

مركز البيدر للدراسات والتخطيط

Al-Baidar Center For Studies And Planning



# International Experiences In Selecting Members Of Constitutional Courts

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## About Center

Baidar Center for Studies and Planning is a non-governmental and non-profit organization established in 2015 and registered with the NGO Directorate in the General Secretariat of the Council of Ministers in Baghdad.

The Center seeks to contribute to developing the state and its institutions, by proposing ideas and practical solutions to the main problems and challenges facing the state, including improving public sector management, policies and strategic planning, using reliable data and best practices. The Center engages the relevant authorities in the state with regular meetings to support this objective and utilises the support of international organizations dedicated to assisting Iraq's development. The Center also seeks to support economic reforms, sustainable development and provide technical assistance to the public and private sectors. The Center also seeks to support development of the private sector to provide job opportunities for citizens through training and upskilling, in a way that reduces dependence on government institutions and contributes to supporting and diversifying the country's economy.

The Center aims to utilise the vast amount of potential in Iraq's human resources by organizing programs to prepare and develop promising young people, including leaders capable of proposing, adopting and implementing visions and future plans that advance society and preserve its value system based on the commitment to a high moral standard and rejection of all types of corruption.

# International Experiences In Selecting Members Of Constitutional Courts

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## **An original constitutional study supported by the experiences of the constitutional courts in the world**

We have already said that the international experience confirms that constitutional courts often consist of multiple categories, and that the number of judges in them usually represents the minority, not the majority, unlike what is marketed in Iraq by some personalities and parties who are not familiar with the local constitutional contents and the international experiences, among whom who talk aimlessly. The origin of the preponderant theory in this regard – according to the experiences of the international constitutional courts, the most important of which will be presented – is the inclusion of other groups in the court, other than judges, who have the majority and the probability in many experiences. And you will notice through the presentation that the predominance in these courts usually rests with the jurists and not the judges. In fact, there are international constitutional courts that do not have a single judge. The groups that make up the court may be represented by law professors in universities, lawyers, former presidents of the republic, some administrative officials or some public figures, and so on.

In general, we will list the most important international models in this regard. In order to reveal the lost truth in the midst of clamor, and these models that we will present represent (24) experiences of the constitutional courts in the world, from Europe, the Americas, and Asia, which are presented for the first time. This study is unprecedented in this section.

### **1– The Spanish Constitutional Court:**

The Spanish Constitutional Court, according to Article (159) of the amended

Spanish Constitution of 1978, consists of (12) members, consisting of legal university professors, judges, public prosecutors, public officials and lawyers, who exercise the same competencies.

The House of Representatives elects four (4) of them, the Senate (4), (2) from the government and (2) from the Judicial Council; Which means that the number of judges is (2) out of a total of (12). Accordingly, the majority belongs to jurists and others, not to judges. (This mechanism was not mentioned in the Spanish constitution, but rather in the law that regulates the work of the court).

## **2- The Italian Constitutional Court:**

According to Article (135) of the amended Italian Constitution of 1947, this court consists of (15) members, one third of whom are chosen by the president, one third by Parliament in joint session, and one third by the regular and administrative higher courts, and they are chosen from among legal university professors, judges and lawyers. They practice the same competencies. This means that only one-third of them are judges. Accordingly, the majority belong to the jurists and not to the judges.

## **3- The German Federal Constitutional Court:**

Like the Italian court, the German Constitutional Court is composed of legal university professors, judges and lawyers who practice the same competencies, and the German constitution does not mention this mechanism but rather the law).

## **4- Austrian Constitutional Court:**

According to Article (147) of the amended Austrian Constitution of 1945, it consists of (14) members and (6) substitutes. The president, his deputy, six (6) of these – original members – and three substitutes are appointed on the recommendation of the government, and they are from among the judges, administrative officials, and legal university professors. This means that each item has two seats; Thus, the number of judges is (2). The remaining six (6) and the three substitutes are appointed upon a proposal from the National Council and the Federal Council. As a result, the number of judges is (2) out of a total of (14) members. Accordingly, the majority is non-judges.

### **5- The Chilean Constitutional Court:**

According to Article (92) of the Chilean Constitution of 1980 amended in 2015, the court consists of ten members who possess a law degree with (15 years) service, and are known for their professional and academic excellence. Accordingly, the court contains nothing but jurists.

### **6- The Bolivian Constitutional Court:**

Article (199) of the Bolivian Constitution of 2009 stipulates that members of the court be among those with recognized expertise in the fields of law. This means that it may also be the preserve of jurists, and it does not have judges.

