

IRAQI JUDICIAL FORUM

THE JUDICIAL SYSTEM IN IRAQ: FACTS AND PROSPECTS

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JUDICIAL SYSTEM IN IRAQ

**A Review of the Legislation Regulating
Judicial Affairs in IRAQ**

By/ Medhat Mahmoud

Chairman of the Court of Cassation,
President of the Council of judges

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INTRODUCTION

Judges enjoy a highly revered stature in the people's minds (all the people) due to the role they play in preserving social equilibrium. They restore rights from those who have illegally taken them and return them back to those from whom these rights had been taken. Being the custodians and guardians of the people's rights, freedom and dignity, they deserve the great veneration and esteem the people bestow on them. The esteem the judiciary enjoys is common in the Arab society, in general, and in the Iraqi society, in particular. The Iraqi people highly have esteemed the judiciary since Hammurabi's Obelisk was erected in 2100 BC declaring justice to the people. The *Hammurabi law* entrusted Hammurabi, the King of Babylon (the sixth king of the Amorite Dynasty), to make sure that justice is done. Declaring the reasons behind this law, the great king said:

"I, Hammurabi, the pious prince who fears God, (promulgate this law) to spread justice in the country, destroy those who commit thins and evils so that the powerful shall not oppress the weak, and for me to shine like the sun over the people and to lighten the country..."¹.

Before Islam, the Arabs gave justice the same highly esteemed position. They entrusted justice administration to priests and fortune-tellers who acted as judges. Examples of those priests and fortune-tellers are Soteih Alze'bi, known as Soteih al-Kahen (or priest Soteih), and Shaq Anmar. Those priests and fortune-tellers assumed the role of judges in the belief that the priest had a jinn follower who would tell him everything. So, the priest would reach the truth through that jinn and the truth would lead him to justice, which the people expect from him. A fortune-teller would reach justice in his judgment through his insight and intelligence.

Besides the priests and fortune-tellers, justice had been undertaken by the chiefs and sages of the tribes before Islam. When a man distinguished himself in a tribe he would rule the tribe and undertake justice. It was by this way that Abu Talib, the Prophet's uncle, assumed his role as a judge. Hashem ben-abd-Manaf and his sons Abdullah ben-Hashem and Abdul Mutallib ben-Hashem (the latter is Abu Taleb's father) undertook justice in Quraish, the tribe to which the Prophet belongs. Quraish at that time undertook arbitration among the Arab tribes. Among the Arab judges who became famous at that period was 'Amer ben-a'-Darb and Aktham Ibn-Sayfi, the famous Arab sage, who was considered the best ruler at his time².

When Islam's message dawned over the world, the new religion conferred on justice an elevated position that surmounted its position before Islam. Judging among the people means playing a role of God. According to

1 Ahmed Zaki Al-Khayat, History of the Legal System in Iraq. p. (18)

2 Ismail Haqi Farag, Islamic Justice and its History, printed by late Ibrahim Al-Wae'z in 1949. Mohamed Shahir Judiciary and Judget, p. (49)

the Quran, *judging rests only with God*³. God also says “*Oh, David! We did indeed make thee a vicegerent on earth: so judge thou between men in truth (justice)*”⁴. At the outset of Islam, justice was administered by the Messenger of God, the Prophet, (peace be upon him). So, with the Arab Prophet himself acting as a judge, can there be a position more venerable than justice administration? God orders Prophet Muhammad “*Judge between them (the people) by what God hath revealed, and follow not their vain desires, diverging from the truth that hath come to thee. To each among you have We prescribed a law and an open way*”⁵.

After the great Prophet, the justice was administered by the nation’s great men; the Caliphs Omar Ibn-el-Khattab and Ali Ibn-abi-Taleb, the latter being considered the most informed of the Prophet’s companions and the most fair judge. According to the Prophet “Ali is the best judge”. Caliph Omar Ibn-el-Khattab sought God’s help when a problem was not solved by Ali.

Later, with Islam entering other nations, justice was administered by elite of the Islamic society. It became impossible for the Caliph to decide by himself on the Muslims’ affairs due to the huge responsibilities he shouldered. Therefore, the judicial branch was separated from the responsibility for State’s general affairs. This happened at the reign of the just Caliph Omar Ibn-el-Khattab who is considered the first one who separated the judicial authority from the executive authority, if the term applies here. He appointed Abi-a-Darda’a as the judge of al-Madina; Sharih as the judge of Basra; and Abu Mussa al-Asha’arie as the judge of Koufa. These were the first specialized judges in Islam⁶.

Judges in the Islamic era were selected by the Caliphs themselves. The Caliphs were very careful in selecting the judges and provided them with all that was necessary to establish justice and support the oppressed. This is an evidence of the high place and esteem of the judge in Islam⁷.

3 Sura An’am, or cattle, verse 57.

4 Sura Sad, verse 26.

5 Sura Ma’ida (The Table Spread), verse (48)

6 Mohamed Shahir Arslan’s book: Judiciary and Judges, p. (55), and Dr Shawkat Alian’s Grievances Justice, p. (26)

7 Caliph Omar Ibn-al-Khattab wrote to Abu Musa al-Ash’arie when he appointed him the judge of Basra (Make peace among the people in your behaviors, in your justice and in your seat, so that the powerful will not covet in your injustice and the weak will not get disappointed of your justice.” , Al-Mawardi’s .book "Judges’ Propriety”, part I, p. (134).

Moreover, a judgment that was delivered by the judge in the Islamic era was binding. The Quran says: “*But no, by thy Lord, they can have no real faith, until they make thee judge in all the disputes between them, and find in their souls no resistance against thy decisions, but accept them with the fullest conviction*”⁸. By contrast, in the pre-Islamic era, when the Arabs would go to arbitration to settle their disputes, the arbitrator’s judgment was not binding on the parties to the dispute if any or both of the adversaries ask for another arbitrator⁹.

In his book "The History of Egypt in the Middle Ages", Stanley Linpaul says: "During the Umayyad State and the outset of the Abbasid State, the judge in Egypt had a prominent position and had a great prestige as a person. Unlike other officials of the State, the judge was not substituted by the Caliph. No one was faster than the judge in quitting his job if any one intervened in his work. The judge was famous among the public for his integrity and his high morals. Therefore, the *Wolat* (plural of *wali*, or governor) had to think long if they wanted to remove a judge from his post, otherwise, they would be exposed to the hatred of the public. During the Abbasid era, the removal of the judge did not lie within the *Wali*'s authority. Appointment of judges and determining their salaries did not also lie within their jurisdiction. These matters were the responsibility of the Caliph himself”.

Other nations conferred on justice and the judges the same high position bestowed by the Arab and Islamic societies upon them. This was explicitly articulated in the constitutions of these countries, which sincerely express the nation's conscience and beliefs. These constitutions expressed the high esteem of the judiciary. They explained the close connection between the independence and integrity of the judiciary on one hand and the establishment of the State itself and the freedom of its citizens on the other hand¹⁰.

Imam Ali Ibn-abi-Talib wrote to al-Ashtar a' Nokha'e when he designated him as the ruler of Egypt: “ Choose that who will judge between people the best of your subjects in yourself; who is able not to put up with matters; not to be wrangled by adversaries, not to go too far in mistake, not to falter from returning to the truth if he knows it, not to seek honor for himself in greed, not suffice himself with least understanding and not its maximum, to stand against them in suspicions and to convince them by reason, the least impatient of them in arguing with the adversary, the most patient in exploring things, the most frank when the truth becomes clear, who does not brag with praise and not to be lured by temptation, those are few. Give more support to your judge, be generous with him to make him self-sufficient and less in need of the people, give him high place so that no one of your followers would be avid in him, so that he would be safe from men's slandering him before you. Consider this carefully”.

Al-Ashmawi: Rules of Procedures in the Egyptian and Comparative Legislation, part I, p.(24).

8 Sura Nisa'a, (The Women), verse (65)

9 Mohamed Shahir Arslan, Judiciary and Judges, p. (60)

10 Mohamed Shahir Arslan, Judiciary and Judges, p. (142). Its source is the book on Islamic Systems by Dr Hassan Ibrahim and Ali Ibrahim, p.(345).

Until the period of the Ottoman rule, Iraq remained loyal to the judiciary giving them the same high esteem they enjoyed during the pre-Islamic and Islamic eras. It may be useful to shed light on the judiciary's position during the period starting from the Ottoman era down to the British occupation period till the formation of the State of Iraq at its different stages. This will enable us to know the real history of the judiciary and the role we want them to play in elevating truth so that they assume their sacred mission in the best way. This is the purpose of this humble study. Suffice it to say that I put a small brick to elevate the bastion of justice. If I am successful, it is God's will.

Medhat Al Mahmoud

Judge,

Baghdad, April 2004

CHAPTER (1) HISTORICAL BACKGROUND OF THE JUDICIAL SYSTEM IN IRAQ

Section (1) The Ottoman Empire

In the introduction, I discussed the judicial system in Iraq during the pre-Islamic ages and the Islamic era. It is appropriate in this outline of the judicial system in Iraq to see how this system developed when Iraq became a part of the Ottoman Empire and one of its states. During that period, Iraq knew one kind of courts; the Islamic Shari'a (law) courts, which rested in their judgments on the Islamic Shari'a (the Hanafi doctrine) and applied its rules to the disputes they decided on.

Judges in these courts were appointed by the Sultan in the Ottoman capital of Istanbul by an order called *Al-Bara'a Al-Sharifa* (or holy charter) decree. They were removed only by order from the Sultan.

The following are the laws and regulations addressing the judges' affairs, appointment, and determination of their privileges during that era:

- The Regulation on the selection of *Hokkam* (Arabic plural of *Hakim*- a judge of the civil courts) issued on 11/4/1329 (Roman calendar) as amended.
- The law on the Islamic *Shari'a Hokkam* issued on 13/2/1329 (Roman calendar) as amended.
- The law on the descriptions of the Islamic Shari'a *Hokkam* and *Qodat* (Arabic plural of *Qadi* - a judge of Islamic Shari'a courts) issued on 17/5/1320 (Roman calendar).
- The law on the descriptions and privileges of the Islamic Shari'a *Hokkam* issued on 17/5/1330 (Roman calendar).

For a person to be appointed *hakim*, he must:

- Be twenty five years of age.
- Have no legal disability preventing him from being appointed as a judge.
- Have not been sentenced to imprisonment for more than a week for an ordinary crime.
- Meet the conditions stipulated in Articles (1729) and (1994) of the Ottoman Code. These Articles provided as follows: (He) must be wise, knowledgeable, honest, strong and having a sound body. A minor, insane, blind or deaf person is not qualified to be a judge."
- Have been graduated from the judges school, or have passed an exam on the subjects taught at that school.

If these conditions are met, the person who meets them would be appointed by *Al-Bara'a Al-Sharifa* (or holy charter) decree as a judge in

accordance with Article (18) of the Ottoman Constitution¹¹. Judges at that time heard cases and delivered their judgments in accordance with basic rules similar to those procedural rules provided in the civil and criminal procedure codes.

As mentioned above, there was only one form of courts; the Islamic Shari'a courts. The Islamic Shari'a rules continued to be applied to all kinds of disputes till the year 1856 when Sultan Abdul-Mejid issued the *Hamayouni* Line (an Ottoman decree). Under that decree, a number of improvements were introduced to the organs of the Ottoman State. Some western laws were copied in the reform plan of the State's departments. The courts had a say in these reforms. In 1880, during the rule of the Ottoman Sultan Abdul-Hamid II, Iraq knew, like other Ottoman states, another kind of courts; the *Nizamia* courts. The *nizameya* courts were formed and entrusted to decide on criminal, and some civil, actions such as the land actions, the land borders actions, and the like.

