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Al-Baidar Center For Studies And Planning

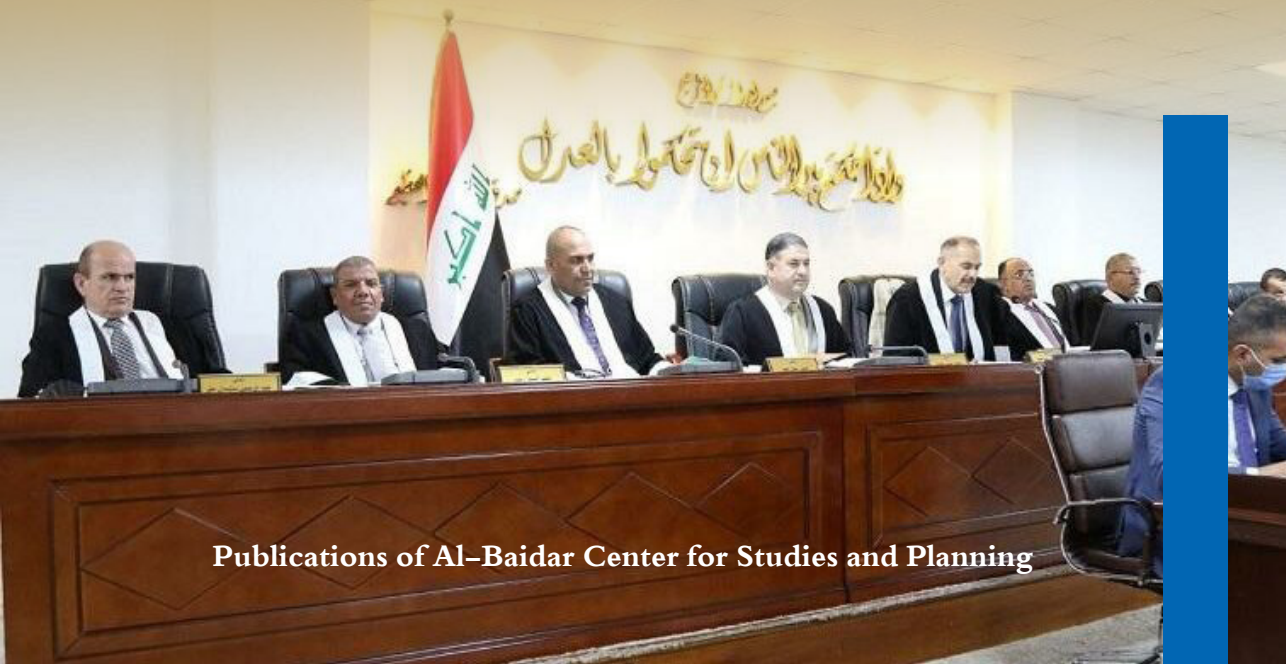


Research Paper

Judicial Guarantee in Balancing the Relationship Between the Federal Government and the Regions

Section Two

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Introduction

We concluded in the first section with the constitutional guarantee, which is one of the basic guarantees for maintaining the balance of the relationship in the federal system between the federal government and the regions. We mentioned the importance of having a codified constitution characterized by relative rigidity, supremacy, and especially the supremacy of constitutional provisions related to organizing the relationship between the federal government and the regions, as previously explained. In this section, we will address the other guarantee, which is the judicial guarantee, and the role of the constitutional judiciary in exercising its guaranteeing role through oversight of the constitutionality of laws, interpretation of the constitution, and adjudication of disputes. This role of the judiciary is imperative in federal systems to strengthen federal relations and entrench the guarantees that ensure the balance upon which the connection between the federal government and the regions is established.

Therefore, we see that the judicial guarantee is among the most important guarantees that preserve the constitutional balance of the relationship. Necessity calls for the existence of a supreme judicial authority that ensures each level of government adheres to its constitutional boundaries and prevents encroachment on the competencies of the other level.

