Tallinn University of Technology
Faculty of Social Sciences
Tallinn Law School

Dzhwar Anwar Ahmad

The Concept of Judicial Independence in The Light of Iraqi Constitution Act, 2005

Master Thesis

Supervisor: Addi Rull, LLM

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I hereby declare that I am the sole author
Of this Master Thesis and it has
Not been presented to any other
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Dzhwar Anwar
“..... “..... 2015

The Master Thesis meets the established requirements

Supervisor Addi Rull, LLM
“ ..... “ 2015

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Abbreviation

CPA Coalition Provisional authority

ECHR European Convention on Human Rights

EU European Union

JIWP International Association of Judicial Independence and World Peace

NCSL National Conference of State Legislatures

TAL Transitional administrative law

UDHR Universal Declaration of Human Rights

UN United Nations

UNSC United Nations Security Council

HRW Human Rights Watch

UNCAC United Nations Convention against Corruption

SOFA United States–Iraq Status of Forces Agreement

UNHR United Nations Human Rights

UNDP United Nations Development program

Introduction

Judicial independence as a fundamental constitutional principle is the most essential requirement for democracy and justice in the society. An independent judicial system can be only maintained by adopting the principle of separation of powers in the constitution and providing constitutional protection for the judiciary.

In order to study the concept of judicial independence in the light of the Iraqi constitution of 2005, it is important to be aware that the constitutional history in Iraq is relatively new compared with that of other developed countries. Before the enactment of the constitution of 2005, the concept of judicial independence has been mentioned in all other Iraqi constitutions. However, the recognition of this concept by previous constitutions was merely nominal and the domination of the executive and legislative was legitimized among their provisions.

The political transitions that have occurred in Iraq after the war in 2003, considered as a quantum leap which produced a number of significant changes with regard to constitutional development in the country. The new events after the liberation war resulted in drafting a new Constitution in 2005 despite the tense political climate. The new constitution adopts Federalism as a form of governance and includes several significant provisions in respect of the independence of the Judiciary.

Apparently, the current Constitution of 2005 is contemporary comparing to previous Iraqi constitutions. The new constitution includes a number of valuable modern constitutional concepts; yet, it contains several defects regarding the relation of the judiciary with the other branches of the state. The Iraqi constitution does not guarantee full independence of the judicial branch. Some of constitution articles allow the other branches to interfere with the judiciary, while other articles heavily influenced by Islam religion provisions which may create serious concerns on the ground about the judicial function and rule of law in the country.

The aim of the thesis is to examine Articles (61, 73, and 91)in the current Iraqi constitution.The mentioned articles explicitly allowed both executive and legislative to interfere in the judiciary. The thesis will also examine the improper consequences of Islam Religion's influence in Articles (2, 92) of the constitution.

In the light of mentioned above, this research aims to find answers to the following questions:

1. What are the defects in the Iraqi Constitution Act, 2005 in respect of judicial independence and which constitutional articles considered as explicit violation of judiciary by both executive and legislative branches?
2. To what extent the influence of Islam religion in the Iraqi constitutional provision affects adversely on the performance of judicial bodies and protection of Individual Rights and Freedoms in the country?

For answering questions above, qualitative, historical and comparative analyses have been used as a methodology. The research focus on identifying the defects in the Iraqi constitution with regard to judicial independence, as well as, analyzing the history of Iraqi constitutions and how the tense political salutation reflected in current constitution's provisions.In order to formulate Convincing answers to the research questions, the authoralso compares Iraqi constitution provisions andjudiciary systems of Iraq with other contemporary federal constitutions in order to explore the flaws included in both Iraqi constitution and judicial system in Iraq.

Materials and sources used in this research are various including books, national statutes, and international treaties academic articles from law journals, in addition to reliable internet materials.Because thethesis deals with constitution of Iraq, it was necessary to depend on Arabic books of some Arabic authors such as "The principle of separation of powers in the constitutions of Iraq and comparative constitutions, constitutional studies" by Ibrahim al-Fayad and "political systems and constitutional law, cultural center for publication and distribution" by Abdul Karim Alwan.

The thesis is divided into three chapters; the first chapter is a general introduction of the principle of separation of powers in relation to the concept of judicial independence. In the same chapter, the development of the concept of judicial independence in both constitutional jurisprudence and international law will be defined, additionally; the chapter sheds light on the historical stages of constitutional development in Iraq.Second chapter examines the constitutional defects in the Iraqi constitution of 2005. The chapter divided into three main subchapters. First subchapter is a study of articles that regulates the relationship between all three branches of the state. Second subchapter, examines the constitutional articles that reflect the influence of other branches in judiciary while last subchapter identifies the improper impact of Islamic religion of the constitutional provision and troubles inthe composition of the Iraqi Federal Supreme Court.The last chapter is allocated to the constitutional reality in Iraq. The chapter is divided into six subchapters; each subchapter examines

different aspects of Iraqi judiciary. The chapter explores the main common Factors between constitutional deficiencies and practical challenges poses an obstacle on the ground to the Iraqi judiciary.

1. Development of the Concept of Judicial Independence

This chapter of the thesis is divided into three subchapters. The chapter focuses on the historical analysis of the concept of judicial independence in constitutional jurisprudence, international law and constitutional history of Iraq.

Because the concept of judicial independence is closely linked to the idea of separation of power; it is important to give an overview about the jurisprudence perspective of the idea of separation of powers in relation to the judicial independence before engaging in the discussion of the main aims of this research.

The first subchapter discusses the idea of separation of powers from the perspective of most famous scholars in the field of constitutional jurisprudence.The second subchapter explores the significance of the concept of judicial independence at international level. The attention given to the concept by states, international organizations, international and national treaties will be also examined.Third subchapter is allocated to the study of Iraqi constitutional history since independence of Iraq. The subchapter will deal with the concept of judicial independence in most of Iraqi constitutions ending with the constitution of 2005.

1.1. Constitutional Jurisprudence

The idea of separation of powers is mentioned by Aristotle under the notion of "mixed government". As this principle an idea can be traced back to an ancient Greece timeline whereas this principle is highlighted in their city-states constitutions. The idea is also widely used by the Roman Republic as part of the constitution of their Republic. This model of governance was mainly based on the division of the authority of the state into three separated powers legislative, executive and judicial.

Although the doctrine of separation of powers is old and traced to medieval theories, it received a great attention and reformulated by 10th century philosophers such as the English philosopher John Locke (1632-1704) and the French philosopher Baron de Montesquieu (1689-1755).

In connection with the relationship between state’s branches, John Locke gave prominence to the legislative authority as the first objective for all states in the beginning of their establishment. In his opinion the legislative authority shall work for the common good. Hence, the legislature is not only the supreme authority in the community, but it is also sacred and unalterable authority which is not

allowed for any person, regardless of his power to issue laws which is not endorsed by legislative authority.

However, the supremacy of legislative branch does not make it an arbitrary authority against individuals and their interests, thus, legislative cannot exceed the power granted to it by community members because basically its power stems from people who elected it.

Locke also imparts a religious whiff to his conception of the legislative authority. In his opinion, those who administrate legislative authority enacting rules which aims to regulate individual actions, and individual actions, must comply with the natural instinct or the Divine will, while Divine will aim to protect human species, any legislation is incompatible therewith is considered null and void.

With regard to the rule of law, in Locke's opinion, despite the fact that the legislative stems from will of the people and govern the people in extempore way,it should be enacted preciously and clearly and any resolution of disputes must be assigned to celebrated judges. Furthermore, legislative as a supreme power in the state is obligated to preserve individuals' property and respect proprietorship in that sense, the state is not allowed to extractindividual property against their will.

By saying that the legislative is the highest authority of the state, the legislative is not permitted to waive the right of the law's enactment to any other authority. However, Locke does not consider legislative a permanent and ambidextrous authority rather than a function is assigned to certain people and for a certain period. Their duty is an enactment of laws, thus, the stability and performance are for laws not for legislative as an institution.[1]

For the executive in Locke's view, law provisions which have been enacted by legislative authority are permanent and constant.Thus, the law provisionsrequire those how can watches over lawimplementation. However, thosepeople who assigned to legislative they will turn to be ordinary people after the performance of their function and in turn, they will be subject of the law. Hence, there must be distinctive authority, beside legislative sees to law implementation, a commanded authority under the observance of legislative. Thus, if the legislative needs meet when necessary, the executive works permanently and constantly. However, this status does not mean that executive branch's function is limited to law implementation, but in some cases it has right to practice legislative function. Practicing legislative function by executive may occur in moderate

[1]Ratnapala, S.Locke and Law, John Locke's doctrine of the separation of powers: A re-evaluation. Aldershot, UK, Ashgate Publishing 2007, pp 244-274.

constitutional regimes.Forexample, in moderate monarchy regimes, the public interest requires cast aside certain affairs to the diligence of executive power because the legislators during law enactment cannot be familiar with all issues, in the same time, there are issues which are not stipulated by law or in case of unexpected situations which impose the head of executive power to make urgent decisions. Furthermore, for the sake of public interest, Locke justifies decisions made by executive authority in conflict with law provisions.

The third power in Locke's perspective is federal authority or international authority which is assigned to issues related to the relation of the society in the world, such as a declaration of war, peace and signing international agreements. However, there is a close relationship between federal and executive power, whereas the both consequently related one with another.

Locke was personally influenced by liberalism and he has had prior knowledge about authoritarian rule and its disadvantages. Therefore, he found in moderate or restricted monarchical regimes a good example for ruling as far as moderate or restricted monarchy regime does not eliminate individual freedoms and natural rights but preserve and regulate those rights. The reason is that individuals delegated the ruler the authority of observance and regulation of their natural rights. Thus, if the ruler failed to maintain his obligations, the individuals have the right to remove him.

However, John Lock's political ideas can be summarized as follows:

- All people are free and enjoy the same political rights.
- Natural rights of a human being are not a grant of anyone and it may not be violated because it is a human being Characteristics as the right to property and the right to life.
- People are all equal no one is above or below another.
- The political power may establish on a contractual basis and by mutual consent between the parties to the contract.
- The authority based on the contract and compromise is the consent of the majority.
- The government may consist on the basis of the separation of powers with upholding the legislative authority obverse other authorities.[2]

In the light of the above mentioned, Locke's notions were very advanced comparing with previous philosophers, on the one hand, he was able to distinguish between the Three authorities, and from the other hand, his views of distinction between the state and the government, in that sense, the state

[2]Harvard University's Justice with Michael Sandel, John Locke, Second Treatise of Government (1690), (2011).

remains stable even though the head of the state is changed.Locke is credited with reformulating of the Concept of public interest or the common good which has been drafted by philosophers such as Thomas Hobbes (1588-1679) in other words, Locke made natural and spontaneous harmony between individual interest and the requirements of the general interest. Notably, the ideas of Locke have had a positive resonance on the both English Revolution of 1688 and revolution in America 1776.[3]

In the same context, the French philosopher Baron de Montesquieu was the one who coined the term tripartite system which is known nowadays as "Separation of powers" or "*triaspolitica*", as a Democratic state's model of governance. In his book "Spirit of the Laws" Baron de Montesquieu divided state authority into three branches: legislative, executive and judicial. Montesquieu's works are considered to be one of the most important works in the field of jurisprudence and politic, which is also reflected later on in the constitution of the United States.[4]

Montesquieu believes that political freedom is only guaranteed in the moderate governments which does not consist an abuse of power by virtue of the principle of separation of powers, as each authority tends to limit other authorities.

In Montesquieu's opinion "constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go. Is it not strange, though true, to say thatvirtue, it has need of limits"[5]by other words, that political freedom is subject to the distribution of powers between the excising forces.

However, what Montesquieu meant is not a full separation of powers, but, he intended distinction in their functions, surveillance of each authority and their equilibrium in order not to let any authority overwhelm the other authorities, with taking into account the supremacy of legislative power. Moreover, it is important that those three authorities should not meet in one person or one institution otherwise, there would not be any freedom and as a consequence, the king or senate can make an inequitable law to be implemented in oppressive way and it is extremely important the judiciary should be separated from the executive and legislative branches.[6]

One of the most important questions is about those who are assigned to these three authorities, in

[3]W Morris, C. Critical essays on Hobbes, Locke, and Rousseau; The Social Contract Theories, New York, Rowman & Littlefield 1999, p 198.

[4]NCSL, Separation of Powers-,, www.ncsl.org/research/about-state-legislatures/separation-of-powers-an-overview.aspx

[5]Classics, C. Spirit of Laws complete edition Baron De Montesquieu. , Book XI of the laws which establish political liberty with regard to the constitution. Vol 1, New York, 2001,

[6]Iain, S. Men of Class: Aristotle, Montesquieu and Dicey on Separation of powers and the Rule of Law. Macquarie Law Journal, 2004, Vol 4.

this respect, and based on Montesquieu's view; Legislative power should remain in the hands of the people to ensure the freedoms. Yet, in states with a high population people cannot directly legislate, it becomes imperative to delegate the legislative function to a council. The delegated council represents people and legislate under their observation, thus, those representatives are elected to represent certain precincts, because usually the population of each region are better able to identify the qualified representatives. Based on Montesquieu's view and because the society consists of ordinary people and nobles, there should be two councils, one represents the public or ordinary people and the other one represents the nobility.

In connection with Executive power Montesquieu sees that this power is based on the person of the Monarch, as one person has more ability to act than several individuals, but the Monarch who holds executive power in his hand be linked to the legislative power and under legislative supervision. Thus, the Constitution gives the Monarch right of objection and preserves his sanctity, at the same time, gives legislative authority right to resist the Monarch (the executive power) through mandatory meeting of the legislative council, voting and approval of the budget and monitory of the implementation of laws.

With regard to Judiciary power, the judiciary is the authority that applies the law and solves individuals' disputes. Unlike Locke, Montesquieu consider judiciary a distinctive authority beside Legislative and executive, meaning that there is no freedom when the judiciary is ineffective, because, when the judiciary is assigned to legislative the life and liberty of the subject might be exposed to arbitrary domination, in this case, the judge and legislator would be the same person, and if judiciary joined the executive authority the judge might behave with violence and suppression.[7]Montesquieu was able by his political thoughts to shake up admittedly authoritarianism and theological ideas which has been prevailed during the reign of Louis XIV. He also was able to inflame Intellectual revolution by that time. Montesquieu has had a deep knowledge of the English constitution because his residence for years in England. This enabled him to achieve the idea of the best political system for the reform process in France in which was a moderate monarchy system, a constitutional monarchy which respect political freedom of individuals and separate between of powers.

[7]Vile, M. Constitutionalism and the Separation of Powers; Montesquieu. 2nd Ed. Indianapolis, Library fund 1998, pp83-107.

1.2. Judicial independence and international law

The human civilization in connection with the concept of judicial independence did not only stand at the announcement of ideas. The idea has been developed by seeking groups of states to issue declarations developing principles and signing international conventions.Allthose documents call for the concept of independence of the judiciary as a backbone for the dissemination of justice and protection of human rights. However, following are some international documentcalls for the importance of the concept of judicial independence:

- The preamble of the Charter of the United Nations confirms the determination of the peoples of the world to the stated conditions to achieve justice including the right to fair and independent judicial system.[8]
- Statute of the International Court of Justice: provided for the composition of the Court of independent judges.
- The Universal Declaration of Human rights establishes the right of every person to have recourse to the competent national tribunals to an effective remedy by any acts violating the fundamental rights granted on an equal footing with others and to Consider the issue of the independent and impartial tribunal.[9]
- The International Covenant on Civil and Political Rights refers to the importance of impartiality and independence of the judiciary.[10]

In the same context, in 1981 a committee of experts in Italy developed draft principles on the independence of the judiciary.The draft principles resulted in the Universal Declaration of independence of justice of the Conference of Montreal in Canada in 1983, but the most important charter with regard to the independence of the Judiciary has been formulated by the United Nations in 1985.The charter is considered to be an international source for the concept of independence of the judiciary.The first article of the charter stipulates that "the independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the laws of the country. It is the duty of all governments and other institutions to respect and observe the independence of the judiciary"[11]

[8]The Charter of United Nations, 1945, "Preamble".
[9] Universal Declaration of Human Rights. December 1948, Art 8.
[10] International Covenant on Civil and Political Rights, 23March1976. Art14.
[11]United Nations office of Drugs and Crimes. Commentary on The Bangalore Principles of Judicial Conduct, 2007, pp

The International Association of Judicial Independence and World Peace (JIWP) is also highlights the essential role of the concept of judicial independence for democracy, liberty and world peace. JIWP regulates the terms and standards which should be followed to achieve independent judicial system and set out the conditions of judicial appointments, safeguard judges and privileges should be granted to them and for the judiciary as a function.[12]

The concept was also received critical development on a regional level formalized in various legally binding documents in America, Europe and Africa.[13]

Based on the above mentioned, the concept of judicial independence is an important international principle and it's recognized by the international community. Beside the regional and international conventions, the principle has been emphasized by many international courts and human rights entities.

