



## **Legal Policy Briefing Paper 6 (March 2006)**

### **PROVINCIAL COUNCIL ELECTIONS**

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INTRODUCTORY NOTE:

This Briefing Paper was prepared in response to the questions that were raised on local government elections at the RTI Regional Team Leaders Meetings in Arbil March 1-6, 2006. It briefly considers the law that governed the first post-war elections for Iraqi Governorate/ Provincial Councils (PCs) held in January 2005 and reviews the law that is now in place for the forthcoming local government elections.

The situation in the Kurdistan Regional Government (KRG) will be examined separately. The discussion is tentative at this stage for it has been difficult to obtain data on KRG's elections. In fact, this particular section is largely based on anecdotal information. Further research is being carried out and once the information is collected, this section will in all likelihood be revised. If you have any relevant information, I would indeed be happy to receive it.

March 19, 2006.

**JANUARY 2005 ELECTIONS**

The 30 January 2005 polls were the first systematic nationally organized elections for Iraq PCs to be conducted since the fall of the previous regime in April 2003. In fact, the local government elections that were to be held had been suspended, first by several US Military Commanders in the field who had been placed in charge Governorates, and then by an executive order of the newly established Coalition Provisional Authority (CPA) in June 2003.<sup>1</sup>

The legal framework for the conduct of January 2005 elections was established by two principal legislative measures adopted by CPA:

- Transitional Administrative Law (TAL) of 8 March 2004:
  - The elections for PCs throughout Iraq (and for the KRG National Assembly) should be held at the same time as the elections for the National Assembly of the Iraqi Transitional Government, no later than 31 January 2005 (Article 57 (B));
  - The boundaries of the 18 Governorates are to remain unchanged (Article 53 (B)).
  
- The Independent Electoral Commission of Iraq (IECI), CPA Order No. 92 (Order #92) of 31 May 2004:

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<sup>1</sup> For the reasoning of the military commanders and CPA for these actions see, William Booth and Rajiv Chadrasekaran, "Occupation Forces Halt Elections Throughout Iraq", *The Washington Post*, June 28, 2003; International Crisis Group, *Iraq: Can Local Governance Save Central Government?* ICG Middle East Report No. 33, 27 October 2004.

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- Headed by a Board of Commissioners;
- Independent and autonomous, non-partisan, neutral and professional governmental body;
- Exclusively empowered to organize, oversee, conduct, and implement all elections that were required to be held pursuant to TAL during the *transitional period*;
- Vested with the authority to frame regulations, rules and procedures with the full force of law to carry out its responsibilities (Sections 1, 3, 4).

IECI officially began functioning on June 4, 2004, and in preparation for the forthcoming national and PC elections to be held simultaneously issued a series of regulations to establish rules and procedures to govern them. Interestingly and curiously, two CPA enactments that pertained to elections during the transitional period -- the Electoral Law, CPA Order No. 96 (Order #96) of 7 June 2004 and Political Parties and Entities Law, CPA Order No. 97 (Order #97) – made no reference to elections for PCs. However, language in these instruments referencing implementation enabled IECI to draw upon them as sources of authority. Filling the void, IECI specifically provided for PC elections with the Governorate Council Elections, IECI Regulation 08/ 2004.<sup>2</sup> This instrument covered, among others, the electoral system, voter eligibility, candidate eligibility, and candidate nominations. The 30 January 2005 polls for PCs were conducted under this Regulation together with several other regulations that were applicable to elections in general.

### **ELECTIONS LAW OF 13 SEPTEMBER 2005**<sup>3</sup>

According to IECI, the reform of the electoral law that governed the January 2005 elections had engaged the main political groups in the transitional National Assembly since August 2005,<sup>4</sup> and the outcome was the Elections Law (Elections Law) that was enacted by the Assembly on 13 September 2005. As the instrument itself declared in its “Reasons for the Law”:

Order #96 was enacted by CPA “in a historical period with its special circumstances. The goal of the [Order] was to establish a National Assembly whose principal task was to prepare a draft constitution. The [Order] was based on a system which considered Iraq as one electoral District. This system was suitable for its time.”

