

مركز البيدر للدراسات والتخطيط

Al-Baidar Center For Studies And Planning



**AN EXCLUSIVE INTERVIEW
WITH DR. FAIQ ZAIDAN, PRESIDENT OF
THE SUPREME JUDICIAL COUNCIL IN IRAQ**

Research Department

Introduction

The judicial authority (with its formations and institutions) is one of the fundamental authorities in stabilizing the political system, along with the rest of the authorities and formations that are organized in the formation of the state building.

In post-2003 Iraq, the permanent constitution stipulated the formation of the judiciary in Chapter Three of Section Three in Articles (90-101), and the constitutional legislator dealt with this in detail by the Supreme Judicial Council and its organs and the Federal Supreme Court.

In view of the effective and sensitive role of the judicial authority in the political, constitutional, and administrative life in all countries of the world. Iraq, as a country with a new political system, there is no doubt that the judiciary and courts - in their diversity and degrees - have a position, role, and influence on the overall public life.

From here, we at Al-Baidar Center for Studies and Planning sought to get acquainted with the opinions and perceptions of the Supreme Judicial Council, represented by its President, Judge Dr. Faiq Zaidan, on a number of important and sensitive issues. We raised a number of questions and inquiries regarding issues that have priority due to the various developments in the political system in Iraq, especially; Evaluation of the constitutional experience in Iraq, the constitutional amendment, the most important items that need a constitutional amendment, the structure of the judicial authority in its two wings, the Supreme Judiciary Council and the Federal Court in the constitution, the role of the Public Prosecution in combating corruption, and other issues that were discussed in this special interview.

We hope that the ideas that were talked about will illuminate some ambiguous spaces in the context of this dialogue and that the opinions presented will be an opportunity for discussion and crystallization of perceptions among the intellectual, academic, and media elites, and hopefully contribute to building a promising state and effective institutions in achieving the public interest. In conclusion, we extend our sincere thanks and appreciation to the President of the Supreme Judicial Council for providing this good opportunity. Al-Baidar Center for Studies and Planning is always keen to take advantage of all available opportunities and capabilities that support the project of human development and the state in Iraq.

What is your assessment of the Iraqi constitution for the year 2005 and the general constitutional experience after nearly two decades?

- The 2005 constitution was drawn up at a stage that reflects the opinion of political opposition to the previous regime. The practical application during the last period has proven that many of the texts contained in the constitution need to be amended, and this is due to the fact that the constitution was drafted in an urgent manner, and that urgency was due to the setting of a time period for its completion until it is voted on, and I think that this was a mistake. Another mistake is that they did not seek the assistance of people who specialized in the law and the constitution. The political touches, which are a reflection of the concerns of each component, were clearer than the legal and constitutional touches, especially with regard to the Shiites and the Kurds in the pre-2003 stage. When the politicians later discovered that these fears were misplaced, especially with regard to the Shiites, they themselves demanded today to amend the constitution, and we agree with them, especially on the issue of federalism and the nature of the system. I believe that a country like Iraq is not suitable for the parliamentary system because it will lead to the establishment of quotas (Muhasasa). That is why I wrote more than one article in which I discussed the need to amend the constitution, and my articles are published on the website of the Supreme Judicial Council.

You have called more than once for constitutional amendments. What do you think are the most important articles or clauses that need to be amended based on practical experience and political developments? Is the amendment in your opinion feasible in light of rigid mechanisms and sharp political differences?

- In terms of possibility, there are two hypotheses, the amendment to the non-controversial constitutional articles so that the amendment can proceed easily; But I think that each component has a certain interest that will try to include one or two articles of its own; Thus, the passage of the amendment will be obstructed. There is a committee that prepared a draft amendment to some articles, and the committee was composed by the Presidency of the Republic in the previous presidential session, on the basis that the proposal includes amending the non-controversial articles, at the forefront of which is Article 76, but its interpretation of

this article was wrong because it was interpreting it in a different way each time. Therefore, the opinion was that it should be formulated more clearly and that the winning party would be the one that forms a government, and not the bloc that has the largest number in the Iraqi parliament. As well as the constitutional article related to the election of the governor by the provincial council and its amendment to the election of the governor by the people, and so are the rest of the other articles, but I expect that the political blocs will not accept that; The objection will not be to these articles. Rather, these blocs will try to include other articles that are controversial, especially with regard to the rights of the region, oil and gas, and others. As a result, the process of amending the constitution will be disrupted.