The attention given to the principle of judicial independence reflected in the constitutions of most of countries, especially the constitutions of democratic countries. Today, this principle is one of the basic postulates that the authorities derive their legitimacy through national constitutions.Without an independent and effective judicial system is impossible for states to enjoy the political and legal legitimacy. States with democratic political systems adheres to the concept of judicial independence in their national constitutions and by providing necessary legal mechanisms to protect the judicial apparatus far away from the executive and legislative branches.

1.3. Judicial Independence in Relation with Iraqi Constitutional History

The constitutional history in Iraq is relatively recent in comparison to the other contemporary countries. The first constitution of the kingdom of Iraq entered into force was in 1925 under the British military occupation. The constitution of 1925 remained in force until the military coup in

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11- 33.

[12]International Association of Judicial Independence and World peace (JIWP), www.jiwp.org/

[13] - Americas

• American Convention on Human Rights (1969) came into force in1978:

- Europe

• European Convention for the Protection of Human Rights and Fundamental Freedoms (1950/2010), Art 6.

• Charter of Fundamental Rights of the European Union of2000, Art 47.

- Africa

• African Charter on Human and Peoples' Rights ("Banjul Charter") (1981): Art 26.

• African Charter on the Rights and Welfare of the Child (1990): Art 1.

1958. After 1958 and the establishment of the republic of Iraq, all adopted constitutions in 1963, 1964, 1968 and 1970 were interim. The last constitution of 1970 remained in force until the occupation of Iraq in 2003. In general, the interim character of Iraqi constitutions was because the political rulers in Iraq used the constitution as a tool to achieve their goals and ambitions away from the interests of the Iraqi people.

All Iraqi constitutions, including the 2005 Constitution, has been formulated in a tense political condition. Before the enactment of the current constitution in 2005, and since 1925, Iraq has seen Military successive coups and martial law prevailing in the country.

Because the documents that underpin the three arms of government and determine the authority of each branch of the government, the political rulers in Iraqhave been always in favor of a constitution that ensure their supremacy on all state facilities including judicial bodies.

The constitutional aspects of judicial "independence" may cover impartiality ofthe judiciary in many ways such as; non-interference by the executive and legislative with court functionality, non-political appointments to a court, and/or on a guaranteed salary for the judges and administrative autonomy of judicial bodies in the country which should be all set by the constitution.[14]

In order to get an idea about the attention span of pervious Iraqi constitutions for the principle of judicial independence, the next section will discuss the history and the status of the judicial branch in the constitution of 1925, 1970 and 2005.

1.3.1. Iraqi Basic Law Act of 1925

The (Iraqi Basic Law) of 21 March 1925, amended on 29 July 1925 and on 27 October 1943, is the first constitution of Iraq. In general, the constitution indicates of human rights and fundamental safeguarded freedoms. It consists of an introduction and ten chapters, the first chapter is allocated for (the rights of the people), which consist of provisions relating to the Iraqi nationality, equality of Iraqis before the law, grounds of nationality, religion, language, personal freedom shall be guaranteed for all, property rights and other basic rights guaranteed by this Constitution to the Iraqi people.

The Chapter (5) 0f the constitution is allocated to the judicial authority. According to article 58,

[14]Judicial Commission of New South Wales, Constitutional Aspects of Judicial Independence, (200-2015) www.judcom.nsw.gov.au/publications/education-monographs-1/monograph1/fblane.htm 20 January 2015

Judges shall be appointed by a Royal Decree and they may not be removed except in the circumstances mentioned in the specific law (judicial Authority Law). Moreover, the courts are categorized to religious, civil, and especial courts. [15]

In the same context, and according to Articles (71, 72), courts shall be free from interference in their affairs and all hearings and trials of the courts shall be open to the public, except some legal justification exists for holding hearings in secret. Judgements of the courts and proceedingsis also to be published, except those relating to hearings held in secret all judgments shall issue in the name of the King.[16]

Remarkably, the basic law refers to the establishment of a Supreme Court; the court, according to the basic law is competent in matters relating to the interpretation of laws and approval of the Basic Law, as well as the trial of ministers and members of parliament accused of political crimes or crimes related to their jobs[17]

In general, the Iraqi basic law of 1925 includes a number of principles that guarantees the independence and preservers the prestige of the judiciary in Iraq. Yet, the law does not include any references to the principle of separation of powers.[18]The absence of any constitution text among the provisions of the basic law demonstrates the simplicity and lack of integration in dealing with one of the most important constitutional principles, which is, the separation of powers. Obviously, the basic law has been drafted in a severe political conditions, it simply shows the influence of the British colonialism ruler on the Iraqi government by that time. It also shows the keen of legislators to grant the king of Iraq largest amount of the constitutional powers and privileges. Remarkably, the British government represented by High Commissioner and Consul-Generalin Iraq intended to Persuade the Iraqi government for constitutional formulation that serve their interests in Iraq in line with the political reality as well as, to preserve the agreement between Iraq and Britain 1922 (Anglo-Iraqi Treaty).[19] The King of Iraq, which represents the executive authority, and Based on the recommendations of British mandate was able to grant remarkable constitutional rights. In other words, the basic law reflects an obvious dominance of executive at the expense of both legislative

[15]Jawad, S., the Iraqi Constitution: Structural Flaws and Political Implications,Historical Context, Bagdad, November 2013, p 6.

[16]The Constitution of the Kingdom of Iraq, March 21, 1925, Art (71, 72).

[17]Ibid.

[18] Ghareeb, E. Dougherty, B. Historical Dictionary of Iraq, Scarecrow press, Oxford 2004, p94

[19]Treaty of Alliance between Great Britain and Iraq, with protocol, signed, at Baghdad Oct10, 1922, in Art (III) stipulates (His Majesty the King of Iraq agrees to frame an Organic Law for presentation to the Constituent Assembly of Iraq and to give effect to the said law; which shall contain nothing contrary to the provisions of the present Treaty..).

and judiciary.[20]

Excluding the principle of separation of powers in Iraqi basic law can be considered as a severe constitutional flaw in that document which is the most important legal document in the country. Deliberate omissionof the principle of separation of powers in the basic law enabled the Kind (Faisal I) years after to use his constitutional powers to cripple the capacity of legislative and judicial branch by issuing decrees ministerial "legal" according to the basic law provisions, which were in conflict with the conflicting with known norms of separation of powers and the concept of judicial independence.

Despite the fact that the constitution did not include the principle of separation of powers, yet, a (High Judicial Council) has been establish at least *De Jure*, and the council was chaired by the president of the court of cassation, therefore, generally it can be said that the Iraqi judiciary during the time of the monarchy has had a sort of independence in compression with the Baathist rule in 1970 and beyond.[21]

1.3.2 Iraqi Constitution Act of 1970

After the delivery of the power to Baath Party in 1967, Baath leaderships intended to leave their mark on the history of Iraq. When the political situation has stabilized, a new constitution came to force in July 1970.The new constitution did not reflect the opinion of the new Baath partisans as far as it expressed the ambitions of Saddam Hussein. Saddam himself has chaired the preparing committee of the constitution, which included a bigger number of lawmakers than politicians or partisan leaders.[22]In other words, the Constitution was expressing the constitutional conception of the state that Saddam Hussein wanted to be. Nonetheless, the constitution was enacted to beInterim but in practice it continued to be in force until the invasion of Iraq, which means, after more than thirty years of legislating it.[23]

The Iraqi interim constitution of 1970 consists of fife chapter divided on 67 articles; it starts by

[20]Grote, R. Roder, T. Constitutionalism in Islamic Counties: Between Upheaval and Continuity, Phases of Constitutional Development and Separation of Powers, Oxford University Press, Oxford 2012, p334.

[21]Ehrenberg, J., Patrice McSherry, J., Sanchez, J., Sayej, C. The Iraq Papers. Oxford University Press, United States2010, p 291.

[22]Sjoberg, L. Gender Jutice and The War In Iraq, Histories For The Wars In Iraq, Uk, Littlefield Publisher2006, p113.

[23]Al Mahmood, M. Pryor, W. The Judiciary In Iraq: The Path to an Independent Judiciary and Modern Court System, 1stEd, library of Congress, 2014, p 51.

stating that the State's goal is to achieve a single Arab state and the establishment of the socialist system. The Constitution also referred to the concept (people are the source of power and legitimacy), however, this concept remained merely a slogan and Baath Party the only source of legislation for over thirty years.

Chapter (3) on the constitution deals with rights and duties which could be ideal in theory. It also identified the philosophy of education, which is contrary to the philosophy of the capitalist system, it calls for the fight against illiteracy and ensure free education for all citizens at all stages of education. The same chapter includes a number of concepts with regard to ensuring justice and fair trail such as; (the accused is presumed innocent until proven guilty a legal trial), right of the sacred defense of the accused at all stages of the investigation publiclyof the trialunless the court decides to make them secret, etc.[24]

The second section of chapter (4) under (Institutions of Iraqi Republic), the constitution refers to (The National Council), this council is supposed to be the legislative body in the country and it has limited legislative powers. In parallel, the second section of chapter (4) is allocated to (The Revolutionary Command Council), which is identified as (The Revolutionary Command Council is the supreme institution in the State), in this council, both legislative and executive is combined and it extremely restricts the National Council. Approving a council that has both jurisdictions by the constitution is simply meant the domination of executive on others government branches and constitutes an obvious in interference in legislative. Worth mentioning, the Revolutionary Command Council years later was only headed by Saddam as a president of a republic and he personally has had the final word about all legislative processes in the country. [25]

In connection with the judiciary, the third and last section of chapter (4) is allocated to identify the judicial branch in Iraq. The constitution referred to the judiciary onlyin two articles as follows:

- ‘‘The judiciary is independent and is subject to no other authority above that of the law.
- The right of litigation is ensured to all citizens.
- The law determines the way of court formation, their lives, jurisdiction, and conditions for the appointment, transfer, promotion, litigation, and dismissal of judges and magistrates.

[24]Interim Constitution of Republic of Iraq on July 16, 1970, Chapters III & V.

[25]O'Leary, B.McGarry, J. Salih, K.The Future of Kurdistan in Iraq, Autonomy in Kurdistan in Historical Perspective. University of Pynnselvina press, United States, 2005, p277.

- The law determines the posts of public prosecution, its agencies and conditions for the appointment of the attorneys general, their deputies, rules of their transfer, promotion, litigation, and dismissal."[26]

Based on the articles above, the constitution gingerly deals with the judiciary, it does not specify the sort of indecency mentioned in the beginning of Article 60. Furthermore, years later and according to the (law of the organization of judiciary system) number160/1979; the previous High judicial council dismissed and replaced by a new council called (Judicial Council), the new council was directly linked to the ministry of justice and chaired by the minister of justice.

Subjecting the judiciary to the ministry of justice basically means that the executive has the direct jurisdiction of the judicial branch. This allowed the executive to dominate all judicial institutions. Thus, those steps were taken by Baath party was not only changes in the rule of judicial in Iraq rather than a full transform of the whole judicial system for more than three decades.[27]

In practice, the constitution paved the way for executive to dominate the judiciary and use it as a mean to perform Baath party's agenda. Iraqi judiciary at the time of the rule of the Baath dictatorship of Saddam has faced a great distress and subjected to abuse, interventions, politicized and lost impartiality. Simultaneously, the Constitution has been constantly violated and ignored by the authorities.

1.3.3. Iraqi Constitution Act of 2005

The current Iraq's permanent constitution was announced by the Iraqi National Assembly and approved by the people through public vote on October 15, 2005. This constitution is the first permanent constitution for Iraq since the issuance of the Basic Law of the Iraqi in 1925.

Since the occupation of Iraq in April 2003 ،the state with its different races and sects lived a new political climate. Whereas, everyone felt that the new historical moment will determine their present and future. Every Iraqi group was feeling that if they could not find a position in the new political scene, it would be difficult to win any political gains or to claim it, especially in light of uncertain future which was open to all possibilities.

During that especial period, and because of the sensitivity of the time, each component of the Iraqi

[26]Interim Constitution of Republic of Iraq on July 16, 1970Chapter IV Institutions of the Iraqi RepublicSection IV The Judiciary, Art (60, 61).

[27]Ehrenberg, J., Patrice McSherry, J., Sanchez, J., Sayej, C. *Supra* nota 20, p 291.

society began to sketch the general features of political their behavior to identify the frame of their activities and submit own demands. Most of those demands reflected in the draft constitution of 2005. Therefore, the draft constitution was colored by Ethnic Sectarianism rather than national characteristics.

The Iraqi draft constitution was prepared inappropriate time, because the security situation on the ground was unstable. Furthermore, the effect of the previous war and dictatorship was visible on the political and social landscape. For example, the lack of Sunni Arabs representative in drafting committee, sparked outrage and concern is increased not only in the Sunni Arab majority provinces but also in the neighboring countries, especially in Saudi Arabia, Turkey and Egypt. As a result of all these internal and international pressures, increasing the representation of Sunni Arabs became possible. Thus, fifteen members have been selected as representatives to take part in drafting process.[28]

However, instead of, selecting a committee of constitutional law experts who have knowledge about the history of the country and its varied religious and ethnic disputes as usually states do during the constitution drafting process, a committee of seventy-five Iraqis have selected among a council of representatives to write the draft constitution. Most of the member was not law experts, but they more likely ethnic and religious representatives, Shiites Arab, Sunni Arab, Kurds, yazidis, Christians and Turkmen. The committee wrote the constitution draft under a severe security conditions so that, the number of attendees at each meeting did not exceed one-third of the elected body. They wrote the Constitution in three months limits.

Because this study is mainly made to deal with the judicial independence in the light of the current Iraqi constitution, it is worthy to mention that this constitution emphasizes the protection of judicial independence from the executive and legislative branches. Precisely, the Article (19) includes many important principles in respect of the independence of the judiciary.[29]

Nevertheless, the constitution contains several articles which are considered to be explicit intervention for judiciary by both legislative and executive authorities, furthermore, the influence of

[28]Ginsburg, T. Dixon, R. Comparative Constitutional Law, Edward Elgar Publishing, Northampton 2011, p 91.

[29]The Constitution of the Republic of Iraq of 2005 in Art19 includes a number of significant principles such as: the judiciary is independent with no power above it other than the law, punishment is personal, no crime and no punishment except by law. No punishment except for an act that the law considers the time it commits a crime, litigation protected and guaranteed right for all, the right of defence is sacred and guaranteed in all stages of investigation and trial and the accused is innocent until proven guilty in a fair and legal trial. *Also see* Amar, V. Tushnet, M. Global Perspectives on Constitutional Law. Independence of Judiciary, Cary, NC, USA: Oxford University Press 2008, p17.

the Islamic religion on constitutional provisions which deals with the mechanism of selecting the federal supreme court members and the conflict reflection on constitutional reality in Iraqi which also raises some other concerns for judicial independence issues. At all events, we will elaborate upon each of these topics in the next chapters.

2. Defects in Iraqi Constitution of 2005 in Respect of Judicial Independence

During the dictatorial rule in Iraq, the legislative authority was exercising simulated power represented by so-called "Iraqi National Council". At that time, the National Council was an alternative of parliament. This council was established in 1980, it consisted of 250 members that were elected every four years basis of the Baathists as a condition for membership.[30] The last session of this council was after the election of new members in 2000. However, the power of the council did not exceed proposing Draft laws to the Revolutionary Command Council for approval, and Revolutionary Command Council was in the top of the pyramid power, which headed personally by Saddam who had an absolute power and the last word upon the Command Council.

After the overthrow of the regime in April 9, 2003 by the United States and some allied countries, a Coalition authority has been formed which was known by the Coalition Provisional authority (CPA). CPA was headed by Paul Bremer. In conjunction ،Iraq became officially under occupation in accordance with UN resolution in 2003.[31] This decision has also authorized theCPA to exercise legislative powers at that time. Thus, in July 22, 2003 the C P A formed a new Council Government in Iraq, the new council consisted of 25 Iraqi members which was the second largest administrative body formed in Iraq after the occupation. However, this council has had a feeble role and continued until 28 June, 2004.

