basis for a constitution that contributes to the sustainability of a democratic transition.

The paper is not exhaustive in terms of the possible categories of the constitution nor issues within those that are addressed here. Its central preoccupation is with each item and the way to approach it from the perspective of Iraqi minorities.

Two qualifying notes are necessary before moving into the main body of the paper. First, the astute reader will note that Sunnis and Kurds have yet to be mentioned, despite being the most identifiable minorities in Iraq. While this reality is unquestioned, the paper operates on the premise that Sunnis and Kurds enjoy certain structural and natural advantages that nullify certain threats which continue to face ChaldoAssyrians and others. As the paper will explain, ChaldoAssyrians also endured other forms of discrimination and violence from which Sunnis and Kurds were exempt. This reinforces present structural disadvantages facing ChaldoAssyrians.

Constituting Democracy in Iraq , August 2005

The distinction between Sunnis and Kurds on one hand and ChaldoAssyrians on the other, is the former's ability to exercise an effective veto through violence should it feel its core interests are jeopardized. ChaldoAssyrians, Turkmens, Yezidis, Shabaks, and Mandaeans offer no credible threat on their own against any Iraqi regime. Sunnis and Kurds do have the ability to undermine the operational ability of government and thus stand in an entirely different negotiating position. Sunnis and Kurds are termed 'super-minorities' in this framework. ChaldoAssyrians, Turkmens, Yezidis, Mandaeans and Shabaks retain the standard classification of 'minorities'.

Second, the ISDP uses the term 'ChaldoAssyrian' while many sources cited refer to 'Assyrians'. ChaldoAssyrian is the name used in the Transitional Administrative Law (TAL) and reflects a compromise within this community to promote unity. Disunity in the community was something fostered during previous regimes. It continues to be fostered today in a political strategy by opponents to any robust ChaldoAssyrian presence in Iraq's political fabric. This latter point is expounded in the contents of the paper. It suffices to say here that ChaldoAssyrian refers to the people who are interchangeably known as Chaldeans, Syraics, Assyrians. They are also known by their religious denominations of Chaldean Uniate (Catholic), Church of the East, Jacobite, Syraic Orthodox, etc. Regardless, they are one unified people and 'ChaldoAssyrian' refers to all of them.

Outlining the key experiences of ChaldoAssyrians in modern Iraq is critical for appreciating the robustness of the argument that the fate of ChaldoAssyrians is vital. Many of the calamities wrought on the ChaldoAssyrians transpired before the globalization of information. Additionally, the injustices visited upon them when information was readily available took place when the population level of ChaldoAssyrians was so low that their experience was subsumed within the horrors affecting the Kurds and the Shia. To remove the veil of ignorance and bring to light these issues in so much as they pertain to potential constitutional remedies is the object of the proceeding two sections.

Context

Iraq a Predatory State

From its inception, Iraq was nothing short of a predatory state. The Sunni Arab minority's leadership since the creation of Iraq amounts to a program of exclusive rule by this one group. It also ensures that the main beneficiaries of economic growth are Sunni Arab and then others. Of course, many non-Sunni Arabs were co-opted and many in Iraq became Ba'ath out of necessity. At its core, however, Iraq was a Sunni Arab dominated polity with all of Iraq's leaders originating from this one narrow group. To sustain this arrangement, governance in Iraq meant the absolute suppression of all groups that might challenge the status quo.

This is a condition found in many, if not most, post-colonial states. In Iraq, however, some of the most pernicious forms of oppression were implemented. This means that the extent of the challenge in reversing the legacy left by such patterns of governance is even greater. Discounting the extent to which Iraq is a failed and predatory state will skew the understanding of what is necessary in terms of policy solutions. This distortion manifests when decision-makers and analysts only see the needs of Shi'a or the super-minorities (Sunnis and Kurds) as peoples with legacies requiring redress through the ongoing processes of political and economic reconstruction.

Needless to say, it is going to take a long term human and financial commitment on the part of the international community to overcome the challenges in Iraq. The drafting of the constitution demands a heightened degree of vigilance. It will likely have a determining impact on whether Iraq can overcome the legacy of eight decades of state seizure and oppression. It demands recognizing that Iraq's woes did not begin and end with Saddam Hussein. Instead, oppression and brutality in Iraq began since Iraq's formation, overseen by the British officials during the mandate period and left relatively unchecked thereafter.

Short-term Calculations and Coalition Myopia in Transition

A constant tension in constitution drafting in post-conflict societies is between framing a document with long-term sustainability in mind, and meeting conflict resolution demands of the moment. This tension is heightened in Iraq where it is difficult to tell whether the conflict is actually at an end – certainly the war is at an end, but not the hostilities. The schedule for developing a constitution in Iraq is too short. It needs more time if there is to be careful consideration of each aspect and if the population is to meaningfully interact with it. Essentially, the present constitution drafting agenda reflects a bias towards resolving the conflict over securing long-term sustainability of democracy.

The extent of the ongoing violence is driving a need to produce a constitution to undermine the insurgency. This calculation is myopic, in that it threatens to produce a document neither owned by the drafters or the people of Iraq. It decreases the legitimacy of the document and threatens to add to the grievances of many Iraqi citizens. Moreover, it means that thoughtful deliberation on what needs to be overcome will not take place.

Constituting Democracy in Iraq , August 2005

In short, much of the juggling act to bring a constitution to Iraq focuses on the interests of the three major groupings: Shi'a, Sunni and Kurd. This is because the coalition sees them as integral to ending the insurgency and thereby allowing for coalition troop reductions. The Iraq Sustainable Democracy Project places great importance on all ethnic and religious minorities in Iraq for a sustainable democratic transition. The following sections will hopefully elucidate the need for a re-thinking of Iraq's problems and the necessary solutions. Most important, is to see the treatment of ChaldoAssyrians, Turkmens, Yezidis, Shabaks, and Mandaeans as the key measure of whether Iraq is moving beyond the politics of state seizure and state sanctioned oppression.

Iraq's Treatment of the ChaldoAssyrians

The following is simply meant to provide the non-ChaldoAssyrian specialist a basic knowledge of the privations they endured. Brevity is a key requirement as this is not the place for a comprehensive historical account.

Ethnic Cleansing/Direct Community Violence

Associations between Iraq and mass murder are naively confined to the Saddam Hussein era, and particularly the Anfal campaigns in northern Iraq. In fact, Iraq's first targeted massacre of civilians on an ethnic basis occurred in 1933. This was in the Simele area and appropriately named the 'Simele Massacre'. Approximately 3000 Assyrians were murdered¹ under the Command of the Kurdish General, Bakr Sidqi by the newly formed Iraqi army. Iraqis painted this victory as one of nation-building and glorified it – promoting the Kurdish General who affected the massacre.² As the US Government's information source on Iraq reports, "The [1933] Assyrian affair marked the military's entrance into Iraqi politics, setting a precedent that would be followed throughout the 1950s and 1960s. [...] The Assyrian affair also set the stage for the increased prominence of Bakr Sidqi."³

ChaldoAssyrians realized the propensity of Iraq to target them for their ethnicity since the early 1930s and this forms an elemental building block of their understanding of Iraq. Thus, to ChaldoAssyrians, what happened to them and the Kurds in northern Iraq in the late 1980s merely marks the maturation of the same processes evolving over a period of five decades. The event itself and the message it sent understandably spurred ChaldoAssyrian flight from the area and Iraq. As a result, ChaldoAssyrians are Iraq's third largest ethnic group, but have almost half their population living in Diaspora.

During the 1960s and 1970s, ChaldoAssyrian churches and villages were systematically razed, fueling more and more dislocation.⁴ This reality of ethnic targeting only culminates in the Anfal. By the time of the atrocities of the 1980s, ChaldoAssyrians were so reduced in numbers that their sufferings were either subsumed within those visited upon the Kurds or ignored outright. As the NGO Indict.org reports, "Whilst the Kurds appear to have been the primary target of the Anfal, other minority groups suffered also. Assyrians, *also referred to by the Kurds as Kurdish Christians*, were also subjected to torture and executions during the campaign and many of their Churches were destroyed by Iraqi government forces. [...] Assyrian villages such as Bakhtoma (April 1987) were burned and bulldozed along with Kurdish (Moslem) villages during the Anfal."⁵

These actions are noteworthy on several grounds. Previous regimes were perpetrators of similar actions, meaning gross human rights violations cannot be limited to the Hussein

¹ International Federation for Human Rights and Alliance Internationale pour la Justice, "Iraq: Continuous and Silent Ethnic Cleansing – Displaced persons in Iraqi Kurdistan and Iraqi refugees in Iran". <http://www.fidh.org/IMG/pdf/iq350a.pdf>. (accessed June 15, 2005). P. 17.

² Tripp, Charles. *A History of Iraq*. Cambridge University Press: Cambridge, 2000. P. 80-81.

³ US Government Country Studies. "Iraq". <http://countrystudies.us/iraq/20.htm>. (accessed June 10, 2005).

⁴ Assyrian Academic Society. "ChaldoAssyrians of Iraq and the Iraqi Interim Constitution". <http://www.aas.net/Position%20Papaers/positionpaper1.pdf>. (accessed June 12, 2005). P. 19 – 23.

⁵ Indict.org. "Crimes Committed by the Iraqi Regime". <http://www.indict.org.uk/crime/details.php?crime=Anfal> (accessed June 7, 2005).

Constituting Democracy in Iraq , August 2005

era. Perpetrators span Sunni Arabs and Kurds serving Baghdad's interests or regional calculations (such as the 1933 massacre). The results were either cleansing from the region (by fleeing to Baghdad), or fleeing the country. In effect, the ultimate outcome is ethnic cleansing from traditional ChaldoAssyrian towns, villages and lands.

