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The Role of Governance in Strengthening of the Constitutional Judiciary

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Abstract. This research article aims to identify the governance of the judiciary in various aspects (transparency, rule of law, participation, accountability, justice, and equality) and its impact on the development of constitutional judicial powers. To centralize the authority and achieve judicial goals within the state, reforms must be implemented. The concept of judicial governance was previously nonexistent, with some viewing judicial power as separate entities performing their duties independently. However, due to developments that the world has witnessed, the responsibilities of the constitutional judiciary have increased, leading to the adoption and application of governance principles. This can only be achieved through promoting the concept of governance and implementing its principles in all state institutions, particularly those of a constitutional nature. This includes reforming the institutional structure to recover the powers to the judiciary, which serves as the arbiter, separator, and balancer among all branches of government.

Keywords: Governance, judicial governance, constitutional judiciary, Federal Supreme Court, independence of constitutional judiciary, guarantees of constitutional judicial.

INTRODUCTION

The adoption of governance principles by the state has become a societal and international demand, in addition to being an organizational necessity. The provision of services characterized by efficiency and effectiveness is a requirement for all individuals before it becomes a goal that the state seeks to achieve. The emergence of governance is attributed to the deficiencies and deterioration in the management of state and societal affairs, both in terms of resource management and distribution, as well as the failure of public institutions in the state to deliver the best services using modern methods.

Governance is a topic that has garnered significant attention from scholars, particularly legal scholars, as it has asserted itself on the agendas of institutions, organizations, and governments. Numerous studies have confirmed a close correlation between governance and the quality of state institutions, especially judicial institutions, which implement state policies aimed at achieving justice in the functioning of the judiciary.

Governance focuses on deepening participation and effectiveness, as well as transparency in managing and subjecting all state activities to a set of laws, instructions, and regulations. Additionally, it involves making decisions aimed at achieving quality and excellence in performance through the selection of appropriate and effective methods to accomplish the objectives and plans for which they were created, all within the framework of a bundle of laws and regulations that ensure the proper application of the law in response to the crises experienced by the judiciary.

Importance of the Study

This study is significant for public facilities in general and for the judiciary in particular. Its importance arises from clarifying and emphasizing the role of governance in constitutional judiciary in enhancing the development of judicial authority. Governance and the judiciary are subjects that attract the attention of scholars seeking to achieve effective guidance, genuine diagnosis, and an understanding of where the shortcomings lie within the judicial system.

Research Problem

The research problem emerges from the need to clarify the meaning of governance. Do judicial developments align with governance? How does the application of governance principles reflect on enhancing the capabilities of constitutional judiciary? Furthermore, what legislations need to be completed to achieve effective governance of the constitutional judiciary, thus elevating its role in fulfilling its essential objectives and functions, which include reviewing the constitutionality of laws and protecting individuals' fundamental rights and freedoms? This problem, along with others, will be addressed in this research through a structured study plan.

Research Methodology

In this research, we adopted an analytical approach that involves analyzing and interpreting relevant legal texts and judicial rulings. We also employed a comparative method, as the study requires understanding what legal scholarship and judicial jurisprudence have achieved, as well as what legal texts have provided regarding the governing principles of judicial authority. Additionally, we examined the role of the judiciary in protecting those principles and determining the consequences of their violation, with a focus on the practical and applied aspects in Iraq.

Study Plan

To address the aforementioned problem and other questions that may arise on this topic, we divided our research into two sections. The first section discusses the essence of governance and its reflection on the status of the constitutional judiciary function, which we subdivided into two parts. The first part covers the concept of governance and its dimensions, while the second part addresses governance and its reflection on the function of the constitutional judiciary.

The second section of this study illustrates governance and its role in reforming the constitutional judiciary, which we also divided into two parts. The first part discusses governance of the judiciary in light of its independence and the guarantees thereof, while the second part examines governance of the judiciary in the context of expanding powers and mechanisms for change.

CHAPTER ONE

The Nature of Governance and Its Reflection on the Status of the Constitutional Judiciary Function

Each state has its own approach to addressing the issue of governance; however, they all aim for legislative organization through the establishment of rules that ensure sound management. Nonetheless, the legal meaning of governance refers to a set of laws and regulations that govern a specific procedure. Governance in the field of the judiciary, however, is significantly more important than in any other area. To realize governance in a practical and applicable manner, it is necessary to understand the concept of governance and its principles in the first section, followed by an examination of governance and its reflection on the function of the constitutional judiciary in the second section.

Section One

The Concept of Judicial Governance and Its Principles

The recent interest in the concept of governance is attributed to a set of reasons that have led to a change in the role of the state. The concepts of governance have diversified across various fields, whether political,

economic, or social, with scholars frequently providing definitions for this concept. Governance also encompasses principles and frameworks that are complementary to it. In the first subsection, we will define judicial governance, while in the second subsection, we will explore the principles of judicial governance.

Subsection One

Definition of Judicial Governance

To provide a clear and comprehensive definition of governance in general and judicial governance in particular, we will divide this subsection into several sections. The first section will address the meaning of governance, the second section will discuss the importance of governance, and the third section will outline the objectives of governance, as follows:

Axis One: The Meaning of Governance

The term governance emerged alongside terms such as privatization [7] and globalization [22], and there is no unified definition that specifies and clarifies the concept of governance. As a result, definitions of governance have proliferated. It has been defined as "the exercise of political, economic, and administrative authority in managing the affairs of a country at all levels. Governance includes the mechanisms, processes, and institutions through which citizens and groups express their interests and needs and exercise their legal rights and obligations. This concept relies on participation, transparency, and accountability, ensuring optimal use of resources while guaranteeing justice and the rule of law." [28] It has also been defined as "deepening the role of oversight and performance monitoring." [3].

The definition of judicial governance is described as "a system under which the judicial administration is subjected to a set of laws, regulations, and decisions aimed at achieving quality and excellence in performance by selecting the appropriate and effective methods to realize the plans and objectives of the judicial authority and to regulate the relationships between the key parties that influence performance" [35]. It is also defined as "a set of controls that ensure institutional discipline in the management of courts according to global standards, contributing to the development of court administration and supporting the full exercise of financial and administrative functions" [37].

In our view, judicial governance can be defined as a set of applicable legislation, laws, and regulations within the state that govern the operations within the judicial institution and organize the procedures for litigation among all parties in a manner that safeguards the public interest, adhering to standards of transparency, accountability, equality, and the rule of law to preserve judicial stability.

Axis Two: Importance of Governance

Governance is considered one of the most important regulatory standards for improving performance, thereby enhancing outcomes, whether related to the private sector or the public sector in general or to the judicial sector in particular. Through governance, state resources and capabilities can be preserved, which leads to the realization of the plans set by the state.

As for the importance of governance in the judicial field, the judiciary holds the highest status and acts as the guardian of all individuals' rights in society due to its independence (See Article (87) of the Constitution of the Republic of Iraq, 2005) within balanced constitutional frameworks (See Article (88) of the Constitution of the Republic of Iraq, 2005).

The judicial apparatus, particularly constitutional justice, is one of the most important entities within the state, as its significance lies in its continuous pursuit of expressing the nation's components, vision, and aspirations by achieving its hopes and establishing the foundations of justice and achieving peace within society through its role in organizing relationships among all individuals in the community.

Axis Three: Objectives of Governance

Governance aims to redefine the primary role of the state in managing public interests. On one hand, it seeks to enhance individuals' capabilities for participation and initiative, and on the other, it aims to encourage institutions to use their resources correctly and optimally to achieve sustainable growth and development. It also promotes new policy programs based on partnership within the state in a context grounded in democracy,

accountability, and respect for human rights. Furthermore, governance facilitates the oversight process over all state institutions [41].

Establishing a governance system within the judiciary requires a strong and effective judiciary that adopts governance standards in a proactive and sound manner, to achieve the set objectives while organizing its authorities and powers in a way that regulates its functions and provides an ideal model for judicial work that enhances trust between all members of society and state institutions in order to achieve the public interest.

From this perspective, governance begins its practice through the establishment of an integrated governance system by defining behaviors aimed at serving its interests and encouraging leaders to make correct decisions. Governance also relies on official legislation, represented by laws, instructions, and regulations, along with decisions, making the state and all community institutions—including the judicial institution in general and constitutional justice in particular—able to employ this role to produce an effective model that achieves good and desired outcomes while excluding the inadequate.