On 3 May, 2005 the government council has been dissolved and replaced by the interim Iraqi government, the interim government priority was preparing for the establishment of a permanent and elected Iraqi government for four years, as well as writing the draft constitution, and configuration it for public vote, as a consequence, the new The Constitution was adopted on 15 October 2005.

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[30] Bremer, P. McConnell, M. My Year In Iraq: The Struggle to Build a Future of Hope. New York, Simon and Schuster, Rockefeller Centre 2006, p 38.

[31]United Nations Security Council, S/RES/1483/2003,Reaffirming the sovereignty and territorial integrity of Iraq, Adopted by the Security Council, 4761st meeting, 22 May 2003.

The first article of the Constitution stipulates that the Republic of Iraq is a federal state independent and fully sovereign. The system of government is republican, representative (parliamentary) and democratic. While according to the third section under chapters (2) and (3) of the constitutional provisions, the federal legislative authority consists of two councils: Representatives and the Federation Council. Thus, the constitution applies two chamber system "Bicameral Legislature Composed"[32]as itis applicable in the United States and most of the federal states. [33]The current political system in Iraq is a parliamentary system, so that, the elected Parliament (Chamber of Deputies) or Council of Representatives has an essential role in the constitutional and political life in the state governance system, and this system has own features and characteristics as follows:

Firstly, the executive branchemerges from Parliament at the expense of the parliamentary majority, i.e., the party winning the majority or they are formed in coalition of parties constituting the parliament, and ministers are accountable to Parliament (the responsibility of individual or collective responsibility of solidarity) and the ministry does not belong to the President because their presence depends on a vote of confidence, which must be obtained. However, they are not subordinate to the parliament because the executive branch has the right to postpone the convening of parliament, the right to dissolve the parliament and the right to veto laws by the head of state. Thus, these are signs of the independence of the ministry (executive) Parliament (the legislative) in this type ofsystem.

Secondly, the balance and cooperation between the legislative and executive branches showing through equality between them do not outweigh the one or the other), thus, the balance of powers between the both branches constitute in a range of authorities governed by both of them, as executive power the right to dissolve the parliament, in return the legislative authority has the right to withdraw confidence from the ministries after an investigation and questioning them. The cooperation appears through the involvement of the ministry in parliament sessions,submitting oflaw drafts and enactment of law. While from the legislative side the cooperation appears when Parliament stand to authorize the executive branch to carry out missions legislative, or when the legislative authority, transmitting to the executive branch the inability to apply the laws through regulations and instructions which are initially acts of the legislative power. [34]

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[32]The Constitution of the Republic of Iraq of 2005, translated in Iraq, Art.48

[33]The United Arab Emirates is the only Federal state which the federal authority consist of one Council (Unitary Legislative Composed), 43 members divided on the United Arab Emirates and are to be appointed, however, in 2006 a big change has been made after passing a law allows to elect half the members of the Council, Al Tmawi, S. the three authorities in Arab constitutions in contemporary Islamic political thought. Beirut (Arabic) 1979, P 211.

[34]Alwan, A. Political Systems and Constitutional Law. cultural centre for publication and distribution, Jordan 2000, p

Regardless of the possibility of preponderance of one branch or another or in case of balance between both branches legislative and executive, the judiciary remains completely independent from both branches. Thus, the judiciary should not be a subject of interference by other authorities and judges exercise their professional responsibilities without being influenced by anyone.

Because the principle of separation of powers associated with a system of checks and balances, the independence of the judiciary has the utmost importance in this system. If the constitution is the soul of the nation, indeed, the judicial power is the value of this soul which individuals can rely on it without any discrimination between them in order to achieve the rule of law. Hence, the principle of rule of law is also essential for any constitutional system of any government, therefore, the rule of law cannot be performed without a judicial authority practices its function independently. In other words, the concept of judicial independence should be the first base of any constitutional formulation because it is related with respecting of fundamental rights and freedoms of citizens. Additionally, when the judiciary is independent, separated from the pressures of powerful interests in society and enable to establish justice without fear or favoritism, it becomes the best guarantee to establish justice and tranquility for individuals in order to achieve the rule of law society.

Back to the main point, regarding with the principle of separation of powers, the current Iraqi constitution states that the federal authorities consist of legislative, executive and judiciary, they shall exercise their competencies and tasks on the basis of the principle of Separation of Powers. [35]

In fact, this equality which is mentioned above remains a theory, while the reality on the ground is that one of the branches outweighs the other as far as having enough strength. Therefore, the legislative outweigh the executive in the absence of a parliamentary majority, or when the government of a coalition of parties in the parliament. But if the parliamentary majority is for one political party, outweigh then is for executive authority. This means, with respect to the principle of separation of powers there should be an equality of the legislative and executive-not fully separated- but there should be check and balance between them, and this is what should be reflected in functions and powers of both branches which is mentioned in chapters (1,2) of the Third Section of the Constitution.

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218. (Arabic).

[35] The Constitution of the Republic of Iraq of 2005, translated in Iraq, Art 48.

2.1. The Balance Between Legislative and Executive Branches in Iraqi Constitution

According to the constitution, the legislative branch consists of the two councils, Representative and Federation Council. The Council of Representatives is competent to (1) enactment of federal laws,.(2) control over the performance of the executive power, (3) The election of the President of Republic (4) organizing of the process of the ratification of international treaties and conventions,(5) approving the appointment of the Chairman and members of the Federal Cassation Court, the chief of public prosecutor, head of the judicial supervision, ambassadors and those with special grades, army chief, commanders and intelligence chief.

The Council of Representatives has also the power of the accountability of the President and relieves him after being found guilty by the Federal Supreme Court if he reneged on the constitutional oath, violated the Constitution or convicted of treason. The council has also right to direct questions to the prime minister and minister on any subject within their specialty, poses a general topic for discussion to clarify the policy performance of the Cabinet or one of the ministries, moreover, Representative Council has the power to withdraw confidence from a minister and prime minister, and the right to question officials of independent bodies.[36]

In the same context, the power of the Federation Council is regulated by a law enacted by the members of the Council of Representatives. However, the federation council:

1) Shall exercise the powers of the planning and implementation of public policy for the state and the general plans and overseeing the work of the ministries and departments not associated with the Ministry.

2) Propose draft laws and issuing regulations, instructions and decisions to implement the laws

3) Preparation of the draft general budget and final accounts and development plans

4) Recommending the Council of Representatives to approve the appointment of deputy ministers, ambassadors, owner's special grades, army chief and his assistants, commanders and above, head of the National Intelligence Service, heads of the security services, and also negotiation and sign international agreements and treaties.[37]

[36] Ibid, Art 61.
[37]Ibid, Art 65.

According to Article (64) The Council of Representatives may be dissolved upon the request of one-third of its members by the Prime Minister with the consent of the President of the Republic, in this case, the President of the Republic shall call for general elections, consequently, The Council of Ministers is deemed resigned and continues to run everyday business.[38]

Based on the above mentioned, we can conclude that the Iraqi constitution did not apply the strict separation of powers, especially regarding with the executive and legislative branches, but there are a balance and cooperation between both of the branches. However, this balance is non-integrated with the outweigh of the legislature, whereas the legislature (the Council of Representatives) has the power to control the performance of the executive power, while, the executive does not enjoy such a power. More than that, if the council of representatives has been dissolved upon a request of the executive, The Council of Ministers itself is deemed resigned. This means that the request upon dissolution of the council of representatives will not be feasible as a weapon for executive to restrain the legislative power, and executive authority would not use it at all if legislature exceeds its power limits. Therefore, the balance between control tools which each branch has, it cannot be achieved.

The constitution does not set any constitutional instrument for the accountability of the Council of Representatives or controlling council's acts if the council exceeded its authorities or bypass the Constitution. Hence, existing of a constitutional mechanism in this regard is essential to prevent the legislature from overtaking and restraining it when needed, notably, the constitution did not set any mechanism to remove the members of the council of representatives by a certain ratio of citizens when those members are no longer represent the interests of the people, at the time, the (Article 5) Of the Constitution states that people are the source of authority and legitimacy.[39]

It is worthy to mention, that according to Article (93para. 6), the federal supreme court has jurisdiction over Settling accusations directed against the President, Prime Minister and Ministers, whereas it would be worthwhile to include also chief of the council of representatives, his both deputies and members of the council representatives in order to guarantee Judicial review of the legislature.

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[38] Ibid, Art 64.

[39]This mechanism exist in countries with semi-direct democracy system, such as Switzerland, which boils down to the presence of representatives elected by the people but the people remain retains certain rights and powers are observe the actions of their representatives and resort to certain actions represent manifestations of democracy. Such as, right of certain number of voters in the constituencies to request for dissolution of parliament, however this depends on a number of citizens of each circle (or territory) who enjoy the right to vote. In the same context, in former socialist countries of Eastern Europe the electorate should recall parliamentarians if they break their word because are legally bound by their promises. Van der Hulst, M. The Parliamentary Mandate, A Global Comparative Study. Loss of mandate, Removal from office before a mandate expires. Inter Parliamentary Union, Geneva 2000, Pp 18-19.

Yet, with regard to the relationship between the executive and legislative branches, the constitution states that the President of Republic or Prime Minister has right to invite the Council of Representatives to a special session. Furthermore, President of the Republic, or the Council of Ministers to submit draft laws to the Council of Representatives, while the Council of Representatives has right to submit law proposals. However, this could be illogical and it should be vice versa, because submitting draft laws is purely legislative action and belong to legislative power not to the executive. Worthy to mention that according to the constitution The Council of Ministers may issue regulations and instructions and decisions to implement the laws which are also considered to be legislative action.[40]

2.2. Influence of Legislative and Executive Branches on the Independence of Judiciary In The Constitution

According to Article (87) of the constitution, Judiciary Authority is independent. The courts, in their various types and levels, shall assume this power and issue decisions in accordance with the law. In the same context, the Article (88) states that judges are independent with no power above them except that of the law and no authority has right to interfere in the judiciary or in the affairs of justice. The Constitution also gave the Federal Supreme Court under the Article (93, Para 1) the right to control the constitutionality of laws and regulations, so that, the constitution guarantees non-encroachment of other authorities in the judiciary.

The Federal Supreme court has the right to adjudicate issues that arise from the application of federal laws, decrees, regulations, instructions and procedures issued by the federal authority. The law guarantees the right of the Council of Ministers and individuals to appeal directly to the Court, as Well as, decides on disputes that arise between the federal government, the governments of regions, provinces, municipalities and local administrations. The court duty is also to solve the disputes that arise between the governments of the regions and provinces and decide about charges against the President and the Prime Minister. Furthermore, the court has the authority to approve the final results of the general elections for membership of the Council of Representatives. In addition to other privileges granted to judiciary in order to avoid any encroachment by other authorities.[41]

[40]The Constitutionof the Republic of Iraq of 2005, translatedinIraq, Art 80.
[41]Ibid, Art (97, 19).

Despite the mentioned safeguards to judicial independence, the constitution allows both legislative and executive to interfere with the judiciary. This subchapter is divided into two parts. The first part examines the constitutional articles that allow the executive to interfere in the judicial branch. The second part examines the influence of executive in the judicial branch according to the constitution.

2.2.1. The Improper Influence of Legislative on Judiciary

According to Article (91) of the constitution the Supreme Judicial Council is assigned "to nominate the Chief Justice and members of the Federal Court of Cassation, the Chief Public Prosecutor, and the Chief Justice of the Judiciary Oversight Commission, and to present those nominations to the Council of Representatives to approve their appointment."[42]

Based on the article above and Regardless of the constitutional power granted to the Iraqi Supreme Judicial Council to nominate the mentioned type of judge in the article, the appointment of them is conditioned to approval of Council of Representatives. The contribution of Council of Representative in this particular issue creates serious concerns about whether a Council of Representatives as a legislative body has the right to appoint the members of higher judicial institutions or both nomination and appointment shall only be made by the judicial branch.

Obviously, the article allows legislative branch to intervene in the judiciary because the method of choosing higher Iraqi court members is purely a judicial issue. Thus, assigning this particular task to legislative may raise concerns about the extent of protecting the concept of judicial independence by the constitution. Worth mentioning, the experience of modern states tends to provide judiciary highest degrees of independence.[43]In this respect, the European Charter on the Statute for Judges in

[42]Iraqi Higher Judicial council has been established on April 9, 2003, and reformed later on under Law of Administration for the State of Iraq for the Transitional Period or what is also called the transitional administrative law (TAL), the council (composed of the Presiding Judge of the Federal Supreme Court, the presiding judge and deputy presiding judges of the federal Court of Cassation, the presiding judges of the federal Courts of Appeal, and the presiding judge and two deputy presiding judges of each regional court of cassation), *see* The law of Administration for the State of Iraq for the Transitional Period, June 28, 2004, Art 45. Also *see* Al Mamoudi, H. The Negotiation in Civil Conflict, Construction and Imperfect Barging in Iraq: The Capacious Framework Text. University of Chicago press, Ltd, London, 2014, p 96.

[43]According to Swiss Federal Constitution, to determine the required number of judges for Higher Federal Court, Parliament is responsible for appointing the judges. to perform this, Parliament and the preparatory Court Commission depend on information with regard to the Federal Supreme Court's workload. Hence, the applicable method for appointing Judges in Switzerland is different than what it is in Iraq in sense of the role of judiciary in selecting the judges, See Swiss Federal Constitution(Art. 168 para.1).Also See, Lienhard, A. The Swiss Federal Supreme Court: A Constitutional Assessment of Control and Management Mechanisms, International Journal for Court Administration, October, 2008, Pp 3-5.

Article (2) states that judges shall be selected by independent body base the choice of candidates on their capability to assess impartially the legal issues which will be referred to them. Moreover, candidates should not be excluded because of their personal political view, ethics or social origin, etc. [44]

In the same context, and In withregard to the powers granted to Council of Representatives, the constitution in (Art 61. Para 6) states that Council of Representatives shall be competent in Relieving the President of the Republic by an absolute majority of the Council after being convicted by the Federal Supreme Court in one of the following cases:

1) Perjury of the constitutional oath.
2) Violating the Constitution.
3) High treason.[45]

Based on above, if the Council of Representatives does not decide by absolute majority of its members Relieve the President, despite his condemnation of the Federal Court for serious crimes mentioned by the article, the Federal Court decision becomes worthless and the president can continue his work as president of the Republic of Iraq,. Rather, it is assumed that the Federal Court ruling to convict the president of such crimes implemented automatically followed by exempting him from office without the need for approval by the parliament, because the judiciary is supposed to be independent in exercising its function and the court decisions shall be implemented without any dependency on any other bodies out of the judicial system.

As a comparison the constitution of the United Statesrefers to the impeachment and removal of the US president in Article (II**.** Sec. 4) By indicating that "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.)" Based on this Article it can be concluded that the constitution does not refer to the procedure of impeachment or the mechanism of removal of the president. However, the impeachment resolution procedure is usually made by the House of Representatives of United States, after that, the resolution will be delivered to the House committee on Judiciary which is standing committee for House of representative. The committee will determine whether the resolution is compatible with impeachment before sending it to the vote in a formal impeachment inquiryby the House of Representatives. The House of Representatives

[44] European Charter on the Statute for Judges and Explanatory Memorandum , Selection, Recruitment, initial Training, DAJ/DOC (98) 23,Strasbourg, 8 - 10 July1998, Art 2.
[45]The Constitution of the Republic of Iraq of 2005, translated in Iraq. Art(61, Para 6.B).

needsa simple majority to approve or reject the impeachment. When impeachment was approved by the House, the Committee will open an investigation to collect evidence for each impeachment the Committee then draft articles for every single impeachment. Once again the House votes on each article and the required votes is a simple majority. If the full House of Representatives approved one article or more with all evidence, it means the president is impeached. After that, the House of Representatives appoints prosecutors from congress and the trail will be held by the president of the Federal Supreme Court.[46]

From above, the US constitution avoided to determine the procedure of impeachment and removal the president unlike Iraqi constitution. However, the reason for impeachment, which is mentioned in Article (2) of US constitution includes Misdemeanors. And obviously, misdemeanors lesser criminal act Misdemeanors and usually the punishment of misdemeanors less severely than felonies. Which means that the US constitution drafters were more careful to include even misdemeanors because the sensitivity of the position of President and in order not go unpunished even for simple crimes. Furthermore, the procedures of impeachment and removal in US are more specific and more Accurate while in Iraq the chance of Impunity is likely higher according to the constitution provisions.

