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**SUB-NATIONAL GOVERNMENT IN POST-CONSTITUTION
IRAQ: CONSTITUTIONAL AND LEGAL FRAMEWORK**

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I. INTRODUCTION

This discussion focuses on constitutional and legal issues implicated in sub-national governance with the coming into force of the new Constitution of the Republic of Iraq ("Constitution") when the "seating" of the new government takes place following the national elections of 15 December 2005 (Article 144).¹ To date, the LGP2 Policy Team has issued several Papers that illuminate sub national/ local government issues in the context of the Constitution.² The intent here is not to simply re-visit these issues but rather to examine those salient ones in greater depth from constitutional and legal perspectives and to explore issues not considered in these writings. This paper will begin with a review of the Coalition Provisional Authority's (CPA) Transitional Administrative Law (TAL) of 8 March 2004 and CPA Order Number 71 (Order #71) of 4 April 2004, its principal enactment for sub-national governance, and the structure of local government that these instruments introduced to Iraq. This will be followed by an analysis of the legal standing of this structure and TAL and Order #71 themselves after the Constitution is in force, relevant Constitutional provisions pertaining to sub-national government, and broad legislative options that may be available for institutional arrangements for sub-national governance.

II. TAL AND ORDER #71³

It is relevant to briefly examine the arrangements provided in TAL and Order #71 because these remain largely undisturbed (in formal terms) so far. Moreover, the experience gained thus far by sub-national government entities (and continue to gain) may well be critical in shaping the future of sub-national governance in Iraq.⁴

During the transitional period, TAL constituted the governing law of Iraq (Articles 1(A), 3), and in effect, its interim constitution. TAL also affirmed legal measures taken by CPA – such as Regulations and Orders -- prior to its promulgation as well as those issued thereafter (Article 26).⁵ Some structural

¹ The Constitution was adopted by the national Referendum held on 15 October 2005.

² See, Dr. Christine L. Fletcher & Dr. Talib Al Hamdani, *The Iraq Constitution as a Policy Document for Sub-National Government* (Fletcher & Al Hamdani), Dr. Christine L. Fletcher, Dr. Abdalla G. Mohammad & Dr. Saladin O. Perababi, *Assisting Provincial Councils and the Kurdistan Regional Government: Identifying a Local Government Role in the Kurdistan System of Government* (Fletcher, Mohammad & Perababi), Ricardo Silva-Morales, *Overview on Intergovernmental Fiscal Relations in Iraq*, July 30, 2005 (Silva-Morales July 2005), Ricardo Silva-Morales, *Alternative Organizations for Governorate Administration*, 10/2005 (Silva-Morales October 2005). Ricardo Silva-Morales, *Intergovernmental Fiscal Policy Elements in Iraq's New Constitution, Potential Implications*, 11/22/05 (Silva-Morales November 2005).

³ The arrangements for the judiciary under TAL, excepting those for the Federal Supreme Court (see, Section V.B), are excluded from the present discussion.

⁴ See, Section VI, p.29.

⁵ CPA' Order #100, entitled *Transition of Laws, Regulations, Orders and Directives Issued by the Coalition Provisional Authority* of 28 June 2004, made appropriate revisions of these instruments to facilitate the transfer of full governing authority to the Iraqi Interim

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features introduced by TAL at the center were altered with effect from 30 June 2004 but TAL itself retained its status as the authoritative instrument for governance (Annex to TAL).

TAL provided for sub-national governance within the context of a “republican, federal, democratic, and pluralistic” system of government, with “powers ... shared between the federal government and the regional government, governorates, municipalities, and local administrations” (Article 4). TAL articulated two principles in sub-national governance: first, “[t]he design of the federal system in Iraq shall be established in such a way as to prevent the concentration of power in the federal government ...”, and secondly, this system “shall encourage the exercise of local authority by local officials in every region and governorate, thereby creating a united Iraq in which every citizen actively participates in governmental affairs, secure in his rights and free of domination ...” (Article 52).

Laws enacted under the previous regime that conflicted with TAL were declared null and void (Article 3 (B)). In fact, Law No. 159 of 1969 that imposed limitations on powers of the local governments was suspended to the extent of the inconsistency by Order #71 (Section 8 (1)). Clearly, TAL and Order #71 did not intend to reject what had existed respecting sub-national governance in its entirety. Rather, features of some prior legislation were incorporated into the new instruments, most notably the provisions relating to the authority of sub-national governments to raise revenue introduced under Law No. 130 of 1963 (Order #71 Section 8 (1)).

Federal Government:

The Iraqi Transitional Government (ITG), identified in TAL as the “federal government” (Article 24 (A)), was granted “exclusive competence” over a list of subjects (Article 25). The subjects themselves were further regulated by CPA Orders – thus, Order #95 of 2 June 2005 on Financial Management Law and Public Debt Law (Order #95) provided a comprehensive framework for the conduct of federal financial and budgetary policy as well as public debt policy. Legislation of the “federal legislative authority”, the National Assembly, superseded any legislation issued by “any other legislative authority” (Article 26 (B)). Subjects not reserved to ITG were available for the exercise of the authority of sub-national entities (Article 57 (A)). Sub-national bodies were assigned a consultative role in managing the natural resources of the country (Article 25 (E)).

With effect from 30 June 2004, the Iraq Interim Government (IIG) replaced ITG pursuant to the Annex to TAL and CPA Order No. 100 of 28 June 2004 (Order #100) but it functioned pursuant the legal framework of TAL.

Government (see below, p. 5) but the legal framework for local governance was not affected by it, with the exception of provisions relating to certain senior ministerial officials.

Sub-national Governance:

For sub-national governance, TAL offered a legal framework, and this was reiterated and implemented by CPA Order #71, excepting that the territories under Kurdistan Regional Government (KRG) were excluded from its application (Section 1). TAL provided for two hierarchically arranged administrative levels, "regions" and "governorates". The only Region recognized by TAL was KRG, created to administer the former Kurdistan; this provision, as well as others which covered the authority of KRG, in essence recognized the reality of the separate existence of Kurdistan. Provision was made for any group of no more than three Governorates, with the exception of Baghdad and Kirkuk, to formally move for recognition as a region (Article 53). The areas of the authority of KRG, ultimately subject to the exclusive subject matters vested in ITG/ IIG, were detailed (Article 54) but there was no indication that other regions that may come into being would have similar or identical powers. TAL also encouraged "de-centralization" and "devolution" of power from the center in the functioning of both the Regions and Governorates (Article 56 (C)).

Each Governorate was given the authority to name a Governor, Governorate (Province),⁶ municipal and local councils (Article 55 (A)). TAL specifically authorized the Governorate Councils (Provincial Councils) to be separately funded from the national budget, raise revenues by means of taxes and fees, organize Governorate operations, monitor and recommend improvements in the delivery of public services, amend specific local project plans in annual ministry budget plans by two-thirds majority, initiate and implement projects on its own or in partnership with NGOs, and conduct other activities consistent with national laws. They were to perform their responsibilities independently of the control or supervision of any central ministry but were also required to assist ITG/ IIG with the operations of "federal" ministries in their respective areas. The Councils were authorized to approve or veto the appointments of Directors-General of ministries and local ministerial officials ranked at the level of "senior positions" in their respective areas (Order #100 imposed new procedural requirements here). The chief executive -- "head of civil office" -- in each Governorate was the Governor, selected by the Council, and this official was vested with the responsibility of implementing the decisions of the Council (TAL: Article 56 (A); Order #71: Sections 1, 2, 3).

