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The Genesis and Evolution of Judicial Oversight (A Comparative Study)

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Abstract: This research examines the evolution of judicial review regarding the constitutionality of laws in Iraq, Egypt, and the United States of America from a comparative perspective. It aims to highlight the historical and constitutional foundations that have contributed to shaping the nature of this review within each legal system. The study emphasizes that judicial review did not emerge uniformly; rather, it evolved based on the distinct specificities of the political contexts, judicial traditions, and constitutional circumstances of each state. This has directly impacted its institutional structure and its efficacy in safeguarding the principle of constitutional supremacy. In the United States of America, judicial review emerged through case law and evolved gradually as a mechanism to ensure the conformity of legislation with the Constitution. This system represents a decentralized model reliant on the role of the courts in examining the constitutionality of laws while adjudicating disputes, thereby reinforcing the balance of powers and the protection of rights and freedoms. This model has fundamentally relied on judicial independence and the accumulation of judicial precedents in the interpretation of constitutional provisions. As for the Egyptian experience, it has undergone successive phases influenced by political and constitutional transformations, evolving from limited forms of review to a comprehensive centralized model epitomized by the establishment of the Supreme Constitutional Court. This model has contributed to unifying the mechanisms of review and consolidating the stability of legal principles related to ensuring constitutional legality, while achieving a balance between the imperatives of legislative stability and the necessity of effective oversight over state authorities. In Iraq, the genesis of judicial review materialized through successive political and constitutional processes that ultimately led to its modern regulation via the Federal Supreme Court. This Court is considered the principal institutional framework for monitoring the constitutionality of laws and ensuring compliance with the constitutional provisions. The evolution of the Iraqi constitutional system indicates the impact of the changing legal environment on the Court's jurisdictions and operational mechanisms, reflecting an increasing desire to foster the principle of constitutional legitimacy. The comparative analysis reveals that the divergence in models of judicial review among the United States, Egypt, and Iraq is tied to a constellation of political, constitutional, and historical factors. Nevertheless, the common objective among them remains the preservation of constitutional supremacy and the defense of fundamental rights. Furthermore, the efficacy of judicial review transcends institutional structures to encompass other factors, such as judicial independence, the clarity of constitutional provisions, and the entrenchment of a culture of constitutional respect within the political system. Consequently, this highlights the significance of comparative research in understanding the development of this review and exploring avenues that ensure the enhancement of the judiciary's role in achieving the balance of powers and safeguarding the rule of law.

Keywords: Judicial Review, Federal Supreme Court, Supreme Constitutional Court.

Introduction

Judicial review of the constitutionality of laws is a vital legal mechanism that supports the supremacy of the constitution and ensures public authorities' adherence to its provisions. This process is considered a fundamental means of maintaining the balance between authorities and protecting rights and freedoms from the overreach of the legislative authority. Judicial review emerged in various historical and constitutional contexts; in the United States, it was linked to the development of constitutional adjudication, which began in the early nineteenth century, establishing the concept of constitutional scrutiny of laws through their actual application. In Egypt, judicial review evolved gradually, influenced by constitutional and political changes, ultimately leading to a solid institutional framework embodied by the Supreme Constitutional Court. As for Iraq, the constitutional review process witnessed fluctuations due to continuous political and constitutional changes, until it eventually stabilized within the Federal Supreme Court as an element of the contemporary constitutional framework. Consequently, studying the evolution of judicial review in these three systems is of immense scientific and practical importance, as it sheds light on the diversity of constitutional ideologies and procedures for protecting constitutional legitimacy. Accordingly, examining the development of judicial review in these three systems is of great scientific and practical significance, as it illustrates the variety of ideologies and constitutional procedures for safeguarding constitutional legitimacy. This research is of paramount importance in clarifying the historical and institutional development of judicial review, which serves to preserve the integrity of the constitution and enhance legal stability. It also highlights the similarities and differences between various models of review, thereby enhancing the understanding of the interaction between the judicial and legislative branches in each legal system. The research is particularly significant in studying how political and legal contexts influence the nature of the review and its jurisdictions, while assessing the effectiveness of this mechanism in supporting constitutional legitimacy and fostering trust in the legal system. This contributes to enriching comparative constitutional research and promotes dialogue regarding the ideal frameworks for organizing judicial review. This research seeks to answer the main question: How did the judicial assessment of the legality of laws evolve in Iraq, Egypt, and the United States, and what are the historical and constitutional reasons that influenced the formation of their distinct models? The research also poses other sub-questions, including: How did the political system and judicial traditions shape the nature of the review? Did differences in origin affect the varying effectiveness of the constitutional judiciary and its role in protecting rights and freedoms? Furthermore, this study addresses the impact of modern constitutional developments on strengthening or restricting judicial review within each legal framework. The research hypothesis assumes that historical and constitutional contexts, alongside the political circumstances in the three countries, have led to a clear divergence in the structure and scope of judicial review. However, their common goal remains to uphold the supremacy of the constitution and protect fundamental rights. The research posits that the American model, characterized by decentralized judicial review through direct judicial interpretation, has indirectly influenced other review frameworks. The Egyptian and Iraqi experiences favored a more centralized institutional form, resulting from the unique political and legal relationships in each country. The study is expected to demonstrate that the effectiveness of judicial review depends not only on the adopted state model but also on additional factors, including judicial independence, the clarity of constitutional texts, and the extent to which a culture of constitutional respect is entrenched within the political system.

Methodology

This study adopts a qualitative doctrinal legal research approach with a comparative perspective to analyze the evolution of judicial review in Iraq, Egypt, and the United States. The research relies primarily on secondary data, including constitutional texts, statutory provisions, judicial decisions, and scholarly legal literature. The comparative method is employed to identify similarities and differences in the institutional structures, historical development, and functional roles of judicial review across the selected legal systems.

Data collection is conducted through a comprehensive review of legal documents such as constitutions (1925 Iraqi Basic Law, 1971 Egyptian Constitution, and the U.S. Constitution), as well as relevant laws governing constitutional courts and judicial practices. In addition, academic books,

journal articles, and theses related to constitutional law and judicial oversight are systematically examined to support the analysis.

