



PUBLIC INTERNATIONAL LAW & POLICY GROUP

www.publicinternationallaw.org

A Global Pro Bono Law Firm

IRAQ FEDERAL SUPREME COURT

Legislative Drafting Guide

**Prepared by
The Public International Law & Policy Group**

November 2006

LEGISLATIVE DRAFTING GUIDE: IRAQ FEDERAL SUPREME COURT

Decision Tree

What is the source of the Federal Supreme Court's jurisdiction?

- Constitution and Enabling Legislation
- Subsequent Legislation
- Decisions of the Court

What are the general procedures of the Court?

- Quorum requirements
- Public or Private Sessions
- Timeframe for a ruling to become effective

What are the procedures for adjudicating a constitutional complaint where an injury or violation of rights and freedoms are alleged?

- Standing requirements
- Initiation of proceedings
- Possible rationale for rejecting a complaint

What are the procedures for adjudicating the constitutionality of a government act or law?

- Standing requirements
- Effect of a ruling of unconstitutionality regarding a government act or law
- Type of legislative review
 - Repressive or "a posteriori" review
 - Abstract Review
 - Concrete Review
 - Preventative or "a priori" review

How are disputes between national, regional, governorate, and local authorities adjudicated?

- Standing requirements (who can bring a suit)
- Timeframe for bringing a dispute before the Court
- Effect of a ruling

What is the composition of the Federal Supreme Court and how is the composition determined?

- Number of Judges
- Appointment procedures for Judges
 - Involvement of Executive and/or Legislature
 - Involvement of Judicial Services Commissions
- Qualification of Judges
 - Civil Law Training
 - Expertise in Islamic Jurisprudence
- Tenure of Judges
- Removal procedures for Judges
- Hierarchy of Judges on the Court

LEGISLATIVE DRAFTING GUIDE: IRAQ FEDERAL SUPREME COURT

Executive Summary

The Iraq Constitution establishes an independent Federal Supreme Court and provides a broad outline of its competencies. Legislation detailing specific aspects of the Court's jurisdiction and functioning must be approved by two-thirds of the Council of Representatives. The issues for the Council of Representatives to consider when drafting this legislation include the extent and source of the Court's jurisdiction; the general Court procedures; the processes for adjudicating constitutional complaints, challenges to the constitutionality of government acts or laws, and disputes between different levels of judicial bodies; and the composition of the Court itself.

The Iraq Federal Supreme Court could have original or appellate jurisdiction over constitutional questions. Appellate jurisdiction would enable lower courts to adjudicate issues with constitutional implications. Original jurisdiction would mean the Federal Supreme Court would be the only Iraqi court that could hear and rule on constitutional questions.

There are also a number of procedural questions regarding the functioning of the Court which could be resolved through enabling legislation. The Court could require cases to be heard by the full Court, or allow some subset of the Court to hear and rule on cases. Public proceedings allow for maximum transparency, while private hearings help guarantee the safety of judges, attorneys, and parties. A ruling may be effective immediately upon the Court's ruling, or may be delayed until the decision is published in the Court's official records. Issues regarding these decisions should take into account the capacity and resources of the Court itself and the related government offices.

With regard to who can bring an individual complaint before the Court, the standing requirements could allow broad access to the Court to encourage individuals to bring cases. Alternately, access could be restricted to reduce frivolous claims and ensure the Court is not overburdened and to promote decentralization of dispute resolution through use of other lower courts. The Court could refuse to hear a complaint for a number of common reasons, including violation of the general procedural requirements, failure to exhaust other remedies, or obvious lack of a violation of a human right or basic freedom.

Standing to challenge the constitutionality of a government act or law,¹ absent an actual injury, is usually restricted to government entities, although, recognized ethnic, religious, or other communities may also be granted this right. The Federal Supreme Court could have the authority to review legislation prior to enactment or to review laws only after they are enacted. When reviewing a law after it has been enacted, the Court could have the authority to consider only cases in which an actual dispute exists (concrete review) or to also consider cases that challenge a law without an actual dispute between parties (abstract review). Lastly, a ruling of unconstitutionality could either invalidate an entire statute or invalidate just the specific section of the statute deemed in conflict with the Constitution.

The procedures for hearing competency disputes between different levels of government authorities could also be established through enabling legislation. Issues related to adjudicating competency disputes include standing requirements, the timeframe for the ruling to take effect, and actions that may be required as a result of the Court's decision.

The composition of the Court could greatly impact its authority, effectiveness, and legitimacy. A higher number of judges on the Court would allow broad participation, but could also limit the efficiency of the Court in reaching decisions. The nomination and appointment procedure could be restricted to the executive and/or legislature. Alternately, nominations and appointments could also include input from independent judicial selection commissions and community groups, including legal associations. It is commonly believed that even if the executive holds the final authority for appointing judges, a more inclusive selection process increases the ultimate legitimacy of a court.

According to the Constitution, the judges could be required to have either civil or religious training, or both. State practice indicates that the requirement of civil training increases respect for a court within the greater society, particularly in those with diverse populations. Judges themselves could be appointed for lifelong terms or have limited terms; the latter is more consistent with general state practice. Additionally, establishing clear criteria and limits on removal procedures could safeguard the independence of the Court and avoid arbitrary dismissals. Finally, an administrative hierarchy within the Court, which establishes a president and a vice-president, could help streamline the Court's daily functioning.

¹ For purposes of this memo – including the sample language provided – unless otherwise indicated, references to “act(s) or law(s)” or “act(s) and law(s)” are meant to refer to all government laws, decisions, regulations, instructions, or procedures or other governmental decrees, decisions, or acts.

Some comparative practices that might merit observation include those of Afghanistan, Hungary, South Korea, Slovakia, Slovenia, South Africa, and Yemen. A chart describing Arab judicial structures can be found in Annex I of this legislative guide. Annex II contains a compilation of sample language for Federal Supreme Court legislation.

TABLE OF CONTENTS

Decision Tree	2
Executive Summary	4
Statement of Purpose	9
Introduction.....	9
Constitutional Framework	9
Independence and Jurisdiction of the Federal Supreme Court	10
<i>Independence of the Court.....</i>	<i>10</i>
<i>Source of Jurisdiction</i>	<i>10</i>
<i>Original or Appellate Jurisdiction</i>	<i>11</i>
<i>Sample Language.....</i>	<i>12</i>
General Procedures for Court Proceedings	14
<i>Requirements for a Quorum</i>	<i>14</i>
<i>Private and Public Sessions of the Court.....</i>	<i>14</i>
<i>Timeframe for Rulings to Come into Effect.....</i>	<i>15</i>
<i>Sample Language</i>	<i>15</i>
Adjudication of Constitutional Complaints where an injury or violation of rights and freedoms are alleged	16
<i>Standing</i>	<i>17</i>
Standing for an Individual or Group.....	17
Limits on Standing (South Africa).....	17
Expansive Provisions for Standing (Hungary).....	18
<i>Sample Language.....</i>	<i>18</i>
<i>Review by the Court to Initiate Official Proceedings</i>	<i>19</i>
<i>Sample Language</i>	<i>20</i>
<i>Rejection of a Constitutional Complaint</i>	<i>20</i>
<i>Sample Language.....</i>	<i>21</i>
Adjudication of the Constitutionality of a Government Act or Law	22
<i>General Issues</i>	<i>22</i>
<i>Sample Language.....</i>	<i>22</i>
<i>Standing to Challenge Adjudication of Constitutionality of a Law</i>	<i>23</i>

<i>Sample Language</i>	24
<i>Effect of the Ruling</i>	24
<i>Sample Language</i>	25
Adjudication of the Constitutionality of a Government Act or Law –	
Repressive Review	25
<i>Abstract Review</i>	25
<i>Concrete Review</i>	26
<i>Sample Language</i>	26
Adjudication of the Constitutionality of a Government Act or Law –	
Preventive Review	27
<i>Sample Language</i>	28
Disputes between National, Regional, Governorate, and Local Authorities	
and Judicial Bodies	28
<i>Sample Language</i>	29
Composition of the Federal Supreme Court	31
<i>Number of Judges</i>	31
<i>Selection of Judges</i>	31
Collaborative Selection Processes.....	32
Judicial Selection Commissions.....	33
<i>Qualifications of Judges</i>	33
General Qualifications.....	33
Expertise in Islamic Jurisprudence.....	34
<i>Timeframe for Filling Vacancies</i>	35
<i>Oath of Office</i>	35
<i>Tenure of Judges</i>	35
<i>Removal Procedures</i>	35
<i>Hierarchy of Judges within the Federal Supreme Court</i>	36
<i>Sample Language for the Composition of the Court</i>	37
Conclusion	43
Annex I – Arab Judicial Structures	44
Annex II – Sample Language for Federal Supreme Court Legislation	46
Annex III - About the Public International Law & Policy Group	62

LEGISLATIVE DRAFTING GUIDE: IRAQ FEDERAL SUPREME COURT

Statement of Purpose

This legislative drafting guide discusses the issues involved in formulating legislation for the Iraq Federal Supreme Court. This guide compares legislation used by various states to establish their respective constitutional and high courts and provides sample language for legislation in Iraq.

Introduction

The Constitution establishes the independence of the federal judiciary and the Federal Supreme Court. Specific articles of the Constitution draw the broad outlines of the Court's competencies, but leave the specific issues of jurisdiction, procedures, and composition to be established by legislation. While many states specify the competencies of their highest court or tribunal in their constitutions, it is not unusual to resolve these issues through enabling legislation. Issues which are left to be decided by the Council of Representatives include the Court's jurisdiction, the general procedures for adjudication of cases, and the composition of the Court itself.

A court with a firm foundation and structure will more likely adjudicate in a fair manner. It will also be better able to maintain independence from the political influence of the executive or legislative branches. A court's structure alone cannot ensure its legitimacy or independence. All branches of government must also adhere to the principles of justice. The ability of the Federal Supreme Court to adjudicate according to the principles of transparency, fairness, and equality will determine the success and legitimacy of the Court in the eyes of the Iraqi people and the international community.

Constitutional Framework

The Iraq Constitution establishes the independence of the Judicial Authority.² The Federal Judicial Authority is made up of the Higher Juridical Council, Federal Supreme Court, Federal Court of Cassation, Public Prosecution Department, Judiciary Oversight Commission and "other federal courts that are regulated in accordance with the law."³ The establishment of additional courts

² IRAQ CONST. art. 87.

³ IRAQ CONST. art. 89.

within the judiciary is to be regulated by law.⁴ The Constitution defines the Federal Supreme Court as “an independent judicial body, financially and administratively.”⁵ Article 93 grants the Court jurisdiction over a number of specific issues.⁶ The Court’s work will be further defined by legislation passed by a two-thirds majority in the Council of Representatives.⁷ The decisions of the Court are final and binding on all authorities.⁸

Independence and Jurisdiction of the Federal Supreme Court

Independence of the Court

The independence of a high court⁹ is generally established in a state’s constitution, but most states also reference it in the court’s enabling legislation. Many states explicitly indicate that the laws of the state are the only source of the high court’s jurisdiction and powers.¹⁰ This can help insulate a court from attempts by religious or other authorities to influence the court’s independence. Without such a clause, other authorities may claim to exercise authority over the court.

Source of Jurisdiction

Enabling legislation for a state’s high court also often defines the source of jurisdiction for the court, namely which acts or laws can or cannot change the powers or jurisdiction of the court. This helps to ensure continuity in a court’s jurisdiction. There are three main sources of jurisdiction for most high courts: (1)

⁴ IRAQ CONST. art. 96.

⁵ IRAQ CONST. art. 92(1).

⁶ See IRAQ CONST. art. 93 (stating that the “Federal Supreme Court shall have jurisdiction over the following: (1) Overseeing the constitutionality of laws and regulations in effect; (2) Interpreting the provisions of the Constitution; (3) Settling matters that arise from the application of the federal laws, decisions, regulations, instructions, and procedures issued by the federal authority. The law shall guarantee the right of direct appeal to the Court to the Council of Ministers, those concerned individuals, and others; (4) Settling disputes that arise between the federal government and the governments of the regions and governorates, municipalities, and local administrations; (5) Settling disputes that arise between the governments of the regions and governments of the governorates; (6) Settling accusations directed against the President, the Prime Minister and the Ministers, and this shall be regulated by law; (7) Ratifying the final results of the general elections for membership in the Council of Representatives; (8)(a) Settling competency disputes between the federal judiciary and the judicial institutions of the regions and governorates that are not organized in a region; and (8)(b) Settling competency disputes between judicial institutions of the regions or governorates that are not organized in a region.”

⁷ IRAQ CONST. art. 92(2).

⁸ IRAQ CONST. art. 94.

⁹ For the purposes of this Legislative Guide, “high court” refers to the highest judicial body of a state that has jurisdiction over constitutional issues. In most states, this is either the supreme court or the constitutional court. In addition, the term “court” refers to the highest court of a state unless explicitly noted.

¹⁰ See ETHIOPIA CONST. art. 79 (requiring the judges of Ethiopia’s Federal Supreme Court to “exercise their functions in full independence and shall be directed solely by the law”).

a state's constitution and related enabling legislation; (2) subsequently enacted acts or laws;¹¹ and (3) decisions by the court itself. Allowing subsequently enacted laws to change the jurisdiction of the court can help shape the court's competencies if they are still evolving. There must, however, be well-defined and explicit safeguards to ensure the legislature cannot reduce the power of the court with every change in political administration. One way to do this is to require a two-thirds majority in the legislature and in the court itself to change a court's jurisdiction.

Original or Appellate Jurisdiction

Whether the Federal Supreme Court has original or appellate jurisdiction over constitutional issues is closely tied to the Court's competencies. Many high courts have original jurisdiction over constitutional matters, meaning the court is the only body which can rule on these cases. This is common in many European states, including Slovakia, Slovenia, and Hungary. This model is sometimes favored because it allows immediate resolution of the issue in question. Limiting constitutional review to just one body can also raise the stature of constitutional review because a high court with original jurisdiction over constitutional issues – a so-called “constitutional court” – usually operates outside of the state's judicial branch. If the high court is the only body that can rule on constitutional matters it also ensures the development of certain expertise within the high court.

