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**THE POWERS OF THE FEDERAL SUPREME COURT IN
LEGAL SUPERVISION AND INTERPRETATION ON THE
COSTITUTIONALITY OF LAWS: A CASE STUDY OF THE
IRAQI CONSTITUTION 2005**



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UUM
Universiti Utara Malaysia

**DOCTOR OF PHILOSOPHY
UNIVERSITI UTARA MALAYSIA
2017**

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LEGAL SUPERVISION AND INTERPRETATION ON THE
CONSTITUTIONALITY OF LAWS: A CASE STUDY OF THE
IRAQI CONSTITUTION 2005**



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**A Thesis Submitted to the Ghazali Shafie Graduate School of Government
In Fulfillment of the Requirements for the Doctor of Philosophy
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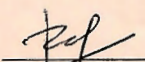

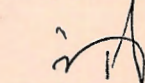
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ABSTRAK

Perlembagaan Iraq 2005 memberikan Mahkamah Agung Persekutuan (selepas ini dirujuk sebagai "FSC") kuasa bagi mengawal selia undang-undang dan pentafsiran mengenai Perlembagaan undang-undang. FSC merupakan mahkamah tertinggi dalam piramid kehakiman Iraq. Selain memiliki kuasa mengawal selia undang-undang dan mentafsir Perlembagaan, FSC juga boleh menentukan tindakan eksekutif adalah mengikut Perlembagaan. Tesis ini merangkumi pelbagai masalah seperti keputusan FSC yang muktamad dan sifat keputusan FSC yang mengikat iaitu isu di mana undang-undang akan diguna pakai jika berlaku percanggahan antara undang-undang persekutuan dan wilayah, serta komposisi ahli FSC. Objektif utama tesis ini adalah untuk mengkaji keputusan FSC dalam menjalankan kuasanya bagi urusan mengawal selia undang-undang dan pentafsiran mengenai Perlembagaan berkaitan keputusannya yang muktamad dan sifatnya yang mengikat semua pihak berkuasa. Tesis ini menggunakan metodologi penyelidikan doktrin undang-undang dan empirikal; data dokumentari dikumpulkan melalui sumber perpustakaan termasuk undang-undang yang berkaitan, kes mahkamah dan sumber lain telah disokong oleh data utama yang dikumpulkan dari temubual dengan hakim FSC, peguam dan ahli akademik khusus dalam bidang undang-undang Perlembagaan. Tesis ini menyimpulkan bahawa kuasa FSC dari segi pengawal seliaan dan pentafsiran undang-undang mengenai Perlembagaan adalah secara praktisnya dilemahkan oleh Perlembagaan Iraq sendiri. Sebagai contoh Perkara 61 (6) dilihat seperti mempersoalkan keputusannya yang muktamad dan sifat keputusan FSC yang mengikat. Juga, Perkara 121 (2) dilihat juga berpihak kepada undang-undang wilayah sekiranya berlaku percanggahan dengan undang-undang persekutuan berkenaan dengan perkara di luar bidangkuasa eksklusif kerajaan persekutuan. Tesis ini mencadangkan supaya Perlembagaan Iraq 2005 perlu ditafsirkan secara meluas. Ia bukan undang-undang di mana tafsiran yang sempit perlu diterimapakai. FSC Iraq diharapkan supaya menentukan undang-undang, termasuk maksud Perlembagaan.

Kata Kunci: Undang-undang Perlembagaan, Mahkamah Agung Persekutuan, Kawal selia Undang-undang, Perlembagaan Iraq 2005.