At the level below Governorate Councils, each Governorate was permitted to establish, as necessary, councils such as *Qada* and *Nahiya* councils, city councils, *Beladiya* and *Hayy* councils. These bodies, in effect, were to function as extensions of the federal and provincial administrations with respect to service delivery, with the authority to organize their respective operations taking into account local needs and interests, identify local budgetary requirements through the national budgeting process, recommend disciplinary

⁶ "Province"/ "Provincial Councils" constitute the common usage, though English translations of the relevant Arabic texts uniformly prefer "Governorate"/ "Governorate Councils".

actions respecting local officials, and raise its own revenues. The Governorate Councils were authorized to grant other specific responsibilities to the lower level councils they created. The administration of each council was to be in the hands of an elected "Mayor", and this official was also to be the primary liaison between the council and Governors (TAL: Article 56 (B); Order #71: Sections 4, 5).

It is of course patent that, in the exercise of powers granted to them by TAL and Order #71, sub-national institutions were necessarily required to respect and abide by the Fundamental Rights of the citizens proclaimed by TAL (Chapter Two).

TAL did not introduce a genuine federal system of governance to Iraq. Very briefly, TAL's division of powers between the federal and regional/ provincial entities did not produce the distinguishing feature of federalism, each entity having its own sphere, independent yet co-ordinate with each other.⁷ In fact, one commentator has asserted that many of the provisions of TAL were viewed by its authors as "primarily aspirational and designed to guide the writing of the permanent constitution rather than have any immediate effect."⁸

III. THE CONSTITUTION

The adoption of the Constitution did not usher in a new era in local governance in Iraq. Nor did it embrace the entire local governance legal framework that was introduced under TAL and Order #71.

A. TAL and Order #71 in Relation to the Constitution:⁹

Constitutional and Legal Provisions:

TAL provided the conditions under which that instrument and legal enactments issued under the authority of CPA retained validity. TAL itself "shall remain in effect until the permanent constitution is issued and the new Iraq government is formed in accordance with it" (Article 62; see also, Article 3 B)). Further, it was declared

[t]he laws, regulations, orders, and directives issued by the Coalition Provisional Authority pursuant to its authority under international law

⁷ This is the essence of the classic formulation of K.C. Wheare.

⁸ Nathan J. Brown, *Transitional Administrative Law: Commentary and Analysis*, pp.3-4, <http://www.geocities.com/nathanbrown1/interimiraqconstitution.html>

⁹ An authoritative translation of the Constitution has yet to be released. Reference is made here to the unofficial English translation by UNAMI. The authoritative Arabic text may be found in, *Gazette*, 28 December 2005.

The Constitution will come into force with the seating of the new legislature following the national elections of 15 December 2005 (Article 144).

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shall remain in force until rescinded or amended by legislation duly enacted and having the force of law (Article 26 (C)).

The Constitution, on its part, explicitly referred to TAL in two provisions. First, it declared that

[t]he Transitional Administrative Law and its Annex shall be annulled on the seating of the new government, except for the stipulation of Article 53 (A) and Article 58 of the Transitional Administrative Law (Article 143).

TAL's Article 53 (A) established KRG, and its Article 58 directed ITG to "act expeditiously to take measures to remedy the injustice caused by the previous regime's practices" (the practices themselves were then enumerated). Secondly, there is a more detailed reference in the Constitution (Article 140) to TAL's Article 58 that directs the Executive Authority to take the necessary steps to complete the implementation of its requirements as well as a modification of that Article. The modification is with respect to the steps required for the resolution of the status of Kirkuk and other disputed territories -- normalization and census, concluding with a referendum -- with a time limit, 31 December 2007.

More generally, the Constitution also declared that "[e]xisting laws shall remain in force, unless annulled or amended in accordance with the provisions of this constitution" (Article 130). In terms of the present discussion, this is directly relevant to Order #71 and other pertinent laws (such as Order #95) but it is also worth noting that it is applicable to the laws of the previous regime that have continued to be recognized, implicitly or explicitly, as well.

Residuary Law:

The pertinent question then is, do TAL and Order #71 subsist as the residuary law of Iraq until the stipulated events take place (i.e. the formation of the new government, in the case of the former, and annulment or amendment, in the case of the latter)?

Arguably, the answer rests upon the determination as to which of the Constitution's provisions rendered provisions in TAL and Order #71 null and void because they conflicted or were not in accord with such provisions. The Constitution itself makes its supremacy abundantly clear with the declaration that the instrument is "the preeminent and supreme law" of Iraq, binding on all parts without exception and that no law shall contradict it (Article 13) -- even in the absence of such a declaration, the Constitution would reign supreme in relation to the two earlier instruments under standard interpretation rubrics for written constitutions. To that extent, express language of annulment in the Constitution referencing a particular provision of earlier instruments is not required for its negation.

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Take the case of the Constitution's provisions respecting the law-making powers of the Regions and Governorates vis-à-vis the Federal legislative authority. As for powers shared between the Federal government and the Regions and Governorates, Constitution's Article 117 - Second declared that "[t]he priority goes to the regional law in case of conflict between [such] powers shared between the federal government and regional governments". In the event of a "contradiction" between Federal Government and Regions with respect to the powers that fall outside the exclusive authority of the Federal Government, Article 117 states that "the regional authority shall have the right to amend the application of the national legislation within that region." Contrast these provisions with TAL's declaration that "[l]egislation issued by the federal legislative authority shall supersede any other legislation issued by any other legislative authority in the event that they contradict each other" (Article 26 (B)).¹⁰

Perhaps, one more example, of somewhat different order, may be cited. Order #71 invested Governorate Councils with the authority to "initiate and implement provincial projects alone or in partnership with international and non-governmental organizations" (Section 2 (2)) but the Constitution gives no such authority to these bodies. This silence has implications. A Governorate Council that resolves to act in cooperation with NGOs has no specific legislative mandate to do so; such a body may still act since there is no express prohibition against such an association, though arguably it could potentially face a legal challenge.

There is a further legal issue that is worthy of notice: once TAL is annulled with the formation of the government, would Order #71 too cease to have legal standing since TAL provided legal validation of legislative acts of CPA? It does not, because Order #71 explicitly invoked the laws and usages of war and relevant UN Security Councils resolutions, including Resolutions 1483 and 1511 (2003) as the bases of the authority of the Administrator of CPA to issue that (and other) legislation. However, there remains the issue, certainly at the theoretical level at least, whether the Order was consistent with the authorities invoked.¹¹

Arguably, the ambiguity that exists with respect to TAL and Order #71 would be clarified over time. The formation of the new government and the possible determination to annul or amend inherited laws on the part of the Federal legislature may not be the only events that may bring about this clarification. It is possible that, consistent with directives in significant number of Articles

¹⁰ An exception to this was provided in TAL for Kurdistan region: the Kurdistan National Assembly was permitted to amend the application of Federal laws therein, with the exclusion of legislation concerning the exclusive authority of the Federal government and the arrangement of the courts (article 26 (B) referencing Article 54 (B)).

