



Legal Policy Briefing Paper 5 (January 2006)

THE FEDERAL SUPREME COURT AND JUDICIAL REVIEW

Vijaya Samaraweera, D.Phil., J.D.

Senior Legal Policy Advisor

INTRODUCTORY NOTE:

This is the final Briefing Paper in the series of briefings that cover the new Constitution (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)); *The Constitution and Sub-National Governance: Structural Arrangements and Authorities* (Legal Policy Briefing Paper 3 (January 2006)); and, *Amending the Constitution and Law-making in Post-Constitution in Iraq* (Legal Policy Briefing Paper 4 (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 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 144). TAL refers to Coalition Provisional Authority's *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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JUDICIAL REVIEW

- Definition: The authority of a court to review a law or executive action for constitutionality and to strike down the law or executive action if it is violative of the constitution concerned.
 - Depending upon the particular jurisprudence adhered to, the court may also look beyond the constitution, most particularly at basic principles of justice and/ or international standards of human rights, in making its determinations.
- Constitutional Court: Judicial review is the particular purview of a constitutional court. A constitutional court is typically the highest judicial organ in the judicial branch of the government, and it may be established as a specialized body or as a court that has, in addition, wider appellate jurisdiction.

COURT'S STRUCTURE

- The Federal Supreme Court is designed to be the highest judicial organ in the country, and it is to be viewed primarily as a constitutional court with expansive judicial review powers. However, it is entrusted with other types of jurisdiction as well:

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- Appellate authority for challenges to the decisions relating to membership status by the Council of Representatives (Article 52),
- Ratification of the results of the general elections for the Council of Representatives (Article 93 – Second (Seventh)).

These additional jurisdictions would no doubt elevate the Court's status within the country in general.

- The Constitution directs the Court to have standing as an independent judicial body, financially and administratively (Article 92), and its decisions are final and binding (Article 94).
- The Constitution is categorical that judges (in general) are independent and there is no authority over them except by law (Article 88).
- Judges of the Court shall be drawn from the pool of judges and experts in Islamic jurisprudence and law experts.

JURISDICTION

- The Court has jurisdiction over the following subjects under Article 93:
 - Constitutionality of laws and regulations in effect;
 - Interpretation of the provisions of the Constitution;
 - "Settle" matters that arise out of federal legislation and executive action of Federal authorities;
 - "Settle" disputes that arise between the Federal government and the governments of the Regions, Governorates and sub-national institutions of governance;
 - "Settle" disputes arising between governments of the Regions and Governorates.
 - "Settle" competency jurisdiction between the Federal judiciary and the judicial institutions of the Regions and Governorates, and between judicial institutions of the Regions and Governorates.
- What is meant by the phrase "settle" in the last four subjects listed above is unclear. It is inconceivable that, with this phrase, the Court is cast as a mediation or conflict resolution body as well (this could well be an infelicitous translation of the Arabic text). While there is no specific reference to the Constitution, it is clear that in exercising these particular jurisdictions the Court would necessarily have to be guided by that instrument.

DISCUSSION

- Court's independence: Under the Constitution, the Federal Government is organized under the principle of separation of powers (Article 47). However, in formal terms, two constitutional provisions have the potential of eroding and/ or compromising the independence of the Court and its judges:
 - 1) Implementing legislation¹ is required by the Council of Representatives on the method of selection of the Court's judges and its "work" (Article 92 – Second). A proviso requires such implementing legislation be enacted by a two-thirds majority of the Council of Representatives. Perhaps this may prove to be a check on that body.
 - 2) High Judicial Council and its role: This body is vested with significant authority: manage the affairs of and supervise the Federal judiciary as well as to prepare its draft budget. The disquieting provision is that which instructs the Council of Representatives to determine that body's method of establishment and rules of operation by implementing legislation (Articles 90-91). Unlike in the case of implementing legislation for the Court, there is no requirement of a two-thirds majority, and the Council perhaps may find it easier to enact legislation that is far less protective of the new body's independence.
- The Court will, sooner or later, be confronted with substantial and wide range of issues for its judicial review. The language employed in the drafting of the Constitution is so often vague, ambiguous and/ or lacking in clarity that the Court's intervention would no doubt be fundamentally decisive in shaping the fledging democracy in Iraq. Its review of the constitutionality of executive action of the Federal authorities would equally impact upon governance.
- Arguably, issues arising from three particular areas should initially come before the Federal Supreme Court.
 - 1) Legal standing of TAL's Federal Supreme Court: As structured, this body had original and exclusive jurisdiction over legal proceedings between the ITG/ IIG and sub-national governmental institutions, judicial review of laws and executive action on the part the Federal authorities that are challenged, and ordinary appellate jurisdiction (Article 44). This body will expire when TAL is annulled in accordance with the Constitution upon the formation of the new government but the new Federal Supreme Court would not be in place until implementing legislation for its establishment is enacted. In other words, there will be an interim period. In the event the TAL high court continues to function, the new Federal

¹ The Constitution does not provide a role for the Federation Council, the second legislative chamber that will be established, in these enactments. On implementing legislation see, Vijaya Samaraweera, *Amending the Constitution and Law-making in Post-Constitution in Iraq*, Legal Policy Briefing Paper 4 (January 2006)).

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Supreme Court may have to determine whether that body's actions are constitutional or not.

- 2) Legal standing of Order #71:² Given that the annulment of TAL with the formation of the government would not lead to the demise of Order #71, there is the question for judicial review whether the instrument is consistent with the authorities it invoked. If this matter comes up before the Court, it would entail delving into international law (UN Security Council Resolutions and laws and usages of war) and interpreting it within the context of the law of Iraq. If this matter comes up before the Court, it would entail delving into international law and interpreting it within the context of the law of Iraq. This arguably is an unlikely scenario.³
- 3) Transitional Provisions for the amendment of the Constitution: Several issues may arise from the constitutional provisions applicable during the transitional period. Among them:
 - a) Whether or not the committee that the Council of Representative is required to form from among its members to recommend constitutional amendments comprises of the "main components of Iraqi Society".
 - b) Amendments approved by the Council shall be put before the "people" in a referendum within two months of its approval. Arguably, the questions whether "the people" equates with "voters" or not may be a matter for the Court to determine.

² On this subject see, Vijaya Samaraweera, *TAL and Order #71: Residual Law of Post-Constitution Iraq?* Legal Policy Briefing Paper 2 (January 2006).

³ Nonetheless, Nathan J. Brown has argued that another issue with international law implications, whether the UN Security Council Resolution 1546 permits the presence of the Coalition forces only for the duration of the transition to the fully independent Iraq or not, is likely to be tested before the Federal Supreme Court. *Draft of the Iraqi Constitution: Analysis and Commentary*, p. 7, [http:// www. Carnegieendowment.org](http://www.Carnegieendowment.org). It may be noted that this is a politically charged issue, whereas the legality of Order #71 may not achieve the same political complexion.