



# **Arab Center for the Development of the Rule of Law and Integrity**

## **The Judicial System in Iraq Draft Working Paper for Discussion On the Higher Judicial Council and the Superior Federal Court**

### **Draft**

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**Beirut, November 10, 2006**

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When the modern Iraqi state was established on August 23, 1921, its judicial system was not subject to any change but rather maintained the approach established during the British occupation, which inherited a large part of its aspects from the Ottoman occupation. The conditions and requisites for appointing magistrates and judges remained subject to the Decree of Courts Formation issued on 28/12/1917, which remained in vigor until 1929 when the first national law was issued to organize the judiciary affairs in Iraq. This law which held number 31 was known as the Law of Magistrates and Judges.

The Court of Cassation was formed according to the stipulations of article 81 of the Statute (the first permanent Iraqi constitution, which governed Iraq from 1925 until July 12, 1958). It is located in Baghdad. Its competence includes looking into all cases that fell under the jurisdiction of the Court of Appeal during the British occupation. Thus, this Court acquired two qualities. The first quality is that of true Cassation; and the second is that of Appeal, which is looking into cases that are subject to appeal. This state of affairs continued until 1945 when the competence of the Court of Cassation became limited to looking into cases of a cassation nature. As for its Appeal duty,

it was referred to the courts of Appeal as per Law no. 3 of 1945.<sup>2</sup>

After the enforcement of the Judicial Service Law no. 27 of 1945, a Law holding no. 58 was issued in 1956 to organize judicial affairs in Iraq. This law introduced the formation of a committee known as the Committee of the Affairs of Magistrates and Judges.

The Higher Judicial Council was established (article 49) for the first time as an ad hoc council entrusted with performing a comprehensive and global investigation in the affairs of magistrates and judges. Law no.58 of 1956 was replaced by a new law bearing no. 26 of 1963, which aimed to organize the affairs of judges. This law was known as the Judiciary Law; through it the legislator aimed at confirming the independence of the judiciary and at considering its authority as parallel and complementary to the legislative and executive authorities.<sup>3</sup> The law mentioned the Judiciary Council, which is considered as an alternative for the Committee of the Affairs of Magistrates and the Judiciary that was established as per Law no. 58 of 1956.

In 1977, the Justice Council was formed. Upon its establishment, it took over the duties of the Judiciary Council and the organization of the affairs of judges, in addition to its competencies in giving counsel to the Ministry of Justice and

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<sup>2</sup> Refer to Judge Midhat Mahmoud (Head of the Court of Cassation - Head of Judiciary Council), Baghdad, 1<sup>st</sup> ed., Sabbah Sadek Jaafar Al Anbari Publ., 2005, pp. 21-22.

<sup>3</sup> Refer to the obligations of the Judiciary Law, No. 26, 1963.

drafting its plans and supervising their implementation. The presidency of the Justice Council was conferred to the Minister of Justice. Thus, the judicial authority was incorporated within the executive authority (government). All talks of the autonomy of the judiciary were suspended in the light of its subordination to the authority of the Minister of Justice.<sup>4</sup> Later, the Law of Judicial Organization no. 160 of 1979 was issued and entered into vigor on January 17, 1980; thus, superseding the Judiciary Law of 1963 and the regulations issued under it. Hence, we have moved from the Judiciary Council to the Justice Council.

The organization of the judiciary in Iraq according to the Judiciary Organization Law no. 160 of 1979 continued until 2003 when the Judiciary Council was reinstated as per decree no. 35 of September 18, 2003 issued by the American Civil Governor of Iraq, Paul Bremmer.

Despite ample talk about the autonomy of the judiciary, and the efforts exerted by legislators to take recourse in the different constitutions to confirm some general principles on the autonomy of the judiciary, and to assure that the judiciary is autonomous and is subject to no other authority but that of the Law and that the right to litigation is guaranteed to all citizens, the rule is becoming practically more and more restrictive. This is done by putting all authorities in the hand of the Revolution Council as per the temporary constitution issued on July 16,

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<sup>4</sup> Refer to: Ministry of Justice Code, no.101 of 1977 (article 4, paragraph 1).