These courts started to apply the new laws copied by the Ottoman legislator from the West, such as the Ottoman Criminal Code (whose provisions were mostly copied from the French criminal code), the land law and other laws¹². Courts in Iraq were formed in accordance with the administrative divisions starting from the village down to the district, the county and ending with the province¹³. In the village and district there was a simple form of courts "magistrates' circuits". The members of the district council took responsibility for the magistrates' circuits in the district. The village senate members took responsibility for the village. These courts decided on the disputes among individuals in the district or the village.

Following the publication of *Hokkam A'Solh* (or magistrates) Act on 24/4/1913, the functions of the "magistrates' circuits" were entrusted to the magistrates' courts, which were also called the "circuit courts". According to this Act, a magistrates' court was formed at the centre of every "district" to hear lawsuits there. The court, then, would move to the villages, which are administratively affiliated to the district, to hear the lawsuits there instead of receiving the villagers in the district. We may still find in some remote areas in Iraq at the present time a similar form of the circuit courts. A judge of a certain district visits the neighboring district to decide on cases at certain times.

Presumably, after the *Hokkam A'Solh* Act had been issued, the magistrates' courts were formed in every district in Iraq. In reality, however, these courts were formed in the centers of the major districts only. The court

11 Abdul Hamid Koba, the Judicial Systems and the Legislative Movement in Iraq, p.(160).

12 Abdul Hamid Koba, the Judicial Systems and the Legislative Movement in Iraq, p. 15.

13 Abdul Rahman Khedr, the Judicial Development in Iraq, the Judiciary Magazine, issue No.(1), third year, 1937,p.37.

sat as an individual judge assisted by a number of employees who were authorized by him to hear cases in his absence¹⁴.

In the county centre and the province centre, *Bada'a* courts (or courts of first instance) were formed. These courts were formed of a presiding judge and two members. They undertook the tasks of the magistrates' courts at districts. They also undertook investigation in felonies and then would refer the cases to the high criminal courts. They also decided on misdemeanors and infractions¹⁵. The Baghdad court of first instance, which was established on 19/12/1917, was particularly important due to the importance attached to Baghdad among the Iraqi cities. The Baghdad court was divided into two courts; the first heard civil cases and the second heard commercial cases¹⁶.

In addition to the Islamic Shari'a courts, the magistrates' courts and the courts of first instance, courts of appeal were also formed during the Ottoman era in every county, which was considered the centre of the province. The court of appeal was formed of a presiding judge and four (4) members in addition to two (2) honorary members when the court was divided into two courts. The courts of appeal heard appeals against all judgments issued in civil and commercial actions that could be appealed. They also sat as courts of cassation to decide on the judgments issued by the courts of first instance in civil actions and misdemeanors¹⁷.

At the top of the hierarchy, there was the Court of Cassation based in Istanbul. The Court of Cassation examined the judgments delivered by the courts at the various provinces ruled by the Ottoman State.

14 Ahmed Zaki Al Khayat , History of the Legal Profession in Iraq, p. (52).

15 Abdul Rahman Khedr, the Judicial Development in Iraq, p.(37), from the Judiciary Magazine, issue No.(1) in 1937.

16 Ahmed Zaki Al Khayat, History of the Legal System in Iraq, p.(55).

17 Abdul Rahman Khedr, Judicial Development in Iraq, p. (37), issue No. (1), the Judiciary Magazine issued in 1937.

Section (2) The British Occupation

Britain occupied the City of Basra in 1915. Instead of maintaining the laws and the judicial divisions which existed during the Ottoman era, as the international norms require, the British military administration enacted a number of laws and regulations in Basra, which it called the "Iraqi Code". These laws were derived from the laws enacted by the British authorities in India. The application of these laws was not restricted to Basra but extended to the two cities of Al-Emara and Al-Naseria. The laws were applied in the centers of the cities only. Outside the centers, the British military authorities applied the "Tribes Disputes System" designed by the British ruler Henry Dobbs. This system was derived from the "Indian borders crimes system".

During the British occupation of Iraq, the British occupying authority established the "Basra courts" in 1915 and Colonel Fox became the first justice officer in Basra. These courts started to use Arabic in their proceedings instead of the Turkish language.

On 11/3/1917, Britain occupied the City of Baghdad and the Turkish judges left the city. The Courts' activities were suspended or almost suspended, as the Turkish employees left them too. The courts documents were destroyed. No court continued to undertake its activity except one Islamic Shari'a court and one magistrates' court in Baghdad. Their location was in the government palace adjacent to the *Wali's* room¹⁸.

The situation continued as such till the Courts Declaration was issued on 28/12/1917 ratifying the report of Sir Bonham Carter. The occupation authorities asked Sir Carter to prepare a report on the courts in Iraq and to give recommendations on how to breathe life into the courts, which the Ottomans left. In his report, Sir Carter recommended that the Islamic Shari'a courts should restore their previous position during the Ottoman era, as the Iraqis respected these courts.

According to the "Courts Declaration" referred to above, the courts in Iraq during the British occupation period were formed as follows:

1. ***The court of appeal***: It was established in Baghdad and was considered the high court in all the occupied territories. Its judgments were final because appeals against the judgments of the Court of Cassation in Istanbul were no longer permitted and no court of cassation was established in Iraq at that time. The court of appeal was formed of a British presiding judge and two Iraqi *Hokkam*.
2. ***Bada'a courts*** (or, courts of first instance): They were established in Baghdad, Al-Hella, Yakuba, Basra and Mussel. They were presided over

18 Ahmed Zaki Al-Khayat, History of the Legal Profession in Iraq, p.(48), and Abdul Hamid Koba, Judicial Systems and Legislative Movement in Iraq, p.(128).

by British *judges* with Iraqi *Hokkam* as members. These courts assumed the task of hearing civil and commercial actions.

3. **Magistrates' courts:** They were established in Baghdad, Basra, Mussel, Al-Emara and Karkouk. They were entrusted to decide on conciliation actions, as the case had been under the Ottoman rule.
4. **Shari'a (or, Islamic law) courts:** They were the same during the Ottoman rule. They assumed the task of hearing Muslims' personal status actions. They totaled 30 courts in 1920. The decisions of these courts were ratified by the Islamic Shari'a Cassation Board, which was established on 14/8/1918.
5. **Criminal courts:** These consisted of the High Criminal Court and criminal courts of three degrees. The judgments of the High Criminal Courts on felonies were subject to the ratification of the General British Royal Governor, as he was considered the supreme judicial authority in respect of criminal courts¹⁹.

Under British occupation, Arabic became the language used in the courts. The judicial system was unified in Baghdad, Mussel and Basra. A justice administration was established. It was headed by Sir Bonham Carter who became responsible for administering the judicial affairs in the country and represented the General Royal Governor. He was called "*Nazer Al-Adlia*" or judicial superintendent²⁰.

19 Ahmed Zaki Al-Khayat, the History of the Legal System in Iraq, p. (54).

20 Same source, p. (48)

Section (3) The National Rule

With Iraq getting its independence, the judicial system remained as it was under the British occupation rule, which inherited this system from the time of the Ottoman occupation. As said above, the judicial system was re-regulated under the “Courts Formation Declaration” issued on 28/12/1917. The controls and conditions under which *Hokkam* and *Qodat* were appointed remained as they were during the British occupation era till 1929 when the first national act “*Hokkam and Qodat Act No. 31/1929*” was issued to regulate the judicial affairs in Iraq. The Act contained the conditions for the appointment, promotion, transfer and disciplinary trial of *Qodat* and *Hokkam*. It was indeed the first gain, which enhanced the judges’ stature and independence.

The *Hokkam and Qodat Act No. 31/1929* distinguished between the *Hakim* and *Qadi*. It defined the *Hakim* in Article (2) as the judge at civil courts. The *Qadi*, according to this Act, is the judge at the Islamic Shari’a courts. Act 31/1929 specified the different conditions for appointment in both positions²¹:

According to Article (9), a candidate for the position of *Hakim* must have obtained an L.L.B degree from the faculty of law. He must have served for a period of not less than two years at courts or at the departments of the Ministry of Justice or other ministries; in addition to the other conditions contained in this Article. However, Article (10) requires only that a candidate for the position of *Qadi* must be a jurist or selected from among those who have served in the judiciary for a period not less than two years and has passed the general exam conducted for that purpose²².

21 Article (9) of the Hokam and Qodat Act No. 31/1929 provides the following: No Hakim shall be appointed unless he meets the following conditions:

- 1- He must be an Iraqi national.
- 2- He must be not less than 25 years old.
- 3- He must have sound body according the provisions of the employees act.
- 4- He must know Arabic.
- 5- He must be known for good manners and reputation.
- 6- He must be graduated from the Ottoman school of law before 23 August 1921 or from the Iraqi faculty of law and has worked for at least two years in the legal profession or in an important position at courts or at the departments of the Ministry of Justice or the other ministries' departments or other positions provided that he accompanies those at a court for a period not less than one year.

According to this Article the candidate who is the graduated from the Iraqi faculty of law is at the same level of the one who is graduated from a foreign school of law and has passed the additional examination on the Iraqi laws according to the requirements set down by the competent authorities.

22 Article (10) of the Hokam and Qodat Act No 31/1929 provides the following: No Qadi (judge) is appointed in that position unless he meets the following conditions:

- 1- He must be an Iraqi national.
- 2- He must be not less than 25 years old.
- 3- He must be of sound body according to the provisions of the Employees Act.

For the first time in the history of Iraq, a committee from the *Hokkam* and *Qodat* called "the *Hokkam* and *Qodat* Affairs Committee" was formed under the provisions of Act 31/1929²³.

The committee was entrusted to manage the affairs of all the *Hokkam* and *Qodat*. The committee nominates for appointment the *Hokkam* and *Qodat* in these positions and mediates with the Minister of Justice to issue a royal decree to officiate that appointment²⁴.

The committee also nominates *Qodat* for promotion in the judicial posts and submits that nomination to the minister to issue a decree to that effect or reject the nomination by a grounded decision. In case of rejection, the committee would nominate three (3) persons whom it deems efficient to occupy the judicial post, and the minister would in this case select one of them for promotion²⁵.

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- 4- He must know Arabic.
 - 5- He must be know for good manners and reputation.
 - 6- He must be graduated from the *Qodat* (judges) school in Astana before 23 August 1921 or from the Iraqi faculty of law or not graduated but worked in the judiciary for a period not less than two years after he proves his ability in the general exam before the committee. If there is no one who meets the above-said conditions, he may be appointed from the jurists provided that the candidate proves his ability in the exam to be held by the committee for this purpose.

- 23 Article (3-1) of the *Hokam* and *Qodat* Act No. 31/1929: A committee shall be formed at the Ministry of Justice to be called the *Hokam* and *Qodat* affairs committee. This committee shall convene to discuss the affairs relative to the *Hokam* and *Qodat* identified in this Act. The committee shall be presided over by the chairman of the court of cassation and shall include two members one of them from the employees of the Ministry of Justice or a Hakim appointed by the minister and the other shall be either a Hakim appointed by the minister and the other shall be either a Hakim to be appointed on annual rotation from among the *Hokam* of the court of cassation or the chairman of the Sunni Islamic Shari'a cassation board or the chairman of the Ga'afari cassation board the person whose affair shall be considered is a "civil" Hakim or a Sunni or Ga'afari judge.
- 24 Article (8) of the *Hokam* and *Qodat* Act No. 31/1929: The Hakim and judge shall be appointed by a royal decree to be obtained by the Minister of Justice upon a decision from the committee. The minister shall obtain a royal decree only in accordance with a decision from the committee. However, he has the right to refuse an appointment decision on condition that he explains the reasons behind his refusal.
- 25 Article (12-2) of the *Hokam* and *Qodat* Act No 31/1929: When a post is vacant, the promotion shall be by a decision from the minister in accordance with a decision from the committee. He shall issue a promotion decision only with a decision from the committee. He has the right to refuse the appointment decision relative to selecting the most efficient and return the case to the committee, together with an explanation of the reasons behind his refusal. Accordingly the committee shall nominate the three (3) persons whom it deems the most competent for promotion and the minister shall then select one of them for promotion.

