Can the Federal Supreme Court in Iraq Apply the methods of Judicial Review in the Supreme court of U.S.?.

هل بإمكان المحكمة الاتحادية العليا في العراق تطبيق اساليب المراجعة القضائية المتبع في المحكمة العليا في الولايات المتحدة الامريكية؟-(*)-

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المستخلص

هذا البحث يناقش تجربة الولايات المتحدة في المراجعة القضائية او الرقابة على دستورية القوانين. بما ان الدستور العراقي النافذ قد تأثر الى حد كبير بالنموذج الدستوري الأمريكي بات من الضروري الاطلاع على الأساليب المتنوعة من التجارب المقارنة ومنها طريقة السوابق القضائية في الولايات. ان للمراجعة القضائية في الولايات المتحدة اسس قوية وحيوية جديرة بالبحث والتطبيق. لذا كان لابد للمشرع العراقي الاطلاع عليها عن قرب. سيعمد هذا البحث على مقارنة المنهاج الأمريكي للمراجعة القضائية بالأسس الجديدة للرقابة القضائية على دستورية القوانين التي نص عليها الدستور العراقي في المادة ٢. لقد انشأت المحكمة العليا في الولايات المتحدة اساليب واسعة للمراجعة القضائية والتي يمكن للمحكمة الاتحادية العراق ان تطبقها، ولكن بطريقة محدودة بسبب الظروف المتباينة في كلا البلدين. لنرى ذلك بوضوح، نحتاج إلى إلقاء نظرة فاحصة على جذور ونطاق المراجعة القضائية في الولايات المتحدة. وسنتعرف على ما إذا كان بإمكان المحكمة الاتحادية في العراق تطبيق اساليب الولايات المتحدة في المراجعة القضائية.

الكلمات المفتاحية: دستورية القوانين، الدستور، السوابق القضائية.

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Abstract

This paper will start with a discussion of the United States experience of judicial review. It is important to address a different method, the common law method, because the new constitutional court in Iraq needs to look at a variety of approaches around the world. The United States' judicial review has its vital roots in a repugnancy theory of a sort, and this repugnancy can be compared in some helpful ways with modern repugnancy clauses in the Islamic world. To see this clearly, we need to take a closer look at some of the Constitution's key provisions.

One key provision, Article VI, makes the Constitution the supreme law of the land and requires the court to be "bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding."[1] In addition, the court is granted the power to decide cases arising under the Constitution, laws, and treaties of the United States.[2] Gradually, the United States judicial review has evolved in line with society's needs and political orientations as well as a judge's own values, which may vary over time.[3] A consideration of these issues ensures that the United States has its own unique method of applying the repugnancy clause related to the history of its developing judicial system, and the political impact of judicial determinations.

(1) Article VI, cl. 2 of THE US CONSTITUTION states: "This Constitution, and the Laws of the United States … and all Treatises … shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding."

(2) The precise language is: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. CONST. art. III, § 2.

(3) John Hart Ely, Democracy and Distrust: a Theory of Juridical Review (Harvard University Press, 1980),43.

Key words: Constitution, judicial review, common law, civil law.

The United States Model of Judicial Review and the Repugnancy Standard

This section will carefully examine the roots of judicial review in the U.S. to demonstrate its method of progressive implementation of the concept of judicial review as a form of repugnancy. In addition, the following question will be addressed: How did the Supreme Court come to be seen as the necessary guardian of constitutional values through the repugnancy clause of the United States Constitution? This discussion will also highlight elements of Islamic repugnancy through parallel interpretation. In other words, in the Islamic countries, the repugnancy clause operates the same way as the Guarantee clause and the Equal Protection clause operate in the United States: to protect the fundamental integrity of the basic premises on which the governmental and constitutional system is founded.[1] Thus, it is important to examine the United States method to better understand which methods can be appropriated in Iraq, with particular reference to developing of the operation of the Iraqi repugnancy clause.

A-The Roots and Scope of the Judicial Review in the United States

To understand American judicial review, it is particularly important to focus on the roots of judicial review in England, which initially governed the United States under the British colonial system. In fact, before judicial review had a name in the United States, the British practice was understood in terms of review under a repugnancy standard by the parliament rather than the court.[2] For political

(1) Larry Catá Backer, "From Constitution to Constitutionalism: A Global Framework for Legitimate Public Power Systems," Penn State Law Review 113, no. 3, (September 22, 2008):710.