1970 and its amendments, which ruled Iraq for 33 years, a period similar to the period during which the statue governed in the royal era (also for 33 years).

The Law of Judicial Organization obliged the president of the Court of Cassation to present a yearly report of the works of the Court to the Minister of Justice and the Justice Council presided by the Minister as well. Further, the first article of the Ministry of Justice Code gave the Minister of Justice the right to organize seminars and meetings with judges, including the judges of the Court of Cassation, in order to achieve the objectives of the Party and the Revolution. Thus, the Judiciary was not only politicized, but it also became a partisan and was subjected to tight criteria beyond the frames of professionalism and competence. This made partisanship a basis of loyalty.

Such interference spans to give the Minister of Justice the right to supervise all courts and judges and control their personal and official behavior and their commitment to their duties and office hours, which means the extension of the authority of the executive to the judiciary so as to guide and supervise it during its mandate. Talk about the autonomy of the judiciary from the political perspective meant complying with the will of the authorities that did not believe in the principle of the separation of powers. The judiciary was considered as a state facility, which is regarded as the only controlling authority.

The affliction of the judiciary and of the judges was enormous after the suppression of the Judiciary Council in 1977 and after becoming directly affiliated to the Ministry of Justice and losing a large part of their independence, especially following the politicization of the judicial profession. This state of affairs persisted until the reestablishment of the Judiciary Council in 2003 and was aggravated by the disciplinary measures that were forced on judges. However, the reinstatement of the Judiciary Council was preceded by strict administrative measures that led to the laying off of 180 judges. This number increased to reach 250 judges and was considered as a new massacre for the already worn-out Iraqi judiciary.

Regression in the Iraqi judiciary was massive with respect to orientation, organization and practice; and one of its indicators was: the suppression of the Judiciary Council and transferring the affairs of judges and the members of the public prosecution to the Justice Council, which placed the government's interests before the criteria of justice, impartiality and autonomy of the judiciary.

Upon the reinstatement of the Judiciary Council, the preamble opened with a statement that read, "...the way to impose the rule of law is a judiciary system composed of a competent, free staff that is independent from all external influences." For there is no true constitution despite all rights and freedoms included in it without an autonomous judiciary.

The constitution requires a constitutional judiciary; and the latter should protect the right of individuals and not only groups, this is the doorway to democracy.”<sup>5</sup>

The impact of the occupation of Iraq on April 9, 2003 raise a number of jurisprudence, intellectual, legal and political problems on the legality of procedures that are being implemented by the forces of occupation, especially those that led to structural, constitutional, legal and judicial changes. These changes were rejected by the Geneva Conventions of 1949 and their addendums of 1977, except for procedures necessary to manage matters in the occupied zone. Despite the issuance of UN Security Council resolution no. 1483 in May of the same year, which legitimized the occupation and considered the international Coalition Forces as occupation forces subject to the Geneva Conventions, the procedures, decisions and laws issued by the American civil governor in Iraq, Paul Bremmer, surpass this international description adopted by the international law.

Yet, this does not impede the discussion of established and decreed decisions after stating the necessary remarks to understand the legal framework we are tackling. A number of lawmen, judges, lawyers, jurists and human rights advocates are looking to distance the executive authority from subjugating

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<sup>5</sup> Refer to Dr. Chibli Mallat – *Arab Constitutions and their Protection*, ed. Abd Al Hussein Shaaban, the right of express and political participation, seminar of the Arab Organization for Human Rights – London, August 1993, p. 30 and on.

the judiciary and controlling its affairs. They hope to achieve a state of law essentially built on the autonomy of the judiciary.

Decree no. 35 was issued on September 18, 2003 and aimed at reinstating the Judiciary Council. Thus, the Judiciary Council became in charge and supervisor of the judiciary system independent from the Ministry of Justice. Such a modus operandi seeks to establish a state of law despite some persisting inherited applications that interfere in the judicial affairs.

