

**IILHR COMMENTS  
ON  
DRAFT LAW ON FEDERATION COUNCIL**

**May 19, 2009**

After studying the current Federation Council Draft law, IILHR has compiled the following comments for your review. The main areas of concern are the following:

- The present draft does not include independent representation of the region as required by Article 65 of the Constitution. While the governorates that make up the Kurdistan region will be represented, the language of Article 65 “to include representatives from the regions and the governorates that are not organized in regions” could be interpreted to indicate that regions should be represented as political entities, with separate status from governorates.
- The dates and means of direct election of Federation Council members within the governorates is not clear. The legislation could consider including language indicating whether the governorates have discretion to establish regulations governing the time and means for elections or whether the central government will establish a uniform law.
- The present draft does not enumerate the scope of the Federation Council’s jurisdiction. The use of the phrase “related to the regions and governorates not organized in regions” could leave much room for interpretation. Where the upper chamber has limited jurisdiction, international practice indicates that the upper chamber’s jurisdiction should be enumerated either in whole or in part.

**I.**

*Article 1:*

*First: The federation council shall represent the interests of regions and governorates not organized in region, and shall include their representatives.*

**COMMENT:**

If the Federation Council representatives are meant to represent the interests of the regions as well as the governorates not organized into regions (as both Article

65 of the Constitution and this current draft state), then the language here may require that Kurdistan, as the sole region currently established, have representatives independent of those of its governorates, or that the representatives of the governorates that make up the Kurdistan region vote as a block (as they do in Germany).<sup>1</sup>

The repeated use of the word “region” throughout the Constitution strongly implies that the drafters intended region(s) to be political entities with some degree of sovereignty and representation. While the Kurdistan region, as a geographic area, will be represented by the representatives of the three governorates it comprises, the language here implies that Kurdistan must also be represented as a political entity. This interpretation is consistent with Article 65 of the Constitution, but may be in conflict with Article 2 below.

Also, a clearer definition of the interests of the regions and governorates not organized into regions may also be appropriate depending on how limited the Council of Representatives intends the Federation Council’s jurisdiction to be. In the Egyptian constitution, for example, Article 194 declares that “the Shoura Assembly is concerned with the study and proposal of what it deems necessary to preserve the principles of the...revolution...to consolidate national unity and social peace...”

## **II.**

### *Second:*

*a. Members of the council shall be elected by a direct general secret ballots by the residents of the province.*

*b. Number of the seats of the council shall be allocated to small components. The law shall regulate the number of these seats and mechanism for nomination.*

### **COMMENT 1:**

Assuming (b) means that each governorate shall be divided into districts, and that each district shall elect a certain number of seats to the Federation Council (i.e. with four total seats for each governorate and eight total for Baghdad), there is some question as to which body shall regulate (a) the division of the governorate into districts; (b) the number of seats each district may elect; and (c) the mechanism for nomination. The draft here states that “the law shall regulate the number of these seats and mechanism for nomination.” Regarding which governing body (local or central) establishes the law in question, there are several options: (1) the above decisions may be left to the discretion of the governorates themselves or; (2) they may be uniform and regulated by the central government.

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<sup>1</sup> Public International Law & Policy Group. The Iraq Federation Council. 23. (July 2006).

Though it does not utilize a system of direct election, the United Arab Emirates (UAE) leaves the method of appointment of representatives for its upper chamber to the discretion of the individual Emirs.<sup>2</sup>

Leaving the above issues to the discretion of the governorates and/or regions would grant more control to local governments in determining how they are represented in the central government and by whom. It would also reinforce the concept of federalism by granting the regions/ governorates sovereignty in this area. The governorates/ region(s) would have the ability to divide into districts and assign seats with or without regard to population or to take other issues into consideration.

### **SUGGESTION:**

1. The Council of Representatives might consider altering the language of Second (b) to clarify whether governorates/ region(s) shall have discretion with these matters or not. If the draft intends to grant discretion to the governorates, the following language might be considered:

- (a) Members of the Federation Council shall be elected by direct general secret ballots by the residents of the governorate.*
- (b) The governments of the regions and governorates not organized into regions shall regulate by law the electoral districts, the number of seats each district shall elect, and the mechanisms for nomination.*

or

- (b) The governments of the regions and governorates not organized into regions shall regulate by law the mechanisms for the nomination and election of its representatives.*

2. If the draft does not intend to grant the governorates discretion but to require the Council of Representatives to create a uniform law, the following language might be considered:

- (a) Members of the Federation Council shall be elected by direct general secret ballots by the residents of the governorate.*
- (b) The number of seats each region and governorate not organized into regions shall be allocated to districts within the regions and governorates. The Council of Representatives shall regulate by law the number of these seats per district and the mechanism for nomination.*

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<sup>2</sup> *Id* at 23.

