



IILHR COMMENTS ON CONSTITUTIONAL AMENDMENTS

PART A

Article 15:

First: Regulation shall be issued to facilitate the implementation of the law without violating it.

COMMENT 1: add “and in compliance with the intention of the legislator”

PART B

Article 16: [art. 19 (9) of the current Constitution]

Law shall have no retroactive effect unless a provision stipulates that in its text. This exclusion shall not include criminal laws, taxation laws and the fiscal costs and fees, except for the benefit of the accused or the mandated person.

COMMENT: the legal principal of retroactive effect of laws it's a fundamental one and shouldn't be left to legislature to define it so any exceptions should be stated by the Constitution. Usually the only exception related to criminal or administrative law but in very limited manner favoring citizen's rights. *Possible re-draft of article may be: “law shall act only of the future, except for the more favorable criminal or administrative law.”*

PART C

Article 19:

The state shall draw the construction of Iraqi Economy in a way that guarantees its renaissance in accordance with modern economic principles (basis), ensures the full investment of its resources, diversification of its resources, encouragement and development of private sector.

COMMENT: it's not clear what type of economy Iraq is developing? Centralized economy or market economy? There is no mention of nature or type of economy, principles are general ones (maybe mention: free trade and enterprise, fair competition, protection of national interests or stimulation scientific research)

PART D

Article 22

First: Public assets are sacrosanct, the state should protect them and individuals should maintain them.

Second: the provisions related to the preservation of State properties, their management, the conditions for their disposal, and the limits for these assets not to be relinquished shall be regulated by law.

COMMENT: there is an imbalance by the language used to define public property vs private property [art. 45 (art. 17 (2) and 52 (art. 23 old Constitution)]. Only homes are inviolable not private property in general as it's should be. Why do you continue to use the term "state property"? "Public property" is more accurate. The constitution should define public property or the types of public property: belonging to the State or provinces/governorates/regions; public property (as well as private) should be guaranteed and protected by law. Public property should be managed or taken care of by public institutions (and not taken care of individuals).

PART E

Article 40

First: Every citizen has the right to health care. The State shall maintain public health and provide the means of prevention and treatment by building different types of hospitals and health institutions.

COMMENT 1: Right to proper health care should be guaranteed by the state and the constitutional duty to develop policies and strategies and take appropriate measures for implementing those policies not only building up health institutions.

Second: Individuals and entities have the right to build hospitals, clinics or private health care centers. They shall be overseen by the government.

COMMENT: what kind of oversight of the Executive? Would be advisable to limit it to financial monitoring, till decentralization or empowerment process of provincial, regional or local authorities will end. Additionally, private entities should have the right to more than just "build" hospitals, should extend to operating, maintaining, etc.

PART F

Article 46

First: Iraqis are equal ~~before the law~~ in their rights, freedoms and public duties, without discrimination based on gender, race, ethnicity, nationality, origin, color, religion, sect, belief or opinion, or economic or social status.

COMMENT: Why deleting "Iraqis are equal before the law"? Should be kept as basic constitutional article otherwise could lead to controversial interpretation.

PART G

Article 51

Ninth: Unlawful detention shall be prohibited except in accordance with the law and based on judicial order.

COMMENT 1: The formulation of this paragraph creates confusion. Unlawful detention should be prohibited by law. Otherwise may be interpreted as unlawful detention can be legislated and judicial order can be issued on unlawful basis. Article 55 First B covers it.

PART H.

Article 55

First: Private property is protected. The owner shall have the right to benefit, exploit and dispose of private property according to the law.

COMMENT 1: please see comments at Part D. Private or public property should be equally guaranteed and protected by law.

Third: A. The Iraqi shall have the right to own property anywhere in Iraq. No others may possess a real estate except as exempted by law.

COMMENT 2: This paragraph excludes foreign citizens to own property as houses or apartments, not mentioning land. In other countries if restrictions exist for foreigners it is typically a restriction on their ability to own land, but they are allowed to buy real estate (houses, buildings, etc). Keeping the article as it is currently worded would affect foreign investments to be developed in the future.

PART I.

Article 61

Second: It is not permissible to force any person to join any party, society, or political entity, or force him to continue his membership in it. Affiliation for any of them shall not violate the principal of equal opportunities in public service.

COMMENT 1: the second sentence of paragraph is confusing and doesn't make sense.

PART J.

ARTICLE 63

The Iraqi shall have the right to commit to the provisions of his religion and sect in his personal status and the personal status law shall ensure regulating that.