The data analysis technique applies descriptive and analytical methods. The descriptive approach is used to explain the historical evolution and institutional frameworks of judicial review in each country, while the analytical approach evaluates the effectiveness, scope, and limitations of each model. Furthermore, a comparative legal analysis is utilized to interpret how political, constitutional, and historical contexts influence the formation and operation of judicial review systems.

The study also incorporates an interpretative approach to examine constitutional provisions and judicial practices, focusing on how courts interpret and apply constitutional norms in different jurisdictions. This allows for a deeper understanding of the relationship between judicial review and the principles of constitutional supremacy, separation of powers, and protection of fundamental rights.

Results and Discussion

Chapter One: The Genesis and Evolution of Judicial Review in Iraq

Following the promulgation of the first Iraqi constitution after independence, during the royal era, the Iraqi constitutional legislator addressed the issue of judicial review of the constitutionality of laws. This constitutes a constitutional precedent in the Arab world, as no other Arab constitution had previously addressed this matter. This indicates constitutional awareness, legislative depth, and a commitment to protecting constitutional legitimacy. This analysis will explore the stages of judicial assessment regarding the legality of laws in Iraq, divided into three sections. The first section will examine judicial review in the repealed constitutions (royal and republican). The second section will analyze the judicial review of the constitutionality of laws under the Law of Administration for the State of Iraq for the Transitional Period. The third section will investigate the judicial review of the legality of laws under the current 2005 constitution.

Section One: Review in Previous Constitutions

The constitutions of the royal era and the repealed republican era were known for their provisions relating to the judicial review of the constitutionality of laws, and we will examine this review process under these constitutions as follows:

First: Judicial Review in the 1925 Founding Constitution:

The primary legal framework of Iraq, the constitution promulgated on March 21, 1925, entrusted the responsibility of adjudicating cases related to interpreting other laws and harmonizing them with its provisions to a specialized court known as the High Court [1].

Article 81 of the Constitution states that ((A High Court shall be established... to decide on matters concerning the interpretation of this law and the conformity of other laws with its provisions)).

Article (82) clarified the composition of the court, stipulating in its third paragraph that: ((The High Court shall consist of eight members besides the President, elected by the Senate, four from among its members and four from the judges of the Court of Cassation or other senior judges, and it shall convene under the chairmanship of the President of the Senate; if the President is unable to attend, his deputy shall chair the court session))

Consequently, the Chief Justice holds the position of the President of the Senate, while the High Court consists of four judges and four members of the Senate. The court convenes based on a royal decree approved by the Council of Ministers, and it performs the functions of the federal court related to reviewing constitutional law; however, its participation in this field is almost non-existent due to the clear political dominance over its membership. The Senate constitutes fifty percent of its members, and the Chief Justice serves as the President of the Senate, while the King holds broad authority over the court.

The King appoints the members of the Senate, unlike the House of Representatives whose members are elected, and the King is immune from legal prosecution according to the constitution( ).

However, the court's composition differs when it comes to a trial before it; in this case, it is formed in accordance with the provisions of Article 82/Paragraph 3; except that its convening requires the issuance of a royal decree or the approval of the Council of Ministers. If the matter concerns the interpretation of the provisions of the Basic Law or the violation of one or more laws or their articles against these provisions, the High Court, formed in accordance with Article 82/Paragraph 3, shall not convene except by the issuance of a royal decree and the approval of the Council of Ministers, provided

that the National Assembly is in session. In the absence of the House of Representatives sessions, the members of the court are not appointed through Senate elections, as outlined in Article 82, Paragraph 3, but through a decision by the Council of Ministers and the issuance of a royal decree, as explained in Article 83 of the Basic Law [2]. Thus, the High Court, under the 1925 Basic Law, is considered a temporary court given that its establishment is tied to the specific responsibilities assigned to it. This weakness enabled the executive authority to encroach upon its operations. As a result, judicial scrutiny of legislation was rarely implemented, and the court did not contribute to protecting the constitutionality of laws [3].

Nevertheless, after amending Article (83), the Iraqi constitutional legislator limited the High Court's authority to assess the constitutionality of laws and regulations, restricting it only to the former, in accordance with the second amendment of the Basic Law, Law No. (69) of 1943 [4]. The amended Article (83) stipulated that if the National Assembly (Parliament) with its two chambers (House of Representatives and Senate) is not in session, the executive authority shall appoint the members of the High Court as provided therein ((If the National Assembly is not in session, the appointment of the aforementioned members in Article Seven shall be by a decision of the Council of Ministers or a royal decree)).

The term of membership in the court is determined by the period necessary to deliberate on the case for which it was convened and to issue a ruling. Upon the issuance of the decision, the court's powers terminate, ending the membership term [5].

The High Court significantly impacted the assessment of the constitutionality of the 1942 amendment to the Basic Law, despite concerns about its conflict with Article 22 of the Constitution, which prohibits any amendment to the Basic Law during the regency period regarding the King's rights and succession. The court issued a decision allowing the change. Additionally, the High Court affirmed its authority to assess the constitutionality of legislation by challenging the 1938 Law No. (20) regarding the prevention of harmful propaganda [6].

It can be concluded from this statement that the measures approved by the constituent legislative body in the Basic Law had a distinct practical application. The facts of constitutional law indicate that the High Court failed to perform its designated function. The function of assessing the constitutionality of laws was not duly executed; the only decree issued throughout the Kingdom was the prominent ruling issued in September 1939, which annulled specific articles of Law No. (20) of 1938 [7].

Although it was a harsh ruling that did not acquit any party, it significantly enhanced the protection of human rights and individual freedoms during that period. The statement noted: "Since assigning a person to police surveillance or imposing restrictions on their residence falls under the jurisdiction of the judicial authority, the majority of the court decided that Article 4 of the Prevention of Harmful Propaganda Law No. (20) of 1938 granted the Council of Ministers powers, in accordance with the Basic Law, reserved for the judicial authority." Since Article 5 of the law in question relates to the previously mentioned Article 4, the majority of the court concluded that both articles were invalid. As for Article (86), it was repealed [8].