2.2.2. The Improper Influence of Executive on Judiciary

Inconjunction with the influence of the legislative branch, the constitution allows the executive to interfere withthe judiciary. The most prominent flaw regarding with the interference of the judiciary by executive lies in Article (73) of the constitution. The article regulates the presidential powersin general and also identifies the President of Republic authority for issuing a special pardon. The Article (73) states that the president "To issue a special pardon on the recommendation of the Prime Minister, except for anything concerning a private claim and for those who have been convicted of committing international crimes, terrorism, or financial and administrative corruption"[47].

The constitutional article above restricts the validity of the President to issue a special pardon with two conditions;

[46]The House of Representatives has inessential role in impeachment procedure of the president and the House committee of Judiciary which is belong to the House of Representative contribute with House in all procedural steps for more information, See T.J. Halstead. CRS Report for Congress, an Overview of the Impeachment Process. 98-806 A, The Library of Congress, 20 April2005, p3.

[47] The Constitution of the Republic of Iraq of 2005, translated in Iraq. Art (73. para.1).

Firstly, the pardon shall be issued on the recommendation of the Prime Minister.Secondly, the pardon shall not be related to private claims, international crimes, terrorism, financial and administrative corruption. In the same context, the amended Iraqi penal code of 1969 states that the special pardon shall issue by a presidential decree consequent exemption from all or some sentences or replacing the sentence of the planned sanctions.[48]

In fact, presidential privileges are included in most of contemporary constitutions all over the world such as; the constitution of the United States, Finland, Japan, and France. Still, different constitutions setting different rules, conditions and constraints which must be fulfilled before granting this particular privilege to the president. However, states in their constitutions exceedingly try to restrict this right. For instance, in Turkey, the right of pardon has been granted to the president of Turkeyaccording to the Turkish Constitution provisions. Yet, the constitution in Article (104), restricts this right only for cases of chronic illness, old age or disability. Other constitutions set complicated rules to persons who can apply for pardon such as; completing all or part of their sentence or restricting the right of pardon with misdemeanors and minor infractions. [49]

It is worth of noting, that usually States establish the conditions and rules for to justify the president's pardon power. These conditions are associated mainly with social infrastructure, political circumstances and cultural situation of the community. The proportion and quality of offenses covered by the presidential pardon, is also depends on the constitutional legislator's certainty of the legal situation and social development.

In light of the political history of Iraq, the executive branch was notoriously gone beyond its powers and competence, especially overtaking on the judiciary. The use of presidential pardons by the ruling authorities of Iraq has become something familiar in Iraq's history. In this respect, the dictatorial regime was using the right of pardon quite often to release criminals of serious crimes or to make political deals with other countries through the process of exchanging of release convicts. Therefore,

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[48]Iraq Penal code No. 111 of 1969, Art. 154. notably, the Art.138 of the code states that The expression (Presidential Council) replaces the phrase (President of the Republic) wherever they exist in the Constitution, and regulations concerning the President of the Republic after one session following the enactment of this constitution, which means the President of the Republic is not only person who issues a special pardon solo, but it is the responsibility of presidential Authority, consisting of the president and his two deputies.

[49] The Federal constitution of United of 1789 in (Art.2, section 2) grants the president of United States the right of Issue pardons for offences against the United States, except in cases of impeachment. Yet, this right is restricted with certain conditions, for more details see, Pardon Information and Instructions http://www.justice.gov/pardon/pardon-information-and-instructions (24 December 2014)., also see The Constitution of the Republic of Turkey, Duties and Powers, 7 November 1982, Art.104.

the inclusion of such provision in the current Iraqi constitution may pose a threat to the persistence of head of state in the use of this right to a certain political purposes at the time that the division of state's power in the new Iraq substantially based sectarian shares between religious and ethnic parties. Worth mentioning, the only law that illustrates this presidential right in the constitution is the Iraqi Penal Code, which in turn, does not specify any special conditions to restrict this right.

Regardless of the list of crimes mentioned as exemption from especial pardon in Article (73, para1) of the Iraqi constitution, the Article does not include serious crimes which may have direct impact on Iraqi society such as; drug trafficking, Human trafficking and incest. Bearing in mind, every constitution reflects the national customs, social norms of the society and the political climate in the country. Therefore, the enactment of the new constitution of Iraq has seen severe competitions between conflicting ethnic, religious and political parties in order to reach the highest level of power which is president of the republic and exploit the constitutional powers and privileges granted to the president for narrow partisan, nationalist or religious purposes and circumventing the judiciary.

2.3. Religious Influence on the Constitution and Straggles to Pass Laws on The Supreme Court

The subchapter sheds the light on the religious influence on the constitution of 2005 with regard to the composition of the Federal Supreme Court and the possible consequences of combining the religion with court issues.

The subchapter is divided into two parts. The first part deals with the history of the Supreme Court or constitutional court of Iraq. Historical Stages of development, the nature and constitutional role assigned to the court starting from the first constitution of Iraq in 1925 and ending with the statues of the Federal Supreme Court in the current constitution. The second part of the subchapter will examine the Article (92) of the current constitution. The article deals with the composition of the court. Apparently, the article is ambiguous and contains obvious flaws in respect of the nature of the court members, their numbers, and the mechanism of the member’s selection process. In connection, this part will also examine the legal problems in the law that regulates the court work and the impact of legal defects in Article (92) and the Law of Federal Supreme Court on the performance of the court

2.3.1. Historical Background of the Federal Supreme Court

The history of the Supreme Court can be traced back to the time of establishment of the first constitution of the Iraqi Kingdom in 1925. A separate chapter of the constitution was allocated for judiciary in Iraq ،the form of courts, their nature and method of establishment.

The Article 81 of the basic law of 1925 dealt with High Supreme Court. The court consists of eight members, four Judges and four shall be selected from Senate members and all eight members shall be appointed by the Senate through election. President of the Court is the President of the Senate. However, the constitution does not indicate the mechanism of their election nor the party that nominated their names. Furthermore, the court cannot be held without a royal agreement issued by the king with the consent of the Council of Ministers.

According to the Iraqi basic law the Court jurisdiction is the trial of ministers, members of parliament, and members of the Court of Cassation, And interpretation of constitutional texts.[50]

In the light what mentioned above, the Court's activity on the Control of the constitutionality of laws is almost non-exist and political dominance on the court is clear through the way of appointing the court members. More than that, the political dominance of King of the court is obvious because in principle according to the basic law, the Senate shall be appointed by the king himself.

In 1968 a new constitution has been enacted for the republic of Iraq, the new constitution included many revolutionary slogans and several provisions emphasize the rule of law and justice society.

The interim constitution of 1968 in an article (87) refers to the establishment of the constitutional Court, and courts duty to oversight the constitutionality of laws. Yet, the constitution does not mention the mechanism of establishment of the court or the conditions of selecting the court members.

Later on, the constitutional court has been regulated by Law No. 159 of 1968. The Law stated that the Court shall consist of a chairman and eight members and an additional member can be added in the event of interpretation of law texts. The President of the Court is the President of the Court of Cassation, or one of his deputies and Members of the Court combined of judges and senior government officials, three judges of the Court of Cassation and four senior government officials, including the head of the financial control board and head of the Office of Legal Blogging and three executives of not less than grades Director General. The Members and President of the court shall be

[50]Constitution of the Kingdom of Iraq, March 21, 1925, Art, 81.

appointed by the Council of Ministers with the proposal of the Minister of Justice.[51]

The regime in Iraq by that time was seeking to take control of all matters relating to the state management, and the spirit of prominent dominance can be seen easily in the Law No. 159 of 1968. The work of the court, the possibility to modify and Abolition has been regulated by a law which is in principle less powerful than constitutional texts. The composition of the court which the majority is for the executive power shows the regime attempts to dominate all state facilities including the highest judicial institution which is constitutional court.

In 2005 and after the war of liberation of Iraq, the Iraqi Federal Supreme Court has been established. The establishment of the court was based onthe Federal Supreme Court Law of 2005 Iraq, the courts' law was itself issued earlier, according to State Administration Law for the transitional period of 2004.[52]The State Administration Law regulated the authorities and institutionsof Iraq during the transitional period (thenfollowed the end of the Coalition Provisional Authority until the issuance of the constitution of 2005). In connection with the judiciary,the law contains a clear reference to the constitutional control over the laws and refers to the formation of supreme federal court (the current Supreme Federal Court), the court's function is constitutional control of laws in addition to other tasks. Therefore, and according State Administration Law, the Federal Court Law of 2005 has been issued in order to determine the court functions and authorities.

Both the laws mentioned above deals with the mechanism of the court establishment and membership conditions as follow:

Firstly, the court shall consist of nine members, including President. [53]

Secondly, members and the chairman of the federal supreme court are appointed by the Presidency council of the state, they will be selected among the candidates who proposed by the Judicial Council after consultation with the Judicial Councils in the regions, the list names of candidates submitted to the Presidential Council must be at least seventeen name but not more than Twenty Seven names. Notably, the Federal Court Law does not refer to number of candidates in

[51]Constitutional Court Act of Iraq, No. 159 of 1968, Art, 1.

[52]Federal Supreme Court Law No. 30 of 2005 of Iraq, Art 1.

[53]The Law of Administration for the State of Iraq for the Transitional Period of 2004 in Art (44. Para. E) stats that (the Federal Supreme Court consists of nine members, and the Supreme Judicial Council, an initial consultation with the Judicial Councils of the provinces to nominate at least eighteen to twenty-seven individuals for the purpose of filling vacancies in court mentioned, and the same way later nominated three members each vacancy later gets because of death, resignation or removal, and the presidency Council to appoint the members of this court and naming one of them as its chairman. in the case of rejection of any appointment of the Supreme Judicial Council nominates a new set of three candidates).

detail;however,the number of candidates is mentioned in Article (44. Para E) of the Transitional Administrative Law.

Thirdly, neither the Transitional Administrative Law, nor the Federal Court Law refers to the terms and conditions that should be available in the member or the chairman of the Federal Court, however, the nomination is limited to the Supreme Judicial Council.

Fourthly, none of those laws include any referencesabout the devoting of the chairman and members to work in the Federal Court, however, the State's Administration Law states that the chairman of the Federal Supreme Court is automatically shall be the head of the Supreme Judicial Council. Notably, the both laws are silent about financial and pension rights of the member if the member holds another judicial post along with membership or chairmanship of the Federal Court. In the same context, the Law of Administration for the State of Iraq for the Transitional Period does not specify the legal status of the members of the Court.

Fifthly, Federal Court Law adopted the concept of lifetime membership of the court members.

From the above, those laws were not raising the level of ambition that is in harmony with the historical stage in Iraq. Both laws contain several defects, and this can be seen quite naturallyby taking in consideration Iraqi's lack of experience in this field. Hence, following are some notifications about the both laws with regard to the mechanism of federal Supreme Court establishment:

Firstly, membership nomination for the Federal supreme court is only limited to high judiciary council. This is a practical restriction which means, that the membership ofthe Federal Supreme Court is only available for judges, because the Iraqi judicial council deals namely with judges according to CPA's order No.35 of 2003.[54]

Secondly, lack of openness in accepting other categories of juristic and University professors unlike the experience of the other countries. The Constitutional Jurisdiction has its own features which differ than ordinary Jurisdiction. In principle, the constitutional judge has the status of the legislator which requires sufficient knowledge in both doctrine and theoretical legal issues. The constitutional judge deals with constitutional texts which needs intellectual competence to research the constitutional problem and find the suitable solutions. This task can be done in a better way by other law experts not only judges.

[54]Coalition Provisional Authority. CPA/ORD/13 SEP 2003/.35, re-establishment of the council of judges, (Art.3.para.1), 2003, p2.

Thirdly, the Federal Supreme Court Law has adopted the concept of lifelong membership, and the text did not set any condition to terminate the membership in case of ineligibility. This concept is unique which cannot be found in any system of the other countries, except the United States constitutionin 1787. Yet, the United States constitution of 1787 restricted the lifelong membership with good behavior of the member.[55] The constitutional text is general and there were no specific Federal Supreme court in United State at the time the constitution has been enacted. The Federal court in United State since that time has been adopted customary law, unlike the Federal Supreme Court Iraq.

Fourthly, in accordance with Article (44,ParaE) of Transitional Administrative Law and Federal Court Law, the Judicial Council shall nominate Federal Supreme Court members. The nomination shall be made after consultation with the Judicial Councils of the regional governments. The legal dilemma here is the members of the Federal Supreme Court shall be nine members and they shall hold their offices for lifelong; therefore, the question is what will be the situation if new regions has been established in Iraq in the future? Is it supposed to remove some member or replace them? Is it supposed to increase the number of the members? Both scenariosare not applicable because according to the Federal Court Law, and Transitional Administrative Law those members are nine and they hold the office for lifelong. The legislator in drafting this piece of law was unfortunate, especially due the current situation in Iraq the emergence of new regions is an obvious fact and the constitution itself allow the establishment of new regions in the country.

2.3.2. Article (92) Of the Constitution and Legal Troubles in the Composition of Federal Supreme Court.

As it mentioned in the previous chapters, the Article (92) indicates the composition and mechanism of establishment of the Federal Supreme Court. The article states that Court is an independent judicial entity, administratively and financially. The court is made up of a number ofjudges (experts in Islamic jurisprudence, and legal scholars, whose number, the method of their selection, and the work of the Court shall be determined by a law enacted by a two-thirds majority of the members of

[55] According to the constitution of United States, (Art.3 para.1) the Judges shall hold their offices during good behavior, and they shall get paid for their services, a compensation, which shall not be decrease during their continuance in their job.

the Council of Representatives).[56]

From the above, The Constitutional text does not determine the number of members of the Federal Supreme Court, but it leaves this task to a law which shall be enacted later on.Hence, the Constitutional text only refers to the type of the Court members as follows:

1) Judges
2) Experts in Islamic jurisprudence
3) Legal Scholars.

The text leaves the detailed matters the law. Therefore, it is important here to define the categories mentioned in the constitutional text in order to identify each category as following:

2.3.2.1. Judges

The Constitutional text does not indicate the level of experience or the class of the Judge to be a member of the Federal Supreme Court. Thus, the text does not specify which type of Judges would be members of the court. Whether the membership is only meant for the members of the court of Cessation or it may include others.

The Constitutional text also does not set any mechanism of nomination of the Court members. The text does not clarify whether the nomination shall be done by the Supreme Judicial Council or by direct nomination for those who are efficient for membership. In the same context, the text does not specify whether the membership only includes the judges who holding offices or it also include those who are retired.

The Omission of those important issues mentioned above is considered to be a Constitution defect because the formation of the Court is one of the most important issues which should be covered by the constitution itself. The reason for this, is to prevent the possibility of domination of the Council of Representatives to change the law according to own political interests of the parties.

[56]The Constitution of Republic of Iraq of 2005, translated in Iraq. Art 92.

2.3.2.2 Experts in Islamic Jurisprudence

The constitutional text in the article (92) has brought a new concept which does not exist in any other Constitution so far as is known. What would be the reason for allowing Islamic Jurisprudence Experts to be members among the members of the Federal Supreme Court? A sufficient answer for this question cannot be found among Constitutional provisions. However, the answer could be linked to the uncertainty in two paragraphs in Article (2) of the Constitution. The paragraph (1/a) of Article (2) states that: "No law may be enacted that contradicts the established provisions of Islam" and the same article in paragraph (1/b) indicates that "No law may be enacted that contradicts the principles of democracy."[57]

The contradiction between these two pieces of the same Article is evident. Basically, the Islamic religion does not recognize democracy as a form of government. Thus, the provisions of the Islamic religion contradict with the basic principles of democracy. The main source in the Islamic religion is the laws of the Divine. God is the first source of legislation, unlike democracy, whereas people are the source of legislation. Furthermore, because of the religion's nature, Islam is considered to be social religion. This means, the Islamic religion has right to govern most areas of life, the Islamic religion has his own way to deal with different life aspects. It has also own laws for this purpose. It regulates social aspects such as; marriage, divorce and all family issues. Islamic laws deal with political life also such as; political system, elections and state management. The same thing applies to the judicial authority in Islam, as the Islamic religion has its own judicial system. The term of democracy the way which is well-known nowadays, does not exist in Islam because Islam does not recognize equality, freedom of speech, right of minorities and other basic human rights. Moreover, Islamic religion does not recognize the peaceful rotation of power, therefore, modern constitutions with all constitutional principles considered unacceptable by the Islamic approach.

Combining religious provision with the principle of democracy in the same constitutional article by the legislator is something worth to be studied.