(2) Some comenterty claimed that the history of judicial review in the United States, the birthplace of judicial review, is related to=

reasons, British governments were keen to impose their legal hegemony over all colonies, through the English doctrine of parliamentary supremacy, with the court subordinate to this doctrine.[1] Under this doctrine, the parliament has absolute epistemic authority and judges could not violate the laws "either for causes or persons, within any bounds." [2] The traditional meaning of legislative sovereignty is: if the parliament violates the constitutional rules, there are no "illegal consequences" that the courts can address.[3]However, the colonial office's application of repugnancy was reflective of policy and practice to assert the parliamentary supremacy, rather than a judicial positive criterion of repugnancy.[4]

One commentator has laid down that the idea of judicial review in England appeared gradually. However, this idea was not to strike down a law if it was contrary to the constitution, but the judge occasionally asserted that the government must adhere to the constitution. For example, in 1610, Dr. Bonham's case,[5] the precursor of the doctrine of

=repugnancy standard and rooted in the thirteenth century in Bracton, England. Mary Sarah Bilder, "The Corporate Origins of Judicial Review." The Yale Law Journal 116, no. 3 (January 2006): 513.

(1) Louis E. Wolcher, "A Philosophical Investigation into Methods of Constitutional Interpretation in the United States and the United Kingdom." Virginia Journal of Social Policy & the Law 13, (2006) :245

(2) R.H. Helmholz, "Bonhams Case, Judicial Review, and the Law of Nature," Journal of Legal Analysis 1, no. 1 (January 2009): 328.

(3) Wolcher, A Philosophical Investigation ,277–78.

(4) Ibid, 279.

(5) Dr. Bonham's Case, 8 Co. Rep. 114 (Court of Common Pleas [1610])In brief, "Dr. Bonham, a Cambridge University graduate in medicine, was forbidden to practice his profession in London by the Royal College of Physicians unless he first secured its license (Clark 1964, 208-217). He rejected the demand. In response, the College first fined him, then ordered his imprisonment, in both=

judicial review by a federal judge in the United States, was decided.[1]The chief justice was Sir Edward Coke whose work proved influential in shaping American law.[2]He asserts that "when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such Act to be void."[3] Thus, the human laws cannot be freed from the natural law. But there was no evidence that English courts rejected a law because it was contrary to the common law.[4] This idea was carried to America as a "veritable proposition" and the British colonial courts could exercise a power to hold colonial laws invalid if it contrary to some higher England, which meant the framers of the Constitution of the

=instances acting under a royal grant, one expressly confirmed by an Act of Parliament, and which confined the practice of medicine in London to men who had first been admitted to practice by the College. Dr. Bonham had not been so admitted. He did not have a license from the College and he refused to seek one. He disputed the validity of the action taken against a graduate of his ancient university. In due course, he sued the College for false imprisonment and the case came on before the Court of Common Pleas, in which Sir Edward Coke then served as Chief Justice. The Court held in Dr. Bonham's favor." Helmholz, Bonhams Case, Judicial Review, 327. In the same context, see also, King v. Earl of Banbury, Skinner, 517, 526-7 (K. B. 1694) , Day v. Savage, Hobart (3d ed. i67i) 85 (K. B. 1614)and The City of London v. Wood, 12 Mod. 669, 687 (K. B. 1701) Dudley Odell Mcgovney, "The British Origin of Judicial Review of Legislation," University of Pennsylvania Law Review and American Law Register 93, no. 1 (1944): 3

(1) Helmholz, Bonhams Case, Judicial Review,328.

(2) Ibid.

(3) Ibid,354.

(4) McGovney, The British Origin, 3.