Cultural Genocide

By the time of Ba'ath ascendancy and subsequent primacy in Iraqi politics, ChaldoAssyrians were, perhaps to the regime's frustration, still an unavoidable component of the population. Destruction of their Churches and villages and general targeting by the regime did not produce the degree of marginalization desired. Pursuant to the goal of making ChaldoAssyrians disappear, the regime began the implementation of a policy perhaps more severe than actual murder – cultural genocide.

It became impossible for ChaldoAssyrians to be educated in their Aramaic language, and efforts to sustain the language were aggressively undermined by the regime. Most significantly, the regime disallowed any ChaldoAssyrian from referring to themselves as such in the national census. ChaldoAssyrians could only classify themselves as Kurdish or Arab Christian. Implementation of this policy took place in the censuses of 1977 and 1987.⁶ Unlike the ominous acts of governments that persecute a people through explicit identification (e.g. Nazi Germany and the Jewish people and Apartheid South Africa and its non-European people), Iraq devised a system of persecuting ChaldoAssyrians by *declassifying* them from existence. If the regime could not physically remove you, it tried – and with some success did – remove your ChaldoAssyrian identity.

The impact of these policies is profound. Dislocation from their cultural heritage is an outcome still affecting a large percentage of ChaldoAssyrians. Instead, they were forced to understand Iraq through the vision of a Ba'ath defined Arab state that eradicated the place of ChaldoAssyrians. A large percentage of ChaldoAssyrians are aware of their identity but unable to speak their language. Many more are further and further being dislocated from their ethnic identity, playing out a policy outcome of grand social engineering pursued aggressively by the Ba'ath party.

More disturbing to ChaldoAssyrians than policies such as ethnic cleansing and declassification from existence, has been the more subversive policy of Saddam to engender and nurture splits within the community. The consequence of this policy is evident even in the policy community in Washington which still grapples to identify this minority group with one consistent name. Some use the TAL formulation of 'ChaldoAssyrian', some use Assyrian or Chaldean exclusively and singularly, while many others use them concurrently.

The name ChaldoAssyrian is a compromise struck between numerous representative bodies in order to reflect the unity of the people. This decision arises from a decades-long policy of the Ba'ath party to foment a split in the community to further weaken its ability to politically project itself. Peoples called Chaldean, Syraic, Assyrian are all one people. They are all Christian, but of different religious denominations. The denominational differences are relatively recent to these peoples' collective 6700 year history in the region.

⁶ International Federation for Human Rights and Alliance Internationale pour la Justice, "Iraq: Continuous and Silent Ethnic Cleansing – Displaced persons in Iraqi Kurdistan and Iraqi refugees in Iran". <http://www.fidh.org/IMG/pdf/iq350a.pdf>. (accessed June 15, 2005). P. 17.

Constituting Democracy in Iraq , August 2005

The denominational differences were, and still are, being exploited to create and nurture separate ethnic groupings. State resources and apparatuses were used to sponsor pliable elements of the ChaldoAssyrian population in programs of fracturing the cohesiveness of this ethnic group. In the climate of ethnic cleansing and other forms of cultural genocide, the ChaldoAssyrian population was ripe for being undermined through the twisting and distorting of its history. The deliberate dislocation of peoples from one another within an already vulnerable minority represents a most heinous and vile contempt for human dignity and the precepts of freedom, but it is a legacy of Saddam's Iraq.

As a result, the perpetration and outcome of cultural genocide takes on completely new dimensions in Iraq. By rending apart some peoples from the whole, Saddam and those whom continue to exploit these divisions add to the dislocation of ChaldoAssyrians from their culture and heritage. Conveniently, it also serves to undermine the ability of ChaldoAssyrians to project themselves politically.

Religious Persecution and Targeting

During the Anfal campaign hundreds of ChaldoAssyrian churches were destroyed. This also took place during previous decades. Moreover, in post-liberation Iraq, ChaldoAssyrians are now subject to targeting by both terrorists and criminals. The visibility of their shared religion with the US liberating force and their perceived affluence through family connections living in largesse in 'western' countries makes them primary targets for hostage-taking. Terrorist and criminal targeting of their churches for bombings and shootings is something being felt very seriously by the community. It is spurring a high degree of flight to Syria and Jordan. Even the US Department of State could not ignore this reality in its 2004 Human Rights Report, stating that at least 30,000 fled in a period of months during 2004.

More insidiously, ChaldoAssyrian students (especially young women) are being targeted for un-Islamic dress and other sectarian grounds for attack – precluding them from an education and further marginalizing them in Iraqi society. All this serves to drive an excessive level of flight by families who are feeling fundamentally insecure in what is technically a free Iraq.

Summary

Enduring these events and conditions testifies to the resilience of a people with close to seven millennia behind them in Iraq and the Middle East. Regrettably, the effects of such targeting just in the past eighty years have been nothing short of devastating in terms of the ChaldoAssyrian demographic. It also means that marginalizing ChaldoAssyrians today is facilitated by the communal scarring left by modern Iraqi government policies. Removing the basis for ongoing threats and providing a platform for reversing the effects of past Iraqi government policies vis-à-vis ChaldoAssyrians is essential. Prioritizing such an approach will, as a result, foster a constitutional regime that protects and nurtures Iraq's most vulnerable people and thus invariably enshrines the fundamental rights of all Iraqis.

With the understanding this admittedly short history provides, the paper now turns to the issues, contents, and detail of a future Iraqi Constitution that is able to afford justice for all by ensuring the basic rights and freedoms of its most vulnerable minorities.

Federalism

A unitary state or some form of federation is a fundamental departure point in defining any constitutional arrangement for Iraq. Arising from the uniqueness of Iraq's history, and the Kurdish variable, most deliberations proceed from the assumption that federalism is inevitable. As David Phillips of the Council on Foreign Relations aptly summarized, "The Kurds are prepared to forego their dream of independence only if their core concerns are addressed. Kurds demand federalism, secularism, and the creation of a federal Iraqi state called Iraqi Kurdistan with Kirkuk as its capitol."⁷

Kurdish authorities not signing onto the TAL unless it gave them an effective veto must also be seen in conjunction with their demands for federalism. It is the Kurdish-run poll during the January elections that signals the high demand for federalism from this constituency. As one analyst said, "Kurds want at the very least a high degree of regional autonomy. [...] The unofficial Kurdish referendum on independence for Kurdistan ... should remove all doubts on this point."⁸ During the informal referendum in northern Iraqi areas under Kurdish Authority control, the pro-independence camp won eleven to one. This paper, therefore, operates on the assumption that federalism to some degree is unavoidable; with the caveat that any of the following recommendations for minorities can in principle be modified to suit a unitary national arrangement if necessary.

Two essential concepts marshal understandings of federal arrangements: power-sharing and group autonomy. The former addresses the need of groups to be involved in the processes of decision-making in a society on matters of interest. The latter allows these groups to have authority over their internal affairs.⁹ These principles are in no way exclusive to a specific group and there can be a high allowance for flexibility in their application. Some experts choose to circumscribe these rights based on population numbers, allowing only groups like the Shi'a and the super-minorities to enjoy such provisions. The error in this is it violates the principled realization of federalism, which once opened, must attempt to cater for all peoples. Persecution that generates complexity in solving the problems of ChaldoAssyrians, Turkmens, Yezidis, Mandaean and Shabaks is no reason to shirk the responsibility.

Three technical/empirical matters of federalism must be delineated from which all else will follow. These are: territorial demarcations, decentralization/devolution, and fiscal rights and processes. These are the subject of the following sub-sections.

Territorial Demarcations

Iraq's pre-modern history is rich – with some of the most civilizing societies emerging in its present-day borders. This gives it a rich history with people that have intense ties to the land. Territorial demarcations are going to alienate some while appeasing others but the

⁷ Phillips, David L. "Power-Sharing in Iraq". Council on Foreign Relations. http://www.cfr.org/pdf/Iraq_CSR.pdf. (accessed May 18, 2005). P. 11.

⁸ Ottaway, Marina. "Iraq: Without Consensus, Democracy is not the Answer". <http://www.carnegieendowment.org/files/PB36.ottaway.FINAL.pdf>. March 2005 (accessed June 1, 2005). P. 5.

⁹ Lijphart, Arend. "The Wave of Power-Sharing Democracy" in *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy*. Andrew Reynolds Ed. (New York: Oxford University Press, 2002). P. 39.

Constituting Democracy in Iraq , August 2005

general approach must seek a balance between justice and feasibility while assuaging ethnic and sectarian aspirations to some extent.

Geographic bases for demarcation are espoused by all major analysts and stakeholders as the ideal. This standard also made its way into the report of the Democratic Principles Working Group in laying out a post-Saddam Iraqi transition to democracy. These statements simply pay lip-service to an ideal that will not be met. It is absolutely essential to accept that Kurdish aspirations are expressly ethnic – or else the prospective name of their province would not be ‘Iraqi *Kurdistan*’. “While geographic and economic criteria are the most desirable, the Kurdish drive for ethnically defined constituent units will be difficult to disregard.”¹⁰ Being honest and forthright about this reality will ensure that proposals are not grounded in specious hopes of altruism in the primary motivations of Iraqi political actors. It is important to then acknowledge that redrawing Iraq’s state borders is necessary and must satisfy the super-minorities while also dampening Shi’a and nationalist fears that secessionism is the next possible step.

Balancing competing interests and concerns produces the following proposal:

Baghdad should remain one state. The nine governorates to the south and south-east of the country could become four states.¹¹ The governorates just north of Baghdad from east to west could be fashioned into three states.¹² This would provide assurances to the heterogeneous (but largely Arab) population of Baghdad. The remaining governorates and sections of existing governorates roughly north of the 36th parallel would be divided into three states, rounding out the proposed total of eleven.¹³

The Council on Foreign Relations put forth a proposal recommending five or six federal Iraqi states. One would be Baghdad, and the others would each consist of nothing less than three of the existing governorates.¹⁴ The International Crisis Group appears to accept such a basis for demarcation.¹⁵ Caution against the “five to six” state solution is stressed here. It over-prioritizes serving particularistic interests (such as ethnicity and sectarianism) at the expense of engendering the bases for compromise between groups through greater nodal points for dialogue and debate in the form of states. As Arend Lijphart emphasizes, “it is advisable that the federation ... component units (states or provinces) be relatively small ... to avoid dominance by large states on the federal level.”¹⁶ Five or six states represents an extreme in the territorial demarcation debate (except for

¹⁰ Public International Law and Policy Group, and The Century Foundation. “Establishing a Stable Democratic Constitutional Structure in Iraq: Some Basic Considerations”. May 2003.