In principle, the Court is not meant for dealing with ideological issues, but to solve disputes

[57] The Constitution in (Art 2. Para 1/ A, B) states that Islam is the official religion of the State and is a foundationSource of legislation. the main reason for contradiction could be linked to the conflict between political parties in accordance to their religious view. *See* Ala Hamoudi, H. Ornamental Repugnancy:Identitarian Islam and the Iraqi Constitution, Drafting, University of St. Thomas Law Journal 2010, Vol.7. Art 10.

concerning the legitimacy or constitutionality of a law. According to the Constitutional provisions the Federal Supreme Court only deals with matters which are purely legal and judicial matters. Therefore, the presence of members of non-judges in the Court should be avoidable.

Practically, the term "experts in Islamic jurisprudence"[58] raises several disputed points as follow:

Firstly, in Islam, there are more than Fife branches[59]such as, Shia, Sunnis and numerous of sub-branches. The question is from which branch the experts in Islamic jurisprudence could be selected?

Secondly, each branch of Islam is divided to several congregations, communities and groups. Some branches abide by the principle of higher religious authority which means, the Consensus about the term of expert is extremely hard task.

Thirdly, what kind of Experience terms and conditions shall the expert characterized, and which mechanism would be applicable in selection method. Is it Educational background, the years of servicing? Or it is the expert's publications in the field of Islamic Jurisprudence?

Fourthly, when Islamic jurisprudence expert becomes a member of the Federal Court, the expert will enjoy statues of judge, and the most important character of the judge to refrain from expressing an opinion on any issue related to the object of a dispute. While the main duty of any Islamic jurisprudence expert an Expression of opinions about religious matters.

Fifthly, the term Islamic jurisprudence expert مmay does not necessarily mean only Muslim experts; it may include non-Muslims who specialized in Islamic religion, Law and culture. A good example for this case is Orientalist, those non-Muslims who are expert in Islamic law. As a fact, this may contradict to the real objective of drafting the constitutional text.

Based on above, the inclusion of Islamic Experts as court members may will create several problems which effects on the performance of the court. An Islamic expert to be a member of the highest court of the country is a unique concept which does not even exist constitutions of backward or religious countries.

The Article (92) requires amendment and the paragraph which calls that no law shall be enacted in contradiction of Islam, should be removed, otherwise, it will have severe consequence of the rights, freedoms and judicial independence.

[58]The Constitution of Republic of Iraq of 2005, translated in Iraq,(Art 92. Para 2).

[59]Islam is divided to different branches; in general, most famous Islamic branches are Sunni Islam, Shia Islam, Sufi Islam, Druze and Ba'hai. For more details see, Hussein Nasr, S. Islam: Religion, History and Civilization, Schools of Islam Thoughts and their History. Harper Sanfranciso, 1st Ed, HarperCollins Publishers, 2002, p 153-158.

2.3.2.3. Legal Scholars

The Constitutional text does not determine explicitly the meaning of Legal Scholars but it left these determinations for later legislation as it mentioned earlier in the previous Sections.

By turning back to the Federal Supreme Court Law, the law avoids to determine the qualification of court member, furthermore, according to that law the nomination of the court members shall be done by a Federal Judicial Council, which is a purely judicial institution and only dealing with judges, this mean, that the candidates are "judges" basically because the council does not treat anyone else than that judges. However, the question which will arise in this case,what does it means "legal scholars"? Are they law professors, jurist's, employees in government departments, lawyers or who else? Does it only for those who holding offices or it also include retirees?

Basically, this deficiency in the constitution article may cause a serious confusion and create many legal problems with regard to determination of court member. The uncertainty in this particular matter is quite obvious. Thus, it would be more sensible if the constitution determined precisely certain terms or condition that should be available in the scholar, as it applies in the constitutions of some Arab and foreign countries.[60]

[60]According to the Act of Supreme Constitutional Court of Republic of Egypt, No 48 of 1979, Art 4, the court consist of following type of members:
1. The Court consists of a president and a sufficient number of members. The law does not specify the numbers however; the law indicate that the court consists of a president, more than a Deputy and number of members. The number of voters at the decision issued by the court is seven members as it is mentioned in Art (3) of the law. The law also stipulated that Two-thirds of the members of the court shall be judges.
2. In terms of the conditions to be provided by the president and the members:
a) Availability of general conditions that is required for judiciary under the Judiciary Act.
b) The member shall be over forty-five years old.
c) to be among the following Jurist group:
-members of the Supreme Court,
-Members of the judiciary who are in service and served not less than five years.
-Universities Professors in law served not less than eight years Lawyers who worked in Cassation, Administrative, or High Courts not less than ten years.

2.3.2.4. Expert

The term “Expert” may have more than one meaning, which cause confusion in the selection of experts for the Federal Court. In legal term the word may refer to a Judge or legal scholars or others who skilled in law.[61]

With regard to Islamic Jurisprudence, there is no consensus ona unified definition of the term 'expert'. However, some Muslim scholars describe the experience as a deep knowledge of issues related to Islamic law. Others see that the expert is the one who Industrious in religion, people rely on his opinions in worship and transactions. The expert must be also characterized by puberty, mind, faith, masculinity, diligence, justice and sanity.[62]

The constitution in relation to the experts possibly is more pronounced, in order to avoid any diligence or variation in interpretation, which causes confusion and ambiguity in the application.

Another important point to mention, according to the constitutional text in order to regulate the work of the Federal Court, a law shall be enacted by a two-thirds majority of the members of the Council of Representatives. Yet, the constitution is silent toward amendment or abolition of Federal Court law. Thus, the Constitutional text does not determine the any mechanism for amendment or abolition the law or the required majority for that.

In addition to all the foregoing, the constitutional text does not determine the method of appointment of the Chairman and members of the Court nor the party that nominate them. Unlike the members of the Court of Cassation, the heads of the public prosecution and judicial supervision, which their appointment or selection shall be made by absolute majority of the Council of Representatives. This also considered to bean explicit constitutional defect, because in principle, the Constitutional Court addresses the interpretation of the constitutional texts which supposed to be on the top of Legal pyramid.

In general, the Constitutional article which regulates the Federal Supreme was unsuccessful in preventing the variance in interpretation. The Constitutional defect in this case may be related to a defect of drafting. Relevantly, the law of the Federal Supreme Court, which is in force now ،is also incapable to follow the legislative developments in Iraq. The constitutional ambiguity mentioned in previous chapters has created various arguable practical and legal problems. Indeed, the

[61]The Free Dictionary, www.legal-dictionary.thefreedictionary.com/Legal+scholar, (26 December 2014).
[62] Fathallah, A. glossary of Fiqh al-Jaafari, 1st Ed, 1995, Ahlgreanpublication,Dammam, Sudia Arabia, p380, (Arabic).

constitutional defects and the political situation on the ground is a consequence of long political conflict between different ethnic and religious parties in Iraq. Therefore, the next chapter deals with Constitutional reality in Iraq and struggles facing the Judiciary in the country.

The constitutional uncertainty in the articles dealing with Iraqi Federal Court composition, reflect a serious legal problems in the constitution. Undoubtedly, the Constitution is silence about the mechanism of judge's appointment a legal glitch in the constitution. The constitutional experience of Iraq is new compared to other countries. As it previously clarified, Iraq lacks the constitutional legacy and the reason is the Successive dictatorships which was governing Iraq before 2003. Therefore, the constitutional custom in Iraq did not exist in practice. In addition to the changes in the Iraqi state, including a change in the type of political system of the state from the centralityof the federal state, the federal system has its own characteristics that differ from other types of political regimes. Thus, the current Constitution was drafted in order to comply with the federal system in the new Iraqi state, and is the Federal Court of the most important features of any federal judicial system.

As it was previously mentioned, the US Constitution does not specify the composition the court or the assortment method of selecting judges. The main reason for this, is that the American judiciary relied for a long time on constitutional custom practiced in the country. Notably, the judiciary in US never faced any problems with the method of selecting the judges of the Federal Supreme Court because the customary norms in this respect have been prevailed US judiciary for a long time. For Iraq this issue is quite different, for the reasons that have been mentioned. Therefore, codification of constitutional provisions is a very important issue in countries that suffer from the legal and political unrest to prevent any violation. Undoubtedly, adoption of the federal system in Iraq has created a wide range of political and legal problems. However, finding solutions to these problems lies in the Iraqi constitution and how to address issues related to Federal Supreme Court.

What can be saidis that the presence of the constitutional problems with regard to the formation of the Supreme Federal Court considered legislative shortages must be addressed to close the door on any legal problem and to enable the court to do its job effectively as a judicial institution.

3. Constitutional Reality in Iraq as a Challenge to Judiciary.

The judicial system in Iraq was always affected by the political conditions in the country since the formation of the Iraqi state up to the present day. In principle, the judiciary applies the laws that represent the political philosophy of the authority. Therefore, the volatility of the situation in Iraq from monarchy to military republican and then nationalist, leftist, Islamic and holistic produced a wide number of disparate and sometimes intersecting laws. Some of those laws still available and judges are obliged to apply them, which is one of the challenges facing the judiciary and Preclude achievement of justice.

The judiciary in Iraq like any other country from third world, suffered of many challenges and threats to the independence of the Judiciary. One of the reasons was the lack of legal or judicial culture which usually leads to interference in Judiciary function from individuals or rulers. In this case, the best example from the past era is finding special courts by the former regime and abolition of many judicial rulings.[63]

The repressive nature of previous Iraqi regimes is especially dealing with ethnic and religious minorities plunged the country into deadly spiral. Since 1921 until the overthrow of the Ba'ath regime in 2003, the state was well-known as a state of sectarian biased against the Shiites. The sectarian formed an important pillar of the state's power. The oppression against Shiites was not limited to, exclusion or marginalization, but beyond that to looting national identity of them, seize their homes and properties under the pretext that they are Iranian. Their political rights were denied and their religious freedoms were restricted. The state attitude against Iraqi Shiites pushed them into further isolation in themselves and their refusal to recognize the authorities or participating in the political process. Therefore, the discrimination, forced Shiite politicians to flee from Iraq and the form different opposition parties abroad.

Kurds as a biggest ethnic minority were not in a Far Better Situation than Shiites. They also faced exclusion and they were subjected to an unprecedented violation of their rights and freedoms by multiple centralized systems. More than that, the Saddam Hussein's regime has committed genocide in central and northern Iraq (Kurdistan of Iraq). The government used chemical weapons which are internationally banned weapons, mass graves and Prosecutions against Kurdish activist and politicians. For many decades, the regime also practiced cultural genocide by preventing the Kurdsto

[63]Shetreet, S., Forsyth, C.The Cullture of Judicial Independence, Judicial Independnce in The Face of Violence,Martinus Nijhoff publisher, Netherlands 2012,p173.

converse in their own culture native language.[64]

Oftentimes, the courts and judiciary function has been used as a tool of repression by the Iraqi regime against ethnic and religious minorities. The regime used the legal institutions of the state for particular partisan purposes. The regime has been set up special courts, Supreme military Courts and Revolutionary Court and opponents of minorities such as: Jewish and Kurds been accused of espionage for foreign States[65]

In general, the judiciary system has been used as a tool by the Iraqi regime. Judges were appointed by the consent of the executive power. Judicial officials transferred and removed from office by partisan orders. Furthermore, the economic sanction against Iraq in 90th of the last century contributed to the spread of corruption in the judiciary system.

The reality in which Shiites and Kurds and other minorities lived within Iraq, creating conflict and tension between the various components of Iraqi society and cast a shadow on the judicial independence. The disadvantages of previous eras have emerged after the invasion of Iraq and overthrow of Saddam Hussein. The impact of Conflict between political parties that represent the various ethnicities and sects during the drafting of the new constitution in 2005.therefore, some constitutional texts reflect the chaotic reality that accompanied the liberation of Iraq.

More importantly, the Political chaos extended it to include the judicial function. Such as judge qualification, security of judicial officials, corruption in judiciary and the political and religious interventions in judicial function.

3.1 Religious Influence in Judiciary

One problematic issue of independence of the Judiciary function in Iraq is that the constitution imposes and gives judicial importance to Islamic law which assist the intervention of religious bodies or leaders in judiciary function.[66] The main challenge for courts is how to calibrate the Islamic principles and on whom they can depend on in order to determine those rules of Islam. This

[64] Ethnic Groups in Iraq, Arab 75%, Kurdish 20%, Turkoman, Assyrian or other 5%, while religious division is,, Muslim 97% Shiite comprise upward of 60% 60%, Sunni 32% -37%, Yazidis, Christian and other 3% -5%., see Ethnic and Religious Groups In Iraq, www.usiraq.procon.org/view.additional-resource.php?resourceID=000991 (25 December 2014). See also Black, G. Genocide in Iraq: Human Rights Watch, The Anfal Campaign against the Kurds, Ba'athis and Kurds, (Middle East Watch Report), New York, July 1993, p 25-29.

[65]Yousif, B. Human Development in Iraq1950-1990، Human Rights and Political Freedom, Death Penalty law, Hoboken : Taylor & amp; Francis, 2011, p38-39.

[66]The Constitution of the Republic of Iraq of 2005, translated in Iraq. Art 2.

situation may well open the courts to outside influence in their function and rely on Islamic Religious ruling "*Fatwa*"[67]

Officially, the constitution approved the sectarian in Iraqi society. It gave the priority of Islamic provisions, in the same time, the constitution denying the legal right of religious minorities in Iraq laws, such as family law and Inheritance law.

Imposing severe Islamic expressions in the constitution may lead to the Islamization of the society and constitute a serious threat to the freedoms, Democracy and women's rights. Constitutionalizing Islam as the official religion and main source of legislation, means Legitimizing teaching of the Islamic religion in public schools, the use of religious symbols in public life and state funding of religious institutions.

Obviously, the Iraqi society is multiracial and multi-religious society, therefore, imposing the concept that no law shall enact that contradicts the established provisions of Islam in the first paragraph of Article (2) will certainly constitute a threat tothe rights of minorities.[68] This legal situation creates doubts about the ability of judicial institutions and the performance of courts about the capability of protecting the rights of religious minorities in the country.

Granting Islamic religion a significant role in the Constitution may will also provide Muslim clerics in the state a great capability to intervene in political and judicial matters. Moreover, it may enable them to influence in the society and weaken the rule of law. Practically, after the invasion of Iraq in 2003, the role of religious power is significantly increased and explained. Hundreds of Religious authorities have been established based on their constitutional right mentioned in Article (2). Those religious authorities have varied religious directions from different Islamic schools oftentimes; they differ in their viewpoint of religious matters. Hence, Iraqi Shiites who currently cling the power, are well-known by depending on “Fatwa" from high religious authorities about different aspects of life. Therefore, it is Easy to predict issuing fatwa in political matters, such as, elections, or giving legitimacy of authority or political urge people to obey authority or stand against it or Interference withthe social life of people and personal status matters such as; Inheritance and marriage, etc.

The most important point here, the likelihood, possibility is Federal Court judges compelling to ask the religious authorities for determining or interpretation of law texts. Thus, the courts would become a tool in the hands of religious authorities to influence in the decisions of judges. In other

[67] "Ftwa" is a religious opinion on a matter of Islamic law. The opinion must be issued by recognized and reliable religious Islamic authority. *See*What is Fatwa?, www.islam.about.com/od/law/g/fatwa.htm (26 December 2014).
[68]The Constitution of the Republic of Iraq of 2005, translated in Iraq. (Art 2, Para A).

words, integrating religious norms in the Constitution and Iraqi Federal Supreme Court, whichis the highest judicial authority is explicit intervention in judiciary; furthermore, it is a direct way to influencejudicial decisions and it will definitely create a threat to achieving the rule of law in the country.

Undoubtedly, the majority of the Iraqi people isMuslims, including the territory of Kurdistan. Muslims are divided into two main sects, Shiite and Sunni. Beside Muslims there are also other religious minorities Yezidis, Sabians, Christians, Jews, and others.

The fact that the majority of the people are Muslims does not mean necessarily that the laws of the state must be Islamic Law. The history proves that the Iraqi law has been always secular laws that are consistent with the nature of any civil society. On the one hand, of Iraqi society did not get used to impose religious laws as a part of the legal system since the establishmentof the Iraqi state. On the other hand, considering the religion of Islam, an official source of legislation will harm the credibility of the Iraqi judiciary. More than that, the modern constitutions avoid merging religious norms with constitutional provisions regardless of the religious majority in the community. Western State's constitutions are secular constitutions although, their population with the majority of Christians, as well as, the constitutions of the East Asian countries, despite condemning the Buddhist religion of their people, but most of their constitutions devoid of any religious norms.

It can be said that the merging of religion and state is eliminate mistake made by the constitutional legislature in the all Iraqi constitutions including the of the 2005 constitution. Rebuilding a state of consists of ethnic and religious minorities where everybody can enjoy equal rights require keeping religion out-of-state authorities. Hence, the Article (2) of the constitution requires amendment in that way Islam would not be considered as a fundamental source of legislation instead it could be one of legislation sources beside other sources.