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## **COMMENT 2:**

Article 49 (fourth) of the Constitution requires that the elections law for the Council of Representatives shall aim to achieve a percentage of representation for women of not less than one-quarter of the members of the Council of Representatives. There is no similar provision in this Federation Council draft legislation.

## **SUGGESTION:**

The Constitutional Review Committee may consider altering the language of Article 1 to include language regarding the inclusion of women in the Federation Council.

*(c) The elections law of each governorate shall aim to achieve a percentage of representation of women of not less than one quarter of the members of the Federation Council.*

## **III.**

### Article 2:

*Each governorate shall have 4 seats in the federation council, organized in a region or not, except Baghdad, which shall have 8 seats.*

## **COMMENT:**

As stated above under Article 1 of this draft, Article 65 of the Constitution states that the Federation Council shall include “representatives from the regions and the governorates that are not organized in a region.”

This language implies that regions shall be represented independently of their governorates. While the Kurdistan region will be geographically represented by Dahuk, Suleymaniyya, and Erbil, the region will not be politically represented under this construction. This might be constitutionally problematic as Article 65 expressly states that regions shall be represented in the Federation Council.

## **SUGGESTION:**

The Constitutional Review Committee may want to consider one of the following options for altering the language of Article 2:

*Each governorate not organized into a region shall have 4 seats in the Federation Council, except Baghdad shall have 8 seats. Each region shall have \_\_\_ seats in the Federation Council.*

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Or

*Each governorate organized in a region or not, shall have 4 seats in the Federation Council, except Baghdad shall have 8 seats. Each region shall have \_\_\_\_ seats in the Federation Council.*

Or

*Each governorate organized in a region or not, shall have 4 seats in the Federation Council, except Baghdad shall have 8 seats. The representatives of governorates organized into regions shall vote as a block on all matters before the Federation Council.*

Each of the above suggestions represents different outcomes for the political power and sovereignty of regions within Iraq. The language of the first suggestion is supported by the language of Article 65 and grants the region the power to represent its governorates at the national level. The second suggestion grants the governorates and the region significant power within the central government as the interests of the representatives for both the governorates and the region they form will likely overlap. The language of the third suggestion ensures that governorates that have formed a region operate as a unified political entity, but allows for the representation of the individual governorates within the region they form. This system is similar to that used in the upper chamber in Germany.

## IV.

### Article 3:

*The federation council shall be called to convene by a presidential decree upon calling for the Council of Representatives within 15 days from the date of the ratification of the election results. Its eldest member shall chair the first session to elect the Chairman.*

### **COMMENT:**

The language “upon calling for the Council of Representatives” is unclear. It is likely a translation issue. What this appears to mean is that the President shall convene the Federation Council by presidential decree within 15 days from the date of the ratification of the Federation Council election results from the regions and governorates not organized into regions.

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This interpretation, if correct, raises the issue of election dates and timing. Shall all governorates elect their representatives on the same date? Shall a portion of the Federation Council be up for reelection on alternate years or every two years?

## **SUGGESTION:**

The Constitutional Review Committee may wish to consider one of the following suggestions for Article 3:

*The Federation Council shall be called to convene by a presidential decree within 15 days from the date of ratification of the election results from the regions and governorates not organized into regions.*

*The times of holding elections for members of the Federation Council, shall be prescribed in each region and governorate not organized into regions by the government thereof; but the Federation Council may at any time by law make or alter such regulations, except as to the places of election.*

Or

*The times of holding elections for members of the Federation Council, shall be prescribed in each region and governorate not organized into regions by the government thereof except for the first election to create the first Federation Council.*

*The date of the first election shall be determined by the Council of Representatives/ presidential decree/ etc. The Federation Council may at any time by law make or alter regulations as to the time of elections for Council members, except as to the places of election.*

V.

### Article 4:

*The requirements for the candidate to the federation council are the same as for the candidates to the membership of CoR, in addition to be a resident of the governorate he is representing, and must not be under 40 years of age, and this shall be regulated by a law.*

## **No Comments or Suggestions**

VI.

### Article 5:

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*Each member of the federation council shall take the oath stated in article 50 of the Constitution.*

## **No Comments or Suggestions**

### **VII.**

#### Article 6:

*The federation council shall establish its bylaw to regulate its work.*

#### **COMMENT:**

The Constitutional Review Committee should consider clarifying the term “work” is needed. What is within the scope of the Federation Council to regulate regarding its functioning and procedures?