COMMENT: the original text of guaranteeing freedom of conscience and religion offers equal treatment of religions in Iraq. Personal status (law) is an Islamic term used to differentiate between religions traditions, customs and culture in Muslim world. If this text is approved, it will create an inequity between Muslims and Christians as the later will have to follow the Islamic legal framework in dealing with their religious customs.

PART K.

Article 66

Third: Surrendering Iraqi to any state or foreign entity shall be prohibited except in accordance with the law.

COMMENT: No Iraqi citizen should be extradited or expelled from Iraq but there should be room for exception, For example, it is typical to make an exception to the extradition law according to international agreements of which Iraq is or may become a party of, according to the law and on mutual basis, and based on court ruling. It would be advisable to confer this to ensure is not the case.

PART L.

Chapter One Legislative Power, Article 70

COMMENT 1: It would be advisable to state that the supreme representative and sole legislative authority of the country is the Iraqi Parliament which consists of Council of Representative and Federation Council.

PART M

Article 83

Second: A. Laws shall be proposed by ten member of the Council or by one of its specialized committees

B. Bills shall be presented by one of the specialized committees in the council. Consultations with the government shall be made prior to presenting a bill that might cause financial burden to the general treasury.

COMMENT: What is the difference between a law (A) and a bill (b)?

Ninth: B1 – First: Judicially convicted with a criminal or financial offence

COMMENT 1: If the President enjoys full immunity there should be a constitutional provision referring to procedure (who can initiate, approve starting investigation), institutions involved (courts) or withdrawing confidence if there is evidence of wrongdoing.

Second: Afflicted with disability that impede or obstruct his work

COMMENT 2:

- Including the term “disability” as a motive to relieve the President from Office could lead to misinterpretation and discrimination of people with disabilities. Would be advisable to rephrase as “permanent impossibility/inability to fulfill his responsibilities/duties” ;
- would be advisable to set up a timeline by parliament to fill the vacancy;
- also would be advisable to provide alternatives in case the Presidency Council is dissolved as to who will take over the

interim office? The head of one of the Iraqi Parliament's houses should take over;

- Another possibility is the suspension from office until investigations are concluded by Parliament defining by whose request (% of members of parliament, what majority of votes, period of suspension and so on).

Tenth: B. On Inquiry: "in a period not exceed 30 days."

COMMENT 3: the date of inquiry should be agreed on jointly by Council of Representatives and PM's office and should not exceed 15 days from sending the request on behalf of parliament. The period of 30 days is excessive and is not covering possible major or emergency political issues which would need immediate resolution.

Eleventh F: Provisions related to ministers mentioned in the articles above shall be applicable to others with the same grade.

COMMENT 4: It is not clear what the drafters understand by "others with same grade as ministers". Should be referring to all officials appointed by the Council only.

PART N.

Article 86

- A. A member of the Council of Representatives shall enjoy immunity for statements made during the electoral term (while the Council is in session) and the member may not be prosecuted before the courts for such.*

COMMENT 1: what do you mean by statements? Does this cover all votes and political opinions expressed by legislator during his or her mandate? What do you mean by while the Council is in session? Does that mean that legislator is not covered by immunity for statements made during parliamentary vacations? On the other hand, it would be advisable to have a separate chapter on all rights, benefits and immunities for all members of Iraqi parliament (Council and Federation Council)

- B. A Council of Representatives member may not be placed under arrest during the legislative term of the Council of Representatives, unless the member is accused by felony and the CoR members consent by an absolute majority of members present to lift his immunity or if he is caught in flagrante delicto in the commission of a felony.*

COMMENT 2: the provision does not covers if Legislator are to be searched, investigated or prosecuted; neither does it specify the institutions entitled to conduct the investigations or prosecutions. Not only should the arrest of a member be decided by the Council but also search, beginning of investigation and prosecution. According to the current constitutional provisions members of the CoR may be judged by any court in Iraq. As directly elected officials, members of parliament have a certain status and in case of a felony they should be judged by the highest court (most experienced judges) in country which was the Federal Supreme Court. As the FSC becomes a Constitutional