ABSTRACT

The Iraqi Constitution 2005 gives the Federal Supreme Court (hereinafter referred to as “FSC”) the powers of legal supervision and interpretation on the constitutionality of laws. The FSC constitutes the apex court in the Iraqi judicial pyramid. Apart from having the powers of legal supervision and interpretation on the constitutionality of laws, the FSC equally determines the constitutionality of the executive actions. This thesis revolves around a wide range of problems such as the finality and binding nature of the decision of the FSC, the issue of which law is to prevail in case of a conflict between federal and regional law, and the composition of the members of the FSC. The main objective of this thesis is to analyse the decisions of the FSC in terms of exercising its powers of legal supervision and interpretation on the constitutionality of laws as to its finality and binding nature on all authorities. The thesis adopts a doctrinal legal and empirical research methodologies; documentary data were collected through a library based sources including relevant legislations, court cases and other resources were corroborated by primary data collected from interviews with judges of the FSC, lawyers and legal academics specialized in the area of constitutional law. The thesis concludes that the powers of the FSC in terms of legal supervision and interpretation on the constitutionality of laws are practically undermined by the Iraqi Constitution itself. Take for instance Article 61(6) seems to question the finality and binding nature of the decision of the FSC. Also, Article 121(2) appears to be in favour of a regional law in case there is a conflict with a federal law in respect to a matter outside the exclusive powers of the federal government. The thesis recommends that the Iraqi Constitution 2005 must be interpreted broadly. It is not a statute where a narrow interpretation may be justified. The Iraqi FSC is expected to determine the law, including the meaning of the Constitution.

Keywords: Constitutionality of Laws, Federal Supreme Court, Legal Supervision, Iraqi Constitution 2005.

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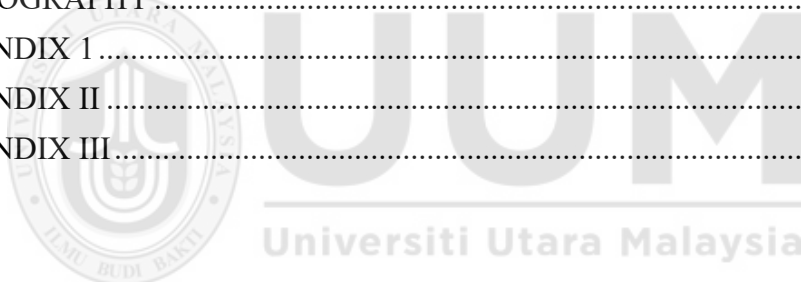
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LIST OF ABBREVIATIONS

FSC	Federal Supreme Court
GC	Governing Council
CPA	Coalition Provisional Authority
MPS	Members of Parliament
SOP	Separation of Powers
HJC	Higher Juridical Council
TAL	Transitional Administrative Law
US	United States
UK	United Kingdom
FC	Federal Constitution
RG	Regional Government
FL	Federal Law



CHAPTER ONE

INTRODUCTION

1.1 Background of the Study

Constitution of a country represent sacred document from which all laws and actions derive their legitimacy. As a sacred document, it must be respected by all authorities or persons, in order to foster the spirit of constitutionalism. The Constitution separates the functions of law making, administration and interpretation of the laws between the three arms of government, namely the legislature, the executive and the judiciary. While the law-making function is vested in the legislature or the parliament, the administration of the laws is the preserve of the executive. Legal supervision and interpretation on the constitutionality of laws is vested in the judiciary that comprise of the courts. It follows, therefore, that the three arms of government and all authorities must keep and act within the confines of the powers given to them by the Constitution. In all democracies, especially for countries with a written Constitution the Constitution is of crucial importance because it is superior to all laws and guides the operation of government. Being superior, the Constitution prevails over other laws. Thus, when ordinary laws conflict with the Constitution, the Constitution prevails, and the ordinary law becomes null and void to the extent of its conflict with the constitutional

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APPENDIX 1

The Constitutions

1. Constitution of the United States (1789).
2. Basic Law of Ottman 1876.
3. Basic Law of Iraq 1925.
4. Constitution of Iraq 1958.
5. Constitution of Iraq 1963.
6. Constitution of Iraq 1964.
7. Constitution of Iraq 1968.
8. Constitution of Iraq 1970.
9. Constitution of Iraq 1990.
10. Constitution of Iraq 2005.



APPENDIX II

IN- DEPTH INTERVIEW QUESTIONNAIRE: Interview Questions – English



Dear Participant,

My name is HIND ALI MOHAMMAD. I am a PhD student at University Utara Malaysia. I am conducting research to examine the powers of the Federal Supreme Court in Iraq on legal supervision and interpretation on the constitutionality of laws under the Iraqi Constitution 2005. Your participation will help me in this study to gather important and relevant information related to the powers of the Federal Supreme Court in Iraq. All the responses will be treated in the strictest confidence and the data collected will be stored in anonymous form. The findings of this research will only be used for academic purpose only. All answers will be used only for scientific purposes and dealt with strictly confidential. I appreciate your tight schedules and thank you in advance for taking your time.