SUBSECTION TWO

Principles of Judicial Governance

The principles of governance vary according to the field in which they are adopted and applied, reflecting the differing needs based on the nature of work and its objectives. This section will elucidate these principles through several themes as follows:

Axis One: Transparency

The principle of transparency, which is one of the foundational principles of judicial governance, represents an essential framework aimed at achieving integrity, fostering trust, and enhancing the capacity for making appropriate decisions. This principle refers to the freedom to access all information and the obligation to disclose it. Transparency is realized when freedom of expression is firmly established; thus, it necessitates legislation that facilitates the free flow of information. The right to access information and its circulation is a fundamental pillar of governance. [33].

Transparency, akin to openness, serves a singular objective: accountability, candor, clarity, and the elimination of ambiguity. Generally, the principle of transparency is defined as "the clarity and disclosure upon which accountability is based in all forms and patterns of the administrative process, contributing to reducing corruption and enhancing the values of integrity under a legislative framework characterized by clarity and stability that reflects a democratic approach to empower affected parties in the service and enable employees to assume their responsibilities through the existence of open communication channels and the free flow of information." [14].

In its 2007 report on corruption prevailing in the judiciary, Transparency International stated, "The rubber-stamp judiciary provides 'legal' protection for those in power to cover suspicious or illegal strategies, such as embezzlement, nepotism, and political decisions." [74].

In the context of constitutional judicial governance, there is a clear reference to the principle of transparency, which is considered one of the fundamental pillars of governance. This is stipulated in the internal regulations of the Federal Supreme Court No. (1 of 2022), which includes provisions that judgments or decisions issued by the court must state the names of the members who participated in rendering the judgment or decision, the names of the parties or their legal representatives, and the reasons upon which the court relied in issuing the judgment or decision, along with the relevant constitutional and legal texts and applicable constitutional principles, as well as the judicial provision pertinent to the case, and finally, the decision number and the date of its issuance. (See Article (34) of the Internal Regulations of the Federal Supreme Court No. 1 of 2022)

Furthermore, the internal regulations of the Federal Supreme Court include provisions for publishing the court's session schedules, the dates for issuing its judgments and decisions, and their publication. The court also issues a journal titled the "Iraqi Constitutional Judiciary Journal," dedicated to publishing constitutional decisions, judgments, studies, research, and judicial precedents. It also stipulates the publication of decisions declaring laws, regulations, and other decisions unconstitutional that the court deems necessary to publish in the official gazette and on the court's website. (See Articles (36, 47, 48) of the Internal Regulations of the Federal Supreme Court No. 1 of 2022)

Axis Two: Rule of Law

Law has emerged within the historical development of human societies to limit and constrain the absolute power of the ruler while recognizing the rights of citizens. The rule of law necessitates that the rules imposed by

the state upon itself, for the benefit of citizens, should empower them to defend their rights before the judiciary. [86].

The principle of the rule of law refers to "the state's subjection to the law in all forms of its activities and the various actions and conduct it undertakes." [13]. It is measured by the extent of compliance and confidence among stakeholders in the equal application of legal statutes by the government across all individuals and institutions, particularly regarding trust in judicial procedures. This principle—the rule of law—is of significant importance, transcending individual boundaries to encompass the entire society and state institutions. A higher rule of law index fosters trust between government executive institutions and individuals, thereby establishing the principle of the rule of law as one of the fundamental and essential pillars of governance. [31]

Moreover, this principle entails the application of the legal rule to similar cases, which is expressed as "equality before the law." The existence of a stable legal framework alongside an independent judiciary fosters democracy and the implementation of governance principles, ensuring that legal frameworks are characterized by fairness. Additionally, key indicators governing the rule of law include (the existence of a legal rule or written law or stable rules, the publication of laws in a manner that ensures awareness among all individuals, and the existence of mechanisms for resolving disputes equitably accessible to all). [33].

In the realm of constitutional judicial governance, there is a clear reference to the principle of the rule of law, which mandates the compliance and commitment of all individuals to legal provisions. The Constitution of the Republic of Iraq, 2005, explicitly states the finality and binding nature of the decisions made by the Federal Supreme Court, asserting that "the decisions of the Federal Supreme Court are final and binding on all authorities." (See Article 94 of the Constitution of the Republic of Iraq of 2005) This affirmation of the binding nature and authority of the Federal Supreme Court's decisions is not confined to the constitution alone but is also enshrined in the Federal Supreme Court Law (See Article 5/Second of the amended Federal Supreme Court Law No. 30 of 2005) and its Internal Regulations. (See Article 36 of the Internal Regulation of the Federal Supreme Court No. 1 of 2022)

Axis Three: Participation and Accountability

The concept of participation and accountability refers to the existence of regulated methods and procedures that enable the questioning of any individual with responsibility and the oversight of their actions in managing public affairs. In contrast, there is the possibility of their dismissal or prosecution in cases of legal violations or transgressions. Such accountability is guaranteed by law and is realized through the presence of an independent judiciary characterized by impartiality and fairness. This principle is connected to the necessity of activating the role of laws and regulations in prosecuting anyone who commits errors or infringes on the rights of others due to violations of laws and decisions, from the highest echelons of power to its grassroots. Accountability does not merely hinge on punishment; it also relies on the presence of incentives that encourage officials to perform their duties with integrity, sincerity, and effectiveness. [33]

This principle measures the extent to which individuals can participate in decision-making processes and in the formulation of strategies. One of the most significant applications of human rights principles is manifested in the implementation of democratic principles through political participation and freedom of expression. The principle of accountability is reflected in the extent to which citizens can hold officials accountable for the outcomes of their decisions. The application of this principle greatly aids in reducing the extent of corruption by allowing individuals to oversee the performance of state officials. [31]

In the realm of judicial governance, this principle plays an equally important role as the previously mentioned pillars. The Constitution prohibits judges from combining judicial functions with legislative or executive roles or from belonging to any political party or organization or engaging in any political activity. (See Article 98 of the Constitution of the Republic of Iraq of 2005) Furthermore, the Constitution stipulates that judge must not exploit their influence to purchase or lease anything from state property, nor should they rent or sell anything to the state, or enter into contracts with the state in the capacity of contractors, suppliers, or vendors. (See Article 127 of the Constitution of the Republic of Iraq of 2005)

Axis Four: Justice and Equality

The debate surrounding justice and equality is central to societal life; justice and equality are intertwined demands that are no longer merely claims of one group over another or one category over others.

This principle is generally considered one of the most important foundations of governance, serving as the cornerstone for establishing the rule of law and ensuring security and peace for all individuals. It is rooted in a historical foundation, exemplified by the Declaration of the Rights of Man and of the Citizen of 1789. (See Article 1 of the Universal Declaration of Human Rights, which states: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit

of brotherhood.") This principle has been enshrined in various constitutions, including Iraqi constitutions, from the promulgation of the Basic Law of 1925 to the Constitution of the Republic of Iraq of 2005. (See Article 14 of the Constitution of the Republic of Iraq of 2005, which states: "Iraqis are equal before the law without discrimination based on gender, race, nationality, origin, color, religion, sect, belief, opinion, economic status, or social status.")

Judicial governance may not require constitutional or legal frameworks to implement justice and equality, as this principle is enshrined in all international agreements and the constitutions and domestic laws of all countries. All of them affirm justice and equality before the law and before the judiciary, as well as equality in rights and freedoms, ensuring full protection for the rights of judges and litigants.

Within the scope of this dimension and its role in governing constitutional judiciary, we find a clear reference to justice and equality in initiating lawsuits before the Federal Supreme Court. This is evident in the internal regulations of the Federal Court, which state that any natural or legal person, or any legally recognized civil society organization, has the right to file a direct lawsuit before the Federal Supreme Court. (See Article (20) of the Internal Regulations of the Federal Court No. 1 of 2022) Furthermore, any party with a vested interest has the right to directly challenge any lawsuit submitted to the court concerning issues arising from the application of federal laws, decisions, regulations, and procedures issued by the federal authority. (See Article (25) of the Internal Regulations of the Federal Court No. 1 of 2022)

SECTION TWO

Governance and Its Reflection on the Function of Constitutional Judiciary

Governance calls for the independence of the constitutional judiciary and the assurance of litigants' rights before it, as well as the respect for the procedural rules of justice. The constitutional judiciary is one of the most important components upon which the rule of law is built in achieving its objectives, particularly in ensuring the proper functioning of all its institutions. Governance has a significant and effective impact on the constitutional judiciary, as its essence primarily aims to establish the principle of equality in the exercise of judicial duties, thereby fostering trust among all stakeholders, whether state authorities, institutions, or individuals.