Act 31/1929 also entrusted the committee to transfer the *Hokkam* and *Qodat* from a court to another. This would be executed by a decree from the minister acting upon the committee's recommendation²⁶. The *Hokkam* and *Qodat* Affairs Committee had the power to hold disciplinary trial for *Hokkam* and *Qodat* if they committed an act inconsistent with their posts or if they neglected performing their functions. Disciplinary trials are held by an order by the minister who is also entitled, by rule of law, to serve a notice to the *Hakim* or *Qadi*.

According to Article (18), the committee has power to impose the following penalties: reprimand, demotion and removal from office. Penalties must be approved by the minister. In case the committee decides the removal of a *Hakim* or *Qadi* from his post, in addition to the approval of the minister, the case must be submitted to the Council of Ministers to give a yes or no decision upon the removal decision (Article 22).

If the committee finds out that it is necessary to refer the *Hakim* or *Qadi*, except for the *Hokkam* of the Court of Cassation, to the criminal courts, the committee must take a decision to that effect and submit it to the minister, who may accept or reject that decision. If the case concerns a *Hakim* at the Court of Cassation, the minister must submit the bill of indictment to the Council of Ministers to decide whether the *Hakim* should be put on trial. In case of approval, the *Hakim* will be referred to the High Court formed in accordance with the Iraqi Constitution²⁷.

The *Hokkam* and *Qodat* Affairs Committee was re-formed in accordance with Act No. 68/1943 and was called the "*Hokkam* and *Qodat* Committee" to meet the requirements at that time²⁸. According to Article (4) of

26 Article (13) of the Hokam and Qodat Act No. 31/1929: The transfer of Hokam and Qodat from a court to another shall be upon an order from the minister in accordance with a decision from the committee. However, the minister has the right to refuse the decision. If the minister deems that the transfer is necessary for public interest and that the committee disagrees with his opinion in this regard, he shall have the right to enforce this transfer without taking heed of the committee's opinion provided that he explains the reason behind his decision in writing.

27 Article (25) of the Hokam and Qodat Act No. 31/1929:

1. If the defendant is one of the Hokam/Qodat of the court of cassation, the minister shall immediately submit the bill of indictment to the Council of Ministers to determine whether a trial shall be held or not.
2. If the Council of Ministers deems that the trial is necessary and that the crime is related to the position, the necessary procedures shall be taken for the High Court to sit according to the provisions of the constitution act. If the Council of Ministers deems that the crime is not connected with the position, in this case the minister shall take the necessary procedures to refer the case to the competent court.
3. If the Council of Ministers deems that there is no need for trial, the minister shall then comply with Article (24-2).

28 Article (1) of second Act No. 68/1943 amending the Hokam and Qodat Act No. 31/1929: The board entrusted with taking care of the affairs of the Hokam and Qodat and called the *Hokam* and *Qodat* committee shall be formed as the following:

- a- 1- The chairman of the court of cassation as a presiding judge.

that Act, the post of "Deputy *Hakim*" was introduced²⁹. According to Article (10), there are five degrees of *Hokkam* and four degrees of *Qodat*³⁰.

As for the courts and their formations, they remained as they were with the exception of the Court of Cassation, which was formed according to Article (81) of the Iraqi Constitution on 24 December 1925. The Court of Cassation, established in Baghdad, was entrusted to hear all actions that lied within the jurisdiction of the Court of Appeal in Baghdad during the British occupation. Thus, the Court of Cassation had two jurisdictions: a principal jurisdiction of cassation and an appellate jurisdiction. As a court of cassation, the court hears and decides on judgments and decisions delivered on appeals before the court of appeal. As a court of appeal, the court hears appealed

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- 2- A Hakim from the court of cassation to be appointed by the minister for one year term.
 - 3- A senior employee at the Ministry of Justice to be selected by the minister.
 - b- If the case is related to Qodat, one of the two chiefs of the two Islamic Shari'a cassation boards shall replace the member Hakim as the case may require.

- c- If the chairman of the committee is unable to attend, the deputy chairman of the court of cassation to be selected by the minister shall act on his behalf. If one of the chiefs of the two cassation boards is absent, a member of the board to be selected by the minister acts on their behalf.

- d- The chairman of the board or a board member shall not attend the trial if the case is related to one of his relatives till the fourth degree.

- e- The committee shall open a special register to contain all the information regarding the qualifications and the personal and scientific behavior of each Hakim or Qadi in accordance with the official reports it receives from the court of cassation and the ministry.

29 Article (4) of Act No. 68/1943 amending the Hokam and Qodat Act No. 31/1929:

- 1. A deputy Hakim from among those who meet the conditions stipulated in para. (1,2,3,4,5,6) of Article (7) and are not less than 22 years old may be appointed.
- 2. The deputy Hakim shall be under probation for two years and he may be appointed in the post of Hakim - 5th level after this period
- 3. The deputy Hakim is considered a criminal Hakim - 3rd level. He shall hear conciliation and first instance actions whose value not to exceed 50 dinars. He monitors the regulation of notices and the court's registers, and supervises all the clerk works. He may participate in the formation of the court of first instance or the grand court if the need arises by nomination from the chairman.
- 4. The Qadi may be granted the power of deputy Hakim at remote locations.

30 Article (10) of Act No. 68/1943 amending Hokam and Qodat Act No. 31/1929:

a - Levels of Hokam shall be five (5) levels, the first is its top and the fifth is its bottom as the following:

- 1. The chairman of the Court of Cassation, his deputy, Hokam and the chairmen of the courts of first instance are at the first level.
- 2. Deputy chairmen of the courts of instance, individual Hokam, the Hokam of the courts of settlement appeals, the first Hakim of each of the criminal court and the magistrates' court in Baghdad, Basra and Mussel come at the 2nd and 3rd levels.
- 3. Conciliation *Hokam*, the courts of first instance, investigation and procedures Hokam are posted at the 4th and 5th levels.

b – Levels of *Qodat* shall be four (4) levels according to the following:

- 1. Chairmen of the two Islamic Shari'a cassation boards are at the 1st level.
- 2. Members of the two Islamic Shari'a cassation boards and Qodat of Baghdad, Mussel and Basra come on the 1st and 2nd levels.
- 3. *Qodat* of the other provinces centers are at 2nd and 3rd levels.
- 4. *Qodat* of counties and districts are at the 4th level.

actions. This situation continued till 1945 when its functions were restricted to hearing actions as a Court of Cassation only. Its appellate functions were entrusted to the courts of appeal according to the provisions of Act No.3/1945³¹.

The following is a list of the actions that were decided by the Iraqi courts from the beginning of 1924 to June 1925, and statistics about the number of courts in Iraq during that period. I believe this list will give an illustration of the state of courts at that time.

1) The number of cases

<u>Kind of courts</u>	<u>No. of Cases</u>
▪ Courts of first instance	931
▪ Magistrates' courts	51118
▪ Personal status actions for non-Muslim sects	1337
▪ Grand criminal actions	629
▪ Appellant criminal actions	1323
▪ Summary criminal actions	5719
▪ Ordinary criminal actions	76339
▪ Sunni Islamic Shari'a actions	779
▪ Ga'afari Islamic Shari'a actions	6773
▪ Actions before the Court of Cassation till 1924	963
▪ Appellant actions till 1924	304
Total	<u>153233</u>

31 Abul Hamid Koba, *Judicial Systems and the Legislative Movement in Iraq*, p. (91).

2) The number of courts.³²

<u>Kind of court</u>	<u>Number</u>
▪ Court of appeal	1
▪ Court of first instance	5
▪ Courts of individual <i>Hokkam</i>	7
▪ Magistrates' courts	9
▪ Islamic Law Cassation Board	2
▪ Islamic Shari'a courts	27

After the enactment of *Hokkam* and *Qodat* Act No.31/1929 and its amending Act No. 39/1932 and Act No. 68/1943, the Courts Formation Act No. 3/1945 was issued. Under that Act, the Courts Formation Declaration issued on 28 December 1917 was amended and the rules regulating the functions of the Court of Cassation were put in detail. The new Act No.3/1945 divided Iraq into six (6) judicial regions: Baghdad, Basra, Mussel, Al-Hella, Diyali, and Karkouk. Each region was considered a judicial region (*mandeqa adleya*) for the purpose of regulating their administrative affairs. The chief justice of the grand court was considered the chief of the judicial region and was in charge of administrating and regulating the judicial activities in that region³³.

The Iraqi regions were connected to a certain court of appeal; Baghdad's court of appeal covered Baghdad, Al-Hella and Diyali. Mussel's court of appeal covered Mussel and Karkouk. Basra court of appeal covered only the Basra region. Act 3/1945 allowed the establishment of a court of appeal in both Karkouk and Al-Hella³⁴.

The same Act also divided the courts of first instance into two types. The first is the limited courts of first instance, which had the power to look into actions whose value did not exceed 500 *Dinars*, and the actions of lump sum fees or whose value could not be determined. The second is the unlimited courts of first instance which had the power to hear all actions whatever was their value³⁵.

Under the same Act, a magistrates' court and an Islamic *Shari'a* court were formed in each area where there was a court of first instance. The said Act provided for the suspension of procedures and hearing of legal actions that were not urgent from the 15th of July to the end of September every year. This period of suspension was called the annual courts vacation³⁶.

32 Statistics taken from the "Lawyer" magazine issued in 1925.

33 Article (6) of the Courts Formation Act No. 3/1945.

34 Article (7) of the Courts Formation Act No. 3/1945.

35 Article (9) of the Courts Formation Act No. 3/1945.

36 Article (15) of the Courts Formation Act No. 3/1945.

After the enactment of the above-said Act and due to the new developments, the Judicial Service Act No. 27/1945 was issued, which repealed the *Hokkam* and *Qodat* Act 31/1929 as amended. Among the most important provisions introduced by the new Act was the restructuring of the *Hokkam* and *Qodat* Committee in a form different from the committee established under Act No. 31/1929. It put the committee under the presidency of the chairman of the Court of Cassation with two members of the court of cassation and two members of senior officials at the Ministry of Justice. The two senior officials are appointed by the minister annually. When the committee looks at a matter concerning the *Qodat* of the Islamic *Shari'a* courts, the chiefs of the Sunni Islamic *Shari'a* Cassation Board and of the Ga'afari Islamic *Shari'a* Cassation Board sit as members of the committee in lieu of the *Hokkam* of the Court of Cassation³⁷.

Act 3/1945 raised the legal practice term required for the candidate to be appointed in a judicial post from two years to three years after graduation from the faculty of law³⁸. It also provided for the appointment of inspectors from the Ministry of Justice to supervise and control the functions of *Hokkam* and *Qodat*, the Islamic *Shari'a* boards and the employees empowered with judicial authorities. By way of exception, the activities of the Court of Cassation were not subject for inspection and entrusted this function to the Court of Cassation's Chairman³⁹.

The Act further laid down the principle that a *Hakim* or *Qadi* may not be suspended or prosecuted except after obtaining permission from the Minister of Justice with the exception when they caught red handed in a serious felony. In that case the minister must be notified of that matter⁴⁰. The Act granted the *Hokkam* and *Qodat* special benefits provided that they shall not exceed 25 percent of their salaries⁴¹. It raised the salaries of *Hokkam* and *Qodat* more than the salaries they used to earn under Act 31/1929 as amended⁴².

37 Article (2-4) of the Judicial Service Act No. 27/1945 provided the following: The chiefs of each of the two Islamic *Shari'a* Cassation Boards shall be members of the committee in lieu of the two *Hokkam* at the court of cassation when the case is related to a *Qadi*. If any of the chairmen of the two Boards is absent, the most senior member of his Board will attend on his behalf.

38 Article (5-7) of the Judicial Service Act No 27/1945.

37 Article (23-1) of the Judicial Service Act No. 27/1945: The Minister (of Justice) has the right to supervise and control all *Hokkam* and *Qodat*, civil and Islamic *Shari'a* courts, spiritual sectarian boards and the employees entrusted with judicial powers. He has the right to appoint inspectors from the Ministry of Justice for this purpose. Inspection of the works of the Court of Cassation's *Hokkam* shall be carried out by its chairman only.