The importance of such a decision resides in the fact that the legislator has acknowledged the presence of an independent judiciary that is in charge of ensuring that the judges and the members of the public prosecution perform their duties away from any external influence or authority and that they follow only the dictates of their conscience, the rule of law and the constitution.

The decree reiterated the suspension of any text that stands in opposition with the principle of the independence of the judiciary. Theoretically, the judge and the member of the public prosecution are practicing their duties impartially, objectively and without fear of any administrative procedures, such as transfer, promotion or disciplinary procedures, such as punishment and isolation or unjust imprisonment. Yet, the continuation of the phenomenon of terrorism and the spread and exacerbation of political confessionism and ethnic

sectarianism has greatly influenced the implementation of this practically feasible principle.

The Judiciary Council is composed of the following:

- 1- Head of the Court of Cassation and five deputies.
- 2- Head of the Advisory (Shura) Council.
- 3- Public Prosecutor.
- 4- Head of the Justice Supervision Council.
- 5- General Director of the Administrative District. (a judge or a member of the general prosecution)
- 6- Heads of Appeal Courts (14 head).

As per decree no. 35 of 2003, the tasks of the Judiciary Council could be summed up as follows:

- Complete administrative supervision of the affairs of judges and members of the prosecution, to the exception of the members of the Court of Cassation that are administratively supervised by the head of the court since it is the highest judicial body in Iraq.
- Nominate qualified candidates for the post of judges and public prosecutors and recommend their appointment.
- Appoint candidates in judicial posts as stated in the laws of judicial organization and public prosecution.

- Promote, delegate and transfer judges and members of the public prosecution.
- Investigate all violations committed by the above and advise them to step down from their posts.

In chapter six of the Law of State Management during the transitional phase (temporary constitution) issued on March 8, 2004 we read, “The judiciary is an independent authority that is by no means managed by the executive authority.”<sup>6</sup>

Its budget was ratified by the National Assembly (Parliament) and not by the Ministry of Finance. The autonomy of the judiciary implies, among other things, confining the general mandate of looking into different litigations from natural and moral persons, including the government, to the judiciary all the while taking into consideration the international agreements and conventions. This means that the judiciary manages itself and the legislative and executive authorities have no right to interfere in its affairs. Further, the judicial institutions includes all the judicial systems from courts to public prosecution districts, the judicial supervisory committee, the institution for the education of judges and members of the public prosecution up till the mid-level employees.

The head of the judiciary is directly related to the head of the state, since the later is the symbol that represents the state.

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<sup>6</sup> Refer to Abd Al Hussein Shaaban – Iraq: Constitution and State from Occupation to Occupation, Dar Al Mahroussa, Cairo, 2004.

The judiciary enjoys a moral personality, financial and administrative autonomy and an independent budget. Its verdicts and decisions are imperatively applicable and all those who abstain from their application are subject to legal prosecution. As for the appointment of judges and members of the public prosecution, in addition to the management of the judicial affairs, they are confined to the Judiciary Council. Thus, the judiciary is committed to drafting a law to regulate this procedure. As for the legal texts of the Constitution, these can not be changed except with a majority of the two thirds of the members of Parliament.

With respect to the federal and regional courts, the State Management Law considered in article 46 that the federal courts are courts located outside the province of Kurdistan. These courts implement federal laws and the provincial courts in the province of Kurdistan are affiliated to them. (Of course there is a problem as to the borders of the province and the federation to be exact, notwithstanding the issue of Kirkuk, which is an issue that sparkles debate)

In article 34, the State Management Law requires the establishment of the Superior Federal Court. This same article also defined its establishment and its competence. On its part, article 35 stipulated the establishment of the Higher Judiciary Council to be in charge of the judicial duties, to supervise the federal judiciary and to appoint the head of the Superior Federal

Court, heads of the federal courts of appeal, and the head of each provincial cassation court and his deputies.