<http://www.reliefweb.int/library/documents/2003/pilpg-irq-31may.pdf>. P. 24.

¹¹ These could be fashioned from Basrah, Muthana, Dhiqar, Maysan, Wasit, Najaf, Babil, Karbala, Qadisiyah.

¹² These would be organized out of Anbar, Salahadin, Diyala, Tamim on the one hand and the lower areas of Irbil, Sulaymaniyah, and Ninawa on the other.

¹³ These would consist of a north-eastern state from parts of Arbil and Sulaymaniyah; a north-western state carved out from Arbil and Dohuk (likely to be called ‘Iraqi *Kurdistan*’); and a smaller state lying beneath these two others in north and north-eastern Ninawa (called ‘Ashur’).

¹⁴ Phillips, David L. “Power-Sharing in Iraq”. Council on Foreign Relations. http://www.cfr.org/pdf/Iraq_CSR.pdf. (accessed May 18, 2005). P. 22.

¹⁵ International Crisis Group. “Iraq: Don’t Rush the Constitution”. June 8, 2005. http://www.crisisgroup.org/library/documents/middle_east_north_africa/iraq_iran_gulf/42_iraq_don_t_rush_the_constitution.pdf. P. 10.

¹⁶ Lijphart, Arend. “Constitutional Design for Divided Societies”. *Journal of Democracy*. Vol. 15, No. 2. P. 105.

Constituting Democracy in Iraq , August 2005

the preposterous Kurdish Regional Government demand for a two-state confederation on a simple Kurdish-Arab axis).¹⁷

At the other end of the spectrum is the allowance by Adeed Dawisha to possibly retain the eighteen governorates if just to avoid “blatant ethnic and sectarian concerns.”¹⁸ Such an approach is also known to be relatively popular among the Sunni Arab population.¹⁹ This also shirks the responsibility to rework a failed arrangement. Eighteen provinces is unwieldy and can prove to be an overly burdensome monetary obligation on the national fiscus. It also retains the basis for division of peoples.

The proposal here for eleven states acknowledges the ‘tacit’ ethnic and sectarian concerns of the Shi’a majority and the Sunni and Kurd super-minorities. It provides a modicum of justice in that it mitigates the effect of eighteen governorates used to divide peoples. It also reduces the cost ineffectiveness of sustaining eighteen governorates (with their requisite administrative and political apparatuses). Eleven states offers greater efficiency but accounts much more for mitigating the potential of ethnic ossification and subsequent secessionism. In this way it meets the three requirements of justice and feasibility that balance with satisfying historically grounded ethnic and sectarian concerns.

Additionally, it creates one state – called Ashur – that genuinely transcends all ethnic and sectarian divides. It surpasses Baghdad in that despite the capitol’s heterogeneity, it will always be predominantly Arab. In this state roughly north of the 36th parallel is a land that consists of Shi’a and Sunni Arabs, Kurds, Turkmens, Shabaks, Yezidis, and ChaldoAssyrians with no group nakedly dominating the others (as would be the case in every other state). Ashur can be the only non-ethnically, non-religiously determined state and serve as a model for the rest of the country.

The proposed state of Ashur also affords entirely marginalized minorities such as Turkmens, Yezidis, Shabaks, and ChaldoAssyrians some degree of justice and comfort in having territorial representation that balances reasonably with their proportion of the population. Federalism as a principle will then be fulfilled because it will reach all peoples, even on a territorial basis. This overturns the effort of previous Iraqi regimes to decimate these peoples, while not fundamentally prejudicing the needs of the three major groups (Shi’a, Sunni, and Kurd).²⁰

Federalism experts note that if only two or three groups are given representation, it can build conflict into the system of governance. A majority group will focus on the center for power while the two others would push for devolved authorities.²¹ This is a struggle that Iraq will face (as do all federations – new and old). Tensions can be mitigated, however,

¹⁷ Public International Law and Policy Group, and The Century Foundation. “Establishing a Stable Democratic Constitutional Structure in Iraq: Some Basic Considerations”. May 2003. <http://www.reliefweb.int/library/documents/2003/pilpg-irq-31may.pdf>. P. 15.

¹⁸ Dawisha, Adeed. “Iraq: Setbacks, Advances, Prospects”. *Journal of Democracy*. Vol. 15. No. 1, January 2004. P. 16.

¹⁹ International Crisis Group. “Iraq: Don’t Rush the Constitution”. June 8, 2005. http://www.crisisgroup.org/library/documents/middle_east_north_africa/iraq_iraq_iran_gulf/42_iraq_don_t_rush_the_constitution.pdf. P. 10.

²⁰ This proposal builds on a challenge that David Phillips sets forth but then seems to avoid in his piece, “Power-Sharing in Iraq”. In it he states, “For Iraq to become a viable state, the permanent constitution must establish a system of governance that addresses the core concerns of Iraq’s diverse ethnic and sectarian groups”, but when discussing territorial demarcation argues that, “Iraqi Turkmens and ChaldoAssyrians must recognize that they reside in federal Iraqi states where Arabs and Kurds constitute the majority.”

²¹ Ghai, Yash. “Role of Constitutions in the Transition to a Consolidation of Democracy”. Conference on Democratic Transition and Consolidation. Madrid, October 19 to 27, 2001. Conference submission. P. 2.

Constituting Democracy in Iraq , August 2005

through the existence of eleven states and by creating a state called Ashur, home to an amalgamation of real minorities, where no group holds a definite plurality. The latter's natural heterogeneity would compel it to seek compromise solutions in debates on devolved authority, jurisdiction and fiscal federalism.

In implementing this demarcation, it is essential for maintaining the principle that there be a "prohibition against altering the proportion of a minority in areas inhabited by them."²²

Decentralization/Devolution

Decentralization and devolution are used here inter-changeably. Necessity drives decentralization. Necessity arises from a territorial federalism that must be complimented by meaningful areas of policy jurisdiction at the state level – a degree of autonomy, in effect. Kanan Makiya, perhaps one of the better known scholars on topics of governance in Iraq, effectively demands decentralization. He argues that without decentralization of powers to the sub-federal governments, "there can be no federalism worthy of the name."²³

Actually, decentralization must be a priority for one paramount reason: Iraq is a state designed to be manipulated from the center. Centralization is a governance trend nurtured by the British mandate power and that Saddam Hussein virtually perfected. Centralization in Iraq masks what is actually 'state seizure' by narrow segments of the body politic. State seizure was the foundation stone for tyranny. Smashing such a pillar of Iraqi politics is the driving necessity behind devolution and must be an explicit policy outcome from the very onset of drafting a new constitution. Building new pillars on the basis of devolution, which are equitable and sustainable, is the challenge facing Iraq's constitution drafting body.

Invariably ethnic and sectarian considerations must also be factored into the interests served by decentralization. It is one of the three principles that needs to be met as set out in this paper for good reason. The International Crisis Group acknowledges, "after decades of power imbalance and discrimination ... [e]thnic inequities and unresolved political and economic issues could ignite tensions and provoke violence between Kurds, Arabs, and Turkomans. [...] the regime's tendency to rule along regional, tribal or sectarian lines inevitably has politicised these differences..."²⁴ Power-sharing is the principle means for addressing the core communal demands of Iraq's variegated peoples.²⁵ This is especially so when the only effective corporate groups are ethnically or religiously defined as is the case in Iraq.²⁶

²² Ghai, Yash. "Public Participation and Minorities". Minority Rights Group, July 2003. <http://www.minorityrights.org/admin/Download/pdf/PublicPartic2003.pdf>. P. 7.

²³ Makiya, Kanan. "A Model for Post-Saddam Iraq". *Journal of Democracy*. Vol. 14, No. 3. P. 8.

²⁴ International Crisis Group. "Iraq Backgrounder: What Lies Beneath". October 1, 2004. http://www.crisisgroup.org/library/documents/report_archive/A400786_01102002.pdf. P. 14.

²⁵ Lijphart, Arend. "Constitutional Design for Divided Societies". *Journal of Democracy*. Vol. 15, No. 2 (April 2004). P. 96.

²⁶ Ghai, Yash, Mark Lattimer, Yahia Said. "Building Democracy in Iraq." Minority Rights Group, February 2003. <http://www.minorityrights.org/admin/Download/Pdf/IraqReport.pdf>. P. 33.

Constituting Democracy in Iraq , August 2005

Devolution deemphasizes the center, Baghdad, as the sole repository of power. For groups who will either never claim the center in a majority, or who are dislocated through electoral fortunes, there will always be an acceptable 'second-best' alternative in their region/locality.²⁷ Pernicious outcomes of zero-sum calculations that demand control of the center become lessened through devolution when implemented robustly.

The constitution drafter's conundrum is to define the parameters of devolution as a principle – just as is done with territorial demarcation. The same three guideposts remain: justice, feasibility, and ethnic/sectarian considerations. Devolution can be seen from three aspects depending on what stakeholder cap one is wearing. For the democratic transition expert, devolution needs to be informed by past injustices, providing for a degree of redress while also facilitating development. Administrators will seek assurances of efficiency in governance and delivery of basic goods and services. Political party officials require that some attention be given to their ethnic and sectarian concerns in defining what powers are devolved, and the inter-relationships between the tiers of government.