In your opinion, what are the most prominent articles that have become necessary to amend?

- One of the most prominent articles in need of amendment is Article No.76 of the Constitution, which was the cause of the political crises after 2010. The Federal Court in 2010 interpreted this article for circumstances known at the time, and we do not agree with its interpretation because it was a wrong interpretation, and all governments formed after 2010 are not based on this interpretation, meaning that they were not formed by the largest bloc, but rather were formed by consensus. In any case, we believe that this article needs to be amended and reformulated. The other point is the subject of the (two-thirds majority) clause in the constitution, including Article 142. Since the adoption of the Federal Council law requires a two-thirds majority and we believe that this is unsuccessful, as well as the approval of the Federal Court law requires a two-thirds majority and is also unsuccessful, this indicates that the Federal Court Law from 2005 to today has not been approved, so we have no Federal Court law. The law in which the Federal Court is currently operating is an order from the government of Mr. Iyad Allawi when he was prime minister and has executive and legislative authority. The court law has not been enacted yet, and this is evidence that the majority required to legislate the law is an incorrect majority; Because each component has the possibility of disrupting or obstructing a majority from meeting and voting, it will use it and therefore the law will not be approved, and there are even arbitrary conditions that were stipulated by some components; One of them is that they have the right of veto, and

this is a wrong perception. In all countries of the world, there is no judge to object to, and the consequence of his objection is that the opinion of the rest of the judges does not pass. There is no such thing. Judicial decisions are issued by way of majority or agreement, there is no way that the minority obstructs the opinion of the majority. In general, we believe that this is incorrect. Voting on the validity of the deputy's membership in Article 52 also requires a two-thirds majority and we believe that it is not necessary, and the rest of the articles that stipulated a two-thirds majority and I think were mentioned in four places in the constitution, including the issue of the quorum for the presidential election session, which also requires a two-thirds majority. We believe that this is incorrect, given the obstruction that occurred due to this article. Also, among the articles that need to be amended and reformulated are those related to judicial authority as a condition for obtaining the approval of the Iraqi Council of Representatives to appoint some senior judicial positions represented by the Chief of the Court of Cassation, members of the Court of Cassation, the Chief Public Prosecutor and the Chief of Judicial Supervision. We believe that this constitutional provision is in violation of another constitutional provision, which is the text of Article 47 of the Constitution, which provides for an important constitutional basis, which is the principle of separation of powers, and each authority exercises its competencies in isolation from other authorities. While we come and pledge the appointment of senior positions in the Supreme Judicial Council with the approval of the Iraqi Council of Representatives. Personally, I was subjected to blackmail when I was nominated as president of the Court of Cassation, as the voting process at that time was delayed by about a year because of political blackmail; That is why I am one of the most enthusiastic about amending this article because it enshrines the approval of the House of Representatives, which is a contradictory and conflicting political force, and sometimes they look at their interests before they look at the interest of the country. This is frankly a historical mistake, and it sometimes and indirectly weakens the judiciary, especially the judge who reaches a high rank and aspires to prove his position. He will be concerned that the House of Representatives may not agree, and he may have to compliment a person or party on a particular position in order that no one object to it. This is incorrect, so it needs to be reformulated. Certainly, the articles that need to be amended are the contentious ones, such as the relationship of the region to the center, as it is a thorny issue, and these articles are more important, and it is very difficult to modify them. Every text relating to the territory is not clear, interpretable, or has two meanings, and we think it needs to be modified.

How do you view the constitutional organization of the judicial authority in its two wings, the Supreme Judicial Council and the Federal Supreme Court?