### **7- The Federal Supreme Court of Brazil:**

According to Article (101) of the amended Brazilian Constitution of 1988, the court consists of (11) members, who are appointed by the president after the approval of the Senate. They are required to have “distinguished legal knowledge and an unblemished reputation.” As such, there may be no judge in it.

### **8- The Mongolian Constitutional Court:**

Article (65) of the Mongolian Constitution of 1992 amended in 2001 stipulates that members of the court must possess ((higher qualifications in law and politics)). This also means that it may be the preserve of jurists and not judges. It should be noted that the fifth paragraph of this Article (65) of the Constitution prohibits members of Parliament, ministers and Supreme Court judges from being members of the Constitutional Court.

### **9- The Portuguese Constitutional Court:**

According to Article (222) of the Portuguese Constitution of 1976 amended in 2005, the court consists of (13) members, six of whom are judges, and the rest (7) are jurists, meaning that the majority are jurists.

### **10- The Turkish Constitutional Court:**

According to Article (146) of the Turkish Constitution of 1982, the court is composed of (15) members, of whom (3) are judges, (2) from the State Council, and (3) university professors in the fields of law, economics and political science,

and (4) amongst senior executives, lawyers and prosecutors. There remain three members elected by the National Assembly. In the end, the number of judges is (3) out of (15) members. Accordingly, the majority belongs to the jurists and others, not to the judges.

### **11– Ukrainian Constitutional Court:**

According to Article (148) of the amended Ukrainian Constitution of 1996, the Constitutional Court is composed of (18) members. Six of them are judges appointed by the President and Parliament, and the rest (12 members) are chosen by opening the door for nomination and competition among citizens, provided that the candidate is from those with high qualification in legal studies or lawyers. As stated in other courts, all of them are then called (judge), and they exercise the same competencies. Accordingly, the majority (two-thirds) is for jurists and not for judges.

### **12– The Indian Supreme Constitutional Court:**

According to Article (124) of the Indian Constitution of 1949, amended in 2016, the Constitutional Court ((composed of a number of judges, legal scholars and lawyers)), and all of them in this court according to the constitution – as in other constitutional courts – are called (judge). This is because they practice judicial work even if they are not judges. It should be noted that the Indian constitution used the same description used in the Iraqi constitution to express the jurists in court, which is (jurists).

### **13– The Colombian Constitutional Court:**

Article (232) of the Colombian Constitution of 1991, amended in 2015, stipulates that members of the court must be academics in (judicial specialties) – this means that they must be law professors – or lawyers or holders of a position in the judiciary or public prosecution.

### **14– The Ecuadorian Constitutional Court:**

Article (433) of the Ecuadorian Constitution of 2008, amended in 2015, stipulates that members of the court must be lawyers, judges, or legal university professors.

### **15– The Indonesian Constitutional Court:**

The constitutional oversight under the Indonesian constitution of 1945 was entrusted to the Supreme Court, and after the third constitutional amendment in 2001, the Constitutional Court was established that was entrusted with this task. Paragraph C /5 of Article (24) of the amended constitution stipulated that the members of the court be ((from statesmen who have knowledge of the constitution and public institutions)). The text is clear, as it does not require that a member of the court be one of the legal scholars or judges, and the like, but rather all it requires is that he be someone who has served the state and has knowledge of the constitution and public institutions. It is a trend that is not without validity. A man who served the state was raised in administration and had accumulated experience in understanding the law and the constitution, so perhaps such would be better than many PhD holders and others.

### **16– Malaysian Federal Court:**

Paragraph (b) of Article (122) of the Malaysian Constitution of 1957, amended in 2007, stipulates that judges for the court shall be appointed by the Ruler of the State – the King – upon the proposal of the Prime Minister, and after taking the opinion of the Board of Rulers. Article (123) of the constitution stipulates the qualifications of these members to be ((lawyers or those who were members of a judicial or legal body in the Federation, or a legal body in a state, or this and that)). As such, the combination is a mixture of lawyers, judges and jurists.

### **17– The Tunisian Constitutional Court:**

Article (118) of the new Tunisian constitution of 2014 – the post-revolution constitution – stipulated that the number of members of the Constitutional Court be (12) members, provided that (three-quarters of them are specialists in law). As for the last quarter (3 members), their appointment is left to the President of the Republic. This means that it brings together the jurists who make up the majority – the three quarters – and some well-known personalities appointed by the President of the Republic. There are no judges there, according to the principle, unless the president appoints some of them.