Furthermore, governance strives to achieve a credible constitutional judiciary by making it a reality free from all obstacles that undermine the principle of equality. This will be elaborated upon in the first section of this requirement, while the second section will address the degree of trust in the constitutional judiciary in dismantling the dilemma of political exploitation.

SUBSECTION ONE

The Credibility of the Constitutional Judiciary in Achieving Equality

The principle of equality, as defined by the judiciary, is "the right of citizens to seek judicial review when their rights and freedoms have been violated in order to remedy those violations." [16] This notion of equality does not negate the necessity of addressing situations according to their variances. This is rooted in Aristotle's idea that "treating different situations in the same manner is akin to treating similar situations differently; in both cases, the treatment is equal in its injustice." [82]

The principle of equality holds significant constitutional value, as it is enshrined within the core of constitutional documents and is also recognized at the international level. Internationally, the principle of equality before the judiciary is articulated in numerous international treaties. For instance, the Universal Declaration of Human Rights, adopted by the United Nations General Assembly [75], states that "everyone is entitled to a fair and public hearing by an independent and impartial tribunal, in the determination of their rights and obligations and of any criminal charge against them." (See Article (10) of the Universal Declaration of Human Rights of 1948) Additionally, the International Covenant on Civil and Political Rights emphasizes that "all persons are equal before the courts and tribunals," (See Article (14/1) of the International Covenant on Civil and Political Rights of 1966) and that every individual is entitled to have their case heard fairly and publicly by a competent, independent, and impartial tribunal established by law, which was also adopted by the United Nations General Assembly. [76]

The emphasis on this principle is not limited to global agreements but extends to regional agreements as well. The Arab Charter on Human Rights, adopted by the Arab League, [77] states that "all individuals are equal before the judiciary, and the states guarantee the independence of the judiciary and protect it from any interference, pressure, or threats, as well as ensure the right to litigate at all levels for every individual subject to its jurisdiction." (See Article (12) of the Arab Charter on Human Rights.)

This principle has been incorporated into domestic legislation, as it was inspired by constitutions following the emergence of modern states, which included it in their internal texts. All Iraqi constitutions, from the

Fundamental Law of 1925 to the Constitution of the Republic of Iraq of 2005, have enshrined this principle, particularly in Article (19/6), which states that "every individual has the right to be treated fairly in judicial and administrative proceedings."

We may ask whether this principle (equality) has been realized in practice within the constitutional judiciary and its competencies outlined in the constitutional document, or whether it is merely a slogan appropriated by legal texts to fill the contents of the articles.

When examining the decisions of the Federal Supreme Court regarding equality in political rights, we can refer to what the Federal Supreme Court stated in one of its decisions when reviewing the appeal submitted against Article (46) of the Iraqi Parliamentary Elections Law. (See Article (46) of the Iraqi Parliamentary Elections Law No. (9 of 2020) prior to the amendment, which states: "The winning candidate in the parliamentary elections is obliged to take the constitutional oath within a maximum period of one month from the date of the first session. Otherwise, the alternative shall be the candidate who received the highest votes among the losing candidates in their list within their electoral district. In the event that the winning individual candidate does not take the oath, the alternative shall be the highest losing candidate in their electoral district." This law was repealed under Article (25/1) of Law No. (4 of 2023), the third amendment to the Law on Parliamentary Elections and the Councils of Provinces and Districts No. (12 of 2018).) The decision stated: "Legal equality is the fundamental principle upon which all manifestations of equality are based. It means that all similar legal statuses are subject to the same legal treatment without discrimination based on gender, origin, language, religion, or belief. Undoubtedly, the principle of equality is the cornerstone of any democratic organization of rights and public freedoms; it is the spirit of democracy without which the meaning of democracy vanishes, and the entire concept of freedom collapses. Any organization of the electoral process by the legislator is insufficient to achieve the desired objectives unless this organization aligns with various requirements, the most important of which is the principle of equality among individuals. Political equality is the foundation of true democracy. Influenced by this idea of equality, modern democracy has adopted the principle of equal universal suffrage, so that every person has one vote. Thus, citizen participation in political activity through voting and candidacy is the sole instrument of electoral legitimacy in democratic states, and these are two complementary rights; parliamentary democracy cannot exist without both. There are multiple legal foundations emphasizing the principle of equality."

The contested article was annulled and replaced with the following: "The winning candidate in the parliamentary elections is obliged to take the constitutional oath within a maximum period of one month from the date of the first session. In the event that the winner does not take the oath, the highest losing candidate in their electoral district shall be the alternative." (Federal Supreme Court Decision No. (144/Federal/2021) issued on (November 12, 2021))

In another decision related to equality in civil rights, the court affirmed this principle when considering a case concerning the constitutionality of Article (25) of the Law on the Sale and Lease of State Property No. (21) of 2013, amended by Law No. (21) of 2016. (See Article (25) of the Law on the Sale and Lease of State Property No. (21 of 2013), which states: "The Minister of Finance may sell or lease agricultural lands located outside the prohibited areas, which are not subject to the allocated water share, without a public auction, and the Minister of Agriculture shall lift the agricultural reform restrictions on those lands, and the sale and lease shall be recorded as a final revenue for the state treasury, while respecting the rights of easements.") The reasoning of the decision stated: "...What is stated in the repeated Article (25) of the Law on the Sale and Lease of State Property No. (21) of 2013 is in violation of the principle of equality in accordance with Article (14) of the Constitution of the Republic of Iraq of 2005. A quick review of all declarations of rights that followed revolutions, reaching the global declarations of human rights and the texts of most constitutions worldwide, clearly shows the rank occupied by the principle of equality in these texts, particularly concerning the prohibition of discrimination among individuals based on ethnicity, religion, or culture. The application of the principle of equality through the interpretations of the constitutional judge grants this principle the obligatory constitutional truth, necessitating the need to persistently root the constitutional values of the principle of equality. The fundamental obstacle in realizing the principle of equality is manifested in the conflict between theoretical and practical realities of the law. This means that, from a formal perspective, the law achieves equality when it addresses everyone without exception. However, it violates the principle of equality in practical terms when it treats different legal statuses in the same manner." [69].

Through the examination of significant international agreements and constitutional texts that enshrine the principle of equality before the law, it becomes evident that this principle is one of the fundamental tenets upon which constitutional justice is built in modern states. Thus, respecting and instilling this principle throughout all legal proceedings is sufficient to demonstrate the credibility of the constitutional judiciary. Equality before the law facilitates the establishment of a fair judiciary that provides effective judicial services. Furthermore, equality before the constitutional judiciary implies that no particular entities or individuals are discriminated against in terms of legal procedures or in the issuance of judgments in cases brought before it; all are equal before the law, subject to a single legal framework and a unified judiciary.

The principle of equality is among the most crucial principles underpinning governance, as it necessitates fair treatment that requires similar cases to be handled equally, without discrimination between one case and another. It also entails ensuring fair treatment without bias or inclination towards one party at the expense of another.

Generally, judicial governance and, specifically, constitutional justice do not require legislative frameworks to implement the principle of equality, as all global and regional international agreements, constitutions, and domestic legislations explicitly affirm this principle before the law in general and before the judiciary in particular. To ensure comprehensive protection for the rights of constitutional judges and litigants, it is emphasized that there should be no discrimination among individuals, whether they are governmental institutions or ordinary citizens, nor should there be any preferential treatment. Instead, all individuals must be equal before the law and the judiciary, with the constitution and subsequent laws serving as the foundation of everyone's commitment to the state. [27]

Successful governance leads to the distribution of powers, the delineation of responsibilities, and the clarity of jurisdiction regarding decision-making at all levels. It serves as a remedy for those who exceed their authority and for those who fail to utilize it appropriately. The correct implementation of governance results in transparency and clarity, preventing bias towards one party at the expense of another, which, in turn, leads to the achievement of fair treatment and equality among all individuals, thereby preventing conflicts of interest and promoting ethical conduct. Ultimately, the purpose of governance is to attain acceptable outcomes and rectify paths and errors. [87]

SUBSECTION TWO

The Confidence of the Constitutional Judiciary in Dismantling the Dilemma of Political Exploitation

It is essential to foster trust among all entities—state authorities, institutions, and individuals—in the constitutional judiciary as a supreme authority and one of the most critical branches of state power. This trust enables individuals to benefit from the decisions issued by the judiciary concerning the cases brought before it. Such trust can only be achieved by extricating the judiciary from the realm of political exploitation, ensuring that it remains unaffected by external influences when exercising its constitutional powers. This allows the judiciary to fulfill its role in protecting rights and freedoms and adjudicating cases in accordance with the law, free from any subservience to state powers. The confidence of all parties in the constitutional judiciary cannot be strengthened or manifested in reality unless the dilemma of political exploitation is effectively dismantled. [83]

The judicial authority, in general, and the constitutional judiciary, in particular, play a significant and increasingly vital role in regulating all societies. However, the frequent recourse to the constitutional judiciary for addressing social or economic issues paves the way for its involvement in politically charged matters. This shift raises concerns about the depth of the constitutional judiciary's authority, leading to ongoing debates regarding its transition from addressing social and economic issues to engaging in political controversies.

