



## **Legal Policy Briefing Paper 1 (December 2005)**

### **NEW CONSTITUTION OF THE REPUBLIC OF IRAQ: DIRECTIVES FOR SPECIFIC LEGISLATIVE MEASURES**

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INTRODUCTORY NOTE:

This is the first in a series of Briefing Papers on the new Constitution that will be issued. A more comprehensive treatment of the Constitution, entitled *Sub-National Government in Post-Constitution Iraq: Constitutional and Legal Framework* (RTI/ USAID ISLGP/ LGP 2 - Legal Policy Discussion Paper 1), will be issued shortly.

An authoritative English translation of the Constitution has yet to be released. Reference is made here to the unofficial UNAMI English translation. For the Arabic language text of the final draft constitution see, <http://www.bahzani.net> (original); <http://www.niqash.org> (revisions of 12 October 2005).

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

18 December 2005

**NOTE:** The authoritative Arabic text of the Constitution was published in the *Gazette*, 28 December 2005.

**INTRODUCTION**

This briefing paper lists those provisions in the Constitution that direct enactment of legislative instruments respecting specific subject matters. In reviewing these provisions, the following may be noted:

- The number of such provisions is exceptionally high (54) for an instrument of this order – indeed, this feature alone makes the Constitution unique. Their inclusion perhaps stemmed from limitation of time to determine the final language and/ or the controversial nature of the subject matter that precluded an agreement on the necessary language.
- Some of these requirements may be deemed mandatory (“shall”; alternatively, “will be”: not necessarily the appropriate usage but language that may reasonably be interpreted to mean mandatory), while others are discretionary (“may”).
- Prescribed actions are required to be taken, in one case, by means of referendum, and in other cases, by legislatures. Which legislature it is, is made explicit at times. Where there is no such language – in majority of instances -- an editorial decision has been made to identify the appropriate body by referencing the subject matter to the powers allocated between the center and the periphery and/ or the inherent nature of the subject matter itself.

An explanation is necessary here. At the Federal level, the Constitution's reference to legislative power encompasses two chambers, the Council of Representatives and the Federation Council (Article 46). However, the Federation Council is not formally established by the Constitution; its formal establishment, composition, and responsibilities are to be determined by legislative action on the part of the Council of Representatives (Article 62). In

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light of this, the reference to the Council of Representatives rather than to the national legislature, as such, is appropriate.

- In some cases, the precise manner of the legislative action that had to be followed is stipulated.
- A time table is given for the required action only in one instance (see Article 114).
- As translated, some of the provisions are ambiguous and/or lack clarity (whether the ambiguity/ lack of clarity are present in the original is not known at this stage). Indeed, in a few instances, a reasonably acceptable editorial judgment cannot be made; where necessary, reference is made to these. In general, where the translation adopts “organize” and “stipulate” with reference to directives respecting legislative acts, the words are used unless the contexts suggest otherwise.
- It is possible that some of these provisions will take a different shape and form with Constitutional amendments in the coming months. The abrogation of entire provisions cannot be ruled out. It is equally possible that none of these will be touched by amendments.
- Fundamental issues concerning the interpretation of some of these provisions, at the very least, will surely arise and they may be considered by what is in effect the Constitutional Court for Iraq, the Federal Supreme Court.

The requirements for legislative action laid out in the Constitution are identified below with necessary amplification. Articles that are directly relevant to sub-national governance (14) are highlighted.

### **SECTION ONE: FUNDAMENTAL PRINCIPLES (Articles 1-13)**

#### **Article 4 – Second: Official Language**<sup>1</sup>

- Definition of the “scope” of the term (Constitution recognized two official language, Arabic and Kurdish (Article 4 – First); Turkmen and Syriac languages were also recognized as official languages in the administrative units where these language-speakers are in the majority (Article 4 - Fourth) and its application, including in: the official gazette (both languages), transactions in official settings such as the Council of Representatives, Council of Ministers, courts, and official conferences (either), official documents and correspondence (both), schools teaching both languages, and in any setting demanding of the principle of equality such as with respect to bank notes, passports and stamps.
- Mandatory. Impliedly by the Council of Representatives.

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<sup>1</sup> Headings supplied.

**Article 4 – Fifth**

- Each Region or Governorate may adopt any other local language as an additional official language.
- Discretionary. Referendum, with the majority of its population determining the outcome. Article 127 provides that referenda directed by the Constitution required only simple majority, unless otherwise stated, for validation.