Constitutional law experts criticize the rampant weaknesses in the Basic Law, particularly regarding constitutional review, which demonstrated an imbalance of power, thereby undermining the administrative authority. The Constitution clearly restricts the High Court's authority to assess the legality of laws to the Council of Ministers. The executive authority, responsible for enacting laws, frequently seeks to keep certain legislation in effect despite constitutional objections. It is inconceivable that the authority responsible for enacting those laws would use this procedure wisely. It would have been more appropriate to grant citizens the ability to file a constitutional challenge against any law before the High Court [9].

The constituent legislator could not evade the influence of political circumstances and trends when structuring the High Court. Thus, this organization was influenced by the prevailing trend in constitutional drafting, which bolstered the executive authority at the expense of other branches of government, leading to a reduction of its influence compared to the executive authority. This was achieved through indirect methods, including the High Court, which is influenced by the orientations and trends of the executive authority [10].

Second: Judicial Review of the Constitutionality of Laws in the Repealed 1968 Constitution:

On November 14, 1968, the Constitutional Court Law was issued, two months after the promulgation of the Constitution on September 21, 1968; the interim constitution established a fundamental system for the judicial review of the constitutionality of laws. The Iraqi legislator arranged this law in ten articles; the first article defined the court's formation, specified the required qualifications for its members and the conditions for their appointment, as well as its headquarters. Articles two and three regulated the court's procedural aspects, including its convening, the absence of its members, and the issuance of its decisions. The law mandated a simple majority for decision-making, without specifying a certain percentage of votes [11].

Article four dealt with the jurisdictions of the Constitutional Court and listed them as: 1- Interpreting the provisions of the interim constitution. 2- Adjudicating the constitutionality of laws. 3- Adjudicating the violation of administrative and financial laws. 4- Adjudicating the violation of laws issued pursuant thereto. 5- Adjudicating the violation of decrees against their legal basis.

Article One of the Supreme Constitutional Court Law No. 159 of 1968 defined the composition of the court, stipulating that: ((A Supreme Constitutional Court shall be formed under the presidency of the President of the Iraqi Court of Cassation or his deputy in his absence, and the membership of the President of the Board of Supreme Audit, the President of the Legal Drafting Bureau, three permanent judges from the Court of Cassation, three members from among senior state officials whose rank is not less than a Director General, and four reserve members, two of whom are judges from the Iraqi Court of Cassation and two are senior state officials whose rank is not less than a Director General, appointed by the Council of Ministers based on a proposal from the Minister of Justice, and a presidential decree is issued for their appointment)).

However, the criticism directed at judicial review during that period was that individuals lacked the authority to directly challenge the constitutionality of a law before this court. This deprived them of a fundamental guarantee for protecting individual rights and freedoms from violation [12].

Consequently, the constitution established the judicial review of the constitutionality of laws, and the formation of this court constitutes a crucial foundation for the principle of the supremacy of the constitution and adherence to its texts, provisions, and principles, thereby avoiding any misinterpretation of the texts. However, this court did not perform its duties during the period of the 1968 constitution.

The 1968 constitution is the only constitution from 1958 to 2004 that governed the formation of a specialized court. The constitutions of 1958, 1963, 1964, and 1970 lacked provisions for specialized courts; nevertheless, the 1964 constitution mandated the establishment of the State Council in Article 93, entrusting it with the task of administrative justice. The article emphasized the necessity of forming the State Council; established by law, it is responsible for administrative adjudication, and drafting, reviewing, and interpreting laws and regulations.

Third: Judicial Review of the Constitutionality of Laws in the 1970 Constitution:

Following numerous political, social, and economic transformations, an interim constitution was issued by the dissolved Revolutionary Command Council Decision No. (792) on July 16, 1970; the drafting process involved forming a committee that included the Head of Legal Affairs in the Revolutionary Command Council and two professors from the College of Law and Politics at the University of Baghdad. A series of extensive meetings culminated in the adoption of a draft interim constitution, presented to the Vice President of the dissolved Revolutionary Command Council on June 9, 1970 [13].

The interim constitution addressed the judiciary in Article 63, which stated that: ((A- The judiciary is independent, subject to no authority other than the law. B- The right to litigation is guaranteed for all citizens. C- The law determines the method of forming courts, their levels, jurisdictions, and the conditions for the appointment, transfer, promotion, prosecution, and retirement of rulers and judges)) [14].

The language of the previous constitution indicates that its judicial arrangement deviated from the 1968 constitution; the judiciary was not described as an independent authority; rather, its function was discussed in Chapter Five, entitled "The Judicial Authority." This discrepancy stems from the different perspectives of power holders regarding the essence of authority in society, along with their belief that all authorities are unified—specifically, political authority. This method aligns with the

concept of the unity of authorities and departs from the theory of the separation of powers [15].

The repealed 1970 constitution clearly opposed the system of judicial review of the constitutionality of laws, and therefore did not refer to it explicitly. This enabled the legislative authority under that constitution—represented by the dissolved Revolutionary Command Council and the President of the Republic, who was granted legislative powers under Council Decision No. (15) for the year 1993—to act arbitrarily, ignoring constitutional provisions and frequently violating its principles and foundations [16].

Some jurists add that the omission of a clause determining the competent authority to assess the legality of laws has several reasons. The silence might be intentional, indicating the constitutional framers' belief in the absolute power of elected legislative bodies as the embodiment of popular will. On the other hand, the framers might fail to agree on a specific form of review, or the court might have previously established its right of review without it being officially declared in the previous constitution. Thus, the new constitution is issued without establishing an innovative review mechanism, relying instead on the pre-existing framework [17].

However, an alternative trend in constitutional jurisprudence assumed that the Constitutional Court, established under the repealed 1968 constitution, should continue to function despite the implementation of the 1970 constitution, based on [18]:

Article 66 of the 1970 Constitution states that all legislation and decisions issued by the Revolutionary Command Council prior to the promulgation of this constitution shall remain in effect. This essentially implies the continued application of the Constitutional Court Law No. 109 of 1968, as it was not explicitly or implicitly repealed.

Although this opinion holds significant value, constitutional facts indicate that the court did not take the necessary executive actions to ensure the implementation of the Constitutional Court Law and enable its members to exercise their judicial review responsibilities. A third opinion suggests that the dissolution of the Courts Law was not attributed to the erosion of its constitutional foundation, but to a customary practice resulting from its non-application under the 1970 constitution. We believe this opinion is incorrect due to the failure to meet the necessary conditions to establish such a custom. The non-application of the Courts Law is not... but rather merely an application of a custom not reinforced by the belief in its necessity, i.e., the moral element of the custom, especially since the conditions for applying the law were met, and the legal conscience in Iraq had settled on the motives for enacting this law, which were stated in its explanatory memorandum [19].

