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Iraq's Judiciary: Problems of Unrestricted Independence**

السلطة القضائية في العراق: إشكاليات الاستقلالية غير المقيدة

Abstract: This paper provides a historical assessment of the Iraqi judiciary's independence since 1921, focusing on the deviations and challenges that have been encountered since Iraq's 2003 democratic transition. These issues have emerged due to the unbalanced total separation of the judiciary from the executive and legislative branches, which has granted it "excessive" independence. The paper maintains that this pattern of independence has resulted in several clashes within the judiciary itself, ultimately leading to its politicization. It proposes several institutional reforms within the judiciary, including models for its restructure and regulation, as well as balanced relationship with other powers. These reforms would establish an independent and responsible judiciary, safeguarding it from politicization and the emergence of judicial oligarchies or dictatorships.

Keywords: Iraqi Judiciary; Judicial Independence; Democratic Transition; Separation of Powers.

ملخص: تقدّم الدراسة استعراضًا تاريخيًا لاستقلالية القضاء في العراق منذ عام 1921، مسلّطة الضوء على الانحرافات والإشكالات التي نشأت في العراق منذ تجربة الانتقال الديمقراطي عام 2003، والتي نجمت بسبب فصل السلطة القضائية فصلاً تامًا وغير متوازنٍ عن السلطتين الأخريين، ومنحها استقلالية «مفرطةً». وترى الدراسة أن هذا النمط من الاستقلال أوجد عدة صراعات داخل القضاءٍ ذاته، كما أدخل القضاء قسْرًا ضمن العملية السياسية ومعادلاتها؛ ما أدى إلى تسييسه. وانتهت الدراسة إلى اقتراح عدد من الإصلاحات المؤسسية داخل القضاء، كما أوردت عدة نماذج مقترحة لإعادة هيكلة السلطة القضائية من الداخل، ولضبط علاقتها بالسلطات الأخرى وموازنتها. وقد تؤدي هذه الإصلاحات إلى تأسيس قضاء مستقل ومسؤول، وتكبح تسييسه، وتجنّبه نشوء أوليغارشيات أو دكتاتوريات قضائية.

كلمات مفتاحية: القضاء العراقي؛ استقلال القضاء؛ الانتقال الديمقراطي؛ فصل السلطات.

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Introduction

The Iraqi judicial model is unique in Arab judicial history, particularly with regard to its independence. Historically, the judiciary and judges in all Arab countries have laboured under the dominance of the executive branch, which has prevented the judiciary from performing its role impartially and objectively, especially in matters of governance and politics. In contrast, the Iraqi judiciary offers an example of the risks associated with unregulated institutional independence, which has led to a judicial imbalance, and to the judiciary, especially the Federal Supreme Court, playing important political roles, unprecedented in contemporary Arab politics. These roles have sparked a great deal of turmoil in Iraqi society, among the political elite and among judges themselves. By looking deeper into the Iraqi experience, this study examines the problems that can emerge due to total separation of the judicial branch from the remaining branches, thereby granting it excessive, irresponsible independence. The study further suggests some approaches to attaining a balanced distribution of powers inside and outside the judiciary, thereby avoiding the emergence of "judicial oligarchies or dictatorships" and curbing the politicization of the judiciary.[1]

The removal of Iraq's authoritarian regime in 2003 led to the total collapse of the state. The process of state reconstruction was intended to pave the way for a new state radically different from the preceding one. This difference is embodied in democratic features such as the peaceful transfer of power, the separation and balance of powers, and the guarantee of political freedoms. The process of democratic transformation came as a shock, as it involved an immediate transition from a violent, authoritarian regime to one that has striven to be ideally democratic. It ignited a state of chaos in the absence of a real vision guiding the process of re-establishing state institutions.

The democratic transition resulted in a sudden, immediate shift from a state of subordination (the "judicial institution") to a state of independence (a "judicial authority"), which had constitutional, legal, and political implications. During this transition from mere judicial bodies, which were administratively subject to the executive authority, to a judicial authority, the judiciary struggled to extend its influence and acquire power within the judicial corps. Positions that enjoyed constitutional weight and power privileges emerged in stark contrast to the limited nature of the earlier bureaucratic conflict within the parameters of professional advancement.

As such, the judiciary was coercively brought into the political process and its equations, and thus into conflicts and tugs-of-war between political forces, which politicized it and impacted its impartiality. The judiciary's politicization escalated to the extent that it was forced to directly intervene in electoral conflicts – ruling on electoral appeals and certifying election results, and even assuming direct executive responsibilities in managing the Election Commission, which is supposed to be independent from all three branches of government. In terms of regime change, the newly formed judiciary suffered from the "excessive independence" that it had suddenly come to enjoy. This was reflected in the apparent confusion in the formations of power and their institutions, and in the overlap in the distribution of responsibilities and powers.

[1] This study discusses the status of the judiciary authority in Iraq prior to the amendment of Law No. 30 of 2005, "ordering" the formation of the Federal Supreme Court on 18 March 2021, which was merely a temporary political consensus to address the constitutional vacuum that had resulted from the Court's disruption following the retirement of one of its members. The agreement on the new composition of the Federal Court was tantamount to the official announcement of a new phase in its evolution and roles. The Court was completely subject to the authority of the Supreme Judicial Council, which enjoyed absolute, unlimited powers. These powers qualified the Supreme Judicial Council to play a political role which became quite apparent after the parliamentary elections in the fall of 2021 and the decisions of the Court – which arrogated to itself the authority to review the decisions of the previous court. These decisions were decisive in determining the fate of the political system: from deciding election results, to confirming the political balances within the consociational system, and the disturbances and clashes that accompanied the formation of the new government and to which the Court itself was vulnerable. And lastly, there was a clash with the region of Kurdistan following the Court's direct move to strengthen the central government.

Since 2003, Iraq's judiciary became increasingly politicized and its independence compromised. The greater the independence the judiciary gained, the more enshrined it became as a constitutional authority, rendering it more vulnerable to politicization. When judicial independence is taken to such an extreme that it evades oversight or accountability from other authorities, the politicization of the judiciary becomes inevitable. Thus, the struggle is no longer to maintain the impartiality of the judiciary and its independence from the whims of the executive authority, be it a class tyranny (oligarchy) or an individual tyranny (autocracy, embodied in a ruler's interventions to impose his own interests). Instead, it becomes an internal battle for the objectivity and impartiality of the judiciary in the face of the personal whims and interests of the judges themselves. In other words, a political or partisan oligarchy shifts to an oligarchy of judges within positions of judicial power. Instead of resisting a dictatorial president – usually the head of the executive authority who exercises hegemony over the entire state – the judiciary has to resist the dictatorial judge, or the head of the judiciary who exercises hegemony over the judiciary.

This paper explores the unregulated independence of the judiciary in Iraq since 2003, and ways to address its repercussions using a legal framework. The first section represents a brief overview of the independence of the judicial institution in the first Iraqi state (1921-2003) in its various stages (oligarchic, militaristic, individualistic, single-party regime, an authoritarian regime, and a personality cult). The second section provides a deep examination of the emergence of the judiciary in the second Iraqi state beginning in 2003, and its judicial, legal, and political repercussions. The final section proposes models and options to address the judiciary's independence.

The Independence of the Judiciary under the First Iraqi State (1921-2003)

Despite the structural, ideological, and institutional differences between successive regimes, whether monarchies or republics, the status of judicial institutions did not differ significantly in the first Iraqi state. In the first phase of state building (1921-1958), the Basic Law of the Kingdom of Iraq (the 1925 Constitution)[2] stipulated the formation of a "Supreme Court" which would be responsible for trying cassation judges as well as ministers and members of the National Assembly for political crimes or crimes related to their positions. This Court was also responsible for interpreting the Constitution and ruling on the constitutionality of laws (Article 81). These are very important powers, especially since the Court is a political council whose members are chosen either by the Senate (Second Chamber) (Article 82/3), or the Council of Ministers (Article 83) if the Senate is in recess. The Court consists of four members of the Senate, its president, who presides over the Court, and four senior judges (Article 82/3).