One of the most significant vulnerabilities that can be politically exploited to influence the constitutional judiciary is the lack of clear provisions for establishing the constitutional court within the constitutional document. Additionally, the absence of explicit delineation of its powers, independence, and the guarantees afforded to its members leaves room for legislative interference in this vital judicial authority. Such interference may manifest through stipulations regarding the court's jurisdiction, procedural mechanisms, financial remuneration, pension rights, or tenure. This issue will be explored in detail in the second section of this study.

A pertinent question arises: To what extent can and does political authority influence the constitutional judiciary and limit its judicial jurisdiction when exercising its constitutional functions?

Before addressing this question, it is important to note that the Constitution of the Republic of Iraq (2005) does not provide detailed provisions regarding the formation of the Federal Supreme Court. In contrast, some constitutional texts explicitly outline its jurisdiction (See Article (93) of the Constitution of the Republic of Iraq (2005)) and independence from other branches of state power (See Article (92/First) of the Constitution of the Republic of Iraq (2005)), along with the binding nature of its decisions. (See Article (94) of the Constitution of the Republic of Iraq (2005)) Nevertheless, despite these constitutional provisions, the legislative authority is granted the power to enact a law that specifies the number of members of the court and regulates their selection process and the court's operations, requiring a two-thirds majority in the House of Representatives for its passage. (See Article (92/Second) of the Constitution of the Republic of Iraq (2005))

To respond to the aforementioned inquiry, an examination of the texts within the Iraqi Constitution reveals that political authority can significantly impact the role of the Federal Supreme Court. The existence of a consensus government may facilitate the transfer of political quotas into the court, influenced by political, social connections, and personal beliefs or motivations. Such a scenario risks transferring political conflicts into the highest judicial institution—the constitutional judiciary—potentially disrupting its operations. [5]

The provision granting the legislative authority the power to issue a law determining the number of judges in the Federal Supreme Court and regulating their selection and operations requires a two-thirds majority in the House of Representatives (See Article (92/Second) of the Constitution of the Republic of Iraq for the year 2005) raises concerns and doubts. This law could be passed through political consensus by the political authority (legislative) since that majority is described as a qualified majority.

While we acknowledge the stipulations of the Constitution of the Republic of Iraq granting the legislative authority the ability to regulate certain matters related to the Federal Supreme Court through legislative instruments of lesser rank than laws, we do not fully support any decisions issued by the executive authority concerning the Federal Supreme Court based on its authorization from the legislative authority or in situations permitted by the Constitution. This is because the exercise of legislative authority by the executive is an exceptional power, and exceptions should not be expanded, as they are exercised in specific cases outlined in the Constitution. Such expansions could enable the executive authority to influence judicial independence since such laws would allow the executive to exclude certain judges it disapproves of. Furthermore, the regulation of a significant authority such as the judiciary, which is no less important than other authorities and plays a critical role in protecting rights and freedoms and overseeing the actions of the legislative and executive authorities, must remain the prerogative of the original authority (the legislative authority) and cannot be delegated to another authority. [20]

The potential fierce conflict that may arise between the constitutional judiciary represented by the Federal Supreme Court and the legislative authority represented by the House of Representatives raises the question of how members of the constitutional judiciary can be appointed by specific legislative authorities rather than by representatives of the people or directly by the people, while at the same time not being accountable to any authority or to the public. This situation creates an imbalance by allowing the constitutional judiciary to suspend laws enacted by the representatives of the people (the parliament) that reflect popular will and national sovereignty. How can a designated body oversee the actions of an authority elected by the people? [88]

The concept of governance is linked to the idea of reforming the system, as it contains a set of rules capable of organizing the political sphere. From this foundation, governance has emerged as a method relied upon for managing and shaping the basic principles under which all state institutions operate in coordination with other essential foundations within society. This can only be achieved through delineating and translating it by reforming legislation, starting from the highest legislation at the top of the hierarchy—the constitution—to the lowest level of laws. Accordingly, governance is intertwined with political reform, primarily through combating the plague of corruption in governance. Wherever these characteristics exist, political reform acts as a means, and governance serves as a method for addressing areas of weakness and dysfunction in governance. [89].

Governance in the context of constitutional judiciary and its relationship with parliament involves correcting imbalances within the parliament itself, protecting the parliament by invalidating legislative texts that violate the constitution, and leaving it to the parliament to reorganize what has been annulled. Additionally, the constitutional judiciary can elevate the performance of the parliament and expand its legislative powers. All these factors contribute to safeguarding the parliament.

Before concluding this section, we would like to briefly address an important issue related to political exploitation on one hand and governance and the role of the constitutional judiciary on the other, which is the topic of electoral funding for candidates and political parties. Governance within the context of the constitutional judiciary involves principles of justice, equality, and transparency in the distribution of financial resources to candidates and parties, halting electoral fraud through vote-buying, and preventing undue influence on voters by foreign aid or wealthy individuals. It also includes prohibiting the misuse of state resources and the mobilization of public interest to serve private interests, as well as limiting public spending on electoral campaigns and political activities, and other forms of corruption. Through the oversight of the constitutional judiciary over the electoral process and the accompanying appeals, it can contribute to reducing electoral corruption and its associated issues.

CHAPTER TWO

Governance and Its Role in Reforming the Constitutional Judiciary

Governance aims to achieve and enhance the efficiency of all state institutions. In order to enable the constitutional judiciary to fulfill its role of protecting the constitution, it must be independent and free from interference by other authorities. In addition to its independence, it must possess adequate guarantees that allow it to achieve its defined objectives. Furthermore, governance contributes to the reform of the constitutional judiciary in terms of its powers and the internal changes within its system. From this perspective, we will address in the first section the governance of the judiciary in light of its independence and guarantees, while in the second

section we will illustrate the governance of the judiciary concerning the expansion of powers and mechanisms for change.

SECTION ONE

Governance of the Judiciary in Light of Its Independence and Guarantees

The constitution is no longer merely a political text resulting from a consensus among societal forces to play a secondary role; it has become a legal document that imposes its rules on all authorities. In democratic states, the constitution is considered the instrument that legitimizes the practices of power and guarantees legal protection and oversight of the actions of authorities. All legislation, regulations, treaties, and agreements, as well as any activities or actions undertaken by public authorities, are subject to it. These authorities are obligated to adhere to constitutional texts based on the principle of separation of powers, which designates the judiciary as an independent authority separate from other powers.

The constitutional judiciary is created by the constitution; therefore, it is not indebted for its existence to any other authority. Since the constitutional judiciary is an essential part of the judicial authority, it stands on equal footing with other powers. In this section, we will discuss the independence of the constitutional judiciary in the first subsection, and in the second subsection, we will address the constitutional guarantees.

SUBSECTION ONE

Independence of the Constitutional Judiciary

The independence of the judiciary is considered one of the fundamental pillars upon which the rule of law is established. It is a constitutional principle that governs how democratic states organize their powers, emphasizing that the judiciary or the judge is subject solely to the law to achieve justice. In this section, we will demonstrate the role of the constitutional judiciary in entrenching the foundations of its independence in the first axis, while the second axis will address the constitutional frameworks supporting judicial independence.

Axis One: The Role of the Constitutional Judiciary in Entrenching Its Independence

The role assigned to the constitutional judiciary necessitates the exercise of its functions with complete independence from all state authorities. While the independence of the ordinary and administrative judiciary is a prerequisite for achieving justice, the constitutional judiciary serves as a guarantee for upholding the independence of the judiciary in the laws that govern and regulate its work, thereby establishing the foundations of judicial independence within its texts.