Some states restrict their high courts to appellate review and allow lower courts, for example Iraq's Court of Cassation, to consider constitutional issues in regular proceedings. In such states, the highest court considers constitutional issues only on appeal. The United States and South Africa are two examples of this model. This structure can help decrease the caseload of the highest court. It can also provide time for analysis of the issue within the lower courts and within society as a whole. However, this structure can also lead to uncertainty regarding constitutional questions because each case must be heard by the lower courts before reaching the highest court. This appeals process requires additional time and bureaucracy, and can possibly leading to inconsistent decisions until an appeal is successfully brought to the high court.¹²

¹¹ See *Law on the Constitution* art. 21 (Slovenia), Venice Commission CODICES website, at <http://www.codices.coe.int> (last visited Jan. 16, 2007) (providing Slovenia's Constitutional Court authority on matters vested in the Court through statutes); SPAIN CONST. art. 161 (providing that Spain's Constitutional Court can derive power from “organic laws”).

¹² The legislation governing the high courts in the appellate model does not usually define the competencies of the lower federal or local courts. The legislation generally only references the court's involvement in the appellate review process.

Sample Language

Independence of the Court

The Federal Supreme Court is an independent judicial body charged with safeguarding the principles of the Constitution. The Federal Supreme Court is independent of all levels of authority and all state authorities in Iraq.¹³ The Federal Supreme Court shall exercise its function in full independence and shall be directed solely by the law.¹⁴

Source of Authority

Option 1: Authority derived only from the Constitution and enabling legislation

The Federal Supreme Court shall have jurisdiction over only such matters as are vested in the Federal Supreme Court by this Act and the Constitution.

Option 2: Authority derived from the Constitution, enabling legislation and subsequent statutes

The Federal Supreme Court shall have jurisdiction over such matters as are vested in the Federal Supreme Court by this Act and the Constitution. The Federal Supreme Court shall also have jurisdiction over such matters as are vested in the Court by statute.¹⁵

Jurisdiction

Option 1: Original Jurisdiction

- Any person¹⁶ may, under the conditions determined by this Act, file a constitutional complaint with the Federal Supreme Court if they believe that their human rights and basic freedoms as protected under the Constitution have been

¹³ *Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina* arts. 2-3 (Bosnia-Herzegovina), Venice Commission CODICES website, at <http://www.codices.coe.int> (last visited Feb. 17, 2006); *Law on the Constitutional Court* art. 2 (Slovenia).

¹⁴ ETHIOPIA CONST. art. 70.

¹⁵ *Law on the Constitutional Court* art. 21 (Slovenia).

¹⁶ This sample language is provided to demonstrate the differences between provisions that affirm original jurisdiction and those that affirm appellate jurisdiction. In the final draft of the Federal Supreme Court law, however, the terminology will need to be reconciled with the terms used in other sections – particularly the section on standing (see below). For instance, while the option 1 language refers to the right of “any person” or the “Human Rights Commission” to file a case, the law’s “standing” provisions will ultimately determine which “persons”, “individuals”, “groups”, “communities”, “organizations”, “ombudsman” or other “government officials” will have standing. When these are clarified, the terminology used throughout the final law should be made consistent.

violated by an act or law¹⁷ of a government entity of any level or any other public entity.

- A High Human Rights Commission may, under conditions defined by statute, file a complaint with the Federal Supreme Court concerning a particular case.
- If other remedies are provided for in this Act or by statute, no constitutional complaint can be filed under the provisions of this Article until all other remedies provided for in this Act or by statute have been exhausted.¹⁸
- The Federal Supreme Court shall have the authority to evaluate the conformity of the government acts and laws to existing statutes, the Constitution, and the international treaties of which Iraq is a signatory.¹⁹
- The Federal Supreme Court shall have the authority to reject appeals which do not present a fundamental constitutional question.

Option 2: Appellate Jurisdiction

- The Federal Supreme Court will hear appeals by individuals who believe their human rights and basic freedoms as protected under the Constitution have been violated by an act or law²⁰ of a government entity of any level or any other public entity.
- Cases that arise from the implementation of a government act or law can be appealed to the Federal Supreme Court.
- The review by the Federal Supreme Court shall evaluate the conformity of the government acts and laws to existing statutes, the Constitution, and the international treaties of which Iraq is a signatory.²¹
- The Federal Supreme Court shall have the authority to reject appeals which do not present a fundamental constitutional question.
- The Federal Supreme Court shall reject appeals, or consolidate cases as necessary, on issues which it has already issued a decision or on which it is already considering at the time the appeal in question is submitted to the Court.

¹⁷ For purposes of the sample language provided, unless otherwise indicated references to “act(s) or law(s)” or “act(s) and law(s)” are meant to refer to all government laws, decisions, regulations, instructions, procedures or other governmental decree, decisions or acts.

¹⁸ This language is modeled on the *Law on the Constitutional Court* arts. 50-51 (Slovenia) and the *Constitutional Court Act*, arts. 61-67 (South Korea), at <http://www.ccourt.go.kr/home/english/welcome02.jsp> (last visited Jan. 16, 2007).

¹⁹ *Law on the Constitutional Court* art. 22 (Slovenia).

²⁰ The draft language provided in this document refers to any “law or act”, however, it might be recommended that a definition section is added to the law which clarifies that “unless otherwise stated ‘law or act’ refers to any laws, decisions, regulations, instructions, procedures or other governmental decree, decisions or acts.”

²¹ *Law on the Constitutional Court* art. 22 (Slovenia).

General Procedures for Court Proceedings

Enabling legislation provides an opportunity to clarify the Federal Supreme Court's operations. Such clarification can help promote consistency in the Court's daily activities and strengthen the perception of the Court as an efficient institution. While the procedures for states' high courts vary greatly from state to state, there are a number of issues which enabling legislation often addresses. These include, but are not limited to: (1) how many judges are required to hear and decide cases, (2) whether court proceedings are generally public or private, and (3) the timeframe for the ruling on a case to come into effect.

Requirements for a Quorum

Enabling legislation usually defines how many judges constitute a quorum, or how many judges are required to hear and decide a case. While many states do not require all of a court's judges to be present to hear a case, it is common state practice to require all of a court's judges to participate in the final decision. In Slovenia, for example, only a majority of the judges have to be present in order to hear a case, but all of the judges must take part in the final decision.²² Requiring all judges to be present during all of a court's proceedings related to a case may create a burden on the judges. However, requiring all judges to participate in a final ruling insulates a court from claims of bias and ensures that no single faction consistently dominates the decision-making process.²³

Private and Public Sessions of the Court

Enabling legislation usually establishes whether a court hears cases in public or private sessions. There are two standard approaches: (1) a court will hear cases in public unless otherwise decided by the court or (2) a court will hear cases in private unless otherwise decided by the court.²⁴ Mandating public hearings, unless otherwise explicitly decided by the court, can increase the perception of transparency, but can also become problematic if security concerns require the court to consistently hear cases in private. It is common for judges to deliberate

²² *Law on the Constitutional Court* art. 35, 41 (Slovenia).

²³ See *Constitutional Court Act* art. 23 (South Korea) (setting a quorum at seven of nine justices).

²⁴ See *Act on the organisation of the Constitutional Court of the Slovak Republic, on the proceedings before the Constitutional Court and the status of its Judges* ("Slovakia Constitutional Court Act") art. 30 (Slovakia), at Venice Commission CODICES website, at <http://www.codices.coe.int> (last visited Feb. 17, 2006) (requiring proceedings to be public unless otherwise decided by the Constitutional Court); *Law on the Constitutional Court* art. 38 (Slovenia) (requiring the court to explicitly decide to exclude the public from a hearing).

and vote on a final ruling in private, rather than in public. This system ensures the process is not politicized and protects the judges themselves.²⁵

Timeframe for Rulings to Come into Effect

The Constitution leaves open the timeframe for when a Federal Supreme Court decision becomes effective. Most states make decisions effective either (1) immediately upon the court's decision or (2) upon official publication of the decision by the government or court. Making the decision effective only after it is published allows time for citizens to read the decision. However, this may be problematic if resource and logistical issues lead the publication to be delayed indefinitely, or if the publication is not widely available. Laws that require the court's decisions to become effective immediately often require the court's final decision to be announced at a public hearing. This ensures that the public is aware of the decision while accounting for the possibility that the official publication of the decision may be delayed.

Sample Language

General Provisions for Adjudicating Cases

- The majority of the members of the Federal Supreme Court must be present in order for the Court to hear a case.

Option 1 – Default is Public Hearings

- Oral arguments of the case shall be made at a public hearing. The Federal Supreme Court may exclude the public from the hearing of a case and hear the case in a private session if it deems it necessary for privacy or personal rights of the parties to be protected. A written decision to hear the case in a private session must be substantiated and be made available to the public. No appeal shall be permitted against such a decision. This decision shall be taken by all of the members of the Court.
- A majority of the members of the Court must support the ruling in order for the Court to reach a decision.
- The pronouncement of the final decision of the Federal Supreme Court shall be open to the public.

²⁵ See *Constitutional Court Act* art. 34 (South Korea) (allowing the pronouncement of final decision by South Korea's court to be held in public, but restricting the oral arguments and deliberation to private sessions).

Option 2 – Default is Private Hearings

- Oral arguments of the case shall be made at a private hearing. The Federal Supreme Court may hear a case in public if it deems necessary and appropriate. No appeal shall be permitted against such a decision.
- Once the Court has heard the case, the Federal Supreme Court shall reach a final decision on the case in a private session. This decision shall be taken by all of the members of the Court.
- A majority of the members of the Court must support the ruling in order for the Court to reach a decision.
- The pronouncement of the final decision of the Federal Supreme Court shall be open to the public.

Timeframe for Effect of Ruling

Option 1: Decision Effective Immediately

The decisions of the Federal Supreme Court are effective immediately upon the pronouncement of the Court’s final decision. Decisions are to be published in the [official reporter of the Federal Supreme Court or *Iraq Gazette*] within [two months] after the Court has reached the decision.²⁶

Option 2: Decision Effective When Published

The decisions of the Federal Supreme Court are effective upon the publication of the Court’s final decision in the [official reporter of the Federal Supreme Court or *Iraq Gazette*]. The final decision must be published in the [official reporter of the Federal Supreme Court or *Iraq Gazette*] within [two months] after the Court has reached the decision.²⁷

Adjudication of Constitutional Complaints where an Injury or Violation of Rights and Freedoms are Alleged

A constitutional complaint is a claim by a person or group that the rights and basic freedoms of an individual or group protected by the Constitution have been violated by a law or act of a government or public entity. Enabling legislation relating to constitutional complaints normally addresses three basic categories of issues:²⁸ (1) who has standing, which means the right to bring a constitutional

²⁶ *Constitutional Court Act* art. 36 (South Korea); *Slovakia Constitutional Court Act* art. 18.

²⁷ *Constitutional Court Act* art. 36 (South Korea); *Slovakia Constitutional Court Act* art. 18.

²⁸ This section addresses the adjudication of constitutional complaints, while the next section addresses challenges to government decree or laws. Article 93 of the Constitution can be read to give the Federal Supreme Court jurisdiction to hear constitutional complaints because it is vested with the power to “settle matters that arise from the application of federal laws, decisions, regulations, instructions and procedures issued by the federal authority.”

complaint before the high court, (2) the procedure for accepting and reviewing constitutional complaints by the court itself, and (3) the reasons that the court may refuse to hear a constitutional complaint. Clarifying these issues can help standardize the process and ensure citizens understand the procedures for bringing a complaint before the Court.

Standing

Standing, which means the right to bring a constitutional claim before a court, can have a significant impact on the abilities and powers of a high court. Expansive standing can provide wide public access to a court and help establish the perception of an open and transparent system where access to justice is provided to all. It may, however, also increase a court's workload. Alternatively, a more limited grant of standing means that fewer people can access a court, but may help to ensure constitutional claims are more concrete and legitimate.

Standing for an Individual or Group: In general, an individual who believes his rights have been violated is allowed to file a constitutional complaint with the court.²⁹ Many states also provide this right to distinct groups who believe their collective rights have been violated. Organizations are also sometimes allowed to bring complaints on behalf of an individual (or a distinct group) who believes his rights have been violated. Institutions granted the right to bring claims before courts often include the Human Rights Ombudsman, High Human Rights Commission and the Public Prosecutor's Office.³⁰ The enabling legislation may also require the court to provide an attorney to the individual bringing the suit.³¹ These provisions can help ensure the ability of individuals with limited resources to bring cases before the court.

Limits on Standing (South Africa): Some transitional states have limited access to their constitutional or high courts. In South Africa, cases must usually be referred to its Constitutional Court by the state's lower courts. In addition, there is no automatic right to appeal a ruling from the lower courts.³² Rather, a person can

²⁹ See SPAIN CONST. art. 162(1)(b) (stating "any individual or body corporate with a legitimate interest..." may file a complaint directly with the Constitutional Court).

³⁰ See SLOVAKIA CONST. art. 130(e) (allowing the state's general prosecutor to bring cases before the constitutional court).

³¹ See *Constitutional Court Act* art. 70 (South Korea) (mandating court-appointed counsel upon request if the court decides to hear the case).

³² See SOUTH AFRICA CONST. art. 167(6) ("National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court (a) to bring a matter directly to the Constitutional Court; or (b) to appeal directly to the Constitutional Court from any other court"); Constitutional Court of South Africa website, at <http://concourt.law.wits.ac.za> (last visited Jan. 16, 2007) (noting cases are not

appeal a lower court decision to the Constitutional Court “when it is in the interests of justice and with the leave of the Constitutional Court.”³³ Thus, South Africa has restricted access to its Constitutional Court by requiring a referral by the High Court and allowing its Constitutional Court broad discretion in refusing to hear cases. The Constitutional Court in South Africa has been instrumental in protecting the rights of individual South Africans, while these limitations have allowed the Court to limit its caseload.³⁴

Expansive Provisions for Standing (Hungary): Hungary has an exceptionally broad standing provision. Any person has the right to initiate proceedings before the Hungarian Constitutional Court, regardless of his citizenship or residency in Hungary. Persons who have not been individually injured by the government action can also bring cases before the Constitutional Court.³⁵ Unlimited access to the Hungarian Constitutional Court provides the broadest jurisdiction. Such broad access can also greatly increase the workload of the court.

Sample Language

Standing to Bring a Constitutional Complaint where an Injury or Violation of Rights and Freedoms are Alleged

- A person may, under the conditions determined by this Act, file a constitutional complaint with the Federal Supreme Court if he believes that his human rights and basic freedoms as protected under the Constitution have been violated by a federal act or law of a government entity of any level, any other public entity, or its agents.
- A group may, under the conditions determined by this Act, file a constitutional complaint with the Federal Supreme Court if the group believes that their collective human rights and basic freedoms as protected under the Constitution have been violated by a federal act or law of a government entity of any level, any other public entity, or its agents.

normally brought directly before the Constitutional Court, but reach the court through appeal, and are accepted by the Constitutional Court judges only if the case raises an issue of constitutionality and if there is a reasonable prospect that the appeal may succeed).