**Article 7 – First: Racism, Terrorism, Ethnic Cleansing, Religious Persecution and Saddamist Baath**

- Prohibition of such activities, their promotion and justification by any entity or program, notwithstanding the name adopted. Further, such activities may not constitute part of the political pluralism of Iraq.
- Mandatory (“will be”). Impliedly by the Council of Representatives.

**Article 9 – Second: National Service**

- Stipulation of the service.
- Mandatory (“will be”). Impliedly by the Council of Representatives.

**Article 12 – First: National Flag, Anthem and Emblem.**

- Determination in a manner that they represent Iraqi people symbolically.
- Mandatory. Impliedly by the Council of Representatives.

**Article 12 – Second: Official Holidays, Religious and National Occasions and related Decorations and the Hijri and Gregorian Calendar.**

- Regulation.
- Mandatory. Impliedly by the Council of Representatives.

**SECTION TWO: RIGHTS AND LIBERTIES (Articles 14-44)**

**CHAPTER ONE: RIGHTS (Articles 14-34)**

**FIRST: CIVIL AND POLITICAL RIGHTS (Articles 14-20)**

**Article 18 – Third A: Nationality of a Citizen by Birth**

- Stipulation that an Iraqi citizen by birth (which shall be the “basis” of citizenship (Article 18 – First)) may not have his/ her nationality withdrawn for “any reason” and that any person has the right to reclaim nationality when it has been withdrawn.
- Mandatory (“will be”). Impliedly by the Council of Representatives.

Article 18 – Fourth: Multiple Nationalities

- Require that, while Iraqis may maintain multiple nationalities, any one who “assumes a senior, security sovereign position” (it is unclear what type of position this language refers to) must give up other acquired nationalities.
- Mandatory (“will be”). Impliedly by the Council of Representatives.

Article 18 – Sixth: Nationality

- Regulation of nationality, with provision for competent courts to entertain law suites based on such law.
- Mandatory. Impliedly by the Council of Representatives.

Article 21 - Second: Political Asylum

- Regulation of the right to political asylum. It is further declared that that no political refugee shall be surrendered to a foreign entity or returned forcibly to the country from which that person fled.
- Mandatory. Impliedly by the Council of Representatives.

SECOND: ECONOMIC, SOCIAL AND CULTURAL LIBERTIES (Articles 22-34)

Article 22 - Third: Professional Associations and Unions.

- Guaranteeing by the state of the right to form and join such organizations.
- Mandatory (“will be”). Impliedly by the Council of Representatives.

Article 23 – Second: Eminent Domain Taking

- Requiring that no private property may be taken except for the purpose of “public benefit”, with “just compensation” for such taking.
- Mandatory (“will be”). Impliedly by the Council of Representatives.

Article 24: Freedom of Movement.

- Guaranteeing by the state of the freedom of movement of labor, capital and property between Regions and Governorates.
- Mandatory (“will be”). Impliedly by the Council of Representatives.

Article 26: Investments

- Guaranteeing by the state of the encouragement of investment.
- Mandatory (“will be”). Impliedly by the Council of Representatives.

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### Article 27 - Second: State Property

- Regulating the protection and management of state property, conditions for its disposal, and limitations upon its disposal.
- Mandatory. Impliedly by the Council of Representatives.

### Article 28 – Second: Minimum Wage-earners

- Exemption of low wage earners from taxation in order to ensure the maintenance of the minimum wage “required for survival”.
- Mandatory (“will be”). Impliedly by the Council of Representatives.

### Article 30 – Second: Social and Health Security, and Housing and Care and Rehabilitation.

- Guaranteeing by the state of social and health security to the old aged, sick, homeless, unemployed and those in orphanages and on employment disability, and protecting them from “ignorance, fear and poverty” as well as providing them with housing and special programs of care and rehabilitation.
- Mandatory (“will be”). Impliedly by the Council of Representatives.

### Article 31 – Second: Charitable Hospitals, Clinics and Places of Treatment

- Regulation of the provision for individuals and organizations to build such institutions under the supervision of the state.
- Mandatory. Impliedly by the Council of Representatives.

### Article 32: Handicapped and Special Needs Persons

- Establishing the state’s commitment to care for the handicapped and those with special needs and to ensure their rehabilitation in order to reintegrate them into society.
- Mandatory. Impliedly by the Council of Representatives.

### Article 34 – Fourth: Education

- Regulation of the state guarantee of private and public education.
- Mandatory. Impliedly by the Council of Representatives.