Despite the Supreme Court's critical role in the political system, the judiciary did not crystallize as a third constitutional authority during the monarchical era. It was an interim court which convened in response to an indictment decision by the House of Representatives regarding the prosecution of members of the executive and legislative branches, and by a decision of the Council of Ministers or one of the two chambers of the People's Assembly with regard to the interpretation of the Constitution and the constitutionality of laws (Article 82/1-2). Therefore, the Supreme Court was not formed as a permanent institution with a fixed structure, and accordingly, it did not lead to the emergence of a judicial authority parallel to the executive and legislative branches. The judiciary was limited to the courts and judicial institutions which

[2] Texts of constitutions and their amendments: the Basic Law of 1925, the Interim Constitution of 1958, the Interim Constitution of 1964, the Interim Constitution of 1968, the Interim Constitution of 1970, State Administration Law for the Transitional Period and its Appendix 2004, and the 2005 Constitution of Iraq in: Republic of Iraq, Supreme Judicial Council, Iraqi Legislation Base, accessed on 3/7/2023, at: https://bit.ly/3EWZqgL. Texts of the laws and orders mentioned in this research include: Rulers and Judges Law 31/1929, Judicial Service Law 27/1945, Judicial Service Law 58/1956, Judicial Authority Law 26/1963, Ministry of Justice Law 101/1977, Judicial Organization Law 160/1979, Coalition Provisional Authority Order 35/2003, Federal Supreme Court Law 30/2005, Supreme Judicial Council Law 112/2012, Supreme Judicial Council Law 45/2017, Public Prosecution Law 49/2017, and Judicial Supervision Law 29 / 2016.

were entirely subject to the Ministry of Justice. Absolute powers were enjoyed by the Minister of Justice, who dominated the Committee on Rulers' and Judges' Affairs and its decisions regarding appointment, promotion, transfer, penalties, and dismissal (Rulers and Judges Law No. 31 / 1929 and Judicial Service Law No. 27/1945).

Limits were placed on the Minister of Justice's absolute authority at the end of the monarchical era. However, the executive branch continued to dominate, especially with respect to the appointment of senior judges based on the Judicial Service Law 58 / 1956. This law remained in effect throughout the First Republic (1958-1963), whose "brief" interim Constitution of 1958 stipulated the independence of the judiciary and judges (Article 23). However, it did not establish a judicial authority or constitutional court, which had disappeared with the end of the monarchical era, due to the absence of permanent Constitution throughout the Republican era (1958-2003).

The 1964 Interim Constitution of the Second Republic (1963-1968) granted broader independence to the judiciary and judges (Articles 85 and 89). Judicial institutions began to be regulated, while the Constitution provided for the first time a public prosecution and a Council of State that would be responsible for the administrative judiciary and legal interpretation (Articles 91-93). Meanwhile, the judiciary enjoyed increasing independence compared to the previous era. The Judiciary Law 26 of 1963 entrusted judges' affairs entirely to the Judicial Council which, according to this same law, began to take shape as an institution, even though the Minister of Justice sometimes interfered with its powers. At the same time, the executive authority continued to dominate the Judicial Council itself, while exercising the exclusive power to appoint chief judges. Therefore, the judiciary cannot be said to have enjoyed anything more than relative independence.

The 1968 Interim Constitution reproduced the content and sequence of the articles contained in Chapter Four, "The Judicial Authority", Section Four, "Governance Authorities", from the 1964 Constitution. However, it added Article 87, which stipulated the formation of a "Supreme Constitutional Court", which would be responsible for interpreting the Constitution, ruling on the constitutionality and interpretation of laws, the legality of regimes, and the extent to which their decisions were binding. This text constituted a critical development in the status of the judiciary and a step toward establishing it in a fixed constitutional form. However, this development, which was an exception to the course pursued by the regime of the Third Republic (1968-2003), was never completed, as the Court did not form until the 1968 interim constitution was abolished less than two years after its issuance. The 1970 Interim Constitution revealed the true nature of the regime, which not only abolished the text calling for the formation of the Supreme Constitutional Court but retreated significantly from all the texts contained in the interim constitutions of 1964 and 1968, which at the time had constituted a step forward in the evolution of the judiciary.

The 1970 Interim Constitution included only two articles, one having to do with the judiciary and the other with the public prosecution in Chapter Four, which, for the first and last time, changed the appellation "the judicial authority" to "the judiciary". This explains the regime's intention in passing the Ministry of Justice Law 101/1977, which completely ruled out the independence of the judiciary by placing all judicial institutions, courts, and judges under the supervision of the Ministry of Justice, turning "the Judicial Council" into "the Justice Council". This aberrant "historical" situation, which reduced the judicial authority to mere institutions subordinate to the Ministry of Justice and treated it as nothing but a minor branch of the executive authority, was consistent with the authoritarian nature of the regime. It placed all three powers in the hands of the Revolutionary Command Council, which assumed executive authority and, practically, legislative authority as well, while abolishing the judicial authority. In fact, the 1970 Interim Constitution did not classify Chapter Four (Institutions of the Iraqi Republic) as three separate entities as constitutions

generally do. This judicial system continued for more than a quarter of a century (1977-2003) until the collapse of the third republic and the first Iraqi state.

The Independence of the Judiciary in Iraq Since 2003

1. The Transitional Phase

The "occupation authority" inaugurated a new phase in the evolution of the Iraqi judiciary by declaring, once again, its independence from the Ministry of Justice and restructuring the Judicial Council "without its being subject to any control, oversight or supervision from the Ministry of Justice".[3] The Judicial Council was thus made responsible, exclusively and virtually independently, for judges' and public prosecutors' administrative affairs, including appointments, promotions, penalties, and dismissals. In fact, the Coalition Provisional Authority (CPA) order ushered the Iraqi judiciary into a phase marked by the complete independence necessary to establish a judicial authority. The order not only revived the 1963-1964 trend toward freeing the judiciary from the executive authority, but it also ended the anomalous situation that had cracked the judiciary under the laws passed between 1977 and 1979.

Additionally, the order granted increased control within the Supreme Judicial Council to judges, who made up more than 90% of its composition, while marginalizing other branches of the judiciary, such as the public prosecution and the administrative judiciary, all aspects of which were controlled by the Judicial Council. Furthermore, it placed the legal oversight apparatus (Order 35/2003)[4] under the authority of the Judicial Council, represented therein by a single member (less than 3% of the Council's composition). Ironically, this order placed the supervisory apparatus (whose oversight role over judges is quite serious) under the authority of the judges themselves rather than granting it authority over them. In practical terms, this meant the abolition of oversight over the judiciary, which could no longer be held accountable for its actions; a serious flaw in the constitutional design.

The Coalition Authority undertook the process of creating a complete design for the judiciary in Order 35/2003, the features of which were made clear by the State Administration Law for the Transitional Period issued on 8 March 2004. The State Administration Law – which lacked constitutional legitimacy but became the de facto provisional constitution – stipulated [5] the institutional and financial independence of the judiciary and job security for judges, making it extremely difficult for them to be removed. For the first time in the history of Iraq, it established the Federal Supreme Court, a constitutional court with the authority to decide "exclusively and inherently" on the constitutionality of laws, regulations, and instructions. The law divided judicial authority, both constitutionally and functionally, into two parts: the Federal Supreme Court, which performs the functions of both the Constitutional Court and the Federal Court (i.e., the "political judiciary"), and the Supreme Judicial Council, which represents the Council of Judges (i.e., the "traditional judiciary") and regulates the balance between them. The Supreme Judicial Council nominates members of the Federal Supreme Court without the right of appointment or dismissal, while the President of the Federal Supreme Court, in return, presides over the Supreme Judicial Council.

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[3] Coalition Provisional Authority Order, "Restructuring the Judicial Council," No. 35/2003, dated 9/18/2003.

[4] The Judicial Supervision Authority is usually known as the Judicial Inspection Department in other Arab countries.

[5] The CPA faced widespread popular opposition. This opposition was led by Ayatollah Ali al-Sistani in response to the CPA's attempt, as an occupying power and in the absence of any legitimate national authority, to pass an Iraqi constitution and conclude an agreement defining the status of the occupying forces. In the end, it wrote the State Administration Law for the Transitional Phase and signed it through the CPA-appointed Governing Council as a de facto interim constitution without any legitimate legal consideration. The CPA also failed to obtain recognition by the United Nations. For details on the writing of the State Administration Law and surrounding circumstances, see: Firas Tariq Mekkiya, *Qiṣṣat al-Intikhābāt: al-Thawra al-Dustūriyya fī-al-cIrāq 2003-2005* (Beirut: Dar al-Muarrikh al-*c*Arabi, 2015; Baghdad: Civil Dialogue Forum, 2014), pp. 76-98. On the objections and challenges to its legitimacy, see Jamal Beomar, "Constitution Making After Conflict: Lessons for Iraq," *Journal of Democracy*, vol. 15, no. 2 (April 2004), p. 93.