³³ SOUTH AFRICA CONST. art. 167(6).

³⁴ It may not be advisable to create requirements of standing that are so strict as to severely limit access to adjudicate constitutional issues. For example, while the standing requirements for the U.S. Supreme Court ensure a smaller caseload and conformity of cases, their restrictive nature is often criticized as being inflexible to meet the needs of litigants.

³⁵ See HUNGARY CONST. art. 32(a)(3) (“Everyone has the right to initiate proceedings of the Constitutional Court in the cases specified by law”).

- An organization may file a constitutional complaint with the Federal Supreme Court on behalf of an individual or a group who believes that his human rights and basic freedoms as protected under the Constitution have been violated by an act or law of a government entity of any level or any other public entity, or its agents, and with the agreement of the person whose human rights or basic freedoms are being protected during the particular case.
- The Human Rights Commission may file a complaint with the Federal Supreme Court concerning a particular case it is dealing with, and with the agreement of the person whose human rights or basic freedoms are being protected in the particular case.
- The [Public Prosecutor, other courts in the Judiciary including the Court of Cassation, and other independent commissions or through statute] may file a complaint with the Federal Supreme Court with the agreement of the person whose human rights or basic freedoms are being protected in the particular case.
- If other remedies are provided for in this Act or by statute, no constitutional complaint can be filed under the provisions of this Act until all other remedies provided for in this Act or by statute have been exhausted.³⁶

Review by the Court to Initiate Official Proceedings

The procedures for reviewing and accepting (or rejecting) a constitutional complaint and initiating official proceedings vary from state to state. There are, however, a number of provisions which are usually clarified in a state's constitution or enabling legislation. Defining these procedures can shield a court from accusations of bias toward any one group and can increase the transparency of the process.

The decision to accept or reject a constitutional complaint is often made by a subset of the court itself, for example one specific judge or a panel of judges. Slovenia and South Korea's constitutional courts both use a panel system.³⁷ In Albania, the president of the Constitutional Court assigns judges on the court to conduct a preliminary review of each case and report to the entire court. The entire

³⁶ The above language for this section has been modeled on the *Law on the Constitutional Court* arts. 50-51 (Slovenia) and the *Constitutional Court Act* arts. 61-67 (South Korea).

³⁷ *Constitutional Court Law* art. 72(1) (South Korea) ("The President of the Constitutional Court may establish the Panels each of which consists of three Justices of the Constitutional Court and have a Panel take prior review of a constitutional complaint"); *Law on the Constitutional Court* art. 54(1) (Slovenia) ("A decision on whether to accept a constitutional complaint and begin proceedings shall be brought by the Constitutional Court in a senate of three judges at an in camera session").

court then decides whether or not to initiate proceedings.³⁸ Limiting this initial review to a subset of a court allows decisions to be made quickly and with minimal resources.

The decision to accept or reject a complaint is usually made by unanimous consent of the panel or subset of judges assigned to the particular case.³⁹ If a unanimous decision cannot be reached, the issue is moved to the entire court for consideration.⁴⁰ Some states have a special procedure through which a court can be required to hear a case that was initially rejected by the reviewing panel of judges.⁴¹ This safeguard can be important to ensure judges cannot systematically refuse to consider constitutional issues.

Sample Language

Provisions for Review of Constitutional Complaints

- The decision on whether to accept a constitutional complaint and begin proceedings shall be made by a panel of [three] judges on the Federal Supreme Court, in a private session.
- The President of the Federal Supreme Court, in coordination with the other judges on the Court, shall establish the panels. Membership on these panels [will/may] rotate amongst the judges on the Court.
- The rejection or acceptance of a constitutional complaint shall be decided upon unanimously by the panel of [three] judges and shall be made available to the public. An appeal against such resolution shall not be permitted.
- If the panel cannot reach a unanimous decision on the acceptance or rejection of a constitutional complaint, the panel shall refer the decision to the full bench of the Federal Supreme Court. When a decision is not taken within [30] days after the submittal of the constitutional complaint, it shall automatically transfer to the full bench for decision. The full bench of the Federal Supreme Court will then render a

³⁸ *Law No. 8577 of 10 February 2000 on the Organisation and Functioning of the Constitutional Court of the Republic of Albania* art. 31 (Albania), Venice Commission CODICES website, at <http://www.codices.coe.int> (last visited Feb. 17, 2006).

³⁹ *See Constitutional Court Law* art. 72(4) (South Korea) (requiring unanimity to reject or accept a complaint); *Law on the Constitutional Court* art. 55(3) (Slovenia) (requiring unanimity to reject or accept a complaint).

⁴⁰ *See Constitutional Court Law* art. 72(4) (South Korea) (requiring the decision to accept or reject a complaint be made by the entire court if subset of the court cannot reach a consensus).

⁴¹ In Slovenia, even if the complaint is originally rejected by the three-judge panel, a written request by any three judges on the court can compel the court to hear the case. *See Law on the Constitutional Court* art. 55(4) (Slovenia) (“If a constitutional complaint was not accepted by the senate [of three judges], it shall nevertheless be accepted if such is the written decision of any group of three judges of the Constitutional Court within 15 days after the decision of the senate”).

decision to reject or accept the constitutional complaint according to the provisions for voting in other sections of this Act.⁴²

- If the constitutional complaint is rejected by the panel of [three] judges, it shall nevertheless be accepted if a written decision to accept the complaint is submitted to the full bench by any group of [three] judges of the Federal Supreme Court within [15] days of the decision of the panel.⁴³

Rejection of a Constitutional Complaint

State practice indicates that a court may not initiate proceedings on a particular case for a number of reasons, including: (1) the complaint was submitted outside the required timeframe, (2) the complaint was submitted by someone who does not have standing, (3) all other remedies provided were not exhausted, and (4) there was obviously no violation of human rights or basic freedoms. It can be helpful to define these reasons in legislation in order to standardize procedures.⁴⁴ Some states' enabling legislation also includes explicit exceptions to these standard reasons. Slovenia's Constitutional Court can accept a complaint outside the standard procedures if "the alleged violation is obvious and if the complaint would incur irreparable consequences as a result of the implementation of a personal act."⁴⁵ This provision ensures a court can accept a case which would normally have been rejected. Such provisions also guarantee no group is disenfranchised because of limited resources or administrative errors in submitting a complaint.

Sample Language

Rejecting a Constitutional Complaint for Review

- The Federal Supreme Court shall reject a constitutional complaint if:
 - The complaint was filed too late, except as provided in this Act;
 - All other remedies as provided for in this Act or by statute have not been exhausted, except as provided in this Act;

⁴² *Constitutional Court Law* art. 72(4) (South Korea).

⁴³ The above language in this section has been modeled on the *Law on the Constitutional Court* art. 54 and 55 (Slovenia).

⁴⁴ The fourth reason, that there is obviously no violation of human rights or basic freedoms, is a broad category and could therefore be used to reject legitimate complaints. However, it is important to allow the court to reject a complaint which has no merit or is unsubstantiated. The review by a panel of judges, rather than a single judge, and ability of the Full Bench to override the panel's initial decision to reject a complaint safeguard this provision from misuse.

⁴⁵ *Law on the Constitutional Court* art. 51 (Slovenia).

- The constitutional complaint was filed by a person, group or other entity that is not entitled to do so by other provisions of this Act; or
 - There is obviously no violation of human rights and basic freedoms as provided for in this Act and the Constitution.
- The Federal Supreme Court may exceptionally decide to accept a constitutional complaint despite the provisions in the previous section of this Act if the alleged violation is obvious, and failure to hear the complaint would result in grave and irreparable consequences.⁴⁶

Adjudication of the Constitutionality of a Government Act or Law

General Issues

A challenge to the constitutionality of a government act or law (“a challenge”) does not require an actual injury or violation of an individual’s or group’s rights. Rather, when a party challenges the constitutionality of a government act or law, the constitutionality of that act or law – without reference to its application – is reviewed. High courts are also often given jurisdiction to consider the constitutionality of international treaties prior to ratification by a government and application to a state’s citizenry.

Enabling legislation usually addresses three main issues relating to challenging the constitutionality of a government act or law: (1) who has standing to bring a challenge, (2) the effect of a court’s ruling on the law, and (3) whether or not a court has “preventive review” (review of laws before they enter into force), “repressive review” (review of existing laws), or both.⁴⁷

Sample Language

General Provision on the Adjudication of the Constitutionality of a Law

The Federal Supreme Court has jurisdiction over the constitutionality of [government acts and laws prior to enactment,] government laws and acts in effect, provisions of the Constitution, and general government acts and laws, including

⁴⁶ The above language in this section has been modeled on the *Law on the Constitutional Court* (Slovenia).

⁴⁷ The Iraq Constitution provides for legislative review in Article 93(1), which states that the Federal Supreme Court has “oversight over the constitutionality of laws and regulations in effect.” Furthermore, reading Article 93(2), which gives the Court jurisdiction to “Interpret...the provisions of the Constitution” together with Article 2 (b) and (c) also supports the right of the Federal Supreme Court to review the constitutionality of statutes and laws.

those issued for the exercise of public powers. [The Federal Supreme Court has jurisdiction to review the constitutionality of provisions of international treaties prior to ratification of the treaty.]

Standing to Challenge Adjudication of Constitutionality of a Law

Standing to challenge the constitutionality of a government act or law—without a related injury or violation of rights – is usually reserved for government officials and entities. It is standard state practice to grant a state’s president or head-of-state standing to challenge an act or law where there is no related injury or violation of rights. Other key government figures such as the prime minister and leading members of the parliament are also often granted standing.

Many states also allow a specific number or percentage of the regular members of parliament to initiate this process.⁴⁸ France allows sixty members from either its National Assembly or its Senate to request a review of a law by the state’s Constitutional Council; Slovenia allows one-third of its members of the National Assembly to request a review of a law by its constitutional court.⁴⁹ It is also standard state practice to grant the same rights to members of the lower house in states with upper and lower legislative chambers.⁵⁰ Individual citizens are rarely granted standing to challenge the constitutionality of a law or statute if there is no related injury or violation of rights.⁵¹

⁴⁸ ARMENIA CONST. art. 101 (allowing the President and at least one-third of the members of parliament standing to initiate constitutional review of a law); BULGARIA CONST. art. 150 (allowing one-fifth of all Members of the National Assembly, the President, the Council of Ministers, the Supreme Court of Cassation, the Supreme Administrative Court, or the Chief Prosecutor standing to initiate constitutional review of a law); SLOVAKIA CONST. art. 130 (allowing one-fifth of the members of parliament, the President, the “Government of Slovak Republic” and the general prosecutor standing to initiate constitutional review of a law).

⁴⁹ See FRANCE CONST. art. 61 (allowing the President of the Republic, Prime Minister, President of the National Assembly, and President of the Senate and sixty members of either the National Assembly or Senate standing to initiate constitutional review of a law); *Law on the Constitutional Court* art. 23 (Slovenia) (allowing the National Assembly, at least one-third of the members of the National Assembly, the National Council, the government, a court of law, the state prosecutor, the Bank of Slovenia, the Auditor general, human rights ombudsman, representative bodies of local communities, and representatives of state-wide trade unions standing to initiate constitutional review of a law).

⁵⁰ FRANCE CONST. art. 61 (allowing sixty members of the National Assembly or sixty members of the Senate, whose members are elected by the local councils and national representatives, to initiate constitutional review of a law).

⁵¹ See The Constitutional Court of the Republic of Hungary website, at <http://www.mkab.hu/en/enpage1.htm> (last visited Jan. 16, 2007) (stating that the Hungary Constitutional Court grants standing to an individual to challenge the constitutionality of a law).

Sample Language

Standing to Initiate a Challenge to the Constitutionality of a Law

A request for the Federal Supreme Court to consider the constitutionality of a government act or law, including those issued for the exercise of public powers, may be submitted by:

- The President or Prime Minister;
- At least [one-third] of the representatives of the Council of Representatives or the Federation Council;
- A court of law, the Chief Public Prosecutor, or independent commission, provided that a question of constitutionality and legality arises in relation to the proceedings they are conducting;
- Representatives of local communities approved by the Court, if the rights of the local community are threatened.⁵²

Effect of the Ruling

State practice illustrates that there are two standard options regarding the effect of a court's ruling on the constitutionality of a government act or law. In some states, the entire statute is null and void if the court considers any part of the statute unconstitutional.⁵³ In other states, only the section deemed unconstitutional is null and void, and the rest of the statute remains valid.⁵⁴ In a third less common structure, states have given their high courts wide discretion to require the executive and judicial branches to take specific action to remedy the unconstitutionality of the statute or policy in question before declaring it void.⁵⁵

It is also standard state practice to allow a high court to suspend the implementation of the government act or law during the process or adjudication.⁵⁶

⁵² The above language in this section has been modeled on the *Law on the Constitutional Court* art. 23 (Slovenia).

⁵³ See *Act No. XXXII of 1989 on the Constitutional Court* art. 37 (Hungary), at Venice Commission CODICES website, at <http://www.codices.coe.int> (last visited Feb. 17, 2006) (establishing if there is any unconstitutional interpretation of the statute, the entire statute may be declared unconstitutional).

⁵⁴ *Constitutional Courts: Opportunities and Pitfalls* (noting that in the United States even if a statute is held to be unconstitutional only as it was construed and applied in one specific instance, another application of the same statute may be consistent with the Constitution).

⁵⁵ *Act No. XXXII of 1989 on the Constitutional Court* arts. 33-36 (Hungary).

⁵⁶ *Law on the Constitutional Court* art. 39 (Slovenia).

Sample Language

Effect of a Ruling that a Law or Part of a Law is Unconstitutional

- Until such time as a final decision is reached, the Federal Supreme Court may completely or partly suspend implementation of the act or law (including a general act for the exercise of public power), especially if irreparable and damaging consequences may result from the continued implementation of the statute or general act in question.⁵⁷

Option 1: Entire government act or law null and void

- If the Federal Supreme Court finds a government act or law unconstitutional, the Federal Supreme Court shall issue a public decision stating which act or law is null and void.

Option 2: Part of government act or law null and void

- If the Federal Supreme Court finds a government act or law unconstitutional, the Federal Supreme Court shall issue a public decision stating which part of the act or law is null and void.