- I mentioned earlier that the drafting of the constitution in 2005 was based on fears and considerations that had no basis in reality. One of them is the articles related to judicial authority. When we wanted to legislate the Federal Court law in the previous session of the Iraqi Council of Representatives, one of the important political blocs objected, "We, as we did in the constitution, the legislative authority with two heads, the Union Council and the Council of Representatives, and the executive authority with two heads, the President of the Republic and the Prime Minister. By judicial authority, we meant the President of the Judicial Council and the President of the Federal Court." I asked him, "Why?" He replied, "So that there is competition." I asked him, "A competition for what? Did you invent these materials or do they imitate the experiences of regional or global countries, near or far?" "No, this is our invention," he answered, and I told him that this would not work; Peoples are affected by the constitutions of developed countries, or at least the constitutions of regional countries whose circumstances are similar. All the constitutions of the countries surrounding us do not have such texts. There is one judiciary and it has jurisdiction and a court of cassation with specific competencies and a constitutional court, not a "federal". By the way, I object to the word "federal". We recognized in advance that Iraq was divided into multiple regions, and for this, we said a federal court, and in fact, there are no regions other than the Kurdistan region, and there will be no other autonomous regions in the future. We believe this is incorrect and the correct term was assumed to be "Constitutional Court" so that there is no confusion; Therefore, we suffer in our travel outside Iraq because they do not know, what do we mean by the Federal Court and the Federal Court of Cassation, because of these incorrect designations, in all countries of the world the judiciary is one. Ordinary courts have jurisdiction such as the Personal Status Court, the Court of First Instance, the Criminal Court, or the Constitutional Court. The other point I touched upon a while ago is the appointment of senior judicial positions with the approval of the Iraqi Council of Representatives, which is improper and needs to be amended. Likewise, the majority is required and described for the approval of the Federal Court law, and this is supposed to be done by an ordinary majority, and the constitutional articles of the judiciary are redrafted according to the judicial vision and not according to the political vision. The Judicial Council or the Federal Court can formulate the

constitutional articles of the judicial authority in a manner that enhances the independence of the judicial authority from the legislative and executive authorities, and they are the best able to draft articles related to them and the closest to the accuracy. Many of the concepts that were legislated in 2005 are ambiguous in meaning to those who legislated them. When we discuss this with these legislators, they answer that they do not know, so it seems that some of these terms were imposed on them or passed on to them by other people. As a result, we believe that we need an amendment, and we have prepared new formulations that we handed over to the former President of the Republic, and it is assumed that they entered the draft amendment, but I do not know what happened, in addition to our opinion in Article 76 of the Constitution as previously mentioned.

What is your view of Article 92 - Second, which stipulates the formation of the Federal Supreme Court of judges, experts in Islamic jurisprudence, and legal scholars?

- These are imported materials (experts and jurists). First, they do not mean experts and jurists according to the legal distinction that the specialist believes. We sat with them and knew what they meant. Someone said: I am not an expert but a jurist, so I am the president of the court and not a member, as an Islamist who wears a turban, compared to what is found in Iran. The other section is experts and they were also a group among the participants in amending the constitution who hoped to be members of the court and they do not realize that this matter will cause us a great crisis. We believe from our judicial point of view, as long as the court is a court that does its work and resolves litigants' disputes, its members and its president should all be judges and I believe this is the right thing to do.

But there are constitutional councils in some countries that have a class other than judges, such as France and some other countries?

- During my time in France, I visited the Constitutional Council, headed by Foreign Minister Fabiuso. The French Constitutional Council is made up of politicians and academics, but every society has its own culture, circumstances, situation, and history. The history of Iraq,

its judiciary, and its legal status cannot quote these experiences under the title of a court in which politicians and academics are in. Western countries have confidence in the judicial and constitutional decisions issued. As for us, in the ordinary judiciary, there is doubt, let alone if the judiciary consists of politicians and academics.