Section Two: The Genesis of Judicial Review of the Constitutionality of Laws in the 2005 Constitution

The drafting of a new constitution represents a pivotal opportunity for Iraqis, as it will lay the legal foundations and future structure of the Iraqi state, simultaneously defining the relationship between the governed and the rulers, in addition to individual rights and freedoms. The National Assembly tasked a 55-member committee with drafting the constitution. Since the Iraqi elections on January 30, 2005, numerous challenges hindered the participation of significant social groups and political factions, complicating the achievement of political consensus across Iraqi society. Consequently, the National Assembly was forced to include these factions in the constitution drafting committee, increasing its members by 27 (full and advisory) from organizations that abstained from participating in the elections. The formation of the committee enjoyed national consensus, especially after the concerned parties agreed on the necessity of drafting the constitution based on national consensus. The approval of all parties must be obtained to activate the constitutional process. However, the committee faced numerous challenges during the constitution drafting process, most notably the issue of federalism, which caused profound concern. This issue continues to stir widespread debate.

The 2005 Iraqi Constitution did not specify the powers granted to the states; instead, it comprehensively outlined the scopes of the central authority.

Any matters not explicitly stipulated in the constitution are reserved for the states; however, the constitution designates the Federal Supreme Court as the legal authority responsible for resolving disputes between the central government and the states. Article 93 of the 2005 Constitution of the Republic of Iraq outlines the jurisdictions of the Federal Supreme Court as follows:

((First: Overseeing the constitutionality of valid laws and regulations. Second: Interpreting the texts of the Constitution. Third: Adjudicating cases arising from the application of federal laws,

decisions, regulations, instructions, and procedures issued by the federal authority; the law guarantees the right of both the Council of Ministers and concerned individuals and others to directly appeal to the court. Fourth: Adjudicating disputes occurring between the federal government and the governments of the regions, governorates, municipalities, and local administrations. Fifth: Adjudicating disputes occurring between the governments of the regions or governorates. Sixth: Adjudicating accusations directed against the President of the Republic and the Prime Minister, and this shall be regulated by a law. Seventh: A: Resolving jurisdictional conflicts between the federal judiciary and the judicial bodies of the regions and governorates not organized in a region. B: Resolving jurisdictional conflicts between the judicial bodies of the regions or governorates not organized in a region.

Article (4) of the Federal Supreme Court Law stipulated that the Federal Supreme Court shall undertake the following tasks:

First: Adjudicating disputes that arise between the (Federal Government and the governments of the regions, governorates, municipalities, and local administrations).

Second: Adjudicating disputes related to the legality of laws, decisions, regulations, instructions, and orders issued by any entity authorized to issue them, and canceling those that contradict the provisions of the Law of Administration for the State of Iraq for the Transitional Period. This shall be based on a request from a court, official entity, or a plaintiff with an interest.

Third: Considering appeals filed against rulings and decisions of the Administrative Court of Justice.

Fourth: Considering lawsuits filed before it in an appellate capacity, and its jurisdiction shall be regulated by a federal law.

This pertains to its jurisdictions; as for its composition, Paragraph Second of Article (92) of the valid 2005 Constitution dedicated the regulation of the court's composition and stipulated that (The Federal Supreme Court shall consist of a number of judges, experts in Islamic jurisprudence, and legal scholars. Their number, the method of their selection, and the work of the court shall be determined by a law enacted by a two-thirds majority of the members of the House of Representatives).

As for Article (94) of the Constitution, it explicitly stated in text that: Decisions of the Federal Supreme Court are final and binding on all authorities.

Thus, the framers of the valid 2005 Constitution of the Republic of Iraq attempted to create a democratic system under which the establishment of accountability of authority bodies in general is achieved. And the review of the authorities' actions by the Federal Supreme Court in particular [20].

It is evident from the previous discussion that the inclusion of the judicial review of the constitutionality of laws in the 2005 constitution is considered a commendable step by the constitutional legislator in this area. The implementation of the federal system in Iraq, as is the case in other federal states, requires the existence of an impartial judicial authority to assess the constitutionality of legislation enacted by both the central government and the regions, and to adjudicate disputes that may arise between them and the government. Accordingly, the Iraqi Constitution included judicial review, as stipulated in Article (6) of the Internal Regulations of the Federal Supreme Court No. (1) for the year 2005, which states that "If the plaintiff requests a ruling on the legality of a legal text, legislative decision, regulation, instruction, or order, the request must be submitted through a lawsuit that meets the stipulated conditions." Undoubtedly, the judicial assessment of the constitutionality of laws enacted by the 2005 Iraqi constitutional parliament holds significance and legitimacy. Its importance stems from its role that primarily centers on achieving and protecting

legitimacy. Judicial review over the actions of leaders is a fundamental principle of a state governed by the rule of law. It is among the core principles of fair governance that all rulers commit to the principle of legality in their actions, including laws, regulations, decisions, and individual measures. Therefore, there must be an overseer over the legislative authority, as the matter cannot be exclusively entrusted to the consciences of its members and their moral obligations toward the nation. A legitimate government cannot operate without a constitution, and its actions are subject to its restrictions and provisions [21].

Furthermore, it is viewed as a fundamental guarantee for public rights and freedoms against any legislative arbitrariness in lawmaking [22].

Judicial review is central to a judge's responsibilities, reflected in the application of the law and

the pursuit of the most effective legal resolution for the case at hand. By doing so, the law is applied and adheres to the constitution, the supreme and fundamental law of the state; in the event of a conflict between positive law and the constitution, the constitution must take precedence as the supreme law( ). Some legal scholars emphasize that judicial review, particularly when conducted through direct action, is crucial because it leads to a cohesive framework of judicial rulings concerning the constitutionality of legislation, provided there is a single supreme judicial body dedicated to this review, which issues its ruling on a specific law, either upholding or rejecting it. In all cases, the legality of this law cannot be challenged again, as the constitution dictates that its decisions possess absolute authority [23].

