

**IILHR COMMENTS: HIGHER JUDICIAL COUNCIL
DRAFT LAW AUGUST 2008**

After studying the current draft law on the Higher Judicial Council, IILHR has compiled comments into this paper for your review. In summary, the main areas of concern and comment include the following: the delineation of too much power into the hands of one individual (Article 2(1), Art 4, Art 5, Art 8, Art 10); additionally, the mechanics of the law need to be expanded upon and clarified (nomination, election, appointment); further, there are two articles that are unconstitutional as they are written and need to be amended or deleted (Art 3(12) & Art9). On a final note, financial analysis and implications should be included in every draft law, review and suggestion of financial implementation into the annual or future budget needs to be addressed in a separate article. Further review and suggestions are set out in this paper. Please do contact IILHR for further discussion, information and clarification

The following articles of the Constitution should be added to the preamble of this law:

- Article 73(3) – referencing the presidential power to ratify/issue laws; and
- Article 91(1) – referencing the Higher Judicial Council’s power to manage the affairs of the judiciary and to supervise the affairs of the federal judiciary.

The following article of the Constitution should be removed from the preamble of this law:

- Article 92 -- refers to the Federal Supreme Court and not the Higher Judicial Council.

Article 1 – NO COMMENTS

Article 2(1) – (6) outlines the membership of the Higher Judicial Council.

First –

- COMMENT: The chief justice of the FSC should not also be president of the HJC; this puts too much power in one person. This specific proposal has been referred to by Iraqi’s as the “dictatorship of the judiciary.” Additionally, this dual role could pose a conflict of interest and the role of the President in each position is too big for the same person to effectively do both jobs at once.
- SUGGESTION: (1) The president of the HJC to be elected by its members; (2) possibility of rotating the presidential position amongst the members – still leaves the opportunity for too much power in one person, but it least it would minimize this to one term (terms would need to be defined in numbers of years)
- QUESTION: How long are HJC member terms?

Article 3(1) – (12) lists the tasks of the Higher Judicial Council.

- Article 3(1) –
 - COMMENT: The language in this provision should match that in the Constitution. As it reads now the language is different.
- Article 3(2) – gives the power to propose the budget for the judicial authority to the Higher Judicial Council. The article then gives the power to approve, administer and supervise the implementation of the budget to the Council of Representatives.

- COMMENT: Gives the CoR too much power over the Higher Judicial Council.
- SUGGESTION: the following amendment to the draft language:
[PROPOSING THE ANNUAL BUDGET FOR THE FEDERAL JUDICIAL AUTHORITY, AS WELL AS ITS ADMINISTRATION AND SUPERVISION, FOLLOWING APPROVAL OF THE COUNCIL OF REPRESENTATIVES]
- Article 3(3) – (6) – each of these provisions discusses a nomination power of the Higher Judicial Council.
 - COMMENT: What about the Law of Judicial Appointment – shouldn't the nominations and appointments procedures be included in that? In addition, this draft is not clear as to who will appoint people from nominations, nor does the draft law outline procedures for the nomination and appointment processes.
 - SUGGESTION: Draft a new law on judicial organization to provide necessary updating to the Law of Judicial Organization of 1979.
- Article 3(7) –
 - COMMENT/SUGGESTION: There should be clear standards for promotion and advancement of judges so that promotion and advancement does not become an arbitrary process and subject to political will or nepotism.
- Article 3(8) – discusses the term of service and retirement of judges.
 - COMMENT: Article 97 of the Constitution requires a law to set out the authority and reasons for removal and discipline of judges and public prosecutors
 - SUGGESTION: This law required by Article 97 should be promulgated as soon as possible.
- Article 3(9) – NO COMMENTS
- Article 3 (10) – NO COMMENTS
- Article 3 (11)- NO COMMENTS
- Article 3(12) –
 - COMMENT: What is meant by judicial agreements? Only judicial agreements as they relate to judges or all judicial agreements? If the provision means all judicial agreements, then this provision would give the Higher Judicial Council the power to get involved in international agreements as well. This provision could create a conflict between the Ministry of Justice and the Higher Judicial Council.
 - SUGGESTION: Add the words [AS THEY RELATE TO JUDGES] to the end of the provision.
 - COMMENT: Inappropriately gives the HJC the ability to propose laws. Early version of draft we saw had this provision relating to the power of suggesting jurisdiction-related laws, is this what is meant? The HJC should not be proposing laws nor engaging in substantive issues.

- SUGGESTION: Remove provision to “propose laws associated with the judiciary”
- Article 4 -authorizes the Higher Judicial Council to delegate to the President any of the tasks listed in Article 3 of the law.
 - COMMENT: As the provision is currently drafted, the President could have the sole authority to appoint and fire any judge. It is too dangerous to give a single person this much power.
 - SUGGESTION: (1) Amend to state which tasks could be delegated, under what circumstances and that the provision should include the procedure for delegating these tasks; (2) form 3-5 person executive committee of the members that is authorized to carry out such tasks; (3)Delete this provision in its entirety.
- Article 5 -gives the President of the Higher Judicial Council the sole power to convene meetings.
 - COMMENT: Gives too much power to one person
 - SUGGESTION: Amend this provision to read: “The Council meets at least once a month upon a call from its President [OR UPON REQUEST BY NO LESS THAN X MEMBERS OF THE HIGHER JUDICIAL COUNCIL]...”
 - COMMENT: No quorum requirement
 - SUGGESTION: add in the requirement of the presence of a simple majority of the members in order for a meeting to take place
- Article 6 (1)- discusses the establishment of a three-member committee
 - QUESTION/CONCERN: Is this 1 committee for both (A) & (B) or 2 separate committees?
 - COMMENT: vague language
 - SUGGESTION: change from (oversee) to (receive and present recommendations to the council at large on the following)
 - 6(1)(A) COMMENT: vague language – need to define what (professional rights) are.
 - SUGGESTION: define what (professional rights) are
- Article 6 (2)-
 - QUESTION: what is the commission ‘at large’ in the federal cassation Court?
- Article 7 -discusses the position of a General Secretary for the Higher Judicial Council.
 - COMMENT: too vague
 - SUGGESTION: should outline the structure of the staff and dictate that this structure receive the approval of the Council

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- Article 8 -authorizes the President of the Higher Judicial Council to draft the bylaws for the Higher Judicial Council.
 - COMMENT: Gives too much power to the President, he/she should not draft these alone.
 - SUGGESTION: This provision be amended to state [THE HIGHER JUDICIAL COUNCIL SHALL DRAFT THE BYLAWS AND THEY WILL BE ADOPTED BY A MAJORITY VOTE OF THE COUNCIL AND SIGNED BY THE PRESIDENT OF THE COUNCIL].

- Article 9 -states that the Higher Judicial Council established by this law will replace the one established by CPA Order No. 35. The new Higher Judicial Council will extend the old Council and will retain all the rights and obligations as stated in CPA Order No. 35.
 - COMMENT: This seems unconstitutional because the Judicial Council established in the CPA Order grants more authorities to the HJC than the current Iraqi Constitution does.
 - SUGGESTION: Amend article to repeal CPA Order No.35.

- Article 10- authorizes the President of the Higher Judicial Council to issue instructions to facilitate the execution of this legislation.
 - COMMENT: Gives too much power to the President.
 - SUGGESTION: the following amendment “The Higher Judicial Council may [PREPARE] and issue instructions to facilitate execution of the provisions of this law.” This removes the power from the President and gives it to the full Council.

- Article 11: NO COMMENTS
- Article 12: NO COMMENTS