Unlike territorial considerations of federalism, there is much more room for flexibility and novelty with devolution.²⁸ Considerations of population thresholds and other such nominal criteria need not entirely prejudice the basic rights and interests of non-super-minorities such as ChaldoAssyrians. Using this outlook can facilitate the greatest basis for making the constitution a truly transformative instrument in democratization. This is, of course, to some extent dependent on the territorial demarcation framework outlined above. If the extreme proposal of five to six states stands, it could nullify the positive impact of the proposed arrangement for decentralization.

Some scholars are predominantly focusing on decentralization from the federal government to the states. Kanan Makiya is guilty of this error when he writes, "a truly federal system of government is one in which political authority is from the outset constitutionally divided between central and regional political units."²⁹ This is surprising, since international trends are already reflecting the great importance of local government. Municipalities are the delivery points for many basic services and policy development. Myopic considerations fueling this oversight by some arise from adopting a discourse of monolithic blocs in Iraq (e.g. the Shi'a, Sunni, Kurd or Arab-Kurd discourse). These blocs are naturally concerned with ensuring strong states in compensation for sharing the center. Their approach masks what is nothing more than a shift in zero-sum calculations of state seizure to the state and/or regional level.

Robust decentralization will mitigate against such an eventuality, while concurrently serving the three principles identified above. By widening the scope of devolution as enshrined constitutionally to include the municipal tier of government, drafters will lay the bedrock for a stable balance in federal state relationships and preclude the ability of one group to entirely marginalize another. Such an approach is also the most practical developmental strategy for overcoming Iraq's economic and social development challenges.

This strategy has other proponents. David Phillips of the Council on Foreign Relations writes:

²⁷ Reynolds, Andrew. "Constitutional Medicine". *Journal of Democracy*. Vol. 16, No. 1 (January 2005). P. 62.

²⁸ Lijphart, Arend. "Constitutional Design for Divided Societies". *Journal of Democracy*. Vol. 15, No. 2 (April 2004). P. 105.

²⁹ Makiya, Kanan. "A Model for Post-Saddam Iraq". *Journal of Democracy*. Vol. 14, No. 3. P. 8.

Constituting Democracy in Iraq , August 2005

*Decentralization is another way to enhance group rights. Consistent with the principle of decentralization, federal Iraqi state, governorate, county, district and municipal governments should be able to adopt laws conforming to local customs just so long as such laws do not contradict the constitution or laws enacted by the national parliament [...]. Federal Iraqi states should be encouraged to devolve authority to the local level to the greatest extent practicable.*³⁰

Indeed, the Democratic Principles Working Group asserted this approach in its framework for a post-Saddam Iraq.³¹

The suggestion here goes further by requiring institutionalizing the idea of devolution to the local level of government constitutionally. Outlining these powers and the framework for intergovernmental relations is therefore critical.

The national sphere of government would have ministries for defense, national economic management (including taxation, monetary policy, debt management, etc.), foreign affairs, natural resources, national transportation, customs policy, national policing, social welfare, citizenship and immigration, telecommunications, postal services, broadcasting, fisheries, labor and civil and criminal law, development and local government.³²

The state sphere of government would be responsible for guiding the overall policy direction in education, health, social policy, state languages, state policing, agriculture, state economic development, social welfare, state transportation, and regional economic development. There can be several shared areas with the national sphere of government that can be negotiated. Ultimately, state government will provide broad policy guidance/direction in its respective jurisdiction. Its administration can provide a regional appreciation of the policy environment and assist in planning – albeit without the delivery/implementation responsibility.

Local government would be constitutionally recognized as the implementing agent for a number of core government deliverables, but particularly including: education, health, arts and culture, local taxation, local policing, rural/urban planning, social welfare (through multi-purpose community centers as nexus points for an array of social welfare deliverables), and shared areas with the state government. India's ground-breaking work in local government development and decentralization provides the best model for Iraq to adopt. Schedules eleven and twelve of their constitution, enshrines a sound list of

³⁰ Phillips, David L. "Power-Sharing in Iraq". Council on Foreign Relations. http://www.cfr.org/pdf/Iraq_CSR.pdf. (accessed May 18, 2005). P. 26. It is also noteworthy that David Phillips makes this suggestion but later calls for all powers not defined as federal to go to the states – with no mention of devolution to the local tier of government.

³¹ Ghai, Yash, Mark Lattimer, Yahia Said. "Building Democracy in Iraq." Minority Rights Group, February 2003. <http://www.minorityrights.org/admin/Download/Pdf/IraqReport.pdf>. P. 25.

³² A Ministry of Development and Local Government would be responsible for providing a national-level approach to the awesome task of seeing major infrastructural development in communities and the recovery of their economic health. This demands a national strategy with local implementation. Capacity-building of local government is also fundamental and must be done in conjunction with the proposed national norms and standards system.

Constituting Democracy in Iraq , August 2005

governance matters over which rural and/or urban local government would have jurisdiction.³³

The fundamental principle must be devolution to municipal government as much as possible and in order to maintain consistency with Art. 56(c) of the TAL.³⁴ This is practical in that municipal infrastructure for delivery will out of necessity be in each town and at least nearby every village. It also ensures a greater degree of proximity between the service provider (local government) and the citizen – making government appreciably more accountable and responsive to the citizenry. This is the bedrock of a democratic society. State government can realize immense efficiencies in devolving key deliverables and essentially using municipal delivery infrastructure too.

Iraq's constitution must require the formation of local governments over the entirety of the country to be realized through enabling legislation. That process must align itself to the spirit of the constitution with the principles identified above and the assurance that powers and rights will be constitutionally enshrined. If they are not, state levels of government will run roughshod over local government and thereby alienate peoples and undermine democratic development in Iraq.

Underpinning the entire system of devolution must be a Board of National Norms and Standards comprised of officials and representatives from various states and localities. This Board must be constitutionally mandated to constantly develop policy data on national norms and standards of delivery in light of geographic, demographic, and development demands of all major government services. Such a Board will offer ratios on, *inter alia*, educational institutions by type vis-à-vis a population parameter, teacher-student ratios, and supplies to schools in relation to student population. It will be the responsibility of the national government to ensure that no jurisdiction is left dramatically behind in terms of reconstruction and development.

Equitable development for all Iraqis at the coal-face of the community level of government is fundamental to reshaping Iraqis' understanding of government. Previously, government resources were explicitly disbursed in a framework of patron-client relationships. A system of national norms and standards ensures that resources reach all communities in as equitable a manner as practicable.

The proposed arrangements guarantee the realization of a strong, national Iraq (by securing the appropriate and robust areas of delivery for that sphere of government). It is a framework that puts pride of place on efficiency (by recognizing devolution for local government delivery). It satisfies the latent (to say the least) ethnic and sectarian concerns of the major groups by ensuring peoples' regional representation is meaningfully sustained

³³ In rural localities (called 'panchayats'), jurisdiction is granted over, *inter alia*: agriculture, land improvement and land reforms, small scale industries, rural housing, drinking water, roads, bridges, waterways, poverty alleviation programs, primary and secondary education, technical training and vocational training, adult and non-formal education, culture, health and sanitation (including hospitals, primary health centers, and dispensaries), family welfare, women and child development, and social welfare. Schedule eleven can be found at: <http://indiacode.nic.in/coiweb/fullact1.asp?tfnm=00%20515>. Urban local governments have jurisdiction in matters of: urban and town planning, building construction, planning economic and social development, roads and bridges, water supply for domestic and commercial purposes, public health, fire services, urban poverty alleviation, and culture. Schedule twelve can be found at: <http://indiacode.nic.in/coiweb/fullact1.asp?tfnm=00%20516>. In predominantly ChaldoAssyrian urban centers, education would also fall under their jurisdiction.

³⁴ This articles states that, "Where practicable, the federal government shall take measures to devolve additional functions to local, governorate, and regional administrations, in a methodical way. Regional units and governorate administrations, including the Kurdistan Regional Government, shall be organized on the basis of the principle of de-centralization and the devolution of authorities to municipal and local governments."

Constituting Democracy in Iraq , August 2005

vis-à-vis the municipalities in their jurisdiction. Finally, it provides a pillar of security for all Iraq's peoples against potential marginalization by the state and national government.

In the absence of such an arrangement, whereby local councils are given the mandate and the resources for core government deliverables, it will be necessary to create minority commissions on key deliverables. Education, health, culture, local policing and elements of social welfare policy would have commissions comprised of elected ChaldoAssyrians to determine policy, with assured resources for ChaldoAssyrian communities. This is a sub-optimal arrangement but is essential in the absence of strong municipal government. Such systems are in place in Estonia, Hungary, the Russian Federation and Slovenia.³⁵

Yash Ghai makes the case most simply when he says, "A particularly valued form of participation is self-government, where specific matters of special concern to a minority are delegated for policy or administration to the minority."³⁶ Provisions for minority policy determination and administration in key sectors vital to their existence can exist at the national, regional and local level. These must be carefully arranged and developed because it also demands measures blocking any other form of government from interfering in these pockets of separate governance.³⁷

Fiscal Federalism & Division of Revenue Solutions

Unfunded mandates (where the necessary funds do not follow devolved functions) are the most pernicious consequences of poorly devolved authority in federal systems. Local government must receive the resources necessary to fulfill the functions devolved to it. In this sense, fiscal federal arrangements become the true test of a society's commitment to genuine federalism. Local government must have secure sources of projected revenue upon which it can develop its plans and priorities. In the absence of assured revenue, local government (indeed any tier of government facing such a situation) will fail to meet the community's expectations and rapidly lose legitimacy in the eyes of the citizenry. The knock-on effects of such a condition can be disastrous for a nascent democracy. Already there are some voices in the street commenting that basic services were more secure during Saddam Hussein's tenure.