Since the judiciary or the judicial authority is one of the effective guarantees for maintaining this federal balance and its preservation, this is due to several reasons, the most important of which are the independence and impartiality enjoyed by the judicial authority in federal systems. The judiciary is not an instrument in the hands of the federal government or—this is what is presumed—one of its institutions or subject to the influence of either the federal government or the regions; rather, it represents a constitutional body independent from both the

federal government and the governments of the regions, and exercises its role through performing the functions entrusted to it constitutionally and legally. For the constitutional judiciary to perform its tasks, most federal constitutions stipulate general principles aimed at ensuring the independence of the judiciary from any influence by other authorities in the state, guaranteeing its central and sensitive position in political, social, and legal life.

The Role of Constitutional Judiciary in Maintaining Federal Balance

There is no doubt that what is meant by the judiciary or the judicial body guaranteeing the balance of the federal relationship is the constitutional judiciary; it is represented by constitutional courts or federal courts, or supreme courts, with different names due to the different political, legal, and judicial systems of each country. The constitutional judiciary performs several functions to guarantee a balanced relationship in the federal state, the most important of which are: oversight of the constitutionality of laws and legislation, constitutional interpretation, and adjudication of jurisdictional disputes, which we will discuss.

First: Oversight of the Constitutionality of Laws and Legislation

Oversight of the constitutionality of laws and legislation is among the most important and serious functions entrusted to the constitutional judiciary, because it examines legislation of various degrees (laws, regulations, instructions, bylaws). Constitutional jurisprudence historically refers to the role of the Supreme Court in America, which was fundamental in establishing the pillars of judicial oversight over the constitutionality of laws, and to the Chief Justice of the American Federal Court (John Marshall) and the ruling he issued in a famous case known as *Marbury v. Madison*, which was the cornerstone in this field ¹.

Since then, the American Federal Supreme Court has extended its oversight over the constitutionality of laws, despite the absence of an explicit provision in the American constitution allowing it this competence, based on its belief that it is the right and duty of the judge to exercise such oversight, as it is incumbent upon him to resolve disputes, including conflicts between law and constitution. Among the most important factors underpinning the American federal judiciary

1. The case of *Marbury v. Madison* marked the inception of the concept of judicial review of the constitutionality of laws in the United States in 1803. Its summary is as follows: The events of this case began in 1800, following the presidential election in which President John Adams—known for his inclination to strengthen federal authority—was defeated by Thomas Jefferson, who advocated for enhanced decentralization and the empowerment of state authority. To ensure the continuation of his political agenda until the end of his term, President Adams, in the final days of his presidency, issued decisions appointing several judges who supported this direction. Among these appointees were Judge Marbury and several other judges. The judges, through a lawsuit they filed, requested that the Supreme Court, presided over by Chief Justice Marshall, issue a judicial order to Secretary Madison to deliver their appointment commissions. Chief Justice Marshall found himself in a difficult and delicate position: he did not wish to begin by antagonizing the new administration, which might not comply with his order, nor did he want the prestige of the Supreme Court to be diminished by ruling that it lacked jurisdiction. Accordingly, he issued a ruling that became historic in its field: he recognized the right of Marbury and his colleagues to their appointments but rejected their request for the Court to order the delivery of the commissions. This rejection was based on the unconstitutionality of the law that granted the Court the authority to issue such orders in the first instance. For further details, see: Dr. Zuhair Shaker, *The General Theory of Constitutional Judiciary*, Dar Bilal, Lebanon, 1st Edition, 2014.

in exercising its power of constitutional oversight are ²:

1. Affirmation of the supremacy of constitutional texts over laws.
2. The nature of the federal system adopted by the United States of America.
3. The principle of separation of powers, as well as the existence of historical precedents that influenced the adoption of the judiciary of the idea of oversight.

The Supreme Court's refusal to apply unconstitutional laws had a significant impact and tangible effect in other federal states and systems, and most federations have explicitly provided for the right of the judiciary to exercise constitutional oversight over federal laws and to refrain from applying laws deemed unconstitutional ³.

Federal states have differed regarding the determination of the judicial body entrusted with this task, depending on the position of the constitutional legislator and the political and legal circumstances of each country. For example, in Europe, many federations have established specialized courts to consider the constitutionality of laws, often called the Federal Constitutional Court, which has become widespread in European systems, such as the Constitutional Court in France, as well as in Austria and the Federal Republic of Germany in its 1949 constitution, and Russia in its 1993 constitution ⁴. Some federal constitutions have assigned the jurisdiction to adjudicate the constitutionality of laws to the Supreme Court, which exercises this role alongside its other judicial competences,

2. Rifaat Eid Sayed, *The Concise in Constitutional Litigation with an Introduction to Constitutional Judiciary in France and the United States of America*, 1st edition, Dar Al Nahda Al Arabia, Cairo, 2004, p. 140.