#### **SUGGESTION:**

The Constitutional Review Committee may wish to consider the following suggestion for Article 6:

*The Federation Council shall establish the rules of its proceedings, compel the attendance of absent members, punish its members for disorderly behavior, and, with the concurrence of \_\_\_\_\_ (two-thirds, an absolute majority, a simple majority?) expel a member.*

### **VIII.**

#### Article 7:

*First: Sessions of the Federation Council shall be public unless, for reasons of necessity, the Council decides otherwise.*

*Second: Minutes of the sessions shall be published by means considered appropriate by the Council.*

#### **COMMENT:**

For the first part of Article 7, the Constitutional Review Committee may want to clarify the degree of agreement necessary for the Federation Council to keep part of its sessions private. Perhaps two-thirds or an absolute majority must agree to keep a session private. Perhaps a committee within the Federation Council should be established to make such determinations. Additionally, the CRC may want to clarify what constitutes a “necessity.” In the United States, for example, generally only matters related to national security are not made public.

#### **SUGGESTION:**

The CRC may wish to consider the following suggestion for Article 7:

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*First: Sessions of the Federation Council shall be public unless, for reasons of national security as determined by \_\_\_\_\_ (two-thirds, an absolute majority, special committee), the Council decides not to allow public access for a given session.*

## IX.

### Article 8:

*The federation council shall elect in its first session a chairman and a deputy by an absolute majority of the total number of the Council members by direct secret ballot.*

## No Comments or Suggestions

## X.

### Article 9:

*First: The term of the Federation Council shall be four calendar years, starting with its first session and ending with the conclusion of the fourth year.*

*Second: The new Federation Council shall be elected forty-five days before the conclusion of the preceding electoral term.*

## COMMENT 1:

The language of Article 9 is similar to that of Article 56 in the Constitution describing the term duration for members of the Council of Representatives. There was confusion related to that Article regarding whether the definition of “fourth year” refers to the calendar year or to a 365-day cycle based on the start of the first session.

It is likely that the absence of the word “calendar” with reference to the conclusion of the electoral term in Article 9 suggests that the term may be understood as constituting four periods of 365 days after the first session commences.<sup>3</sup>

## SUGGESTION:

The Constitutional Review Committee may wish to consider the following suggestion for article 9:

*First: The term of the Federation Council shall be four calendar years, starting with its first session and ending with the conclusion of the fourth 365-day period after the first session commences.*

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<sup>3</sup>IILHR, Memorandum Regarding Interpretation of Section 56 of the Iraqi Constitution at 3 (Apr. 2009).

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## **COMMENT 2:**

As the draft is written, the terms for the Council of Representatives and the Federation Council are both four years. It may be more efficient to stagger the terms the members of the upper and lower chamber serve to avoid a drastic shift in the political make-up of both houses at the same time. Perhaps the Federation Council terms could be six years or two years rather than four. The Constitutional Review Committee may also consider whether term limits are desirable.

## **XI.**

### Article 10:

*First: The Federation Council shall have one annual term, with two legislative sessions, lasting eight months. The bylaws shall define the method to convene the sessions. The session in which the general budget is being presented shall not end until approval of the budget.*

*Second: The legislative session of the Council may be extended in case the legislative session of Council of Representatives is being extended, or based on a request from the President of the Republic, the Prime Minister, or the chairman of the federation council*

## **No Comments or Suggestions**

## **XII.**

### Article 11:

*The federation council shall be called for an exceptional session by the president, prime minister, the Speaker of CoR, the chairman of the federation council, or by 1/5<sup>th</sup> of its members, and the meeting shall be limited to the topics that necessitated the call*

## **No Comments or Suggestions**

## **XIII.**

### Article 12:

*First: The Federation Council quorum shall be achieved by an absolute majority of its members.*

*Second: Decisions in the sessions of the Federation Council shall be made by a simple majority of members present, unless otherwise stipulated.*

## **COMMENT:**

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As it is not mentioned elsewhere, may the Federation Council adjourn by a simple majority of its members? Does adjournment require the approval of the Council of Representatives? For how long may the Federation Council adjourn if it is able to at all?

### XIV.

#### *Article 13:*

*The Federation Council shall be competent in the following:*

*First: propose bills related to regions and governorates not organized in region, and refer them to Council of Representatives*

#### **COMMENT:**

It is currently unclear what “related to the regions and governorates not organized in regions” includes. Does the Federation Council have the competence to determine what matters are “related” or shall the Federation Council prescribe its jurisdiction in its first session. If the latter, Article 13 should state this requirement.

The German constitution enumerates matters the drafters considered to directly affect the regions and include remuneration and pensions of members of the public service at the regional and local level; amendments to the constitution; general administrative rules; execution of federal laws by the regions; funded mandates where regions must provide more than a quarter of the grant; and federal tax laws where the revenue accrues wholly or in part to the regions.<sup>4</sup>

Unless the Constitutional Review Committee seeks to grant *kompetenz-kompetenz* to the Federation Council, enumerating the matters that the Constitutional Review Committee feels directly relates to the governorates and regions may result in a more efficient system with few conflicts over the scope of the Federation Council’s jurisdiction.