“This law is enacted to provide an election system which is more representative for the voters, the system of multiple districts, without neglecting the advantage of the system of one election district.”

The drafting of the new law was carried out with the assistance of the UN. The UN, it is to be noted, had played a significant role in assisting IECI carry out its mandate in January 2005.<sup>5</sup>

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<sup>2</sup> For a complete list of IECI Regulations for the January 2005 polls see, <http://www.ieciraq.org>.

<sup>3</sup> The references are to the unofficial translation of the original Arabic text as found in <http://www.ieciraq.org>.

<sup>4</sup> Independent Electoral Commission of Iraq, *FAQ 1 – 15 December Electoral System*, <http://www.ieciraq.org>.

<sup>5</sup> Order # 92 specifically called upon IECI to benefit from close consultations with impartial and credible international organizations such as UN and authorized UN Secretary-General to appoint an

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Following provisions of the Elections Law relate to PCs explicitly or impliedly:

- Applicability: to the parliaments of the Regions, PCs and local Councils (LCs) (Article 1). -- unlike TAL, there is no requirement that local elections should be held on the same day as national elections.
- Electoral system:
  - Elections shall be by public process, direct voting and secret ballot (Article 2);
  - Voting shall be conducted in one day, unless a postponement is required for security reasons (Article 4);
  - Date of the elections will be determined by a Presidential Decree announced through media 60 days prior to that date (Article 5);
- Voter eligibility (Article 4):
  - Be an Iraqi citizen;
  - Be legally competent;
  - 18 years old in the month in which the election is held;
  - Registered to vote in accordance with the procedures established by IECI.
- Candidate eligibility:
  - Must be no less than thirty years of age;
  - Must not be covered by the De-Ba'athification Law;<sup>6</sup>
  - Should not have been illegally enriched at the expense of the state or public funds;
  - Should not have been convicted of a crime that violates "honor" and should be known for good conduct;
  - Must have at least a high school certificate or equivalent;
  - Must not be a member of the armed forces at the time of nomination (Article 6);
  - Nominees shall be subjected to the approval of IECI (Article 7).

In addition, a series of acts relating to the conduct of the elections were declared to be "Election Offences" punishable under applicable laws (Article 27).

The Elections Law repealed CPA's electoral law, Order #96 (Article 28). Order #97 on political parties and entities was not affected. Nor was Order #92 on IECI -- in fact, IECI was specifically given the right to issue regulations and instructions necessary for the implementation of the law (Article 29). This task was given urgency by the fact that two crucial elections were forthcoming: the national Referendum on the adoption of the new Constitution on 15 October 2005 and the national elections on 15 December 2005 for the Council of Representatives, the new Federal legislative body introduced by the Constitution. IECI issued a series of

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international electoral expert as a non-voting member of its Board of Commissioners (Sections 3 (2), 5 (2)). On UN assistance to IECI see, <http://www.uniraq.org/elections/default.asp>.

<sup>6</sup> Reference is to De-Ba'athification of Iraqi Society, CPA Order No.1 of 16 May 2003.

Regulations to govern these two<sup>7</sup> but has yet to issue Regulations concerning the conduct of local government elections.

## **DISCUSSION**

- New Constitutional requirements: With the Constitution coming into force upon the seating of the new government (Article 144), a new legal regime for elections will be forthcoming pursuant to the instrument.
  - Article 49 – 3<sup>rd</sup>: specifically calls for implementing legislation to regulate “conditions for candidates and voters and everything connected to elections”;
  - Article 122 – 4<sup>th</sup>: stipulates that the election of PCs, Governors and authorities be established by implementing legislation.

The task of enacting the required legislation impliedly falls upon the new elected Federal legislature, the Council of Representatives.<sup>8</sup> It is of course unknown when the Council of Representatives will act pursuant to the relevant constitutional provisions. On the other hand, it is an open question whether the Council will choose to provide for these subjects through the mechanism of constitutional amendments rather than by implementing legislation.<sup>9</sup>

The LCs receive less than cursory treatment in the Constitution. While LCs have continued to function under the arrangements introduced under CPA, further national legislation or amendment of the Constitution would be required to clarify their legal status. Alternatively, PCs could be given the authority to legislate for them.