3. The number of laws that the Supreme Court of the United States declared unconstitutional, which in 1983 reached one hundred and fourteen federal laws, as well as one thousand and eighty-eight local laws and orders.

4. See: Hisham Mohamed Fawzi, *Constitutional Review of Laws Between America and Egypt with an Analysis of Constitutional Judgments in Both Countries*, Dar Al Nahda Al Arabia, Cairo, 2007, p. 137

as in Switzerland, although the scope of oversight is limited to laws issued by the legislative councils of the regions (cantons), and it is not entitled to exercise oversight over the constitutionality of federal laws and decisions⁵. The Constitution of the United Arab Emirates of 1971 provided for the establishment of a Federal Supreme Court that, alongside its general judicial competences, exercises the function of oversight over the constitutionality of federal and local legislation and decisions⁶.

In Iraq, after adopting the federal system in the 2005 constitution, Article 1 states: “The Republic of Iraq is a single federal, independent, fully sovereign state...”. In the context of organizing the work of the judiciary, specifically the constitutional judiciary, the Iraqi constitutional legislator established the Federal Supreme Court, which represents the constitutional judiciary in Iraq. Article 92 states: “The Federal Supreme Court is an independent judicial body, both financially and administratively.” The constitution granted it several essential competences, including: “Oversight of the constitutionality of effective laws and regulations” (Article 93). The Federal Supreme Court has considered many cases regarding the constitutionality of laws and legislation and has issued important decisions in this field, regardless of the accuracy of the court’s decisions in adjudicating constitutional cases⁷. However, it represents a constitutional and judicial reference to be resorted to in the event of a dispute, especially between the federal government and the region. Whatever the body exercising judicial oversight over the constitutionality of laws—whether a Federal Supreme Court or a specialized Constitutional Court—if it exercises such oversight correctly and accurately,

5. Ismail Mirza, *Constitutional Law: A Comparative Study of the Constitutions of Arab States*, 3rd edition, Dar Al-Malak, Baghdad, 2004, p. 394.

6. Adel Al-Tabatabaei, *The Federal System in the United Arab Emirates: A Comparative Study*, Cairo New Press, 1978, p. 320.

7. The official website of the Supreme Federal Court, which contains the rulings and decisions issued by the Supreme Federal Court regarding the constitutionality of legislation, organized by year: <https://www.iraqfsc.iq/index-ar.php>.

it is one of the essential guarantees for protecting the federal constitution and maintaining the relationship in the state among all its institutions and authorities. It is also one of the pillars of the federal system, meaning it is a guarantee against the transgressions and encroachments of both the federal government and the governments of the regions alike, preventing them from exceeding their limits as set by the federal constitutional document.

Second: Interpretation of Constitutional Provisions

The interpretation of constitutional provisions is among the most important competencies undertaken by the constitutional judiciary and constitutional courts. What is meant by constitutional interpretation is determining the meanings and implications of constitutional provisions by interpreting them and removing ambiguity and vagueness, as well as completing any deficiencies or flaws they may contain. Thus, there must be a supreme judicial authority that serves as the reference for interpreting constitutional provisions and determining the intended meaning to be applied, especially regarding the competences between the federal government and the governments of the regions, to reach the correct constitutional opinion and to avoid conflict and contradiction in opinions if multiple authorities possess the right of interpretation ⁸.

Sometimes, the federal constitution's provisions are defined clearly and precisely, leaving no room for ambiguity in understanding their meaning to the extent that their interpretation falls within a specific framework that cannot be deviated from, such as general principles. Other times, the constitution contains provisions that set broad criteria for dealing with or phrases that can have more than one meaning; the intended meaning is not understood from the text's apparent wording. In addition, there are principles not explicitly stated in the

8. Dawood Al-Baz, *Political and Constitutional Decentralization in the United Arab Emirates, Dar Al Nahda Al Arabia*, Cairo, p. 95.

federal constitution but inferred from some initial principles. This category of provisions is what enriches disagreement and debate in application, which is the role of the constitutional judiciary or the supreme courts. The essential function of constitutional interpretation is that it leads to the application of the law to the material facts presented to the judge, which have no solution according to the apparent text. Interpretation also achieves a social goal embodied in achieving a balance between technical data and social development.⁹

It is worth noting that the ambiguity of some phrases and provisions in constitutions may be intentional or unintentional, either due to a defect in constitutional legislation or because the brevity characteristic of the constitution does not allow for the elaboration of the constitutional rule. Hence, the need arises for the judicial role and for specifying the court competent to interpret ambiguous constitutional texts¹⁰.