We agree with our professor, Dr. Ali Youssef Al-Shukri, that the justification for establishing a system of judicial review of the constitutionality of laws is fundamental to the democratic state. This reinforces the principle of the supremacy of the constitution, as stated in Article 13 of the 2005 Constitution, which stipulates that: "This constitution is the supreme law in Iraq and is binding on all without exception." Secondly, no legislation that contradicts this constitution may be enacted, and any provision in regional constitutions or legal texts that conflicts with it is considered void. Consequently, judicial review maintains the legitimacy of the constitution and entrenches the principle of separation of powers adopted under the current Iraqi Constitution of 2005; it is important to recall that the Federal Supreme Court currently operates under Order No. 30 of 2005, which is a valid order due to the absence of any law to repeal it. From a legal perspective, any law remains in effect unless repealed by a subsequent law [24], [25]. Therefore, we encourage the Iraqi legislature to pass a law establishing the Federal Supreme Court. The current and valid constitution determines the status and importance granted to the Federal Supreme Court as the guardian of the constitution and the rule of law.

Chapter Two: The Genesis of Judicial Review in Comparative Countries

Section One: The Genesis of Judicial Review in Egypt

Prior to the 1971 constitution, Egyptian constitutions were devoid of provisions granting a court or any other body the power of judicial review over the constitutionality of laws. The first legislation in the country to grant this power to a court was the Supreme Court Law promulgated on August 31, 1969. Then, the constitution was drafted on September 11, 1971; this article established the Supreme Constitutional Court, granting it the exclusive authority to review the constitutionality of laws and regulations. Thus, the legislation establishing this court was issued in September 1979, replacing the 1969 Supreme Court Law

This research necessitates exploring the historical evolution of judicial review from its inception to the present time, focusing on the legal precedents and judicial practices that shaped the right of judicial review over the constitutionality of laws in the Arab Republic of Egypt.

In 1923, the legislative framework and constitutional system in Egypt witnessed significant progress with the issuance of the inaugural Egyptian constitution, followed by additional constitutions. It is worth noting that these successive Egyptian constitutions lacked any provisions relating to the judicial examination of the legality of laws, which led to their shortcoming in clarifying the principles underlying the technical organization of this assessment. This led to a divergence of viewpoints among legal scholars, and judicial rulings varied regarding this matter in general

Faced with the silence of the Egyptian constitutions, legal scholars discovered that Egyptians, given their freedom of interpretation, were highly inclined toward this omission, relying on the notion that the constitution, if it does not formally prohibit it, implicitly condones it. Indeed, they were divided among themselves.

A minority opposed and rejected the idea, while the majority supported it, fought for its adoption, and provided interpretations and justification

The justifications put forth by opponents of the concept of review are as follows:

The principle of the separation of powers established by the 1923 Egyptian Constitution dictates preventing the court from effectively exercising constitutional review, as its role is limited to applying laws, not adjudicating their validity.

Article 15 of the Regulations for the Organization of National Courts prohibits these courts from interpreting administrative orders or suspending their execution; therefore, it is necessary to firmly establish these legal principles.

The legislator demonstrated a clear desire to prevent this review, as inferred from the content

of the explanatory memorandum. Decree by Law No. 47 of 1934, which amends specific parts of Law No. 26 of 1926 regarding the regulations for practicing the legal profession before civil courts, stipulated that no judicial body in Egypt may evaluate the constitutionality of laws.

Judges in Egypt lack the necessary independence for constitutional review, as their appointments and employment are subject to the control of the administrative authority.

However, jurists unanimously agree on the necessity of constitutional review of legislation, relying on the following arguments

The imperative of adhering to the principle of legality. Every legitimate government must adhere to this principle, and subordinate regulations must be observed in accordance with superior regulations. It is unacceptable to distinguish between the legality of rules and the constitutionality of laws.

All authorities in the state are subordinate to the constitution; if the legislative authority violates it, members of the judicial authority may not be compelled to abide by it. Consequently, the judiciary possesses the authority to adjudicate the unconstitutionality of any law. This does not mean repealing it, as the judge must adhere to the laws in force in the country and respect the constitution. At the same time, in line with the idea of protecting the integrity of the constitution, they possess the authority that enables them to refrain from enforcing laws that conflict with it; hence, monitoring the constitution constitutes a fundamental element of a judge's responsibilities.

Judicial opinions on this matter were initially tentative, and many were inconclusive in supporting the courts' authority to conduct judicial review regarding the constitutionality of laws. Eventually, the courts acknowledged their authority to assess the constitutionality of laws when an unconstitutionality claim is presented, and a party attempts to invoke it in the matter at hand. Courts derived their jurisdiction to assess the constitutionality of laws from the premise that this authority is a fundamental aspect of their judicial role, which entails applying the law to the cases presented before them. If the legislation intended to be applied in the case conflicts with the constitution, courts must give priority to the constitutional text and uphold the law. This aligns with the concept of the supremacy of the constitution over all other laws; their authority in this matter is limited to refraining from enforcing laws that contravene the constitution.

In 1946, the State Council was established; however, the judiciary was not granted the authority to examine constitutionality. On February 10, 1948, the Administrative Court ruled that courts possess the authority to assess the constitutionality of laws in form and substance. This decision is considered a source of pride and honor for the Egyptian judiciary, and subsequent decisions issued by ordinary and administrative courts have consistently affirmed the judiciary's authority to evaluate the legality of laws presented before it.

The Egyptian State Council was not granted any authority for judicial review over the validity of laws and regulations. However, it granted itself this authority through the principle of abstention, just as the Supreme Court did previously when assessing the validity of rules that violate the law. Consequently, the Council would disregard the application of any legislative provision violating the constitution if challenged for unconstitutionality before it, without issuing a ruling to invalidate it.