3.2. Political Influence in Judiciary

In addition to religious influence in judiciary, the political influence is also another threat faces the judicial function in Iraq. In general, the political conflicts between rulers (executive authority) overshadowed on the judiciary function. In many cases, the political pressures on the courts have led to violations of constitutional provisions and impartiality of the judiciary.

The intervention and interference in judiciary in Iraq often lead to disruption of law provisions or

subject them to private political calculations, in other words, the tendency to politicize the judiciary led to the absence of standards and regulations for justice and fairness. Therefore, a large number of innocent people languishing in Iraqi prisons for long periods, and at the same time there are death sentences remained impermeable against the criminals. Additionally, in many cases, the arrest warrants issued by the courts, has been issued based on requests or suggestions of the executive bodies or powerful politicians, according to informants information that is not necessary to be genuine, but that mostly be malicious and fabricated.

The political disputes have a great impact on the judiciary function and raises serious question about the impartiality of courts in Iraq. The courts have been used as a Tool for implementing political agendas to punish opponents, politicians, the newest example of that is what happened during the reign of former Prime minister Nuri al-Maliki. One of the parliament members, Ahmed al-Alwani was charged with terrorism activities. The Accused belongs to the Sunni sect and he was convicted to death by Baghdad Central Criminal Court On November 23, 2014. Undoubtedly, the court has been exploitedby a governing authority for political purposes. Therefore, the court ruling has been condemned by many human rights bodies, especially by Human Rights Watch (HRW). The organization sees that the judiciary in Iraq is still subject to political influence and it is inefficient and Iraqi Judicial organs are still politicized to a large extent.[69]

The political dominance of the executive on the high court's in Iraq has become commonplace. As the decisions of the Supreme Courts often is taken based on political attitudes of politician's. Court decisions inherently politicized to serve certain political class. Another example of this case, the Supreme Court's ruling in 211 that a number of independent organs such as, the Independent High Electoral Commission and the High Commission for Human Rights in Iraq, are independent bodies, yet, they are all a subject to the oversight of the council of ministers.[70]

Constant violations by the executive authorities of the provisions of the Constitution and the exploitation of the judicial institutions for partisan political purposes will lead to tragic impacts undermine public confidence in courts and other legal institutions.

In fact, the independence of the judiciary is only meaningful when there is public confidence in judicial organs in the country.

[69]Ismael, T., Islamel, J. Iraq in the Twenty- First Century: Regime change and The Making of a Failed State. Routledge, New York 2015. P132.

[70]Federal Supreme Court in Iraq, Independent High Electoral Commission via prime minister, Decision (No 30 / Federal / 2013) November 6, 2011.

Main-while, because of the critical situation in which the Iraq judiciary lives in, the public confidence in judicial institution has dramatically reduced. Basically, the public confidence stems from that fact that judges are partial and independent without any interference in their issues from outside. Judges cannot perform their functions when they face pressures from outside powerful parties under any name. Worthy to mention that one of the challenges for judiciary since 2003 till nowadays is *De-Ba'athification*[71]

Although the aim of the De-Ba'athificationwas a justification for the fact that the people have been suffered, abused and depraved by the Ba'ath Party and their basic human rights has been infringed for many decades. Yet, the process was used later on as a political weapon for retaliation.

Undoubtedly, Ba'ath party was founded at the hands of the Baathists which Sunni sect formed the majority of them. Therefore, the Obsession of power by Shiites after 2003 was seen as an opportunity for revenge. As a consequence, Baathists removed from their positions, bannedfrom participation in political life and thousands of them have been thrown in prisons.

Judges in Iraq are another target De-Baathification. A large number of judges accused of belonging to the Baath Party, the process of de-Baathification. Judges have been removed from their offices, transferred to remote places or they have been accused of various charges.In conjunction, they have been replaced by new judges who often has a political background of the existing parties.[72]

3.3. Corruption as a Threat to Judicial Independence

The financial and administrative corruption in all its manifestations poses a serious challenge to to Iraqi state at the present time**.** Corruption in different state's facilities has been recognized by several national and international organizations. For instance, the Transparency International in its annual in 2014, Iraq ranked second among the most corrupted countries.[73]

Worth mentioning, the United Nations Convention against Corruption (UNCAC) in 2003 which is a

[71]De-BaathificationWas, a process of removing the Ba'ath party and its members from political life in Iraq, the order has been enacted by (CPA), in May 2003. The aim was to prevent the Baathist from all high positions in the state or any future employment in the public sector. See, M, Sissons. A, Al-Saiedi International Centre for Transitional Justice, Iraq a Bitter Legacy: Lessons of De-Baathification in Iraq, Implementing De-Baathification, 2013. p 9.

[72]Stahn, C. The Law and Practice of International Territorial Administration: Versailles to Iraq and beyond, Cambridge University Press, New York 2008, P374.

[73] Transparency International, Corruption Perceptions Index 2014: Results, www.transparency.org/cpi2014/results (26 December 2014).

global convention with strategic dimensions is ratified by Iraq in the year 2007.[74]Means that, the provisions of the Convention are legally binding and considered to be part of the Iraqi legal system. In connection, Iraq has put in place effective policies to combat corruption by taking many of legal measures and the emphasis on international cooperation with international and regional organizations, developing integrity Commission as a specialized anti-corruption independent body recognized by Iraqi constitution, etc.

Yet, the corruption in Iraq has swept most of the state institutions and facilities. Many of the Iraqi ministries are highly involved in financial and administrative corruption. Indeed, the reasons are manifold, the political corruption, security challenges, and lack of efficient transparency or accountability institutions could be the main causes of the state corruption.

The corruption in all its types plagued the country's non-independent judicial branch. However, corrupt judicial loyalties are the most common phenomena which the judiciary in Iraq has been afflicted by.

A decade back, after the invasion of Iraq in 2003, the CPA's chief Paul Bremer became the country's chief executive authority. The reformulation of a new judicial council was Bremer's priority. After the new council has been established, the judge Medhat al-Mahmoud has been appointed as a chief judge of the new Supreme Judicial Council a body responsible for the oversight of all courts all over Iraq. In the same year, The CPA established a committee called the Judicial Review Committee for the liquidation and removal of judges from the judiciary. Therefore, after Rearrange of judicial system in 2005 Al-Mahmoud became the chairman of the Federal Supreme Court.[75]However, in 2013, Iraq's Committee for Justice and Accountability attempted to remove him from his position as Head of Supreme Federal Court. Because his tight relationship with the prime minister and his influence has been able to appeal to the Court of Cassation, the court failed to find sufficient evidence of his relationship with Ba'ath party and his dismissal has been rejected.

Since Medhat al-Mahmoud served as chairman of the Supreme Judicial Court ،the judiciary subjected to continuous interventions by other authorities, especially the executive branch. Al-Mahmoud deliberately appointed close people to him in the top positions of judiciary such as head of the public prosecutor and head of the judicial supervision.

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[74]Iraq has ratified (UNCAC) under Law No. 53 and has been published in Iraqi Facts Newspaper, No. 4047 in 30 August 2007.

[75]Roberts, J. Iraq's Burgeoning Judiciary: Current Issues and the Best Way Forward, Judicial Reforms, Humanities and Social Sciences, Vol. 4 No (1), spring 2008, Pp 2- 3.

The rampant corruption in the higher judicial institutions has seriously affected the capacity of the lower courts such as, Courts of Cassation, Courts of First Instance and Investigation Courts. , although, the Iraqi Constitution explicitly proclaimed the independence of the judiciary and judges[76], the judges themselves have become part of the rampant corruption in the country. Undoubtedly, court Investigators is a key role in the conduct of the investigation and imposition of justice, despite the important role of court Investigators the prevalence of financial corruption has had a negative impact on the reputation of the courts in general and Investigation courts in a special. Very often bribery plays a major role in determining the fate of inductees in custody. In many cases, those who are accused of very serious crimes of terrorism offenses or theft of public funds are released for financial amounts. At the time ،detainees who accused of simplest crime spend long periods in custody without preliminary investigation with them, which is considered to be a clear violation of the Iraqi constitution.[77]

Essentially, that the fight against corruption in the system of judicial in Iraq requires serious effort and plenty of time. Corruption in Iraq as a prevalence is a legacy accumulated from many years of wars, suppression, administrative and security chaos. The judiciary, the victim of the general situation in Iraq, which has led to the growth of corruption along all judicial institutions, starts from Investigation, Courts of First Instance and departments of justice ending with of the Senior Public Prosecutor and Federal Supreme Court.

Bearing in mind, the Constitution to a large extent has ensured judicial protection through constitutional provisions that emphasize the independence of judges and the judiciary, as well as, the constitutional recognition of the Commission of integrity as an independent body[78], nonetheless, the constitutional reality in Iraq indicates opposite. In principle, the duty of the judiciary is fighting against corruption by hold negligent and the transfer of inductees to the courts, but the Iraqi judiciary itself, became a victim of the administrative, financial corruption and nepotism.

The fight against corruption in the judiciary requires drastic changes. Extra measures that can be taken to fight corruption may will be removing judges who exploited highest judicial positions in Iraq, especially the heads of the Supreme Judicial Council and of the Supreme Federal Court.

[76]The Constitution of Republic of Iraq of 2005 in Art 88 states that Judges are independent, and there is no authority over them except that of the law.

[77] Ibid, (Art. 19. para.13) states that (The preliminary investigative documents shall be submitted to the competent Judge in a period not to exceed twenty-four hours from the time of the arrest of the accused, which may be extended only once and for the same period.).

[78] Ibid, Art.102.

Activating the role of the Integrity Commission and giving it wider authorizations to hold all those who involved in corruption prevailing in the judiciary. Furthermore, it is important to take steps to implement legally binding international conventions, which deal with fighting against corruption in general and especially the corruption in the judiciary.

Generally, fighting against corruption associated with other variables, such as that of security and political conditions in Iraq, as well as, internal factors job loyalty, Moral or professional obligation of judges and court staff.

3.4. Repercussions of Security Condition in Judicial Independence in Iraq

One concern for judiciary in Iraq is the security situation which is the most important challenges of judicial independence in general and judges in particular.

After the occupation of Iraq in 2003 the security situation has deteriorated progressively. The country has seen an unprecedented lawlessness and looting of government institutions. The collapse of the state followed by the emergence of different armed groups originated to fight coalition forces as occupiers and finally the emergence of the militias that are fighting among themselves.

In conjunction, Terrorist activities in years followed 2003 severely affected in state's institution's performance. Growing violence and random sectarian assassinations produced unprecedented chaos. Consequently, several groups emerged exercising the authority in isolation from the government las a result of absence of rule of law.[79]

After a slight improvement in the security situation, in 2006, Nouri al-Maliki has been elected as prime minister of Iraq. Al-Maliki has succeeded in strengthening the role of the executive branch at the expense of both the legislative and judicial branches.[80]

The marginalization of legislative power and tyranny in the decision-making arbitrary by the Prime Minister through controlling the army, internal security forces and his loyalty of a particular partisan, the judiciary became the weakest link in this equation for fear of physical liquidation of judges, lawyers and Judicial officials.

The threat against judges was not only personal, it included their families. According to UN reports,

[79]Cordesman, H., Emma, R.,Iraqi's Insurgency and The Road to Civil Conflict. Vol 2, Greenwood Publishing Group, United States 2008, P 455.

[80]Roberts, J. supra note, Areas of Focus and Development, p 4.

more than 210 judges and lawyers has been killed since 2003. Only in 2006, were killed in militia violence.[81]

In fact, the reality in Iraq shows that the judiciary suffers from failure and frustration in the professional side. The judiciary significantly yields to the will of the executive branch (the Prime Minister), therefore, the judicial decisions has been often taken at the expense of justice.

However, there are several facts which mainly affect in the lack of independence of the Iraqi judiciary as follows:

Firstly, according to CPA orders in 2003 and the United States. –Iraq Status of Forces Agreement (SOFA) in 2008, U.S. Forces, their civilian component and U.S. contractors and their employees have immunity from Iraqi legal processes. The immunity provided to this certain foreign group prompted them to violate Iraqi laws, and interfere in national court issues as well as committing crimes against civilians. However, the courts were paralyzed in taking any steps of accountability towards them. This situation has been affected in a bad manner in the reputation in the Iraqi justice system and its inability to perform its role in achieving justice.[82]

Secondly, the failure of public prosecutors of taking the responsibilities entrusted to him. According to The Iraqi Criminal Procedural Law, one of the most important duties of the public prosecution is triggering lawsuits before the competent courts, periodically visiting to prisons and detention centres.[83] However, the Public prosecutors have not showed any attitudes for most serious crimes such as; arbitrary arrests without warrant, tortures, house searches withouta warrant,raping in persons or detention centres and forced displacement of millions of citizens inside and outside the country, etc. all these crimes is considered to be a severe violation of the Iraqi Constitution and international laws, which encouraged the persistence of the repressive apparatus of executive branch to continue committing those crimes.

Thirdly, failure of taking judicial prosecutions against the executive branch, in respect of running secret prisons associated with the Office of the Prime Minister, in which various types of human rights violations practised. This issue has been confirmed occasionally by the Iraqi and international

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[81] Shetreet, S. r Forsyth, C. The Culture of Judicial Independence, Conceptual Foundations and Practical Challenges, Judicial Independence In The Face of Violence, Martinus Nijhoff, Publishers, Netherland 2011, p172.

[82] TheAgreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, Art 12, 2008. Also See, Chuck Mason, R. U.S.-Iraq Withdrawal/Status of Forces Agreement: Issues for Congressional Oversight, Criminal and Civil Jurisdiction, Congressional Research Service. 2009, P 2-7.

[83] Iraqi Criminal Procedural Law No. 23 of 1971, Art 1.

humanitarian organizations.[84]

Fourthly, the Iraqijudiciary contributed in promoting sectarian and ethnic divisions in bydeepening the contradictions between the political process components in Iraq. This contribution could be due the failureof judiciary to act as impartial body in giving legal opinions or ruling according to law Iraqi constitutional provisions.

Fifthly, failure of Supreme Judicial Council to prevent formation of the Special Criminal Courts, which were formed out of the Iraqi judicial system and lacks international standards. Such as; the Central Criminal Court of Iraq and Iraqi Special Tribunal. The later is associated with the Council of Ministers, the establishment of the court condemned by Amnesty International humanitarian and other organizations. Both the courts established by CPA orders in 2003 and 2004.[85] The first Court has jurisdiction of crimes which does not exist in the Iraqi criminal law,While the second court denied the jurisdiction of criminal and misdemeanor courts for crimes under the so-called "terrorism" law.[86]

Sixthly, developing military and internal security forces, courts outside the framework of the Iraqi judicial system. Developing this kind of courts and giving them wide authorities, means taking away the jurisdiction of the criminal courts, because jurisdiction granted the Military courts is not limited to military crimes only unlike to what is mentioned in the Constitution.[87] The jurisdiction of those courts exceeds to cover many crimes which are already stipulated in the Iraqi Penal of 1969. This situation created a legislative stagger and its obvious Sacrilege of the laws currently in force.

In general, the security situation in Iraq has the most important influence on the independence of the Iraqi judiciary. Externally, the restoration of security requires international efforts in the fight against terrorism. The rampant terrorism in the region requires international efforts and the role of powerful states in dealing with terrorism. Notably, the crimes committed against the judiciary staff have increased markedly in 2014 after the recent events. The Recent events caused a serious breakdown of security. The State lost control over a large area of the country. Life of judicial staff in general and judges was exposed to death. The Loose security led to the escape of many of them from war zones in other cities. Tens courts were looted; theft and large areas of Iraq went out from the governmental

[84] Human Rights Watch, Iraq: Secret Gail Uncovered In Iraq 2011. United States 2011.
[85] Coalition Provisional Authority/ Order No 35/ 2003 of September 2003, re-establishment of Council of Judges, Purpose, section 1.
[86] Dobbins, J., Jones, S., Runkle, B., Mohandas, S. Occupying Iraq: A History of The Coalition Provisional Authority. Rand Corporation, Santa Monica, 2009, P 157.
[87]The Constitution of the Republic of Iraq of2005, translatedin Iraq, Art 99.

authority where the population exposed violation of their rights.

Independence of the judiciary is limited to intensify internal efforts to reduce the role of the executive branch and to allow the independent institutions such as; Independent High Electoral Commission and the Integrity Commission to reduce the practical role of executive authorities painted as it is determined by the Iraqi constitution.

