

Transitional Administrative Law

Commentary and analysis, 7/8 March 2004

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NOTE (added 11 June 2004): With virtually no publicity, the Iraqi Governing Council approved an annex to this document immediately before abolishing itself on 1 June 2004. The annex may be viewed [here in English](#) and [here in Arabic](#). (The CPA's posting of the text in both languages is unusual; generally legal enactments are translated into Arabic only after considerable delay. Some internal evidence suggests that the annex was at least partially drafted in English, though it presents itself solely as an enactment of the Governing Council). The CPA also provides its own [analysis of the annex](#).

BACKGROUND: On 1 March 2004, two days after the deadline specified in the 15 November 2003 agreement between the Coalition Provisional Authority (CPA) and the Iraqi Governing Council (IGC), the IGC announced that it had completed and approved the "Transitional Administrative Law," an interim constitution to govern Iraq following the restoration of sovereignty on 30 June 2004 until a permanent constitution is adopted.

The IGC has been wrestling with constitutional issues almost since its creation (an excellent review of the issues as of November 2003 is available from the [International Crisis Group](#); a very interesting, [theoretically-informed discussion by Andrew Arato](#)—based on the now superseded January draft—is still quite worth reading.). Initially, the Council formed a committee to recommend mechanisms for constitution drafting. Its report was due in September 2003. While I do not believe that the committee's report has been made public, it was reportedly unable to develop a definitive recommendation. The work of the committee was superseded by [the agreement reached on 15 November 2003](#) between the Coalition Provisional Authority and the Iraqi Governing Council. That agreement required the Council to approve a "Transitional Administrative Law" by the end of February 2004. Such a law would make possible "local caucuses" by the end of May; the convening of a "Transitional National Assembly" based on those caucuses; the dissolution of the Iraqi Governing Council and the

Coalition Provisional Authority; and the restoration of Iraqi sovereignty by the end of June 2004. Elections for a constituent assembly would follow in 2005; that body would quickly write and seek ratification of a permanent constitution; and elections would be held under the new constitution by the end of 2005.

That plan broke down under international and domestic pressure and was finally abandoned. The effort to write the Transitional Administrative Law survived. The 1 March 2004 announcement that the IGC had agreed on a draft turned out to be an exaggeration, however. It later became clear that not all the language was complete and that English and Arabic drafts had to be reconciled and reviewed. On 5 March the IGC was to meet to approve the final document, but some members raised objections and the signing was postponed until 8 March.

TEXT: While several interim drafts leaked to the press, neither the IGC nor the CPA reported extensively on the efforts to write the Law. Not until 7 March 2006 did the London-based Arabic daily *Al-Sharq al-Awsat* publish a [complete text](#). The next day, on March 8—and only after the signing had been completed—an official copy was released. The CPA has posted [English text](#).

I include some commentary on the provisions of the Law below. I previously posted a [translation and commentary](#) for an earlier draft. As far as I know, no other translation of that earlier draft is publicly available. While I am gratified to have provided a service by posting the translation and commentary, my experience with that draft leads me to ask users to read fairly carefully. Some of my comments were apparently used [in a letter to US National Security Advisor Condaleeza Rice signed by four United States Senators](#). I do not know who drafted that letter, but the person(s) responsible managed to garble some of the information in a manner that I might charitably describe as unhelpful. The letter mixed some very legitimate concerns about religious freedom with hyperbolic and misleading statements (and at least one falsehood).

SECURITY: One issue largely overlooked in press discussions of the law has been the matter of security arrangements after the restoration of Iraqi sovereignty on 30 June 2004. The final text of the Law confronts the issue in an unexpected way.

The 15 November agreement and early drafts of the Law provided that the CPA and IGC would negotiate security arrangements and then present them for adoption to the transitional parliament. The transitional parliament was to meet prior to the restoration of Iraqi sovereignty on 30 June 2004 to approve the arrangements. No provision was made for rejection or even renegotiation of the arrangements: implicitly, the newly-seated parliament was to be given the

choice of accepting arrangements it had not negotiated or delaying restoration of sovereignty. This plan became untenable when the IGC made clear it was no longer willing to negotiate the matter with the CPA. This left the possibility that on June 30, American and other coalition forces may be occupying a country with a sovereign government without the agreement of that government—a situation that might be awkward both politically and legally.

The solution found to this problem in Article 59 (see the commentary below) is ingenious but also audacious and might provoke controversy.