Here there appears to be some confusion in the design of the judicial authority. With its division into two distinct branches, each branch should have its own independent administration, while the Supreme Judicial Council should be headed by the President of the Court of Cassation and not the President of the Federal Court. This appears to have been the intention of Order 35, which referred to the Court six months before stipulating its establishment. Based on a reading of the State Administration Law, the President of the Court of Cassation's deputy headship of the Judicial Council suggests that he is its de facto head, which is consistent with the nature of his job. Meanwhile, the President of the Federal Court's presidency of the Judicial Council was either decided on for personal reasons or honorary ones, i.e., it was granted for the dual purpose of confirming his leadership of the judicial authority and asserting the status of the Federal Court in the political system, which could have been confirmed simply by stipulating that the President of the Federal Court must be the head of the judicial authority without this confusion between the functions of the Court and the Council.

After the collapse of the state in 2003, the occupation authorities formed a judicial review committee to dismiss judges accused of corruption, incompetence, or membership in the Baath Party. They dismissed about 20% of the judges and made new appointments to judicial positions, including the Court of Cassation. The judges on this Court who had been appointed by the Judicial Review Committee chose the chair of the committee himself as president of the Court after he had proven himself to be a member thereof. In fact, however, he should have stepped down from the judicial positions he had been assigned to liquidate to avoid all personal conflicts of interest. The Coalition Authority then reconstituted the Judicial Council after ending its subordination to the Ministry of Justice, granting it full independence based on the appointments of the Review Committee, whereupon it was chaired once again by the President of the Court of Cassation.

The interim government, which also lacked constitutional legitimacy, having been appointed by the CPA, enacted the Federal Supreme Court Law 30/2005, combining executive and legislative powers. This authority enacted the most important laws pertaining to the judiciary and then appointed its members in a blatant violation of the democratic principle of the separation of powers. Furthermore, it granted life appointments to members of the Court. The interim government then appointed judges to the Federal Supreme Court based on the nominations of the Supreme Judicial Council. In violation of the State Administration Law, the candidates included the Head of the Supreme Judicial Council and the President of the Court of Cassation (who had nominated himself via the Supreme Judicial Council, whose members were appointed by the Judicial Review Committee, and via the Federal Court, whose members were appointed by the Judicial Council), thereby becoming the President of the Federal Supreme Court. In yet another constitutional violation, Republican Decree No. 398 / 2005 appointing the president and members of the Federal Court was issued by the Presidency Council (which lacked legitimacy, having also been appointed by the CPA) after its term had ended. However, the Presidency Council, which had been elected by the elected National Assembly, remedied the appointments by acknowledging Republican Decree No. 2/2005.

Most of these appointments might be justified by the fact that they were made through legal, or rather codified, procedures and that most of the judges appointed had qualifying experience and proven competence. The problem, however, is that the process was notably lacking in transparency and that one person possessed growing control over appointments, having amassed all powers within the judicial authority, thus turning it into a judicial dictatorship. Furthermore, the process took place during a transitional phase that lacked legitimacy given the occupation, the laws it had promulgated, and the authorities it had appointed. The process was also carried out individually, first by the head of the CPA, and then by the interim President of the Republic and Prime Minister.[6]

[6] See: Firas Tariq Mekkiya, *Lamaḥāt Istrātījiyya ḥawla Qānūn al-Maḥkama al-Ittiḥādiyya* (Sweden: International Institute for Democracy and Elections; Tunisia: Arab Organization for Constitutional Law, 2017), pp. 7-11.

In fact, the CPA (2003-2004) provided the precise and detailed design of the basic constitutional structure of the Iraqi state as it came to exist after approval of the permanent constitution and the formation of the legitimate, elected government (2005-2006). The following are some basic features of the design of the judicial authority:

1. The CPA established the judiciary with a mature and integrated vision for the first time.
2. The CPA chiefly sought to guarantee the independence of the (traditional) judiciary. To this end, it went to extremes, seeking to ensure its freedom from any oversight framework and granting judges absolute and unlimited powers in the field of the judiciary. This represents a flaw in constitutional design, even if it occurs in the context of a corrective reaction to judges' absolute subordination to the executive authority in the previous regime.
3. The Constitutional Court was established for the first time and was granted the appropriate position and sufficient constitutional power to establish a democratic system in proper balance with the executive authority.
4. The process by which the judiciary was established lacked transparency.
5. The internal design of the judicial authority was muddled.

2. Restructuring the Judiciary in the 2005 Constitution

The 2005 Constitution, enacted by the Constituent Assembly elected by general referendum, was ratified on 15 November 2005, thus becoming the permanent Constitution of the Republic of Iraq. It is the first permanent constitution in the second Iraqi state and the first permanent constitution of the republican era in nearly half a century. The 2005 Constitution devoted Chapter Three of Section Four to judicial authority. However, the passages about the design of the judicial authority are somewhat jumbled. The Constitution enumerates no fewer than six branches of the judicial authority, of which it addresses only two, while neglecting to enumerate the seventh branch, namely, the Administrative Court (Council of State), which it refers to in a contradictory general concluding article.[7] It also fails to address the nature of the relationship between the two main branches, that is, the Supreme Judicial Council and the Federal Supreme Court, and the balance between them.

The Constitution does not make any pronouncement on the issue of separating or merging the presidencies of the Supreme Judicial Council and the Federal Supreme Court, an issue that would later become the subject of intense debate. Nor does it stipulate whether to unify or distribute judicial authority after the manner of the executive branch (the President of the Republic and the Prime Minister) and the legislative branch (the House of Representatives and the Federation Council). In addition, the Constitution left the formation of both the Supreme Judicial Council and the Supreme Federal Court in the hands of legislative bodies, ignoring the details of the composition of the Council and the method by which it and the Court were formed. This also constituted a defect in the design of the judiciary which resulted later in inconsistencies and confusion in the overall structure of power.

The 2005 Constitution goes into detail on the Federal Court and its powers as an exclusive constitutional and federal court to which all authorities' rulings are subject. In a departure from its usual brevity, it expands in Article 93 on the powers of the Federal Supreme Court. In addition to its inherent power to monitor the constitutionality of laws and legislation, the Constitution allows the Court to interpret its texts and to

[7] Article 101, for example, states: "It is permissible by law to establish a Council of State concerned with the functions of the administrative judiciary, fatwas, drafting, and representation of the state and other public bodies before judicial authorities, except for those excluded therefrom by law".

adjudicate issues that arise from the application of federal laws, decisions, regulations, instructions, and procedures issued by the federal authority. The Court was also allowed to adjudicate disputes that arise between the federal government and the governments of regions, governorates, municipalities, and local departments. It could decide on disputes between the governments of various regions or governorates, as well as jurisdictional disputes between the federal judiciary and other judicial bodies, or among different judicial bodies. In addition to the Federal Court's other powers, the Constitution authorizes it to rule on charges brought against the President of the Republic, the Prime Minister, and government ministers;[8] to ratify the final results of general elections for membership in the House of Representatives; to approve the membership of individual representatives; and to rule on membership appeals.

This expansion of the Court's powers granted it constitutional authority and positioned it appropriately within the political system, where it became a credible authority that is practically involved in interpreting controversial articles on the distribution and transfer of power. However, the Constitution's oversight of the mechanism for establishing the Court, entrusting its establishment to a law whose passage would require an enhanced majority, led to a state of paralysis. As a result, the Court has yet to be established more than 15 years after the Constitution was approved. The Constitution required a two-thirds majority to pass the Federal Supreme Court Law (Article 92/Second) to ensure a consociational majority among the main components of the legislature due to the atmosphere of mistrust and mutual apprehension between them. These hindrances have prevented the law's passing, despite multiple attempts in all parliamentary sessions, some of which have even reached the voting stage.[9]

Given the critical nature of this law, there appears to be no possibility of overcoming the obstacle of consociationalism, not only at the level of the judiciary but for the entire political system due to the Constitutional Court's sensitive role in regulating the political process. Thus, the "transitional" Federal Court, which was formed under the State Administration Law of the interim government appointed by the occupation authorities, has continued to operate in its de facto capacity. This unique situation means that the Court that was established even before writing and ratifying the Constitution is the one now charged with interpreting and preserving it.