3.5. Qualification, Training and Serving Conditions of Judges

Lack of qualification training of judges in Iraq is one of the biggest obstacles to the judiciary. In conjunction with other threats, Inefficiency and lack of training of judicial officials constitute a real challenge for achieving an independence judicial system in the country.

The subchapter is divided into two parts. The first part identifies the impact ofthe inefficiency of Iraqi judges, lack training and inability of judicial institutes on the court's performance in the country. The second part examines issues related to serving Conditions of Judges in Federal Supreme Court in the constitution and the court's law.

3.5. 1. Qualification and Training of Iraqi Judges

Under the Basic Principles on the Independence of the Judiciary of UN, the judges should have appropriate qualifications in law. Appropriate training and non-discrimination against person in the selection method because of race, religion, political view, etc. [88]

The issue of qualification of judges is one of the important issues that have been focused on recently in Iraq. The main purpose is to prepare judicial staffs that are capable to exercise their professionalism transparency and impartiality.

The applicable method of State's judge selection in Iraq is the eligibility of candidates to enter the Iraqi High Judicial Institute, the institute sets the conditions which should be available in candidates such as; graduation of a college of law in the Republic of Iraq or equivalent recognized Faculty, ability to pass a test with Iraqi law, the nature of the test and its requirement shall be determined by the Council of the institute. Moreover, the candidate must have practiced law effectively for at least

[88]United Nations Congress on the Prevention of Crime and the Treatment of Offenders, (UNHCR), No 40/32 of 29 November 1985, Basic Principles of Independence of Judiciary, 1985, Part 10.

three years in one of judicial branches. Other conditions, related to the age of the candidate and his nationality.

The studying period in the Judicial institute is two years, during that the Institute provide training for the students such as practicing in the courts under the supervision of a senior judge as well as, piratical courses of qualification during the studying period.

The institute is the only formal institution was candidates can apply to. It belongs directly to the Ministry of Justice, and consists of several departments such as; Department of Legal Affairs, Human Resource and Department of Management.[89]

For established judges in Iraq, training courses areminimalists, The problems of security and administrative corruption system, depriving judges of any training that qualifies them through years of service. Training for establishing judges to is not a legal requirement in Iraq. However, the Ministry of Justice, in very limited cases, offers training courses for judges, which may not have any impact on the development of judges' skills.

As a comparison, states set different conditions for judge's training. For instance, in the United States, training courses for appointing judges at a state level is a legal requirement. Which means judicial education is compulsory for state judges Therefore, there are three main training institutions in the state, the first institution is the National Judicial College which open for all judges in order to provide judges with legal skills and legal procedure knowledge's as well as, offering master and PHD programs for judges.[90] The second institution is the Federal Judicial Centre, which is available only for federal judges. The third one is National Centre for State Courts. Relevantly, In France, all judges are subjected for five days training in a year. While in Australia training courses are voluntary in, but both judges and prosecutors are required to develop their skills 4 day per year as an average.[91]

In Iraq, because of the critical situation of the judiciary, training of Iraqi judges received wide acceptance by many countries in the last decade, several training courses has been organized to train and sensitize Iraqi judges to the discharge of their duties with impartiality and independence away from outside pressures. In this context, some European Countries, EU, and United States received a large number of Iraqi judges as a part of enforcing the rule of law in Iraq.

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[89] Iraqi Judicial Institute www.judicialinstitute-iraq.org/sectionsindex.php (27 December 2014).

[90] National Judicial College www.judges.org/ (27 December 2014).

[91] Thomas, C. Review of Judicial Training and Education in Other Jurisdictions, Report prepared for the Judicial Studies Board, University of Birmingham School of Law, May 2006, p19.

The most prominent program has been launched by the United Nations Development program (UNDP) in January 2011. The program was part of the European Union's Support for the Rule of Law with the contribution of the Iraqi government. Four hundred Judges and legal officials participated in 23 training courses. The main purpose of the program was the improvement of the efficiency of the Iraqi justice system, as well as, improvement of the capability of the key government rule of law institutions.[92]

Additionally, a numerous of courses has been provided by different countries, national and international organization for Iraqi lawyers, Judicial Investigates, and officials who work in Juices offices. All focus of these attempts was to strengthen the ability of the judicial branch in Iraq, provide the lawyer with more professional confidence in order to face the work circumstances and enable them to perform the rule of law in the country.

Despite all previous attempts, Iraqi judiciary remains non-integrated in terms of expertise and efficiency. The high Judicial Institute in spite of its existence as a judicial institution, it lacks the legal requirements in accepting candidates. Therefore, sectarian loyalties often play a prominent role in Candidate's acceptance. For instance, Candidates from the Shiite community have greater chances to be accepted, while candidates from the Sunni sect or other minorities would be easily rejected. Also, the admission is sometimes on the basis of sectarian quotas. This is completely contradicted the international conventions which emphasized on more than one occasion that judges shall be selected on objective basis away from their religious or ethnic backgrounds.[93]

Another interesting issue is the appointment of judges outside the terms of the Iraqi High Judicial Institute. In more than one case, Judges have been appointed based presidential orders away from any objective conditions are available to them.

To appoint judges orders political lacked the necessary conditions led to the creation of a judicial corruption in Iraqi Judiciary and the appearance of judges who lack of qualification in the most sensitive position which is a judicial profession.

Eventually،The problem here is also a constitutional lack. The problem related to the composition of the Federal Supreme Court, whichis considered to be the head of the legal pyramid. Whereas, the Constitutional text in the Article (92) with regard to the composition of the Court of judges, Legal scholars and experts in Islamic jurisprudence, it may will drift the court far away from

[92]Enforcing the Rule of Law in Iraq: Training for judges and legal officials, United Nations Rule of Lawwww.unrol.org/article.aspx?article_id=155 (28 December 2014).

[93] Basic Principles on the Independence of the Judiciary, (UNHR). Supra 1, Art 10.

independence.[94]

More than that, the Constitution does not address the conditions that must be met with the members of the Federal Supreme Court whether they are judges, Islamic jurisprudence or expert or experts. Thus, the constitution does not set any conditions for judge's qualification or which kind of qualification shall be available for Islamic experts to be a member of the court.

3.5.2. Serving Conditions of Judges in Federal Supreme Court

The Serving condition for judges is another important issue of independence of the judiciary. This issue has been emphasized by UNHR, that terms of office are one of the requirements for independence of the judiciary.[95]

The serving conditions beside the other requirements, is considered to be essential for insuring judiciary the legal protection to be away from any outside interference, in the same time guarantee the basic rights of judges in particular and judiciary staff in general.

In Iraq, the terms and conditions of office are again related to Law of Administration for the State Of Iraq for the Transitional Period, which has been enacted by (CPA) just after the invasion of Iraq.

The Iraqi constitution itself does not determine any conditions of office for the members of the Federal Supreme Court. This silence by the constitution consist another risk on the judiciary in Iraq.

The Iraqi constitution in Article (92) leaves the terms of office of judges to a law which shall be enacted later on.[96] Returning to Article 6, Iraqi Federal Supreme Court Law of 2005 judges may not be removed, except in case of disqualification due to conviction for a crime involving moral turpitude or corruption.[97] Yet, the law is silent about the procedures for removal.

Because the significance of determining the terms of office of judges, most of the constitution indicates it between their provisions. For instance, the Constitution of United States in Article (3) indicates that "the Judges, both of the supreme and inferior Courts, shall hold their Offices during good behavior". Thus, the US constitution included this issue and gave it constitutional importance.[98] Leaving the determination of terms of office by the constitution of the Federal Supreme Court can be considered as another constitutional failure may harm the judiciary.

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[94] The Constitution of the Republic of Iraq of 2005, translated in Iraq, Art 92.
[95] Basic Principles on the Independence of the Judiciary, Qualifications, selection and training. Supra 3, Art 12.
[96] The Constitution of the Republic of Iraq of 2005, translated in Iraq. Art 92, Para 2.
[97] Federal Supreme Court Law No. 30 of 2005, Art 6.
[98] The Constitution of the United States of America, Art 3.

In practice, there are numerous reservations about the law of the court because; it has been enacted by the CPA not by an elected national parliament. Therefore, despite the legal defects in the law, the legal status of the law is also doubtful. As a reflection of this situation, the first court chairman Medhat al-Mahmoud served in the office for over nine years. Although al-Mahmoud has been accused several times of corruption and his links with the former regime, but the courts were incapable to remove him. Again, the reason was non-existence of any removal procedures in the law of the court and avoiding this important issue of the current constitution.[99]

3.6. Judicial Reform is a legal Imperative

Atempts to reform the Judiciary in Iraq has started shortly after the occupation of Iraq in 2003. The former regime has left behind a set of legal institutions that lack the minimum requirements ranging from restructuring the constitutional and legal configuration of the Judiciary and ending with the infrastructure of the judicial institutions.

The first attempts Began by the CPA in 2003, and through the hiring of US exports of rebuilding countries that witnessed wars such as Kosovo, their duty was how to Work in order to rebuild judicial institutions and impose security and the rule of law.[100]

One of the biggest obstacles in the way of the Americans at the time was how to exclude Baathists Judges and judicial staff from judicial institutions, especially, those who were involved to a large degree in administration and financial corruption. Other challenges followed the invention of Iraq was the status of Iraqi laws. The laws which were in force created stumbling block to Americans. The reason was,those laws were primitive and Inappropriate with the aspirations of building a modern state. Thechallenge for occupation authorities was the inability to prejudice or change those laws because, according to the Treaty of The Hague if the legitimate power in the country pass to the hands of the occupant, the occupant shall take all necessary steps to insure the security and public order in the country, until unless, is it prevented by the laws in force in the country.[101]

However, the CPA role was limited to producing a set of legislations such as; De-Ba'athification and

[99]O'Leary, B. How to Get out of Iraq without Integrity, University of Pennsylvania press, Philadelphia 2009, 197-198.
[100]Richard,R., Bernnan, J., Charles, P., Hanauer, L., Connable, B., Terrence, K., Micheal, K. Ending The US War in Iraq: and Disestablishment of Untited States Forces in Iraq, Rand Publication, United States 2013, p197.
[101]Laws and Customs of War on Land (Hague IV); October 18, 1907, Art 43. Also *See*, Leonard, MAJ. Rule of Law inIraq, Transitional Justice under Occupation, Restoring Infrastructure, Monograph, Law, School of Advanced Military Studies, United States Army, Kansas, p16.

Restructuring of Ministry of Justice's institutions, as well as, abolishing special and revolutionary courts. They focused their attention more on the configuration of judicial staff and making changes in positions of heads of courts in addition to appointing of a number of new judges and training of judicial personnel.

In fact, CPA attempts were not all fruitful;contrariwise, some of their attempts had a bad reflection on the Iraqi judiciary. For instance, the de-beautificationprocess has become a tool later on to practice political pressures on judges and led to remove a number of them without any legal justification. Moreover, the Continuous interventions in Judiciary function affected in a bad manner in loss of public confidence judiciary independence and their ability to protect people's rights.

After more than a decade followed the occupation, the Iraqi judicial institutions are still in dire need of reform in all respects, the reasons that have been mentioned already affected all together in the performance of judicial functions.

Institutional reforms in Iraq may include judicial infrastructure, for example, linking judicial institutions with a network and providing modern means for judicial staff Such as: providing security for them and rebuild the infrastructure through outsource Foreign aid.

Despite repeated attempts by the state to educate and train judicial personnel, but the reality indicates the opposite. Judiciary workers need to prove competence, integrity, independence and personal deep legal knowledge to judicial matters. Therefore, most countries of the world treat the mentioned issues very seriously to provide greater independence of the judiciary. Undoubtedly, Iraq needs to redouble its efforts in this regard. The solution most probably lies in the benefit from the experiences of developed countries and will build relationships with judiciary of those countries to exchange expertise necessary.[102]

Another important point to mention is, opening institutions that qualify judges and provide them with training and legal culture. Existing of academic centers may be a crucial turning point in creating an appropriate environment of judges and judicial staff to improve their competence and abilities. Opening academic centers in this way in Iraq is highly required, not only for new judges, but also for judges who have spent years in service.

At the level of law reform, the amendment of applicable law an essential issue. The current Constitution requires a serial of the necessary amendment in articles that deals with the

[102]Angeline, L. Judicial Reconstruction and The Rule of Law: Reassessing Military Intervention in Iraq and Beyond. Martinus Nijhoff Publishers, Netherland 2012, pp 109-111.

independence of the judiciary. Indeed, the amendment should cover article (92) which regulates the composition of the Federal Supreme Court. Additionally, the competent authorities should exert as possible efforts tobans the role of religious authorities from judicial function is needed.

One of the issues that need tore-examineis, the Article that calls for the supremacy of Islamic religion. The article should also included by any potential constitutional amendment in the future in order to insure the independence of the Courts and to avoid the domination of one religion on the rest of other religious minorities. Furthermore, these kinds of amendments may contribute to the promotion of the legislature in the Kurdistan Region to follow the same approach in the draft constitution of the region.

The reforms should also implicate a number of other laws, including the Federal Court law, which undergo many Legal lacks. The amendment of this type of laws may contribute to the development of courts functionality. Moreover, determining a mechanism for selecting the court members, serving conditions by the law of the court is on the most significant issues should be taken in consideration in any potential amendment process.

Last but not least, the competent authorities may need to improve the performance of the Iraqi Judicial Supreme Institute. Because the Institute is only judicial body specialized in selecting candidates as future judges. Worthy to mention, the Mechanism of selection of candidates in the institute is inefficient and lacking acceptable standards.

All these issues that have been mentioned previously in this Section, are fundamental issues may need to be followed in order to better reform in judicial institutions such as'; courts and judicial organs in general. However, the greatest burden lies with other authorities in the state, namely, Legislature and Executive. Whenever the interference in the judiciary is avoided by the other branches, the Restoring Infrastructure and reform of the judiciary in Iraq the independence of the judiciary and achieving the rule of law become highly probable.

Conclusions

Judicial independence in Iraq is a relatively recent constitutional concept. Before the enactment of the constitution of 2005, all other previous Iraqi since 1925, constitutions did not give prominence to this concept. However, the new constitution in 2005 was a unique Quantum leap in Iraqi constitutional history. The new constitution carried a set of constitutional concepts in respect of judicial independence, which were not known or recognized by pervious constitutions.

The constitution of 2005 was born in a severe political crisis that followed the occupation of Iraq by United States and western coalition countries. There were several factors contributing in failure to reach unanimous formulation of constitutional provisions that ensure and protect the independence of judiciary far away from other branches of the government. Additionally, the constitution lacks of guarantees concerning protection of human rights, the right of women, minority rights and flows in techniques of legal drafting.

One of the mean straggles during the drafting process was the ethnic and religious diversity of Iraqi people. Iraqis have historically been a Multi-religious and Multi-ethnic people, Kurds, Sunni and Shia Arab Muslims, Christians, yazidies, and other minorities. Each sect of Iraqi society was trying to obtain and constitute as much as possible of political gains in the new constitution, in conjunction, the drafting was signed to a committee, which were, based on Sectarian quotas of different Iraqi sects. This situation created a politically charged atmosphere on the ground between conflicting parties and effectively reflected in the drafting process.

Internal and external pressures were another reason faced the constitution’s drafting process. On the one hand, the external pressure on Iraqi new leaders and disputing parties exercised by United State decision takers to reach a compromise about the final constitution draft. On the other hand, popular pressures by people in order to formulate a constitution assist the new government to take control over the lawlessness rampant in the country. Furthermore, Political legacy and bitter experiences the country has undergone in earlier decades, the politicization of the judiciary by the former dictatorship regimes were still haunting the people and new political leaders.

The above mentioned reasons contributed all together to formulate a constitution marred by some obvious flaws which creates serious concerns in addressing the independence of the judiciary from the other branches of the government, it also raises concern about the constitutional mechanisms provided in the constitution for preserving the fundamental rights and protection of judicial

institutions from religious influence.

The constitutional flaws coincided with constitutional reality on the ground. At a time when constitutional was unable to address some important issues related to independence of judiciary, the reality on the ground contributed in a bad manner in weakens the role of judicial institutions in achieving the rule of law in the country. The obstacles to Iraqi judiciary are manifold. The political interference in the judiciary is oneof the main obstacles, this often occurs by excising pressures on the courts, judges and judicial officials whether through exploiting constitutional loopholes or Juxtaposition of the Constitution or national laws. Islam religion influence in the constitution is another serious challenge to the judiciary, constitution flows concerning the nomination of Islamic clerics in the highest and the most important judicial institution in the country paves the way to continual interference by religious parties in judicial function, judge's appointment and their transfer. Additionally, there a number of other factors that led to the deterioration of Iraqi judiciary such as: The spread of financial and administrative corruption in the judiciary, the security condition and Lawlessness and lack of judges and judicial officials' qualification.