Court the other highest court is the Federal Court of Cassation. As it is written here the FCC will be judging cases of felonies for Federation Council members and could well be biased as the FCC is appointed by FD? (See art. 93 Third)? Drafter may look into reformulating article as: “ *Members of Council of Representative may not be searched, detained or arrested or have their immunity lifted without consent of an absolute majority of members present or if he is caught in flagrante delicto of the commission of a felony. Investigation or prosecution can only be carried out by the Public Prosecutor’s office attached to the High Court of Cassation. The Public Prosecutors Office or High Judicial Council should notify the Council on the intention on search, detain, arrest, investigate or prosecute a Legislator or if asking for the lifting of his immunity.*”

C. Related to the approval by Speaker to arrest a former Member of CoR:

COMMENT 3: Question is when the immunity of members ends: at the termination of mandate or does it continue after legislative term. Why is this determination given to by one person to decide on arresting a former member of parliament? If former members enjoy infinite immunity then the provisions of paragraph B should be applicable in this case too.

PART O.

Article 100

Third: Approving by absolute majority of Members of the Council the appointment of the President and members of the Federal Court of cassation, the Chief Public Prosecutor and the President of Judicial Oversight Commission by an absolute majority based on a proposal of the Higher Judicial Council.

COMMENT 1: Please see comment 2 at Part N.

PART P.

Article 101

The Federation Council shall submit its annual budget to the Council or Representatives for approval.

COMMENT 1: According to art. 81 (2) members of the FC are elected by direct secret ballots as the members of CoR, so they enjoy equality in status as representing Iraqi people. Budget should be approved separately by members of the FC, and incorporated into federal budget.

PART Q.

Article 102

The Federation Council shall meet with the Council of Representatives in joint sessions chaired by the Speaker or his replacement, on a call from the President of the FC, the president of the Republic or the Prime Minister.

COMMENT 1: is not clear who is chairing the joint sessions. As in other countries would be advisable to be chaired alternatively by Presidents of the 2 houses as they are equal in status.

COMMENT 2: why not including a certain percentage of Members of both houses to call for joint sessions?

COMMENT 3: the joint sessions should be conducted based on bylaw/regulation passed by the majority vote of the members of CoR and FC

COMMENT 4: It would be advisable for the Constitution to include a separate provision on joint sessions, procedure and topics of joint meetings such as ceremonial sessions (receiving a foreign dignitary or anniversaries), electing the President of Republic, approving the government and voting on the federal budget, appointing officials, declaring war or a state of emergency; to terminate or suspend armed hostilities, to approve national strategy of homeland defense, pass legislation related to the Status, right, benefits of Members of CoR, ratifying international treaties and agreement or approving members of the Federal Constitutional Court [*Article 106 (former art. 73) or Article 124 Third (former art. 92) refers this to Legislature assuming the intention is to defer it to both houses of Iraqi Parliament*] and FC or any other issues stated by the Constitution or bylaws. These way joint responsibilities of the Iraqi Parliament would be more clear and easy to follow.

PART R.

Article 109

The President, prior to assuming his duties, shall take the constitutional oath before the Council of Representatives in the following language:

COMMENT 1: It would be advisable to specify the language of the oath not forgetting that Iraq has two official languages Arabic and Kurdish. Protocol would require for the President to take oath in both official languages.

COMMENT 2: the President should take oath in a joint session of both houses of Iraqi Parliament (see comment 4 at Part Q)

PART S.

Article 110

C. In case of dissolution of the CoR the President of the Republic shall continue to exercise his duties until after the end of the election of the new CoR and the election of the new president shall be in accordance with paragraph second B of this article.

COMMENT 1: the dissolution of one of the house of Iraqi Parliament shouldn't affect the elected President and he should finish his mandate in good faith.

COMMENT 2: in case of dissolution of CoR, what will happen with the legislative process? Will the FC take over temporarily until the new CoR is elected? Drafters may consider amending the Legislative Power chapter and consider the 2 houses as part of one body – the Iraqi parliament. This way would avoid inconsistency in legislative process.

COMMENT 3: how many times per year or legislative term can a parliament be dissolved? Can the parliament be dissolved during a state of emergency, war? Usually the parliaments cannot be dissolved in a certain time period before end of office (example during last 6 month) of President or PM.

PART T.

Article 111

COMMENT 1: use of “permanent disability” should be reconsidered by drafters. Please see Comment 1 at Part M.

PART V.

Section Two: The Council of Ministers “The Government”

COMMENT 1: Suggestion to include comments on joint sessions of Iraqi Parliament as of Part Q Comment 2.

COMMENT 2: what happens if the Iraqi Parliament fails to vote on government? Would it be a cause to dissolve the legislature? If yes how many attempts of failure of vote?

PART W.