40 Article (37-2) of the Judicial Service Act No. 27/1945: No *Hakim* or *Qadi* shall be suspended or be subject to legal prosecution unless by a permission from the minister, with the exception when he caught red handed in a serious felony...In this case the minister shall be notified of the matter.

41 Article (47) of the Judicial Service Act No. 27/1945: *Hokkam* and *Qodat* may receive special allowances in the cases determined by the Council of Ministers, provided that they shall not exceed 25 percent of their salaries.

After the Judicial Service Act 27/1945 took force and 11 years elapsed since its application, the Judicial Service Act 58/1956 was issued to regulate the judicial affairs in Iraq. Among the most important new provisions in this Act was the provision on restructuring the *Hokkam* and *Qodat* Committee, which became known as "*Hokkam* and *Qodat* Affairs Committee". The chairman of the Ministry of Justice's Inspection Board became a member of the committee besides the deputy chairman of the Court of Cassation and a senior *Hakim* or a senior official at the Ministry of Justice appointed by the Minister of Justice at the beginning of each Gregorian year. According to Act 58/1958, the chairman of the Court of Cassation continued to serve as the chairman of the committee. When the committee examines any affair concerning the judges, the chairmans of the two Islamic Shari'a Cassation Boards sit as members in the committee⁴³.

The Act further raised the age of the candidate to a judicial post from 25 to 30 years. It also raised the period of actual service in a legal profession referred to in Article (5) of the said Act-

- if the candidate to be appointed as *Hakim*, to eight (8) years after graduation from the faculty of law;
- if the candidate obtained a diploma in civil or criminal law, to five (5) years; and
- if the candidate obtained a PhD in civil or criminal law or Islamic Shari'a, to two (2) years⁴⁴.

The new Act stipulated for the first time that a *Hakim* or *Qadi* must swear the oath before the general board of the Court of Cassation prior to commencing his judicial function⁴⁵. Under that Act, the salary and benefits of the chairman of the Court of Cassation is equivalent to the salary and benefits of the minister. It raised the salary of the deputy chairman of the Court of Cassation to 220 dinars per month⁴⁶.

The new Act also prevented the transfer of the *Hakim* or *Qadi* to a civil post except with his written approval⁴⁷. It set the age of retirement for *Hokkam*

42 Article (39) of the Judicial Service Act No.27/1945.

43 Article (2-1-5) of the Judicial Service Act No 58/1956.

44 Article (5) of the Judicial Service Act No 58/1956.

45 Article (10-8) of the Judicial Service Act No 58/1956:

1. Every *Hakim*, *Qadi*, deputy *Hakim* or deputy *Qadi* shall before commencing his judicial functions for the first time swear the following oath: I swear by God! that I judge between people in justice and enforce laws in faith.
2. The oath shall be sworn before the Court of Cassation' General Board.

46 Article (13-1) of the Judicial Service Act No 58/1956

47 Article (4) of the Judicial Service Act No 58/1956

and Qodat at the completion of 63 years of age⁴⁸. A temporary council called the Supreme Council of judges was formed under Article (49) of that Act. The task of the Council was to thoroughly examine the position of all *Hokkam* and Qodat and issue decisions on each of them individually either to instate the Hakim or Qadi in his post or terminate his service.

The Act defined the term of the Council's task at a maximal period of three (3) months from the date of commencing its work. This period may be extended one more month to complete its task⁴⁹.

After eleven (11) years from the date when the Judicial Service Act 58/1956 was enacted, the Judicature Act 26/1963 was issued to replace Act 58/1956 and to regulate the affairs of the judiciary in Iraq.

Among the reasons given for enacting the new Act was that the laws regulating the judicial affairs in Iraq were laid down "under circumstances and at times the legislator did not observe the sanctity of the judiciary and its independence inasmuch as he observed the interest of the rulers at the expense of justice."

Explaining why the Act was called "the Judicature (or, judicial authority) Act", the Explanatory Note of the Act said that the title was intended to mean that the Act is parallel to the Executive Authority Act. The issuance of the Judicial Authority Act, thus, was a precursor that the judiciary is an independent authority side by side with the legislative and executive authorities⁵⁰.

A major amendment introduced by the new Act was that it amended the name of the *Hokkam* and Qodat Affairs Committee formed under Act 58/1956 into *majlis el-qada'* (or, the Council of Judges) and kept its responsibilities as they were⁵¹.

48 Article (53) of the Judicial Service Act No 58/1956

49 Article (49) of the Judicial Service Act No 58/1956:
- A Supreme Council of judges shall be formed from the chief of the committee and its members in addition to two of the chairmen of the courts of appeal selected by the minister to look in the behaviors and proficiency of the Hokam of category 2 and below, and the behaviors and proficiency of Kodat with the exception of the chiefs of the two Islamic Shari'a Cassation Boards, instate that who is proved to be competent in the category he deserves according to the operation of this law, and terminate the services of that who is proved to be incompetent for the judicial service.

50 The reasons prescribed for the issuance of the Judicature Act No. 26/1963.

51 Article (28) of the Judicature Act No. 26/1963:
1. a- The Council of judges shall be formed under the chairmanship of the chairman of the Court of Cassation and the membership of the most subsequent two senior deputies of the chairman. In case they are not present they shall be replaced by the most two senior judges of the Court of Cassation, the head of the Justice Inspection Board, the director of the general justice, one of the judges of the Court of Cassation or the chief of the legal registration department to be appointed by the Minister of Justice. The Council undertakes the tasks defined to it under this Act.

Act. 26/1963 repealed the “judicial regions” formed under the Courts Formation Act 3/1945, as the “appellate regions” have turned the “judicial regions” into redundancies. The Act also dissolved the Sunni and Ga'afari Islamic Shari'a Boards and entrusted their duties to a body at the Court of Cassation. The chairmen of the two boards became members of the Court of Cassation on personal status matters and the members of the two boards were appointed Islamic Shari'a judges at the Islamic Shari'a courts. This was a good step for unifying the Islamic Shari'a judges in Iraq⁵².

While Act 26/1963 was in force, the Ministry of Justice Act 101/1977 was enacted. A major development made by this Act was that it provided for the formation of *majlis el-'adl* (or, Council of Justice) at the Ministry of Justice.

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- b- If the president of the Council is absent the most senior of his deputies acted on his behalf and if they both absent , the Council is chaired by the most senior member of the Court of Cassation judges.
 - c- The Minister of Justice shall have the right to appoint reserve members from the senior officials of the Ministry of Justice and the judges of the Court of Cassation to act on behalf of the absent member.
 - d- A member of the Council of judges may be rebutted for the same reasons the judge may be rebutted. The rebuttal request shall be submitted to the president of the Council of judges. The Council shall then convene in the absence of the of member requested to be rebutted, and shall be replaced by one of the reserve members to look into the request and take the necessary decision in this regard. The decision shall be absolute.
2. The Supreme Council of judges shall conduct a comprehensive investigation on the conditions of all Hokam and Oodat mentioned in par. (1) above, issue a decision on each Hakim or Qadi individually either by instating him in the judicial service or terminating his service.
 3. If the decision of the Council providing for terminating the service of the Hakim or Qadi, the minister shall seek the issuance of the royal decree to that effect.
 4. If the services of the Hakim or Qadi are terminated according to the above, he shall keep his right for receiving his retirement salary or bonus according to the law and he may be appointed in a non-judicial position.
 5. The Hakim or Qadi whose services were terminated according to above mentioned procedures shall not be reinstated in the judicial service.
 6. The Supreme Council of judges shall commence its meetings after fifteen (15) days of enforcement of this Act. It shall convene at least twice per week after that to perform its functions according to the provision of this Article.
 7. The Council shall complete its functions according to the above paragraph in a period of time of maximal three (3) months of the date of commencing its work. It may extend this period for another month to complete the remaining functions if necessary and the Council so decided. The Council is responsible for completing its work in the stated period.

52 Article (72) of the Judicature Act No. 26/1963.

The “Council of Justice” substituted the “Council of Judges” and assumed the task of regulating the judicial affairs in lieu of the “Council of Judges”, besides advising on the general objectives of the Ministry’s plans and supervising their execution⁵³.

The formation of the “Council of Justice” was also an indication of ending the independence of the judiciary and its role as an independent authority from the legislative and executive authorities, as the council was accountable to the Minister of Justice who represents the executive authority.

During the stage following dissolving the “Council of Judges” formed under the Judicature Act 26/1963 and channeling its functions to the Council of Justice, the remaining provisions of Act 26/1963 related to the judges’ affairs continued to be valid till the issuance of the Judicature Act 160/1979, which became in force on 17/1/1980. The new Act completely repealed the Judicature Act 26/1963 and the regulations issued under it. Chapter (2) will discuss the position of judges under the new Act⁵⁴.

53 Articles (4-2-3) of the Ministry of Justice Act No. 101/1977.

Secondly:

- a-Consider the promotion, transfer and secondment of Hokam and Qodat and examine their behaviors and proficiency.
- b-Director generals of the Ministry’s departments and organs other than Hokam shall not participate in the meetings of the Justice Council when discussing the matters mentioned in par.(a) of this item.

Third:

A committee under the name the Hokam and Qodat Affairs Committee shall be formed of three members to be selected by the Council from among its member Hokkam at the beginning of every year to look into the disciplinary matters of Hokam and Qodat and resolve them in accordance with Chapter (8) of Act No.26/1963, and the legal actions arising from its provisions. The Committee’s decision is challengeable at the Court of Cassation’s general body by the Minister of Justice, and the Hakim or Qadi against whom the decision is issued within thirty (30) days of the date of notifying of it. Its decision in this case is final.

54 Article (4-1) of the Ministry of Justice Act No. 101/1977.

CHAPTER (2)
JUDICIAL SYSTEM IN IRAQ UNDER
JUDICATURE ACT 160/1977
AND AFTER RE-ESTABLISHING THE COUNCIL OF JUDGES
BY EDICT 35/2003

Section (1)
Judiciary Independence
under Judicature Act

Chapter (1) of the Judicature Act 160/1977 cites among its objectives, the principle of judiciary independence⁵⁵.

What is meant by the independence of the judiciary? What are the provisions the Judicature Act has laid down to put this principle into effect? What are the real guarantees it brought about to protect the independence of the judiciary. Hardly a constitution or a law regulating judicial affairs in all countries of the world neglects this principle. So, what does this principle mean? What does it signify? What are its dimensions?

Needless to say that the Islamic State at the outset of its emergence had known the independence of the judiciary after the Caliphs no longer administered justice between the people and delegated that task to judges devoted to carry it out. The *Wolat* (rulers) were not permitted to intervene in the judgments delivered by judges. Even the Caliph himself was keen not to intervene in the judges' affairs. Judges were not summoned to appear before the Caliph if someone complained to him against a judge or a judgment.

The principle of the independence of the judiciary was approved by the 7th UN Congress held in Milan in 1985 and was adopted by the UN General Assembly in the same year. The preamble of the resolution of that meeting reads as follows: "As the judges are the responsible persons who are entrusted with the responsibility of taking the decisions that affect the lives of the citizens, their freedoms, their rights, duties and properties....." Accordingly, the UN General Assembly called on states to incorporate in their constitutions the principle of judiciary independence, and urged governments and institutions to respect that independence and be committed to it.

There is no doubt that the judiciary has a particularity different from other public jobs in the State due to the role it plays in ensuring social stability through separating between the conflicting interests in the society, restoring rights, preserving personal and public freedoms and achieving justice. Due to this particularity, the judge should have a "special" position that distinguishes him from the other jobs in the State and enable him to perform his mission without intervention from any authority or agency, and without fear or hesitation. A judge's judgments are governed only by law."