Governance focuses on addressing the overlap of jurisdictions and powers or the potential for overlap and the misuse of this conflict, which leads to the closure of these gaps. The objective of governance is to achieve the independence of the judiciary and judges. On one hand, governance seeks to prevent any intervention by other authorities, whether legislative or executive, in judicial affairs. On the other hand, it aims to uphold the rights of judges within the judicial authority in a manner that ensures equality and reliance on competent judges by combating undue influence and political factions. Essentially, governance aims to ensure that the judiciary or judges do not deviate from the path of justice and the realization of rights. [2]

Judicial independence refers to "the avoidance of any interference in judicial work by any authority from the legislative or executive branches." [38] The principle of judicial independence in relation to the judiciary and other state authorities is based on the principle of non-interference by the legislative and executive branches in matters that fall within the jurisdiction of the judiciary, recognizing it as an independent constitutional authority separate from other powers. [90]. Judicial independence and fairness are among the most important principles of human rights enshrined in numerous international treaties. (See Article 10 of the Universal Declaration of Human Rights of 1948 and Article 14 of the International Covenant on Civil and Political Rights of 1966)

The principle of judicial independence is closely linked to another principle that is foundational to the rule of law: the principle of separation of powers. This latter principle relies on two essential elements for its success: the specialization of functions and organic independence. The legislative authority's role is to enact laws and legislation, while the executive authority's role is to implement those laws in general. Meanwhile, the judiciary plays its unique role in adjudicating disputes brought before it. [8].

Axis Two: Constitutional Frameworks for the Independence of the Constitutional Judiciary

The role assigned to the constitutional judiciary requires it to exercise its functions with complete independence from all state authorities. The independence of the constitutional judiciary necessitates its establishment through a constitutional provision, similar to other constitutional institutions, specifically like the Council of Representatives and the government. This solidifies its existence as an institution within the constitutional framework, such that it cannot be subject to annulment, just as the parliament and government cannot be.

The constitutional document established after 2003, represented by the *Law of the Management of Iraqi State for the Transitional Phase of 2004*, organized the powers of the Iraqi state during the transitional period following the end of the Coalition Provisional Authority until the issuance of the Constitution of the Republic of Iraq in 2005. Article 44 of the *Law of State Management* established the Federal Supreme Court and assigned it the task of overseeing the constitutionality of laws and adjudicating disputes.

Accordingly, the *Law of the Federal Supreme Court No. 30 of 2005* was issued, stipulating in Article 1 the establishment of a court called the Federal Supreme Court, headquartered in Baghdad, which exercises its functions independently, subject only to the law. Additionally, the law outlines the financial and administrative independence of the court in Article 2.

After the issuance of the Constitution of the Republic of Iraq in 2005, Article 89 stated that the judiciary "consists of the Supreme Judicial Council, the Federal Supreme Court, the Federal Court of Cassation, the Public Prosecution Service, the Judicial Oversight Authority, and other federal courts that are organized according to the law." The Constitution also emphasized the independence of the Federal Supreme Court in Article 92/First, which states, "The Federal Supreme Court is a judicial authority independent in terms of finance and administration." Furthermore, the internal regulations of the Federal Supreme Court stipulate its administrative independence. (See Article 1 of the Internal Regulations of the Federal Supreme Court No. 1 of 2022.)

We must inquire about the meaning of judicial independence. Does it refer to the independence of the judicial authority or the independence of judges? Independence should be manifested in the judiciary as an authority, and the independence of those who manage the institution is an integral part of the independence of the institution itself. Thus, the independence of the constitutional judiciary necessitates the independence of the constitutional judge. [26]. What is particularly relevant to this research is the extent to which the constitutional judiciary is independent from the judicial authority.

To answer this question, it is essential to note that the judicial authority is an independent authority tasked with achieving justice in the state through its various courts, and it is responsible for protecting fundamental rights and freedoms.

The judicial system may be unified or dual. Iraq has adopted a dual judicial system (ordinary judiciary and administrative judiciary), where the apex of the administrative judiciary is represented by the Council of State (See Article (1) of the Iraqi State Council Law No. 65 of 1979, as amended), and the Court of Cassation (. See Article (12) of the Judicial Organization Law No. 169 of 1979, as amended) is at the top of the ordinary judiciary. Alongside this dual system, there exists the constitutional judiciary, which is responsible for safeguarding the constitution and ensuring its supremacy. It carries out its functions independently from all other authorities; however, this does not preclude the existence of a relationship between it and the other authorities.

The Constitution of the Republic of Iraq enshrines one of the most critical frameworks that judicial governance seeks to implement, namely, judicial independence. It states in one of its provisions, "The judiciary is independent and is administered by courts of various types and degrees, which issue their rulings in accordance with the law." (See Article (87) of the Constitution of the Republic of Iraq of 2005)

Judicial governance refers to a set of procedures and measures taken to enable the judiciary to perform its responsibilities in the best possible manner. Governance necessitates that attention is paid to the realities of the judiciary in light of its independence, which aims to provide suitable working conditions and environments, modernize working methods, and equip judges with the necessary resources. It fundamentally targets the internal organization of the judicial authority and the organization of work within it. [37].

The concept of judicial independence, in general, serves as a guarantee for the judiciary and should not be considered merely a right or privilege for individual judges. Furthermore, judicial independence constitutes an essential characteristic that requires the application of both the principle of the rule of law and the principle of separation of powers, as each complements the other in achieving the foundation of the rule of law.

It remains crucial for the constitutional judge to fortify their independence. Simply enshrining independence in texts is insufficient; there must also be a reinforcement of this independence in practical application.

SUBSECTION TWO

Guarantees of the Constitutional Judiciary

After elucidating the independence of the constitutional judiciary in the first subsection of this section, we will now address another significant aspect, namely the guarantees that are considered one of the most fundamental issues in ensuring the independence of the constitutional judiciary, which facilitates and preserves this independence. This will be the focus of our discussion in this subsection.

Axis One: Constitutional Frameworks for the Guarantees of the Constitutional Judiciary Regarding Formation and Appointment

1. Guarantees for the Formation of the Court:

Following the change in the system in 2003, Iraq adopted a federal system as the structure of the Iraqi state. This federal system necessitates the existence of a judiciary tasked with resolving disputes that may arise between the central authority and the regions or provinces not organized into regions. This authority is represented by the Federal Supreme Court.

The principle of judicial independence is an inevitable outcome of the federal structure of the state. Given the seriousness of the issue, it is imperative that the formation of the constitutional court is not left solely to the legislative or executive authorities. Therefore, the establishment of the court must be articulated in clear constitutional texts that are free from ambiguity or vagueness. [17]

The Iraqi Constitution delineates the mechanism for the formation of the Federal Supreme Court, stipulating: "The Federal Supreme Court consists of a number of judges, experts in Islamic jurisprudence, and legal scholars, the number of whom is determined, and the method of their selection and the functioning of the court are organized by a law enacted by a two-thirds majority of the members of the House of Representatives." (See Article (92/Second) of the Constitution of the Republic of Iraq of 2005) It is noted from this constitutional text that the constitutional legislator did not specify the number of members of the Federal Supreme Court or the method of their selection, leaving it to the legislative authority to regulate it by law. Additionally, the Law of the Federal Supreme Court outlines the mechanism for establishing this court by stating: "The Federal Supreme Court consists of a president, a vice president, and seven original members who are selected from among the first-class judges currently serving, provided that their actual service in the judiciary is not less than fifteen years." (See Article (3/First/1) of the Law of the Federal Supreme Court No. 30 of 2005, as amended)

2. Guarantees for the Appointment of Judges

Before the amendment of the Law of the Federal Supreme Court, the Supreme Judicial Council was responsible for nominating judges to the Federal Supreme Court, (Refer to Article (3) of the Law of the Federal Supreme Court prior to the amendment, which states, "The Federal Supreme Court consists of a president and eight members appointed by the Presidency Council based on the nomination of the Supreme Judicial Council in consultation with the judicial councils of the regions as stipulated in paragraph (e) of Article (44) of the Law of Administration for the State of Iraq for the Transitional Period) while the Presidency Council held the authority to appoint them. However, the Federal Supreme Court addressed this issue in one of its decisions by declaring Article (3) of the Federal Supreme Court Law, which pertains to the formation of the court, unconstitutional. The Court emphasized the necessity of enacting a law that aligns with constitutional provisions to ensure the court's independence. [64]. As a result, the legislative authority—the Iraqi Council of Representatives—resolved this debate by amending the law and issuing the first amendment to the Court Law No. (25 of 2021), which designated the competent authority for selecting judges for the Federal Supreme Court. (Refer to Article (1) of Law No. 25 of 2021, the first amendment to the Law of the Federal Supreme Court No. 30 of 2005 as amended)

The assignment of the legislative authority the task of enacting a law to regulate the selection and functioning of court members has drawn criticism from constitutional lawmakers. It would have been more appropriate to include explicit provisions in the constitutional document regarding the formation of the court, the number of its members, and the methods of selecting judges, given the importance and sensitivity of the role played by the Federal Supreme Court and the competencies it exercises.