COMMENTARY

Preamble

The Law has a preamble, something missing from initial drafts. Moreover, Article 1 makes the principles enunciated in the preamble an integral part of the constitution. These two features suggest that the authors hope that their effort will survive the expiration of the transitional period and be adopted in the permanent constitution. Making the principles of the preamble an integral part of the constitution is designed to influence the course of constitutional interpretation and jurisprudence (and perhaps guide a constitutional court in interpreting some of the document's provisions). If a permanent constitution is adopted by the end of next year, there is unlikely to be enough time to develop traditions of constitutional interpretation. Thus, I believe that the authors view many of the document's provisions as primarily aspirational and designed to guide the writing of the permanent constitution rather than have any immediate effect.

Article 1

The document specifies that the use of the masculine includes the feminine. (Arabic is a much more strongly gendered language than English, and nouns, verbs, and adjectives all indicate gender. The masculine is generally used not only for men but also for cases in which gender is unspecified.) Thus, this provision makes explicit what might otherwise be only implicit: that every reference to an "Iraqi," "citizen," or "individual" in the masculine refers to women as well as men. This provision seems to be adopted from the draft constitution for a Palestinian state. Juan Cole and Shahin Cole have written a [general analysis on gender issues](#) related to the constitution.

Article 2

The 15 November agreement between the IGC and the CPA provided for an ambitious timetable not simply for the transfer of sovereignty to an Iraqi government but also for the composition of an Iraqi constitution, to be completed by December 2005. That agreement—and

initial drafts of the Law contained no provisions for a failure to meet the timetable. As finally written, article 2 of the law maintains the original timetable but also refers to article 61, which allows for a single six-month extension if the constitution is either rejected or if drafting proceeds too slowly.

Earlier drafts focused great attention on the process of selecting members of a transitional national assembly and constituent assembly. The procedures drafted ran into problems connected with the IGC's and CPA's legitimacy: a transitional assembly was to be selected through a vaguely-specified caucus system that convinced few Iraqis or international observers that it would be immune to manipulation. And since that assembly would draft a law for electing a constituent assembly, the latter body was indirectly tainted as well. The final draft omits many of these provisions. Instead, it has a temporary sovereign government composed by the CPA and IGC, acting in consultation with the Iraqi people and perhaps with the United Nations. Following the composition of that government, elections for a national assembly will be held by 31 January 2005 at the latest.

Article 3

The 15 November agreement as well as earlier drafts of the Law barred amendment. That position is no longer tenable because some of the governance provisions have not yet been written and thus the document will necessarily be amended—as articles 2 and 3 of the Law acknowledge. Thus, Article 3 is forced to provide for a limited amendment procedure.

Article 4

The provisions on federalism here are very general and are given meaning by other articles.

Article 5

The insistence on civilian control of the military Iraqi military is recognition that army intervention in politics has a long history in Iraq—from 1936 until 1941 it was the main arbiter of political power. From 1958 until 1979 every Iraqi president came from the military.

Article 6

This article promises restorative justice. Delivering on that promise will raise many difficult issues, some of which are addressed in article 58.

Article 7

The formula for Islam and Islamic law has provoked great international and domestic controversy. The final version of the Law represents a compromise between those who wished to have Islam serve as "a source" and those who wished it to be "the primary source" of

legislation. However, absent any provisions for determining authoritative interpretations of the shari'ah, it is not clear whether any of these provisions would have any practical legal effect:

- • Designating Islam the official religion has tremendous symbolic importance and is standard in Arab constitutional documents, but the practical meaning of such a designation is probably quite limited.
- • Providing that Islam is "a source" of legislation is vague indeed. Other Arab constitutions refer to "the principles of Islamic law," but the Iraqi Law refers only to Islam. More important, the clause would seem to be an injunction to legislators to consult Islamic law but not to bind them to it, much less to any particular interpretation.
- • The article also bars passing a law that contradicts with aspects of Islamic law that are definite and affirmed by consensus. But this prohibition applies only to the interim period, and thus older legislation is left standing. And given over one thousand years of Islamic legal thought and argumentation, as well as Iraq's Sunni-Shi'i mix, fixed and consensual provisions are extremely few in number.
- • More generally, absent any structure that has the authority to issue authoritative interpretations of Islam, the article by itself will have little impact on the Iraqi legal order. It may at most lend symbolic support to those who call for a greater measure of Islamic legal influence.
- • The article also bars any legislation that contradicts the rights mentioned elsewhere in the Law. This seems to be a strange nod in the direction of those who feared the language on Islam would somehow negate the rights provisions. I describe the language as strange because of its obvious redundancy: affirming the rights provisions in this manner adds nothing to their effectiveness. This language in article 4 simply affirms rights that are affirmed elsewhere. In sum, the language of this article seems to say that it is unconstitutional to pass an unconstitutional law.