55 Article (2) of the Judicature Act (Judiciary is independent, governed by no one except the law".

This position enjoyed by the judiciary is called the independence of the judiciary. The world community has adopted this principle though has differed on its implication. For some jurists, the judiciary is independent from the legislative and executive authorities. For others, it is a part of the executive authority because it applies the laws that are enacted by the legislative authority. The following is a review of the two opinions:

The First View:

Advocates of this opinion believe that the State is composed of three main authorities that are independent from each other. These authorities are: the legislative authority which enacts laws; the judicial authority which applies these laws and secures through their application public freedoms and establishes justice; the executive authority which enforces the laws passed by the legislative and judicial authorities.

According to this view, the principle of judiciary independence means that the judiciary is completely independent from the legislative and executive authorities. The judicial authority derives this independence from its own particularities and from the functions it performs, which are independent by its nature from the legislative and executive authorities.

Advocates of this view further believe that the existence of a judicial authority independent from the other authorities is a true guarantee for the existence of the rule of law. The existence of the rule of law wards off the dominance of dictatorial regimes. Absence of the rule of law means the dominance of the force of arms over the force of law. American jurist, Joseph Story, says: " ...Human governments have only two types of force: the force of arms and the force of law. If the force of law is not used by judges who cannot be intimidated, the force of arms will prevail. In this situation, the military regimes dominate over civil regimes⁵⁶".

Advocates of this view, therefore, hold that the judicial authority should be independent from the other authorities; that it should extend to all disputes; and that no other authority is entitled to exercise this activity.

This group bases its view that judiciary should be considered an independent authority on a number of facts, the most prominent of which are as follows:

- For the rule of law to prevail, the judiciary must be a separate authority. The rule of law means that the rights and freedoms of the citizens must be respected. This is attainable only by the presence of an independent judicial authority that enables the individual to prosecute the public authority for any behavior breaching the law and causing harm to him. The existence of an independent judicial authority bars the formation of special and exceptional courts⁵⁷.

54 Dr Mohamed Asfour, Independence of the Judicial Authority. p. (2)

57 Dr Mohamed Asfour, Independence of the Judicial Authority.

- Considering the judiciary an independent authority is a fundamental guarantee to freedoms. The freedoms, rights and sanctity of individuals are protected by an actually independent judiciary. Without the existence of this authority the community will be deprived of the controls of the law. These controls protect freedom against coercion, aggression and tyranny.

Advocates of this view cite Article (10) of the Universal Declaration on Human Rights which stipulates that: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligation and of any criminal charge against him⁵⁸".

- Considering the judiciary an independent authority is an essential guarantee for the judiciary to perform its judicial function. The judiciary does not have the means the executive authority has such as arms and money. If the judiciary is not an independent authority protected with safeguards against the legislative and executive authorities, it would not be able to stand against the two authorities, especially the executive authority. Consequently it would fail to carry out its mission⁵⁹.

Dr Mohamed Asfour, a staunchest advocate of this opinion, comes out with the following results based on this theory:

- The judiciary is an authority and not a public facility.
- The judiciary is a specialized body, so ordinary people must not encroach upon judicial affairs.
- The judiciary is an impartial body, so it must not be colored by a political tint⁶⁰.

For a judge to be able to perform his mission and complete the fundamentals for the independence of the judicial authority, Dr Asfour suggests the following safeguards:

- A judge should be immune from removal or transfer from his office by the executive authority.
- A judge's promotion should not be controlled by the executive authority.
- A judge's salary should not be put in the hands of the executive authority.
- Judges should be subject to a special system of accountability; disciplinary or civil⁶¹.

58 Same source p. 49.

59 Same source p. (4)

60 Same source , p.(5)

Mr. Mohamed Al-Ashmawy, Dr. Abdul Wahab Al-Ashmawy and Dr Ramzi Seif support Dr Asfour's view that the judges must be provided with these safeguards in order to preserve the principle of the independence of judges. However, they did not comment on the theory dividing the State into three separate powers, chief amongst which, the judicial power.

The Second View

Advocates of this view are of the opinion that there are two authorities in the State: the legislative authority which enact laws, and the executive authority which enforces them. However, they are of the opinion that the Judicial should not be separated from the Executive, as it is a part of the Executive's activities. According to them, the judicial power's activities are part of the executive authority's activities. The Judicial, thus, is a government authority, but it is independent of the other authorities in its functions. This is dictated by its good conduct⁶².

The principle of independence, in the view of this group, means that the courts exercise their work independently from the other governmental bodies. These bodies may not pluck out a legal action that comes within the jurisdiction of the courts and decide on it themselves or intervene to modify a judgment delivered by a court. Judges, as this group says, have immunity different from the other employees. They are governed in their work only the law. The law must provide them with sufficient safeguards in order for them to properly perform their work. These safeguards are the same I cited when I discussed the standpoint of the first group.

Dr. Tharwat Anis Al-Assiuty – a main proponent of the second view - goes further to deny that the judiciary is an authority independent of the executive and legislative authorities. He considers it one of the State's facilities⁶³ independent in applying the law and in assuming decisive functions. By adopting this view, he takes the same view of the Legal System Reform Act which considers "the judiciary independent in assuming decisive functions, but it is from another perspective a facility of the State, which contributes to achieving the objectives of the community...⁶⁴".

Dr Al-Assiuty wants the judiciary to be committed as it was in the past. But its commitment in the present should be to the social ideology prevailing in the community as it is defined in the Revolution's documents. It should not

61 The same previous source, p.(160)

62 Mohamed Al-Ashmawy and Abdul Wahab Al-Ashmawy, Rules of Procedures in the Egyptian and Comparative Legislation. (30), and Dr. Ramzi Seif's Al Wasit in Explaining the Civil and Commercial Code, 2nd edition, p. (43).

63 Dr Tharwat Anis Al-Assiuty, Observing Judiciary and the Revolutionary Legitimacy, a research published in Al Adala (Justice) Magazine, first issue, 2nd year, p.(59).

64 The Legal System Reform Act No. 35/1977, p. (58).

deviate in interpreting the law in contradiction with the cause of socialist transformation. As evidence of the correctness of this view, he says, the judiciary was committed over the ages and it should remain so. He brings evidence from France and America where the judiciary's commitment in the past was in favor of the bourgeoisie classes. The Supreme Court in America sided with the industrial capitalism against the workers; the court insisted to uphold the contracts concluded between the employers and the workers although the contracts contained unfair conditions against the freedom of contracting and consequently they breached the personal freedom guaranteed by the Constitution. The French judiciary suspended its role in controlling the activities of the executive authority in exceptional circumstances. This control looks great, but, in essence, it is insignificant as it retracts if exceptional circumstances arise, Dr. Assiuty says⁶⁵.

He goes further and wants the judiciary to give up its commitment towards the capitalist and bourgeoisie authorities and be committed to the ideas and goals of the revolutionary and socialist authorities, and take a legislative role through issuing directives from the Supreme Court binding to the courts. These directives interpret laws according to revolutionary interpretation to protect the socialist gains in the interest of the toiling classes⁶⁶.

Those were the arguments and views set forth on the principle of judiciary independence.

Our view in this regard is that the theory about the plurality of authorities in the State, which divides the State into three authorities: the Legislative, the Judicial and the Executive wholly independent from each other, emanates from the nature of the functions each authority assumes. The judges seek to establish justice through the application of laws and guaranteeing compliance with their provisions in text and spirit. This necessitates separating between the conflicting interests of the parties to the dispute and, therefore, confronting the aggressor whatever his stature and prestige. If sufficient safeguards are not provided to those in charge of justice administration, chief amongst which judge's independence, they will not be able to perform their mission properly.

Providing judges with sufficient legal protection – in their field of work-against the influences of others - whatever the others may be - is what is meant by the principle of judiciary independence.

The judge in his field of work applies the law enacted by the legislative authority in light of the political, economic and social philosophy of the State. In his work, he carries out the will of the people and delivers judgments on their behalf. Therefore, the law should provide him with sufficient protection in order for him to protect the people.

65 Dr Tharwat Anis Al-Assiuty, *Committed Judiciary and Revolutionary Legitimacy*, p.(41).

66 Same source, p. (74).

When this protection is provided and the guarantees and safeguards are put into operation to prevent their breach, the principle of the independence of the judiciary would then be attained. Among the most important safeguards are the following.

1. Laying down accurate and clear rules stating the methods of the appointment, promotion, transfer and retirement of judges. A judge may not be appointed, promoted, transferred or retired except in accordance with the conditions provided in the law regulating the judicial affairs. A decision appointing, promoting, transferring or retiring a judge must be taken by a judicial body without any interference from any authority or any body.
2. The judge is not liable for the judgments he delivers and the orders he gives even if they were against the interest of a third party, unless this judgment or order is made by fraud or gross professional mistake. In this case, investigation with the judge must be undertaken by a superior judicial body and the claimant should follow the litigation procedures stipulated in law.
3. Pecuniary independence of judges: Allocating a budget for the judiciary separate from the budget of the executive authority is an indication of the independence of the judiciary. Linking the judiciary's budget to a ministry's budget or any to the budget of any other body makes the judiciary subordinate to the will of this ministry or body; a matter which may curtail the independence of the judge in performing his functions. Article (147) of Yemen's Constitution stresses the principle of the pecuniary independence of the judiciary: "The judiciary enjoys an independent authority in both judicial and financial terms..."

Jurists described these safeguards as a method to "protect the judge from abuse by the government and the litigants⁶⁷".

We go back now to the Judicature Act, the subject of this research, to see identify its position regarding the principle of judiciary independence and the rules contained in its provisions in this respect.

Before answering this question, let me say that the Iraqi legislation in all its degrees and levels and in its two spheres, the civil and the criminal, has asserted the principle of the independence of courts and has laid down sufficient safeguards that guarantee for the judge the application of the law in accordance with justice and human perspective while he is secured against harm that might befall him. On top of these legislation is the provisional Iraqi Constitution issued on 16 July 1970. The Constitution provided for the independence of the judiciary – even if this was only in theory – and entrusted

67 Al Ashmawy, Rules of Procedure in the Egyptian and Comparative legislation, 1st part, p. (31), and Dr Ahmed Abul Wafa's book, Civil and Commercial Procedures, 5th edition, p. (56).

the law with the task of forming courts and defining its degrees and powers. It also defined the conditions for the appointment, transfer, promotion, prosecution and retirement of judges⁶⁸.

The Judicial Supervision Act 124/1979 asserted this principle as it entrusted the task of supervision and control over the courts and the administrative and judicial functions of the judges to the judicial supervisors appointed from among the judges⁶⁹.

No other party is permitted to supervise the judge's activities or evaluate the litigation process or how far the judge pursues juristic and judicial activity⁷⁰.

Other than the afore-said tasks, the Judicature Act gives the Minister of Justice the right to supervise the courts in a way that completely contradicts the principle of the judiciary independence⁷¹.

It also binds the Chairman of the Court of Cassation who is entrusted with the task of administering the Court and supervising its work, to submit an

68 Article (63) of the Iraqi provisional Constitution:

1. Judiciary is independent, governed by no one except the law.
2. The right of litigation is warranted for all citizens.
3. The law defines the method of forming courts, their degrees and powers, and the conditions for the appointment, transfer, promotion, advance, prosecution and pensioning off Hokam and Qodat (Justices and Judges).

69 Article (3-4) of the Justice Supervision Act: The Minister shall select the justice supervisors from among the first and second category who enjoy legal and administrative proficiency and served in the position of deputy presiding ju of an appellate court, a member of an appellate court, a president of a grand court or a judge from these two categories known of a distinguished juristic and judicial activity. He shall be transferred to the Board by a decision from the Minister of Justice.

70 Article (13) of the Justice Supervision Act: " The Judicial Inspection Office shall be authorized to control and supervise the activities of :
First: courts connected with the Ministry of Justice with the exception of the Court of Cassation".