The preceding review indicates the Egyptian administrative judiciary's keenness to assert this right at the earliest opportunity. This possibility emerged following the challenge to the validity of Decree by Law No. 148 of 1944, which was issued in the absence of parliament. The government's lawyer argued that the judicial authority lacked the jurisdiction to assess the legality of laws. Consequently, the court addressed the issue explicitly, ruling that it possessed the authority to assess the legality of laws, both procedurally and substantively, as previously noted. The Administrative Court ruling issued on June 21, 1952, affirmed this ruling and emphasized the importance of constitutional scrutiny. Subsequent decisions issued by the Administrative Court supported the judicial authority's power to evaluate the legality of legislation. The court did not merely issue a theoretical declaration; rather, it actively exercised this prerogative by invalidating certain legislation on the grounds of unconstitutionality [26]. Thus, the circumstances during this period exemplified decentralized review, where refraining from enforcing unconstitutional laws was deemed a commendable advancement in strengthening decentralized scrutiny of the constitutionality of legislation. However, the numerous shortcomings of the review by abstention diminished its significance. The primary criticism relates to the absence of coherent criteria for assessing the constitutionality of disputed legislative texts, the

fragmentation of authority among various courts, and the inconsistency of rulings, whether between different courts or within the same court. Furthermore, its effects are incidental, as the non-application of a law in a specific dispute does not lead to its total and final loss of efficacy. On the contrary, all its effects remain valid and legitimate, except for the limited scope of that law, which pertains to the judicial dispute in which its application was disregarded. The result is that the binding force of the rulings issued in such cases was relative, as their effects are limited to the specific case and its parties, and therefore do not bind another court or the same judge in a different case.

In 1964, Egyptian President Gamal Abdel Nasser issued the provisional constitution of Egypt.

This constitution was described as provisional because it did not result from a popular referendum, nor was it issued by an elected constituent assembly, but was promulgated following a constitutional declaration. The term "provisional" was not intended to mean the constitution was permanent, but rather it served as a normative constitution, governing the nation's affairs indefinitely until amended or repealed in accordance with established procedures. The National Assembly was tasked with drafting the constitution, according to the stipulations of the constitutional declaration. The preparation committee began its efforts, focusing on drafting the provisional constitution, monitoring any shortcomings, and analyzing the National Charter to extract concepts missing from it. The committee also conducted constitutional analyses to aid in drafting the new constitution. Accordingly, the committee decided to consult numerous researchers from various sectors of society. Subsequently, the committee drafted a constitution, the conclusion of which stated that it would become official the day following its approval by the people. However, the logic of fate proved far stronger than the logic of humanity, as the war broke out on June 5, 1967. The defeat was catastrophic and horrifying, akin to a devastating earthquake that violently shook Egypt due to its sweeping brutality.

In 1969, it was necessary and logical for the legislative authority to organize the judicial assessment of the legality of legislation. On August 31, 1969, Republican Decree No. 81 of 1969 was issued, establishing the Supreme Constitutional Court Law [27], [28].

The aforementioned law stipulates that the Supreme Constitutional Court possesses three primary jurisdictions, as defined in Article 25 of its founding law. The jurisdictions include: judicial review over the constitutionality of laws and regulations; adjudicating jurisdictional conflicts by determining the competent authority when a case concerning the same subject is presented to both ordinary and administrative courts, where neither court acknowledges jurisdiction (positive conflict) or both courts decline jurisdiction (negative conflict); and resolving disputes arising from the execution of two contradictory final judgments, one issued by an ordinary court and the other by an administrative court [29].

The Egyptian constitution promulgated on September 11, 1971, was the first constitution in the country to mandate the establishment of a supreme constitutional court, whose sole mission is to assess the constitutionality of laws and regulations. An independent chapter was dedicated to the Supreme Constitutional Court—Chapter Five of Part Four concerning the system of government—and Article (192) stipulated a transitional measure under which the Supreme Court exercises the jurisdictions stipulated in the law establishing it until the Supreme Constitutional Court is formed. Article Three of the law establishing the Supreme Constitutional Court provided for its creation. Consequently, the 1971 constitution established a historical precedent by adopting the creation of the Supreme Constitutional Court, exclusively competent to adjudicate the constitutionality of laws. This constitution will be remembered for achieving a goal long envisioned by legal scholars and a dream long harbored by legal practitioners [30], [31].

Article 174 of the 1971 Constitution states that the Supreme Constitutional Court is an independent judicial body headquartered in Cairo, Arab Republic of Egypt [32].

On September 6, 1979, the foundational statute for the court tasked with assessing the legality of laws under the 1971 constitution was issued. Law No. 48 of 1979 stipulated in its first article the application of the provisions of the following legislation regarding the Supreme Constitutional Court. The second article mandated the transfer of all cases and requests falling within its jurisdiction and presented before the Supreme Court to this court. The aforementioned law, which entered into force two weeks after its publication in the Official Gazette, repealed the Supreme Court Law No. 81 of 1969 and the Procedures and Fees Law No. 66 of 1970, in addition to any conflicting provisions, immediately upon the establishment of the Supreme Constitutional Court.

During the legislative session preceding the discussion of the bill that ultimately became the Supreme Constitutional Court Law, the government proposed a similar bill but withdrew it in response to significant opposition [33], [34].

The 2012 Egyptian Constitution addressed the judicial assessment of the validity of laws, stipulating in Article 175 that the Supreme Constitutional Court alone possesses the authority to adjudicate this matter.

Moreover, the suspended 2013 constitution and the current 2014 constitution addressed constitutional review in Article 192, designating the Supreme Constitutional Court as the sole authority to conduct judicial review over the constitutionality of laws and regulations, as well as the interpretation of legislative texts.

Section Two: The Genesis of Judicial Review in the United States of America

The Genesis of Judicial Review of the Constitutionality of Laws in the United States of America.

The issue of constitutional review does not logically arise in countries with flexible constitutions that do not differentiate between constitutional laws and ordinary regulations, as any ordinary law enacted in violation of the constitution is automatically amended.

Accordingly, the United States is considered the standard country for this type of evaluation. This review process emerged from the concept of objection, as it lacked a clear constitutional provision. Its origins are attributed to court interpretations and the endorsement of legal intellectuals [35]. Judges acquired this authority through their study of constitutional texts and the formulation of the concept of a hierarchy of legal norms [36], [37].