The constitution must require legislation for a division of revenue framework and formulae. Ministry of Finance officials (along with their counterparts in the Treasury) will be responsible for developing the division of revenue formulae and operationalizing them in each budget cycle. This process will determine each state's and municipal government's equitable share of the national revenue base. The formulae must account for, *inter alia*, demographics (population by age, gender), socio-economic indicators (education levels, health) local economic conditions (as indicators of a local government tax-base), and local infrastructural backlog requirements (e.g. roads needs, electrification, water treatment, etc.). Clearly the Board of National Norms and Standards can serve as an outside agency to comment on the formulae each cycle and make recommendations based on their work and information databases.

³⁵ Ghai, Yash. "Public Participation and Minorities". Minority Rights Group, July 2003. <http://www.minorityrights.org/admin/Download/pdf/PublicPartic2003.pdf>. P. 25.

³⁶ Ghai, Yash. "Public Participation and Minorities". Minority Rights Group, July 2003. <http://www.minorityrights.org/admin/Download/pdf/PublicPartic2003.pdf>. P. 12.

³⁷ Immediately such an arrangement implies the existence of an identity card stating ethnicity or sectarian classification. Identification will allow for voting in councils to do this particular governance work and to receive the goods and services as a member of that minority. Ghai, Yash. "Public Participation and Minorities". Minority Rights Group, July 2003. <http://www.minorityrights.org/admin/Download/pdf/PublicPartic2003.pdf>. P. 23.

Constituting Democracy in Iraq , August 2005

Running these formulae provides the basis on which to project an allocation for every state and municipality – leaving these spheres of government with the prerogative of how to actually apportion the monies. This would provide the high degree of discretion to allow the local elected officials to fulfill electoral mandates (a pillar of democracy). Concurrently, it provides a high degree of transparency on which to hold state and municipal government accountable.

Oil revenue meant that Iraqis never had to pay taxes. This situation will change over time. In order to not preclude local government avenues for future revenue, it is important to provide them with taxation powers to fund selected services (e.g. primary health care or education). These powers will not become operational until communities reach a certain socio-economic threshold. Once the defined threshold is passed, national formulae can be restructured to act as top-up grants to what will become a local tax-base – allowing citizens to see what they are paying for just like in most jurisdictions. Some services will continue to require a substantial portion of funding from the national purse, however.

This approach serves two fundamental principles of governmental financial management. It provides the citizen with the assurance of proximity to the authority most involved in her/his day-to-day life. Although most Iraqis will not become taxpayers for some time to come, the resources at the government's disposal certainly belongs equally to all of them. As such, they deserve the opportunity to have the delivery agents closest to them respond to their pressing needs.

It also guarantees a higher potential for accountability. The fact that most civil servants and their political masters will be drawn from the locality (and in the case of the latter, elected too) assures that systems of graft, corruption, and misappropriation will be harder to develop and/or sustain.

Iraq's governmental financial management system would see all funds reach the national government, to then be apportioned as per weighted variables/priorities (such as health, education, welfare) against national norms and standards for delivery and then disbursed to the respective governmental sphere of delivery. This offers a high degree of transparency and predictability in the financial management system. At the same time, it offers the state level of government the chance to top-up programs and spending items in their jurisdiction, and to facilitate the policy guidance in their respective territories. All three spheres of government would be fulfilling roles best suited them, while satisfying the concerns of the stakeholders seeking a say in governing their own affairs.

A fiscal federal system grounded in transparent and predictable transfers from national treasury to the relevant provincial and municipal treasuries for defined services at set minimum standards removes calculations by stakeholders intent on controlling resources. Once again, it is vital to be honest about what is motivating certain stakeholders in the redefinition of Iraq's governance framework. Resources, particularly oil wealth, are an object of significant attention to all parties.

There are suggestions in the policy community to see Iraq's oil wealth become nationally administered in some fashion.³⁸ Oil and Iraq's natural resources must be nationally administered through agreed upon systems of division of revenue (stipulated above), thereby removing calculations that see resource control as a zero-sum game.

³⁸ David Phillips of the Council on Foreign Relations and the Public International Law and Policy Group and the Century Foundation espouse such a view, among others.

Constituting Democracy in Iraq , August 2005

Given Iraq's over-reliance on oil wealth, and the collapse of its economy, oil revenue for government assumes heightened value. For example, in an interview with the International Crisis Group, Barham Salih stated, "A new Iraqi government should be broad-based, representative and democratic, and take into account Kurdish aspirations and concerns. As an Iraqi citizen and a Kurdish citizen of Iraq, I will have the right to participate in such a government along with other Iraqi citizens *to guarantee an equitable distribution of resources.*"³⁹

Resources can cause splits within groups that are often treated as homogenous blocs when talking about federalism. The potential for such splits over resources and access to power manifested in the Kurdish civil war from 1994-98.⁴⁰ The 'Sunnis' can just as easily slip into serious tension on matters of resource allocation. Salah Omar Ali and Ayad Alawi, founders of the Iraqi National Accord, split apart due to a "disagreement concerning the allocation of Saudi subsidies."⁴¹ Upon independence, matters of resource allocation will consume much greater significance than Saudi subsidies. In that environment, transparent and predictable methods of resource division through robust division of revenue formulae and arrangements will become the primary source of building trust and confidence in Iraq's democracy – not the right to vote.

A system of transfers to each level of government determined by set national formulae and guided by the devolved authorities to each jurisdiction will allay Kurdish, Sunni, Shi'a, Turkmen, ChaldoAssyrian, Mandaean, and Shabak concerns. This neutralizes oil and other resource wealth as a potential source of conflict and destabilization. During the Oil-for-Food Program (OFFP) thirteen percent of the revenue earned by Iraq went to the Kurdish Regional Government. Since at least May 2003, seventy-four percent of the Development Fund for Iraq is slated for Baghdad, with the remaining twenty-six percent going to the "Kurdish population."⁴² This division of revenue was the only workable solution in light of the challenges facing all stakeholders with the collapse of Saddam Hussein's regime. It is now an obsolete formulation as the limitations in the immediate aftermath of regime collapse no longer exist.

³⁹ International Crisis Group. "Iraq Background: What Lies Beneath". October 1, 2004.

http://www.crisisgroup.org/library/documents/report_archive/A400786_01102002.pdf. P. 19. (emphasis mine.)

⁴⁰ As the ICG notes in its excellent background report on Iraq, "The PUK alleges that it has received only US \$4 million from the KDP since 1998 while the KDP is said to earn as much as \$2 million daily from oil trafficking and other trade." International Crisis Group. "Iraq Background: What Lies Beneath". October 1, 2004.

http://www.crisisgroup.org/library/documents/report_archive/A400786_01102002.pdf. P. 18 and 27.

⁴¹ International Crisis Group. "Iraq Background: What Lies Beneath". October 1, 2004.

http://www.crisisgroup.org/library/documents/report_archive/A400786_01102002.pdf. P. 14.

⁴² Public International Law and Policy Group, and The Century Foundation. "Establishing a Stable Democratic Constitutional Structure in Iraq: Some Basic Considerations". May 2003.

<http://www.reliefweb.int/library/documents/2003/pilpg-irq-31may.pdf>. P. 23.

Transparency and Accountability

Iraq's Constitution must require legislation guiding the systems of financial transparency and accountability for the country at all levels of government. The best standard is to require full reporting on the use of any state resources – whether applied by government bodies or transferred to the private sector in outsourcing delivery. This requirement also provides a key pillar sustaining any system of fiscal federalism. It allows each sphere of government the opportunity to monitor the state of the nation's finances and thereby project its own revenue. As the South African constitutional scholar/expert, Christina Murray notes, "constitutional drafters are mistaken if they believe that their job is done once they have provided for regular elections and constitutional guarantees of individual rights [...]. While these are essential, they are not sufficient in the complex world of contemporary governance. Accountability – or ensuring that government is responsive to the people – requires additional safeguards."⁴³

The legislation ensuing from a constitutional imperative must of course be domestically developed. It can benefit from existing paradigms such as Australia's 'Financial Management and Accountability Act', The United States' legislation on government information, the 'Government Performance and Results Act' and the 'Inspector General Act'. Many other transitional societies offer models too; such as South Africa's 'Public Finance and Management Act'. Developing a robust system of transparency is the determining variable of whether Iraqis will also be able to hold their government accountable. In the absence of credible and current information, citizens and other spheres of government will not be able to ensure whether their fundamental interests are being prejudicially treated by the national, state or local spheres of government. This will foster mistrust and nurture dissent by fueling perceptions of illegitimacy in one government or another. Mitigating this potential can only be done when every stakeholder has an opportunity to understand the condition and direction of the government's financial resources.

With a shattered economy that is only now seeing any real opportunity for growth, and a government system that has never known transparency and accountability, it is vital that the constitution embed these ideas and guide the requisite legislation. A system of predictable and agreed upon formulae that determine allotments for spheres of government based on their functions, yet leaves the transfers as discretionary, is a substantial preventative measure against corruption. Given Iraqi claims of extensive corruption to this day, it must be a high priority to deal with it in the constitution.

Ultimately, any such legislation should meet several basic criteria. It must demand clarity on total national revenue; how much will be ring-fenced for debt servicing; how much expenditure is projected by the national government to run its departments (broken down by program and sub-program); how much it is transferring to state government and how much it is transferring to municipal governments based on the division of revenue formulae enacted into law. It must do this with at least two-year forward projections from the current financial year (effectively a medium-term expenditure framework).

This same guiding principle must apply to state and municipal government.

⁴³ Murray, Christina. "Notes on Constitutional Design" Conference on Democratic Transition and Consolidation. Madrid, October 19 to 27, 2001. Conference submission. P.2

Constituting Democracy in Iraq , August 2005

Transparency and accountability are fundamental in overcoming what was nothing short of endemic patronage, corruption, and extensive socio-economic manipulation by the state of peoples unfriendly to the government. The best paradigm can be found in South Africa's constitution. It demands the promotion of "efficient, economic and effective use of resources" (Art. 195(1)(b)), and in its section on co-operative governance, it requires provision for, "effective, transparent, accountable and coherent government" (Art. 41(1)(c)). If stakeholders are to continue to see federalism as a viable option for building a democratic Iraq and not opt out for either outright seizure of the state or secession, this legislative framework must come into existence and be implemented quite rapidly.