71 Article (55-1-a) of the Judicature Act:

- a. The Minister of Justice shall have the right to supervise all courts, judges and persons, employees, organizations and committees entrusted with judicial authorities to ensure the sound administration of courts, the behavior of the employees in charge of their work and their personal and official conduct and the proper order of their registers, accounts and punctuality of the courts administrative staff, and control the judges' commitment to their duties provided for in Article (7) of this Act.
- b. The Minister of Justice shall – in order to carry out the supervision and control of courts as stated in paragraph (a), and to inspect all courts and bodies charged with judicial authorities -authorize for this purpose a judge of the Court of Cassation, the director general (chairman) of the Judicial Inspection Office, judges delegated for supervision or any other judge to undertake this task."

annual report to the Minister of Justice and the Judicial Inspection Office on the activity of his court (Article 55-1-c).

Among other legislation that stressed the principle of the independence of the judiciary is the Civil Procedure Code 83/1969. According to the Civil Procedure Code, the judiciary's jurisdiction applies to all physical and legal persons including the government. No disputes may be heard outside the courts unless specifically provided in law.⁷².

The court's judgments remain enforceable unless invalidated or amended by operation of the law⁷³.

The Criminal Procedure Code sided with the above-said legislation in putting into effect the principle of the independence of the judiciary. It prevented exerting influence on the administration of justice. A person who interferes in the judicial affairs in favor of or against a litigant is punishable under the Criminal Procedure Code⁷⁴.

We go back again to the Judicature Act to see - when reviewing its provisions – how far it achieved the principle of judiciary independence. Does this Act provides for sufficient safeguards guaranteeing this independence and confirm the Iraqi judge's distinctive stature? Does this Act really guarantees the independence and impartiality of the Iraqi judiciary of which it has been famous since it had been created centuries ago? The Iraqi judges have been known for centuries for their belief in justice and awareness of the social, economic and political developments in the country.

I shall discuss below the provisions of the Judicature Act in this connection.

1- Provisions regulating work at the Court of Cassation

The Court of Cassation is the highest judicial body in Iraq. The Judicature Act entrusted the Court of Cassation's administration and the regulation of its judicial functions to the Court's Chairman and members. It established a board made up of the court's Chairman and his deputies called *hay'et el-re'asa* (or, the presiding board). The task of this board is to select the chairs and members of the courts. This is a good safeguard for the

72 Article (29) of the Civil Procedure Code: " The jurisdiction of the civil courts shall apply to all physical and legal persons including the government, and shall be authorized to adjudicate in all disputes save what excluded by a special provision".

73 Article (60-3) of the Civil Procedure Code: "A judgment delivered by the court shall remain respected and enforceable unless repealed or modified by the same court, annulled or challenged by a higher court than the first court according to legal procedures".

74 Article (33) of the Criminal Procedure Code: "Where an employee or person entrusted with a public service mingles with the Hakem or Qadi, or court in favor of or against a litigant shall be punished by imprisonment sentence not to exceed one year and a fine not to exceed 100 dinars or either of the two penalties".

independence of the court. Nevertheless, as said above, the Act binds the court's Chairman to submit an annual report to the Minister of Justice and to the *majlis el Adl* (or, Council of Justice) on the progress of administrative and judicial activity of the court. This is a way of supervising the courts by the executive authority⁷⁵.

2- Provisions regulating work at the appellate courts

The Judicature Act entrusted the Chairman of the Court of Appeal with the task of supervising the appellate courts and their activities in the region of his jurisdiction and the distribution of work among the court's judges⁷⁶.

The Act further provided for the formation of a board at each appellate region. The board is made up of the presiding judge of the appellate court, his deputies and the judges sitting as members of the appellate court. The board is called the "Appellate Region Board". It undertakes the study of the difficulties and problems confronting the courts in the appellate region and makes appropriate suggestions to address them. It also submits proposals to improve the methods of operation and improve performance at courts. The board meets at least once every month and may be invited to meet as needed. A quorum of at least three-fourths of the members of the board must be present for the Board to meet.⁷⁷

75 Article (13- 4 –b) of the Judicature Act: "Hay'et el-re'asa (or, the presiding board, is made up of the Chairman of the Court of Cassation and his deputies." and

Article (14) of the Judicature Act:

Firstly: Selection of the chiefs of the court's boards shall be at the beginning of every year by decision of *hay'et el-e'asa*. In case of the absence of one of them, he shall be replaced by the most senior judge of the court.

Secondly: Formation of the boards including the expanded board shall be at the beginning of each year by a decision from the *hay'et el-re'asa*. Members of the board may not be replaced unless a need arises and shall be done in the same way".

76 Article (18) of the Judicature Act: "The president of the appellate court shall undertake the function of supervision over the courts and their work in his region of jurisdiction and shall undertake the distribution of work among their judges. He may delegate one of his deputies to undertake what he deems of these functions."

77 Article (19) of the Judicature Act:

Firstly: A board called "the Appellate Region Board" shall be formed at each appellate region from the court's president, his vice presidents and judges of the appellate court as members.

Secondly: The board shall meet at least once every month. Its chairman may invite it to convene when needed. A quorum shall require at least three-fourths of its members to meet

Third: The board shall undertake the following tasks:

- a- Study the difficulties and problems facing the courts and decide on them or present a suggestion to the Minister of Justice to address them.
- b- Discuss the requirements of the courts and their employees in light of the annual statistics.
- c- Present suggestions to upgrade the various courts.
- d- Improve the work methods and raise the standard of performance at courts."

Despite this independence in supervision and in regulating the administrative work at the courts of the appellate regions in Iraq, the judiciary's independence is still curtailed on the ground, as the implementation of the decisions of the Appellate Region Board with regard to the financial requirements is still in the hands of the administrative affairs department affiliated to the Minister of Justice.

3- Provisions addressing the judges' affairs

The Judicature Act entrusted a committee made up of three (3) judges to be selected by the Council of Justice from among its members at the beginning of every year, to investigate the complaints and disciplinary matters related to judges⁷⁸.

Article (4-3) of the Ministry of Justice Act 101/1977 provided for the formation of this committee and entrusted it with looking into the disciplinary actions filed against judges and also with the matters resulting from the application of the Ministry of Justice Act⁷⁹.

Disciplinary matters attributed to judges are investigated and referred to trial by a committee made up of judges according to procedures laid down

78 Article (60) of the Judicature Act:

“Firstly: Disciplinary allegations against the judge shall be filed according to a decision from the Minister of Justice to refer him to the Judges Affairs Committee. The decision shall include a statement of the matter attributed to the judge and the supporting evidence. The judge and the public prosecutor shall be informed of the decision.

Secondly:

- a) The Judges' Affairs Committee shall set a date to hear the case and inform the Minister of Justice, the public prosecution office and the judge of that date.
- b) The trial shall be behind closed doors and its ruling shall be in public.
- c) The trial shall be held in the presence of the representative of the Minister of Justice, the public prosecutor or a prosecutor whom he deputizes. The judge shall attend in person and he may accompany an attorney.
- d) The committee shall conduct by itself what it deems necessary of investigations.
- e) The committee shall decide on the action after completing the investigations and hearing the testimony of the Minister of Justice's representative, the public prosecutor's testimonies and the judge's defense. The committee's decision shall be informed to the Minister of Justice, the public prosecutor and the judge.
- f) The committee shall follow in its procedures the rules provided in the Criminal Procedure Code.”

79 Article (4-3) of the Ministry of Justice Act: " A committee called the Hokam and Oodat Affairs Committee shall be formed to include three (3) members selected by the Board from among the Hoakam of its members at the beginning of each year, to look into the disciplinary matters related to Hoakam and Qodat and decide on them according to the provisions of Chapter 8 of Act No. 26/1963, and also the actions resulting from the application of its provisions. The committee's decision shall be challengeable at the General Board of the Court of Cassation by the Minister of Justice and by the Hakim or Qadi against whom the decision has been issued within thirty (30) days of the date the decision has been made notice of and its decision in this respect shall be final”.

by the law, which provide all the guarantees that give the judge the right to defend himself. It made the decisions challengeable before the expanded board of the Court of Cassation.

The principle of conducting enquiry and disciplinary trial for a judge in matters related to his work by a judicial body is a historical principle applied by most of the states. Iraq was among the states that applied this principle under the repealed Judicature Act⁸⁰.

But the new development in the Judicature Act is that it allows the judge or the member of the public prosecution office to accompany an attorney to defend him during the disciplinary trial⁸¹.

Nevertheless, the issue of referring the judge or the public prosecution member to the Disciplinary Committee by a decision from the Minister of Justice constitutes a gross breach of the principle of judiciary independence. This matter was changed with the issuance of Order No. (35) on 18/9/2003, as it became the responsibility of *majlis el-qada'* (or, the Council of Judges).

From the above provisions, it is evident that canceling *majlis el-qada'* (or, the Council of Judges) and entrusting the affairs of judges and members of the public prosecution to the "Council of Justice" under the Ministry of Justice Act No. 101/1977 constituted a great and sharp shift in the history of the Iraqi judiciary and a serious retrogression from the principle of judiciary independence. The Council of Justice is presided over by the Minister of Justice who is – regardless of his title – is a part of the executive authority. The Minister applies the executive branch's policy and is keen to take care of its interests even if those interests are in conflict with the rights of some individuals of the society.

This was evident in practice in some actions related to the government. Orders were given in the Council of Justice sometimes, explicitly or implicitly, to observe the government's interests. This was a gross breach of the impartiality of the judiciary and constituted an act of exercising influence on it. Moreover, the fact that the Minister of Justice presided over the meetings of the Council of Justice has gravely affected the matters related to the transfer, promotion, and appointment of judges in judicial positions, as those matters became in the hands of the Council of Justice under the Judicature Act. We went through this situation in the past under the era of the Council of Justice. The policies of that Council were changing with the change of the minister of justice. We have also seen how this situation has reflected, up and down, on the conditions and affairs of judges and on the behaviors of some of them. Therefore, it was necessary to change the situation. It was imperative to make this change in order to put things right. This change has actually occurred as we will see in Section (2) of this chapter.

80 Articles (57,58,59) of the Judicature Act.

81 Article (60-1) of the Judicature Act.

Section (2) Re-establishment of the Council of judges

Judges and all those concerned with the independence of the judiciary continued to call for re-establishing the Council of Judges and entrusting it with the judges and public prosecution members' affairs and for keeping this council independent from the Minister of Justice. Voices of change were raised high after the change movement in Iraq on 9/5/2003, the date of the collapse of the dictatorial regime which ruled Iraq for more than three decades.

Recognizing the importance of the independence of the judiciary for preserving the security of the society and achieving democracy in Iraq, the Coalition Provisional Authority (CPA) re-established, by Order No. 35 issued on 18/9/2003, the Council of Judges⁸². The Order's preamble begins by the following statement: "...Recognizing that a key to the establishment of the rule of law is a judicial system staffed by capable persons free and independent from outside influences....".

The objective was clear in this Order; i.e. to build the rule of law and establish a bastion protecting this country. This bastion is the independent judicial system.

With the issuance of this Order, two gains were achieved for Iraq:

The first gain was the endeavor to establish the "rule of law" The second gain was the re-establishment of the Council of Judges to be the body responsible for and supervising the judicial system in Iraq, independently from the Ministry of Justice.

By re-establishing the Council of Judges, the legislator admitted there should be an independent judicial authority ensuring that the judges and the members of the public prosecution will undertake their tasks properly and free of any influence. There should be no control over the judges but their conscience and the rule of law. This was asserted by Section (6) of the Order which stipulated that the Council of Judges shall exercise its functions and responsibilities independently of any control or supervision by the Ministry of Justice. The Order suspended any provision in any law contrary to this independence. Hence, the judges and the members of the public prosecution have come to exercise their tasks with impartiality and objectivity without influence from any body and without fear of transfer, delay of promotion, punishment or removal from their offices unjustly.