Do you think the constitutional judiciary in Egypt is the closest to the Iraqi case?

- Yes, it is closer to the Egyptian, Jordanian, and Kuwaiti experiences. The constitutional judiciary is part of the ordinary judiciary and it contains only judges and there are no other titles. We have a frankly unsuccessful experience, which is the experience of the State Council and the Administrative Judiciary. The administrative judiciary is now made up of academics, and they worked for themselves a law that gave them judicial status for certain reasons, and when the political class began to feel the negative aspects of performance, they worked on a draft law in the previous session, or before the previous session, which is the separation of the State Council from the Ministry of Justice; Because the Ministry of Justice was controlled by a political party, and the party's control of the administrative judiciary was reflected. After they sensed the seriousness of this thing, they drafted a law by which they separated the State Council from the Ministry of Justice. At that time, a section of the concerned politicians contacted me and said, "We want to link the State Council to the regular judiciary," and I replied, "Yes, but with conditions. Those who are in it now return to their universities if they are academics. Those who have reached the retirement age are referred to retirement, and we, in turn, will appoint judges specialized in the administrative aspect." Their answer was, "These are our friends." "These are advisors, and every one of them is nominated by a political party." I replied, "This means that we will transfer partisanship and its negative aspects to the State Council, and instead of being in the Ministry of Justice, it will be in the judiciary." "I do not accept that". They wanted to find a point and link the State Council to it. They presented a strange and incorrect proposal, which is to be linked to the President of the Republic (what is the relationship of the President of the Republic with that). It remained an independent body, and this was not correct. When they saw the mistakes committed by this independent body, they presented a draft law in the previous session and another draft law adopted by the Vice-President of the Iraqi Council of Representatives in the previous session, which is

linking the State Council to the Judicial Council according to the vision and conditions of the Judicial Council. But this proposal was at the end of the previous session and was not initiated due to lack of time. Returning to your question, our experience, our culture, and our situation cannot bear that someone who is not a judge comes to perform the duties of a judge among people, with all due respect to him, whether he is an academic or otherwise, and I am supposed to side with the academic.; Because I have an academic degree, but I am speaking objectively, in the judiciary the subject is different, like a clever nurse who cannot be a doctor unless they study medicine. A judge is not a judge without entering the judicial institute regardless of their education or legal background.

We conclude from your words that you support the centralization of the judiciary and not dismantling it, regardless of the nature of this dismantling or fragmentation?

- I believe in the central system in general and its application in the political system. In our private assemblies with politicians, I tell them that the situation in Iraq can only be addressed by the presence of a presidential system, which is the central system, and this also applies to the judicial system. I do not want to say that our situation is excellent, but I say that it is good, compared to the rest of the authorities; There is respect, there is commitment and a lot of other things. Decisions were made in political crises some time ago (according to one of the judges present in the Court of Cassation, who is a Diyala and his son is an employee of the Diyala Court) who told me “We made a decision to suspend the official working hours for that day. While I was going down the stairs, I wanted to inform the staff that we had suspended working hours for this day, and I asked where my son is, he replied, I am home, and I asked him ‘what about your work for today.’ He replied “The official working hours have been suspended for this day.” Diyala suspended working hours shortly after the decision was issued, after which many governorates did the same. This centralization was reflected in the judicial performance in general. One of the peers said, “In one of the governorates, the court is in a remote place, so look at the commitment to work and the commitment to the uniform, as if we live in Baghdad.” It is the truth, not an analogy, but this is the central system. The central system is the best fit for Iraq. I don’t know if the reason was the policy of the previous regime or other reasons. The lack of a central system causes us problems.

What do you think of the experience of the current parliamentary system in Iraq?

- To be frank, I say that it was an extremely unsuccessful experiment, and what you see today is proof of that. We are in favor of changing the system to a presidential system, not a semi-presidential one. There is a close experience to us in Egypt, which is the parliamentary system in the era of the (Muslim Brotherhood) which failed and returned to the presidential system. Look at its positive results. Egypt is a poor country that does not have resources like Iraq; But the unity of the decision contributed to the advancement of the state and the building of new cities, a different economic situation, and a completely different security situation. This is a living model that can be benefited from.