## CHAPTER TWO: LIBERTIES (Articles 35-46)

### Article 38 C: Freedom of Assembly and Peaceful Demonstration

- Regulation of these freedoms consistent with the declaration that state guarantees these in a way that does not violate public order and morality.

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- Mandatory. Impliedly by the Council of Representatives.

### Article 37 – First: Freedom of Association

- Guaranteeing of the freedom to form and join associations and political parties.
- Mandatory (“will be”). Impliedly by the Council of Representatives.

### Article 41: Personal Status

- Regulating the freedom to determine personal status in accordance with respective religions, sects, beliefs or choices.
- Mandatory. Impliedly by the Council of Representatives.

### Article 43 – First B: Endowments

- Freedom to manage endowments, their affairs and related religious institutions
- Mandatory. Impliedly by the Council of Representatives.

### Article 45 – First: Civil Society Institutions

- Organization of the state’s commitment to strengthen the role of CSOs and to support, develop and preserve their independence in a manner consistent with peaceful means to achieve their legitimate goals.
- Mandatory (“will be”). Impliedly by the Council of Representatives.

## **SECTION THREE: FEDERAL POWERS (Articles 47-108)**

### CHAPTER ONE: THE LEGISLATIVE POWER (Articles 47- 65)

#### FIRST: COUNCIL OF REPRESENTATIVES (Articles 49-64)

### Article 49 – Third: Elections

- Regulation of the requirements for candidates, voters and all matters related to elections.
- Mandatory. Impliedly by the Council of Representatives.

### Article 49 – Fifth: Replacement of Members

- Regulation of the replacement of council members upon resignation, dismissal or death.
- Mandatory. By the Council of Representatives.

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### Article 51: Bylaws

- Bylaws regulating the Council's work. Article 55 directs that such Bylaws shall include the definition of the method of convening the chamber for the annual session with two sessions lasting eight months. Article 129 directs that the Council shall adopt in its first session the Bylaws of the Transitional National Assembly until such it adopts its own.
- Mandatory. By the Council of Representatives.

### Article 61 – Fourth: International Treaties and Agreements

- Regulation of the ratification of these instruments by two-thirds majority of the chamber.
- Mandatory. By the Council of Representatives.

### Article 61 – Ninth C: Vesting of Powers in the Prime Minister for Periods of State of Emergency and War

- Regulation of the necessary powers of the Prime Minister to manage affairs of the state during periods of state of emergency and war. These powers shall not contradict the Constitution.
- Mandatory. Impliedly by the Council of Representatives.

### Article 63 – First: Rights and Privileges of Speaker, Deputy Speakers and Members

- Regulation of these rights.
- Mandatory. Impliedly by the Council of Representatives.

## SECOND: FEDERATION COUNCIL (Article 65)

### **Article 65: Council**

- Establishment and formation of this legislative council to include Regional and Governorate representatives, membership requirements, responsibilities and related matters.
- Mandatory. By the Council of Representatives; two-thirds majority.

## CHAPTER TWO: THE EXECUTIVE POWER (Articles 66- 86)

### FIRST: THE PRESIDENT OF THE REPUBLIC (Articles 67-75)

#### Article 69 - First: Nomination

- Regulation of nomination to the post
- Mandatory. Impliedly by the Council of Representatives.



Article 69 – Second: Deputy President/s

- Regulation of the nomination of one or more Deputy Presidents of the Republic.
- Mandatory. Impliedly by the Council of Representatives.

Article 74: Remuneration of the President

- Determine the salary and allowances of the President.
- Mandatory. Impliedly by the Council of Representatives.

SECOND: COUNCIL OF MINISTERS/CABINET (Articles 76-86)

Article 82: Remuneration of the Prime Minister and Ministers

- Regulate the remuneration of these offices and those of similar grade.
- Mandatory. Impliedly by the Council of Representatives.

Article 84: National Intelligence Service and Security Institutions

- Regulate the work and define its duties and authorities subject to the requirement that they shall operate consistent with principles of human rights and the oversight of the Council of Representatives. Article 81 – Second requires that the National Intelligence Service shall be attached to the Cabinet. It may be noted that Article 9 – First D enumerates the duties and responsibilities of the National Intelligence Service, and declares that it is subject to civilian control and legislative oversight and that it shall operate in accordance with the law and pursuant to “recognized” principles of human rights.
- Mandatory. Impliedly the Council of Representatives.