¹¹ See, Section V: B, p.24.

of the Constitution that legislative action be taken on specific subject matters to elaborate their substance, new legislative measures may emerge to clarify the situation. Further, it is quite evident that the Federal legislature, by necessity, would have to take up the matter of implementing legislation with respect to other provisions in the Constitution that implicitly suggest such measures.¹² There is also the possibility that constitutional amendments may affect the standing of these two instruments.¹³ Beyond all these, ultimately, it rests with the Federal Supreme Court, Iraq's new constitutional court, to grapple with these issues and interpret the Constitution, provided they are brought before it and the Court decides that judicial review is merited.¹⁴

B. Federal Government

Under the Constitution, the Republic of Iraq is declared to be a "federal state" (Article 1), with "a decentralized capital, regions and governorates, and local administration" (Article 116). Yet, its precise federal character cannot be determined from a reading of the instrument; this results from both omission and commission.¹⁵ Further, the constitutional language presented in the translation (or, perhaps in the original text) is vague, ambiguous and lacking in clarity, thereby making a true understanding of the Constitution difficult indeed.

The Federal government was to be formed of three branches, legislative, executive and judicial, organized under the principle of separation of powers (Article 47). The institutions at the center are to be the Council of Representatives and Federation Council, constituting the legislative branch; President and Council of Ministers, constituting the executive branch; and Higher Judicial Council and Federal Supreme Court, constituting the judicial branch.¹⁶

Bagdad, demarcated by its municipal borders, was declared the Capital and its status was to be determined by law (Article 124); it is identified as the

¹² On implementing legislation see, Sections III: C, pp.14-15, IV: C, pp. 18-20.

¹³ On constitutional amendments see, Section IV: B, pp. 16-18.

¹⁴ On judicial review see, Section V: B, pp. 23-24.

¹⁵ Fletcher and Al Hamdani characterize the Constitution as an instrument that embodies federalism more in name than in substance. See, Fletcher and Al Hamdani, p.2. Silva-Morales notes that provisions concerning intergovernmental fiscal policy contradict classic features of a federal state, and he also makes the point with respect to distribution roles and responsibilities that what the Constitution effectively offers is "federalism by default". See, Silva-Morales July 2005. Both studies discuss the draft constitution but their conclusions remain broadly valid. Nathan J. Brown, on the other hand, has argued that some features of the draft constitution point to a confederation arrangement. See, Nathan J. Brown, *The Final Draft of the Iraqi Constitution: Analysis and Commentary*, p. 13, <http://www.Carnegieendowment.org>.

¹⁶ It may be noted that the institutional arrangements are modified in certain cases by the "Final and Transitional Provisions" of the Constitution (Section Six). Where relevant attention will be drawn to such modifications.

“decentralized capital” elsewhere in the Constitution (Article 116) but what is meant by this phrase is not clear.

The Federal authorities are mandated to preserve “the unity, integrity, independence, sovereignty of Iraq, and its federal democratic system.” (Article 109). The Federal government was assigned the exclusive authority over foreign policy and diplomatic representation (and related matters such as treaties), national security, fiscal and customs policy (and related matters such as inter-governorate/ -regional commerce), standards and weights, citizenship and naturalization, telecommunications and mail, investment budget, supply of water from outside Iraq, and statistics and census (Article 110).

C. Sub-national Governance

Structure:

In terms of the structure of sub-national governance, there are to be two levels, Regions and Governorates, arranged hierarchically in that order. The Constitution expressly recognized “Kurdistan” as a Region as it existed at the time of its adoption. It also provided for the creation of other Regions by one or more Governorates; the TAL limitation that a Region should consist of a maximum of three Governorates was superseded, thereby allowing the possibility of “super Regions”. The Governorates could begin the process of establishing a Region on the basis of a referendum held at the request of one-third of the council concerned or of one-tenth of the eligible voters of the Governorates concerned (Articles 117 – 119).¹⁷ The earlier prohibition against Kirkuk joining a Region is no longer in place, but Baghdad as the Capital, remained outside. Regions are given the power to define their respective “structure of ... government, its authorities and the mechanisms of these authorities” by adopting constitutions, provided their provisions do not contradict the Constitution (Article 120).

The Governorates are to be made up of a number of districts, sub-districts and villages (Article 122). The administrative boundaries constituted the Baghdad Governorate, and the language is ambiguous as to whether it could become a Region or join a Region (Article 124).

It is indeed noteworthy that the Constitution fails to identify any lower level governing authorities. though there is a single reference to “local administration” in the context of the components of the “federal state” (Article 1).

¹⁷ The Transitional Provisions of the Constitution alters the procedure for the approval of the enactments of the Council of Representatives on account of the coming into being of the Presidency Council in place of the President but this change is not applicable with respect to the Council's acts concerning the formation of Regions (Article 138).

Authorities:

The arrangements provided for in the Constitution for the exercise of governmental authority both followed and departed from TAL and Order #71.

The first type of arrangements focus on shared powers between the center and the Regions and Governorates. Provisions relating to oil and gas, the "ownership" of which belongs to all people of Iraq, are perhaps the most noteworthy of these. The products of the existing gas and oil fields are to be managed by the Federal government and the producing Regional and Governorate governments, so that the revenues will be shared in a "fair manner" in proportion to the population distribution in the country, with "a set allotment for a set time" for those areas that suffered from the actions of the previous regime and those that suffered damages subsequently. The very same entities were also required to work together to develop strategic policies to develop this "wealth" for the highest benefit of the Iraqi people (Articles 111-112). Other shared authority covered the following:

- administration of antiquities, antiquity sites, traditional constructions, manuscripts, and coins, all deemed part of the "national wealth", the responsibility for which is with Federal Government which will administer in cooperation with the Regions and Governorates (Article 113);
- Administration of customs; regulation of main sources of electric energy and its distribution; environmental policy; planning; public health, public educational and instructional policy; main internal water sources (Article 114).

Secondly, the Regions and Governorates were vested with separate and distinct authority of their own as well as authority that was common to both types of entities. The Regions were empowered to adopt constitutions and exercise executive, legislative and judicial powers in accordance with their respective constitutions, except those within the exclusive competence of the Federal government. They were also responsible for all administrative requirements of their respective territories, in particular the establishment and organization of the internal security forces (Articles 120-121). As for Governorates, broad administrative and financial powers were given to them to enable them to manage their respective affairs "in accordance with the principle of decentralized administration". The Governorate Councils could not be subjected to the control or supervision of any ministry or institution, and they could have their own "independent finance" (which may be read as independent sources of revenue) (Article 122 – Fifth).

Over and above these specificities, the Constitution also declared that Regions and Governorates shall be allocated an "equitable share of the national revenues sufficient to discharge [their] responsibilities and duties". This allocation is to be made with "due regard" to their resources, needs and

population percentages (Article 121 – Third). The sub-national governance entities may look upon this provision very favorably, yet it has problematic language, for such words as “sufficient” and “due regard” will require clarifications. All powers not exclusively exercised by the Federal authority under the Constitution were placed in the hands of the Regions and Governorates (Article 115). Finally, they were given the authority, if they so wished, to adopt any language other than the two official languages, Arabic and Kurdish, as an additional language by referendum approved by the majority of the population (Article 4).¹⁸

There is also provision in the Constitution for the mutual delegation of vested powers between the Federal government and the Regions and Governorates (Article 123).