Time to look at and respond to this questionnaire.

This questionnaire consists of three sections:

Section A: Demographic Information.

Section B: Relates to the Composition and the extent of the powers of the Federal Supreme Court under the 2005 Iraqi Constitution

Section C: Relates to the Working of Separation of Powers under the Iraqi Constitutional Law and issues of Judicial Independence

Please, take your time to complete all questions as completely as possible. Your participation will be greatly appreciated.

Sincerely,

HIND ALI MOHAMMAD

PhD student

College of Law, (COLGIS)

Universiti Utara Malaysia

Supervisors:-

DR. AHMAD MASUM

DR. ROHANA BINTI ABDUL RAHMAN

Universiti Utara Malaysia



QUESTIONS

Section A: Demographic Data of the Interviewees (Judges of the FSC, Lawyers, University professors of constitutional law)

(Please tick (√) in an appropriate box)

1. Profession: () Judge, () Lawyer, () professors of constitutional law.
1. Gender: () Male () Female.
2. Age: () 20-30 () 31-40 () 41-50 () 51-60 () Above 60.
3. Educational level: Bachelor's degree () Master's Degree () Doctoral Degree, ()
4. Marital Status: () Single, () Married, () Divorced, () Widow.
5. Rank.
 - (a) Professor.
 - (b) Senior Lecturer.
 - (c) Other.
6. How long have you been in this Profession?
 - () Less than 1 year.
 - () 1-5 years.
 - () 6-10 years.
 - () 10-20 years.
 - () More than 20 years.

Section B: The decisions of the Federal Supreme Court in terms of exercising its powers of supremacy and constitutional interpretation on the constitutionality of laws are final and conclusive thus binding on all authorities? And are the Iraqi Federal Supreme Court modify the application of the federal law in the regions if there is a conflict between the Federal law and the regional law on issues outside the exclusive jurisdiction of the Federal authorities appointment, Composition, Powers and Independence of the Iraq FSC:-

1. From your experience, what is your opinion about the decisions of the Iraqi Federal Supreme Court, are the decisions final and binding on all authorities and persons? How strong and independent do you see the Iraqi Federal Supreme Court in taking her decisions? (Probes are there interferences from the other arms of government? If there is executive interference in the decisions of the FSC how has the FSC handled such situations?)
2. How are powers shared between the federal and regional governments in Iraq?
3. In your opinion, how appropriate is the provision allowing the application of regional law over federal law in case of conflict between regional law and federal law? (Does this amount to regional paramountcy? Does this not amount to creating dual judicial authority in Iraq?)

Section c: 3. Should the Iraqi Federal Supreme Court comprising of experts in the area of Islamic Jurisprudence conferred with the power to the supervise the constitutionality of laws in supremacy and constitutional interpretation? And Should the Iraqi Federal Supreme Court comprising of not-elected judges conferred with the power to the supervise the constitutionality of laws in supremacy and constitutional interpretation?

1. What are the criteria adopted in the appointment of judges of the FSC under the 2005 Iraqi Constitution? What are the considerations in the appointment? How different is the process under the 1925 Basic Law of Iraq?
2. In your opinion, why are members of parliament elected by the people of Iraq, while the judges of the FSC are not elected? And do you consider the fact that the judges of the Iraqi FSC being unelected, should not be allowed to determine the constitutionality of laws passed by the Iraqi Parliament?

3. What is your opinion on the composition of judges of the FSC of Iraq in terms of its inclusion of Islamic experts? What are the main reasons for the inclusion of Islamic experts among the judges? And how do you rate the expertise of the Islamic Judges in the appreciation of the rules of interpretation? (Are their decisions carrying equal weight with the decisions of other judges?)
4. What is your opinion on the powers of the FSC asserting its “constitutional control” in the interpretation of the constitution? How has the FSC used its powers in determining the constitutionality of the actions of the other branches?
5. In your opinion to what extent do you think the powers of the FSC of legal supervision and interpretation assisted democracy and the protection of the Iraqi people? (Has the FSC checked the domination of one level of government or community from the other?)
6. How do you see the working of separation of powers under the Iraqi 2005 Constitution? (Probes: How has separation of powers shaped the working of the 2005 Iraqi Constitution? And do you consider the powers of the FSC in the determination of the constitutionality of laws as a violation of the concept of separation of powers?)
7. Do you consider the powers of the FSC in the determination of the constitutionality of laws as a violation of the concept of separation of powers?
8. Finally, is there anything you would like to add or comments you wish to make on any of the issues raised please do in the space provided below.