Most states that have adopted the federal system have assigned the power to interpret the constitution to a judicial authority entrusted with this competence, whether a Federal Supreme Court, a Constitutional Court, or otherwise. For example, the Basic Law of the Federal Republic of Germany assigned the task of interpreting the federal constitution to the Constitutional Court in case of disputes over the rights and duties of both the federation and the states, especially regarding the implementation of federal laws by the states and the application of federal oversight in other disputes related to public law between the federation and the various states or within a single state, unless recourse to another judicial authority is possible.¹¹

9. Shaker Radi Shaker, *The Jurisdiction of the Constitutional Judge in Binding Interpretation*, 1st edition, Dar Al Nahda, Cairo, 2005, p. 23.

10. Ibid.

11. Article 93 (Paragraphs 3 and 4) of the Basic Law for the Federal Republic of Germany of 1949

The Federal Supreme Court in the United Arab Emirates also undertakes the task of interpreting constitutional provisions based on the request of the federal government or the government of one of the Emirates ¹². In Iraq, the 2005 permanent constitution assigned the task of interpreting constitutional provisions to the Federal Supreme Court, as stated in Article 93, paragraph two: “The Federal Supreme Court is competent to interpret the provisions of the constitution.” The Federal Supreme Court has, since its inception, exercised its constitutional competence to interpret constitutional provisions presented to it, especially those that have caused political or legal controversy or disagreement, whether between official institutions and entities or between the federal government and the region. The Federal Supreme Court has issued decisive opinions on a significant number of constitutional provisions presented to it ¹³.

Third: Adjudication and Judgment in Jurisdictional Disputes

The process of distributing competences between the federal government and the regions leads to significant obstacles in practice, whether from the federal government or the governments of the regions, as the duplication of public bodies between the federal authority on one hand and the authorities of the regions on the other may result in conflict and contradiction in the exercise of these competences ¹⁴.

Most federal constitutions grant the competent judiciary—usually the constitutional judiciary—the authority to adjudicate disputes that may arise between the federal government and the regions or between the regions themselves. These

12. Dawood Al-Baz, *Op. cit.*, p. 104

13. One of the most prominent interpretative decisions of the Supreme Federal Court is its interpretative ruling in 2010, numbered (25/Federal/2010), regarding Article (76) of the Constitution and the determination of the meaning of “the largest parliamentary bloc.” See: The official website of the Supreme Federal Court: <https://www.iraqfsc.iq/index-ar.php>.

14. Ali Youssef Al-Shukri, *The Head of State in the Federal Union*, College of Law, p. 70.

disputes cannot be resolved through arbitration or diplomatic relations, as the relationship between these entities is governed by domestic law, not international law. Therefore, this competence granted to the constitutional judiciary serves as an alternative to diplomatic settlements for resolving disputes that occur between sovereign states, which may involve the use of force ¹⁵. Such disputes require the highest judicial authority to adjudicate and resolve them, according to the provisions, purposes, and general objectives of the federal constitution ¹⁶.

Thus, it is necessary to have a supreme judicial authority that adjudicates disputes arising between the federal authorities and the regions regarding jurisdictional conflicts, because such disputes usually occur when one of the parties violates the principle of constitutional distribution of competences. This distribution would have no value if one of the authorities could overstep the limits set by the constitution without a supreme authority to deter such violations, which may lead to an imbalance in the relationship between authorities.