The lack of clarity, vagueness and ambiguity in its language raises doubts about the validity of the Constitution’s declaration of the establishment of a federal system. This would be apparent even with a cursory review. To exemplify, the exclusive authority vested in the Federal Authority is diluted, if not undermined, by other provisions. For example, Regions and Governorates are permitted to establish offices in Iraqi embassies and diplomatic missions in order to promote cultural, social and developmental affairs (Article 121 – Fourth); political matters are excluded but whether this exclusion will, in practical terms, insulate the exclusive authority of the Federal government from encroachments by the Regions and Governorates is doubtful. Again, while the Federal government was vested with exclusive authority over customs policy formulation, under a further provision the administration of that policy was required to be in coordination with Regions and Governorates (Article 114 –First).¹⁹

Further examples may be offered. For one, the implementing legislation required on the part of the Federal legislature on a host of subject matters (as discussed below) has the potential of further clouding the arrangement of the distribution of powers and responsibilities between the center and sub-national institutions of governance and the relationships between these two strata. For another, as noted several times elsewhere in the present paper, many definitional problems and the need to clarify vague language are likely to arise and these may further complicate the proper understanding of the institutional arrangements put forth by the Constitution.

Implementing Legislation:

Some of these arrangements, concerning both structure and powers and responsibilities, will certainly be subjected to changes -- the nature of which cannot be predicted – on account of the fact that the Constitution specifically

¹⁸ Under Article 131 of the Constitution, unless otherwise noted, only simple majorities are required for successful referenda.

¹⁹ For further discussion see, Silva-Morales July 2005.

called for implementing legislation respecting them.²⁰ As for the shared competencies of the Federal government and Regions and Governorates, the following required legislative action: matters relating to oil and gas and antiquities and antiquity sites and related matters (Article 113) , management of customs and internal water resources (Article 114), health including hospitals, clinics and treatment places (Articles 30 and 31) and education (Article 34). In the case of the Regions, the executive procedures for the formation of these entities were left to be determined by law (Article 118), as were the elections and powers of the Governorate Council and Governor and their administrative and financial authority (Article 122).

There were a number of other important subject matters subjected to directives for implementing legislation. Thus, the regulation of the following public bodies that included representatives of the Regions and Governorates was reserved for implementing legislation: Public Commission on Governorates not incorporated into Regions (mandate to guarantee such entities fair participation in various federal institutions, missions, fellowships, delegations and conferences - Article 105), Public Commission on Audit (audit and appropriate federal revenues – Article 106) and Federation Council (second legislative chamber – Article 65). Apart from these, other public commissions, conceivably with sub-national representation and/ or impacting upon sub-national governance, could be formed “according to need and necessity” under the Constitution (Article 108). The mutual delegation of powers between the different levels of government was also subject to a legislative directive (Article 123).

It is worthy of notice that directives for implementing legislation touched the center as well. Thus, as far as the executive authority is concerned, implementing legislation was required respecting, among others, nominations to the post of President and one or more Deputy Presidents (Article 69), remuneration of the President, Prime Minister and ministers (Articles 74, 82), and the formation, duties and responsibilities of the ministers and their authority (Article 86).

Implicit in the Constitution is the necessity of implementing legislation on a host of subject matters, and a number of these are matters central – indeed, crucial – to the ordering of sub-national governance. Thus, for example, the Constitution is silent on the process of constitution-making on the part of the Regions (see Article 120), and it is evident that this undoubtedly crucial issue has to be addressed in future legislation. Perhaps, one more example would suffice: the procedure for the allocation of equitable share of the national revenues to the Regions and Governorates to enable them to discharge their responsibilities and duties (see, Article 121 – Third) surely has to be established by a legislative mandate.

²⁰ For further information on directives for implementing legislation see, Vijaya Samaraweera, *New Constitution of the Republic Of Iraq: Directives for Specific Legislative Measures*, RTI/ USAID ISLGP/ LGP2 - Legal Policy Briefing Paper 1 (December 2005).

There are further areas in which the Council of Representatives may have to come forward with legislation: the Constitution's complete silence on some crucial subjects and its apparent omissions on some other subjects. To exemplify the former, as noted previously, the Constitution failed to address the matter of governance below the level of Governorates. As for the latter, it refers to Regions but not to Governorates in enumerating the requirements for the amendment of the Constitution under regular provisions that affect the authority of sub-national entities (see below).

IV. PROCESS OF AMENDING THE CONSTITUTION AND LAW-MAKING

This discussion, in the main, is necessarily an abstract one for an obvious reason: the dynamics of political parties/ groups and interest politics within and without the Federal legislature and the wider political realities when it determines to act legislatively will shape the nature and form of the constitutional amendments and legislation that will eventually emerge.

A. Council of Representatives:

Although the Constitution identifies two bodies, the Council of Representatives and the Federation Council, as constituting the Federal legislative power, in reality only the former will matter (see, Articles 49-64). In fact, even the power to create the non-elected Federation Council was handed over to that body (Article 65) by virtue of which the Council of Representatives would, in effect, dominate the Federation Council.²¹ The Federation Council is likely to be assigned a role in law-making. However, arguably it will not resemble anything even close to the conventional second or upper chamber in a Federal legislature that is typically intended to act, more or less, as a check on the elected body. In fact, provisions for its structuring are such that the Federation Council found no place at all in the crucial constitutional amendment process.

B. Amending the Constitution

Four institutions of government have specified roles in the two sets of procedures laid down for amending the Constitution: the Council of Representatives, from the Federal legislature, President²² and Council of Ministers, from the Federal executive, and Regional governments from the sub-national level. Each procedure is unique, and the role these institutions play is quite varied.

²¹ Brown, *The Final Draft of the Iraqi Constitution*, pp. 8-9, describes the Council of Representatives' authority to establish the Federation Council as "absolutely extraordinary".

²² Under the Transitional Provisions of the Constitution, the Presidency Council exercises the powers vested in the President (Article 138 – First).

Transitional Provisions:

During the period covered by the Transitional Provisions of the instrument, the procedure for constitutional amendment is as follows:

- When it begins to function, the Council of Representatives shall form a committee of its members, which shall be “representative of the main components of Iraqi Society”, empowered to report to the Council its recommendations for amendments within a period of not more than four months. The committee will be dissolved upon a decision being made on its recommendations;
- The recommendations for amendments shall be taken up together as one list by the Council, and if an absolute majority of the Council votes in favor, the Articles concerned are deemed amended;
- The amendments approved by the Council of Representatives shall be put before the “people” in a referendum within two months of the Council’s approval. The referendum passes if it wins an absolute majority of those who voted, unless two-thirds of voters in three or more Governorates reject it.

The validity of the application of this process ceases upon the completion of actions taken or (impliedly) when the specified time period lapses. Thereupon, the procedure for the amendment of the Constitution reverts to that stipulated in its regular provisions (Article 141).