**Adjudication of the Constitutionality of a Government Act or Law –
Repressive Review**

Most high courts can review acts or laws already in effect, meaning they have “repressive” review.⁵⁸ There are two forms of “repressive” review: (1) a challenge made without reference to a concrete conflict arising from the application of the law in a particular case, known as “abstract” review, and (2) a challenge made with reference to a particular case, known as “concrete” review. It should be noted that concrete review is only relevant if Iraq’s Federal Supreme Court has original jurisdiction over constitutional issues and lower courts are not authorized to rule on constitutional issues.

Abstract Review

While abstract review is similar to a constitutional complaint, abstract review challenges the act or law itself, not only the application of the act or law.

⁵⁷ *Law on the Constitutional Court* art. 39 (Slovenia).

⁵⁸ The Federal Supreme Court is granted repressive review through Article 93(1) of the Constitution: “The Federal Supreme Court shall have jurisdiction over the following: (1) Oversight of the constitutionality of laws and regulations in effect.” This article does not differentiate between abstract and concrete repressive review.

Abstract review does not reference a specific case or dispute. The purpose of abstract review is to ensure that no act or law, even when correctly applied, discriminates against a particular group. Many high courts can undertake the abstract review of an act or law.⁵⁹

Concrete Review

Concrete review is only relevant if Iraq's Federal Supreme Court has original jurisdiction over constitutional issues and lower courts are not authorized to rule on constitutional issues. Concrete review is a procedure through which a lower court questions the constitutionality of an act or law which is relevant for its finding in a particular case. This lower court then has the ability to refer the constitutional issue to the high court. This can be important to clarify constitutional issues which arise in lower court proceedings, but on which that lower court does not have the jurisdiction to rule. The proceedings are generally suspended during the review by the high court, and continued upon the release of the high court's ruling for final adjudication by the lower court. States that allow their constitutional courts concrete review of laws include Bulgaria, Spain, Slovenia, Croatia, and Slovakia, among others.⁶⁰

Sample Language

Review of Existing Legislation with Repressive Review

- The Federal Supreme Court has jurisdiction to decide if an act or law in effect conforms with the Constitution.⁶¹
- The claim submitted to the Federal Supreme Court must include the provisions being challenged and the incompatibility of those provisions with the Constitution.⁶²

⁵⁹ *Comparative Constitutional Analysis: Table 2*, CONCOURT.NET, at <http://www.concourts.net/tab/tab2.php?lng=en&stat=1&pri=0&srt=0> (last visited Jan. 16, 2007).

⁶⁰ *Comparative Constitutional Analysis: Table 2*, CONCOURT.NET (showing it is common for states' constitutional courts to have concrete review jurisdiction, although it is less common than abstract review).

⁶¹ *Law of the Republic of Armenia on the Constitutional Court* art. 55.

⁶² Abstract review is implied if there is no provision requiring a challenge to the constitutionality of a statute come from a lower court or be in connection with an ongoing court case.

Request for the Adjudication of the Constitutionality of a Law by a Lower Court⁶³

- When the issue of whether or not an act or law is constitutional is relevant to a case being tried in a lower court, the lower court shall request the Federal Supreme Court to adjudicate the constitutionality of the act or law.
- No appeal shall be made against the decision of a lower court to request adjudication by the Federal Supreme Court of an act or law.
- When a lower court requests the Federal Supreme Court to adjudicate on the constitutionality of an act or law, the proceedings of the lower court shall be suspended until the Federal Supreme Court makes a decision on the constitutionality of the act or law. If the lower court deems it urgent, it may continue proceedings other than the final decision.
- The parties to the original case and the Minister of Justice may submit opinions on the constitutionality of the act or law to the Federal Supreme Court.
- The Federal Supreme Court shall render a decision on the constitutionality of the act or law within [60] days of the request by the lower court.
- Any decision that an act or law is unconstitutional shall bind the ordinary courts, other state agencies, and all branches of government.⁶⁴

Adjudication of the Constitutionality of a Government Act or Law – Preventive Review

Preventive review of acts or laws, meaning the review of legislation before it enters into force, is much less common than repressive review. France's Constitutional Council has the authority of preventive review after the passage of a bill but before its promulgation. A disadvantage of preventative review is that it politicizes the court because it requires the court to render an opinion on a legislative act during the legislating process. It also allows the political minority to use the court to limit the ability of the political majority to legislate. While the impact of the law on society cannot be considered in the decision, preventive review allows for earlier adjudication of disputes.⁶⁵ Standing to initiate preventive review is generally very limited because of the issues discussed above. Only the

⁶³ This sample language is only relevant if the Federal Supreme Court is granted original jurisdiction over constitutional issues and lower courts in Iraq are not authorized to rule on constitutional issues.

⁶⁴ The above language in this section has been modeled on the *Constitutional Court Act* arts. 41-48 (South Korea).

⁶⁵ Herman Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe*, THE UNIVERSITY OF CHICAGO PRESS (2000).

president (or head-of-state) and members of the legislature are usually granted standing to request preventive review.⁶⁶

Sample Language

Preventive Review of a Government Act prior to Enactment

Upon a request by [three-eighths] of the members of the Council of Representatives or the Federation Council, the Federal Supreme Court shall examine the constitutionality of any government act or decision deemed contestable under this Act or other statute. If the Federal Supreme Court declares the government act or decision unconstitutional, the President or responsible government body shall not promulgate the act or law unless the unconstitutional sections are eliminated or changed to adhere to the Constitution.⁶⁷

Preventative Review of Legislation prior to Enactment

Upon a request by [three-eighths] of the members of the Council of Representatives or Federation Council, the President or the Prime Minister, the Federal Supreme Court shall examine the constitutionality of any government act or law deemed contestable under this Act or other statute enacted by the Council of Representatives [or Federation Council] but not yet promulgated. If the Federal Supreme Court declares the contested act or law unconstitutional, the President shall not promulgate the act or law until the unconstitutional sections are eliminated or changed to adhere to the Constitution by the Council of Representatives [or Federation Council].⁶⁸

Disputes between National, Regional, Governorate, and Local Authorities and Judicial Bodies

Disputes between government entities often have specialized procedures.⁶⁹ States have established both specific⁷⁰ and general rules⁷¹ for adjudicating these

⁶⁶ See generally *Comparative Constitutional Analysis: Table 2*, CONCOURTS.NET (illustrating France, Hungary, Spain, Slovenia, and Turkey are examples of states which allow some form of preventive review by their respective constitutional courts).

⁶⁷ The above language in this section has been modeled on the *Act No. XXXII of 1989 on the Constitutional Court* arts. 33-36 (Hungary).

⁶⁸ The above language in this section has been modeled on the *Act No. XXXII of 1989 on the Constitutional Court* arts. 33-36 (Hungary).

⁶⁹ See IRAQ CONST. art. 93(4), 93(5), 93(8) (granting the Federal Supreme Court authority to settle “disputes that arise between the federal government and the governments of the regions and governorates, municipalities, and local administrations...disputes that arise between the governments of the regions and governments of the governorates...competency disputes between the federal judiciary and the judicial institutions of the regions and

disputes. Key issues that are usually addressed in enabling legislation include: (1) which parties can bring a case, (2) the timeframe within which a case must be brought before the court, and (3) the effect of a court's ruling.

The party that believes another body is infringing on its jurisdiction almost always has standing to bring a claim.⁷² An example of this would be a local entity that claims the national government is infringing on the local entity's responsibilities. The required timeframe for bringing a suit varies, but often falls between 60 to 180 days from when the cause of the infringement is known.⁷³ With respect to the effect of the court's ruling, legislative language often clarifies whether the Court's ruling will have an immediate or delayed effect and describes how the ruling will impact relevant governing entities.

Sample Language

Disputes between National, Regional, Governorate, and Local Authorities and Judicial Bodies

- The Federal Supreme Court itself shall decide whether an issue addressed to it is within its competencies.
- The Federal Supreme Court shall have the authority to hear and rule on the following:
 - Disputes that arise between the federal government and the governments of the regions and governorates, municipalities, and local administrations;⁷⁴
 - Disputes that arise between the governments of the regions and governments of the governorates;⁷⁵

governorates that are not organized in a region...[and]...competency disputes between judicial institutions of the regions or governorates that are not organized in a region").

⁷⁰ *Constitutional Court Act* arts. 61-67 (South Korea) (detailing specific issues related to competency hearing including the cause for request, classification of adjudication on competence disputes, time limit for request, matters to be stated on written request, provisional remedies, decision, and effect of decision).

⁷¹ *See Law on the Constitution* art. 61 (Slovenia) ("A request for a decision on disputes concerning jurisdiction between courts and other State bodies and on disputes concerning jurisdiction between the National Assembly, the President of the Republic and the Government, may be submitted by an affected body within 90 days from the day such body became aware of the interference of another party in its area of jurisdiction... (2) If a jurisdictional dispute occurs because several bodies refuse to be competent in a particular case, a solution to the case may be proposed by the body to which the case was assigned, but believes that the matter does not fall within its jurisdiction").

⁷² *See Slovakia Constitutional Court Act* art. 61 (noting the inclusion of an explicit grant of standing to the entity which believes it has been wrongly assigned a case).

⁷³ *See Constitutional Court Act* art. 38 (South Korea) (requiring a dispute to be requested within sixty days after the existence of the cause is known, and within one hundred eighty days after the cause occurs).

⁷⁴ IRAQ CONST. art. 93(4).

⁷⁵ IRAQ CONST. art. 93(5).

- Competency disputes between the federal judiciary and the judicial institutions of the regions and governorates that are not organized in a region;⁷⁶ and
- Competency disputes between judicial institutions of the regions or governorates that are not organized in a region.⁷⁷
- The provisions of this Article apply equally to all disputes defined in this Article.
- Bodies that can request such a decision include federal government entities, governments of the regions, governorates, municipalities and local administrations, and judicial institutions of the federal government, regions, and governorates not organized in a region.
- A request for a decision on disputes on which the Federal Supreme Court has authority to rule may be submitted by an affected body within [180] days from the day such body becomes aware of the cause of the request.
- The body requesting a decision under this Article must be directly affected by the cause of the request.
- If a competency dispute occurs because several judicial bodies refuse to consider the particular case, a solution to the case may be proposed by the body in which the complaint was originally filed. This body can propose a solution even if it believes it does not have the authority to render such a solution. An initiative for resolving the jurisdictional dispute may also be submitted by a party to the procedure which caused the jurisdictional dispute by refusing to hear the case, even if this body believes it does not have the authority to render such a solution.
- Until such time as a final decision is reached, the Federal Supreme Court may completely or partly withhold implementation of the federal laws, decisions, regulations, instructions, procedures or other governmental decree, decisions or acts, especially if irreparable and damaging consequences may result from the continued implementation of the act or policy in question.⁷⁸
- The Federal Supreme Court shall issue a decision stating which governing body is competent and may rule that any act or law whose unconstitutionality or illegality has been established is null and void, in part or in whole.
- The decisions of the Federal Supreme Court are binding on all federal, regional, governorate, municipal and local bodies.⁷⁹

⁷⁶ IRAQ CONST. art. 93(8)(a).

⁷⁷ IRAQ CONST. art. 93(8)(b).

⁷⁸ *Law on the Constitutional Court* art. 39 (Slovenia).

⁷⁹ The above language in this section has been modeled on the *Law on the Constitutional Court* art. 61 (Slovenia), the *Constitutional Court Act* §4 arts. 61-67 (South Korea), and the *Slovakia Constitutional Court Act* title 3.

Composition of the Federal Supreme Court

Number of Judges

The Constitution does not define how many judges will sit on the Federal Supreme Court. The text explicitly leaves this decision to the Council of Representatives. “The Federal Supreme Court shall be made up of a number of judges, experts in Islamic jurisprudence, and legal scholars, whose number, the method of their selection, and the work of the Court shall be determined by a law enacted by a two-thirds majority of the members of the Council of Representatives.”⁸⁰ In general, the number of judges on constitutional or high courts can vary, but many courts have between nine and twelve judges.⁸¹

The process of selecting judges often impacts the number of judges on a court. For example, if the process is highly politicized, there may be more judges on the court to allow each relevant group at least one nominee. A less-political process of nomination may allow a smaller number of judges since not all groups feel it necessary to have a representative on the court. Many believe a politicized selection process leads to a greater number of less-experienced judges, and that a court will function more efficiently with fewer highly-qualified judges sitting on the bench.⁸²

Selection of Judges

While no consensus exists on the best way to select judges for a state’s constitutional or high court, state practice illustrates that there are a number of standard elements employed by the majority of states. Transparency is important to bolster public trust in court decisions. An open call for nominations to initiate

⁸⁰ IRAQ CONST. art. 92(2).

⁸¹ See *Law of the Republic of Armenia on the Constitutional Court* ch.1 art. 1 (establishing Armenia’s Constitutional Court has nine members); *Institutional Act on the Constitutional Council* art. 1(1) (France) (establishing France’s Constitutional Council has nine members); *Constitutional Court Act* art. 3 (South Korea) (establishing South Korea’s Constitutional Court has nine members); SOUTH AFRICA CONST. art. 176 (establishing the South African Constitutional Court has 12 members); *United States Judiciary Act of 1869*, FEDERAL JUDICIAL CENTER, at <http://www.fjc.gov/history/home.nsf/page/10b> (last visited Jan. 17, 2007) (establishing the United States’ Supreme Court has nine members).

⁸² See *Law of the Organisation and Trial Procedures of the Constitutional Court* art. 4 (Turkey), Venice Commission CODICES website, at <http://www.codices.coe.int> (last visited Feb. 17, 2006) (requiring the nomination of substitute judges to Turkey’s Constitutional Court before an actual vacancy occurs to facilitate quick replacement of judges).

the selection of judges can increase the transparency of the process.⁸³ State practice reveals that the appointment of judges is typically done by either the executive or the legislative branch, or in a collaborative process involving both arms of the government. Depending on the political dynamics of a given country, processes involving both branches can sometimes reduce the potential for political domination by one branch or party.⁸⁴ Involving both branches, and consequently more players, can sometime also delay critical appointments and leave a judiciary weakened and without a sufficient number of judges. Also, some states establish independent judicial selection commissions such as a “higher judicial council” or a “judicial services commission” to nominate candidates which are then forwarded for final approval and appointment to the executive and/or legislature. This option may limit the political influence over the selection process and may result in the appointment of more qualified and neutral judges.