Article 85: By-laws

- By-laws to organize the work of the Council.
- Mandatory. By the Council of Ministers.

Article 86: Ministers and Ministries

- Regulate the formation, duties and responsibilities of the ministries and authority of the ministers.
- Mandatory. Impliedly by the Council of Representatives.

CHAPTER THREE: THE JUDICIAL AUTHORITY (Articles 87 to 101)

FIRST: HIGHER JUDICIAL COUNCIL (Articles 90-91)

Article 87: Structure and Operation

- Specify the establishment, authorities, and rules of operation of this body that shall oversee the affairs of the Judicial Committees. Article 88 enumerates the Council's authorities.
- Mandatory. Impliedly the Council of Representatives.

SECOND: FEDERAL SUPREME COURT (Articles 92-94)

Article 92: Composition and Work

- Determination of the number and method of selection of the members of this institution, which shall consist of judges, experts in Islamic jurisprudence and law experts, and its work.
- Mandatory. By the Council of Representatives; two-thirds majority.

Article 93 – Third: Right to Invoke Jurisdiction

- Guaranteeing the right of "Cabinet" members and individuals to invoke the jurisdiction of the court when aggrieved by the application of instruments of the federal authority.
- Mandatory. Impliedly the Council of Representatives.

Article 93 – Sixth: Allegations against the President, Prime Minister and Ministers

- Regulate the Jurisdiction of the Court (the English translation uses the term "settle" which seems inappropriate in the context).
- Mandatory. Impliedly the Council of Representatives.

THIRD: GENERAL PROVISIONS (Articles 95-101)

Article 96: Courts

- Regulate the establishment of courts and their jurisdiction and composition, terms of service and discipline and retirement of judges and public prosecutors. Article 94 declares that judges may not be removed except in cases specified by law and that such law will determine such provisions with particularity and regulate their disciplinary measures.
- Mandatory. Impliedly the Council of Representatives.

Article 99: Military Courts

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- Regulation of military judiciary and specify the jurisdiction of military courts, with limitation of such jurisdiction to crimes of military nature on the part of members of the armed and security forces as determined by the applicable law.
- Mandatory. Impliedly the Council of Representatives.

### Article 101: State Council

- Regulate the establishment of a "State Council" that specializes in the functions of the administrative judiciary, legal drafting, and representation of the state and public institutions before judicial bodies, excepting those exempted by law.
- Discretionary ("permitted"). Impliedly the Council of Representatives.

## CHAPTER FOUR: INDEPENDENT COMMISSIONS (Articles 102-108)

### Article 102: High Commission for Human Rights, Independent Electoral High Commission and Commission on Public Integrity

- Regulation of the functions of these independent bodies which shall be subject to the monitoring by the Council of Representatives.
- Mandatory. Impliedly the Council of Representatives.

### Article 103: Central Bank of Iraq, Board of Supreme Audit, Communication and Media Commission and Endowment Commission

- Regulation of the work of each of these financially and administratively independent bodies.
- Mandatory. Impliedly the Council of Representatives.

### Article 104: Foundation of Martyrs

- Regulation of the functions and competencies of this body which shall be attached to the Council of Ministers.
- Mandatory. Impliedly the Council of Representatives.

### Article 105: Public Commission on Governorates outside administrative Regions

- Regulation of the work of the public commission on Governorates that are outside administrative Regions. This Commission's membership shall consist of representatives of the Federal Government and of such Governorates. The Commission shall guarantee the rights of such Governorates with respect to fair participation in managing various federal institutions, missions, fellowships, delegations and regional and international conferences.
- Mandatory. Impliedly the Council of Representatives.

**Article 106: Public Commission on Audit**

- Establishment of a public commission to audit and appropriate federal revenues. This commission shall comprise of Federal Government experts and representatives and of the Regions and Governorates, and shall assume the following responsibilities: ensure the fair distribution of grants, aid and international loans pursuant to the entitlements of the Regions and Governorates not part of a Region; ensure the “ideal” use and division of the federal financial resources; guarantee transparency and justice in appropriating funds to the governments of the Regions and of Governorates not part of a Region in accordance with the “established percentages”.
- Mandatory. Impliedly the Council of Representatives.

**Article 107: Federal Public Service Council**

- Regulation of the functions and competencies of this council that is established to regulate the affairs of the federal public service, including appointment and promotions.
- Mandatory. Impliedly the Council of Representatives.