Thus, political forces have been obliged to treat the interim court formed under the State Administration Law for the Transitional Period as the de facto Federal Supreme Court, even though it was competent to interpret only the texts of the State Administration Law (Article 44/B/2), and not the Constitution or subsequent constitutions. Moreover, the exceptional circumstances surrounding the Court's formation, whose legitimacy and transparency have been called into question, have made it a subject of controversy. The constitutional power it acquired after it became an important feature of the democratic system has been eroded, especially as the 2005 Constitution was tailored to fit the interim court and was not designed with an integrated vision as in the State Administration Law, particularly with regard to the presidencies of the judicial authority, the Court, and the Judicial Council. The 2005 Constitution clearly emerged to preserve the monopoly over the judicial authority by its interim president. With time, however, this short-sightedness would lead to a serious fragmentation of the judicial authority.

In contrast to the State Administration Law, the 2005 Constitution unjustifiably reversed the order of the branches of the judiciary, prioritizing the Supreme Judicial Council over the Federal Supreme Court, while it was supposed to lay the groundwork for a judicial authority founded upon the Federal Supreme

[8] On the other hand, the executive branch was not granted such a right. All judges, not only those on the Federal Court, enjoy immunity from removal unless it takes place via judicial procedures.

[9] Several projects were proposed for discussion during the three parliamentary sessions held in 2008, and later in 2011. Amendments were made to the draft of the last project, which faced widespread criticism and was proposed for discussion in an amended form in the final parliamentary session in 2015.

Court by prioritizing the latter in order to establish its vital role in the nascent democracy. The 2005 Constitution touched upon the overall composition of the Federal Court, which was to include not only judges but religious and legal scholars as well. It nevertheless perpetuated judges' absolute dominance over the composition of the Supreme Judicial Council,[10] which would manage all other judicial bodies. This situation, which watered down the function of the public prosecution service, eliminated the judicial oversight body, and gave free rein to the judiciary without any type of oversight or accountability, was bound to lead to a dictatorship or "oligarchy" of judges.

The dictatorship of the chief justice and the existing composition of the authority and judicial positions that came into existence via non-transparent mechanisms in a time of transition should not be overlooked. This is the oligarchy that the 2005 Constitution officially enshrined by restricting the nominations of prominent members of the Judicial Council (specifically, the President of the Court of Cassation and his deputies, the head of the Public Prosecution Service, and the head of the Judicial Supervision Authority) to the Judicial Council itself. The oligarchy as such revolved in a hermetically sealed bureaucratic circle limited to a particular group in violation of all democratic axioms, including transparency in the rotation of positions, the principle of equality, and equal opportunities to run for and hold public office.

The 2005 Constitution established the independence of the judiciary, judges, and judicial authority. However, despite all these "textual" assurances, and while it guaranteed financial independence, it nevertheless yielded, with regard to everything related to the administrative independence of the judiciary, to the dangerous trap of the consociational system that followed the collapse of the authoritarian regime. This was an expected development within the atmosphere of mistrust and mutual apprehension that prevailed among societal subgroups that now lacked the sense of shared national identity that had been undermined by years of absolute rule. Therefore, appointments to important judicial positions, such as president and members of the Court of Cassation, head of the Public Prosecution Service, and head of the Judicial Supervision Authority were subject to the authority of the House of Representatives once nominations had been made by the Supreme Judicial Council.

The excessive independence granted to the judiciary by the 2005 Constitution had to be balanced to save it from the executive authority that had dominated it for over a quarter of a century. However, this should not mean balancing the judicial authority with the executive authority, in a similar manner to how the State Administration Law balanced the Federal Court for internationally dictated political purposes.[11] At the same time, this should not mean balancing the judicial authority with the legislative authority, because the natural result is the politicization of the judiciary, exposing the most critical and sensitive judicial positions to political deals and bargains and undermining the judiciary's partisan neutrality. It was, after all, possible to strike a proper balance between the independence of the judicial authority and its accountability.

3. Practical Problems in Legislation and Practice

Supreme Judicial Council Law 112 / 2012 stipulated that the President of the Court of Cassation serve as president of the Judicial Council, while excluding from its membership the President of the Federal Court. In so doing, it separated the presidency of the Federal Court from that of the Judicial Council. In effect, the Vice-President of the Court of Cassation, Judge Hassan Ibrahim al-Humairi, was appointed President of the

[10] A similar debate is taking place in Algeria regarding judges' dominance over the Supreme Judicial Council. See: Yasin Mazouzi, "Dawr al-Majlis al-Aʿlā li-l-Qaḍāʾ fī Taʿzīz Istiqlāl al-Sulṭa al-Qaḍāʾiyya," *Al-Bāḥith Journal for Academic Studies*, no. 11 (June 2017).

[11] Balancing the authority of the Constitutional Court with the legislative authority, in which the Shiite Islamists were expected to achieve an overwhelming majority, as actually happened later, would have turned the Constitutional Court into something similar to Iran's Guardian Council, which would have spelled disaster for US policy in the Middle Eastern region. For a review of the circumstances surrounding the design of the Federal Court under the State Administration Law, see: Larry Diamond, *al-Naṣr al-Mahdūr: al-Iḥtilāl al-Amrīkī li-l-Juhūd al-Mutalakhbiṭa li-Iḥlāl al-Dīmuqrāṭiyya fī al-ʿIrāq* (Dubai: Gulf Research Centre, 2007), pp. 194-196.

Supreme Judicial Council on 11 February 2013, but the Federal Supreme Court overturned the law on 16 September 2013 via Resolution 87/2013,[12] thereby restoring its president as head of the Judicial Council.

On 10 February 2016, the House of Representatives voted to recognize Judge Faiq Zaidan as president of the Court of Cassation, which had been administered by proxy since 2004. Thus, this position was separated from the positions of head of the Supreme Judicial Council and president of the Federal Supreme Court in preparation for the separation of the latter two. On 12 January 2017, the Iraqi House of Representatives voted suddenly, and amid a heated debate, on Supreme Judicial Council Law 45/2017, which again excluded from its membership the President of the Federal Court or any representative thereof, thus officially separating the two bodies and their presidencies.

The President of the Federal Supreme Court seems to have felt that he could not continue combining the three judicial positions. Hence, it was agreed to separate the two main branches in exchange for him retaining the presidency of the Federal Court and ensuring its independence outside the Judicial Council. The Federal Court did not strike down the Supreme Judicial Council law in 2017 as it had done to the same law in 2013. Rather, it struck down only the articles related to the balance of the Judicial Council with the Federal Court (Resolution 19/2017). It excluded the preparation of the Federal Court's budget from the Supreme Judicial Council, which, according to the text of the 2005 Constitution, is responsible for preparing the judicial authority's budget, pointing out the contradiction in its texts in this regard. This contradiction emerged because the Constitution had been tailored to suit the head of the judiciary at the time. The Court also abolished the Supreme Judicial Council's authority to nominate members of the Federal Supreme Court.

In an attempt to pressure the House of Representatives to promulgate the court law and ensure its complete separation from the Judicial Council in Resolution 38/2019, the Federal Court also struck down Article 3 of the currently effective Federal Court Law, which the interim government promulgated via Legislative Decree 30 / 2005 relating to the Judicial Council's nomination of the president and members of the Federal Court. The article struck down by the Federal Court is the same article under which the current president and members of the Court were nominated, as it was issued based on the State Administration Law and not the 2005 Constitution, which indirectly calls the legitimacy of the current Court itself into question.

It seems strange that the Supreme Judiciary Council objected to this decision, forgetting that the decisions of the Federal Court are final and binding on everyone, according to the text of the Constitution, and filed a case before the Federal Court itself (63/2019). In the case, it demanded the protection of judges' "right" to be nominated for membership in the Federal Court, when it was the Supreme Judicial Council itself that had challenged the constitutionality of this "right" in the law that had been issued two years earlier, and which the Court had overturned at the time based on the Council's challenge.

It was clear that an open battle over positions in the judiciary was fuelled by confusion in the organization of the judiciary and conflicting constitutional texts concerning the design of the power structure based on personal interests. This conflict between the Federal Court and the Supreme Judicial Council then escalated in a way that reflected badly on the reputation and prestige of the judiciary, as both parties resorted to measures that violated legal norms. The situation deteriorated to the point of wrangling, name-calling, and insults in the media, as each questioned the legitimacy of the other. This crisis was exploited by the Judicial Council when a member of the Court retired, leaving the Council unable to meet its quorum at the beginning of 2020. Resolution 38/2019 resulted in a legislative vacuum in the Court regarding its formation, or, at the very least, the process of filling a vacancy in its membership due to retirement or death.