Accordingly, the relative independence of the regions does not preclude the existence of some restrictions imposed by the federal constitution on their judicial bodies; in some federal states such as the United States and Australia, regional courts are not entitled to consider disputes involving parties from different states, to avoid bias by local courts towards their citizens against the interests of citizens of other states. Federal constitutions usually prohibit local courts from adjudicating disputes arising between states. In Switzerland, all courts are required to recognize the legitimacy of laws issued by the federal legislative authority, even if this leads to the annulment of local laws issued within the limits of the competences granted to

15. Robert Bowie and Carl Friedrich, *Studies in the Federal State*, Al-Sharqiya Publishing and Printing House, 1967, p. 205.

16. Abdul Aziz Mohamed Salman, *Constitutional Review of Laws*, 1st edition, Dar Al-Fikr Al-Arabi, Beirut, 1990, p. 171.

the cantons ¹⁷. In this context, the Federal Supreme Court in Iraq, according to its constitutional competences, undertakes the task of adjudicating disputes, whether those arising between the federal government and the regions and provinces not organized in a region, or between the regions and the provinces themselves. Article 93 of the constitution states:

- Adjudication of cases arising from the application of federal laws and the laws, regulations, instructions, and procedures issued by the federal authority, and the law guarantees the right of the Council of Ministers, individuals concerned, and others to appeal directly to the court.
- Adjudication of disputes between the federal government and the governments of the regions, provinces, municipalities, and local administrations.
- Adjudication of disputes between the governments of the regions or provinces.

The Federal Supreme Court has considered many cases of jurisdictional disputes, especially those related to the federal government on one side and the region on the other. The existence of a constitutional judiciary that exercises its various constitutional competences is indispensable in building a state that enjoys legal sovereignty, preserves federal balance, and maintains stability among its institutions, authorities, and active entities. If the constitutional judiciary has this distinguished status as the supreme judicial guarantee, this is embodied in reality through several main pillars, the most important of which are:

1. The necessity of the independence of the constitutional judiciary and its awareness of its constitutional and legal responsibility in performing its competences with integrity and professionalism, given the serious and pivotal effects its decisions and judgments have on the state in general.

17. Adel Al-Tabatabaei, *op. cit.*, p. 100

2. The importance of respecting the decisions and judgments of the constitutional judiciary by the various authorities and the parties concerned with those decisions and judgments issued against them by the constitutional courts, because the constitutional judiciary has no power to enforce its decisions against the concerned entities by force and coercion; rather, it derives its strength from constitutional and popular legitimacy.

Constitutional Judiciary in Iraq

The 2005 Iraqi constitution emphasized the importance of forming the Federal Supreme Court within the state's judiciary and exercising the role of constitutional judiciary. Article 89 states: "The federal judiciary consists of the Supreme Judicial Council, the Federal Supreme Court, the Federal Court of Cassation, the Public Prosecution, the Judicial Supervision Authority, and other federal courts regulated by law." The court represents one of the main structures of the judiciary. The constitution also emphasized its independence to ensure its role and competences in the state, as stated in Article 92, paragraph one: "The Federal Supreme Court is an independent judicial body, both financially and administratively." On the other hand, the constitution stipulated the elements of its formation and composition according to Article 92, paragraph two: "The Federal Supreme Court consists of several judges, experts in Islamic jurisprudence, and legal scholars, whose number and method of selection and work are determined by a law enacted by a two-thirds majority of the members of the House of Representatives." It is clear that the constitution decided to compose it of three categories: judges, experts in Islamic jurisprudence, and legal scholars, but did not mention the number and details of each category, nor did it specify the method of their selection or the entities that nominate them, especially for the experts and scholars; rather, it left all this to be regulated by law, requiring a two-thirds majority for its passage, which has

made the enactment of the law a difficult and complex issue that has not been accomplished to this moment. As for the competences of the Federal Supreme Court, the constitution mentioned them exhaustively in Article 93, as follows:

- First: Oversight of the constitutionality of effective laws and regulations.
- Second: Interpretation of constitutional provisions.
- Third: Adjudication of cases arising from the application of federal laws and the laws, regulations, instructions, and procedures issued by the federal authority, and the law guarantees the right of the Council of Ministers, individuals concerned, and others to appeal directly to the court.
- Fourth: Adjudication of disputes between the federal government and the governments of the regions, provinces, municipalities, and local administrations.
- Fifth: Adjudication of disputes between the governments of the regions or provinces.
- Sixth: Adjudication of charges against the President of the Republic, the Prime Minister, and the Ministers, as regulated by law.
- Seventh: Ratification of the final results of general elections for membership in the House of Representatives.
- Eighth: Adjudication of jurisdictional disputes between the federal judiciary and the judicial bodies of the regions and provinces not organized in a region.
- Ninth: Adjudication of jurisdictional disputes among the judicial bodies of the regions or provinces not organized in a region.