### **18– The Algerian Constitutional Court:**

According to the amendment to the Constitution of Algeria for the year 2020 – a few months ago during the era of the current president, Abdelmadjid Tebboune

- the Constitutional Court consists of (12) members, the president appoints four of them, and the Supreme Court elects one member, as well as the Council of State elects one member, while the remaining six are elected from law professors by a vote ; This means that the number of judges is one (1) out of (12) members, while the number of law professors is (6).

### **19- The Moroccan Constitutional Court:**

According to Article (130) of the Moroccan Constitution of 2011, the court consists of (12) members, half of whom are appointed by the king, three are elected by the House of Parliament, and three are elected by the House of Councilors - this is how the constitution calls it, and what is meant by it is the Senate - and these members are chosen ((from the personalities available with a high training in the field of law, and with judicial, jurisprudential or administrative competence)). They are therefore among the holders of a higher degree in law, or of those with judicial, jurisprudential or administrative competence; This means that they are a mixture of jurists, judges and administrative personnel, as well as those with jurisprudential competence. And despite my review of the Moroccan constitution and the organizational law to establish this court, I did not find a definition for the term (jurisprudential competence), but I think it indicates to Sharia jurists, with the presumption that the text expressed the jurists as (among the figures available with a high training in the field of law) which means that they are Jurists or professors, and the judges and administrators expressed that they are (personalities available with judicial and administrative competence). Accordingly, adding a new description other than the aforementioned means a new specialization, which is (those with high competence in jurisprudence), especially since the countries of the Maghreb contain official Islamic institutions.

### **20- The Egyptian Supreme Constitutional Court:**

It consists of current and former members of the judiciary, current and former law professors, and lawyers who worked before the Court of Cassation and the Supreme Administrative Court. The 1971 - annulled - and 2014 constitutions - in force - did not mention this selection mechanism, but rather, both of them referred it to the law. The Supreme Constitutional Court Law was issued in 1979, as amended in 2019, and regulated the mechanism mentioned above in Article (4) thereof.



### **21– The Jordanian Constitutional Court:**

Article (61) of the amended Jordanian constitution of 1952 stipulates that a member of the court be (( one of those who served as judges in the Supreme Court of Cassation and Justice, or one from the law professors in universities or the lawyers, and from one of the specialists to whom the conditions for membership in the Senate apply.” The text came in a form of choice regarding membership of judges, professors and lawyers, except for the last member – a member of the Senate – whose membership is required; In sum, this means that the court may not have any of the three categories, including judges.

### **22– The Syrian Supreme Constitutional Court:**

Clause (4) of Article (3) of Legislative Decree No. 35 of 2012 regarding the establishment of the Supreme Constitutional Court requires that a member of the court be (( holds a degree in Law)) Clause (5) requires that ((he might had practiced judicial work or Advocacy or teaching in the Faculty of Law for a period of not less than fifteen years)).

### **23– Bahraini Constitutional Court:**

According to Article (4) of the Law regarding establishing the Bahrain Constitutional Court No. 27 of 2002, amended in 2012, a member of the court is required to ((hold a degree in law, and have experience in legal matters of not less than fifteen years)); This means that it is only required to have a law degree and have legal experience.

### **24– The UAE Federal Supreme Court:**

Clause (3) of Article (4) of the Law of establishing the UAE Federal Supreme Court No. 10 of 1973 requires a member of the court to (have a degree in Islamic Sharia and law). Clause (4) of the same article adds the following: ((He must have previously worked for a period of not less than fifteen years in a judicial or legal work in one of the courts, or the corresponding functions of the prosecution, fatwa and legislation departments, or government cases, or in teaching law or Islamic law, or in the legal profession or in any other Legal business));

Which means that a member of the court is one of the following categories:

- Whoever practiced judicial or legal work, whether this practice was in the courts, in the government, or in fatwa circles.
- Whoever has taught in law or in Islamic law.
- Whoever practiced law or other legal business.

And here you are to notice how constitutional courts are formed in the countries of the world, from Europe, the Americas and Asia. It has become clear to you how the judges represent the minority in it, and some of the courts have not even a single judge . And you noticed that all of these courts are called by the constitution (court), and their members are called (judges) even though the majority of them are not judges at all. Contrary to what many talked about in the media, among those who fought in the matter without knowledge, as they said that the Federal Supreme Court as long as its name is a court, its members must be judges only, and it is not permissible therefor for anyone else to be in it. Without knowing the difference between a constitutional court and a regular judiciary, and without seeing any international experience in this regard!

And we will complete the presentation in the fifth section of this study, God willing, to talk about international experiences in selecting members of constitutional councils in the countries of the world, with reference to the US Supreme Court, which caused confusion among many.