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AMENDING THE CONSTITUTION AND LAW-MAKING IN POST- CONSTITUTION IRAQ

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INTRODUCTORY NOTE:

This is the Fourth in a series of Briefing Papers on the new Constitution to be issued (previously released: *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)), and *The Constitution and Sub-National Governance: Structural Arrangements and Authorities* (Legal Policy Briefing Paper 3 (January 2006)). These briefings draw 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. The final Briefing Paper of this series, on the Federal Supreme Court and Judicial Review, will be available shortly.

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

The Constitution was approved by the national Referendum on 15 October 2005, and it will come into force with the formation of the government following the national elections of 15 December 2005 (Article 144). 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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AMENDING THE CONSTITUTION

- Two unique mechanisms for amending the Constitution are provided.

Transitional Provisions (Article 142):

- The procedure applicable during the period covered by the Transitional Provisions of the Constitution 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. Even if an absolute majority of those who voted approve, the referendum will fail if 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.

Regular Provisions (Article 126):

- After the Transitional Provisions have lapsed, the procedure in place provides that either the President¹ 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;
 - Constitutional 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 seven days where stipulated, the amendment is deemed ratified by that official.
 - The amendments enter into force on the date of their publication in the official *Gazette*.

¹ Under the Transitional Provisions, a Presidency Council will exercise the powers vested in the President (Article 138 - First).

DISCUSSION: AMENDING THE CONSTITUTION

- This discussion should be placed within the context of a fundamental fact: amending a constitution is supremely a political act. Of course, there are many imponderables concerning the future political process of this fledging democracy.
- The Transitional Provisions prompt several issues:
 - Definitional problems: A number of definitional issues are embedded in the requirements, and these necessarily have to be determined by the Federal Supreme Court.²

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.
 - Absolute majority in the Council: without such approval the proposed amendments will not be placed in a referendum. 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.
 - Referendum threshold: The requirement that the proposed amendments would be rejected if two-thirds of those who voted in three or more Governorates do not approve is seemingly a stiffer test. 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.
 - President: The President has no role under the Transitional Provision.
- In formal terms, the regular procedure for amendment of the Constitution has far more checks and balances but their worth may be questionable in some cases:
 - President and the Council of Ministers as originators of amendments: They share the right with the Council of Representatives but the Council remains the key player in this regard since any such proposal has to win approval of two-thirds of the Council members.

² See the discussion in, Vijaya Samaraweera, *The Federal Supreme Court and Judicial Review*, Legal Policy Briefing Paper 5 (January 2006).

- President's ratification authority: This is not a veto power since the measure automatically becomes law at the expiration of seven days.
- Amendments affecting powers of Regions:
 - these provisions would initially be relevant only to KRG, though other Regions may qualify in the future;
 - the formal safeguarding of sub-national governance interests covers only Regions and not Governorates. Thus, unless the Federal Supreme Court determines otherwise, the standing of the Governorates could be altered by ordinary legislation;
 - the referendum is placed before the "citizens" concerned and not the "voters", which raises a definitional problem;
 - approval of the referendum requires only a simple majority and not an absolute 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.
- If the Council of Representatives 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 too will produce piecemeal measures if it addresses each of these separately. 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.

LAW-MAKING

- The role of the 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. 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 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.

- Law-making procedure: 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 (Articles 57-64, 138 – Fifth)
- The Council is also required to formulate its own bylaws to regulate its work (Article 51).
- Among the provisions the Constitution lays down respecting its procedure, two provisions (in Article 53) in particular should be noted:
 - Sessions of the Council shall be public unless the body deems them otherwise: It is likely that the matter of closed sessions will be dealt by the Council's bylaws; 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.
 - "Minutes" of the sessions shall be published by means deemed appropriate by the body: 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.

Implementing Legislation:

- Two categories of implementing legislation flows from the Constitution:
 - Implementing legislation explicitly required: the task is expressly allocated to the Council of Representatives in some cases, and other cases, falls upon it impliedly.³
 - Implementing legislation implicitly required.
- Explicit instructions, in turn, can be divided into two:
 - Those instructions that offer guidelines as to what needs to be accomplished by the legislation. A plain language reading does not indicate that the scope of the laws to be enacted thereby would be strictly circumscribed by the guidelines, though that issue may be open to judicial review.

³ For details of these provisions see, Vijaya Samaraweera, *The New Constitution of the Republic of Iraq: Directives for Specific Legislative Measures*, Legal Policy Briefing Paper 1 (December 2005)).

- Those instructions which lack guidelines, enabling 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.
- 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: this comprises essentially of hortatory declarations; not legally binding but the Council may be well advised to pay heed to it;
 - Fundamental Principles and Rights and Liberties (Section One, Section Two): binds both generally and specifically, yet some of the provisions are problematic.

EXAMPLE: No law that contradicts the “principles of democracy” and “rights and freedoms” may be enacted (Article 2 – First (B) and (C)). The term “principles of democracy” is a vague formulation, and surely would require the intervention of the Federal Supreme Court to offer clarity. However, 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.

DISCUSSION: 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.
- The Council of Representatives’ law-making can take either of two forms:
 - Ordinary law which will allow for the possibility of it being amended or repealed by ordinary legislative action in the future.
 - 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.

- In following through with implementing legislation or ordinary laws, the Council 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, whereas the latter would offer comprehensive coverage of governance at sub-national level.
- 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.