More interestingly, the article also places religious freedoms on an individual rather than communal basis, unlike initial drafts. This may be partly a response to [the rather lurid letter from four American senators I referred to in the introduction to this commentary](#). And indeed, religious freedom in Arab states is often placed on a communal rather than individual basis (though the claims of the letter made the point in a misleading way). This article thus represents a possible departure in regional conceptions of religious freedom.

The article also proclaims Iraq to be a multi-national state. This is almost unprecedented in Arab constitutions—but not quite. The Ba'athist-era constitutions described Iraq as composed of two

nations (Arab and Kurdish). Such provisions, of course, did not prove convincing to much of the Kurdish population.

Article 9

The detailed nature of this article would turn Iraq into a bilingual state in practice, not merely in theory.

Article 11

This article may attract attention because, if I read the implications correctly, it seems to offer to restore the citizenship of Iraqi Jews who left the country after 1948. I would be surprised if many accepted the offer, however, and it does not seem that the right would pass on to descendants. Far more significant, therefore, is the article's effect on Iraqi Shi'a whom the Ba'athist government stripped of citizenship rights. The call in the article for the National Assembly to issue the necessary legislation may mean that these constitutional rights will not be effective until such legislation is passed, though I am not certain that this is the intention of the article.

An earlier provision to guarantee both fathers and mothers the right to pass on Iraqi citizenship seems to have been removed.

Article 12

The provision for gender equality is very generous. Indeed, it is far more generous than in the United States (where an equal rights amendment to the constitution was never ratified). However, other Arab countries with similar provisions (such as Kuwait) have not always implemented them fully. Kuwait bars women from voting in a manner that almost certainly violates its constitution. Yet it took over three decades for a court case to be raised challenging the ban, and the Kuwaiti courts have thus far escaped from ruling on the matter because of technical deficiencies in the cases that have been raised.

Article 13

Much press comment has parroted the claim that the Law provides for a bill of rights unprecedented in the region. This is an exaggeration: by the standards of the Arab world, the rights provisions are not particularly extensive. What is innovative is the number of rights that are absolute, not depending on implementing legislation. The language here is often quite carefully drafted to close loopholes.

However, some of the rights do operate in accordance with law. While such language is common in Arab constitutional texts, it is not necessarily problematic if the implementing legislation is itself liberal (indeed, the formula of defining rights in legislation is often followed in Europe). However, the reliance on implementing legislation in the Iraqi case may raise

significant problems. First, no formula is included insisting that a right cannot be limited in the guise of defining it. Second, the necessary legislation has not yet been written in most areas (though the CPA has issued a law governing NGOs), meaning that the operative law will date to the Ba'athist era and all that implies.

Article 14

The inclusion of some social and economic rights is standard in the region, though the Iraqi Law introduces a measure of realism with its provision that governmental units guarantee them within the bounds of their abilities—in general, comparable constitutional provisions elsewhere are interpreted as aspirational guidance given to political leaders, a formula the Iraqi Law follows explicitly rather than implicitly.

Article 15

The provisions for searches, detentions, and trials are unusually detailed, undoubtedly informed by Iraq's recent history (and also showing some American influence not in their general spirit—which is common to many systems—but in their specific formulation). The ban on torture is particularly air-tight by regional standards. The prohibition of trials of civilians in military courts and the ban on exceptional courts is also quite unusual for the region (though not wholly unprecedented). However, this wording is flatly contradicted by Article 48, which provides for an exceptional court that is to act wholly outside the constitutional framework.

Article 21

Constitutional protection of working with international NGOs is a much-needed innovation.

Article 23

The language here seems inspired by the Ninth Amendment to the United States constitution. In general it seems to me wise to frame constitutional provisions to the extent possible within terms that Iraqi legal and judicial figures will recognize; while borrowing across borders has become quite common in constitution drafting, the Ninth Amendment is a rarely emulated elsewhere.