One could consider that this is a novelty in Iraq, which never experienced the presence of a superior court that deals with the separation of the constitutional laws, decisions, orders, systems and instructions that are issued by the legislative and executive authorities. In the past this has caused a judiciary vacuum that was reflected on human rights and the supremacy of the law.<sup>7</sup>

The Administrative Judiciary had no right to rule on the constitutionality of the laws and their legitimacy. The given justification was that its main mission is to ensure the application of the law and not to search in its legitimacy. Thus, the establishment of a Superior Court is a crucial and primordial issue to ensure the implementation of justice, the rule of law and the protection of rights.

Article 44 of the State Management Law stipulated the formation of a court in Iraq known as the Superior Federal Court and defined its competence and formation. Article 39 conferred the decision of the formation of this court to the board of judges after its election by the Superior Judiciary Court (three times the required number. Those appropriate to preside over the court and to be members in it are chosen).

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<sup>7</sup> The Egyptian, Lebanese and Yemeni judiciary witnessed the presence of a superior constitutional court and this is what was absent in the State of Iraq since its inception.

After the approval of the board of judges and according to the legislative competencies stipulated in decree no. 30 of 2005, the Council of Ministers issued the Superior Federal Court Law on February 24, 2005.<sup>8</sup> This Law chose Baghdad to house the headquarters of the Court where it shall perform its duties independently and without any other authority but that of the Law.

In a groundbreaking framework, it has become possible to litigate on discords that take place between the government and the provincial governments, districts, municipalities and local administrations. This comes in addition to another important issue, which is the settlement of conflicts related to the constitutionality and legitimacy of laws and the removal of everything that stands in opposition with the Constitution; studying the appeals presented against the verdicts and decisions issued by the administrative judiciary and appeal cases (this is regulated based on a given law).

The establishment of the Superior Federal Court was a new basis to keep the budget in the hands of the State authorities and to review all legislations and laws to adapt them to the Constitution, in addition to eradicating all transgressions committed against individuals.

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<sup>8</sup> In its session of July 21, 2004, the Judiciary Council nominated a list of judges for the seats of the members of the Superior Federal Court to be elected based on a secret and free ballot. This was done after consultation with the Judiciary Councils in Kurdistan. The project of the Superior Federal Court was presented to the Council of Judges and its draft law was prepared.  
Refer to: Judge Midhat Mahmoud –The Judiciary in Iraq, *idem.*, pp.52-53.

The ratification of the permanent Iraqi Constitution that was voted on on October 15, 2005 and according to which the elections took place on December 15, 2005, gave precedence and priority to the provincial constitutions over the federal constitution in case they oppose the agreed upon concept of federacy, especially after its successful experiences in more than twenty countries.

The federacy requires the subjection of legislations and provincial laws and constitutions to the federal constitution in case of dispute and not vice versa. Preference, in the case of the federal system is given to the federal constitution; here also, in case of dispute, one could take recourse in the Superior Federal Court. Thus, preference is given to the federal authorities and not to provincial authorities.

This is why the competences conferred to the Superior Federal Court should be given to all Iraq— considering that it is a judicial framework— to settle disputes as mentioned before. Federacy is not a magical solution, especially if it is meant to undermine the state and federal authority for the interest of provinces. The federacy is a legal and administrative framework for the settlement of political problems in a manner that leads to a fair division between the federal authorities and provincial authorities in such a way as to benefit from international experiences and precedence. This should take into consideration the specificity and uniqueness of the Iraqi case

and its Arab environment, all while keeping in mind the necessity of guaranteeing the rights and freedoms and the state of law in the context of a unified democratic Iraq and without violating the rights of others and on the basis of partnership, coexistence and higher national interest.

Weakening the federal constitutions or the Superior Federal Court or the Federal Authorities for the sake of the provinces will lead to the undermining of the state instead of expanding its competencies and responsibilities on the basis of the relation between the federacy and the provinces.

Despite the confusion in the definition of some concepts, the ratification of the Provincial Law and its postponement for 18 months implies that the problem will remain unsolved. This problem will resurface in the context of the plan aiming at amending the constitution, which was agreed upon on the eve of the referendum organized specifically for it.