Initially, American courts did not assess the legality of legislation, but rather limited themselves to implementing them as enacted by legislative bodies. The first precedent for evaluating the constitutionality of legislation occurred in Rhode Island in 1786, prior to the formation of the United States Supreme Court. The state court refused to enforce a law enacted by the legislature, citing its violation of the United States Constitution. This ruling sparked anger among the state's citizens and formed the basis for allegations of politicizing the judiciary [38]

A summary of the court's ruling in the case of Trevett v. Weeden indicates that legislation designating paper currency as legal tender was deemed unconstitutional for violating the state constitution. In 1787, the North Carolina state court ruled in the case of Bayard v. Singleton on the unconstitutionality of a law recognizing the ownership of real estate acquired from confiscated assets of opponents of the revolution [39], [40], [41]

However, these decisions faced substantial resistance from the government and the province's residents. The Trevett v. Weeden decision led the legislature to dismiss all judges from the court, and the citizens of the province refused to re-elect them. Courts were dissuaded from doing so and refrained from addressing this issue until the Supreme Court was established [42], [43], [44].

Upon the establishment of the Supreme Court, it was recognized that the pivotal case in the annals of judicial scrutiny of the legality of legislation was Marbury v. Madison (1803). In this case, Chief Justice Marshall asserted that the Constitution embodies the collective will of the people. Consequently, its regulations take precedence over all governmental activities, even those of Congress, rendering the Constitution superior to ordinary legislation. Therefore, legislation that does not conform to the constitution is deemed null and void [45], [46], [47].

Marshall based his conclusion on the principle of constitutional supremacy, a concept endorsed by Alexander Hamilton in 1788 in his book The Federalist. Hamilton asserted that the Constitution constitutes the fundamental law that judges must recognize, granting them the authority to interpret its meaning in the same way they interpret any legislative text. He claimed that in the event of an irreconcilable conflict between the two, priority must be given to the text with superior authority and significance; specifically, the Constitution must override positive law, implying that the will of the people must govern the will of their representatives. He stated that this outcome does not imply that the judicial authority is superior to the legislature; rather, it solely indicates that the power of the people takes priority over both. And when the intent of the legislative authority conflicts, as stipulated in the Constitution, the decision must align with the Constitution, not with positive law [48].

The details of Marshall's case can be briefly described as follows: The Federalists passed a resolution appointing a number of judges, and the Secretary of State, Marshall, did not deliver the

appointment commissions to the new judges due to the gravity of the situation. President John Adams ratified the provisions on his final night in office, as Thomas Jefferson assumed the presidency. Jefferson exploited this flaw to obstruct the completion of the appointment of a number of judges allied with the opposing Federalist Party. The new Secretary of State, Madison, directed the delivery of appointment commissions to designated judges and excluded others. Marbury, whose appointment was overlooked, rejected this circumstance and petitioned the Supreme Court, seeking a ruling in his favor and ordering Madison to issue the appointment based on the court's jurisdiction to compel such an action. The court faced a difficult dilemma: ruling in favor of Marbury would portray it as hostile to the new administration, while ruling against him would portray it as an adversary of the Federalists, to whom Chief Justice Marshall belonged. Consequently, the court reached a compromise, ruling in favor of the plaintiff while declining to mandate the Secretary of State to issue the appointment order, claiming that the law granting this authority is unconstitutional because Congress lacks the power to expand its jurisdiction in this manner. Its jurisdiction is defined exclusively in the Constitution. Marshall based his ruling on the judiciary's authority to assess the constitutionality of laws, defining the basis and scope of this authority, asserting that the judge's role is to implement laws and determine which should prevail in cases of conflict between them.

While Marbury v. Madison is sometimes strictly interpreted as establishing the judicial principle of protecting its authority from congressional encroachment, this interpretation was not universally applicable. Conversely, the Supreme Court unanimously decided that it upholds the principle that Marbury v. Madison establishes the fundamental tenet that the federal judiciary is the supreme authority in interpreting the Constitution. This notion has been consistently upheld in this court and throughout the nation as a fundamental and intrinsic aspect of the American constitutional framework.

No American commentator disputes the immense value of this precedent, which indeed represents a foundational element of the American constitutional framework. However, some assert that Marshall's personality and the sensitive political context surrounding the ruling amplified its true significance and led to its overestimation. The principles and legal opinions it contained, along with the possibility of its renewal under these circumstances, would reveal numerous shortcomings and areas of criticism.

Compliance with the law is the fundamental basis for the review of constitutional legitimacy. It is a mandate that obliges authority, regardless of its status, to comply with the limitations set by the Constitution, thereby avoiding the exacerbation of its privileges, its abuse, and the imposition of values that serve narrow interests of little importance, and ignoring or undervaluing the will of its citizens, organizing their affairs in a manner that instills fear, interfering in their private lives, or eliminating their rights and freedoms to eradicate them, or suppressing opponents to ensure compliance. In 1905, the Federal Supreme Court reaffirmed its position on labor legislation governing the interaction between workers and employers, designed to protect workers from employer exploitation. It asserted that a law limiting bakery working hours to 10 hours daily is illegal because it violates employers' freedoms and property rights. This law violates employers' rights regarding freedom and property, rendering it illegal. The prevailing anti-labor judicial trend led to the annulment of several laws designed to protect workers, including regulations concerning the working conditions and hours of women and children, workplace accidents, and compulsory arbitration in disputes between employees and employers. All these laws were considered unconstitutional or contrary to the United States Constitution due to their impact on freedom of contract or their infringement upon individual freedoms and property rights.

From 1936 to 1937, the Supreme Court took an oppositional stance toward numerous laws enacted by Congress to realize Franklin Roosevelt's agenda. These laws sought to alleviate the severity of the economic crisis in America and regulated the interaction between labor and capital. The Supreme Court argued that these laws violated individual rights or the powers of the states enshrined in the federal constitution, deeming them unconstitutional and illegitimate.

In 1999, the Supreme Court issued three decisions reaffirming its commitment to reinforcing the principle of state sovereignty and protecting it from federal encroachment. One of these cases indicated that although Congress possesses broad powers, it does not possess absolute authority. When enacting legislation relating to the states, it must not consider these sovereign entities merely as

provinces or institutions. It appears that this decision is neither unprecedented nor final, as the court issued similar rulings between 1995 and 1997. The court is prepared to continue this approach. This procedure will persist in the coming years, especially after its agreement to address concerns related to the fundamental aspects of the federal system.