In its new line-up⁸³, the Council of Judges brings under its umbrella all those in charge of the judicial affairs and the members of the public prosecution. The Council is chaired by the Court of Cassation's Chairman and

82 Appendix No (1).

83 Section (2) of Order No. (35) issued on 18/9/2004

comprises five (5) deputies of the chairman, the Speaker of the State's *Shura* (or, advisory) Council, the chief public prosecutor, the head of the Judicial Inspection Office and the general director of the administrative affairs department – if he is a judge or a prosecutor – and all the fourteen (14) chairmen of the appellate courts. The Council has a staff of employees under the administration of the Council's general secretary who is also a judge.

All those members belong to the judiciary. They are fully aware of its affairs and of the requirements for the Council of Judges to assume its responsibilities. They know the guarantees that should be provided to the judge and the public prosecution member to enable him to undertake his functions independently. Their ultimate objective is to establish justice and secure the rule of law by restoring rights to those to whom those rights belong. This is achieved by the methods laid down by the law regardless of the litigants' affiliations, positions, financial or social status.

The duties entrusted to the Council of Judges are expressed in Section (3) of the Order as follows:

- To exercise administrative supervision over all judges and all members of the public prosecutors, excluding the members of the Court of Cassation where the administrative supervision over them goes to the court's Chairman⁸⁴ due to the particularity of this court being the Supreme Court in Iraq.
- To nominate qualified persons, when necessary, to fill vacancies of the jobs of judges and public prosecutor and to recommend their appointment.
- To assign or reassign judges and prosecutors to hold specific judicial and prosecutorial posts as provided in the Judicature Act 160/197 and the Public Prosecution Act 159/1979.
- To promote, delegate and transfer judges and public prosecutors.
- To investigate allegations of professional misconduct and incompetence involving members of the judiciary or public prosecutors, and, when appropriate, to take appropriate disciplinary or administrative measures against them including removal from their offices.

The above Order left the door open for the Council of Judges to be entrusted with other duties as may be determined by law.

According to the powers assigned to the Council, the principle that the judiciary should take care of its own affairs without intervention from any authority in the State has been established, as these powers which came in

84 Article (15-1-a) of the Judicature Act.

Section (3) of that Order should be read in the light of Section (1) which reads as follows: "...the Council of Judges which is charged with the supervision of the judicial and prosecutorial systems in Iraq. The Council shall perform its functions independently of the Ministry of Justice." It also should be read in the light of Section (6) which states as follows "The Council shall perform its duties and responsibilities independently of any control or supervision by the Ministry of Justice. Any provision in any Iraqi law contrary to the provisions of this Order, specifically the Judicature Act 160/1979 and the Public Prosecution Act 159/1979, are hereby suspended".

In addition, the efforts exerted by the Council during its short lifetime have succeeded in separating the judiciary budget from the budget of the Ministry of Justice. The management of the judiciary's budget was assigned to the Council of Judges. Managing the staff in all the judicial bodies has also become the responsibility of the Council. The title of all the necessary properties, movable or immovable, have also been transferred to the Council and placed under its administration by Act No. (12) issued on 8/5/2004⁸⁵.

The transformation of the Iraqi judicial march has taken place with the issuance of the Order concerning the Administration of the State of Iraq, which was issued on 8/3/2004 during the Provisional Stage. On top of these transformations is the Order's recognition that the judiciary is an independent authority and is not managed by the executive authority by any means according to Section (6) of that Order.

We hope that this march will continue till it achieves its goal. The ultimate objective is to consolidate the principle of judiciary independence and establish the judiciary as an independent authority side by side with the legislative and executive authorities in the permanent constitution which will be issued after the end of the provisional stage in Iraq and the establishment of the democratic institutions.

85 Appendix No. (2).

CHAPTER (3) THE COURT SYSTEM UNDER JUDICATURE ACT

Section (1) Court of Cassation

The Court of Cassation as defined by Article (12) of the Judicature Act is the supreme judicial body that exercises control over all courts. It is made up of a Chairman, five (5) deputies and at least 30 judges as members. The court's premises are in Baghdad.

Articles (35), (203) and (216) of the Civil Procedure Code No. 83/1969 define the powers of this court as follows:

- Decide on cassation appeals filed against judgments and decisions delivered by the appellate courts in their original capacity; the courts of instance that are not within the jurisdiction of the appellate court in its cassation capacity; the judgments and decisions delivered by the personal status courts and the personal matters courts (that concerns non-Muslims) and all the matters that come within the power of the Court of Cassation in its cassation capacity according to the provision of the law⁸⁶.
- Examine the judgments subject to mandatory cassation whether appealed or not appealed by the concerned persons in the civil and criminal fields⁸⁷. They are the judgments delivered on the *Baytel Mal* (treasury) or the endowments of the legally disabled, the deeds considered as judgments and judgments of capital punishment or life imprisonment by cassation.

The Court of Cassation includes a number of courts that guarantee it to perform its functions properly. These courts are specialized in deciding on one kind or more of legal actions.

The Court of Cassation is not considered a degree of litigation as it is a court of examination and control. It is not entitled to initiate procedures in an action but it adjudicates in it if it finds that the action is valid for adjudication, where the judgment delivered on it is challenged by appeal based on its powers provided for in Article (214) of the Civil Procedure Code. The judgment it delivers is subject to appeal by the method of correcting the decision at its expanded body.

86 Medhat Al-Mahmoud: Explanation of the Civil Procedure Code No. 83/1969 and its Practical Applications, part I, p. (61).

87 Article (309) of the Civil Procedure Code, Article (254) of the Criminal Procedure Code No. 23/1971 and Article (16) of the Public Prosecution Act No. 159/1979.

The Court of Cassation is managed, as previously mentioned, by the court's Chairman. It has an independent budget. Distribution of the work in the court is done by its Presidency Board. It enjoys complete independence being the Supreme Court in Iraq. It is not linked to the Council of Judges and its Chairman is the president of the Council of Judges as provided for by Section (3) of the Judicial System Independence Application Act No. 12 issued on 8/5/2004 (appendix No. (2)).

The number of the court's members is currently 24 members including the Chairman of the court and his deputies.

Section (2) **Courts linked to the Council of judges**

I. Civil Courts

1- Courts of appeal

Iraq is judicially divided into 14 appellate regions⁸⁸. The appellate region is managed by the appellate court situated at the center of the region and is considered the high Council of Judges in this region. It is made up of the presiding judge, a number of his deputies and judges as needed. It exercises the powers defined for it by the law. All the courts coming within its geographical domain are linked to it administratively. The court undertakes the distribution of work among the judges of these courts and provides them with the administrative staff and the material requirements from its allocated budget.

The court's judicial powers according to Article (34) of the Civil Procedure Code are the following:

- Decide on appeals against judgments delivered by the courts of first instance in first degree in actions of a value not to exceed one thousand (1000) Iraqi dinars.
- Decide on judgments on bankruptcy, corporate liquidation and other judgments as provided for by the law. In this capacity it is a court of second degree.
- The appellate court has another judicial function as it is considered a cassation examination court in some cases including appeals by cassation against judgments delivered by the courts of first instance where these courts exercise the powers of the (annulled) conciliation (magistrate) courts. It also looks into, in cassation capacity, the

88 Baghdad appellate region – A'Rasafa, Baghdad Appellate Region – Al Karkh. Basra Appellate Region , Ninwi Appellate Region, Babel Appellate Region. Thi Qar Appellate Region, Karkouk Appellate Region, Wsit Appellate Region. Dayali Appellate Region, Saladin Appellate Region, Nagef Appellate Region. Al-Anbar Appellate Region, Misan Appellate Region, Al- Mathni Appellate Region.

decisions delivered by summary courts and allegiance courts and the other decisions provided for in Article (216/1) of the Civil Procedure Code. It also decides on the rulings and decisions within its powers as determined by the law.

2- The courts of first instance

Article (21/1) of the Judicature Act provided that "a court (or more) of first instance is formed in the center of each governorate or province. It may be established in districts...." The court of first instance sits as a single judge. It decides on actions and matters within its powers as determined by the law.

The Civil Procedure Code determined the powers of this court as follows:

- It looks into civil actions provided for in Article (31) of the Civil Procedure Code. Its judgments in this case shall be in the last degree that can be appealed by cassation before the region's appellate court situated within its geographical jurisdiction.
- It decides on civil actions provided for in Article (32) of the Civil Procedure Code. Its ruling shall be in the last degree capacity and is subject to be appealed by way of cassation before the Court of Cassation, unless the action is more than one thousand (1000) Iraqi dinars in value. In this case its rulings shall be of the first degree subject to be appealed.
- It also decides on summary actions not to be delayed. The number of the courts of first instance currently reaches 119 courts.

3- Courts on civil matters

The courts of first instance assume the capacity of these courts to rule in personal status actions for non-Muslims and foreigners who are subject to the civil law in their civil status matters and not the Islamic Sharia provisions. Their rulings in these actions are in the last degree capacity subject to be appealed by cassation before the Court of Cassation⁸⁹.

4- Personal status courts

Article (26) of the Judicature Act provides that "a personal status court (or more) shall be formed in any location that has a court of first instance." The personal status court sits as a single judge and decides on personal status cases according to the provisions of the law.

Articles (300), (302) and (305) of the Civil Procedure Code determined the powers of this court specifically. These courts apply in its hearings of

89 Medhat Al-Mahmoudm same reference, p. (54).

disputes on the personal status the Articles of the Personal Status Act No. 188/1959 on all litigants save those excepted by a special law. Rulings and decisions delivered by this court shall be in a last degree capacity subject to be appealed "by cassation" before the Court of Cassation.

4- Labor courts

Article (127) of the Labor Act No.71/1987 provided that a labor court (or more) is to be formed in each governorate. It sits as a single judge. Its powers are delegated to the court of first instance if it is not formed in some governorates. Its rulings shall be in a last degree capacity that can be appealed before the Court of Cassation.

The Labor courts look into civil and criminal actions, cases and disputes provided for in the Labor Act and Retirement and Social Security Act for laborers and the other related legislations in this respect. The number of the labor courts in Iraq is currently (14) courts.

II. Criminal courts

1. Courts of felonies

A criminal court (or more) is formed in the center of each governorate. It is presided over by the presiding judge of the appellate court or one of his deputies and two judges as members. The court's presiding judge and its members are assigned by a statement to be issued by the Council of Judges. The court decides on criminal offences referred to it by the investigating courts or misdemeanor courts. Its judgments can be challenged by way of cassation before the Court of Cassation in Baghdad.

The Iraqi Central Criminal Court formed under Order No. (13) on 11/1/2003 is attached to the criminal courts. This court decides on major criminal cases and sits in the same way like the other criminal courts. It delivers its judgments in last degree capacity. They are subject to appeal by way of cassation before the Court of Cassation. The number of criminal court in Iraq currently is (21) courts.

2. Courts of misdemeanors

A court of misdemeanor is formed at every location that has a court of instance. It sits as one judge and if no assigned judge is appointed for this court, the judge of the court of first instance takes over his functions. Courts of misdemeanor decide on misdemeanors and infractions that are referred to them by the investigating courts. They adjudicate on them according to the law and their rulings are in the last degree capacity subject to appeal before the appellate court in the region in its cassation capacity.

There are courts of misdemeanor specialized in certain kinds of action such as the traffic courts which sits as one judge and decide on traffic offences. The number of the courts of misdemeanor in Iraq are currently (105) courts.

3- Juvenile Courts

There are two types of juvenile courts:

a- Investigation courts (juvenile crimes)

They investigate the crimes attributed to the juveniles. The juvenile, according to Article (3) of the Juvenile Care Act No.76/1983, is the one who completed 9 years of age till before 18 years of age. The juvenile investigating court sits as one judge and its rulings are subject to appeal in cassation before the Juvenile court in its capacity as a court of subject matter before which trials are carried out. Here it takes the capacity of a cassation court in relation to the decisions taken by the juvenile investigating judge.

b- Trial courts

They undertake the trial of the juvenile for crimes attributed to him. If the crime attributed to him is a felony the court sits under a presiding judge and two members who are specialized in criminology or in subjects related to juvenile affairs. If the crime attributed to the juvenile is misdemeanor or infraction the court sits under the juvenile judge alone.

