

## EDITOR'S CORNER

### Iraq and Law & Economics

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Over the past decade I have been trying to understand the move to a free market in transition countries, mostly Bulgaria, using law and economics. Often it turns out that understanding society, institutions and “rule of law” values are needed to make any sense of how contracts work—or don’t. As director of the University of Delaware’s Legal Studies program, I have learned about “law and society”—a movement that argues, among other things, that law is not just what is in law books and in judges’ decisions, but in what people think is just and what is the law. The U.S. attack on Iraq and the current effort to create in Iraq a new democratic government and a “rule of law state” pushed me to use law and economics to understand these events.

Four issues seem to be fit for analysis. The legal rationale for the war under the U.S. Constitution, and whether the move to war satisfied this requirement, is the first issue. Second is the choice of whether to move against the Iraqi government under international law, specifically the UN Treaty and the UN Security Council. These are questions about the rule of law in the U.S. and among the advanced democracies.

Turning to creating a new Iraq, a third issue is what is the chance of creating a new democratic system in Iraq? And, fourth, what is the chance to assure the “rule of law” in the ordinary business of life?

The U.S. Constitution grants the right to declare war to the Congress; the law and economics question that struck me comes from the understanding of contracts: how specific should this provision be considered? Ultimately, the question is the “efficient” contract. For example, in 1991 the Congress did not specifically “declare war” against Iraq. Were the fundamental requirements upheld? A constitutional scholar might answer differently, but if the constitution is a long-term contract between the U.S. public and its governmental agents, we want to find the “understood contract” for choosing to go to war. The public is not specialized in law, and doesn’t worry about esoteric details. The public does rely on experts in law—for interpretation of personal rights guaranteed by the constitution as well as the technical rules of declaring war. We might worry if the public neglects the clear statement of the Constitution; this might indicate that the public really lacks understanding of fundamental Constitutional provisions.

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In the case of the invasion of Iraq, I was very surprised that there was no serious debate over a U.S.-led war. The Vietnam war showed the terrible consequences of “sneaking” our country into war, while the Gulf war showed that the U.S. Congress and public were willing to discuss a war seriously and back the war if a convincing rationale was given. The “contract” that Presidents cannot drag the country into war by fiat seemed to be broken.

Now, in cases of emergency, the President can resist attack, and a fair extension of that principle is that the President could order a pre-emptive strike. But no evidence of such a strike has been provided; I am surprised at the lack of severe criticism. The Congress *did* vote to let the President go to war pursuant to a U.N. Security Council resolution to invade Iraq, but it would be pushing legalism to an extreme to argue that the war actually was fought in accord with such a resolution; it is obvious that the effort to get such a resolution failed.

So why was the war supported in the United States, and why is it still fairly popular now in late November 2003? Thinking about the contract between the public and the Congress and President, I think that the war was seen as a good, small war, something like the U.S. invasions of Panama, Haiti and Granada. If the war is small enough and won't lead to bad results, no declaration is needed—just like a *de minimis* violation of the wording of a contract. The President said it would be easy and work out well, and the Congress, basically acting as judge in the matter, did not disagree. If in the end the war turns out badly, the President and Congress could still say, “it *looked like* a good, easy and small war” and that would be some defense. But the bar for starting a similar war would be higher.

Why didn't the U.S. government persevere with its effort to obtain the support of the U.N. Security Council for a war against Iraq? At the time, it seemed possible to gain such a resolution and so to have a large coalition to fight the war, if the United States were to wait a few weeks, and if other countries were brought into helping lead the war and the following occupation. The rationale would have had to change, to “collectively ridding the world of a dangerous dictator” rather than repelling an impending attack.

Looking back, such a resolution would have made the U.S. (and United Kingdom) position much easier. If countries with more Middle-Eastern experience like France and Turkey had been involved, and perhaps countries with Arabic speakers like Egypt or Saudi Arabia, the war and occupation would have taken a very different course. Since the United States has to deal with many countries on a regular basis, attacking some as “Old Europe” and their advice as wrong just stores up trouble for future cooperative efforts, such as the continuing Doha round of trade talks.

The reason for the “go-it-alone” approach seems to be a view of the world's countries as short-term dealmakers, where the countries come together for a particular agreement or invasion that benefits that group of countries then, and afterwards they go their own ways—the “coalition of the willing.” This is a “spot market” deal, in economic terms. It's striking that most European Union countries strongly objected to this approach. For forty years, they have been involved in a kind of “rule of law” activity, in which proper norms of international behavior have slowly evolved, in the

European Union and elsewhere, as in Bosnia and Kosovo. While they haven't created an "international law" comparable to domestic law, they have encouraged international courts, decisions by the United Nations, and in general moved toward a "rule of law" system. They have to deal with each other on numerous issues, on a daily basis—in the EU—and these interactions are subject to treaties that are effectively a constitution, so it seems to them, and to their publics and elites, more normal to work together in a "rule of law" environment in international relations in general. One country acting on its own, without regard to others, seems more like the bad old days of power politics, or even the actions of a Napoleon or Hitler aiming to dominate the world. This contrasts with the U.S. public and elites, which don't have the same history and see the rest of the world as remote and "different"—not a place of the rule of law. So violating the WTO treaty on steel tariffs isn't seen in the United States so much as illegal behavior that violates law, but as a possibly risky action that helps some Americans.