In this context, governance aims to protect the independence of the constitutional judiciary. One of the key standards of governance is the mechanism for selecting and nominating judges in a manner that ensures the integrity of the selection processes related to competence, fairness, and equality, in addition to issues surrounding their appointments and promotions, thereby guaranteeing the equity and efficacy of the appointments. [37]

Axis Section: Constitutional Frameworks for Guarantees of the Constitutional Judiciary Regarding the Inviolability of Judges

Judges enjoy several guarantees that ensure their independence while performing their functions, with the foremost guarantee being their inviolability against dismissal. The Constitution of the Republic of Iraq (2005) affirms this principle, stating that "judges cannot be dismissed except in cases specified by law, and the law shall define the specific provisions regarding them and regulate their disciplinary accountability." (Refer to Article (97) of the Constitution of the Republic of Iraq of 2005)

Moreover, the French Constitutional Council has reaffirmed the independence of the judiciary and the impossibility of dismissing judges, establishing this as a principle of constitutional value, as judges are regarded as protectors of individual freedom. However, the Constitutional Council has also indicated that legislators may override this if necessary for maintaining public order or matters pertaining to the public interest, which hold constitutional significance. [84]

Despite the Iraqi Constitution containing a provision prohibiting the dismissal of judges, this constitutional provision presents a general rule stating that judges cannot be dismissed; however, it simultaneously permits the legislature to outline certain exceptions to this rule, allowing for the dismissal of judges under specific conditions as defined by law. Nonetheless, it is essential that exceptions not be expanded, as doing so may conflict with the independence of judges. Thus, it would have been preferable to establish these exceptions within constitutional provisions. [5]

Governance aims to prevent conflicts of interest by maintaining an effective, impartial, and fair judiciary. This principle is one of the essential aims of governance and is especially crucial in the judiciary, which serves to resolve disputes. Governance principles have evolved to prevent any conflicts of interest in the services provided by the judiciary. [37]. The inviolability of judges against dismissal assists the constitutional judiciary in fulfilling its constitutional duties aimed at achieving justice and upholding rights.

Axis Three: Constitutional Frameworks for Guarantees of Financial Independence for Constitutional Courts

1. Guarantees of Financial Independence:

The state must allocate financial resources to the constitutional judiciary to ensure that independence is not merely an illusion. This requires that the constitutional judiciary have a budget that is independent of other branches of government, and it should have the right to manage its financial matters through its own budget. This is because the judiciary is best positioned to determine its own needs. The revenue from fees for cases brought before the constitutional court is insufficient, necessitating that the legislative branch allocates funds to cover the constitutional judiciary's budget. [1]

The constitutional legislator rightly emphasized the financial independence of the Federal Supreme Court through explicit provisions, preventing any interference from the legislative or executive branches in the financial affairs of the constitutional judiciary. This independence is also affirmed by the law governing the court and its internal regulations. (Refer to Article (92/First) of the Constitution of the Republic of Iraq (2005), Article (2) of the Federal Supreme Court Law No. 30 of 2005 as amended, and Article (1) of the Internal Regulations of the Federal Supreme Court No. 1 of 2022)

Furthermore, the Federal Supreme Court itself has reinforced this independence through its decisions. One such decision declared the unconstitutionality of Article (3/Second) of the Law of the Higher Judicial Council No. (45 of 2017), which stipulated, "The proposal of the annual budget for the federal judicial authority and its presentation to the Council of Representatives for approval." [62].

2. Guarantees of Financial Remuneration for Judges:

One of the most crucial guarantees for judges of the constitutional judiciary is financial remuneration and the mechanisms to regulate it. These guarantees ensure that judges and their families have sufficient income to meet all their needs. This financial security extends beyond their active service to include their retirement, recognizing the years they have dedicated to the service of the constitutional judiciary.

Some constitutions emphasize and safeguard the financial independence of judges' salaries to ensure they are not compromised, which in turn supports the independence of the constitutional judiciary. Some constitutions go further, stipulating that judges' salaries cannot be reduced while they are in office. However, the Constitution of the Republic of Iraq does not mention the financial remuneration of Federal Supreme Court judges.

The legislative authority, the Council of Representatives, is responsible for regulating the financial remuneration of Federal Supreme Court judges through the Law of the Federal Supreme Court, which stipulates, "The president and members of the Federal Supreme Court shall receive the salary and allowances of a minister." (Refer to Article (6/First) of the Federal Supreme Court Law No. 30 of 2005 as amended)

Regarding the retirement salaries of Federal Supreme Court judges, the Law of Salaries of Judges and Members of the Public Prosecution No. (27 of 2008) excluded the president and members of the Federal Supreme

Court from its provisions. (Refer to Article (3) of the Judicial Salaries and Public Prosecution Members Law No. 27 of 2008 as amended) Furthermore, the Law of Salaries and Allowances of the Council of Ministers No. (27 of 2011) was annulled by a decision of the Federal Supreme Court. (6) Additionally, Article (6/Second) of the Law of the Federal Supreme Court No. (30 of 2005), which outlined the retirement rights of the president and members of the Federal Supreme Court, was annulled by the Unified Retirement Law No. (9 of 2014) as amended. (Refer to Article (38/First/T) of the Unified Retirement Law No. 9 of 2014 as amended) This implies that there is no specific provision regulating the retirement salaries of Federal Supreme Court judges.

It would have been preferable to enshrine the financial remuneration of Federal Supreme Court judges in the constitutional document itself, including provisions to prevent any reduction in their salaries. This would ensure that the matter is not left to the discretion of the legislative authority, which could undermine the principle of separation of powers.

SECTION TWO

Judicial Governance in Expanding Powers and Mechanisms of Change

The functions and jurisdiction of constitutional courts inherently possess a judicial nature, leading some countries to consider them part of the judicial authority. The Iraqi Federal Supreme Court is included within the structure of the judicial authority, (Refer to Article (89) of the Constitution of the Republic of Iraq (2005).) playing a significant and direct role in the operations of constitutional institutions and the foundations of the governance system. Reflecting its reformative role and in line with the principles and objectives of judicial governance, this section will address the expansion of the powers of constitutional courts in the first subsection and the governance and internal mechanisms of change for the constitutional judiciary in the second subsection.

SUBSUBSECTION ONE

Expanding the Powers of Constitutional Courts

The powers of constitutional courts are often delineated within the constitutional document itself or through specific laws, preventing the courts from extending their oversight to matters beyond their pre-defined jurisdiction. This approach is exemplified by the Constitution of the Republic of Iraq (2005). (Refer to Article (93) of the Constitution of the Republic of Iraq (2005).)

The jurisdiction of the Federal Supreme Court is not only defined by the Constitution but also extended by the Federal Supreme Court Law. An additional jurisdiction introduced by the law allows the Court to review appeals against decisions of the House of Representatives made pursuant to its authority under Article 52 of the Constitution of the Republic of Iraq (2005), within thirty days of issuance. (Refer to Article 4 of the Amended Federal Supreme Court Law No. 30 of 2005) The internal regulations of the Federal Supreme Court also emphasize its jurisdictions as outlined in the constitutional document and its law. (Refer to Article 2 of the Internal Regulations of the Federal Supreme Court No. 1 of 2022)

The addition of new jurisdictions by the legislature, as seen in Article 4 of the Federal Supreme Court Law, which introduced new jurisdictions beyond those specified in the Constitution, does not align with the constitutional framework governing the constitutional judiciary, given its sensitive and significant role. The legislature's self-authorization to add new jurisdictions constitutes an overt interference in the functions of the Federal Supreme Court by involving it in matters beyond its predefined scope.

The Federal Supreme Court has consistently adhered to its constitutionally stipulated jurisdictions, as evidenced by several of its decisions. For example, the Court has declared its lack of jurisdiction to review decisions issued by Iraqi courts, decisions of the Kurdistan Region court, [61] the legality of decisions by the Council of State, [60] decisions of the Council of Ministers [65], ministerial orders (6), and administrative decisions, such as those related to housing allocations. [62]. The Court has also ruled that it does not have the jurisdiction to review procedural matters within other courts. [57]

To reinforce the rule of law, it is necessary to expand the jurisdictions of the constitutional judiciary. The following sections will explore this need:

Axis One: Expanding Jurisdiction in Constitutional Amendment Review

First: The Concept of Reviewing Constitutional Amendments

Amending the constitution is both a political and legal necessity, allowing the nation to retain the right to modify the constitution in line with societal developments. This ensures the continuity of the constitutional document within the political system and aims to achieve the nation's higher objectives, thus forming part of its political legitimacy. [91]. Reviewing constitutional amendments is intended to ensure that amendments conform to the constitution, especially regarding procedural and substantive aspects.