Arguably, the requirements imposed upon the transitional amendment process were meant to function as checks and balances. The question is, would they serve the purpose? A number of definitional issues are embedded in the requirements and these necessarily have to be determined by the Federal Supreme Court. Thus, for example, would the Council committee recommending amendments be strictly representative of the “main components of Iraqi Society”? Of course, political dynamics within the body may move the Council to make the committee reflect its principal political landscape, though not necessarily the wider body politic – it is reasonable to posit that this is not what was intended by the relevant language. There is seemingly a far stiffer check, the rejection of amendments if two-thirds of those who voted in three or more Governorates do not approve. However, this conceivably may not be that significant a bar. After all, voting at the far more important referendum on the draft constitution on 15 October 2005, which had a similar requirement, did not meet this threshold. Perhaps, more meaningful may be the requirement of an absolute majority in the Council for the approval of amendments. Nonetheless, it is noteworthy that the procedure under the regular provisions imposes a stiffer two-thirds majority in the Council for amendments to be adopted.

These considerations of course have to be placed within the context of a fundamental fact: amending a constitution is supremely a political act, and there are many imponderables concerning the future political process of this fledgling democracy.

The fact that the Head of State, the President, has not been assigned any role in the process of amending the Constitution during the Transitional Process merits notice.

Regular Provisions:

After the Transitional Provisions have lapsed, the procedure in place provides that either the President²³ and the Council of Ministers, acting collectively, or one-fifth of the members of the Council of Representatives may propose to amend the Constitution. Certain additional checks and balances are imposed upon the amendment process:

- The Fundamental Principles (Section One) and the Rights and Liberties (Section Two) enunciated in the Constitution may not be amended except after two successive electoral terms (each term encompasses four years, Article 56 - First) and with the approval of two-thirds of the members of the Council, approval of the voters in a referendum, and the ratification by the President within seven days of referendum approval;
- Provisions other than the Fundamental Principles and Rights and Liberties may not be amended except with the approval of two-thirds of the members of the Council, approval of the voters in a referendum, and the ratification by the President within seven days of the approval of the referendum;
- Articles may not be amended if such amendment takes away the powers of Regions unless there is consent of the legislature of the Region concerned and the approval of the majority of its "citizens" in a referendum.

In the event that the President does not ratify within the stipulated period, the amendment is deemed ratified automatically. Thus, the President will not have veto power over legislation. The amendments enter into force on the date of their publication in the official *Gazette* (Article 129).

Under this procedure the Council shares with the President and the Council of Ministers the right to propose amendments but nonetheless, the Council remains the key player in this regard since any such proposal has to win approval of two-thirds of the Council members. The President is the

²³ Under the Transitional Provisions, a Presidency Council will exercise the powers vested in the President (Article 138 - First).

ratification authority for the amendments but it is not a veto power since the measure automatically becomes law at the expiration of seven days. Ultimately, all the provisions of the Constitution are open to amendments, with an eight year delay in the case of those that come under the Fundamental Principles and Rights and Liberties Sections.

Where the proposed amendment would take away powers of Regions, additional safeguards – approval of the legislature and the citizens of the Region concerned -- are put in place. At this juncture, these provisions are relevant only to KRG, though other Regions may qualify in the future. The approval of the citizens – not the voters – is by a simple majority. Given the lack of clarity in the Constitution as to what precise powers Regions enjoy, the definition of what they are may well be a pliable standard.

It needs to be pointed out that this procedure identified only the Regions for the formal safeguarding of sub-national governance interests; inexplicably, Governorates are not included. Thus, the standing of the Governorates could be altered by ordinary legislation.

C. Law-Making

The Constitution provides instructions in some detail regarding some aspects of the Council of Representatives' law-making procedure -- some of these are modified for the duration of the period when the Transitional Provisions apply (see, Article 138-Fifth). The Council is also required to formulate its own by-laws to regulate its work (Article 51).²⁴

Among the provisions the Constitution lays down respecting its procedure, two provisions in particular should be noted: sessions of the Council shall be public unless the body deems them otherwise, and "Minutes" of the sessions shall be published by means deemed appropriate by the body (Article 53). It is likely that the matter of closed sessions will be dealt by the Council's by-laws; what precise rule will emerge of course cannot be forecast but it is to be hoped that allowance of closed sessions will be carefully defined. On the other hand, the appropriateness of requiring only the Council's Minutes rather than proceedings themselves to be disseminated to the public is arguably not conducive to public's access to the body it elected.

The Constitution's requirement for implementing legislation was in some cases, explicitly allocated to the Council of Representatives. With respect to other requirements, given the structural arrangements, the responsibility falls upon the Council impliedly. Several of these instructions offer guidelines as to what needs to be accomplished. A plain language reading does not indicate that the scope of the laws to be enacted thereby would be strictly

²⁴ The Transitional Provisions provided that the bylaws of the National Assembly shall be adopted by the Council of Representatives at its first session until it adopts its own (Article 133).

circumscribed by the guidelines, though that issue may be open to judicial review. Such instructions are to be contrasted with those provisions which lack them, which would enable the Council to be free to determine what needs to be accomplished; this of course is not an unrestrained power, for the Council would be subject to both the constitutional provisions that impose other constraints (see below) and legislative politics. As noted previously, a number of provisions implicitly suggest the need for implementing legislation.

Requiring implementing legislation by the Constitution essentially transforms the worth of the subject matter concerned. Since the subject matter is given the imprimatur of a law through the ordinary course of legislative action, it may be repealed or amended by ordinary legislation as well. If the subject matter had been elaborated and incorporated into the Constitution itself, then a constitutional amendment would have been required for any changes.

In the exercise of its legislative powers, the Council of Representatives has to take special cognizance of several Constitutional provisions. The Preamble, composed of hortatory declarations, is not legally binding but the Council may be well advised to pay heed to it.²⁵

On the other hand, the Fundamental Principles and Rights and Liberties enshrined in the Constitution are binding generally and specifically. Thus, no law that contradicts the "principles of democracy" and "rights and freedoms" may be enacted (Article 2 – First (B) and (C)). Yet, the term "principles of democracy" is a vague formulation, and surely would require the intervention of the Federal Supreme Court to offer clarity. Again, the Council may have considerable leeway respecting certain rights and liberties since the Constitution mandates it to enact implementing legislation to elaborate on what is stated. On the other hand, the declaration that no law shall contradict "the established provisions of Islam" (Article 2 – First (A)) is likely to become controversial since what "established" means may be disputed.²⁶ Equally, controversies may also emerge on the application of the Constitutional provision that identifies Islam as "a fundamental source of legislation" (Article 2 – First); the role of Islam in legislation was a hotly debated subject, certainly by outside commentators,²⁷ and acceptance of this language rather than the declaration that Islam was "the sole source" of legislation is recognized as a concession by the drafters.

D. Constitutional and Legislative Options

A number of scenarios may be sketched as being hypothetically available to the Council of Representatives in focusing on sub-national governance. In offering these it should also be noted that any of them -- or any combination

²⁵ Brown, *The Final Draft of the Iraqi Constitution*, p.1. The Constitution drafters considered making the Preamble legally binding but eventually dropped the idea.

²⁶ Brown, *The Final Draft of the Iraqi Constitution*, p.2.