Collaborative Selection Processes: Some states have a collaborative selection process that involves both the executive and legislative branches. There are three models for a collaborative selection process that are often used. In the first model, the executive and legislative branches share responsibility for nominating and appointing each individual judges of the court.⁸⁵ In the second model, the executive and legislative branches each nominate a pre-determined number of the judges to the court and appoint them independent of the other branch’s approval or input. Thus, each branch operates independently of the other in appointing and approving their respective nominees.⁸⁶ In the third option, only one branch is involved in the appointment of the judges to a state’s high court.

A collaborative selection process for each judge can foster inter-government relations. Including both the executive and legislature can help reduce perceptions that one branch has influence over the court. However, a process which involves

⁸³ See *Law on the Constitution* art. 13 (Slovenia) (requiring a public call for nominations for vacancies on the Constitutional Court from which the president can, but does not have to, select his nominees).

⁸⁴ Donald Horowitz, *Constitutional Courts: Opportunities and Pitfall* (noting the exclusive power of Hungary and Poland’s parliaments to appoint judges has politicized the process).

⁸⁵ Donald Horowitz, *Constitutional Courts: Opportunities and Pitfall* (noting in the United States, Slovenia, and Zambia the appointment process requires nomination by the President and approval by the representative assemblies).

⁸⁶ See Venice Commission CODICES website (noting in Italy, Bulgaria, Spain and Armenia the president is granted the authority to appoint between one-half and one-third of the court, with the remaining appointments made by the legislature or through election by the existing judiciary); *Morocco in Brief*, UNDP-POGAR, at <http://www.pogar.org/countries/index.asp?cid=21> (last visited Jan. 17, 2007) (noting in Morocco the constitutional chamber of the Supreme Court is made up of the First President of the Supreme Court, three judges appointed by the king and three judges appointed by the parliament); *Constitutional Court Act* art. 4 (South Korea) (establishing the justices are all appointed by the president, but of the nine members of the court, three are elected by the representative body and three designated by the Chief Justice of the Supreme Court).

more than one branch can become problematic if political disagreements lead to a stalemate. It is therefore important that the enabling legislation include a contingency for the breakdown of this process.

Judicial Selection Commissions: South Africa has a Judicial Service Commission that generates a list of individuals from which the state's President can choose judicial candidates. The Commission prepares a list of nominees with three names more than the number of appointments to be made, and submit the list to the President. Then, "the President may make appointments from the list, and must advise the Judicial Service Commission, with reasons, if any of the nominees are unacceptable and any appointment remains to be made."⁸⁷ This increases the involvement of legal associations and minority parties. A commission can be important if a state's politics are dominated by one particular group. Many experts believe that even if the executive holds the final authority for appointing judges, a more inclusive selection process increases the ultimate legitimacy of a court.⁸⁸

The Philippines also employs a nominating commission that screens applicants before the executive makes the ultimate appointment. Judges of the Philippines' Supreme Court and the lower courts are appointed by the executive, but these judges must be selected from a list of three candidates prepared by the Judicial and Bar Council.⁸⁹ The Judicial and Bar Council membership includes representatives of the courts, the executive, the legislature, and legal professionals.⁹⁰ Egypt utilizes a similar system with the executive authority, appointing judges only after the Supreme Council of Judicial Bodies approves them.⁹¹

Qualifications of Judges

General Qualifications: Many states require judges on their high courts be of a certain age, be legally educated, and have served as a lawyer or judge for a requisite number of years. Examples of qualifications for judges on high courts

⁸⁷ SOUTH AFRICA CONST. art. 174(4)(a) & (b).

⁸⁸ See *White Paper on Guidance for Promoting Judicial Impendence and Impartiality*, IFES, at <http://www.ifes.org> (last visited Jan. 17, 2007) (noting the Ugandan Judicial Commission includes representatives of the Supreme Court, attorneys chosen by the Ugandan Legal Society, the public service commissioner, the attorney general, and lay people chosen by the President. This diversity is seen as one of the key factors in the success of the selection process).

⁸⁹ Constitution of the Philippines art. 9, at <http://www.comelec.gov.ph/laws/consti.html> (last visited Nov. 2, 2006).

⁹⁰ Specifically, the Judicial and Bar Council is comprised of the following members: "the Chief Justice as ex officio Chairman, the Secretary of Justice, and a representative of the Congress as ex officio Members, a representative of the Integrated Bar, a professor of law, a retired Member of the Supreme Court, and a representative of the private sector." See PHILIPPINES CONST., art. 8.

⁹¹ Judicial Authority Act of Egypt, art. 44.

include the following. In Bulgaria, judges must be lawyers of high professional and moral integrity with at least 15 years of professional experience. In Slovakia, judges must be citizens, have reached the age of 40, possess a university law degree and have worked for at least 15 years in the legal profession. In Spain, judges must have been magistrates, prosecutors, university professors, public officials, or lawyers, all of whom must be “jurists of acknowledged competence” with at least 15 years of professional experience.⁹²

Expertise in Islamic Jurisprudence: Legislation can be used to clarify the requirement set out in Article 92(2) regarding “experts in Islamic jurisprudence.”⁹³ State practice illustrates that most states that recognize Islam as a source of legislation require judges on their highest courts to have civil law training. In such states the judicial systems are often divided into civil and *Shari’a*-based courts, and these courts maintain separate jurisdictions. However, state practice illustrates that the rulings of such *Shari’a*-based courts can usually be appealed to a state’s highest court.

While state practice illustrates that the majority of states do require civil law training for judges on their highest courts, the requirements for judges in Afghanistan and Yemen provide for the inclusion of Islamic-trained judges. The 2004 Afghan Constitution is similar to the Iraq Constitution in that it provides for the inclusion of Islamic experts on the state’s highest court. Members of the Afghan Supreme Court “should have higher education in law or in Islamic jurisprudence, and should have enough expertise and experience in the judicial system of Afghanistan.”⁹⁴ Yemen requires all judges to hold a university degree in law or Islamic law and successfully complete a training course at the High Judicial Institute. This course includes training in civil law and Islamic criminal legislation, and at least six months of training as assistant judges or public defenders.⁹⁵

⁹² Note that the requirements listed for Bulgaria, Slovakia, and Spain, refer to the requirements for these states’ high federal or constitutional courts. Venice Commission CODICES website.

⁹³ IRAQ CONST. art. 92(2).

⁹⁴ Unofficial English Translation of the Afghan Constitution, art. 118 (2004) , at <http://www.af/resources/aaca/constitution/FinalDraftConstitutionEnglish.pdf> (last visited Oct. 3, 2006)

⁹⁵ See *The Arab Judicial Forum White Papers: Theme 1: Judicial Selection, Ethics and Training*, Arab Judicial Forum, Kingdom of Bahrain, September 15-17, 2003 website, at http://www.arabjudicialforum.org/ajf_wp_1.html#35 (last visited Feb. 17, 2006) (stating candidates also work for an additional two years in the courts before they are appointed judges).

Timeframe for Filling Judicial Vacancies

Enabling legislation also often includes the required timeframe for filling vacancies on a state's high court. This can help reduce uncertainty and the decrease the ability of any one group to delay the process indefinitely.

Oath of Office

Many states require judges to take an oath of office. The appointee usually pledges himself to the basic principles of justice, confidentiality of court proceedings, and the state's Constitution. This oath is usually witnessed by the executive and/or legislative branches. This oath can help ensure the judges' allegiance to the Constitution and to no other political, religious, or additional authority.

Tenure of Judges

The Constitution does not indicate the term for a judge on the Federal Supreme Court, or if this term is renewable or a lifelong position. Lengthy, nonrenewable terms are characteristic of legitimate and well-functioning high courts. Lengthy terms can help ensure consistency. The length of terms often varies from 9 to 12 years,⁹⁶ although some judges are appointed for life.⁹⁷ Typically, the more frequently judges are appointed, the more power the appointing bodies have over the court.

Removal Procedures

In order to maintain their independence, many constitutional and high courts only allow the judges on the court to remove a judge.⁹⁸ The two most common reasons for removal are (1) a decision by their peers on the court by a super or

⁹⁶ See Venice Commission CODICES website (noting Bulgaria, Italy and Slovenia appoint their respective constitutional court judges to nine year nonrenewable terms).

⁹⁷ See *White Paper on Guidance for Promoting Judicial Impedence and Impartiality*, IFES (noting Bosnia-Herzegovina and the United States both appoint judges to their highest courts for lifelong terms). In Iraq, Judges of the Federal Supreme Court established under the Transitional Administrative Law were appointed for life.

⁹⁸ IRAQ CONST. art. 97 ("Judges may not be removed except in cases specified by law. Such law will determine the particular provisions related to them and shall regulate their disciplinary measures").

absolute majority,⁹⁹ and (2) criminal liability leading to imprisonment that has been proven by a court of law.¹⁰⁰

Some states have limited the criminal liability of judges. Slovakia does not allow the judges of its Constitutional Court to be criminally prosecuted or held in custody without the consent of the other members of the court. This is applicable even when a judge has been caught and apprehended while committing the offense.¹⁰¹ Such provisions can ensure the criminal justice system is not manipulated to falsely prosecute or remove judges, but can also be problematic if a judge has obviously committed a crime. States also often establish rules for disciplining judges within the judiciary.¹⁰²

Hierarchy of Judges within the Federal Supreme Court

An internal administration or hierarchy can facilitate the division of labor and administrative responsibility within a court. The most common positions include a President/Chief Justice and a Vice-President/Deputy Justice. Judges can be elevated to these positions during the selection process, separately by the executive branch after the selection process, or by their fellow judges when they take their position on the court.¹⁰³

⁹⁹ See *Slovakia Constitutional Court Act* art. 16 (allowing seven members of Slovakia's constitutional court to apply to the President of the state for removal of a judge).

¹⁰⁰ See *The Rules of Procedure of the Constitutional Court* art. 19 (Slovenia) (stating a judge on Slovenia's constitutional court may be "prematurely relieved of his office ...if he is sentenced to imprisonment for a criminal offense").

¹⁰¹ See *Slovakia Constitutional Court Act* art. 14 (noting a judge is immune from prosecution for misdemeanor offenses).

¹⁰² See *Slovakia Constitutional Court Act* art. 13 (authorizing the President of the state, upon the request of the Court itself, to temporarily suspend a judge because of actions which are not consistent with his office, or during criminal proceedings against the judge).

¹⁰³ See *Slovakia Constitutional Court Act* art. 7 (establishing the president and vice-president of the Constitutional Court are appointed by the state's president); *Law on the Constitutional Court* art. 10 (Slovenia) (establishing the president of Slovenia's Constitutional Court is elected by secret ballot by the members of the Court itself for a term of three years).

Sample Language for the Composition of the Court

General Composition of the Court

The Federal Supreme Court shall be made up of one Chief Justice, [eight] judges, one alternative judge, and four advisors (which include two experts in Islamic jurisprudence and two legal scholars).¹⁰⁴

Independence of Judges

The members (“Members”) of the Federal Supreme Court shall adjudicate independently according to the Constitution and laws, guided by the principles of equality and justice and by their own personal conscience.¹⁰⁵

Qualification of Federal Supreme Court Members¹⁰⁶

- Members must be judges, experts in Islamic jurisprudence, and legal scholars.¹⁰⁷
- Members must be of high moral standing.¹⁰⁸
- All Members shall have successfully completed at least two years of training at the Judicial Institute in Baghdad in which training shall be provided in civil law as well as Islamic Shari’a law.
- [Members with professional experience as a judge, public prosecutor, or attorney for at least [15] or more may be exempt from training at the Judicial Institute.]

Option 1: Require civil law training for all members

- Members shall be appointed from among those who are citizens, are [40] years old or older, possess a university law degree, and:¹⁰⁹
 - have at least 15 years of professional experience as a judge, public prosecutor or attorney;
 - are qualified as an attorney and have been engaged in legal affairs in a state agency, enterprise or other government-invested national or international institution for at least 15 years;

¹⁰⁴ Note that all references to “of judges, experts in Islamic jurisprudence, and legal scholars” is language taken directly from Article 92(2) of the Iraq Constitution.

¹⁰⁵ The above language in this section is modeled on the *Constitutional Court Act* art. 4 (South Korea) and SOUTH AFRICA CONST. art. 176.

¹⁰⁶ These provisions are representative of provisions in other states. The provisions can be considered as a unit or can be considered separately.

¹⁰⁷ IRAQ CONST. art. 92(2).

¹⁰⁸ *Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina* art. 84.

¹⁰⁹ *Slovakia Constitutional Court Act; Constitutional Court Act* art. 5 (South Korea).

- are qualified as an attorney and have held a position equivalent to a professor at a state-recognized university for at least 15 years; or
- are qualified as an attorney and are of acknowledged competence with at least 15 years of professional experience in [*insert relevant field*].

Option 2: No requirement of civil law training for all members

- Members shall be appointed from among those who are citizens, are [40] years old or older, possess a university law degree, and:¹¹⁰
 - have at least 15 years of professional experience as a judge, public prosecutor, or attorney;
 - are qualified as an attorney and have been engaged in legal affairs in a state agency, enterprise, or other government-invested national or international institution for at least 15 years;
 - are qualified as an attorney and have held a position equivalent to a professor at a state-recognized university for at least 15 years;
 - are qualified as an attorney and are of acknowledged competence with at least 15 years of professional experience in [*insert relevant field*];
 - are of acknowledged competence as an expert in Islamic Jurisprudence¹¹¹ with at least 15 years professional experience of [*insert relevant field*]; or
 - are of acknowledged competence as a Legal Scholar¹¹² with at least 15 years professional experience of [*insert relevant field*].

Appointment of Members of the Federal Supreme Court¹¹³

Option #1: Joint executive and legislative process to appoint all members of the Federal Supreme Court with the assistance of a Higher Judicial Council

- The President/Prime Minister of the Republic shall notify the Higher Judicial Council of the vacancy(ies) in the membership of the Federal Supreme Court member at least [six] months prior to the termination of the period of office of members appointed earlier.
- The Higher Judicial Council shall submit a list of at least [5] nominees for each vacancy on the Court. Proposals must be submitted within [two] months, or in the case of an unexpected vacancy, in not more than [30] days. Proposals must be substantiated and a written consent of the candidate, stating agreement to stand as a candidate, must be enclosed.

¹¹⁰ Slovakia Constitutional Court Act; Constitutional Court Act art. 5 (South Korea).

¹¹¹ IRAQ CONST. art. 92(2).

¹¹² IRAQ CONST. art. 92(2).

¹¹³ These provisions set out an inclusive selection process. Provisions can be removed or added depending on the specific process determined to be appropriate for the Federal Supreme Court.