- Election Law and IECI: When the Constitution comes into force, TAL becomes null and void (Article 141), excepting its provisions relating to KRG (Article 53A) and determination of the status of Kirkuk (Article 58). Order #92 is a separate legislative act of CPA and it will continue to have legal validity, with the exception of its provisions that are inconsistent with the Constitution, until it is repealed or amended by the new Federal legislature (Article 130). The same is true of the Election Law enacted by the transitional National Assembly.
- Date of the Elections: The Constitution is silent as to when elections are to be held. Neither does it stipulate that national and local government elections should be held on the same date. For that matter, unlike TAL, there

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<sup>7</sup> For a complete list of these Regulations see, <http://www.ieciraq.org>. Law on the Referendum on the Constitution No. 2 of 2005 enacted by the National Assembly was the primary law for the 15 October 2006 Referendum.

<sup>8</sup> See, Vijaya Samaraweera, *The New Constitution of the Republic of Iraq: Directives for Specific Legislative Measures*, Legal Policy Briefing Papers 1 (December 2005).

<sup>9</sup> On amending the constitution and implementing legislation see, Vijaya Samaraweera, *Sub-National Government in Post-Constitution Iraq: Constitutional and Legal Framework*, Legal Policy Discussion Paper 1 (January 2006).

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is no requirement in the Elections Law that local elections should be held on the same day as national elections.

The authority Election Law granted to the President to call for elections by a presidential decree with a date specified 60 days from the announcement raises several issues. The Law does not make it clear on whose advice this action should be taken by the President, and on the other hand, the Constitution does not refer to “presidential decrees” as executive instruments of the office. The President’s authority, as stated in the Constitution, is limited, much of it ceremonial or endorsing the actions of the Prime Minister and Cabinet and the national legislature (see, Articles 67-75). However, there is nothing in the Constitution to indicate that the grant of additional executive authority by legislation is prohibited. It is likely that, in calling for PC elections, the President will act on the advice of the Prime Minister and Cabinet. In the unlikely event that he does not do so, a constitutional crisis may be in order.

The issues raised herein are the type of issues that arguably should end up for judicial review before the Federal Supreme Court for definitive answers. It is equally arguable that this is unlikely to happen. There is no indication as to when this body would be established pursuant to the Constitution, and even if it does come into existence, given the lack of a tradition with judicial review the likelihood is that the invoking of the Court’s jurisdiction will not begin to occur soon.<sup>10</sup>

- Legal Issues: The Election Law raises a number of legal issues. To exemplify:
  - Election offences: The Election Law enumerates for the first time acts that would be deemed offences (see, Article 27), and then goes on to state that the punishments for such offences shall be “in accordance with punishment stated in the applicable law”. The problem is that the Penal Code does not provide ready guidance here.<sup>11</sup>

IECI issued Electoral Offences, IECI Regulation 12/2005 but its applicability was limited to the transitional period (Section 1.6). However, the Election Law remains in effect and presumably IECI may act pursuant to it again.

## **KURDISTAN REGIONAL GOVERNMENT**

TAL recognized Kurdistan as a Region with its own government, KRG, and accorded it special status (Articles 53- 54). The Constitution largely confirmed this arrangement (Articles 117 – First, 141). The Constitution of the Iraqi Kurdistan Region of 25 October 1992 claimed an expansive territory as falling within Kurdistan,<sup>12</sup> and TAL acknowledged the territories controlled by Kurdistan on 19

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<sup>10</sup> See the discussion in, Samaraweera, *Sub-National Government in Post-Constitution Iraq*.

<sup>11</sup> Subject to certain modifications, the 1969 Iraqi Penal Code was validated by CPA’s Penal Code, Order No. 7 of 10 June 2003.