#### **SUGGESTION:**

Please see Appendix I (attached) for suggestions – Select articles from the German Constitution regarding the jurisdiction of its upper chamber, the Bundesrat.

**Note:** based on the second part of Article 13 (below), the Constitutional Review Committee may want to include language indicating that, in addition to enumerated subjects within the jurisdiction of the Federation Council to propose bills, the Federation Council shall approve or reject bills referred to it by the Council of Representatives. The Constitutional Review Committee should also

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<sup>4</sup> Public International Law & Policy Group, The Iraq Federation Council, 17 (July, 2006).

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consider whether the Council of Representatives is *required* to refer bills of related to specific subjects to the Federation Council for consideration or whether such referrals are up to the discretion of the Council of Representatives.

Including language that clarifies these issues (i.e. which topics are “related” to the governorates and the regions and whether the Council of Representatives is obliged to refer such bills to the Council for approval) would likely reduce conflicts and increase efficiency and transparency.

### XV.

*Second: To review bills related to regions and governorates not organized in region, referred to it by Council of Representatives and it may take the following measures:*

- a. objection to the bill by absolute majority of its members.*
- b. in case of objection, the bill shall be returned to Council of Representatives with the reasons for objection in a period not to exceed 15 days*
- c. the bill which was returned because the federation council objected to it shall be considered approved by Council of Representatives when the latter approves the reasons for objection and take it into consideration, by absolute majority of members present.*
- d. the bill which was returned according to paragraph (b) shall be considered approved by Council of Representatives when the latter rejects the reasons for objection by 2/3<sup>rd</sup> of members present.*
- e. the council of representatives shall refer the bill to the president in a period not to exceed 15 days, and to notify the federation council on that in cases of paragraphs (c & d) above*

### COMMENT:

The Constitutional Review Committee may want to consider what happens to the bill should the Council of Representatives not agree to accept the Federation Council’s objections by an absolute majority or to reject the objections by a two-thirds majority of present members. As the bills the CoR will refer to the Federation Council relate to the regions and governorates, the consequences of Federation Council objections should be substantial. Without expressly stating whether a bill dies if the Council of Representatives cannot meet the standards outlined in (c) and (d) above, the current language may leave open a loophole allowing the Council of Representatives to pass a bill to which the Council has objected to the President without responding to the objections. This would undermine the authority of the Federation Council to object to bills related to the governorates and regions and may be perceived as undemocratic.

### XVI.

*Third:*

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*a. Approving by an absolute majority of members, the appointment of the President and members of the federal constitutional court, President and members of the Federal Court of Cassation, the Chief Public Prosecutor, and the President of Judicial Oversight Commission, based on a proposal from the Higher Juridical Council.*

*b. Appointing and dismissing officials of the independent commission on monitoring federal revenue allocations stated in article ( ) of the constitution  
Fourth: Overseeing and monitoring provincial councils, and this shall be regulated by a law*

## **No Comments or Suggestions**

### **XVII.**

#### Article 14:

*The federation council shall refer its annual budget to the Council of Representatives for approval*

## **No Comments or Suggestions**

### **XVIII.**

#### Article 15:

*Both Federation Council shall meet with Council of Representatives in joint sessions chaired by the speaker of Council of Representatives or whoever represents him, on a call from the latter, or the chairman of federation council, or the president, or the prime minister.*

## **No Comments or Suggestions**

### **XIX.**

#### Article 16:

*First: member of the federation council shall enjoy the same rights and benefits as the member of Council of Representatives*

*Second: member of the federation council shall enjoy the same immunity as the member of Council of Representatives as stated in Article 63-second of the constitution.*

## **COMMENT:**

For the first part of Article 16, the Constitutional Review Committee may want to either outline which rights and benefits the Council of Representatives and Federation Council shall enjoy (i.e. does this include compensation?) or, reference the Articles in the Constitution that enumerate these privileges.

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## **SUGGESTION:**

The Constitutional Review Committee may want to consider the issue of compensation within the language of the legislation.

## **XX.**

### *Article 17:*

*First: The Federation Council may be dissolved by an absolute majority of the number of its members, or upon the request of one-third of its members by the Prime Minister with the consent of the President of the Republic.*

*Second: Upon the dissolution of the Federation Council, the President of the Republic shall call for elections within a period not to exceed sixty days from the date of its dissolution for the purpose of electing new council.*

## **No Comments or Suggestions**

Should you need any further information or have follow up question, please contact IILHR.