Consequently, the Supreme Court assumed the role of the legislative body, issuing ordinary legislation. American scholar Charles Grove Haines pointed out in his article on the judicial review of the constitutionality of laws in the United States that this review of the actions of Congress and the states resulted in a form of judicial legislation, positioning the Supreme Court as a primary legislative entity. The United States Supreme Court has evolved into the supreme legislator, possessing the ultimate authority to confer binding status upon legislation. Legislative acts only attain their final status with the approval of the Supreme Court, i.e., their ratification. The dynamic between the Supreme Court and the rulers, namely Congress and the President, has evolved. These rulers have transformed into agents of the judiciary, exercising power under the supervision and oversight of the Supreme Court, akin to how agents operate under the rule of rulers. Thus, the political system in the United States is a prerogative of a body of judges, or a judicial minority, that exercises its authority under the guise of the law—that is, in the name of the Constitution, which it interprets according to its discretion or in alignment with the interests it protects.

The United States Supreme Court plays a vital constitutional role in upholding the principle of legality, ensuring a government restricted by the protection of individual rights and freedoms, and maintaining the balance of power. This is achieved through the authority it granted itself to oversee the legislative and executive branches and ensure their adherence to constitutional limits. Consequently, the court assumed the role of the arbiter over the Constitution and its influential voice; as expressed by one of its justices, it has effectively become "the Constitution".

It also influences public policy, a function stemming from its interpretation of legislation. Public policy issues are presented to the court as legal disputes requiring resolution. The Supreme Court participates to some extent in the policymaking process within every democratic system, as this is its role. Every judge faces the dilemma of choosing among numerous interpretations or applications of a legislative decision, executive order, or legal document. The matter is constitutional because the dispute entails resolution, and when a judge selects an interpretation, that interpretation establishes a policy for the involved parties. If other judges endorse the interpretation, the judge has established a policy applicable to all jurisdictions where this perspective dominates. An example of this is evident in the realm of racial equality. In the late 1880s, several states enacted legislation mandating segregation between Black and White individuals in public institutions. In 1880, Louisiana enacted legislation mandating separate but equal transportation on railway lines for Black and White individuals. Two years later, Homer Plessy, of African descent, challenged Louisiana's legislation by refusing to relinquish his seat in a "Whites-only" car on a train traveling from New Orleans to Covington, Louisiana. He was arrested and charged with violating parliamentary laws. Plessy asserted that this legislation was illegal. In Plessy v. Ferguson (1896), the Supreme Court upheld Louisiana's legislation, thereby entrenching the principle of "separate but equal," which persisted for nearly sixty years. During this period, numerous states mandated racial segregation in public transportation, seating arrangements, drinking fountains, and facilities. Black people were occasionally barred from entering restaurants and public libraries, and notably, Black students were typically sent to inferior educational institutions.

Conclusion

First: Findings

The study demonstrates that the origins of judicial review varied among the countries under research, shaped according to the nature of the constitutional system and the political background of each state. In the United States, judicial review developed through judicial precedent, whereas both Egypt and Iraq adopted a centralized institutional model for constitutional review.

The Iraqi experience illustrates the direct impact of political and constitutional transformations on the structure of the judicial review system, where the establishment of the Federal Supreme Court was a pivotal point for instituting a constitutional framework to monitor legislation and ensure the supremacy of constitutional texts.

The first Iraqi constitution was issued during the royal era under the title 'The Iraqi Basic Law of 1925', followed by the promulgation of the first permanent constitution in the republican era in 2005. Both constitutional documents stipulated the establishment of a judicial review system to verify the legality and constitutionality of laws, whereby this responsibility was vested in a specialized constitutional court that undertakes this role in addition to other constitutional jurisdictions. To bolster its independence, the constitutional texts explicitly affirmed the court's enjoyment of financial and administrative independence.

The Iraqi constitutional legislator delegated the regulation of the court's membership affairs—in terms of number and qualifications—to the legislative authority, based on the provisions of Article (92) of the 2005 constitution. This approach faced harsh criticism from legal academics and constitutional law jurists, as critics argue that the specific nature of the Federal Supreme Court necessitates its regulation through explicit constitutional texts; this is to immunize it from political interference and guarantee its impartiality and independence during the formation and decision-making phases.

The American model highlights the concept of decentralized judicial review, which relies on the role of all courts in monitoring the constitutionality of laws; this model has contributed to entrenching the judicial interpretation of the constitution and ensuring the protection of rights and freedoms through the accumulation of legal precedents.

The Egyptian experience indicates a process of gradual evolution, through which review transitioned from fragmented forms to a centralized constitutional monitoring system. This evolution contributed to unifying constitutional principles and achieving greater legal stability in the organization of legislation.

The Egyptian constitution affirmed the judiciary's authority to conduct constitutional review; the 1971 constitution explicitly stipulated the establishment of the Supreme Constitutional Court, defining it as an independent judicial body, whose primary role is to evaluate the conformity of laws and regulations with the constitution, and thereby determine the legality of legislation. Furthermore, subsequent constitutional amendments expanded the scope of this judicial review.

The Egyptian Supreme Constitutional Court adjudicates constitutional lawsuits through multiple primary mechanisms: preliminary challenge (incidental plea), judicial referral, or its self-initiating authority.

The study asserts that the political and legal differences among the United States, Egypt, and Iraq have led to distinct variations in the scope and mechanisms of judicial review. However, their common objective lies in ensuring the primacy of the constitution and activating the principle of legality and the rule of law.

Second: Recommendations

We recommend that the Iraqi legislator expedite the approval of the anticipated Federal Supreme Court law, provided this legislation aims to address the current legislative vacuum and ensure the court's formation complies with approved standards, including integrating experts in Islamic jurisprudence and legal scholars into its composition.

The necessity of explicitly stipulating the retroactive effect of the court's rulings, while affirming that its decisions are final and binding on all state authorities, to ensure their effective and credible enforcement.

We propose that the Egyptian legislator adopt the principle of election to select the members of the Supreme Constitutional Court, rather than strictly adhering to appointment procedures.

It is also proposed to implement the "original lawsuit" procedure, granting individuals the right of direct recourse (direct petition) to the Supreme Constitutional Court.

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