Second: Jurisprudential Views on Reviewing Constitutional Amendments

Jurisprudence is divided into two main schools of thought regarding the review of constitutional amendments: opposition and support. The opposition argues that the absence of a constitutional provision enabling the constitutional judiciary to review amendments excludes such reviews from its jurisdiction. They also contend that subjecting amendments to the same scrutiny as ordinary laws is inappropriate due to differences in procedural and substantive aspects, and that the constitutional judiciary should adhere to the limitations and jurisdictions assigned to it. [92]

The supporting perspective holds that allowing the constitutional judiciary to review amendments helps ensure that the authority responsible for constitutional amendments adheres to the restrictions and procedures specified in the constitutional document. Recognizing the judiciary’s authority to oversee amendments acts as a genuine safeguard for the constitution, reinforcing the principle of legality and ensuring that all public authorities' actions are subject to the law. Opposing this perspective would enable the amending authority to bypass the imposed restrictions. [9]

Third: Instances of Reviewing Constitutional Amendments

The constitutional judiciary faces no difficulty in reviewing amendments when the constitution explicitly provides for such reviews. In this case, the constitution grants the judiciary the power to oversee any amendments, both procedurally and substantively, and such amendments are not effective until the constitutional court has ruled on their constitutionality. (Refer to Article 120 of the Tunisian Constitution of 2014) However, in some countries, the constitutional document explicitly prohibits the judiciary from reviewing constitutional amendments. (Refer to Article 368 of the Indian Constitution of 1950, as amended in 1976)

In the absence of an explicit constitutional provision allowing constitutional courts to review constitutional amendments, these courts do not have the jurisdiction to consider such amendments. The explicit mention of a specific jurisdiction implies the exclusion of others. [85]

In our opinion, oversight of constitutional amendments is legitimate even without an explicit provision granting constitutional courts this power. We disagree with the view that the absence of a clear provision precludes courts from reviewing constitutional amendments. The silence of the constitution should not be interpreted as prohibiting judicial review of constitutional amendments. For example, some constitutional or supreme courts have assumed the authority to review constitutional amendments despite the lack of explicit authorization, interpreting their power to review the constitutionality of laws broadly to include constitutional amendments. [40]

Governance provides substantial freedom to create a modern regulatory environment with transparent laws and an appropriate judicial framework. It also establishes national foundations for reform, improves the performance of all state authorities, and enhances the state's vision of distributing powers and responsibilities to meet everyone's needs. [6] To confer constitutional legitimacy on the Federal Supreme Court's oversight of constitutional amendments, governance relies on formal legislation, enabling the state to utilize this role to achieve the desired outcomes and make responsible decisions. [72]

Axis Two: Expanding Jurisdiction in Legislative Omission Oversight

First: Definition of Legislative Omission

Legislative omission refers to the "failure of the legislature to enact a law or regulate a right or freedom as mandated by the constitution, whether this failure is intentional or unintentional, resulting in the disruption of a constitutional guarantee concerning the regulation of rights and freedoms." [10]. Some define it as "the parliament organizing certain matters inadequately, leading to a legislative void that does not align with the parliament's obligation to exercise its legislative authority as specified by the constitution." [18].

Second: Forms of Legislative Omission

1. Total Legislative Omission: This occurs when the legislature fails to address a specific issue mentioned in a constitutional provision or fails to regulate a matter that the constitution recommends for regulation. Consequently, constitutional provisions remain unimplemented and do not translate into effective laws that influence the real-world legal relationships among individuals, filling any potential legal gaps in the state's legal system. Total legislative omission is defined as "the complete absence of legislation or legal rules regarding a specific constitutional matter." [12]
2. Partial Legislative Omission: Contrary to total legislative omission, partial or relative legislative omission occurs when the legislature addresses a constitutional issue but inadequately. In this type of omission, the legislature enacts the necessary legal provisions but fails to cover all aspects of the issue comprehensively, either intentionally or unintentionally. This incomplete regulation is known as partial omission, where the laws issued by the legislative authority do not fully encompass the subject matter. [34]
3. Deceptive Legislative Omission: This form of omission occurs when the legislative authority outwardly exercises its jurisdiction but, in reality, delegates some of its powers to the executive authority. This delegation leads to the executive authority undertaking responsibilities constitutionally assigned to the legislative authority. [30]

his delegation from the legislative authority to the executive authority and the excessive generalization even in matters that have detailed rules occur through the issuance of regulations, which constitutes a breach of the rules of distribution of powers between the legislative and executive authorities [34]

Third: Means of Addressing Legislative Omission

1. Revealing Judicial Rulings: The theory of jurist Kelsen is the true theory behind the concept of revealing rulings. Kelsen views constitutional judiciary as a negative legislator that cannot replace the legislative authority. Consequently, the constitutional judge must play a creative role by using technical and legal means to self-limit his authority to avoid conflicts with the legislative authority [12]. This means that the constitutional judge's role is limited to merely revealing or diagnosing the existence of legislative omission and then notifying the legislative authority without this notification having any binding or directive nature.
2. Directive Judicial Rulings: In this form, the role of the constitutional judge does not stop at merely revealing a constitutional breach generally. Instead, the constitutional judiciary includes directives, warnings, or reprimands within its rulings, aimed at urging the legislative authority to address the omission that contravenes the constitution [13].
3. Rulings Declaring Unconstitutionality Due to Omission: In this type of omission, the constitutional judiciary addresses the legislative omission through its ruling without directing any calls, recommendations, or granting the legislature time to address the omission. Here, unconstitutionality is not applied to the entire text but only to the part that includes the omission, resulting in partial annulment [30].
4. Supplementary or Additive Rulings: In this type of omission, the constitutional judiciary interprets legislative texts with the addition of a specific provision that was omitted or overlooked by the legislator to ensure it conforms to the constitution. This interpretation by the constitutional judiciary of legislative texts takes three forms: constructive interpretation, which aims to fill the legislative gap; neutral interpretation, which does not add anything to the legislative texts and is limited to interpretation only; and directive interpretation, which aims to guide those applying the legal texts in following the guidelines reached by the constitutional judiciary [4].

The quality of governance lies in its assumption that any area can be misused, even merely by prediction, and then seeks to close that door through monitoring. When the law and procedure are clear, monitoring them is straightforward, and the opposite is also true: when the law or procedure is vague and varies from one place to another, it opens the door for interference and negatively impacts the course of justice. Governance's role here is to close this possibility before it occurs [37].

Governance seeks to establish transparency by formulating policies, raising awareness of rights and duties, ensuring fairness in decision-making, and developing long-term strategic plans. All of this contributes to effective oversight of the authorities' actions to detect and minimize violations [6]. This only manifests through extending the constitutional judiciary's oversight over the legislative omission exercised by the legislative authority.

SUBSECTION TWO

Governance and the Mechanism of Internal Reform in Constitutional Judiciary

In recent times, governance has become one of the most crucial pillars in the reform of all state facilities in general and the constitutional judiciary in particular. Therefore, it is necessary to highlight the key reforms in the internal structure of the constitutional judiciary across several areas, as follows:

Axis one: Reform of the Constitutional Judiciary in Terms of Formation

Much has been written about the formation of the Iraqi Federal Supreme Court according to Article 93 of the constitution, and many opinions have been proposed regarding its formation. However, in this study, we attempt to link the formation of the court with governance to achieve constitutional reform. Article 93 of the 2005 Constitution of the Republic of Iraq outlines the mechanism for forming the members of the Federal Supreme Court, stating that it consists of a number of judges, experts in Islamic jurisprudence, and legal scholars. Their number, the method of their selection, and the court's functioning are regulated by a law enacted by a two-thirds majority of the members of the House of Representatives. This provision raises several questions: Why did the constitution not specify the number of court members? What is the status enjoyed by experts in Islamic jurisprudence and legal scholars, and what is their role?