- On completion of the two month period of submissions, the President/Prime Minister of the Republic shall propose [3] candidates for each of the vacant positions on the Federal Supreme Court from among the candidates nominated by the Higher Judicial Council.
- The President/Prime Minister shall present his proposed candidates to the Council of Representatives in a period not less than [30] days but not more than [60] days, or in the case of an unexpected vacancy, not less than [15] days but not more than [30] days.
- The Council of Representatives must approve each of the nominations for members of the Federal Supreme Court by at least a [two-thirds] majority of its members before expiration of the term of each of the previously appointed members.
- Each appointed member must take the following oath before the Council of Representatives prior to assuming his office. “I hereby swear that I shall adjudicate according to the Constitution, the law, and my conscience; preserve the confidentiality as to proceedings and voting; and strive to the best of my ability for constitutionality, legality, and the protection of human rights, liberties, and basic freedoms.”¹¹⁴

Option #2: Separate executive and legislative process to appoint members of the Federal Supreme Court with the assistance of a Higher Judicial Council

- The President/Prime Minister is authorized to appoint one-half of the total number of Members to the Federal Supreme Court.
 - The [President/Prime Minister] of the Republic shall notify the Higher Judicial Council of the vacancy(ies) in the membership of the Federal Supreme Court at least [six] months prior to the termination of the period of office of members appointed earlier.
 - The Higher Judicial Council shall submit a list of at least [5] nominees for each vacancy on the Court. Proposals must be submitted within [two] months, or in the case of an unexpected vacancy in not more than [30] days. Proposals must be substantiated and a written consent of the candidate, stating agreement to stand as a candidate, must be enclosed.
 - On completion of the [two] month period of submissions, or in the case of an unexpected vacancy, [30] days, the President/Prime Minister of the Republic shall appoint one candidate for each of the vacant positions on the Federal

¹¹⁴ The above language in this section is modeled on the *Slovakia Constitutional Court Act* arts. 11-14, the SOUTH AFRICA CONST. art. 161, and the *Institutional Act of the Constitutional Council* art. 1 (France).

Supreme Court from among the candidates nominated by the Higher Juridical Council.

- Each appointed member must take the following oath before the Council of Representatives prior to assuming his office. “I hereby swear that I shall adjudicate according to the Constitution, the law, and my conscience; preserve the confidentiality as to proceedings and voting; and strive to the best of my ability for constitutionality, legality, and the protection of human rights, liberties, and basic freedoms.”¹¹⁵

- The Council of Representatives is authorized to appoint one-half of the total number of Members to the Federal Supreme Court.
 - The Council of Representatives shall notify the Higher Judicial Council of the vacancy(ies) in the membership of the Federal Supreme Court member at least [six] months prior to the termination of the period of office of members appointed earlier.
 - The Higher Judicial Council shall submit a list of at least [5] nominees for each vacancy on the Court. Proposals must be submitted within [two] months, or in the case of an unexpected vacancy in not more than [30] days. Proposals must be substantiated and a written consent of the candidate, stating agreement to stand as a candidate, must be enclosed.
 - On completion of the two month period of submissions, or in the case of an unexpected vacancy, [30] days, the Council of Representatives shall appoint one candidate for each of the vacant position on the Federal Supreme Court from among the candidates nominated by the Higher Judicial Council.
 - Appointment requires that the Council of Representatives approves the nomination by at least a [two-thirds] majority of its members before expiration of the term of each of the previously appointed members.
 - Each appointed member must take the following oath before the Council of Representatives prior to assuming his office. “I hereby swear that I shall adjudicate according to the Constitution, the law, and my conscience; preserve the confidentiality as to proceedings and voting; and strive to the best of my ability for constitutionality, legality, and the protection of human rights, liberties, and basic freedoms.”¹¹⁶
 - The Council of Representatives, by a [two-thirds] majority vote, may nominate a subset of its members to oversee this process.

¹¹⁵ The above language in this section is modeled on the *Slovakia Constitutional Court Act* arts. 11-14, the SOUTH AFRICA CONST. art. 161, and the *Institutional Act of the Constitutional Council* art. 1 (France).

¹¹⁶ The above language in this section is modeled on the *Slovakia Constitutional Court Act* arts. 11-14, the SOUTH AFRICA CONST. art. 161, and the *Institutional Act of the Constitutional Council* art. 1 (France).

Option #3: Singular executive appointments of members of the Federal Supreme Court with the assistance of the Higher Judicial Council

- The President/Prime Minister is authorized to appoint all Members to the Federal Supreme Court.
 - The [President/Prime Minister] of the Republic shall notify the Higher Judicial Council of the vacancy(ies) in the membership of the Federal Supreme Court at least [six] months prior to the termination of the period of office of members appointed earlier.
 - The Higher Judicial Council shall submit a list of at least [5] nominees for each vacancy on the Court. Proposals must be submitted within [two] months, or in the case of an unexpected vacancy in not more than [30] days. Proposals must be substantiated and a written consent of the candidate, stating agreement to stand as a candidate, must be enclosed.
 - On completion of the [two] month period of submissions, or in the case of an unexpected vacancy, [30] days, the President/Prime Minister of the Republic shall appoint one candidate for each of the vacant positions on the Federal Supreme Court from among the candidates nominated by the Higher Juridical Council.
 - Each appointed member must take the following oath before the Council of Representatives prior to assuming his office. “I hereby swear that I shall adjudicate according to the Constitution, the law, and my conscience; preserve the confidentiality as to proceedings and voting; and strive to the best of my ability for constitutionality, legality, and the protection of human rights, liberties, and basic freedoms.”¹¹⁷

Term of Members

Option 1: Renewable Terms

Members shall be appointed to a term of [nine] years which is renewable. [Members shall be renewed or replaced by thirds every three years.]¹¹⁸

Option 2: Non-Renewable Terms

Members shall be appointed to a term of [nine] years which is non-renewable. [Members shall be renewed or replaced by thirds every three years.]¹¹⁹

¹¹⁷ The above language in this section is modeled on the *Slovakia Constitutional Court Act* arts. 11-14, the SOUTH AFRICA CONST. art. 161, and the *Institutional Act of the Constitutional Council* art. 1 (France).

¹¹⁸ *Law of the Republic of Armenia on the Constitutional Court* ch.1 art. 1, *Institutional Act on the Constitutional Council* title 1(1) (France); *Constitutional Court Act* art. 3 (South Korea); SPAIN CONST., Title IX, Constitutional Court, art. 159. The language requiring the renewal or replacement of one third of the Members at one time would ensure that not all of the Members leave at the same time, but permits certain consistency.

Option 3: Life-long Terms

Members shall be appointed for a term of life. A judge, except by his own decision, cannot be removed from his office during his life, except under other provisions of this Act.

Removal Procedures

- A Member of the Federal Supreme Court shall not be prematurely removed from office without his acquiescence, unless:¹²⁰
 - He is sentenced to imprisonment for a criminal offense; or
 - He becomes permanently incapable of performing his duties.
- The determination that a Member is permanently incapable of performing his duties as specified in this Article shall be made by the other Members by anonymous ballot of an absolute majority.

Position of the President and Judges of the Federal Supreme Court

- The Federal Supreme Court shall have a President and Vice-President chosen from among its members.
- The President shall be elected by the Members of the court themselves for the term of [three] years. After the expiration of this term, the same Member may be re-elected as President.
- The election of President shall be held at an administrative session at least [30] days prior to the expiration of the term of the previous President. The election shall be held by secret ballot and require a majority of the votes of all the judges.
- If no candidate for President is elected in the first round, those two candidates who received the greatest number of votes shall qualify for the second round of voting.
- The provisions of this Article shall also apply to the election of the Vice-President of the Federal Supreme Court.
- The President, the Vice-President, and the other Members of the Federal Supreme Court shall hold positions, with the rights and obligations connected with the positions, as determined by Statutes and Rules of Procedure which shall regulate in greater detail the material and other conditions of their work.¹²¹

¹¹⁹ *Law of the Republic of Armenia on the Constitutional Court* ch.1 art. 1, *Institutional Act on the Constitutional Council* title 1(1) (France); *Constitutional Court Act* art. 3 (South Korea).

¹²⁰ *Constitutional Court Act* art. 8 (South Korea); *Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina* arts. 85-91.

¹²¹ The above language in this section has been modeled on *The Rules of Procedure of the Constitutional Court* § 3 arts. 5-9 (Slovenia), and the *Slovakia Constitutional Court Act* art. 11.

Conclusion

The Iraq Constitution provides a broad outline for the establishment of a Federal Supreme Court and its competencies. The details of jurisdictional divisions, procedures for adjudication, and composition of the Court are to be resolved by two thirds of the Council of Representatives through enabling legislation. These details can provide a vital foundation to help establish the independence and legitimacy of Iraq's judiciary. This Court has the opportunity to protect fundamental rights and freedoms of all Iraqis. However, the structure of the Federal Supreme Court alone can not ensure a well-functioning judicial system. A sound structure with appropriate checks and balances can help the court maintain its independence and integrity. The actions of the judges serving on the Court as well as other governmental and non-governmental actors will ultimately determine the success or failure of the judicial system and the Court itself.

Annex I – Arab Judicial Structures¹²²

Constitutional Provisions on the Judiciary					
	<i>Guarantees independence of judiciary</i>	<i>Specifies court structure</i>	<i>Judicial review of constitutionality of legislation</i>	<i>Provides for Specialized courts</i>	<i>Specifies judicial council and its composition</i>
Algeria	Yes, few detailed provisions	Little detail	Constitutional council	Yes	Yes, places president as its head
Egypt	Yes, few detailed provisions	Little detail	Constitutional court	Yes	Yes, places president at its head (but legislation passed in 1984 has allowed most of its competencies to be exercised through exclusively judicial body)
Jordan	Yes, few detailed provisions	Some detail	Limited	Yes, limited details	No
Kuwait	Yes, few detailed provisions	No	Constitutional court	Limited provisions	Yes, composition left to legislation
Lebanon	Yes, very general provision	No	Constitutional council	No	No
Morocco	Yes, few detailed provisions	No	Constitutional council	Very limited	Yes, composition specifies executive branch

¹²² *Arab Judicial Structures: A Study Presented To The United Nations Development Program, UNDP-POGAR, at <http://www.pogar.org/publications/judiciary/nbrown/tprovisions.html> (last visited Feb. 17, 2006).*

					participation
Palestine (DRAFT)	Yes, some detailed provisions	No	Constitutional court	Some limited provisions	Yes, composition left to legislation
Saudi Arabia	Yes, few detailed provisions	Limited	No	Some limited provisions	No
Sudan	Yes, some detailed if somewhat weak provisions	Yes	Constitutional court	Some provisions	Yes, leaves composition to legislation; leaves much authority in hands of chief justice and president
Syria	Yes, few detailed provisions	No	Constitutional court	Some provisions	Yes, headed by president
Tunisia	Yes, few detailed provisions	No	Constitutional council	Limited provisions	Yes, composition left to legislation
UAE	Yes, some detailed provisions	Yes	Yes, in Federal Supreme Court	No	No
Yemen	Yes, some strong and detailed provisions	No	Yes, in Supreme Court	Prohibited by Constitution	Yes, composition left to legislation

Annex II – Sample Language for Federal Supreme Court Legislation

Independence of the Court

The Federal Supreme Court is an independent judicial body charged with safeguarding the principles of the Constitution. The Federal Supreme Court is independent of all levels of authority and all state authorities in Iraq.¹²³ The Federal Supreme Court shall exercise its function in full independence and shall be directed solely by the law.¹²⁴

Source of Authority

Option 1: Authority derived only from the Constitution and enabling legislation

The Federal Supreme Court shall have jurisdiction over only such matters as are vested in the Federal Supreme Court by this Act and the Constitution.

Option 2: Authority derived from the Constitution, enabling legislation and subsequent statutes

The Federal Supreme Court shall have jurisdiction over such matters as are vested in the Federal Supreme Court by this Act and the Constitution. The Federal Supreme Court shall also have jurisdiction over such matters as are vested in the Court by statute.¹²⁵

Jurisdiction

Option 1: Original Jurisdiction

- Any person¹²⁶ may, under the conditions determined by this Act, file a constitutional complaint with the Federal Supreme Court if they believe that their

¹²³ *Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina* arts. 2-3 (Bosnia-Herzegovina), Venice Commission CODICES website, at <http://www.codices.coe.int> (last visited Feb. 17, 2006); *Law on the Constitutional Court* art. 2 (Slovenia).

¹²⁴ ETHIOPIA CONST. art. 70.

¹²⁵ *Law on the Constitutional Court* art. 21 (Slovenia).

¹²⁶ This sample language is provided to demonstrate the differences between provisions that affirm original jurisdiction and those that affirm appellate jurisdiction. In the final draft of the Federal Supreme Court law, however, the terminology will need to be reconciled with the terms used in other sections – particularly the section on standing (see below). For instance, while the option 1 language refers to the right of “any person” or the “Human Rights Commission” to file a case, the law’s “standing” provisions will ultimately determine which “persons”,

human rights and basic freedoms as protected under the Constitution have been violated by an act or law¹²⁷ of a government entity of any level or any other public entity.

- A High Human Rights Commission may, under conditions defined by statute, file a complaint with the Federal Supreme Court concerning a particular case.
- If other remedies are provided for in this Act or by statute, no constitutional complaint can be filed under the provisions of this Article until all other remedies provided for in this Act or by statute have been exhausted.¹²⁸
- The Federal Supreme Court shall have the authority to evaluate the conformity of the government acts and laws to existing statutes, the Constitution, and the international treaties of which Iraq is a signatory.¹²⁹
- The Federal Supreme Court shall have the authority to reject appeals which do not present a fundamental constitutional question.

Option 2: Appellate Jurisdiction

- The Federal Supreme Court will hear appeals by individuals who believe their human rights and basic freedoms as protected under the Constitution have been violated by an act or law¹³⁰ of a government entity of any level or any other public entity.
- Cases that arise from the implementation of a government act or law can be appealed to the Federal Supreme Court.
- The review by the Federal Supreme Court shall evaluate the conformity of the government acts and laws to existing statutes, the Constitution, and the international treaties of which Iraq is a signatory.¹³¹
- The Federal Supreme Court shall have the authority to reject appeals which do not present a fundamental constitutional question.
- The Federal Supreme Court shall reject appeals, or consolidate cases as necessary, on issues which it has already issued a decision or on which it is already considering at the time the appeal in question is submitted to the Court.