The Federal Supreme Court is also competent to consider appeals regarding

the validity of the membership of members of the House of Representatives, as stated in Article 52, paragraph two: “The decision of the House may be appealed before the Federal Supreme Court within thirty days from the date of its issuance.” The Federal Supreme Court is also competent to convict the President of the Republic, as stated in Article 61, paragraph six, item (b): “The President of the Republic may be removed by an absolute majority of the members of the House of Representatives after being convicted by the Federal Supreme Court in one of the following cases: 1. Perjury of the constitutional oath. 2. Violation of the Constitution. 3. High treason.” The constitution also made its decisions final and binding on all authorities, as stated in Article 94: “The decisions of the Federal Supreme Court are final and binding on all authorities.”

Based on all this, and what the constitutional legislator has granted the Federal Supreme Court of crucial and important competences, the court has, since its formation, considered a large number of requests and lawsuits and has issued sensitive and effective decisions and judgments that have played a decisive role in resolving some crises faced by the state and the political system, whether in interpreting some constitutional articles—for example, its interpretation of “the largest parliamentary bloc” or the issue of “parliamentary immunity of a member”—or its decisions and judgments regarding the unconstitutionality of some laws and legislation and the annulment of some paragraphs and articles, such as its annulment of the Oil and Gas Law in the Kurdistan Region, or its annulment of some articles and paragraphs contained in the Federal Budget Laws, or its decision on the unconstitutionality of the “open session,” and others. While the Federal Supreme Court has had solid and decisive decisions and judgments based on precise constitutional and judicial grounds, some of its decisions have been marred by weakness, ambiguity, or contradiction with some constitutional and factual data. In this regard, some specialists and constitutional law professors

have directed scientific criticism at those decisions and judgments, pointing out the formal and substantive gaps and defects they contained ¹⁸.

There is no doubt that the experience of the constitutional judiciary in Iraq is new and still in the process of formation, growth, and development compared to other constitutional experiences. It is in urgent need of completing the basic elements of its structure, foremost among them the law of the Federal Supreme Court as outlined in the constitution. The implementation and respect of its decisions are among the most important elements of its existence and the preservation of its central position in building the state, stabilizing its political system, and creating a positive balance among its institutions and authorities, especially between the federal government and the regions.

Conclusion

We conclude that the existence of constitutional judiciary in the federal state is among the most fundamental guarantees for maintaining the balance of the relationship between the federal government and the regions, due to the authority and distinguished position it holds in the state's judicial apparatus, and its independence, impartiality, and objectivity in performing its role and function. This sensitive and important role is embodied through the functions and competences granted to it by the constitutional legislator, foremost among them constitutional oversight, constitutional interpretation, and adjudication of jurisdictional disputes, as confirmed by many federal constitutions, including the 2005 Iraqi constitution.

18. In this regard, reference should be made to research and commentary on the decisions of the Supreme Federal Court in legal journals and on electronic platforms, such as the official website of the Supreme Federal Court and the Supreme Judicial Council. Reference should also be made to certain publications, including: Dr. Adnan Ajil Obeid, *The Quality of Judgments of the Supreme Federal Court in Iraq*, 1st edition, Dar Al Salam Legal Library Publications, Najaf Al-Ashraf, 2021.

The constitutional judiciary is represented by courts specialized constitutionally, whether constitutional courts or supreme courts, with different names, and the Federal Supreme Court in Iraq represents the federal constitutional judiciary and exercises its role and competencies according to the 2005 constitution and its internal regulations. The role of the constitutional judiciary is manifested in constitutional and political life by serving as a supreme reference and recourse in disputes arising between various authorities, institutions, and political actors. The guarantee of the independence and impartiality of the constitutional judiciary requires distancing it from political and partisan influences and the necessity of respecting its decisions and judgments, as its decisions are final and must be implemented by all authorities without exception. In this way, the judicial guarantee can be realized in practical reality and the entirety of legal, political, and social life.

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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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