**Article 108: Other Independent Commissions**

- Permits legislative enactments for such bodies in accordance with “need and necessity”.
- Discretionary. Impliedly the Council of Representatives.

**SECTION FOUR: POWERS OF THE FEDERAL GOVERNMENT  
(Articles 109-115)**

**Article 112 - First: Oil and Gas Revenues**

- Regulation of the mandate given to the Federal Government, working with the governments of oil and gas producing Regions and Governorates, to manage oil and gas extracted from current fields, providing that it distributes oil and gas revenues in a “fair manner in proportion to the population distribution” throughout the country with a set allotment and set time for those areas that suffered damage by the unjust deprivations by the former regime as well as those areas that suffered subsequently, and providing also that this distribution assures balanced development in the different areas.
- Mandatory (“will be”). Impliedly the Council of Representatives.

**Article 112 – “Third”: Antiquities and Antiquity Sites<sup>2</sup>**

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<sup>2</sup> This provision, incorporated in the draft constitution with the amendments made immediately prior to the national Referendum, is not numbered. However, it follows Article 112 – Second.

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- Regulation of the 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.
- Mandatory (“will be”). Impliedly the Council of Representatives.

### **Article 114 – First: Customs**

- Organization of the administration of customs, a shared competency of the Federal Government and Regions and Governorates, by the Federal Government in cooperation with the Regions and Governorates.
- Mandatory (“will be”). Impliedly the Council of Representatives.

### **Article 114 – Seventh: Internal Water Resources**

- Providing for the formulation of policy and organization of the main internal water resources, a shared competency of the Federal Government and Regions and Governorates, in a way that guarantees fair distribution.
- Mandatory (“will be”). Impliedly the Council of Representatives.

## **SECTION FIVE: POWERS OF THE REGIONS (Articles 116-125)**

### **CHAPTER ONE: REGIONS (Articles 116-121)**

#### **Article 118: Regions**

- Definition of the executive procedures for the formation of Regions.
- Mandatory. By the Council of Representatives; by a simple majority within six months of its first session.

#### **Article 120: Constitutions of Regions**

- Adoption of Constitutions defining the structure of the government of the Region concerned, its authorities and the mechanisms of exercising these authorities, provided that they do not contradict the national Constitution.
- Mandatory. By Governments of the Regions.

### **CHAPTER TWO: GOVERNORATES NOT INCORPORATED INTO REGIONS (Article 122-123)**

#### **Article 122 - Second: Administrative and Financial Authority**

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- Granting of broad administrative and financial authorities to such Governorates to enable them to manage their respective affairs in accordance with the principle of decentralized administration.
- Mandatory (“will be”). Impliedly the Council of Representatives.

**Article 122 – Fourth: Elections and Powers of Council and Governor**

- Regulation of the election of the Governorate Councils, Governor, and their respective powers.
- Mandatory. Impliedly the Council of Representatives.

**Article 123: Delegation of Powers**

- Regulation of the delegation of powers exercised by the Federal Government to Governorates and vice versa.
- Mandatory. Impliedly the Council of Representatives

CHAPTER THREE: THE CAPITAL (Article 124)

**Article 124 – Second: Baghdad**

- Regulation of the status of the capital. Articles 124 – First declared that Baghdad, with its municipal borders, constituted the capital of the Republic of Iraq, and Article 124- Second requires a law to regulate this.
- Mandatory. Impliedly by the Council of Representatives.

CHAPTER FOUR: THE LOCAL ADMINISTRATIONS (Article 125)

**Article 125: Ethnic Minorities**

- Effectuation of the Constitutional guarantees (enumerated in Section Two: Rights and Liberties) to nationalities such as Turkmen, Caideans, and Assyrians respecting their administrative, political, cultural and educational rights.
- Mandatory (“will be”). Impliedly the Council of Representatives.

**SECTION SIX: FINAL AND TRANSITIONAL PROVISIONS  
(Articles 126-144)**

CHAPTER ONE: FINAL PROVISIONS (Articles 126-131)

None.

CHAPTER TWO: TRANSITIONAL PROVISIONS (Articles 131-144)

Article 132 – Third: Political Prisoners, Victims of Oppression, Families of Martyrs and those injured by Terrorism

- Regulate matters concerning the guarantee of the state of care for political prisoners and victims of oppression under previous dictatorial regime, consistent with Article 132 – First, and its guarantee of compensation to families of martyrs and those injured by terrorist acts, consistent with Article 132– Second.
- Mandatory. Impliedly the Council of Representatives.