[12] Federal Court decisions mentioned in this research include: 87/2013, 19/2017, 38/2019, 63 / 2019 at: The Federal Supreme Court website (images of the decisions), accessed at: https://bit.ly/3IJz3fo. The Iraqi Legislation Base website (texts of decisions), accessed at: https://bit.ly/3Zjmw9n

Worsening contradictions and conflicts relating to the structure of the judicial authority now necessitate its reorganization based on an integrated vision that ensures balance among its branches, as well as between the judiciary and other authorities. Similarly, it is imperative to address the aberrations that have plagued the judicial authority during transitional periods that have lacked legitimacy and transparency. The legislative vacuum related to the Federal Court will in turn lead to a constitutional vacuum that will impact the peaceful transfer of power, which is the most critical point in today's fragile political system. The 2005 Constitution requires the Federal Court to ratify final election results; accordingly, the electoral cycle (election of the House of Representatives and the formation of a new cabinet) – indeed, the entire political process – rests on the enactment of the Federal Court Law.

Supreme Judicial Council Law 45/2017 established judges' dominance within the Council as drawn up by Coalition Authority Order 35/2003, where judges make up 90% of the Council (18 out of 20 members). The Council is headed by the President of the Court of Cassation. The Supreme Judicial Council law establishes dominance not only by judges (a dictatorship of judges), but by the Judicial Council itself (an oligarchy of judges). The Judicial Council is responsible for judges' promotions. However, this includes the appointment of the presidents of courts of appeal and the nomination (in effect, the appointment) of the president and members of the Court of Cassation and the head of the Judicial Supervisory Authority, who make up the membership of the Judicial Council itself.

In effect, then, the Judicial Council appoints itself, and there is no term limit for membership. Its members retain their membership until they are retired, thus replaced individually in a way that ensures the ongoing influence of the Council's existing makeup. This practice militates against transparency in the rotation of positions within any authority, including the judicial authority. Finally, the Supreme Judicial Council Law perpetuates dominance by the President of the Council (an autocracy of the President). Now that the position of Vice President of the Council has been abolished, the Council is allowed to delegate some of its tasks to the President individually, but not to a group of its members, or to a committee made up of a number of them. The law authorizes the President of the Council to determine the details of the Council's administrative structure and issue instructions on how to implement the Council law. Moreover, it authorizes him to carry out these tasks alone, even without a vote or delegation by the Council.

As for the Public Prosecution, Public Prosecution Law No. 49/2017 (Article 2) details a broad range of critical tasks undertaken by the Public Prosecution Service. Members of the judiciary have long called for a re-activation of the role of the Public Prosecution, which was rendered absent for decades by the dictatorial regime. In reality, however, such calls do not appear to be sincere. The Public Prosecution in Iraq is limited to the deputation of judges (434 out of 1,600 judges, or about 25% of their total) on an individual and temporary basis, and sometimes by the Supreme Judicial Council itself, to carry out the functions of the Public Prosecutor and Assistant Public Prosecutor. The apparatus has no administrative or institutional structure, nor even a website.

Indeed, the Public Prosecution Law, which was submitted and whose enactment was overseen by the Supreme Judicial Council itself, does not establish the Public Prosecution as an institution. The Public Prosecution is represented on the Judicial Council by only one member (the head of the Public Prosecution Service) out of 20 (i.e., 5% of its total membership), even though public prosecutors make up 25% of the judiciary. Furthermore, it is the Supreme Judicial Council that nominates the head of the Public Prosecution Service to the House of Representatives for appointment. Although the Public Prosecution Service is limited to the deputation of up to a quarter of all judges, the Judicial Supervision Authority is virtually non-existent, limited to only two employees, namely the head of the Authority, his deputy, and eight deputed judges

who supervise approximately 1,600 judges and prosecutors in 157 courts which rule on nearly 1.5 million cases annually.[13]

The Judicial Supervisory Authority does not exist as an institution, having no appointed supervisors, no institutional formation, no administrative staff, and no annual budget. Furthermore, it is entirely subordinate to the Judicial Council. Judges are deputed as judicial supervisors by the Supreme Judicial Council on an individual and temporary basis and are represented on the Judicial Council by a single member, that is, 5% of the council's membership. Its president is also nominated by the Judicial Council. The fact that this is how the Judicial Oversight Authority operates 15 years after the adoption of the Constitution points clearly to the lack of transparency in the judicial authority, while also raising doubts concerning its bureaucratic corruption, as it reveals a deliberate intent to skirt the Constitution and evade any oversight or control.

It is truly ironic that while the Judicial Supervisory Authority is supposed to be a supervisory body that oversees the conduct and discipline of judges and prosecutors, in reality, it is entirely under the management of the Judicial Council. This constitutes an egregious flaw and a fundamental contradiction in the design of the judiciary which originated in the 2005 Constitution itself.

The consociational paralysis relating to the passage of the Federal Court law and the appointment of new staff, or, at the very least, the replacement of some of its members, has perpetuated the Court's transitional status and the existing staff, who did not obtain their positions through transparent, sound mechanisms, and whose interests are served by the indefinite continuation of the status quo. Sooner or later, however, the Federal Court will have to step into its role in the political process, engage in its complexities, and recognize the impacts of this role on its reputation and impartiality.

In fact, the Court has issued a number of decisions that have had a significant impact on the political process and the constitutional system. Because of these decisions, the Court was widely accused of political bias toward certain parties. These decisions ultimately led to an imbalance among the branches of government in favour of the executive branch, which reinforced the dominance of the prime minister. Consequently, a change to the Court has become a basic demand for political reform, as was evident from the widespread demonstrations that began in the summer of 2015. In some of its decisions, the Court has adopted a literal interpretation of the Constitution which displayed inadequate constitutional knowledge and understanding. Some of them were weak or lacked a clear rationale, while others, though solid, raised questions concerning the timing and circumstances of their issuance.[14]

Regardless of the Federal Court's decisions, the constitutional and political controversy they have sparked, and the accusations of partiality on its part, certain decisive positions and cases have pointed unambiguously to the politicization of the judiciary and its subservience to political forces. This has undermined its reputation, despite the hypothetical excessive independence provided by the Constitution to the judiciary. These positions, mostly public and frequent, have manifested in the judiciary's political will to issue or revoke a ruling, or retreat from its decisions[15] concerning political leaders. This implies either

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[13] For the number of judges, public prosecutors (with a total of 1,574), and judicial inspectors, and the number of courts and cases, see *al-Majmūʿa al-Iḥṣāʾiyya al-Sanawiyya li ʿĀm 2017* (Baghdad: Ministry of Planning - Central Bureau of Statistics, 2018), pp. 839-840. The Judicial Supervisory Authority is reported to have 11 members, including its head and his deputy, which means that there are only nine supervisors. According to the latest update, the number of judges and public prosecutors came to a total of 1,598. See the website of the Supreme Judicial Council: The Judicial System, Supreme Judicial Council**,** accessed on 7/3/2023, at: https://bit.ly/3kOenuE. The website provides a summary of basic information related to the judicial system in Iraq. It is also important to include the administrative and military judiciaries, which fall outside the authority of the Judicial Council. However, the website omits any reference to the Judicial Supervision Authority, despite being one of the basic components of the Council, the number of its staff, and its working mechanism. This lack of transparency serves to conceal the fact that the Authority plays essentially no role.

[14] Muhammad Youssef, Muhammad al-Ghannam & Firas Mekkiya, a*l-Sulṭa al-Tashrīʿiyya li-Majlis al-Nuwwāb al-ʿIrāqī: Dirāsa Muqārana* (Tunisia: Arab Organization for Constitutional Law, 2017), pp. 11-13; Mekkiya, *Lamaḥāt Istrātījiyya*, pp. 11-13.

[15] This usually happens in precise synchronization with a given political agreement, in response to a given political climate or process, or via formal procedures. It tends to involve convictions in terrorism cases, some publicly documented through confessions by the accused while they were not in custody, and where there were no suspicions that they had been subjected to torture or coercion.

that the charges were originally fabricated based on the political authority's will – usually the executive branch – or that the judiciary has vetoed its rulings, likewise according to the political authority's will. In any case, this signifies the politicization of the judiciary and its loss of the independence that enables it to fulfil its duty of achieving justice.[16]

Not limited to decisions and rulings in cases involving political leaders, the politicization of the judiciary has extended to individual judges as well. Documents and other evidence, leaked for political purposes, demonstrate how judges have deviated in their rulings according to partisan, sectarian, or ethnic interests. Arrest warrants issued by investigative judges against partisan figures have likewise been used as crass ploys with the intention of extortion or settling personal scores.