The judgments delivered by the juvenile court shall be in the third degree capacity subject to appeal in cassation capacity before the Court of Cassation. The judgments it delivers in felonies are subject to mandatory cassation whether challenged or not by the concerned persons in accordance with Article (16) of the Public Prosecution Act No. 159/1979. The number of juvenile courts in Iraq currently reaches (17) courts.

4- Customs courts:

They decide on actions related to customs matters and sits under a presiding judge and another judge as a member and a civil employee to be assigned by the Minister of Finance. The judgments they deliver are in the third degree capacity subject to appeal in cassation before the Cassation Board formed under Article (250) of the Customs Act No. 23/1984. The number of customs courts in Iraq currently is (3) courts.

5- Investigation courts

Article (35) of the Judicature Act provided for the formation of an investigating court (or more) in each location having a court of first

instance. The investigating court sits as a single judge and decides on all crimes. The law permitted assigning an investigating court or more to investigate one kind or more of crimes such as the investigating courts on combating crime and the investigating courts of major crimes. The number of investigating courts in Iraq is currently (132) courts.

The total number of judges of the courts mentioned in Chapter (3) of this study – save the Court of Cassation – is (756) judges.

Section (3) **Courts not linked to the Council of judges**

I. The Court of Administrative Justice

The Court of Administrative Justice is linked to the State's Shura (or advisory) Council. They decided on the validity of the administrative orders and decisions issued by the employees and officials in the State's departments and the socialist sector, which are not challenged before any authority. The court was formed by Act 106/1989.

The Court of Administrative Justice consists of a judge of the first class or a counselor in the State's Shura Council and two assistant judges or counselors from the State's Shura Council. The court was formed only in Baghdad.

II. The General Disciplinary Board

The General Disciplinary Board is linked to the State's Shura Council. The Board decides on the challenges filed by the employees against the decisions issued against them from the authorities to which they belong. The Board meets under the chairmanship of the Speaker of the State's Shura Council or a deputy speaker or an original or delegated member of the Council from the judges. Besides, the Board comprises two members of the Council or delegated judges. The Board's decisions can be challenged by way of cassation before the plenary session of the State's Shura Council (article 7 of the State's Shura Council).

Section (4) **Other Judicial Authorities** **Linked to the Council of judges**

I. Public Prosecution

Under Article (25) of the Public Prosecution Act No.159/1979 the Public Prosecution Office is made up of the public prosecutor, two deputies, a number of prosecutors and their deputies. The head office of the public prosecutor is in Baghdad and its functions cover all parts of Iraq.

The public prosecutor initiates action of the public right, monitor investigations on crimes, file appeals against judgments and decisions

delivered by the criminal courts, misdemeanor courts and investigating courts. He supervises the work of investigators, attends investigations in a felony or misdemeanor and gives his remarks and submits his legal requests. He undertakes investigations in crimes in case of the absence of the investigating judge according to Article (3) of the Public Prosecution Act. If the need arises the Council of Judges may delegate a public prosecution member to assume the functions of the judge in the criminal court, a misdemeanor judge or an investigating judge according to Article (49), *Ibid*.

The public prosecution member also attends all the court procedures in criminal and misdemeanor actions and actions relative to family affairs.

The public prosecution member is subject in respect of his position to the same rules and conditions applicable to judges with regard to promotion and advance. He enjoys the same financial privileges of the judge and equals him in salary and benefits.

Members of the public prosecution office are currently (112) members.

II. Judicial Supervision Authority

It is made up of a chairman and two deputies and adequate number of justice supervisors. The Office according to its Act No. 124/1979 undertakes the task of supervision and control over all the courts' activities - save the Court of Cassation- and over the activities of the employees entrusted with judicial powers. It also examines complaints referred to it and submits its report to the Council of Judges according to Articles (17), (23), (27) and (34) of the Justice Supervision Act.

III. Secretariat of the Council of Judges

It is formed under Order No. (35) on 18/9/2003. It is presided over by the Council's secretary general who is from among the judges assisted by a number of employees. It undertakes the administrative affairs of the judges and public prosecutors. It prepares work schedules of the Council of Judges and follow up its decisions.

ANNEXES

- 1- Order No. (35) issued on 18/9/ 2003 concerning the re-establishment of the Council of judges.
- 2- Order No. (12) issued on 8/5/2004, the Judicial System Independence Application Order

ANNEX (1)
COALITION PROVISIONAL AUTHORITY ORDER No. (35)
CONCERNING THE RE-ESTABLISHMENT
OF THE COUNCIL OF JUDGES

Pursuant to my authority as Administrator of the Coalition Provisional Authority (CPA), and consistent with relevant U.N. Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war,

Noting that, prior to the changes made by the former regime, Iraq had a functioning Council of Judges that administered the judicial and prosecutorial systems to insure that judges and public prosecutors were appointed from among persons enjoying the highest reputation for fairness and integrity and of recognized competence of law, and that the judicial system exercised its authority in accordance with the rule of law, and

Recognizing that a key to the establishment of the rule of law is a judicial system staffed by capable persons and free and independent from outside influences.

I hereby promulgate the following:

Section 1
Purpose

This Order re-establishes the Council of Judges ("the Council"), which is charged with the supervision of the judicial and prosecutorial systems of Iraq. The Council shall perform its functions independently of the Ministry of Justice.

Section 2
Membership

1) The following officials shall serve as members of the Council:

Chief Justice of the Supreme Court (President of the Council)
The Deputy Chief Justices of the Supreme Court
Director-General of the State Council Assembly
Director-General, Office of Public Prosecution
Director-General, Legal Supervision Office
Director-General, Administration, if such person is a Judge or Prosecutor
Presidents of the Appellate Courts

2) The Council shall also have a Secretary-General, who shall be selected by the President of the Council. The Secretary-General shall perform administrative functions for the Council, together with such additional employees as the Council and the Ministry of Finance may deem appropriate.

- 3) The President of the Council shall be the Chief Justice of the Supreme Court. The Vice President of the Council shall be selected by the Council from the Deputy Chief Justices of the Supreme Court.

Section 3 Duties

- 1) The Council shall have the following specific duties:
 - a) To provide administrative oversight of all the judges and all public prosecutors, excluding, however, the members of the Supreme Court.
 - b) To investigate allegations of professional misconduct and incompetence involving members of the judiciary or public prosecutors, and, when appropriate, to take appropriate disciplinary or administrative measures against members of the judiciary or public prosecutors, including but not limited to, removing a judge or prosecutor from office, including the members of the Supreme Court.
 - c) To nominate capable persons as required to fill judicial vacancies or public prosecutor vacancies, and to recommend their appointment.
 - d) To promote, advance, upgrade, and transfer judges and prosecutors.
 - e) To assign or reassign judges and prosecutors to hold specific judicial and prosecutorial posts as provided for in the Law of Judicial Organization (Law No. 160 (1979)) and the Law of Public Prosecution (Law No. 159(1979)).
- 2) The Council shall have such other duties as may be determined from time to time by law.

Section 4 Meetings

- 1) The Council shall conduct regular meetings at least monthly. The President of the Council may call special sessions of the Council when needed to conduct necessary business.
- 2) A quorum shall require at least three-fourths of the membership of the Council and the presence of either the President or the Vice-President of the Council. Decisions of the Council will be by majority vote of those members present.

Section 5 Disciplinary and Professional Standards Committee

- 1) The Council shall appoint a Disciplinary and Professional Standards Committee ("the Committee") of at least three (3) members from its own membership. The Committee shall investigate allegations of misconduct

and incompetence by members of the judiciary and public prosecutors, and shall make appropriate decisions concerning disposition of those allegations, including but not limited to, the removal of that judge or prosecutor from office if the allegations are substantiated.

- 2) Any judge or prosecutor adversely affected by a decision of the Committee may appeal the decision to the Council within thirty (30) days from the date of the decision of the Committee. The decision of the Council on the appeal shall be final and conclusive, and no further appeal is authorized.
- 3) The Director General of Public Prosecutions shall also have the right to appeal any decision made by the Committee to the Council, within thirty (30) days from the date of the decision of the Committee.

Section 6 Independence of the Council

- 1) The Council shall perform its duties and responsibilities independently of any control, oversight, or supervision by the Ministry of Justice. To the extent that provisions of Iraqi law, specifically the Law of Judicial Organization (Law No. 160 (1979) and the Law of Public Prosecution (Law No. 159) (1979) conflict with the provisions of this Order, those provisions of Iraqi law are suspended.
- 2) The Council of Judges shall take the place of the Council of Justice that was previously established by the Judicial Organization Law (Law No. 160) (1979) in so far as the Council of Justice exercised any authority over any judge or prosecutor. All administrative oversight of the judges and prosecutors shall now rest only with the Council of Judges. The Council of Justice shall continue in existence, but shall have no jurisdiction over any prosecutor or judge.

Section 7 Entry into Force

This Order shall enter into force on the date of signature.

L. Paul Bremer,
Administrator
Coalition Provisional Authority
18/9/2003

COALITION PROVISIONAL AUTHORITY LAW NUMBER 12 APPLICATION OF THE JUDICIAL SYSTEM'S INDEPENDENCE

Pursuant to my authority as Administrator of the Coalition Provisional Authority (CPA) and consistent with relevant U.N. Security Council resolutions, including Resolution 1483(2003), and the laws and usages of war,

Noting that, the independence of the judicial system established by the Coalition Provisional Authority Order Number 35 and the Law of Administration for the State of Iraq during the Transitional Period requires an independent administration.

Recognizing that the Iraqi law still lacking an independent judicial system as one of the consequences of the former regime:

I hereby promulgate the following:

Section 1 Purpose

This Law facilitates the application of the Coalition Provisional Authority Order Number 35 and Section (6) of the Law of Administration for the State of Iraq during the Transitional Period.

Section 2 Definition

For the purpose of this Order the Council of Judges means the Judicial Council re-established by the Coalition Provisional Authority Order Number 35 or the institution coming after it according to the Law of Administration for the State of Iraq during the Transitional Period.

Section 3 Budget

The Council of Judges and the Supreme Court shall have separate budgets at a date not after 15 May 2004. The Ministry of Finance shall fully cooperate to initiate, finance and support each of these two budgets including re-appropriation of funds from the budget of the Ministry of Justice accordingly.

Section 4 Staff

All employees working for courts, in courts or those who have primary connection with courts including but not limited to judges, public prosecutors, court investigators, court clerks, Legal Supervision Office staff, security staff, support and administrative staff and those currently appointed by the Ministry

of Justice shall be employees in the Council of Judges and the Supreme Court accordingly before 15 May 2004.

Section 5 Possession

All real and material property or otherwise including but not limited to furniture, vehicles, office equipment, libraries, house utilities of judges and public prosecutors which are primarily usable in connection with courts and the judicial system in the possession of the Ministry of Justice before 15 May 2004 shall become in the possession of the Council of Judges and the Supreme Court accordingly.

Section 6 The State Council Assembly

The State Council Assembly shall remain part of the Ministry of Justice.

Section 7 References in the Law

References in the Iraqi law of the Ministry of Justice or the Minister of Justice and if needed in accordance with the Coalition Provisional Authority Order Number 35 or the Law of Administration for the State of Iraq during the Transitional Period as needed and as appropriate to maintain the judicial system independence shall be transferred to the Council of Judges or its president, the Supreme Court or its chief justice, or the Supreme Federal Court or its chief justice accordingly. The courts shall have sole legislative authority to adjudicate in differences in this field.

Section 8 Cooperation

The Ministry of Justice, the Council of Judges, the Ministry of Finance and all concerned governmental departments shall cooperate to the maximum in the application of this law and the Coalition Provisional Authority Order Number 35.

Section 9 Entry into Force

This order shall enter into force on the date of signature.

L. Paul Bremer,
Administrator
Coalition Provisional Authority
8/5/2004