



## **Legal Policy Briefing Paper 3 (January 2006)**

### **THE CONSTITUTION AND SUB-NATIONAL GOVERNANCE: STRUCTURAL ARRANGEMENTS AND AUTHORITIES**

Vijaya Samaraweera, D.Phil., J.D.  
Senior Legal Policy Advisor

INTRODUCTORY NOTE:

This is the third in a series of Briefing Papers on the new Constitution that will be issued (previously issued: *The New Constitution of the Republic of Iraq: Directives for Specific Legislative Measures* (RTI/ USAID ISLGP/ LGP2 - Legal Policy Briefing Paper 1 (December 2005)); *TAL and Order #71: Residual Law of Post-Constitution Iraq?* (Legal Policy Briefing Paper 2 (January 2006)). These briefings draws upon the Discussion Paper entitled *Sub-National Government in Post-Constitution Iraq: Constitutional and Legal Framework* (RTI/ USAID: ISLGP/ LGP 2 - Legal Policy Discussion Paper 1 (January 2006)), and that document may be consulted for a comprehensive analysis of the Constitution. Further Briefing Papers will follow.

The version of the Constitution to which reference is made here is the one produced by UNAMI. This is an unofficial translation. The authoritative Arabic text may be found in, *Gazette*, 28 December 2005.

The Constitution will come into force with the formation of the government following the national elections of 15 December 2005 (Article 139). TAL refers to Coalition Provisional Authority's (CPA) *Transitional Administrative Law* of 8 March 2004, and Order #71 refers to CPA Order Number 71 of 4 April 2004 on *Local Governmental Powers*.

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## **FEDERAL GOVERNMENT**

- Republic of Iraq is a “federal state” (Article 1), with a decentralized capital, regions and governorates, and local administration (Article 116).
- The Federal government is to be formed of three branches, legislative, executive and judicial, organized under the principle of separation of powers (Article 47).
- Principal Federal authorities under Section Three:
  - Executive: President and Council of Ministers;
  - Legislature: Council of Representatives and Federation Council;
  - Judiciary: Higher Judicial Council and Federal Supreme Court.
- Bagdad, demarcated by its municipal borders, is declared the Capital of Iraq.
  - Status to be determined by implementing legislation (Article 124).<sup>1</sup>
- Federal authorities:

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<sup>1</sup> The subject of implementing legislation will be discussed in the forthcoming Briefing Paper 4. For a listing of the constitutional provisions that require implementing legislation see, Vijaya Samaraweera, *The New Constitution of the Republic of Iraq: Directives for Specific Legislative Measures*, Legal Policy Briefing Paper 1 (December 2005).

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- Mandated to preserve “the unity, integrity, independence, sovereignty of Iraq, and its federal democratic system.” (Article 109);
- 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).
- Shared authority with Regions and Governorates (see below).

### **SUB-NATIONAL GOVERNANCE**

- Provisions both followed and departed from TAL and Order #71.

#### Structure:

- Two hierarchically arranged levels: in order, (1) Regions and (2) Governorates not incorporated in a Region.

#### (1) Regions (Articles 116-121):

- Express recognition of “Kurdistan” as a Region as it exists at the time the Constitution comes into force. Essentially adopts TAL’s provision (Article 53 (A));
- No other Regions identified. Any one or more Governorates may move to create a Region; TAL limitation that a Region should consist of a maximum of three Governorates (Article 53 (C)) superseded.
- Procedure for establishing regions: on the basis of a referendum held at the request of
  - (a) one-third of the council concerned, or
  - (b) one-tenth of the eligible voters of the Governorates concerned.
- TAL (Article 53 (C)) prohibition against Kirkuk joining a Region is removed but Baghdad, as the Capital, to remain outside;
- Regions are given the power to adopt constitutions to define their respective structure of government, its authorities and the

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mechanisms of these authorities, provided their provisions do not contradict the Constitution (Article 120).

### (2) Governorates (Article 122):

- Made up of a number of districts, sub-districts and villages;
- Baghdad: the administrative boundaries of Baghdad, excluding the territory declared as the Capital, constituted the Baghdad Governorate, and thus, by implication it too could become a Region or join a Regional arrangement.

### Authorities:

- Two distinct arrangements for the exercise of governmental authority: (1) shared competencies between the Federal authorities and sub-national entities, and (2) sub-national powers.

### (1) Shared powers between the center and the Regions and Governorates:

- Provisions relating to oil and gas:
  - (a) Ownership of oil and gas fields belongs to all people of Iraq;
  - (b) Products of the existing gas and oil fields to be managed by the Federal government and the producing Regional and Governorate governments;  
  
Revenues from these sources 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;
  - (c) Federal government and producing Regions and Governorates required to work together to develop strategic policies to develop them for the highest benefit of the Iraqi people (Articles 111-112).
- Cultural "national wealth": antiquities, antiquity sites, traditional constructions, manuscripts, and coins. Responsibility of the Federal government which will administer them 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; and,

main internal water sources (Article 110).

(2) Regions and Governorates not incorporated in a Region:

- Vested with separate and distinct authority of their own as well as authority that is common to both types of entities;
- All powers not exclusively exercised by the Federal authority under the Constitution (Article 115).

Regions:

- 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;
- Responsible for all administrative requirements of their respective territories, in particular the establishment and organization of the internal security forces (such as police) (Articles 116- 117).
- Regions, if they so wished, could 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).

Governorates:

- Broad administrative and financial powers enable them to manage their respective affairs in accordance with the “principle of decentralized administration”.
- 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).
- 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).
- As in the case of the Regions, Governorates could adopt, if they so wished, 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).

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- Provision for the mutual delegation of vested powers between the Federal government and the Regions and Governorates (Article 123).

### **DISCUSSION**

- The Constitution may be faulted on three principal grounds:

(1) Structural arrangements and vesting of powers in each component lacks symmetry and coherence. Thus, the exclusive authority vested in the Federal Authority is diluted, if not undermined, by other provisions.

EXAMPLE (1): 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 encroachment, deliberate or otherwise, by the Regions and Governorates is doubtful.

EXAMPLE (2): While the Federal government was vested with exclusive authority over customs policy formulation, under a further provision the administration of that policy is required to be in coordination with Regions and Governorates (Article 114 –First).

(2) Constitutional language is vague, ambiguous and lacks clarity (perhaps, this is so in the original text as well). The primary result is a host of definitional issues:

EXAMPLE (1): Article 121 (Third) requires that Regions and Governorates receive an “equitable share” of the national revenues sufficient to discharge their responsibilities and duties on the basis of due regard to their resources, needs and population percentages. The phrase “equitable share” is vague.

EXAMPLE (2): Baghdad, whose status as the Capital is to be determined by implementing legislation, is identified as the “decentralized capital” elsewhere in the Constitution (Article 117). Yet, what is meant by this phrase is not clear.

(3) Inexplicable gaps and omissions in the structural arrangements and vesting of institutional power:

EXAMPLE (1): No reference at all to local level institutions of governance such as *Qada* and *Nahiya* councils, though there is a single reference to “local administration” in the context of the components of the “federal state”. This is in striking contrast to TAL (Article 56 (B)) and Order #71 (Section 4).

EXAMPLE (2): There is no reference to the procedure by which

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Regions may adopt their own constitutions, nor is there a directive for implementing legislation on this important subject.