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TAL AND ORDER #71: RESIDUARY LAW IN POST-CONSTITUTION IRAQ?

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IRAQ STRENGTHENING LOCAL AND PROVINCIAL GOVERNANCE PROJECT

INTRODUCTORY NOTE:

This is the second in a series of Briefing Papers on the new Constitution that will be issued. The first, *The New Constitution of the Republic of Iraq: Directives for Specific Legislative Measures* (RTII/ USAID ISLGP/LGP2 - Legal Policy Briefing Paper 1 (December 2005)), was circulated on 18 December 2005, and drew upon the work carried out for the Discussion Paper entitled *Sub-National Government in Post-Constitution Iraq: Constitutional and Legal Framework* (RTII/ USAID: ISLGP/ LGP 2 - Legal Policy Discussion Paper 1 (January 2006)). This briefing does the same. The Discussion Paper may be consulted for a comprehensive analysis of the Constitution. Further Briefing Papers drawing upon this document will follow.

The Constitution comes into force with the formation of the government following the national elections of 15 December 2005 (Article 144). Reference is made here to the version that was reproduced in *The Washington Post*, 12 October 2005. An authoritative English translation of the instrument is as yet unavailable.

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*.

CPA's 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 Government which took over from the Iraq Transitional Government on 30 June 2004. However, the legal framework for local governance was not affected by it, with the exception of provisions relating to certain senior ministerial officials.

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SOURCES OF AUTHORITY

TAL:

- Issued by the Administrator of CPA on the basis of authority flowing from international law (relevant UN Security Council Resolutions, including Resolution 1483 (2003), and the laws and usages of war).

Order #71:

- TAL and international law (relevant UN Security Council Resolutions, including Resolutions 1483 and 1511 (2003), and laws and usages of war).

APPLICABILITY

TAL:

- Governing law of Iraq (Articles 1 (A), 3) – in effect, the interim constitution;
- Laws enacted under the previous regime that conflicted with TAL null and void (Article 3 (B));

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- Shall remain in effect until the permanent constitution is in place and the new government of Iraq is formed (Articles 62).

Order #71:

- Applicable to all Governorates, excepting the territories under the Kurdistan Regional Government (Section 1): KRG was formally recognized as a “Region” by TAL (Article 54).
- Law No.159 of 1969 that imposed limitations on the powers of the local governments suspended to the extent of inconsistency with Order #71 (Section 8 (1));
- Features of some prior laws incorporated, most specifically Law No. 130 of 1963 relating to the authority of local government to raise revenue (Section 8 (1));
- Shall remain in force until rescinded or amended by duly enacted legislation (TAL: Article 26 C)) – in effect, by the Constitution and/ or laws of the new legislature.

CONSTITUTION’S TREATMENT

TAL:

- Referred to in two provisions:
 - Article 138: TAL annulled upon the formation of the new government, excepting for Articles 53 (A) and 58: TAL’s Article 53A established KRG and Article 58 directed the Executive authority to take expeditious steps to remedy the injustices caused by the previous regime;
 - Article 136: The Federal Executive authority shall undertake the necessary steps to complete the implementation of the acts required to remedy the injustices stipulated in TAL’s Article 58, with the proviso that acts respecting the status of Kirkuk and other disputed territories be completed by 31 December 2007.

Order #71:

- Covered by the provision that all existing laws shall remain in force, unless annulled or amended in accordance with the Constitution (Article 126). This provision of the Constitution is applicable to other CPA laws (for example Order #100) and laws of the previous regime that have continued to be recognized, implicitly or explicitly, as well.

DISCUSSION

Constitution's Supremacy:

- The Constitution is “the sublime and supreme law” of Iraq. It is binding on all parts without exception and 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; inconsistency or contradiction is all that is required.

TAL:

- Unambiguous: annulled, excepting for its Articles 53 (A) and 58, upon the formation of the new government.
- Until then, those provisions in TAL that conflict or are inconsistent with the Constitution shall be null and void.

- EXAMPLE: national laws v. sub-national laws:

TAL: Federal legislature's enactments supersede any other legislation issued by any other legislative authority in the event they contradict each other (Article 26 (B)).¹

Constitution:

a) With reference to powers shared between the Federal government and the Regions and Governorates, the priority goes to the regional law in case of conflict (Article 111);

b) In cases of contradiction between Federal Government and Regions with respect to the powers that fall outside the exclusive authority of the Federal Government, the regional authority shall have the right to amend the application of the national legislation within that region (Article 117).

Order #71:

- The annulment of TAL, by itself, will not end legal validity since it draws upon another source of authority: UN Security Council Resolutions and laws and usages of war. However, an issue remains:

¹ An exception to this was provided 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)).

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- Is the Order consistent with the international law authorities invoked? This issue, if raised, will fall within the Judicial Review jurisdiction of the new Federal Supreme Court,² and the exercise of the jurisdiction will entail delving into international law and interpreting it within the context of the law of Iraq, realistically an unlikely scenario.
- Order #71's provisions are null and void where they conflict or were not in accord with the Constitution. Again, resolution of the conflict will rest with the Federal Supreme Court.

- EXAMPLE: Governorate Councils and cooperation with NGOs:

Order #71: Governorate Councils have the authority to initiate and implement provincial projects alone or in partnership with international and non-governmental organizations (Section 2 (2)).

Constitution: no such authority given to the Governorate Councils. 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.

- Any potential conflict between TAL and Order #71 on the one hand and the Constitution on the other may also be clarified by other measures:³
 - Constitutional amendments;
 - Implementing legislation explicitly required by the Constitution;⁴
 - Implementing legislation implicitly required by the Constitution;
 - Ordinary legislation.

² On judicial review see, Vijaya Samaraweera, *Sub-National Governance in Post-Constitution Iraq: Constitutional and Legal Framework*, Legal Policy Discussion Paper 1 (December 2005).

³ These subjects will be covered in a forthcoming Briefing Paper.

⁴ See, Vijaya Samaraweera, *The New Constitution of the Republic of Iraq: Directives for Specific Legislative Measures* (RTI/ USAID ISLGP - Legal Policy Briefing Paper 1 (December 2005)).