The thesis demonstrates author's interests in the field of constitutional law and his personal experience during the time he was working as a Judicial Investigator in the court house in Iraq. The manifold challenge to Judiciary he has witnessed motivated him in choosing this topic. His personal desire is that this research may contribute in developing future researches in respect of the statues of judicial independence in the current constitution.

What emerges from the study of judicial independence in the light of the Iraqi constitution of 2005, the constitution contains several provisions that can be seen as an explicit violation in judicial by both, legislative and executive branches. It also reflects the negative influence of Islamic religion in the constitutional provision that deals with the court's composition and fundamental human rights.

In assessing the influence of legislative and executive branches in the judiciary, according to the constitution and as a feature of the federal state's system, Iraqi legislative authority is composed of two councils, council of representative and federal council. The Article (61) of the constitution states that the representative council is competent to relieve the president of the republic by an absolute majority of the Council after being convicted by the Federal Supreme Court for crimes related to Perjury of the constitutional oath, violating the constitution and high treason. The legal dilemma will arise when the council fails to collect required votes; in this case, the President of Republic is likely able to continue his job as a president after being convicted of serious mentioned crimes by the

highest judicial body in Iraq, which is, Federal Supreme Court. According to the mentioned article of the constitution, relying on the council of representative to relieve to the president of the republic makes the court decision in vain. Thus, the constitution obviously allows to legislative to encroach on judiciary. Which is, an explicit violation of the judiciary by legislative.

In connection with the method of selection judges and members of high judicial bodies, such as; Federal Court of Cassation, the Chief Public Prosecutor, the constitution in Article (91) states that the federal judicial council shall nominate the candidates and to present those nominations to the Council of Representatives to approve their appointment. Again, mandate the Council of Representatives for such an action is another constitutional flaw, because the method of nomination the judges for high judicial bodies and their appointment is a purely judicial issue. It would be more apropos that the constitution keeps this particular issue only competence to the judiciary.

The influence of executive in the judicial branch is another arguable issue in the Iraqi constitution. The constitution in Article (73) grants the President of Republic the right of Issuing special pardon without turning to the judiciary. According to the constitution, the president to issue a special pardon on the recommendation of the Prime Minister, except crimes related to private clams, terrorism, international crimes and administrative and financial corruption. Hence, the constitution restricts the right of the president to issue a special pardon with two conditions, the pardon shall be recommended by Prime Minster, and it must be related to certain crimes. Indeed, this particular privilege is indicated by several constitutions all over the world. Yet, states tend to restrict this right as possible by setting different rules and conditions to reduce the likelihood of the use of this right for political or personal purposes.The Iraqi constitution determines a particular set of crimes as an exception and gives the possibility to pardon to cover any other type of crimes. In this respect, it would be worthwhile that the constitution, determine only those types of crimes which can be covered by the pardon, and not vice versa. Furthermore, the Iraqi constitution failed to include as an exception a number of serious crimes which may have direct impact on Iraqi society such as; drug trafficking, Human trafficking and incest.

In connection with the mechanism for selecting the judges to Federal Supreme Court, the constitution avoids providing the procedure of member's selection, the constitution is also avoids determining the numbers of court member and it leaves all these issues to a law to be enacted later. By studying the Law of Federal Supreme Court it can be easily noticed that this law has failed to a large extent to determine a clear mechanism nomination the court members. The law does not

determine the number of court members neither the conditions that should be available in the candidates, in other words, the law does not address several significant issues related to the nomination of the court members and contain a number of obvious defects. Hence, the constitution treatment of Federal Supreme Court's member selection is incomplete. Omission of this important issue by the constitution is an explicit constitutional defect.

One of the most fatal constitutional flaws lies in Article (92).The article deals withthe composition of members of the Federal Supreme Court and it reflects the influence of Islam religion in the constitution in determining the court members, in this respect, the article states that the court members shall be consist of judges, experts of Islamic jurisprudence and legal scholars. The inclusion ofexperts of Islamic jurisprudence between court members is a new and obscure concept and does not exist in any other constitution in the world. Undoubtedly, the constitutional court is mainly purely judicial body and deals with issues related to interpretation of the constitution and determination of constitutionality of laws and regulations, therefore, The presence of scholars of the Islamic religion among the members of the Court cannot be justified in any way and it represents an explicit constitutional defect. In fact, the reason of imposing the Islam with court issues could be related to Article (2) of the constitution, because the Article (2) stipulates that Islam is the official religion of the State, afoundational source of legislation and no law shall enact that contradicts the provisions of Islam.

The constitutional dilemma is not only about inclusion of experts of Islamic jurisprudence, but it is also about the Linguistic meaning of "experts of Islamic jurisprudence" the constitution does not specify what makes experts of Islamic jurisprudence. So, the main concern in this case is about the mechanism of selecting those experts. In Islam, there are more than fife main branches and each branch has several congregations or groups which they follow different higher religious authorities, furthermore, it is extremely hard to determine the conditions that should be available in those experts, whether it's their educational background, years of serving or something else. This means, that any consensus about who would be considered as an expert is an impossible task.

The concerns also arise about the term "Legal Scholars'', neither the constitution nor the Federal Supreme Court's law specify what does the term "legal scholars" mean. Because the term may carry different interpretation, the term "scholars" may extend to include other than judges such as; law professors or Jurists. Bearing in mind, according to Federal Supreme Court's law the court members shall be nominated by the Federal Judicial Council, and this council is completely judicial that only

deals with judges, which means, that probable candidates are only judges. This situation will cause a legal and practical confusion.

The constitutional ambiguity in the Iraqi constitution extends toaffect on the fundamental rights and freedoms. The constitution in Article (2) identifies Islam as the official religion of Iraq and is a foundation legislation source. In Section (A) of Article (2) the constitution states that no law shall be contradicting to Islamic fundamental provision, in conjunction, the constitution in Section (B) of Article (2)indicates that no law may be enacted in contradiction with the principles of democracy. Obviously, the constitution combines two different and incompatible concepts. Islam as a social religion regulates different aspect of life, it interferes in individuals' social life, set own rules and restrict most of social relations through strict religious provisions as an alternative for positive law. Thus, pluralism, freedom of speech, woman's rights and fundamental human rights have basically been rejected by Islam, therefore, notions such as: equality of gender and equality between people regardless of their personal believes violates Islamic principles. A combination of two contradicts principles in the same document shows the frailer of the constitution's drafter to avoid religious hegemony of Islam, it also creates serious concerns about the protection of religious minority's rights and the capability of judicial institutions to protect them.

In conjunction with the constitutional defects, the constitutional reality in Iraq constitutes a true threat to the judiciary. Establishing Central Criminal Court of Iraq, Iraqi Special Tribunal, military and internal security forces, courts by legislative and outside the constitutional framework has had the unfortunate consequenceof performance of judicial institutions in achieving their duties. Additionally, the widespread financial and administrative corruption among judicial institutions crippled the capability of courts in the performance of the desired role to achieve the rule of law in the country.

Judges qualification and serving conditions were other important issues that have been discussed in this thesis. Undoubtedly, the courts in Iraq suffer from lack of qualified judges and judicial officials, the reasons are deficiency of modern judicial institutes that qualifies the judges to work in the courts or providing required training to them, and using nepotism in the method of selection of candidates to the Iraq judicial institute, which in consequence, produced a great number of non-qualified judges and caused a Significant harm the judicial system in the country. In connection with serving conditions of the members Federal Supreme Court, the constitution avoids this particular issue and leaves it to the law. In this respect, the Court's law states that the members shall hold their offices of

life; however, they may be removed in case of disqualification due to conviction for a crime involving moral turpitude or corruption. Once again, the court's law does not provide any mechanism of their removal. Non-inclusion of serving conditions in the constitution is one of the other constitutional defects in the Iraqi constitution.

The judicial reality in Iraq shows that the country needs to take bold steps in the field of judicial reform. The current experiments demonstrate that the Iraqi judiciary suffers from a wide range of threats began with constitutional defects in provisions that regulates the judicial branch and ending with a practical challenge to the judiciary. The solution to reviving the Judiciary in Iraq may lie in examined constitutional amendments. However, the constitution amendment would not be an easy process because the Iraqi Constitution is a rigid constitution that requires complicated procedure such as supermajorities in representative council, direct approval by the electorate in a general referendum, and approval of the amendments by the president of the republic

Despite the complicate procedures set by the Iraqi constitution, the amendment is achievable. The government can provide an appropriate political atmosphere and mobilize people for potential amendments in the constitution, but most important is partisan consensus between ethnic and sectarian parties to reach a settlement and conviction for general amendment and especially in those provisions that deals with judiciary branch.

Beside the required constitutional amendments, a comprehensive reform of the Iraq Judicial system is an essential requirement. The reform shall include amendments in national legislations that regulate court's working in the country, including the Federal Supreme Court Law. Obviously, Federal Supreme Court Law has been codified in a severe political situation under the conditions of occupation, more than that, the law does not keep pace with developments in the field of judicial and the law is incapable of regulating the work of the court in a desired manner, therefore, the modification of the law is essential necessity to fill legal and constitutional gaps in the work of the court.

As practical, necessary steps, the Iraqi judicial council may also make improvements in the Iraqi judicial institute. Approving the potential candidate is only assigned to the institute to work as judges in different courts of the country. The law of the institute determines the conditions for candidates. The lawis lacking convenient andwell-established standards in accepting the candidates. The improvements could be made by enacting a new law for the institute that comply with internationally applied standards in the selecting the candidates. The council may also need to make

a good faith effort to in field of rehabilitation of judges and judicial officials, ensuring their personal security and corruption fighting in judicial filed.

Kokkuvõte

Sõltumatu kohtusüsteemi ajalugu Iraagis on suhteliselt hiljutine võrreldes teiste kaasaegsete riikidega. Tuleb välja tuua, et poliitilisi üleminekuid, mis on toimunud Iraagis peale 2003. aastat, peetakse hüppeliseks edasiminekuks, mis on kaasa toonud olulisi muudatusi põhiseaduslikus elus. Sündmused, mis järgnesid 2003. aastale sillutasid teed uue põhiseaduse jõustumiseni 2005. aastal. Uus põhiseadus võtab föderalismi kui valitsemise vormi ja moodustab riigis uue õigussüsteemi, mida saab vaadelda kui olulist arengut kohtuvõimu sõltumatuses.

Üldjuhul pakuvad riigid põhiseadusega tugevaimat iseseisvust kohtuvõimule, ses suhtes on 2005. aasta Iraagi põhiseadus võrreldes eelmiste Iraagi põhiseadustega kaasaegsem. Uus põhiseadus sisaldab mitmeid väärtuslikke ja kaasaegseid põhiseaduslikke kontseptsioone; kuid samas sisaldab ka mitmeid puudusi seoses kohtuvõimu seosega teiste valitsuse harudega ning islami religiooni mõjuga põhiseaduslikele sätetele.

Käesolevalõputöö tähtsus seisneb faktilises asjaolus, et 2005. aasta Iraagi põhiseadus sündis kriitilises poliitilises olukorras riigis, mida iseloomustab usuline ja etniline mitmekesisus ning kus on aastakümneid kannatatud repressioonide ja õigluse puudumise all. Ilmselgelt on sõltumatu kohtusüsteem oluline nõue õiglaseks, järjekindlaks ning neutraalseks õigusemõistmiseks, seetõttu võib sõltumatu õigussüsteemi õppimine läbi Iraagi 2005. aasta põhiseaduse oluliselt aidata põhiseaduslike vigade kindlaks tegemisel seoses sõltumatu kohtusüsteemiga. Käesolev lõputöö võib kaasa aidata paremate tagatiste või alternatiivide leidmisele põhiseaduslikule ebaselgusele nendes põhiseaduse sätetes, mis reguleerivad kohtusüsteemi ja paremate lahenduste pakkumisele õiglase kohtumenetluse, õigusriigi ning demokraatia tagamiseks.

Antud lõputöö eesmärk on uurida 2005. aasta Iraagi põhiseaduse sätteid, mida saab pidada täidesaatva ja seadusandliku võimu selgesõnaliseks sekkumiseks kohtusüsteemi. Uuring samuti demonstreerib ja analüüsib islami religiooni mõju ulatust Iraagi põhiseaduslikele sätetele, mis võivad mõjutada kohtute funktsionaalsust ning üksikisiku õiguste ja vabaduste kaitset.

Lõputöö koosneb kolmest peatükist, millele järgnevad peamised järeldused, iga peatükk katab erinevaid aspekte kohtute sõltumatuse kontseptsioonist Iraagis. Esimene peatükk on jaotatud kolmeks peamiseks alapeatükiks, millest esimene on sissejuhatav ning määratleb kohtute sõltumatuse mõiste lähtudes põhiseaduslikust kohtupraktikast. Teine alapeatükk on uuring antud kontseptsiooni kohta rahvusvahelises õiguses. Kolmas alapeatükk on antud kontseptsioonist

erinevates Iraagi põhiseadustes lõpetades 2005. aasta põhiseadusega.

Teine peatükk uurib Iraagi 2005. aasta põhiseaduse põhiseaduslikke vigu. Antud peatükk on jaotatud kolmeks alapeatükiks. Esimene alapeatükk on seadusandliku- ja täitevvõimu tasakaalust põhiseaduses. Teine alapeatükk on kohtuvõimu sõltumatuse problemaatika kohta lähtudes osadest põhiseaduse sätetest, nende sätete uuring, mis reguleerivad kõigi kolme riigivõimu omavahelisi suhteid ning nende mõju kohtusüsteemile. Kolmas alapeatükk analüüsib religiooni mõju põhiseadusele ja seaduste vastuvõtmise keerukust Iraagi Riigikohtus ningkohtu koosseisu keerukust islamiusu mõju ja õiguslike dilemmade, mis on tekkinud osade sätete vastuolust, kus on kombineeritud islami usk ja demokraatia põhimõte, tagajärjel.

Kolmas peatükk näitab põhiseaduslikku reaalsust Iraagis. Kolmas peatükk on jaotatud viieks alapeatükiks. Antud peatükis on uuritud praktilisi väljakutseid Iraagi kohtusüsteemis ning kas peamised ühiseid jooned põhiseaduse puuduste ja praktiliste probleemide vahel tekitavad takistusi Iraagi kohtusüsteemile.

Järeldused on välja toodud lõputöö lõpus. Iraagi 2005. aasta põhiseadus sisaldab mitmeid puudusi, mida saab lugeda kohtusüsteemi selgesõnaliseks rikkumiseks. Põhiseadus lubab nii täidesaatval kui ka seadusandlikul võimul sekkuda kohtuvõimu. Põhiseadus annab Iraagi presidendile teatud õigused ilma kohtusüsteemi poole pöördumata. Mõni põhiseaduse säte piirab kohtusüsteemi võimu kuna presidendi tagasikutsumiseks on vaja ülemkogu esindajate nõusolekut. Ka Riigikohtu seadust on antud lõputöös analüüsitud seoses kohtuvõimu sõltumatusega.

Seoses islamiusu mõjuga põhiseadusele ei suutnud põhiseadus võimaldada õiguslikult aktsepteeritavat mehhanismi Riigikohtu liikmete valimiseks. Lisaks ei ole selgelt sätestatud, kes kvalifitseeruvad „islami usu kohtupraktika ekspertideks“, kes tuleb Riigikohtu liikmetena kaasata kohtu tegevusse, ning see on suur põhiseaduslik viga.

Lähtudes põhiseaduslikest vigadest põhiseaduslik reaalsus kujutab endast tõsist ohtu Iraagi kohtusüsteemile. Põhiseaduslik läbikukkumine mainitud oluliste teemadega tegelemisel on mõjutanud negatiivselt ka kohtute tulemuslikkust. Ka teiste oluliste tegurite, nagu korruptsioon, turvalisuse puudumine ning juriidilise pädevuse puudus, olemasolu kujutab endas tõelist väljakutset kohtusüsteemile ja mõjutab negatiivselt õigusriigi saavutamist.

Lahenduseks oleks muudatuste tegemine sätetes, mis tekitavad ohtu kohtusüsteemi sõltumatusele. Oluliseks nõudeks oleks ka Iraagi õigussüsteemi oluline reformimine. Reform peaks hõlmama muudatusi siseriiklikes õigusaktides, mis reguleerivad kohtu tööd, sealhulgas Riigikohtu seadus.

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