Article 124

COMMENT 1: Endowment commissions should be independent financially and administratively as they deal with religious institutions properties/finances (revenues).

PART X.

Article 129

Third: Members of the Federal Constitutional Court shall be nominated by the President of the Republic and the Prime Minister with the approval of the absolute majority of the members of the legislative power.

COMMENT 1: Nomination of members of Constitutional Court should be a wider prerogative than limited to Executive power. Drafter may opt to include nomination right of both Houses of Iraqi Parliament.

Article 130

Fourth: ... (Second sentence) The law shall guarantee the right of direct appeal to the Court to the Council or Ministers or those concerned, natural or moral personality.

COMMENT 1: what about direct appeal for the Members of the Iraqi parliament? The formulation of the paragraph as it is, may state a priority for access to justice through CC of the Prime minister.

Article 131

Rules and decisions of the Court are final and binding for all authorities.

COMMENT 1: Rulings and decisions of the Court should be public and should be made public in the Official Gazette. What about laws considered unconstitutional? What about drafting a procedure on implementing Court rulings/decisions in case of unconstitutional laws or regulations? Laws need to be sent back to public authorities issuing them to be amended or invalidated. Typically, a period of time and instructions are given to allow for citizens, regions, businesses, etc (all who have been affected by the law which was ruled unconstitutional) to take steps to rectify any action which may have

resulted from/or been based on the unconstitutional law before the court's ruling.

Chapter Four – Independent Commissions

GENERAL COMMENT: Drafters may consider extending the establishment, cancellation and oversight of Independent Commissions as well as the appointment and relive of Head of IC jointly by both houses of Iraqi Parliament. Who is appointing the Members of IC? The authority of appointing members of IC should be given also to the Iraqi Parliament or open to fair and open competition to all citizens of Iraq.

Section Four – Competencies of Federal Authorities

GENERAL COMMENT: using of term federal authorities as well as federal government or federal power (respective regional power) is confusing. Drafters should be using federal authorities as it comprises of the legislative, executive and judicial federal authorities. All authorities/powers stated in this section refer to those of federal powers.

Article 153

Independent Commissions may submit proposed laws, related to their work to the Council of Representatives.

COMMENT: Independent Commissions should not be able to propose laws. They could serve as an advisory role on subjects related to their work for the elected officials whom can proposed laws as well as providing information, etc but they should not be given the right to propose laws separately.

Article 158

Twelfth: Drawing up policy related to protection of environment, nature, water and air pollution, and implementing it in coordination with relevant regions and governorates.

COMMENT 1: this obligation federal government should be matched with extending the basic freedoms and right of Iraqi citizens introducing their RIGHT TO HEALTHY ENVIROMENT.

Article 169

Second: In case of contradiction between regional and national legislation in respect to a matter outside the exclusive authority of the federal government, the regional power shall have the right to amend the application of the national legislation within that region.

COMMENT 1: drafters should use same terminology reacted to legislation; instead of national legislation or laws should use federal legislation or laws.

COMMENT 2: in case of contradiction of regional vs federal laws is in the jurisdiction of the Federal Constitutional Court to rule on it and it s decisions should be implemented by authorities (federal or regional or local).

Article ():

The government of the region shall have the right to use federal armed forces and security services, in order to maintain public order in the region, prevent risks, resulting from aggression, or natural disasters, and the federal government shall have the same right to use security services of the region.

COMMENT: on regional governments right to use federal armed forces and security services – should be done based on a request to the federal government as all armed and security forces are under direct order of the Prime Minister (as commander in chief of armed forces)

Article 177

Third: Every referendum mentioned in this Constitution is deemed adopted with the approval of the majority of the voters unless otherwise stipulated.

COMMENT 1: the formulation of the article excludes any other referendum in Iraq than those mentioned in it. Drafters should think amending it as follows: “any referendum held in Iraq shall be approved by the majority of voters unless otherwise stipulated”.

COMMENT 2: would be advisable to complete article as “this shall be regulated by law.”

Article 178

The Speaker, the President of the Federation Council, their deputies and members of the two chambers may not take other posts, practice and other job, profession, business or industrial work.

COMMENT: it’s absolutely inadmissible that is limited to only some of the elected people. The prohibition should included locally elected official and especially members of the federal or local government as they are financially managing the country/provinces/regions and more exposed to corruption.

Chapter Two - Transitional Provisions

COMMENT 1: all reference to Transitional National Assembly or Transitional Administrative Law should be deleted.