The need for greater transparency and accountability could not be more urgent given the last two years of financial management in Iraq. Larry Diamond, a democratic transition expert and also Coalition Provisional Authority (CPA) advisor, urged a focus on transparency early this year. He writes, "In a second miscalculation, the CPA never allowed for the US occupation itself to be held accountable [...] Iraqis complained about corruption and abuse in the awarding of reconstruction contracts by the CPA..."⁴⁴ These problems exacerbate latent hostility between numerous ethnic and religious groups – and even within groups (as mentioned above).

⁴⁴ Diamond, Larry. "Lessons from Iraq". *Journal of Democracy*. Vol. 18, No. 1, January 2005. P. 18.
Copyright, ISDP 2005 <http://aas.net/isdp>

Forming Legislatures and Legislature Decision-Making:

Parliament is always going to be a vital body, but is especially so in a nascent democracy. It offers all of Iraq's peoples the most tangible evidence that they are included in the new Iraq. Many groups were represented in previous dictatorial regimes, but in a post-Saddam Iraq, with what many feel are free and fair elections, parliamentary aspirations increase exponentially. The reason is quite simple. While elections give a citizen a once-off chance every four to five years to influence governance in the country directly, one's elected representative operationalizes that vote for the period between elections.

There are a litany of decisions to make about legislature structure and arrangements, but the most fundamental are: whether to establish a presidential or parliamentary arrangement to guide legislatures, the way a legislature is constituted and how it is to take its decisions, and adoption of either a unicameral or bicameral system (with much room for creativity in between).

A Parliamentary System is Best

Parliamentary systems, statistically-speaking, constitute 30 of 36 stable democracies according to one study.⁴⁵ The chance that this is a purely spurious relationship is not great enough to dismiss it as an overall indicator of the intrinsic value of parliamentary systems. Parliament provides all peoples in transitional societies with confidence in the government's ability to operate. Presidential systems can have an elected government's agenda blocked (as seen so often in the US). This is not intrinsically negative, except that the US has a bureaucratic apparatus that can sustain itself despite a legislature-executive impasse. This is never assured in transitional societies. Stalemates and blockages in governance can destroy groups' confidence in the system and help them decide on opting-out of the democratic experiment.

Presidential systems have a greater degree of zero-sum game calculations in that there is one leader (something inherent to having a president), for a fixed term. Parliamentary systems, where the leader is drawn from the legislature, inherently facilitate a structure for direct accountability between elections through votes of no confidence. Accountability is most profoundly exercised by this mechanism – if ever used. If the leader or executive loses the confidence of the legislature to govern, a vote of no confidence will bring down the government because the peoples' representatives desire it.

Compromise is fundamental to parliamentary systems – as seen in Iraq today through the continuous exchanges between various factions. Such a system provides fertile ground for confidence-building measures between parties/groups on a continuous basis. With a legislative agenda that starts from the prime minister, channeled through the executive and processed by parliament's apparatuses, there is also a great amount of incentive for meaningful inter-group dialogue between backbench members of parliament.

⁴⁵ Lijphart, Arend. Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries. (New Haven: Yale University Press, 1999). P. 121.

Constituting Democracy in Iraq , August 2005

Forming a Legislature and Taking Decisions

Obviously legislatures are formed through elections in most democratic states. There are exceptions and these exceptions must be considered for Iraq and its most vulnerable minorities. Iraq requires a system that assures certain minorities of an appropriate level of representation in the legislature(s).

This can be done through a twofold arrangement. First, a proportional representation system is essential because many minority communities are also geographically dispersed as a result of Ba'ath Arabization policies. Second, is to reserve seats for these minorities in the legislatures.⁴⁶ To allow for a robust opportunity for representation, "delegates should be chosen ... with a low threshold."⁴⁷ Those parties considered to speak legitimately for the community and to represent it must gain their votes by running on their own list in the elections. They may espouse an array of policy views and align themselves with other groups on ethnic, religious or political lines – but they must be able to demonstrate that they have a legitimate constituency for whom they speak in conjunction with their ethnic identity. If enough ChaldoAssyrians, Mandaeans, Yezidis, Shabaks, and Turkmens fill their reserved seats through elections (or even exceed them) that is sufficient. If they fall short, a formula using the votes gathered by the parties that passed the threshold can be used to allocate the remaining seats from the parties' lists.

The principle reason for requiring that parties be elected on independent lists, is that in the case of ChaldoAssyrians, the policies of ethnic cleansing, cultural genocide, religious targeting and climate of fear have undermined its ability to adequately project itself politically as a group. This adverse outcome inflicted on the ChaldoAssyrian identity continues to manifest itself. In the resoundingly successful first free elections in Iraq – not only were a large proportion of ChaldoAssyrians disenfranchised by not being able to vote – but the majority of ChaldoAssyrians who did make it into the National Assembly did so on the list of another ethnic group.

For example the January 2005 elections brought Mr. Ablahad Afram Sawa into the National Assembly. He is the President of the 'Chaldean Democratic Union Party'. The name itself testifies to the policy stance on whether Chaldeans and Assyrians are one people. He was elected on the Kurdish list. While Mr. Sawa is entirely entitled to his political opinions, the fact that he was elected on a Kurdish list means he has no demonstrable constituency on a significant scale. He may be allowed to sustain himself on the Kurdish list – with all the stigma it accords to the Kurdish parties for perpetuating a program of cultural genocide against another minority – but it does not constitute ChaldoAssyrian representation. For this reason, under the proposed framework here, he is entirely precluded from assuming one of the reserved seats in the National Assembly for ChaldoAssyrians or from being a legitimate spokesman for them. He should be able to run as the Chaldean Democratic Union Party independently, and if he retains the designation ChaldoAssyrian in his identity book and passes the electoral threshold, take up a reserved seat like the independently elected ChaldoAssyrian party in the National Assembly today.

⁴⁶ Many jurisdictions reserve seats for vulnerable groups, the most successful example is that of India, which reserves seats for the most vulnerable castes and minorities at a level of roughly 20 percent of the seats in the legislature. Ghai, Yash. "Public Participation and Minorities". Minority Rights Group, July 2003. <http://www.minorityrights.org/admin/Download/pdf/PublicPartic2003.pdf>. P. 16-17.

⁴⁷ Elster, Jon. "Ideal and Reality in Constitution-Making". Conference on Democratic Transition and Consolidation. Madrid, October 19 to 27, 2001. Conference submission. P. 1.

Constituting Democracy in Iraq , August 2005

ChaldoAssyrian, Turkmen, Yezidi, Shabak, Mandaean elected through parties that ran independently can be seen as the authoritative voices of these constituencies on policy matters relevant to them. Additionally, these legitimate representatives must be able to nominate persons for power-sharing posts within the executive and other arms of government.

Without adequate representation in the National Assembly and the Senate, ChaldoAssyrians cannot hope to realize an equitable share of the benefits of democratization nor make their full contribution to the process of democracy-building in Iraq.

Without adequately providing for the representation of these minorities, Iraq and the coalition would be sanctioning and solidifying the outcomes of past policies of ethnic cleansing and cultural genocide.

Additionally, they will not be able to fulfill the essential role of holding the government to account. Elections provide some form of majority (whether it is exclusive or a coalition) a mandate to govern. The other members in the legislature – along with regular members of parliament – will be responsible for ensuring that the government accounts for its actions. “The minorities will not be able to exercise their responsibility if they lack sufficient presence in debates and governance bodies in Parliament. Once the channels for the participation of minorities have been guaranteed, the application of majority rule in decision-making should be ensured and facilitated.”⁴⁸

In the absence of constitutional guarantees for representation of the most vulnerable minorities, it will be necessary to develop governing councils of each minority that direct particular policies vis-à-vis their community. This can be done on a geographic and/or non-geographic basis. In essence the constitution must facilitate ChaldoAssyrian, Turkmen, Yezidi, Shabak, and Mandaean autonomy in matters of education, personal law, culture, language, religion, and matters of social welfare policy that have cultural/religious ramifications.⁴⁹

A Bicameral Arrangement

Over-burdening the nation by creating too much government is always a concern. The formation of each institution and its potential contribution must be weighed against a number of costs. A legislature costs money in just establishing and maintaining a building, staffing, operational costs linked to administration, and for providing a place for the executive to engage with members of parliament. The question becomes, why create a second, weaker chamber?

An Iraqi Senate will provide the platform for regional representation as is done in numerous other federal countries. In effect, it provides another pressure release valve

⁴⁸ Cisneros, Gabriel. “Constitutional Design”. Conference on Democratic Transition and Consolidation. Madrid, October 19 to 27, 2001. Conference submission. P. 2.

⁴⁹ Precedents exist for such arrangements. “Muslims in India; linguistic groups in Belgium; national minorities in Estonia; Latvia, and Hungary; Arabs in Israel ... registered members of the group, wherever they may be living in the state, are bound by regulations made by, normally, a council of the group in respect to matters delegated to it. Both territorial and group autonomies give the minority or the territorial community the right to legislate on and administer certain matters, usually to the exclusion of the national authorities.” Ghai, Yash. “Public Participation and Minorities”. Minority Rights Group, July 2003.

<http://www.minorityrights.org/admin/Download/pdf/PublicPartic2003.pdf>. P. 23.

Constituting Democracy in Iraq , August 2005

within the governance framework, for those who still lack genuine confidence in the commitment and good will of other stakeholders. Additionally, with significantly less powers than the National Assembly, a Senate mitigates the zero-sum calculations of stakeholders in terms of jockeying for positions and therefore offers a solid basis on which to share power to a greater extent.