There is a two-part question regarding the above. The first is that there are historical fears in Iraq of returning to the presidential system, and Iraq is still suffering from that experience. The second part: is that Iraq after 2003 did not apply the parliamentary system properly, so the question of judgment and evaluation of failure or success is a debate?

- You asked me about the constitution and I answered that the constitution was formulated in a way that responded to pre-2003 fears. When they drafted the constitution and established the federations, and the proposal was that it should be a federation of the south and a federation of the center, and so on, and designed for personalities we respect and appreciate, they were afraid of the idea that the presidential system would produce a dictatorial president again. They did not realize that they were the majority. They used to say we are a majority, but they did not touch it on the ground and did not realize the size of the majority, whether it was fifty or fifty-five percent. They did not realize that it was an overwhelming majority, so they had such fears. That is why they said we form two federations, one in the center and the other in the south, and Baghdad has its own peculiarity; For fear of the emergence of a presidential regime and a dictator and a coup d'état, we will then declare our independence as they thought. These fears are real and not a conclusion, and I heard them from them. Yes, the experience of Baathist rule in particular with the presidential system is a very bad experience, and it at least at the level of Iraq gave a perception as if every president is Saddam, every president will be a dictator and cling to power. I think these fears are misplaced if there are constitutional

and international guarantees. With an obsession with fear, the stage that the previous regime ruled at its time, and a dictatorship that did not come easily, Saddam executed people and offered temptations and money to the countries of the world to keep quiet about him and bought international approval for what he was practicing. This story will not be repeated. I mean intimidating people from the idea of another dictator is incorrect. We believe that there are sufficient guarantees. When the constitution is drafted in a clear and transparent manner, there is no fear of dictatorship. For the second part of your question regarding the non-implementation of the parliamentary system, ignorance of the implementer and the system that we have originally has nothing to do with the parliamentary system. I mean, daily they work to decorate this system, consensual democracy, Muhasasa, and whoever claims that he is against Muhasasa, against sectarianism, against nationalism is the same as the most sectarian people when the division of positions begins and says these are the rights of the component, the rights of the sect, the rights of the creed, the rights of the party. They do not want to get out of this story, no matter how successful a particular person is in a ministry. We assume, for the sake of argument, that one of the employees is an expert in a particular specialty and has the ability and management. Let us suppose that he is from component X. It is absolutely impossible for component Y to accept him in a position that is classified for him and vice versa. Sometimes they are formal descriptions, such as against sectarianism and against Muhasasa. The same story has been repeated since 2003 until now, and this situation has become within the same component.

The issue of the multiplicity of supervisory institutions, the Integrity Commission, the Board of Financial Supervision, and Integrity Committees; This plurality is constitutional and legal. However, there is an inverse relationship between a large number of these parties and the issue of corruption in particular. How do you view this plurality?

- One of the negative experiences or things that came after 2003 is that America wanted to transfer the experiences it had succeeded in, to Iraq. All the ideas related to this pluralism are present and quoted in America exclusively. They are all new experiences that they wanted to implement in Iraq. Their title may be correct, but the application is not. We have the Board of Financial Supervision. The work of the Board was supposed to expand and its jurisdiction

to expand. The Board had existed before 2003 and had personalities and experts. It was an institution that followed the judiciary. All crimes of administrative corruption were found after 2003 and are found in Penal Code No. 69 on bribery and embezzlement. Ok, when we came and established the Integrity Commission, before its existence no one was held accountable for bribery, embezzlement, and crimes of administrative corruption, for example, the idea of the Commission of Integrity may be correct, but its construction was a mistake.

What is your assessment of the role of public prosecution in the anti-corruption file?