2. ما هي الامم عبيد التي خنفت عبيد رقة لامة حكمة التي حلة يا, براريك هل لدق ضاة
لام حكمة التي حاياي قدارة في نفس يرا حكام الاستورال عرق ي 2005؟ هل رالق سام لطق يله
تسي رعل يت عيين اى ضاة؟ ايفخت ل ف عومي ق عبيد رقة لامة حكمة يديستور 2005, عن القل ون
الساس يلا عراق يلام عام 1925؟

3. براريك ل ما اذا اعض الي برلمان في نيين مقبال لاش عبال عرق ييين مقبال لامة حكمة التي حاياي
غير في نيين مقبال لاش عبال عرق يي سام حل م القل ون بت ح يديستور ية القل ون التي يت صدر
لمن برلمان لاقراق ي هل هذا جاز بريك؟

4. برطيغال ي ف لام حكمة لامة حكمة من (غير اى ضاة) و هم

خبر لفي طلق هالس لمي، وفق هالمقل ون, ما هي الاسباب التي ادت الى وجوم؟ براريك هل
يستي طيع موالا نفس يرا الاستور؟ وتلع تبر مذل ق رار اتتلي ي صدر هالخبلو والفق له مس اوية
الى ق رار اتق ضاة لام حكمة التي حاياي اعلي؟

5. ما هو رايك حول الصالحية لام حكمة التي حاياي اعلي في الدق لينة نفس يرا القل ون يلق ولين؟
وليفت ستخدم لام حكمة قصال حيلها ضلك لسل طك ال اخر في الولة انا كان هن الفت جاوز من
لسل طات؟

6. برريك هل تعتقد ان الصالحية لام حكمة التي حاياي في الرقاب نفس يرا القل ون يلق ولين ارساء
الي م قراطي وتو حمي حقوق لاش عبال عراق ي؟ هل تكون لام حكمة مي من قيب اعض ال حياي افي
عل هاضلك لسل طات اول حك ومه؟

الفرع ب/ال عم فالي فصل لهي لسل طات بموجب الاستورال عرق ي 2005.

7. لفي فترى ال عم فالي فصل لهي لسل طات بموجب الاستورال عرق ي 2005؟ لفي فتي مقبل م
الفصل لهي لسل طات نفس يرا الاستور؟

8. هل تعتقد ان الصالحية لام حكمة التي حاياي اعلي في الدق لينة نفس يرا م خالف لسل طات فصل لهي ل
لسل طات نفس يرا ل عراق؟ ما هي الاسباب التي تراها في فصل لهي لسل طات نفس يرا ل عراق؟

9. لفي فتي مقبل م لسل طات نفس يرا ل حكمة في دراية وحكومة اى في يال عراق؟ هل تعب
سل طات حكمة اى ليم اوسع من سل طات ل حك ومقلم ركزي بموجب الاستورال عرق ي 2005؟

10. في ريك هل هو من بين بفي إل ح كم لذي يس م ح بت طبي ؤ ل ق ل ون ال احيي على الق ل ون
التحادي اذا ح هش راع بين الق ل ون التحادي والق ل ون ل ق ل يم يف ان ق ل ون القيم هو لذي
ي طبق؟ كما هو ال ح الف ي ال مادة (2 / 121) من الب د ت و ر ؟ هل هذ ل و د ل ي ان ش ا ع س ل ط ق ض و ط ية
مزدوج في ال عراق؟

واخي ر ا اذا كان ل ي ك اي اض فة ا ت ل ي ق ل و ت ق ي ا ي ق ض ي ت ي ر ج ل ق ي ا م ه .