Some scholars in constitutional jurisprudence have posited that the lack of a specific designation for the members of the constitutional court within the constitutional document aims to allow for an increase in the number of members if circumstances necessitate it to address the burdens and responsibilities placed upon the court. [23] However, we disagree with this perspective; such an approach may only be applicable in an environment that is both available and characterized by democracy. Furthermore, this viewpoint does not align with the reality in Iraq, where it is not feasible to leave the determination of the members of the Federal Court solely in the hands of the legislative authority, allowing it to act without oversight while exploiting its constitutionally enshrined powers. It would have been more prudent for the constitutional legislator to specify the number of members of the Federal Supreme Court within the constitutional document itself.

Regarding the role of experts in Islamic jurisprudence and legal scholars, opinions vary. One perspective holds that the role of these experts is purely consultative and does not extend to making final decisions in disputes brought before the court, [32], while another viewpoint asserts that these experts are integral to the court and possess the same authority as judges. [42]. A third opinion suggests the necessity of distinguishing between two types of jurisdictions: the first being judicial jurisdiction, exercised by judges, such as adjudicating disputes and overseeing the constitutionality of laws and the interpretation of the constitution; the second being non-judicial jurisdiction, exercised through collaboration between judicial bodies and experts in Islamic jurisprudence and legal scholars, exemplified by the certification of elections. [21]

The problem that governance may face arises when the involved parties and implementers do not fully believe in its principles and foundations; it may devolve into merely a bureaucratic exercise aimed at filling a specific legal void, allowing those responsible to find numerous ways to circumvent it, rendering the procedures effectively nonexistent [29]. Therefore, we advocate for restricting membership in the Federal Supreme Court to judges or professors of constitutional law, given their scholarly expertise in matters of a constitutional nature.

Axis two: Reforming the Constitutional Judiciary in Terms of Duration

Constitutions often explicitly state the duration of membership for constitutional judges, with some stipulating lifetime appointments and others specifying fixed terms. The Federal Supreme Court Law specifies that judges serve for life while granting them the right to retire at any time they wish. (See Article (6/Third) of the Federal Supreme Court Law No. 30 of 2005 prior to amendment, which states: "The President and members of the Federal Supreme Court shall continue to serve without specifying an upper age limit unless they wish to resign from service.") Opinions differ regarding the adoption of lifetime membership for judges of the Federal Supreme Court; proponents argue that the lack of a legal retirement age for judges aims to ensure the court's strength when making decisions on cases before it and to safeguard its independence[21]. Conversely, opponents contend that Iraqi legislators have deviated from certain legislative practices by imposing an upper age limit for retirement for constitutional judges, asserting that judges wishing to extend their service must undergo evaluations by specialized medical committees to confirm their mental and physical fitness. [11]

The first amendment to the Federal Supreme Court Law addressed the duration of membership by establishing a retirement age of seventy years for the President and members of the Federal Supreme Court. (See Article (6/Third/A) of the amended Federal Supreme Court Law No. 30 of 2005) We believe that the legislator has

excessively extended the legal retirement age for the President and members of the Federal Supreme Court, as it would have been more appropriate to set the retirement age at sixty-five, a more suitable age for retirement. Medical studies have shown that individuals over the age of seventy are susceptible to numerous medical and psychological issues that can impair a judge's performance and concentration, particularly since the duties of constitutional judges are of great significance.

Axis three: Reforming the Constitutional Judiciary in Terms of Judicial Discipline

Judicial discipline refers to "any action taken by a judge that constitutes a deviation from the duties of their position, whether within the scope of that position or outside of it." [2].

The basis for the idea of disciplining judges does not contradict the rights and guarantees granted to judges by the legislator to ensure the proper administration of justice. In cases where judges commit disciplinary offenses that warrant accountability, the issue of discipline must be raised. For a judge to be held administratively accountable for violating laws or regulations, the violation necessitating discipline must be serious, indicating an element of intent in the judge's wrongdoing [93]. Moreover, judicial misconduct is not limited to judges neglecting their duties related to their judicial responsibilities; it encompasses any behavior that could undermine the dignity and honor of the judicial office, even in the private lives of judges. [2]

Referring to the legislative texts governing instances of judicial discipline, we find that the amended Judicial Organization Law No. (160 of 1979) delineates the duties of judges that may be considered judicial violations. These duties include maintaining the dignity of judges, confidentiality regarding matters and information, refraining from engaging in commercial activities, and wearing the specific attire required for advocacy, among others. (See Article (7) of the Judicial Organization Law No. (160 of 1979), as amended) The law also specifies the types of penalties that may be imposed on judges who violate their duties, which include reprimand, warning, delay in promotion or salary increases, or termination of service. (See Articles (57, 58) of the Judicial Organization Law No. (160 of 1979), as amended)

We may ask whether these provisions in the Judicial Organization Law apply to the judges of the Federal Supreme Court. Before answering this question, it is important to note that both the Federal Supreme Court Law and its internal regulations make no reference to the discipline of the court's members. Furthermore, reviewing the Constitution of the Republic of Iraq of (2005) reveals that it states, "Judges may not be dismissed except in cases specified by law; the law also defines the specific provisions concerning them and regulates their disciplinary accountability." (See Article (97) of the Constitution of the Republic of Iraq of 2005)

In response to the previous question, it is not possible to apply the legal provisions outlined in the Judicial Organization Law to the members of the Federal Supreme Court. Discipline for members of the court cannot rest with any entity other than the Federal Supreme Court itself; otherwise, it may lead to politicization and harassment of the court's members, diminishing their stature and respect. Therefore, we urge the legislator to include clear legal provisions in the Federal Supreme Court Law regarding the issue of disciplining judges, free from deficiencies or ambiguities.

Before concluding this discussion, it is essential to note that we have attempted to illustrate the effects and implications of governance on the rulings of the constitutional judiciary. This has been done by adopting principles of judicial governance, which may positively influence the constitutional judiciary, such as justice and equality among all individuals, by providing specific rulings for all legal statuses while simultaneously offering general rulings that are similar for individuals holding the same legal status. This approach results in the satisfaction of all parties, preventing feelings of favoritism or bias. Conversely, a lack of such principles would yield negative repercussions and adverse outcomes.

CONCLUSION

Through our research on the role of governance in strengthening constitutional justice, we have reached a number of findings, which we will present first, followed by recommendations regarding this topic.

First: Findings

1. The Constitution of the Republic of Iraq of 2005 and certain judicial legislations include several principles of judicial governance. However, legislative texts alone are insufficient, as they require effective executive tools to actualize these principles in practice.
2. The primary aim of the judicial governance process in the field of constitutional justice is to enhance the performance of all state authorities by effectively achieving their objectives, which contribute to the welfare of individuals and society.

3. Despite the importance of the topic of governance, there are many problems that arise in its implementation. These issues have repercussions for future generations due to their connection to a vital institution—the constitutional judiciary. The classification of developed states is measured by the extent to which the rule of law is upheld, presenting a genuine challenge to achieving judicial governance.
4. The judicial challenge to the state is based on the requirements of governance within judicial institutions, especially constitutional justice, as a modern concept that emerged from the challenges of developing the judicial institution. This is evident in two aspects: the first relates to reforming the judiciary as an independent authority, while the second concerns finding methods and means to provide services as an important facility in order to overcome the negative aspects of slow justice.
5. There is no conflict between the independence of the judiciary and the disciplinary matters concerning judges; they represent two important and essential elements in all judicial systems, including constitutional justice, provided that judges are afforded sufficient disciplinary guarantees to uphold the principle of judicial independence.

Second: Recommendations

1. In light of the goals set for governance and the nature of the problems it addresses, as well as the challenges it faces, there is a need for cohesive efforts from all parties and for open channels of communication in all directions, enabling institutions to benefit from one another in order to produce constitutional justice outputs that comply with the law.
2. It is essential to enact comprehensive constitutional and legal legislations that obligate all public and private state facilities to follow proper governance principles.
3. There is a necessity to implement judicial governance to provide information related to policies, systems, laws, legislations, and specific decisions and regulations that organize constitutional justice in order to resolve all cases presented before it.
4. The issue of disciplining constitutional judges should be entrusted to the Federal Supreme Court itself, free from the influence of both the legislative and executive authorities, as well as from the Supreme Judicial Council.
5. It is essential to formulate a strategy for applying the principles of judicial governance to address any infringements on the Constitution or circumventions of the law by the legislative or executive authorities, aiming at reforming state institutions.
6. Strengthening the state's power necessitates attention to legal legislations and its institutions of a constitutional nature, particularly constitutional justice, which will lead to functional and institutional reform of the judiciary through the governance of constitutional justice

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