²⁷ See for example, United States Commission on International Religious Freedom, *Iraq's Draft Permanent Constitution: Analysis and Recommendations*, September 15, 2005.

thereof -- may equally produce an outcome that is inimical to the interests of strong and effective sub-national governance as much as an outcome that is quite favorable to the very same interests. Ideally, the Council will act to clarify, properly demarcate boundaries and parameters, and bring order to sub-national governance.

If the Council chooses to follow the path of constitutional amendment, ultimately there is no provision of the Constitution that it cannot amend. Indeed, where the instrument gives directives for specific implementing legislation on sub-national governance, the Council may arguably act by way of amendments rather than by ordinary laws. Given the fact that the Constitution addresses the structure and powers of sub-national governmental institutions in manifold Articles embedded in its different Sections, the amendment process, if addresses each of these, will also produce piecemeal measures. A fully fledged comprehensive measure such as a "Local Government Code" will not be embodied in the Constitution by an amendment -- it is simply not feasible. On the other hand, an amendment may be issued empowering the Council to enact a local government code; such an amendment ideally would be in the form of declaratory principles and would also have safeguards against routine amendments in the future.²⁸

The Constitutional amendment option may be bypassed and/ or combined with legislation (whether original, amending or repealing) enacted by the Council of Representatives in the ordinary course of the exercise of its responsibilities. Such legislation can take either of two forms. First, it may take the characteristic of an ordinary law, and thus, allow for the possibility of it being amended or repealed by ordinary legislative action in the future. Secondly, incorporated in the law itself would be the stipulation that its amendment or repeal requires two-thirds (or three-fourths or such formula) majority and not (depending on what the chamber's bylaws stipulate) simple or absolute majority as would be the case ordinarily. The latter course of action – identified in American jurisprudence as "legislative entrenchment" -- is deemed incompatible with principles of democracy since it is meant, and essentially functions, as a strict limitation on future legislative action. If the legislature desires to bind the future legislatures, then the path to follow is constitutional amendment.²⁹

²⁸ See, for example, Article X (Local Government) – Section 3 of the 1987 Constitution of the Republic of the Philippines: "The Congress shall enact a local government code which shall provide for a more responsive and accountable local government structure instituted through a system of decentralization with effective mechanisms of recall, initiative, and referendum, allocate among the different local government units their powers, responsibilities, and resources, and provide for the qualifications, election, appointment and removal, term, salaries, powers and functions and duties of local officials, and all other matters relating to the organization and operation of local units."

²⁹ See, Julian N. Eule, "Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity", *American Bar Foundation Research Journal* (1987), pp. 384-427. There are advocates of legislative entrenchment as well who point to its value under particular

If the Council acts legislatively on sub-national governance, whether in terms of implementing legislation or ordinary laws, it could produce either a “Local Government Law” or a “Local Government Code”. The essential distinction between the two is breadth of coverage. The former typically does not address all the manifold subject matters or topics of local governance; it would primarily deal with structural arrangements and powers and responsibilities of the various authorities concerned. There is in fact a draft local government law proposed by the Ministry of Municipalities and Public Works (Proposed Local Government Law – version 3). This proposal will inevitably undergo further revisions to take into account the relevant provisions of the Constitution (besides, it is also possible that a different ministry may have responsibility over local government affairs after the formation of the government). The Local Government Code typically takes one of three forms, a composite of existing laws, an entirely new enactment, or a combination of the two. In all these cases, the coverage of subjects is comprehensive.

These two legislative measures may also include “enabling provisions”: these would confer authority to local administrative agencies (whether newly created or already existing) to engage in activities not previously allowed by law.

Any action legislatively on the part of the Council of Representatives empowering sub-national institutions of governance has a fundamentally important corollary: the Council may be deemed to have plenary or complete power over such institutions, subject to applicable provisions of the Constitution. This general rule in municipal law has a crucial implication: whatever authority it confers upon the institutions concerned is open to amendment or revocation by the Council – in other words, these institutions do not have complete autonomy, and the manner in which they function is essentially circumscribed by the authority that has been vested.³⁰

Finally, it is necessary to note that, since the Constitution is silent on the subject, the procedure by which Regions may adopt constitutions of their own will have to be addressed by the Council, either by way of a constitutional amendment or ordinary legislation. Obviously, in empowering constitution drafting and vesting powers and responsibilities in the Regions, the Council will necessarily have to be consistent with the relevant coverage in other instruments, including the Constitution.

normative circumstances. See in particular, Eric A. Posner & Adrian Vermeule, “Legislative Entrenchment: A Reappraisal”, 111 *Yale Law Journal*, 1665 (2002).

³⁰ In American jurisprudence this is embodied in what is popularly known as “Dillon’s Rule” after the decision of Judge John F. Dillon in, *Clinton v. Cedar Rapids & Missouri River R.R. Co.*, 24 *Iowa* 455 (1868). See, Richard Briffault, “Home Rule, Majority Rule, and Dillon’s Rule”, 67 *Chicago-Kent College of Law Review* 1011 (1999).

V. FEDERAL SUPREME COURT AND JUDICIAL REVIEW

A. Structure and Jurisdiction:

Judicial review may be defined as the authority of a court to review a law or executive action for constitutionality and the striking down of the law or executive action if it is violative of the constitution concerned. Depending upon the particular jurisprudence adhered to, the court may also look beyond the constitution, most particularly at basic principles of justice and/ or international standards of human rights, in making its determinations. Judicial review is the particular purview of a constitutional court. A constitutional court is typically the highest judicial organ in the judicial branch of the government, and it may be established as a specialized body or as a court that has, in addition, wider appellate jurisdiction.

The Federal Supreme Court detailed in the Constitution is to be viewed primarily as a constitutional court with expansive judicial review powers, though it has also been vested with jurisdictions that usually do not fall within the rubric of judicial review.³¹ These additional jurisdictions no doubt heighten the Court's standing within the judiciary in particular, and indeed, within the country in general.

The Constitution directs it to have standing as an independent judicial body, financially and administratively (Article 92), and its decisions are final and binding (Article 94).

The Court has jurisdiction over the following subjects under Article 93):

- Constitutionality of laws and regulations in effect;
- Interpretation of the provisions of the Constitution;
- "Settle" matters that arise out of federal legislation and executive action of Federal authorities;
- "Settle" disputes that arise between the Federal government and the governments of the Regions, Governorates and sub-national institutions of governance;
- "Settle" disputes arising between governments of the Regions and Governorates;
- "Settle" competency jurisdiction between the Federal judiciary and the judicial institutions of the Regions and Governorates and between judicial institutions of the Regions and Governorates.

What is meant by the phrase "settle" in the last four subjects listed above is unclear. It is inconceivable that, with this phrase, the Court is cast as a mediation or conflict resolution body as well (this could well be an infelicitous

³¹ Thus, appellate authority for challenges to the decisions relating membership status by the Council of Representatives (Article 52, and ratification of the results of the general elections for the Council of Representatives (Article 93 – Second (Seventh)).

translation of the Arabic text). While there is no specific reference to the Constitution, it is clear that in exercising these particular jurisdictions the Court would necessarily have to be guided by that instrument.