This problem was exacerbated by a state of lawlessness and weak state control over the security situation. No fewer than two civil wars broke out in Iraq within a single decade, while local communities fell back on clan and tribal affiliations in an attempt to ensure social control outside the framework of the state. The tribal social system managed to establish a parallel customary judiciary which frequently undermined the prestige, and even the very existence, of the state's formal judiciary. In addition, Iraq witnessed the growth of an armed tribal authority that was increasingly difficult to control, accompanied by the growing authority of the military organizations that had assumed the task of defending Iraq and liberating the lands occupied by ISIS following the collapse of the Iraqi army. All of these factors disturbed civil peace and posed a threat to security and the state's ability to monopolize power. In the absence of a legitimate authority that could provide them with the protection they needed to perform their jobs impartially and fairly, judges were subjected to personal threats and attempts to influence their rulings by force.

Proposed Reforms

Institutional Reforms[17]

Before discussing the design of the judiciary, I will first touch upon some of the elements needed to reform the judicial system in Iraq, which include: the enforcement of rulings, enhancing judges' political expertise, the administrative judiciary, the public prosecution service, and judicial oversight.

a. Enforcement of Rulings

Despite the high degree of institutional independence it has been granted, the judiciary tends to be one of the weakest constitutional authorities due to its lack of real power, as embodied in the influence and wealth possessed by the executive authority, and the public representation and communication enjoyed by the legislative authority. As a result, the judiciary is held entirely hostage to the executive authority. The authority to carry out judicial rulings is usually limited to the Ministry of Interior or the Ministry of Justice, whereas the judiciary has no authority in practice. Therefore, the "Judicial Enforcement Authority", or the body responsible for implementing judicial rulings, should be attached to the judiciary and, specifically, to the Supreme Judicial Council.

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[16] A thorough examination of examples of this phenomenon would go beyond the scope of this study. However, certain salient cases may be mentioned: instructions issued to the judiciary to rescind the de-Baathification ruling against Saleh al-Mutlaq and Dhafer al-Ani based on a political agreement between the Prime Minister and the Speaker of Parliament; the convictions and subsequent acquittals of Mishaan al-Jubouri, Laith al-Dulaimi, Khamis al-Khanjar, and Rafiʿ al-Issawi; the convictions of Tariq al-Hashemi and Atheel Al-Nujaifi and the rumored deals to acquit them; and the arrest and subsequent release of those who participated in the demonstrations of Fall 2019, as well as their mass release based on a political order issued by the new Prime Minister.

[17] I am indebted for the diagnosis of the judicial system and its problems to a series of workshops organized by the Council of Advisors, the Prime Minister's Office, 2019-2020, in one of which I met the President of the Supreme Judicial Council, Judge Faiq Zaidan, and the Head of the Public Prosecution Service, Judge Muwaffaq Mahmoud al-Ubaidi.

b. Political Experience

Despite their professional competence, judges generally lack a keen political sense, as their study and practice are limited to the traditional judiciary. This situation impacts judges' awareness of the seriousness of moving from the status of a judicial institution to that of a judicial authority, the role of the judiciary in the political system and the balance of powers, and specifically, the vital role of the Constitutional Court in preserving the democratic system. This state of affairs is not well suited to the change that has occurred in the position of the judiciary in the second Iraqi state since 2003. First, the study of constitutional law should be intensified, and not be limited to the first year of law faculties' curricula, when students have yet to mature either as persons or as legal scholars.

Further, the focus in constitutional law curricula should be on the various political systems rather than on general theory, and on constitutional rather than theoretical jurisprudence. In this regard, the Judicial Institute – the academy which specializes in training judges[18] – cannot afford to continue limiting itself to general instruction without any sort of specialization. Two of the most important specializations are those of constitutional and administrative jurisprudence. It will also be necessary to create specializations for which there will be a growing need, such as commercial and financial jurisprudence.

c. Council of State

Article 1 of the 2005 Constitution charged the Council of State with three tasks: administrative judiciary, issuance of fatwas and drafting, and representation of the state apparatus and other public bodies before the judiciary.[19] These tasks may seem contradictory, especially the combination of the administrative judiciary with state representation, while drafting and the issuance of fatwas, and particularly drafting, are central to the work of the legislative authority (the House of Representatives, the legal department, or via the creation of a legislative department). In fact, they might be included within the formations of the Federal Supreme Court (in its capacity as the Constitutional Court, if the House of Representatives is not qualified to carry out this role), which should also perform the function of issuing fatwas in keeping with its duty to interpret the Constitution.

Currently, there is no harm in the Federal Court undertaking these two roles, which it can perform efficiently. Indeed, this is what gives it broader and more robust powers. However, the process of transferring and regulating these powers requires a constitutional amendment, which does not appear to be possible at present. When redesigning the judicial authority, the function of the Council of State should be limited to the administrative judiciary now that it is receiving more attention in teaching, training, and specialization.

The Council of State has been neglected by the Constitution. It has also been a subject of dispute by the executive and judicial authorities against the backdrop of the old legacy of the former's dominance over the latter. Thus, the Council of State should be granted a constitutional status commensurate with the importance of its function by being recognized as a branch of the judiciary. Indeed, the judicial authority has at times been completely absorbed, as was the case of the State Shura Council (currently the Council of State) during the Third Republic.

It is not reasonable for the Administrative Judicial Court to be subordinate to the executive authority when the Constitution provides explicitly for the independence of the judiciary, nor for the Administrative Judicial Court to become an independent body outside the judicial authority as is the case now, to the exclusion of all other civil judicial bodies and institutions. However, this is a matter that can be addressed by legislation that is consistent with the Constitution. In fact, the prospects for reforming the administrative

[18] See: The Republic of Iraq, Supreme Judicial Council, Judicial Institute, accessed on 7/3/2023, at: https://bit.ly/3IQFFsh

[19] See: Introduction to the Council of State, in: The Republic of Iraq, Council of State, accessed on 7/3/2023, at: https://bit.ly/3L1mT4t

judiciary (generally, and in Iraq specifically) are limited to this sphere, given that the constitutional role of the administrative judiciary in maintaining the proper balance of powers in a democratic system is still far from being fulfilled, even at the conceptual level.

d. Public Prosecution Service

To ensure the independence of the public prosecution from the judiciary, thereby enabling it to carry out its functions as outlined in the current law, the Public Prosecution Law will need to be re-enacted. As such, the law must establish the Public Prosecution Service as an institution that enjoys independence from the Judicial Council in its administrative and financial structure, formations, and departments, similar to the laws governing all other institutions of the Iraqi state. Similarly, the law should establish the independence of the public prosecution corps from the judicial corps, and provide for legal professionals (graduates of law faculties, lawyers, and even judges, hypothetically) to specialize from the time they enter the Judicial Institute until they are appointed to the public prosecution corps.

e. Judicial Supervision Authority

It will be necessary to establish an independent body to which the judiciary is accountable, thereby bringing an end to the current anomalous situation where the Judicial Supervisory Authority is subordinate to the Judicial Council rather than exercising oversight over the Council. It will not be sufficient to establish the Judicial Supervisory Authority as an institution independent of the Supreme Judicial Council, nor to establish an independent supervisory body. Rather, the Supervisory Authority must be designed with special mechanisms whose membership is not limited to judges (but includes the public prosecution and lawyers) or even to legal professors (to include, for example, accountants and auditors).

Furthermore, its nominations should be made not only by the Judicial Council but by multiple parties, such as relevant independent oversight bodies (the Integrity Commission, the Financial Oversight Bureau, the Human Rights Commission, and the Federal Service Council), and other branches of the judiciary, such as the Council of State and the Public Prosecution Service after being dissociated from the Judiciary Council. The percentage of judges should be neither dominant nor distinctive. Moreover, the body should be armed with real powers that, first, enable it to perform its oversight function and, second, free it from the hegemony of the Judicial Council. It should insist, for example, that in order for judges' and public prosecutors' appointments and promotions to be approved, it must grant its own approval rather than simply being consulted in a non-binding manner. Additionally, judges' rulings should be subject to a periodic review to verify their consistency with the provisions of the law.