Lastly, a Senate offers a credible basis for enhancing systems of accountability and transparency. A Senate should not be able to veto the National Assembly, but must have a remit that allows for detailed reviews of government policy, legislation and budgets. If it is to have amendatory powers over National Assembly decisions, this should come at a high threshold in terms of voting and result in the return of a bill to the National Assembly with the Senate's amendment. A Senate merely able to deliberate and comment meaningfully on the budget through adopted reports, for example, will provide a failsafe for transparency regardless of amendatory powers.

The over-arching objective is building the basis for a sustainable democratic transition. Sustainability means building confidence in Iraqis that zero-sum calculations are unproductive and too costly. It means providing hope that one can never be permanently excluded from processes of governance. A Senate which is regionally representative, includes the most vulnerable minorities and can review a budget in detail can build the confidence of citizens in the government's performance for all Iraqis.⁵⁰ Constitutional design scholar Andrew Reynolds articulates the essential goal when he states that it is important for stakeholders to feel that even if they lose an election, it does not preclude some type of victory in the future or the jeopardizing of their basic rights in the present.⁵¹

Alleviating regional and ethnic tensions through the Senate can be done by weighting representation to give expression that transcends states and also by reserving seats for the most vulnerable minorities: ChaldoAssyrians, Turkmens, Yezidis, Shabaks, and Mandaeans. At the same time, the broad regions of north, center and south should be reasonably represented. "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."⁵² Providing reserved seats that allow both regions and particular ethnicities guarantees of representation provides a high degree of cooption into the democratic experiment at a low price for the governing party.

It is important to elect Senators. Reserved seats should once again go to persons and parties running independently from the following minority groups: ChaldoAssyrians, Turkmens, Yezidis, Shabaks, and Mandaeans. Electing Senators follows the American, Swiss and Australian model. It ensures representivity and accountability of the Senator to a constituency. The number of seats must account for regional needs and minority needs. Regional representation will inherently cover the needs of Shi'as, Sunnis and Kurds.

⁵⁰ These two basic criteria (regionalism and ethnicity) are inevitable considerations for a second chamber in the legislature. In their excellent study on establishing a democracy in Iraq, the Public International Law and Policy Group and the Century Foundation, explicitly situate the second chamber as resolving regional tensions. Nonetheless, they also are compelled to state, "Composition also should be weighted to ensure that the Kurdish minority is not subjected to undue discrimination and could provide guaranteed seats for minorities that are too small to 'own' a constituent unit." Public International Law and Policy Group, and The Century Foundation. "Establishing a Stable Democratic Constitutional Structure in Iraq: Some Basic Considerations". May 2003. <http://www.reliefweb.int/library/documents/2003/pilpg-irq-31may.pdf>. P. 36.

⁵¹ Reynolds, Andrew. "Constitutional Medicine". *Journal of Democracy*. Vol. 16, No. 1 (January 2005). P. 67.

⁵² Public International Law and Policy Group, and The Century Foundation. "Establishing a Stable Democratic Constitutional Structure in Iraq: Some Basic Considerations". May 2003. <http://www.reliefweb.int/library/documents/2003/pilpg-irq-31may.pdf>. P. 34.

The Executive

Avoiding a presidential system is vital for Iraq. It removes a large basis of power-sharing because it is inherently exclusive. Juan Linz makes the most persuasive argument against this type of system. He argues that a fundamental feature of presidentialism is that, "it introduces a strong element of zero-sum game into democratic politics with rules that tend toward a 'winner-take-all' outcome."⁵³ There can only be one president, and they appoint their advisors, from whom they seek guidance in decisions ultimately taken by them. At best, there may continue to be a ceremonial presidency, with very limited powers – as in Israel. All effective authority must sit with the prime minister and the executive, drawn from the legislature and held accountable to it.

Designing a system to place checks on a president is not unprecedented, but is also no guarantee over the long term. Presidents can have their power circumscribed to some extent, but it is possible to see their dominance grow out of proportion with what may have been constitutionally envisioned. These problems are rooted in their majoritarian nature.⁵⁴ A prime minister and cabinet derived from the legislature and having seats reserved for various groups ensures that no one is ever excluded from the basic corridors of power while developing a framework that still allows the government to govern. A ceremonial president can be selected by the National Assembly and greatly limits the threats of presidentialism. Adeed Dawisha writes, "An arrangement of this sort would be less open to an abuse of power, less likely to slide into authoritarianism, less vulnerable to military coups, and therefore more likely to endure..."⁵⁵

Iraq requires an executive and leader with broad-based support in a system that facilitates regular contact between the country's variegated interests. This is only possible in a system that places groups in positions of power legitimately. A prime minister and cabinet derived from the National Assembly or state legislature is vital for attaining such a balance. As Arend Lijphart writes, "the cabinet in a parliamentary system is a collegial decision-making body—as opposed to the presidential one-person executive with a purely advisory cabinet—it offers the optimal setting for forming a broad power-sharing executive."⁵⁶

Belgium's system of reserving seats for minorities is critical in attaining the necessary balance. The precedent it sets has clear benefits for Iraq. It provides a clear basis for proportional representation in the Executive for the three major groups: Shi'a, Sunni, and Kurd. Second, the Belgian model provides for deviation from purely proportional representation of ethnic groups by giving slight overrepresentation to smaller groups – in Iraq this should be applied to ChaldoAssyrians, Turkmens, Yezidis, Mandaean, and Shabaks.

Moderate overrepresentation of minorities such as ChaldoAssyrians provides two key benefits to Iraqi society. First, it relieves the tensions and apprehensions of the Shi'a majority by diffusing power from the super-minorities. Second, it meaningfully redresses the legacy of why these minorities are so vulnerable. ChaldoAssyrians find themselves on

⁵³ Linz, Juan. "Presidential or Parliamentary Democracy: Does It Make a Difference?" in Juan J. Linz and Arturo Valenzuela, eds. *The Failure of Presidential Democracy*. (Baltimore: Johns Hopkins University Press, 1994). P. 18.

⁵⁴ Majoritarian meaning their inherent power-base being a 50 percent plus one mandate.

⁵⁵ Dawisha, Adeed. "Iraq: Setbacks, Advances, Prospects". *Journal of Democracy*. Vol. 15. No. 1, January 2004. P. 16.

⁵⁶ Lijphart, Arend. "Constitutional Design for Divided Societies". *Journal of Democracy*. Vol. 15, No. 2. P. 101.

Constituting Democracy in Iraq , August 2005

the verge of going into complete Diaspora from Iraq. Extensive implementation of specific policies of repression is producing outcomes despite the demise of the Ba'ath. Moreover, giving them disproportionate weight in the executive caters to the lowest-common denominator of Iraqi society and will do more to ensure equitable development for all Iraqis.

Judiciary and Constitutional Protection

A constitution in Iraq will require protection through several safeguards. Elections, the most obvious form of accountability, will not suffice to protect Iraqis from a government willing to ignore constitutional principles. Beyond elections, the single most important defense of Iraqis' constitutional rights will come from a judiciary, court system and a constitutional court empowered to enforce the constitution's primacy.

The Judiciary

Merit must be the main basis for appointment as a judge. A judicial service commission will provide recommendations on the appointment of judges in the courts of Iraq. This includes recommendations on the appointment of judges to the constitutional court. Second to merit as a basis of appointment, must be the desire to ensure representation of Iraq's groups in the constitutional court. It must include a fair number of Kurdish and Sunni judges or it will hold little credibility in the eyes of a significant proportion of the population. "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."⁵⁷

Reserving seats for judges in the constitutional court must account for the fact that it cannot be a large body. It is not recommended to exceed nine judges over and above a president and vice-president. The president and vice-president should not belong to the same ethnic group. Nor should these posts be filled by the same sectarian group. This will ensure that at any given time, if the president is a Shi'a, the vice-president must be Sunni, Christian, Yezidis or Mandaean.

Of the nine positions for judges, one seat must be reserved for a ChaldoAssyrian and another for a Turkmen. The appointment of a ChaldoAssyrian and Turkmen judge must have a two thirds approval from the Members of the National Assembly whose parties were independently elected to represent those respective communities. If there is no provision for reserving seats for ethnic minorities in the National Assembly, then the appointment of a ChaldoAssyrian and Turkmen judge must have the approval of a council that governs the internal affairs of these communities.

The Constitutional Court's Remit

A constitutional court in Iraq must be able to question the constitutionality of any government action (legislative or programmatic) and must be able to protect citizens' constitutional rights if/when violated by another citizen acting in their private capacity. The remit of the constitutional court must be as unbounded as possible. For this to be realized, it is critical that the actors able to bring issues to constitutional court be left wide open and the type of issues it can engage with must be expansive.

⁵⁷ Public International Law and Policy Group, and The Century Foundation. "Establishing a Stable Democratic Constitutional Structure in Iraq: Some Basic Considerations". May 2003.
<http://www.reliefweb.int/library/documents/2003/pilpg-irq-31may.pdf>. P. 18.

Constituting Democracy in Iraq , August 2005

In some jurisdictions, constitutional courts are unable to deal with intra-governmental matters. "Courts emerging from the British Commonwealth are often more reluctant to resolve conflicts between different parts of the national government. Instead, they focus on the protection of individual rights."⁵⁸ Iraq's nascent governmental structures, and the newness of federalism is likely to create a great amount of friction and conflict. It is vital that the constitutional court be able to adjudicate these matters. It is also important that private citizens are able to bring matters against any government agency acting in a fashion prejudicial to their constitutional rights.

Corruption and general malfeasance in Iraq at the governmental level vis-à-vis community development makes it vital that different spheres of government are able to take their complaints to such a court. If local government is to play an important role in assuaging peoples fears of exclusion from the state, it must be able to defend itself from the state level of government and likewise, the state level is going to need assurances that it can defend itself against the central government.