“individuals”, “groups”, “communities”, “organizations”, “ombudsman” or other “government officials” will have standing. When these are clarified, the terminology used throughout the final law should be made consistent.

¹²⁷ For purposes of the sample language provided, unless otherwise indicated references to “act(s) or law(s)” or “act(s) and law(s)” are meant to refer to all government laws, decisions, regulations, instructions, procedures or other governmental decree, decisions or acts.

¹²⁸ This language is modeled on the *Law on the Constitutional Court* arts. 50-51 (Slovenia) and the *Constitutional Court Act*, arts. 61-67 (South Korea), at <http://www.ccourt.go.kr/home/english/welcome02.jsp> (last visited Jan. 16, 2007).

¹²⁹ *Law on the Constitutional Court* art. 22 (Slovenia).

¹³⁰ The draft language provided in this document refers to any “law or act”, however, it might be recommended that a definition section is added to the law which clarifies that “unless otherwise stated ‘law or act’ refers to any laws, decisions, regulations, instructions, procedures or other governmental decree, decisions or acts.”

¹³¹ *Law on the Constitutional Court* art. 22 (Slovenia).

General Provisions for Adjudicating Cases

- The majority of the members of the Federal Supreme Court must be present in order for the Court to hear a case.

Option 1 – Default is Public Hearings

- Oral arguments of the case shall be made at a public hearing. The Federal Supreme Court may exclude the public from the hearing of a case and hear the case in a private session if it deems it necessary for privacy or personal rights of the parties to be protected. A written decision to hear the case in a private session must be substantiated and be made available to the public. No appeal shall be permitted against such a decision. This decision shall be taken by all of the members of the Court.
- A majority of the members of the Court must support the ruling in order for the Court to reach a decision.
- The pronouncement of the final decision of the Federal Supreme Court shall be open to the public.

Option 2 – Default is Private Hearings

- Oral arguments of the case shall be made at a private hearing. The Federal Supreme Court may hear a case in public if it deems necessary and appropriate. No appeal shall be permitted against such a decision.
- Once the Court has heard the case, the Federal Supreme Court shall reach a final decision on the case in a private session. This decision shall be taken by all of the members of the Court.
- A majority of the members of the Court must support the ruling in order for the Court to reach a decision.
- The pronouncement of the final decision of the Federal Supreme Court shall be open to the public.

Timeframe for Effect of Ruling

Option 1: Decision Effective Immediately

The decisions of the Federal Supreme Court are effective immediately upon the pronouncement of the Court's final decision. Decisions are to be published in the

[official reporter of the Federal Supreme Court or *Iraq Gazette*] within [two months] after the Court has reached the decision.¹³²

Option 2: Decision Effective When Published

The decisions of the Federal Supreme Court are effective upon the publication of the Court's final decision in the [official reporter of the Federal Supreme Court or *Iraq Gazette*]. The final decision must be published in the [official reporter of the Federal Supreme Court or *Iraq Gazette*] within [two months] after the Court has reached the decision.¹³³

Standing to Bring a Constitutional Complaint where an Injury or Violation of Rights and Freedoms are Alleged

- A person may, under the conditions determined by this Act, file a constitutional complaint with the Federal Supreme Court if he believes that his human rights and basic freedoms as protected under the Constitution have been violated by a federal act or law of a government entity of any level, any other public entity, or its agents.
- A group may, under the conditions determined by this Act, file a constitutional complaint with the Federal Supreme Court if the group believes that their collective human rights and basic freedoms as protected under the Constitution have been violated by a federal act or law of a government entity of any level, any other public entity, or its agents.
- An organization may file a constitutional complaint with the Federal Supreme Court on behalf of an individual or a group who believes that his human rights and basic freedoms as protected under the Constitution have been violated by an act or law of a government entity of any level or any other public entity, or its agents, and with the agreement of the person whose human rights or basic freedoms are being protected during the particular case.
- The Human Rights Commission may file a complaint with the Federal Supreme Court concerning a particular case it is dealing with, and with the agreement of the person whose human rights or basic freedoms are being protected in the particular case.
- The [Public Prosecutor, other courts in the Judiciary including the Court of Cassation, and other independent commissions or through statute] may file a complaint with the Federal Supreme Court with the agreement of the person whose human rights or basic freedoms are being protected in the particular case.

¹³² *Constitutional Court Act* art. 36 (South Korea); *Slovakia Constitutional Court Act* art. 18.

¹³³ *Constitutional Court Act* art. 36 (South Korea); *Slovakia Constitutional Court Act* art. 18.

- If other remedies are provided for in this Act or by statute, no constitutional complaint can be filed under the provisions of this Act until all other remedies provided for in this Act or by statute have been exhausted.¹³⁴

Provisions for Review of Constitutional Complaints

- The decision on whether to accept a constitutional complaint and begin proceedings shall be made by a panel of [three] judges on the Federal Supreme Court, in a private session.
- The President of the Federal Supreme Court, in coordination with the other judges on the Court, shall establish the panels. Membership on these panels [will/may] rotate amongst the judges on the Court.
- The rejection or acceptance of a constitutional complaint shall be decided upon unanimously by the panel of [three] judges and shall be made available to the public. An appeal against such resolution shall not be permitted.
- If the panel cannot reach a unanimous decision on the acceptance or rejection of a constitutional complaint, the panel shall refer the decision to the full bench of the Federal Supreme Court. When a decision is not taken within [30] days after the submittal of the constitutional complaint, it shall automatically transfer to the full bench for decision. The full bench of the Federal Supreme Court will then render a decision to reject or accept the constitutional complaint according to the provisions for voting in other sections of this Act.¹³⁵
- If the constitutional complaint is rejected by the panel of [three] judges, it shall nevertheless be accepted if a written decision to accept the complaint is submitted to the full bench by any group of [three] judges of the Federal Supreme Court within [15] days of the decision of the panel.¹³⁶

Rejecting a Constitutional Complaint for Review

- The Federal Supreme Court shall reject a constitutional complaint if:
 - The complaint was filed too late, except as provided in this Act;
 - All other remedies as provided for in this Act or by statute have not been exhausted, except as provided in this Act;

¹³⁴ The above language for this section has been modeled on the *Law on the Constitutional Court* arts. 50-51 (Slovenia) and the *Constitutional Court Act* arts. 61-67 (South Korea).

¹³⁵ *Constitutional Court Law* art. 72(4) (South Korea).

¹³⁶ The above language in this section has been modeled on the *Law on the Constitutional Court* art. 54 and 55 (Slovenia).

- The constitutional complaint was filed by a person, group or other entity that is not entitled to do so by other provisions of this Act; or
 - There is obviously no violation of human rights and basic freedoms as provided for in this Act and the Constitution.
- The Federal Supreme Court may exceptionally decide to accept a constitutional complaint despite the provisions in the previous section of this Act if the alleged violation is obvious, and failure to hear the complaint would result in grave and irreparable consequences.¹³⁷

General Provision on the Adjudication of the Constitutionality of a Law

The Federal Supreme Court has jurisdiction over the constitutionality of [government acts and laws prior to enactment,] government laws and acts in effect, provisions of the Constitution, and general government acts and laws, including those issued for the exercise of public powers. [The Federal Supreme Court has jurisdiction to review the constitutionality of provisions of international treaties prior to ratification of the treaty.]

Standing to Initiate a Challenge to the Constitutionality of a Law

A request for the Federal Supreme Court to consider the constitutionality of a government act or law, including those issued for the exercise of public powers, may be submitted by:

- The President or Prime Minister;
- At least [one-third] of the representatives of the Council of Representatives or the Federation Council;
- A court of law, the Chief Public Prosecutor, or independent commission, provided that a question of constitutionality and legality arises in relation to the proceedings they are conducting;
- Representatives of local communities approved by the Court, if the rights of the local community are threatened.¹³⁸

¹³⁷ The above language in this section has been modeled on the *Law on the Constitutional Court* (Slovenia).

¹³⁸ The above language in this section has been modeled on the *Law on the Constitutional Court* art. 23 (Slovenia).

Effect of a Ruling that a Law or Part of a Law is Unconstitutional

- Until such time as a final decision is reached, the Federal Supreme Court may completely or partly suspend implementation of the act or law (including a general act for the exercise of public power), especially if irreparable and damaging consequences may result from the continued implementation of the statute or general act in question.¹³⁹

Option 1: Entire government act or law null and void

- If the Federal Supreme Court finds a government act or law unconstitutional, the Federal Supreme Court shall issue a public decision stating which act or law is null and void.

Option 2: Part of government act or law null and void

- If the Federal Supreme Court finds a government act or law unconstitutional, the Federal Supreme Court shall issue a public decision stating which part of the act or law is null and void.

Review of Existing Legislation with Repressive Review

- The Federal Supreme Court has jurisdiction to decide if an act or law in effect conforms with the Constitution.¹⁴⁰
- The claim submitted to the Federal Supreme Court must include the provisions being challenged and the incompatibility of those provisions with the Constitution.¹⁴¹

Request for the Adjudication of the Constitutionality of a Law by a Lower Court¹⁴²

- When the issue of whether or not an act or law is constitutional is relevant to a case being tried in a lower court, the lower court shall request the Federal Supreme Court to adjudicate the constitutionality of the act or law.

¹³⁹ *Law on the Constitutional Court* art. 39 (Slovenia).

¹⁴⁰ *Law of the Republic of Armenia on the Constitutional Court* art. 55.

¹⁴¹ Abstract review is implied if there is no provision requiring a challenge to the constitutionality of a statute come from a lower court or be in connection with an ongoing court case.

¹⁴² This sample language is only relevant if the Federal Supreme Court is granted original jurisdiction over constitutional issues and lower courts in Iraq are not authorized to rule on constitutional issues.

- No appeal shall be made against the decision of a lower court to request adjudication by the Federal Supreme Court of an act or law.
- When a lower court requests the Federal Supreme Court to adjudicate on the constitutionality of an act or law, the proceedings of the lower court shall be suspended until the Federal Supreme Court makes a decision on the constitutionality of the act or law. If the lower court deems it urgent, it may continue proceedings other than the final decision.
- The parties to the original case and the Minister of Justice may submit opinions on the constitutionality of the act or law to the Federal Supreme Court.
- The Federal Supreme Court shall render a decision on the constitutionality of the act or law within [60] days of the request by the lower court.
- Any decision that an act or law is unconstitutional shall bind the ordinary courts, other state agencies, and all branches of government.¹⁴³

Preventive Review of a Government Act prior to Enactment

Upon a request by [three-eighths] of the members of the Council of Representatives or the Federation Council, the Federal Supreme Court shall examine the constitutionality of any government act or decision deemed contestable under this Act or other statute. If the Federal Supreme Court declares the government act or decision unconstitutional, the President or responsible government body shall not promulgate the act or law unless the unconstitutional sections are eliminated or changed to adhere to the Constitution.¹⁴⁴

Preventative Review of Legislation prior to Enactment

Upon a request by [three-eighths] of the members of the Council of Representatives or Federation Council, the President or the Prime Minister, the Federal Supreme Court shall examine the constitutionality of any government act or law deemed contestable under this Act or other statute enacted by the Council of Representatives [or Federation Council] but not yet promulgated. If the Federal Supreme Court declares the contested act or law unconstitutional, the President shall not promulgate

¹⁴³ The above language in this section has been modeled on the *Constitutional Court Act* arts. 41-48 (South Korea).

¹⁴⁴ The above language in this section has been modeled on the *Act No. XXXII of 1989 on the Constitutional Court* arts. 33-36 (Hungary).

the act or law until the unconstitutional sections are eliminated or changed to adhere to the Constitution by the Council of Representatives [or Federation Council].¹⁴⁵

Disputes between National, Regional, Governorate, and Local Authorities and Judicial Bodies

- The Federal Supreme Court itself shall decide whether an issue addressed to it is within its competencies.
- The Federal Supreme Court shall have the authority to hear and rule on the following:
 - Disputes that arise between the federal government and the governments of the regions and governorates, municipalities, and local administrations;¹⁴⁶
 - Disputes that arise between the governments of the regions and governments of the governorates;¹⁴⁷
 - Competency disputes between the federal judiciary and the judicial institutions of the regions and governorates that are not organized in a region;¹⁴⁸ and
 - Competency disputes between judicial institutions of the regions or governorates that are not organized in a region.¹⁴⁹
- The provisions of this Article apply equally to all disputes defined in this Article.
- Bodies that can request such a decision include federal government entities, governments of the regions, governorates, municipalities and local administrations, and judicial institutions of the federal government, regions, and governorates not organized in a region.
- A request for a decision on disputes on which the Federal Supreme Court has authority to rule may be submitted by an affected body within [180] days from the day such body becomes aware of the cause of the request.
- The body requesting a decision under this Article must be directly affected by the cause of the request.
- If a competency dispute occurs because several judicial bodies refuse to consider the particular case, a solution to the case may be proposed by the body in which the complaint was originally filed. This body can propose a solution even if it believes it does not have the authority to render such a solution. An initiative for resolving the jurisdictional dispute may also be submitted by a party to the procedure which

¹⁴⁵ The above language in this section has been modeled on the *Act No. XXXII of 1989 on the Constitutional Court* arts. 33-36 (Hungary).

¹⁴⁶ IRAQ CONST. art. 93(4).

¹⁴⁷ IRAQ CONST. art. 93(5).

¹⁴⁸ IRAQ CONST. art. 93(8)(a).

¹⁴⁹ IRAQ CONST. art. 93(8)(b).

caused the jurisdictional dispute by refusing to hear the case, even if this body believes it does not have the authority to render such a solution.

- Until such time as a final decision is reached, the Federal Supreme Court may completely or partly withhold implementation of the federal laws, decisions, regulations, instructions, procedures or other governmental decree, decisions or acts, especially if irreparable and damaging consequences may result from the continued implementation of the act or policy in question.¹⁵⁰
- The Federal Supreme Court shall issue a decision stating which governing body is competent and may rule that any act or law whose unconstitutionality or illegality has been established is null and void, in part or in whole.
- The decisions of the Federal Supreme Court are binding on all federal, regional, governorate, municipal and local bodies.¹⁵¹

General Composition of the Court

The Federal Supreme Court shall be made up of one Chief Justice, [eight] judges, one alternative judge, and four advisors (which include two experts in Islamic jurisprudence and two legal scholars).¹⁵²

Independence of Judges

The members (“Members”) of the Federal Supreme Court shall adjudicate independently according to the Constitution and laws, guided by the principles of equality and justice and by their own personal conscience.¹⁵³

Qualification of Federal Supreme Court Members¹⁵⁴

- Members must be judges, experts in Islamic jurisprudence, and legal scholars.¹⁵⁵
- Members must be of high moral standing.¹⁵⁶

¹⁵⁰ *Law on the Constitutional Court* art. 39 (Slovenia).