- A state of misunderstanding prevails among the people about the role of the judiciary in combating crime in general and combating corruption crimes in particular. I say the judiciary because public prosecution is part of the judiciary. People look at the Public Prosecution as an investigator, and it is the one who discovers the crime and collects evidence, and this is not true. Public Prosecution is a supervisory work under the law, preserving public money, but it is not the one who interferes with the small and large and stirs complaints or investigates them. Yes, it is possible for the Public Prosecution to move the complaint and report it, but conducting an investigation into crimes of administrative corruption is not within its specializations, rather it is within the specializations of the Integrity Commission. Now, as a fait accompli, we have a law that says we have an integrity commission that is specialized in cases of administrative corruption, The Public Prosecution monitors the work of the Integrity Commission and monitors the work of the judiciary in this matter. I mean, the Public Prosecution does not go to the ministries and ask them to present their files. This is the work of the Integrity Commission and not the work of the Public Prosecution. But people may not have this picture clear to them, so often people blame the judiciary and the public prosecution as part of it. The judiciary, in fact, is like the customer in the restaurant. The chef cooks then the waiter brings you food ready to eat. That is the work of the police and the Integrity Commission. They are the ones who collect evidence and bring it to the judiciary. The judiciary then issues a decision canceling or closing the case; There is a saying - I smell smoke but I don't see fire - I know a person is corrupt but I can't judge him without evidence, I want proof. Evidence is prepared by the Integrity Commission for corruption crimes, and for ordinary crimes by the police. If there is a defect in the decision or in the case related to

the integrity or ordinary crimes, the defect is from the authorities that provided incomplete or insufficient evidence.

In the recent crisis that the judiciary faced, there was a general awareness of the role of the judiciary and we often hear that it is (the last bastion of building this state). How do you evaluate that?

- This positive view was formed because the incident was clear and unambiguous. That is why people actually saw that the judiciary was a strong and independent authority, and no one could influence it because the issue was clear. The same independence and the same authority are present in the simplest case to the largest case.

The last question; Your Honor, the President of the Federal Court of Cassation and the Head of the Judicial Authority, and your field of work tends to the specializations of the private law department more than the general department. The question is why did you choose the specialization of constitutional law in your studies, especially in the Ph.D.?

- For the master's degree, I chose constitutional law and wrote about the Federal Court because it was part of the judiciary. I saw the violations of the court itself, and it was painful in terms of formation and in terms of decisions. When I chose it for the master's degree (the Federal Supreme Court in Iraq, its formation and establishment, and the doubts that arise about its competencies). As for the doctoral study, I did not intend for the first time to complete it. I was perplexed about the subject with which to complete it and the lack of time. By chance, the Prime Minister at the time, Dr. Haider Al-Abadi, if you remember, issued the reform package. The package contained clear constitutional violations, and it was striking to me. When I was going to Beirut on a special case, I visited the supervisor of my master's thesis, who is one of the senior scholars of constitutional law in the Arab world, Dr. Zuhair Shukr, a respected person, and while I was sitting with him, the Lebanese crisis related to the elections was at the time. At that time, the President of the Republic came out on television and issued a statement postponing the convening of the Lebanese Parliament and extending

the period, and directly (Dr. Zuhair Shukr) said, “This is a constitutional error.” As a result, I have a topic for my Ph.D. thesis. Because they want a comparative study, the topic was chosen in addition to the reform package proposed by al-Abadi and it became the basis from which it was launched, and constitutional violations were studied in previous governments, so it became a constitutional topic and a doctoral thesis. In addition to the theoretical section, there is a practical section documenting constitutional violations in Iraq.

Thank you very much, Honorable Judge, Dr. Faik Zaidan, for providing this opportunity, and thank you for your frankness. We hope to have continued communication with you in the future.

Research identity

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Note: Opinions expressed in this research do not necessarily reflect the center's point of view, but only express the point of view of its author.

About center

Al-Baydar 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 utilizes the support of international organizations dedicated to assisting Iraq's development. The center also seeks to support economic reforms, and sustainable development and provide technical assistance to the public and private sectors. The center also seeks to support the 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 utilize 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.

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