Article 25

The specification of the duties of the federal government is more detailed than in previous drafts; the language that would govern oil revenues seems to be a compromise formula. The result does seem to be a genuine federal system, though given the importance of oil revenues in supporting all government functions in Iraq, the balance in this article might seem weighted slightly in favor of the central government. However, actual operation of the system is difficult to predict with precision.

Article 26

This is a significant article in three respects:

- In affirming the legislation in place as of June 30, the Law answers the question left open in initial drafts of the status of CPA legislation. Presumably, IGC legislation would take effect only if it gained CPA approval prior to June 30.
- This is made more specific by the final clause, which specifically provides for the continued effectiveness CPA legislation taken on the basis of its authority by virtue of international law. This formula leaves a potential loophole here, though I cannot see it being used in the transitional period. The CPA has issued a wide variety of legal enactments, and a very bold Iraqi court might hold that the CPA exceeded the bounds of international law. Such a position would not be implausible. The 1907 Hague convention which the CPA avoids citing in its legal enactments, preferring the more generally worded UN Security Council resolutions states "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." The CPA seems to subscribe to a fairly broad interpretation of what it means to be "absolutely prevented" from respecting laws in force. Indeed, one might be able to contest the legality of the Law itself a product of a CPA-managed process on such grounds. The resulting constitutional and legal chaos makes such a position politically unlikely.
- Allowing federal legislation to trump that of provincial and regional bodies is a significant marker of a federal (rather than confederal) system, though the language here is hardly unqualified.

Article 27

Barring militias not formed in accordance with a law (and specifically a federal law) is a very significant step, but also provokes a very difficult problem: in the absence of a federal law, such forces would seem to be illegal. If so, the prospects of writing and passing legislation would seem to be unlikely by June 30. Yet disbanding such militias would raise considerable difficulties at present.

The language in the article regulating intelligence forces is general, but mere mention of the subject is innovative. The most significant element is probably the insistence on parliamentary oversight; I know of no Arab state in which such a parliamentary role has ever been successfully asserted.

Article 29

This is an interesting symbolic step (though probably only symbolic): the Law essentially is asserting a right to proclaim the dissolution of the CPA, and the CPA—by approving the Law—is implicitly acknowledging that right. This reverses the legal, chronological, and political relationship between the structures created by the Law and the CPA.

Article 30

While the detailed provisions for selecting members of the Assembly present in earlier drafts have been removed, the final text of the Law appears to be far more detailed on the operations of, and relations among, various constitutional structures. Indeed, earlier drafts were often conspicuously silent on such fundamental questions as who may introduce legislation. The final text of the Law is far more explicit, generally establishing a parliamentary system (though the presidency is more than a symbolic office). Interestingly, the name of the assembly has been changed from “Transitional Assembly” in earlier drafts to “National Assembly” in the final text.

Much press speculation centered on whether the matter of representation for women was a quota or a goal. To my reading, the final language could be read either way; the matter is essentially referred to the elections law.

Article 31

Provisions for membership in the Assembly are quite detailed on the issue of debauchification. But the requirement that members have a good reputation seems problematically vague. The education requirement—that members have a secondary school degree or its equivalent—may be partly aimed at older tribal leaders. Interestingly, Iraq’s tribal leaders successfully deleted a requirement in the 1925 constitution that parliamentary deputies be literate.

Article 33

While most Arab constitutions allow the interpellation of ministers, this Law extends that right to members of the presidency.

Article 35

The introduction of a prime minister alongside a presidency could make for a complicated system, though it should not be confused with a 5th-Republic arrangement since the Assembly itself selects the members of the presidency.

Article 36

The language here seems to imply that the members of the presidency are not politically responsible to the Assembly after their election, though they may be removed for questions regarding their competence and integrity. Since the decisions of the presidency are made by consensus, it is not clear that identifying one as president and the other two as deputies has any practical meaning.

Article 38

There is no requirement that the prime minister or ministers be members of the Assembly.

Article 39

Allowing the presidency—even if it acts upon the recommendation of the judicial council—the authority to appoint members of the Supreme Court is a diminution of independence of the judiciary, even when compared to Iraq’s neighbors. Much depends on how the presidency treats the recommendations emanating from the judicial council (and whether the presidential appointment power emerges as a real authority or a mere formality).