¹⁵¹ The above language in this section has been modeled on the *Law on the Constitutional Court* art. 61 (Slovenia), the *Constitutional Court Act* §4 arts. 61-67 (South Korea), and the *Slovakia Constitutional Court Act* title 3.

¹⁵² Note that all references to “of judges, experts in Islamic jurisprudence, and legal scholars” is language taken directly from Article 92(2) of the Iraq Constitution.

¹⁵³ The above language in this section is modeled on the *Constitutional Court Act* art. 4 (South Korea) and SOUTH AFRICA CONST. art. 176.

¹⁵⁴ These provisions are representative of provisions in other states. The provisions can be considered as a unit or can be considered separately.

¹⁵⁵ IRAQ CONST. art. 92(2).

- All Members shall have successfully completed at least two years of training at the Judicial Institute in Baghdad in which training shall be provided in civil law as well as Islamic Shari'a law.
- [Members with professional experience as a judge, public prosecutor, or attorney for at least [15] or more may be exempt from training at the Judicial Institute.]

Option 1: Require civil law training for all members

- Members shall be appointed from among those who are citizens, are [40] years old or older, possess a university law degree, and:¹⁵⁷
 - have at least 15 years of professional experience as a judge, public prosecutor or attorney;
 - are qualified as an attorney and have been engaged in legal affairs in a state agency, enterprise or other government-invested national or international institution for at least 15 years;
 - are qualified as an attorney and have held a position equivalent to a professor at a state-recognized university for at least 15 years; or
 - are qualified as an attorney and are of acknowledged competence with at least 15 years of professional experience in [*insert relevant field*].

Option 2: No requirement of civil law training for all members

- Members shall be appointed from among those who are citizens, are [40] years old or older, possess a university law degree, and:¹⁵⁸
 - have at least 15 years of professional experience as a judge, public prosecutor, or attorney;
 - are qualified as an attorney and have been engaged in legal affairs in a state agency, enterprise, or other government-invested national or international institution for at least 15 years;
 - are qualified as an attorney and have held a position equivalent to a professor at a state-recognized university for at least 15 years;
 - are qualified as an attorney and are of acknowledged competence with at least 15 years of professional experience in [*insert relevant field*];
 - are of acknowledged competence as an expert in Islamic Jurisprudence¹⁵⁹ with at least 15 years professional experience of [*insert relevant field*]; or
 - are of acknowledged competence as a Legal Scholar¹⁶⁰ with at least 15 years professional experience of [*insert relevant field*].

¹⁵⁶ *Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina* art. 84.

¹⁵⁷ *Slovakia Constitutional Court Act; Constitutional Court Act* art. 5 (South Korea).

¹⁵⁸ *Slovakia Constitutional Court Act; Constitutional Court Act* art. 5 (South Korea).

¹⁵⁹ IRAQ CONST. art. 92(2).

¹⁶⁰ IRAQ CONST. art. 92(2).

Appointment of Members of the Federal Supreme Court¹⁶¹

Option #1: Joint executive and legislative process to appoint all members of the Federal Supreme Court with the assistance of a Higher Judicial Council

- The President/Prime Minister of the Republic shall notify the Higher Judicial Council of the vacancy(ies) in the membership of the Federal Supreme Court member at least [six] months prior to the termination of the period of office of members appointed earlier.
- The Higher Judicial Council shall submit a list of at least [5] nominees for each vacancy on the Court. Proposals must be submitted within [two] months, or in the case of an unexpected vacancy, in not more than [30] days. Proposals must be substantiated and a written consent of the candidate, stating agreement to stand as a candidate, must be enclosed.
- On completion of the two month period of submissions, the President/Prime Minister of the Republic shall propose [3] candidates for each of the vacant positions on the Federal Supreme Court from among the candidates nominated by the Higher Judicial Council.
- The President/Prime Minister shall present his proposed candidates to the Council of Representatives in a period not less than [30] days but not more than [60] days, or in the case of an unexpected vacancy, not less than [15] days but not more than [30] days.
- The Council of Representatives must approve each of the nominations for members of the Federal Supreme Court by at least a [two-thirds] majority of its members before expiration of the term of each of the previously appointed members.
- Each appointed member must take the following oath before the Council of Representatives prior to assuming his office. "I hereby swear that I shall adjudicate according to the Constitution, the law, and my conscience; preserve the confidentiality as to proceedings and voting; and strive to the best of my ability for constitutionality, legality, and the protection of human rights, liberties, and basic freedoms."¹⁶²

Option #2: Separate executive and legislative process to appoint members of the Federal Supreme Court with the assistance of a Higher Judicial Council

- The President/Prime Minister is authorized to appoint one-half of the total number of Members to the Federal Supreme Court.

¹⁶¹ These provisions set out an inclusive selection process. Provisions can be removed or added depending on the specific process determined to be appropriate for the Federal Supreme Court.

¹⁶² The above language in this section is modeled on the *Slovakia Constitutional Court Act* arts. 11-14, the *SOUTH AFRICA CONST.* art. 161, and the *Institutional Act of the Constitutional Council* art. 1 (France).

- The [President/Prime Minister] of the Republic shall notify the Higher Judicial Council of the vacancy(ies) in the membership of the Federal Supreme Court at least [six] months prior to the termination of the period of office of members appointed earlier.
- The Higher Judicial Council shall submit a list of at least [5] nominees for each vacancy on the Court. Proposals must be submitted within [two] months, or in the case of an unexpected vacancy in not more than [30] days. Proposals must be substantiated and a written consent of the candidate, stating agreement to stand as a candidate, must be enclosed.
- On completion of the [two] month period of submissions, or in the case of an unexpected vacancy, [30] days, the President/Prime Minister of the Republic shall appoint one candidate for each of the vacant positions on the Federal Supreme Court from among the candidates nominated by the Higher Juridical Council.
- Each appointed member must take the following oath before the Council of Representatives prior to assuming his office. “I hereby swear that I shall adjudicate according to the Constitution, the law, and my conscience; preserve the confidentiality as to proceedings and voting; and strive to the best of my ability for constitutionality, legality, and the protection of human rights, liberties, and basic freedoms.”¹⁶³
- The Council of Representatives is authorized to appoint one-half of the total number of Members to the Federal Supreme Court.
 - The Council of Representatives shall notify the Higher Judicial Council of the vacancy(ies) in the membership of the Federal Supreme Court member at least [six] months prior to the termination of the period of office of members appointed earlier.
 - The Higher Judicial Council shall submit a list of at least [5] nominees for each vacancy on the Court. Proposals must be submitted within [two] months, or in the case of an unexpected vacancy in not more than [30] days. Proposals must be substantiated and a written consent of the candidate, stating agreement to stand as a candidate, must be enclosed.
 - On completion of the two month period of submissions, or in the case of an unexpected vacancy, [30] days, the Council of Representatives shall appoint one candidate for each of the vacant position on the Federal Supreme Court from among the candidates nominated by the Higher Judicial Council.

¹⁶³ The above language in this section is modeled on the *Slovakia Constitutional Court Act* arts. 11-14, the SOUTH AFRICA CONST. art. 161, and the *Institutional Act of the Constitutional Council* art. 1 (France).

- Appointment requires that the Council of Representatives approves the nomination by at least a [two-thirds] majority of its members before expiration of the term of each of the previously appointed members.
- Each appointed member must take the following oath before the Council of Representatives prior to assuming his office. “I hereby swear that I shall adjudicate according to the Constitution, the law, and my conscience; preserve the confidentiality as to proceedings and voting; and strive to the best of my ability for constitutionality, legality, and the protection of human rights, liberties, and basic freedoms.”¹⁶⁴
- The Council of Representatives, by a [two-thirds] majority vote, may nominate a subset of its members to oversee this process.

Option #3: Singular executive appointments of members of the Federal Supreme Court with the assistance of the Higher Judicial Council

- The President/Prime Minister is authorized to appoint all Members to the Federal Supreme Court.
 - The [President/Prime Minister] of the Republic shall notify the Higher Judicial Council of the vacancy(ies) in the membership of the Federal Supreme Court at least [six] months prior to the termination of the period of office of members appointed earlier.
 - The Higher Judicial Council shall submit a list of at least [5] nominees for each vacancy on the Court. Proposals must be submitted within [two] months, or in the case of an unexpected vacancy in not more than [30] days. Proposals must be substantiated and a written consent of the candidate, stating agreement to stand as a candidate, must be enclosed.
 - On completion of the [two] month period of submissions, or in the case of an unexpected vacancy, [30] days, the President/Prime Minister of the Republic shall appoint one candidate for each of the vacant positions on the Federal Supreme Court from among the candidates nominated by the Higher Juridical Council.
 - Each appointed member must take the following oath before the Council of Representatives prior to assuming his office. “I hereby swear that I shall adjudicate according to the Constitution, the law, and my conscience; preserve the confidentiality as to proceedings and voting; and strive to the best of my ability for constitutionality, legality, and the protection of human rights, liberties, and basic freedoms.”¹⁶⁵

¹⁶⁴ The above language in this section is modeled on the *Slovakia Constitutional Court Act* arts. 11-14, the SOUTH AFRICA CONST. art. 161, and the *Institutional Act of the Constitutional Council* art. 1 (France).

¹⁶⁵ The above language in this section is modeled on the *Slovakia Constitutional Court Act* arts. 11-14, the SOUTH AFRICA CONST. art. 161, and the *Institutional Act of the Constitutional Council* art. 1 (France).

Term of Members

Option 1: Renewable Terms

Members shall be appointed to a term of [nine] years which is renewable. [Members shall be renewed or replaced by thirds every three years.]¹⁶⁶

Option 2: Non-Renewable Terms

Members shall be appointed to a term of [nine] years which is non-renewable. [Members shall be renewed or replaced by thirds every three years.]¹⁶⁷

Option 3: Life-long Terms

Members shall be appointed for a term of life. A judge, except by his own decision, cannot be removed from his office during his life, except under other provisions of this Act.

Removal Procedures

- A Member of the Federal Supreme Court shall not be prematurely removed from office without his acquiescence, unless:¹⁶⁸
 - He is sentenced to imprisonment for a criminal offense; or
 - He becomes permanently incapable of performing his duties.
- The determination that a Member is permanently incapable of performing his duties as specified in this Article shall be made by the other Members by anonymous ballot of an absolute majority.

Position of the President and Judges of the Federal Supreme Court

- The Federal Supreme Court shall have a President and Vice-President chosen from among its members.

¹⁶⁶ *Law of the Republic of Armenia on the Constitutional Court* ch.1 art. 1, *Institutional Act on the Constitutional Council* title 1(1) (France); *Constitutional Court Act* art. 3 (South Korea); SPAIN CONST., Title IX, Constitutional Court, art. 159. The language requiring the renewal or replacement of one third of the Members at one time would ensure that not all of the Members leave at the same time, but permits certain consistency.

¹⁶⁷ *Law of the Republic of Armenia on the Constitutional Court* ch.1 art. 1, *Institutional Act on the Constitutional Council* title 1(1) (France); *Constitutional Court Act* art. 3 (South Korea).

¹⁶⁸ *Constitutional Court Act* art. 8 (South Korea); *Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina* arts. 85-91.

- The President shall be elected by the Members of the court themselves for the term of [three] years. After the expiration of this term, the same Member may be re-elected as President.
- The election of President shall be held at an administrative session at least [30] days prior to the expiration of the term of the previous President. The election shall be held by secret ballot and require a majority of the votes of all the judges.
- If no candidate for President is elected in the first round, those two candidates who received the greatest number of votes shall qualify for the second round of voting.
- The provisions of this Article shall also apply to the election of the Vice-President of the Federal Supreme Court.
- The President, the Vice-President, and the other Members of the Federal Supreme Court shall hold positions, with the rights and obligations connected with the positions, as determined by Statutes and Rules of Procedure which shall regulate in greater detail the material and other conditions of their work.¹⁶⁹

¹⁶⁹ The above language in this section has been modeled on *The Rules of Procedure of the Constitutional Court* § 3 arts. 5-9 (Slovenia), and the *Slovakia Constitutional Court Act* art. 11.

Annex III – About the Public International Law & Policy Group

The Public International Law & Policy Group, a 2005 Nobel Peace Prize nominee, is a non-profit organization, which operates as a global pro bono law firm providing free legal assistance to states and governments involved in peace negotiations, post-conflict constitutions, and prosecuting war criminals. To facilitate the utilization of this legal assistance, PILPG also provides policy formulation advice and training on matters related to conflict resolution.

PILPG's four primary practice areas are:

- **Peacebuilding**
- **War Crimes**
- **Post-Conflict Political Development**
- **Public International Law**

To provide pro bono legal advice and policy formulation expertise, PILPG draws on the volunteer services of over sixty former legal advisors and former Foreign Service officers from the US Department of State and other foreign ministries. PILPG also draws on pro bono assistance from major international law firms including Covington & Burling; Curtis, Mallet-Prevost, Colt and Mosle; DLA Piper Rudnick; Steptoe & Johnson; Sullivan & Cromwell; Vinson & Elkins; Wilmer, Cutler & Pickering; and graduate international affairs and law students at American University and Case Western Reserve Schools of Law. Annually, PILPG is able to provide over \$2 million worth of pro bono international legal services.

Frequently, PILPG sends members in-country to facilitate the provision of legal assistance and its members often serve on the delegations of its clients during peace negotiations. To facilitate this assistance, PILPG is based in Washington, D.C. and has points of contact in New York City, Boston, Seattle, Cleveland, London, Paris, Rome, The Hague, Stockholm, Belfast, Krakow, Budapest, Zurich, Tbilisi, Kabul, and Nairobi.

PILPG was founded in London in 1995 and moved to Washington, D.C. in 1996, where it operated under the auspices of the Carnegie Endowment for International Peace for two years. PILPG currently maintains an association with American University in Washington, D.C., and Case Western Reserve University in Cleveland, Ohio. In July 1999, the United Nations granted official Non-Governmental Organizations status to PILPG.

In January 2005, a half dozen of PILPG's pro bono clients nominated PILPG for the Nobel Peace Prize for "significantly contributing to the promotion of peace throughout the globe by providing crucial pro bono legal assistance to states and non-state entities involved in peace negotiations and in bringing war criminals to justice."