When much of the world sees a system of international "rule of law" it makes sense for countries like the United States, with a weaker sense of such a system, to pay attention to those values. What looks like aggressive but proper independent action to Americans can be seen as extreme and improper violations of international law by others. When this is true, we can expect conflict, as people try to punish the "law violators." Today, most U.S. interactions with the rest of the world involve trade and a combination of social and economic issues, and on these it is very hard for one country to impose its will. So acting as a "law violator" in one area (Iraq) is likely to lead to retaliation or lack of cooperation in others, with painful consequences for the United States. Globalization keeps increasing close connections that rely on all countries cooperating and accepting a "rule of law," so I expect that the United States will pay a high price for its Iraq approach, and will eventually come to a more law-governed approach.

What is the chance of creating a new democratic government in Iraq? A law-based perspective notes that a democratic constitution is basically not majority rule, but a set of rules that structure political decisionmaking and also a set of rights that protect people from their government. These rules are not just written on paper, but are in the hearts and the expectations of the public, and the elites, and elected leaders.

Will it be possible to bring such a system of rules into effect in Iraq? A written constitution may be possible, but making it clear that the majority does not "rule" could be very difficult. Iraq and the Middle East in general have had very aggressive governments that ruled dictatorially and certainly had no sense of rights for political or cultural minorities. Setting up a structure that protects such rights effectively has to involve giving the public, the elites, and for that matter the police and the army, the idea that rules protecting a minority are not to be trampled. These groups must see the value to them of a "rule of law state" and also believe that most other people see these values too. Otherwise, people will fear that others will act first to capture total power and destroy any opposition. And if they resist this, they will be alone and will be destroyed.

Roger Scruton's [2002] very interesting book points out that it took centuries for democratic institutions and moral values to develop in the "West", starting with the separation of religion and government, and then building a healthy skepticism of government backed by institutions that would fight against an overweening government. While we see in the ex-communist countries of Eastern Europe some fast movements to democratic limited government, we see many failures too. And this is in a region with some traditions of democracy and limited government. Farther east, in regions that never had democratic government, it is hard to see any truly democratic systems. A culture of authoritarian rule, and a view that "capturing everything" is better than being cautious, make it hard to make and keep limited government.

What is the chance for a working free market economy in Iraq, where contracts are enforced and private business can rely on other firms and ultimately on courts and prosecutors to assure that private contractual arrangements are fulfilled? Here, we can think of incentives, norms and institutions, using new institutional analysis to flesh out law and economics. Certainly, democracy isn't needed to have effective rule of law in business. But oil- or mineral-rich economies have a terrible history of assuring the enforcement of private contracts. It is just too easy to grab the oil, using force. No owner can move the oil elsewhere, and in contrast to manufacturing or hi-tech or trading, incompetence or a bad reputation don't destroy its value. So there's always an incentive to capture the oil with business tricks or politics. Proper business courts aren't needed to have prosperity, and so there is little incentive to develop them.

The norms of obeying one's contracts can develop in a complex economy where continued relations are needed for prosperity. LaPorta et al. [1998] show that a "history" of effective law, like the common-law tradition in the English-culture countries, helps economic growth. Could these norms or traditions be developed quickly, or imported, to Iraq? While most history is negative, there are some cases of rapid economic growth under a workable rule-of-law system, starting from nearly zero. China might be the most positive current example. The Middle East's merchant culture certainly has the makings of some norms of contract, but it might not be sufficient for an advanced industrial economy.

Perhaps importing a set of laws and courts from another country would be the fast and effective way to develop a system of contracts in Iraq. British or American law could be imported, and local judges, prosecutors and lawyers trained. This would have considerable advantages: it would be a modern, internationally known and effective system, and if enforced with help from the United States or the United Kingdom, it could quickly focus expectations and put down roots. It would greatly help in business relations with the West. The disadvantages are first that Iraqis would likely oppose it as something imposed from outside, and second that it has very different structures from Sharia (Islamic) law and so would conflict seriously with the domestic legal culture. (Again, see Scruton [2002]). If it were accepted as generically "modern" like the internet or cellphones, as a new technology, it might succeed.

These four “rule of law” questions regarding Iraq all were tied to law and economics, and I think that the focus of the law and economics approach helps us to see the questions more clearly. Yet in each case, differences in culture and history made a difference in practice, and they influenced the institutions of law and economics. Certainly, Coase emphasized transactions costs as important in the analysis of property; what seems significant here is that the transactions costs are different in different environments. I had to go to the new institutional economics, such as Douglass North’s 1990 book, and to works on culture to structure the law and economics questions.

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