Most of these changes would require nothing but legislative action, and rarely would they call for constitutional interventions. In fact, international law encourages the recent trend to establish an independent authority to supervise the judiciary whose membership includes a mix of judges and non-judges, both legal professionals and others, so as to prevent any authority, especially the executive, from exercising undue control or influence over others. It should also ensure that, like other public servants, judges are subject to accountability and oversight, whether this authority engages only in appointments or nominations to judicial posts, or has the power to exercise oversight, hold others accountable, and impose disciplinary sanction

2. Proposed Models for Restructuring the Judiciary

Preventing an oligarchy of judges necessitates the imposition of term limits for all senior judicial posts without exception, and in all branches of the judiciary. This includes the president and members of the Federal Court, the head of the Supreme Judicial Council, the Court of Cassation, the Council of State, the Public Prosecution Service, and the Judicial Supervision Authority, who should be referred for retirement,

even if this means leaving a vacancy. It is assumed that they have served long enough to be qualified to run for the position, which means that they can be referred to retirement even if they have not reached retirement age. Moreover, there should be one non-renewable term to forestall bargaining and deals over positions.

In parallel with the judicial reform process, the design of the judiciary should be balanced, one that both guarantees its independence and ensures that no authority encroaches on the powers of other authorities or dominates the political system. It should also prevent the emergence of unlimited powers within any authority that may pave the way for corruption or a bureaucratic monopoly on power. The judicial authority should be designed, or redesigned, in Iraq specifically in keeping with an integrated vision of the role of the judiciary in the political system, and the importance of ensuring that the judiciary functions within the proper bounds. The judiciary can be held in check by virtue of the powers exercised by the Constitutional Court and the mutual balance with other authorities, which subjects the judiciary to accountability and oversight via the other authorities and places a check on excessive independence, while at the same time allowing both the judiciary and judges the independence they require.

The judiciary should also be designed in a manner that addresses the ambiguity in the Constitution and other legal texts concerning the structure of the judiciary and its branches resulting from the distorted vision of the drafters of the 2005 Constitution and conflicts of interest. Additionally, the imbalances that arose due to the lack of transparency that marked the transitional period and the absence of a legitimate authority should be considered.

It is necessary to preserve the independence of the judiciary from the executive authority as guaranteed by the 2005 Constitution, thereby preventing a return to the situation during which the judicial institution was subservient to the political will of those in power under the dictatorial regime that ruled the country for over a quarter of a century. It is also necessary to preserve the independence of the judiciary from the legislative authority within a nascent democracy that is still scattered and turbulent, since granting the latter even some limited powers will render the judicial authority vulnerable to partisan quotas in a consociational system based on tacit understandings outside constitutional frameworks, as in the experience of "independent" bodies, some of which (such as the Election Commission) collapsed as institutions due to the loss of their independence and their open division along party lines. Hence, the judiciary must be spared this unhappy fate, which could politicize it to the point where its impartiality is destroyed.

The Constitution clearly and explicitly authorizes the House of Representatives to appoint the president and members of the Federal Court of Cassation, the head of the Public Prosecution Service, and the head of the Judicial Supervision Authority (Article 61/Fifth/A). However, this is precisely what should be avoided, if only temporarily, by having the House of Representatives delegate this power to the Supreme Judicial Council as part of an amendment to the law pertaining to the latter, or by means of a "political" agreement to have the House of Representatives limit itself to the formal ratification of the nominations made by the Supreme Judicial Council, with the understanding that later, this clause must be struck entirely from the Constitution as one of the amendments being called for to reform the political system.

Therefore, it is not possible – in either the Iraqi case or similar cases of fledgling democracies that have just emerged from authoritarian or dictatorial regimes – to balance the judiciary with either the executive or the legislative authority. Nor can it be balanced with the fourth authority (the "independent bodies"), a concept which has not yet been crystallized in Iraqi constitutional jurisprudence, or as a constitutional authority with a clear role in balancing the political system. Moreover, even if the role of such independent bodies is spelled out, they remain recently formed institutions that cannot counterbalance the judiciary with its firmly established institutions. However, the executive authority should be subject to oversight and control by competent independent bodies (such as the Integrity Commission, the Bureau of Financial

Oversight, the Federal Service Council, and the Human Rights Commission), to affirm the authority of independent bodies as a constitutionally recognized fourth authority, and to limit the absolute power of the judiciary. This must be emphasized in the future Constitution, or in current legislation. This does not mean that we have exhausted all possibilities for a constitutional design which ensures that the judiciary does not monopolize power. After all, the judiciary can be balanced by the judiciary itself, by dividing it functionally and administratively into branches which themselves act to balance each other out and prevent a monopolization of power by any one of them through a process of mutual oversight. Three models can be proposed in this regard; however, this is best done following the reorganization of the Supreme Judicial Council.

The Supreme Judicial Council needs to be reconstituted in a balanced form. The first way to do this is by reconstituting it as a council of the judiciary, as it is now, with all judicial bodies represented on an equal footing, and its membership limited to the President of the Court of Cassation, the Public Prosecution Service, the Judicial Supervision Authority, and the Council of State, or with its membership extended to include their deputies, at the most. Here, practical necessity will require the establishment of another formation, that is, a Council of Judges. The second way is reconstituting it as a judicial council only, as it was in the past – with its membership limited to the president of the Court of Cassation, his deputies, and the presidents of the courts of appeal, without its interfering in the affairs of other branches of the judiciary. In this case there would be no occasion for the membership of the head of the Public Prosecution or the Judiciary Supervisory Authority. The reason for this contradiction is the evolution that has occurred in the functions of the judicial establishment and the need for genuine roles for the prosecution and supervisory body, together with the ongoing existence of the same old structures (the Judicial Council, which was originally the Council of Judges).

Judges' inadequate political experience generally has become evident in many decisions handed down by the Federal Court.[20] Indeed, this Court, supposedly composed of the finest of all judges, has revealed a lack of awareness of the varied impacts of its decisions and their negative effects on the stability of the political system, and on ensuring that the emerging democracy does not go off track. Therefore, it would be preferable to infuse the Court with non-judges and jurists (such as professors of political science and experts on Sharia and positive law as stipulated in the Constitution). This would convert the Court into something like a constitutional council, which would, through its decisions and rulings, be better able to maintain the stability of the constitutional system and its administration. In this regard, there is an urgent need to expedite the enactment of the Federal Court Law to overcome the obstacle of consociationalism so that the Court can assume its true constitutional role and to avoid the constitutional vacuum.

The first model for redesigning the judicial authority involves acknowledging the realistic division of judicial authority between the Federal Supreme Court and the Supreme Judicial Council in a way that parallels the division of executive authority between the President of the Republic and the Prime Minister, and of legislative authority between the House of Representatives and the Federation Council. The mutual balance between the two branches is based on each of them exercising oversight over the other in the areas of appointment and dismissal. For example, the Supreme Judicial Council appoints (or chooses, nominates, or has veto power over) members of the Federal Court from among the judges. Similarly, the Federal Court appoints (or chooses, nominates, or has veto power over) members of the Supreme Judicial Council, while each of these two bodies has the power to try or initiate a lawsuit against a member of the other branch in order to hold it accountable for this or that action or failure to act. This model is the least radical, and the most likely to be implemented. However, it would also be the least beneficial, as it would

[20] Yusuf, al-Ghannam & Mekkiya, pp. 11-13.

keep other branches of the judiciary under the control of the Judicial Council and would not allow them to grow either functionally or administratively as independent entities. As such, it would provide only a limited degree of balance.

The second model involves redesigning the judicial authority based on its five branches (the Federal Court, the Judicial Council, the Council of State, the Public Prosecution Service, and the Judicial Supervisory Authority), each separate and independent from the others. This is an expansion on the first model to include the remaining branches of the judiciary, in order to activate their roles and enable them to carry out their functions by bringing them out from under the Judicial Council and eliminating the dual function now being performed by the latter. The balances among the branches will be based on what is possible. Specifically, each branch will submit nominations for its own presidency. These nominations will be made by the branch's board of directors, not by the former president like an inauguration or "coronation". This will be followed by a meeting of the heads of all branches, except for the branch in question, and those involved will approve or reject the nominations of the branch concerned. This option sets out to crystallize and develop the jurisdictions of the judiciary. However, it still falls short of granting the judiciary sufficient constitutional power to counterbalance other authorities.