Article 40

I believe it is unprecedented in Arab governance to remove the Ministry of Justice from all administrative matters involving the judiciary. However, administration is not defined. If this were to be fully implemented, it might involve transferring oversight of a wide variety of functions to the Judicial Council (such as budgeting, relationship with other branches of government, and nonjudicial court personnel). While Judicial Councils are quite widespread in Arab governance, few would have the administrative capacity to oversee such a wide range of tasks, and the Iraqi Judicial Council—only recently reformed by the CPA—would likely need tremendous assistance. I may be reading too much into the administrative autonomy provision, but it seems to me to be potentially far reaching. Since many Arab executives dominate the judiciary through their extensive administrative roles rather than through heavy-handed direct control, my reading—if correct—implies a major step toward true judicial independence.

Article 44

The Supreme Court is really more of a constitutional court (a specialized body with exclusive jurisdiction over constitutional cases) than a more general supreme court (which generally has appellate functions). While there is a provision for appellate functions, the next article mentions a Court of Cassation; such a body is normally the highest appellate court for most cases.

Article 45

This article on the composition of the judicial council raises two interesting issues. First, it refers to specific court structures without elaboration (though Article 46 does offer some detail), thus presumably necessitating their establishment. More specifically, it mentions a Court of Cassation that seems to be separate from the Supreme Court but that would presumably take the latter body's place as the supreme court of appeals.

Second, the judicial council mentioned in article 45 has already been established by [CPA Regulation 35](#). The problem is that the provisions of Article 45 conflict with those of Regulation 35. This leaves some matters unclear. Would the Judicial Council immediately be formed in accordance with the provisions of Article 45? As opposed to an earlier draft, Article 45 now makes no mention of the need for implementing legislation. Nevertheless, since not all the courts mentioned may now be operating, would CPA Regulation 35 operate provisionally, even though it would be rendered unconstitutional?

Article 46

This is one more example of how carefully federal arrangements have had to be negotiated.

Article 48

The provision for the Special Tribunal raises several issues. First, it flatly contradicts the promise of Article 15 barring exceptional courts. Second, this court, intended to try accused war criminals, is not merely exceptional. It is placed completely outside the constitution. The court in question was [established by the IGC](#) after being [delegated by the CPA](#) to try those accused of atrocities and war crimes. In one sense, the Law transfers the court to a body authorized by the CPA into a wholly Iraqi court.

But the Special Tribunal is no ordinary court. In some uncomfortable ways, it resembles the political courts established in some Arab countries in the 1950s and 1960s after a regime change to deal with the old regime. I have no doubt that the procedural safeguards will be far greater than in those earlier bodies, but the political nature of the court cannot be ignored. Indeed, the language here is startling, because the constitution does not simply recognize the IGC-established Special Tribunal but also exempts it from any of the provisions of the constitution. No other Iraqi courts may be involved in cases in the jurisdiction of the Special Tribunal. The language is so sweeping, it is not clear whether the law establishing the Tribunal may be amended under this constitution.

Article 49

The effect of this article is to render Iraqi bodies that had been created under the CPA.

Article 53

This article not only enshrines the status quo; it also spells it out in more detail than did initial drafts. Subsequent articles are the most detailed and carefully drafted in the constitution, suggesting that the matter of the central government's relationship with Kurdish areas was the most complicated matter to negotiate.

The various provisions on federalism are quite complex and it is difficult to predict precisely how they would work. This is partly the case because the provisions are mutually dependent (and sometimes in tension with each other). For a trenchant critique of the approach adopted, consult the March 8 entry in [Spencer Ackerman's Iraq'd](#) blog.

Article 59

This article is likely to cause considerable controversy, since it compensates for the absence of an agreement over security arrangements in an audacious manner.

First, the article effectively places the Iraqi military under American command (in the form of the "unified command" of the "multinational force"). Second, it mentions [UN Security Council Resolution 1511](#) and effectively uses it to prolong such a security arrangement until a permanent constitution is approved and operating.

Significantly, of all the provisions of the draft constitution, this was the one major issue not to leak.

Articles 60-62

The provisions for the permanent constitution are notable in several ways:

- • They abandon the attempt in earlier drafts to establish principles governing the permanent constitution. This seems wise, since the Law, approved by an unelected body, would lack the legitimacy to set conditions on the actions of the elected body writing the permanent constitution.
- • They devote more details to procedures for adopting the constitution. Besides the widely-noted adoption provisions involving the referendum (debate over which led to a delay in the final signing), there are provisions for delays in the writing of the permanent constitution.
- • The responsibility for drafting the constitution is transferred from a specially-elected constituent assembly to the National Assembly.