Although the Federal Supreme Court is to stand as a body independent of the Federal legislature and executive, there is a disquieting constitutional provision. The Council of Representatives is to enact implementing legislation, on the basis of two-thirds majority, determining the method of selection of the judges of the Court – who shall be drawn from the pool of judges and experts in Islamic jurisprudence and law experts -- and its “work” (Article 92 Second). Perhaps, the two-thirds requirement would check the Council from compromising the independence of the Court. Further, the Constitution is categorical that judges (in general) are independent and there is no authority over them except by law (Article 88).

There is another constitutional mechanism that may potentially prove to be problematic. This concerns the Higher Judicial Council which under the Constitution is vested with the authority to manage the affairs of and supervise the Federal judiciary as well as to prepare its draft budget. Its method of establishment and rules of operation are to be laid out by implementing legislation (Articles 90); without the requirement of a two-thirds majority, the Council perhaps may find it easier to enact legislation that is far less protective of the new body's independence.

B. Judicial Review:

The Federal Supreme Court is structurally well placed to play a profoundly important role with its judicial review. Arguably, issues arising from three particular areas should initially come before the Federal Supreme Court.

The first concerns the legal standing of the Federal Supreme Court that was established under TAL. As structured by TAL, this body had original and exclusive jurisdiction over legal proceedings between the ITG/ IIG and sub-national governmental institutions, judicial review of laws and executive action on the part of the Federal authorities that are challenged, and ordinary appellate jurisdiction (Article 44). This body will expire when TAL is annulled in accordance with the Constitution upon the formation of the new government but the new Federal Supreme Court would not be in place until implementing legislation for it is enacted. In other words, there will be an interim period. In the event the TAL high court continues to function, the new Federal Supreme Court may have to determine whether that body's actions are constitutional or not.

Secondly, there would be the issue of the legal standing of Order #71. As argued previously, the annulment of TAL with the formation of the government would not lead to the demise of Order #71. TAL provided general basis for that instrument but the instrument itself expressly invoked the laws and usages of war and relevant UN Security Councils resolutions for

legitimation.³² The question then is, is Order #71 consistent with the authorities it invoked? If this matter comes up before the Court, it would entail delving into international law and interpreting it within the context of the law of Iraq. This arguably is realistically an unlikely scenario.³³

The third likely matter concerns the Transitional Provisions for the amendment of the Constitution. Thus, whether the committee that the Council of Representative chooses to recommend constitutional amendments consists of the "main components of Iraqi Society" or not may be ripe for judicial review. The Transitional Provisions also require that the amendments approved by the Council of Representatives shall be put before the "people" in a referendum within two months of its approval. Arguably, the questions whether "the people" equates with "voters" or not may be a matter for the Court to determine.

Beyond these, as the discussion in the preceding Sections of the present paper points out, the Court will, sooner or later be confronted with a substantial and wide range of issues for its judicial review. The language employed in the drafting of the Constitution is so often vague, ambiguous and/ or lacking in clarity that the Court's intervention would no doubt be fundamentally decisive in shaping the fledging democracy in Iraq. Its review of the constitutionality of executive action of the Federal authorities would equally impact governance.

How these scenarios will unfold is unknowable at this stage. This is not only because the Federal Supreme Court has yet to be established. Once in place, how the Court will shape itself will be determined by a host of factors, among which its composition and the rules for the invocation of its jurisdiction, crucial for its role, would no doubt be paramount.

VI CONCLUSION

There is a myriad of issues that should be considered with respect to the policy implications that the discussion in the present paper bring out. However, none is of more immediate consequence than the implications of the procedure found in the Constitution for its amendment during the period when the Transitional Provisions are applicable: which amendments alter the Constitution and which fail do so -- and indeed, what is not even considered - will be momentous for Iraq.

³² On this subject see above, Section III: A, pp. 8-10.

³³ Nonetheless, Nathan J. Brown has argued that another issue with international law implications, whether the UN Security Council Resolution 1546 permits the presence of the Coalition forces only for the duration of the transition to the fully independent Iraq or not, is likely to be tested thereafter. Brown, *The Final Draft of the Iraqi Constitution*, p.7. It may be noted that the presence of Coalition forces is a politically charged issue, whereas the legality of Order #71 may not achieve the same political complexion.

The special transitional provisions on constitutional amendment were inserted into the draft constitution when the virtually last-minute revisions were adopted by the drafters on 12 October 2005.³⁴ Very little is known publicly of what transpired that day. Nonetheless, it is reasonable to argue that the carving out of special procedure constituted the ready acknowledgment of the drafters of the fact that their product was an unfinished one. Iraq's constitution-drafting process was rushed and flawed. There is broad consensus among commentators that the Constitution was not comprehensive as it could (or should) have been. This is owed to the failure on the part of the drafters to agree upon language and/ or compromises on language that had to be made among themselves. The process was heavily criticized, within and without the country, for both substantive reasons relating to content and procedural reasons, among others, concerning the failure to bring into the process both the ordinary citizens and important segments of the Iraqi society.³⁵

While a reasonable argument may be made as to why the special transitional amendment procedure was carved out, it is altogether a different matter when it is asked why the regular amendment process was diluted so that an easier path of action was offered to the Council of Representative. Any attribution of motives to the drafters for this decision would be highly speculative. However, it is appropriate to offer the conclusion that, when placed within the comparative context of recent constitution-making in post-conflict societies, the revision gave the Council of Representatives unusual powers.³⁶

At the outside, the procedure under Transitional Provisions provides a time table of six months from the date of the first official meeting of the Council of Representatives for the completion of amendments to the Constitution. In policy terms, this six month period may well prove to be critical for the future of sub-national governance in Iraq. To be sure, there is nothing to indicate, as of now, that the Council will embark upon constitutional amendment work that will produce determined centralization of power at the expense of sub-national governance. Yet, it is not far fetched to suggest that there exists the potential for an erosion of the standing of the sub-national institutions of governance in relation to the center through this process.

³⁴ *The Washington Post*, 12 October 2005, distinguishes such revisions when it published the draft constitution that was presented for the Referendum on 15 October 2005. The revisions are also to be found in, *Iraqi Politics and Constitution*, <http://www.niqash.org>.

³⁵ See, for example, International Crisis Group, *Unmaking Iraq: A Constitutional Process Gone Awry*, Middle East Briefing No. 19 (25 September 2005); Jonathan Morrow, *Iraq's Constitutional Process II: An Opportunity Lost*, United States Institute of Peace Special Report 155 (November 2005).

³⁶ For comparative perspectives of lessons of recent constitution-making for Iraq see, Jamal Benomar, "Constitution-making After Conflict: Lessons for Iraq", *Journal of Democracy*, 15: 2 (2004); United States Institute of Peace, *Iraq's Constitutional Process: Shaping a Vision for the Country's Future*, Special Report 132 (February 2005).

Upon the expiration of the transitional period, the Council of Representatives would have a less commanding role in the process of amending the Constitution but it would nonetheless remain the key player. On the other hand, when it comes to implementing legislation and enactment of ordinary laws, its standing is indisputably supreme. In exercising these powers it is hoped that the Council would avoid the pitfalls that will inevitably be highlighted when the focus is on the Constitution: the instrument's failure to delineate the federal system properly, gaps in coverage and the use of language that is vague, lacking in clarity and ambiguous.