Judges on the constitutional court should be able to decide whether a sphere of government is seeing a loss of its powers or ability to fulfill its responsibilities in light of actions by another sphere of government. This will give proper effect to the principle of federalism and its underlying fiscal arrangements. As analyst David Phillips argues, "Consistent with the practice of constitutional federalism, the national constitution should empower federal Iraqi states with governance responsibility. These constitutional limits would be enforced by the constitutional court."⁵⁹

Developing such an arrangement through the constitutional court ensures that peaceful means are sought to overcome conflicts. If, for example, the states in the Kurdish dominated region of northern Iraq perceive a great threat in an action of the national government, they will immediately assess viable options for defending their interests. Without a measure for them to seek recourse through a constitutional court, the aggrieved parties will seek other remedies that can jeopardize the stability and cohesiveness of Iraq.

⁵⁸ Ackerman, Bruce. "Constitutional Design". Conference on Democratic Transition and Consolidation. Madrid, October 19 to 27, 2001. Conference submission. P. 3.

⁵⁹ Phillips, David L. "Power-Sharing in Iraq". Council on Foreign Relations. http://www.cfr.org/pdf/Iraq_CSR.pdf. (accessed May 18, 2005). P. 20.

Human Rights

It suffices to say that where the TAL was extraordinarily successful is in the promulgation of individual human rights and freedoms. It also went a great way to ensure group rights and freedoms. At the time of writing, it appears that neither of these rights will attain the same stature. Drafts of an Iraqi bill of rights are in circulation and have been translated. Analysis of these drafts indicate that the freedom of religion, thought, conscience, gender rights, expression, opinion, press, assembly and association are all diminished to one degree or another.⁶⁰

Stated quite simply, the new Iraqi constitution must maintain the human rights provisions in the TAL and explicitly seek adherence to the international human rights instruments to which the Iraqi state is a signatory. These basic rights are enunciated particularly in the International Covenant on Civil and Political Rights, as well as various other conventions and treaties. Nonetheless, these rights were given effective articulation in the TAL and deviation from that standard is worrisome for sustainable democratic development in Iraq.

The diminishment of these rights as reflected in the early draft not only adversely impacts on Christian ChaldoAssyrians, Mandaeans, and other religious minorities, but also on Muslims themselves. The work of The United States Commission on International Religious Freedom (USCIRF) provides sound reasoning for robust religious freedoms that benefits *all* Iraqis. As USCIRF found, the proposed bill of rights can now possibly facilitate the state to act as a guarantor of religious expression and thus orthodoxy. In this framework, it is possible that Muslims who have religious opinions differing from the prevailing state orthodoxy can be subject to punishment.⁶¹ This explains the motivations of secularists in the Iraqi political fabric that are of Muslim and non-Muslim extraction.

If Iraq does become an Islamic state with Shari'a law a primary source of legislation, the constitution must develop means to protect ethnic and religious groups. Territorial and non-territorial protections/exemptions of non-Muslims and state and local spheres of government should be provided for constitutionally through opt-out clauses.

Human rights also requires institutionalization through the formation of a human rights court. Such an entity must be the primary recourse for individuals whose human rights are violated. Of course, its decisions, just as those of other courts, are subject to review by the constitutional court if they have implications for the constitution.

Minority and Indigenous Peoples' Rights

Given the extent of persecution against groups such as ChaldoAssyrians, Turkmens, Mandaeans and others, it is vital that redress take the form of minority rights over and above those covered in the proposals in preceding sections of this paper.

⁶⁰ This cursory synopsis comes from the analysis by the United States Commission on International Religious Freedom. The full analysis can be found at:

http://www.uscirf.gov/mediaroom/press/2005/july/07262005_analysis.html. (accessed July 28, 2005).

⁶¹ United States Commission on International Religious Freedom. "Iraq's Permanent Constitution: Analysis of July 20, 2005 Bill of Rights". http://www.uscirf.gov/mediaroom/press/2005/july/07262005_analysis.html. (accessed July 28, 2005).

Constituting Democracy in Iraq , August 2005

Constitutional guarantees for minorities must be that their ethnic, religious, cultural, and language rights will be respected and given robust enforcement. This means demanding that any act of government (at any level) prejudicial to the basic interests of ChaldoAssyrians, Turkmens, Mandaean and others be counted as a human rights violation and subject to adjudication by a human rights court and then a constitutional court if necessary.

Minority and indigenous peoples' rights require allowances for education, language development and the use of language officially in areas where a group predominates. It also means ensuring that the constitutional provisions outlined under subjects such as federalism, the executive, and the judiciary are respected wholly. Such provisions effectively guard against the marginalization of Iraq's most vulnerable minorities. Clarifying the importance of this in a bill of rights will reinforce the inviolability of these rights and make all Iraqis feel safer and a part of the national fabric.

Conclusion

The objective of this paper is not to exhaust the litany of issues requiring attention in drafting a constitution. Instead, the purpose is to raise awareness among decision-makers and analysts of the place of ChaldoAssyrians, Turkmens, Yezidis, Shabaks, Mandaeans and other neglected minorities vis-à-vis the constitution. If properly understood, it becomes clear that in addressing their basic rights and providing redress for their sufferings, Iraq can be turned into a much more sustainable democracy. The present direction of catering almost exclusively to the needs of Shi'a, Sunni and Kurd stakeholders is a myopic approach that will prove detrimental to establishing the rule of law and respect for human dignity for all Iraqis.

Works Consulted

Ackerman, Bruce. "Constitutional Design". Conference on Democratic Transition and Consolidation. Madrid, October 19 to 27, 2001. Conference submission.

Assyrian Academic Society. "Position Paper: ChaldoAssyrians of Iraq and the Iraqi Interim Constitution". <http://www.aas.net/Position%20Papaers/positionpaper1.pdf>. (accessed June 12, 2005).

Cisneros, Gabriel. "Constitutional Design". Conference on Democratic Transition and Consolidation. Madrid, October 19 to 27, 2001. Conference submission.

Dawisha, Aheed. "Iraq: Setbacks, Advances, Prospects". *Journal of Democracy*. Vol. 15. No. 1, January 2004.

Diamond, Larry. "Lessons from Iraq". *Journal of Democracy*. Vol. 18, No. 1, January 2005.

Elster, Jon. "Ideal and Reality in Constitution-Making". Conference on Democratic Transition and Consolidation. Madrid, October 19 to 27, 2001. Conference submission.

Ghai, Yash, Mark Lattimer, Yahia Said. "Building Democracy in Iraq." *Minority Rights Group*, February 2003. <http://www.minorityrights.org/admin/Download/Pdf/IraqReport.pdf>.

Ghai, Yash. "Public Participation and Minorities". *Minority Rights Group*, July 2003. <http://www.minorityrights.org/admin/Download/pdf/PublicPartic2003.pdf>.

Ghai, Yash. "Role of Constitutions in the Transition to a Consolidation of Democracy". Conference on Democratic Transition and Consolidation. Madrid, October 19 to 27, 2001. Conference submission.

Indict.org. "Crimes Committed by the Iraqi Regime". <http://www.indict.org.uk/crimedetails.php?crime=Anfal> (accessed June 7, 2005).

International Crisis Group. "Iraq Background: What Lies Beneath". October 1, 2004. http://www.crisisgroup.org/library/documents/report_archive/A400786_01102002.pdf.

International Crisis Group. "Iraq: Don't Rush the Constitution". June 8, 2005. http://www.crisisgroup.org/library/documents/middle_east___north_africa/iraq_iran_gulf/42_iraq_don_t_rush_the_constitution.pdf.

International Federation for Human Rights and Alliance Internationale pour la Justice, "Iraq: Continuous and Silent Ethnic Cleansing – Displaced persons in Iraqi Kurdistan and Iraqi refugees in Iran". <http://www.fidh.org/IMG/pdf/iq350a.pdf>. (accessed June 15, 2005).

Lijphart, Arend. "Constitutional Design for Divided Societies". *Journal of Democracy*. Vol. 15, No. 2 (April 2004).

Lijphart, Arend. *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*. (New Haven: Yale University Press, 1999).

Constituting Democracy in Iraq , August 2005

Linz, Juan. "Presidential or Parliamentary Democracy: Does It Make a Difference?" in Juan J. Linz and Arturo Valenzuela, eds. *The Failure of Presidential Democracy*. (Baltimore: Johns Hopkins University Press, 1994).

Makiya, Kanan. "A Model for Post-Saddam Iraq". *Journal of Democracy*. Vol. 14, No. 3.

Murray, Christina. "Notes on Constitutional Design" Conference on Democratic Transition and Consolidation. Madrid, October 19 to 27, 2001. Conference submission.

Ottaway, Marina. "Iraq: Without Consensus, Democracy is not the Answer". <http://www.carnegieendowment.org/files/PB36.ottaway.FINAL.pdf>. March 2005 (accessed June 1, 2005).

Phillips, David L. "Power-Sharing in Iraq". Council on Foreign Relations. http://www.cfr.org/pdf/Iraq_CSR.pdf. (accessed May 18, 2005).

Public International Law and Policy Group, and The Century Foundation. "Establishing a Stable Democratic Constitutional Structure in Iraq: Some Basic Considerations". May 2003. <http://www.reliefweb.int/library/documents/2003/pilpg-irq-31may.pdf>.

Reynolds, Andrew. "Constitutional Medicine". *Journal of Democracy*. Vol. 16, No. 1 (January 2005).

Tripp, Charles. *A History of Iraq*. Cambridge University Press: Cambridge, 2000.

United States Commission on International Religious Freedom. "Iraq's Permanent Constitution: Analysis of July 20, 2005 Bill of Rights". http://www.uscirf.gov/mediaroom/press/2005/july/07262005_analysis.html. (accessed July 28, 2005)

US Government Country Studies. "Iraq". <http://countrystudies.us/iraq/20.htm>. (accessed June 10, 2005).