The third model involves an integrated design for the judiciary in an integrated manner, that is, by giving the Judicial Authority Council a permanent institutional form in which all five branches of the Authority are represented equally, with one seat for each of their heads, after an independent administration has been established for each branch. In contrast to other authorities, this council, which crystallizes the judiciary, would enjoy complete constitutional authority with a wide range of options to ensure balance among the branches. This includes nominating, selecting, appointing, vetoing, or any combination thereof for presidencies, or even the boards of directors of the branch presidencies, and managing all affairs of the judicial authority. This would be done in a joint manner that would prevent any branch from monopolizing power within itself or expanding at the expense of other branches.

In each models, it is appropriate to appoint someone to head the judiciary, lest its constitutional power be dispersed vis-à-vis other authorities. The head of the judiciary would be the president of the Federal Court per its function, given that the Constitutional Court is the true political authority of the judiciary.

The 2005 Constitution guaranteed the financial independence of the judiciary in general, and of the Federal Court in particular. However, the ambiguity in the Constitution itself regarding the organization of the judiciary and the distribution of powers between the Court and the Supreme Judicial Council, including those pertaining to the annual budget and the consequences of the subsequent struggle over influence between the Federal Court and Supreme Judicial Council, necessitates specifying via legislation the authority responsible for preparing the budget. In this connection, there should be a single unified budget for the judiciary rather than two separate budgets, one for the Federal Court and another for the Supreme Judiciary Council as is the case now.

There are three reasons for this. First, it would help to prevent chaos in the annual state budget generally. It would be unreasonable to divide the state budget into several budgets under the pretext of independence, bearing in mind that we do have separate budgets for independent bodies. Second, it would solidify the constitutional status of the judiciary as an integrated authority vis-à-vis other authorities, and not simply separate branches or judicial bodies. The balance within the budget will be between the three (or four) state authorities, not between the state authorities and the Federal Court on one hand, and between the state authorities and the Judicial Council on the other. Third, and most importantly, it would help to establish balance among the branches of the judiciary on a practical level by forcing them to submit a unified budget after engaging in negotiations and bargaining amongst themselves rather than presenting separate budgets viewed in isolation before the other authorities. This will force the branches of the judiciary to balance

themselves in other areas, such as nominations for senior judicial positions, appointments to all branches, and their mutual monitoring of one another.

Given the extreme independence of the judiciary, there does not seem to be a need to grant it excessive powers to maintain the balance among the state authorities, such as the power to initiate the removal of the President of the Republic[21] or dissolve Parliament, as the Federal Court has the absolute and exclusive authority to interpret the Constitution, which is considered a rigid constitution. Accordingly, there is also no need to grant it additional authority to rule on constitutional amendments. The Federal Court's competence to ratify the final results of parliamentary elections seems sufficient to prevent it from being drawn further into the electoral conflict. This is what happened in connection with Election Commission Law 31/2019, which limited the appointment of commissioners to the Supreme Judicial Council, judges, and advisors to the Council of State, disturbing the balance between the third and fourth authorities (the third authority being the Judiciary, and the fourth being the Election Commission as an independent body). It also produced an abnormal and unbalanced constitutional situation in which the judiciary would be the executive entity responsible for conducting elections, the judicial body deputed by the Supreme Judicial Council would be the party responsible for electoral challenges, and the Federal Court, as a branch of the judiciary, would be the final authority responsible for ruling on and ratifying election results. Additionally, the Federal Court had the power to decide on appeals of decisions made by the House of Representatives concerning the validity of its members' membership, thus giving the judiciary absolute authority to manage the electoral process without being subject to accountability or oversight.

One can imagine the seriousness of a situation where the judiciary deviates from its mission, for example, and misuses its authority by demonstrating bias for or against a given political figure or organization. The judiciary, in its various branches, may be one of the parties to the nomination or appointment of commissioners and administrations of independent bodies. However, it must not be granted absolute control, or even exclusive power in this connection. Finally, the judiciary must be granted additional powers in other areas, such as ruling on or reviewing procedures for imposing states of emergency.

Conclusion

The concept of judicial review and the formation of a Constitutional Court are critical to the transformation of the judicial institution into a judicial authority. Fortunately, by the advent of the Arab Spring, the existence of a Constitutional Court was viewed as necessary by public opinion in the Middle East and North Africa. Subsequently, awareness of the role of the constitutional judiciary as a guardian of the political system (corresponding to the king's historical role as an arbiter among authorities) first began to form among judges and jurists, albeit in an embryonic fashion. However, constitutional jurists lacked the political experience necessary for the constitutional judiciary.

The role of the Constitutional Court, which is competent to decide on the constitutionality of laws (as well as, occasionally, executive decisions and procedures), has a much more far-reaching impact than simply interpreting the texts of the Constitution. In fact, it exercises oversight over the legislative and executive authorities, and safeguards the legitimacy of the regime. As such, the Constitutional Court is in a position to protect political freedoms and rein in any deviation that threatens the democratic nature of the regime. This is evident from the powers of the judiciary, which may include sensitive functions relating to the process of preserving the political system, such as supervising elections and ratifying their results.

[21] The Federal Court is authorized to try the President of the Republic in specific cases, but if he is convicted, he can only be pardoned by the House of Representatives (Article 61/VI/B).

In the ideal scenario, if the judiciary is called upon to occupy a space that is parallel and equal in weight to that of other authorities, it may carry out additional functions, such as ruling on a declaration of a state of emergency, initiating or ruling on a dismissal of the President of the Republic, and/or the dissolution of Parliament, and/or constitutional amendments. It is here that the "independence of the judiciary" goes much deeper than merely providing job security or protection against the repression of judges as individuals. Rather, the "independence of the judiciary" serves to guarantee its ability to carry out its role as a third authority, together with the political dimensions of being transformed into an actual authority within the system. Moreover, guarantees of independence will be transformed from administrative or legal arrangements to protect judges into constitutional designs within the system of checks and balances among powers.

It follows from this that ensuring the independence of the judiciary, despite its importance in providing the neutral environment needed to enable the judiciary to achieve justice, should be counterbalanced with mechanisms for holding the judiciary accountable. Indeed, accountability is no less important than independence, and its absence can lead to bureaucratic tyranny or administrative corruption within the judiciary just as it does in connection with other authorities, be it through monopolization of power by the executive authority, or oligarchy within the legislative authority. The separation of powers includes mutual balance among them, not an absolute functional separation. Thus, the judiciary is financially accountable to oversight bodies, and its budget is determined – albeit independently – within the general budget of the state. Similarly, service legislation in all its details is subject to the authority of the House of Representatives.

However, the authority over appointments, promotions, penalties, and dismissals may at times be limited to the judiciary, and at others involve the legislative and/or executive branches, depending on the types and positions of the judges concerned. The disadvantage of limiting this authority to the judiciary is the potential politicization of the judiciary, while the disadvantage of extending it to the legislative and/or executive branch is the danger that the judiciary will be completely subject to the control of the other authorities. Nevertheless, there must be a balanced design that guarantees control over the judiciary without forfeiting its independence, or more precisely, without impacting its independence to the point where its neutrality is undermined. This issue can be addressed via numerous mechanisms, such as distributing the authority to make appointments among various parties that are independent of each other; separating the entities that make nominations from those who make appointments, and the entities that make appointments from those who carry out dismissals; introducing multiple levels or stages of dismissal in which different parties are involved; adopting detailed, strict nomination criteria; and adopting these same mechanisms when forming disciplinary or judicial oversight bodies.

There is no meaningful comparison between the subordination of judicial institutions to the executive authority in dictatorial regimes, and the constitutional independence enjoyed by the judiciary in a democratic system, no matter what problems and deviations may arise in the latter case, as dictatorship is an absolute evil.[22] The hegemony of dictatorial regimes cannot be remedied as long as they use repression as a principal means of imposing their authority. In democratic regimes, by contrast, the independence of the judiciary, especially from the executive authority and its influence, makes it possible to address deviations (which can arise subtly through favouritism and concentration of powers) through constitutional design or redesign, the distribution of powers in such a way that no specific individual or group can monopolize control, and the sustained oversight provided by a mutual balance of powers and responsibilities.

[22] "Power corrupts, and absolute power corrupts absolutely," is an aphorism attributed to Lord Acton. See: Imam Abdel Fattah Imam, *al-Ṭāghiya: Dirāsa Falsafiyya li-Ṣuwar min al-Istibdād al-Siyāsī*, World of Knowledge Series 184 (Kuwait: National Council for Culture, Arts and Letters, 1994), p. 13.

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