Once formed, the Council of Representatives would embark on a path-breaking journey. It has before it, precious little precedents to draw upon – the TAL-era National Assembly's experience is far too limited to be substantively meaningful. The Council certainly has both the means and opportunity to establish itself and truly cement its position as the bulwark of democracy and harbinger of true federalism to the country. Of course, the moment may not be seized. Much will depend upon the political dynamics within the Council. The nature of the larger political framework within which it functions, more particularly the political culture or the absence thereof, may well be crucial as well. It is in this context that disquiet needs to be expressed about the failure of the drafters of the Constitution to truly facilitate the public's access to its work. Moreover, it is to be hoped that the referendum process required for constitutional amendments would be both more informative and educative of the issues before the voters than was the case with the Referendum of 15 October 2005 that paved the way for the adoption of the draft constitution.

A profoundly important dynamic underlies the constitutionalism and law-making in the fledging democracy of Iraq: the tension between centrifugal and centripetal tendencies. Given that the structural arrangements for the center and periphery lack coherence, it is relevant to ask whether the Constitution would indeed bring about the desired unity. The argument has been made that

the best way ... to protect the center from centrifugal tendencies is, paradoxical as this may seem, to strengthen government at the various local levels.³⁷

The International Crisis Group, in elaborating on this argument well before the Constitution came into being, posited that this means that there ought to be both the electing of local governments and effectively empowering them so that the central, state and local councils will not lose relevance and would be able to hold a "fragile country together".

The proposition is no less valid now. However, arguably some elements in the Constitution that are meant to strengthen sub-national governance and give it

³⁷ International Crisis Group, *Iraq: Can Local Governance Save Central Government?* Middle East Report No. 33 (27 October 2004), p. 1.

flexibility may well prove to be inimical to the integrity of the unity of the country. Perhaps, the best example of this is the possibility of the creation of "Super Regions" if a significant number of Governorates avail themselves of the process to join together as a Region. The process to accomplish such integration is not complex, and arguably, not difficult either: the referendum required needs only a simple majority for success under the Constitution since no stipulation to the contrary is stated. Such Regions, once established, would have their own constitutions. It is of course possible – indeed, likely -- that the national legislature may well be sympathetic to Regional development, and perhaps would bless the aspirations of those Governorates that wish to form enlarged Regions. Beyond these possible developments, there is also the likelihood that there may be re-arrangements of the boundaries of the Governorates. For unlike TAL, the Constitution does not require the maintenance of the integrity of the existing Governorate boundaries.

At the present time, the particular concern here is the integration of the nine Shia-dominated Governorates in the South into a (Super) Region.³⁸ The expansion of KRG cannot be ruled out as well.

To be sure, depending upon the circumstances, sentiments at the national level as well inter- and intra-Governorate politics may prove to be serious obstacles for the emergence of a Super Region/ Regions and/ or changes in Governorate boundaries. Nonetheless, if Super Regions emerge and boundaries of Governorates are altered, surely their implications for national and legislative politics in general and sub-national governance in particular would be quite considerable. For one, consider the impact upon the balance of power, not only between the center and periphery but also between the Regions and Governorates. For another, once the path is clear, constitutions will emerge, and they may shape governance of the Region/s concerned uniquely: it is safe to say that the governance of a Super Region in the South would be different to that of KRG. Further, re-drawing of boundaries, in the event they occur, would transform the political map of Iraq. Yet again, the tension between centrifugal and centripetal tendencies may be heightened, and centrifugal forces may be ennobled.

The Constitution declares that it is "the guarantor" of the unity of Iraq (Article 1), and the worth of that guarantee is surely to be tested.

If the Council of Representatives has little precedent and experience to draw upon in engaging in its responsibilities, then the Federal Supreme Court would be faced with far less guidance from the past. The TAL-era Federal Supreme Court was entrusted with limited powers of judicial review but no occasion arose for this jurisdiction to be exercised. Not only with respect to jurisprudence but also as far as judicial culture is concerned, the Court will work out of a blank slate.

³⁸ International Crisis Group, *Unmaking Iraq*, p. 8.

IRAQ STRENGTHENING LOCAL AND PROVINCIAL GOVERNANCE PROJECT

There are crucial constitutional questions impacting upon governance that would be raised immediately after the new government is formed. Yet, it is relevant to ask whether the Court will be properly functioning in time to deal with such questions. For example, issues of interpretation relating to the constitutional amendment procedure under the Transitional Provisions would have to be dealt within the six month window of opportunity effectively prescribed. Any delay, either in the formal constituting of the Court by implementing legislation or the Court promulgating its rules for the invocation of its jurisdiction, would mean that there will be no judicial review by default.

Another example may be cited because its significance is not limited by a specified period of time: the standing of Order #71 as the residuary law. This instrument constitutes the foundation of sub-national governance hitherto. Unlike TAL, which will expire with the formation of the new government, Order #71 will continue to be valid until legislation is enacted by the Council of Representatives to amend or repeal it. However, as noted previously, provisions in this instrument that contradict or are inconsistent with the Constitution will no longer have validity. The determination which precise provisions fall within this category rests with the Federal Supreme Court in the event its jurisdiction is successfully invoked. Theoretically, the Court also may be asked to constitutionally test whether Order #71 is consistent with the international legal instruments that were invoked for its passage. However, as noted previously, it is unlikely that this particular path will be taken.

Arguably, Order #71 remains in place with the recognition that there are provisions that are patently contradictory to the Constitution which should not be given cognizance. The task of determining what is invalid is not necessarily an appropriate task for the lay person. Sooner or later either the Council of Representatives and/ or the Federal Supreme Court is likely to act. Thus, strategically, it may not be wise to invest too heavily on the Order in formal terms. Rather, it may perhaps be more sensible to view it in the interim as the touchstone for the continuation of the work of sub-national institutions of governance. This is perhaps particularly true of such local level bodies as *Nahiya* and *Qada* councils which have no foundation at all in the Constitution. The lack of oversight, ministerial or otherwise, may provide an opportunity to, say, the Provincial Councils to act expansively – indeed, Provincial Councils in Hillah, Basra and Baghdad have embarked upon the framing of what they identify as “local government codes”. Of course, they run the risk of being countermanded at some future date by national legislation. Yet, it cannot be ruled out that these could form the basis of an argument before the Council of Representatives in favor of receiving authority commensurate with such exercises; at the minimum, such documents may show the Council as to what subject matters, from the perspectives of sub-national governance, should be covered in prospective legislation

In the longer run, the Federal Supreme Court is bound to play a critical role in shaping governance in Iraq. Its development of a constitutional jurisprudence

will be contingent upon a variety of factors. Among these are: the text of the Constitution itself, procedures for the invocation of its jurisdiction, composition of the body, judicial culture that evolves, and influence of similar bodies in the neighboring countries.³⁹ At the beginning, issuing constitutional challenges respecting legislation or executive actions would certainly be a novelty but that may change with time. It is difficult to predict whether politics of constitutionalism will take hold on a wider canvass in Iraq but it cannot be ruled out that there will indeed be politically sensitive constitutional issues, with potentially divisive consequences for the body politic.

³⁹ In general, these factors have played out in the Arab world. See, Nathan J. Brown, "Judicial Review and the Arab World", *Journal of Democracy*, 9 (1998), pp. 85-9.