<sup>12</sup> Its claim was as follows: Provinces of Kirkuk, Sulaimaniya and Arbil, Province of Dohuk along with the districts of Aqra, Sheikhan, Sinjar and the sub-district Zimar in the Province of Ninevah, districts of

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March 2003 as forming the geographical extent of KRG. As the transitional arrangements were formalized, KRG in effect comprised of the Governorates of Arbil, Sulaymaniyah and Dohuk and not the expansive area claimed by the Constitution of Kurdistan.

Under the previous regime's Governorates Law No. 159 of 1969, Provincial Councils had been established in each of the three Kurdistan Governorates as well. The evidence suggests that they were, very much like the bodies established in rest of Iraq, purely advisory and effectively functioned as arms of the central government rather than as self-government entities. The creation of the "Safe Heaven Zone" for Kurds under the aegis of UN Security Council on 5 April 1991 did not alter the situation; they continued to be meaningless in terms of democratic government. The administration of Kurdistan during the period of UN protection was a highly centralized one, and has remained so after the formal delegation of administrative authority to KRG by CPA. It is noteworthy that the Constitution of Kurdistan has no reference to Provincial Councils.

On the other hand, the Kurdish Constitution provided for the establishment of Municipal Councils in each area with a population exceeding 3,000 persons (Articles 62-67). They were primarily envisaged as entities to "render public services to the population" (Article 65). Elections for Municipal Councils of the Governorate of Sulaimaniya were held in February 2000 and for the councils in the Governorates of Arbil and Dohuk in May 2001.<sup>13</sup> How effective these bodies have been as institutions of local governance has yet to be studied in any systematic way. Anecdotal evidence suggests that they have been primarily advisory bodies.

KRG cooperated with IECEI in the conduct of the 2005 December elections. Indeed, it amended its elections law to harmonize its electoral system with the national system. Thus, the membership of the Kurdistan National Assembly Parliament was expanded from 100 to 111 members, and consistent with the national Constitution (Article 49 - Fourth), 25% of the seats of the Assembly were reserved for women.<sup>14</sup> Elections were held, as in the rest of Iraq, for the Council of Representatives and the three Governorate Councils on 15 December 2005; there were no separate IECEI rules and procedures for these elections. In addition, simultaneously elections were held for the Kurdish Assembly under Kurdistan National Assembly Election IECEI Regulation 14/2005. The provisions in this instrument basically followed those laid down for the elections for the Council of Representatives.

The elections for the KRG PCs drew far less attention than the voting in the KRG territory for the Council of Representatives and the Kurdistan National Assembly.<sup>15</sup> Arguably, this was a reflection of the voter apathy towards institutions that seemed largely irrelevant. For, apart from electing the respective Governors following Order #71, none of the PCs have been active. In fact, these bodies have been largely ignored by the governments that control the Governorates, Patriotic Union of

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Khaniqin and Mandali in the Province of Diyala and the district of Badra in the Province of Al Wasit. Constitution of the Iraqi Kurdistan Region, 25 October 1992, Article 2, <http://www.krg.org>.

<sup>13</sup> Carole O'Leary, "Iraqi Kurdistan: Crucible for Democracy and Model for a Post-Saddam Iraq", *PSK Bulletin*, 2001.

<sup>14</sup> Iraq: Electoral Update, 15 December 2004, UN Information Center, <http://unicwash.org>.

<sup>15</sup> This was true of the Kurdish media as well. In contrast, the election for Kirkuk PC received wide coverage. See, reports in, [www.KurdishMedia.com](http://www.KurdishMedia.com).

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Kurdistan (PUK) in Sulaymaniyah and the Kurdistan Democratic Party (KDP) in the Governorates of Arbil and Dohuk.<sup>16</sup>

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<sup>16</sup> The leaders of the two political groups, Jalal Talabani of PUK and Massoud Barzani of KDP announced the establishment of a unified administration for KRG territory on 7 January 2006. The “Unification Agreement” of 21 January 2006 may be found in, <http://www.krg.org>. The two powerful parties had presented a joint slate for the national elections of December 2005 to maximize their influence in the new national legislature. *Kurdish Observer*, 1 December 2005.