United States were familiar with the idea of judicial review.[1]

This trend towards the idea of repugnancy was not stable in terms of its scope. There were other broad components of repugnancy, such as natural law, divine law, human law alongside the common right and reason, and common law. James Stephen, Colonial Office counsel from 1713 to 1734, asserted that the scope of review in England was not "distinctly ascertained… but it is assuming to be in perfect harmony with English law." [2] In addition, the United States judges also regularly applied primarily at levels as general as natural law, divine law, and human law.[3] For example, in *Robin v. Hardaway*, Justice Mason, by citing Bonham's case, argued: "Now all acts of legislature apparently contrary to natural right and justice, are, in our laws, and must be in the nature of things, considered as void"[4] Another example, in *Roper v. Simmons*, Justice Anthony Kennedy asserted on the abolish the death penalty for juveniles "noting that the nation had reached a consensus against the juvenile death penalty since the number of states that either have no capital punishment or do not allow it for offenders under 18" had reached a tipping point. "[5] Kennedy referred to the new method of interpreting the constitution when the people themselves, as represented by state decisions, create meaning within the Constitution.

(1) Ibid,8.

(2) Damen Ward, "Legislation, Repugnancy and the Disallowance of Colonial Laws: The Legal Structure of Empire and Lloyds Case (1844)." Victoria University of Wellington Law Review 41, no. 3 (June 2010): 388.

(3) Philip Hamburger, "Law and Judicial Duty," The George Washington Law Review72, no. 1, 12 (2003):12.

(4) Robin v. Hardaway, Jefferson iog, 114 (Va. 1772) The court cited Bonham's case.

(5) 543 U.S. 551, 112 S. W. 3d 397 (2005).

The variety of sources that judges used were, to some extent, a result of the absence of a written constitution. At this point, one could understand that general conceptions of the scope of repugnancy in the United States arose as a reaction to the uncertain methods and the absolute parliamentary sovereignty of British colonial legal system. In sum, the English method continued to be applicable to American colonial law, but this method stopped short of embracing judicial review in the modern sense. It later formed the basis of the judicial review in United States, though U.S. courts developed their own unique method of judicial review.

B-The Rise of Judicial Review in the United States

After ratification of the Constitution, "repugnancy" and judicial review continued together to govern the federal review of state legislation. The Constitution explicitly authorizes only a very limited type of judicial review that occurs when the judges of states' courts are "bound" by federal law notwithstanding "contrary" state law.[1] In

(1) The Supremacy Clause states:

That this Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to be Contrary notwithstanding. U.S. CONST. art. VI, cl. 2. However, the question arises as to why the framers of the Constitution did not directly provide Supreme Court judges the power of judicial review? This has raised questions about the scope of US judicial power. Bilder claims that "the Framers of the Constitution presumed that judges would void legislation repugnant to the Constitution." # Others have argued that the conformity to constitutions "evolved only because one branch of government was willing to go beyond its constitutional authority." Hamburger, Law and Judicial Duty,

3. As noted above, the absence of a direct constitutional bond for judicial review has made it a double-edged sword. On the one hand, the judiciary has a wide scope for practicing judicial=

addition, Section 25 of the Judiciary Act of 1789 authorizes the United States Supreme Court to reverse any judgment of a state's highest court if it was "repugnant to the Constitution, treaties or laws of the United States."[1]

After that, the Supreme Court in *Marbury v. Madison* established its right to judicial review to determine the constitutionality of federal laws, judicial decisions, or acts of a federal government official.[2]In *Marbury*, Chief Justice John Marshall insightfully explained that the Constitution exists to impose limits on government powers, and these limits are meaningless unless subject to judicial enforcement.[3] He pointed out that "long and well established" principles addressed "the question, whether an act, repugnant to the Constitution, can become the law of the land."[4] The Court held that the judicial department has the duty to say what the law is.[5] Although this right is not expressly provided in the Constitution,[6] the court justified this right by relying on its power of interpreting the Constitution. The interpretation power allows the court to protect the Constitution against any transgressions or breaches. It is clear that the judicial branch's province is to state and clarify the law. The court assured its position and power to exercise judicial review of federal laws and acts.[7]

=review. This has led to a lack of clarity and specificity concerning the idea of judicial review. for general information. Bilder, The Corporate Origins, 509.

(1) Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 83, 85-87.

(2) Marbury v. Madison, 5 U.S. 137, 138, 2 L. Ed. 60 (1803).

(3) Ibid,176.

(4) Ibid.

(5) Ibid,177.

(6) Ibid.

(7) Ibid.

Hence, a law repugnant to the Constitution is void because "the courts, as well as other departments, are bound by" the Constitution.[1]

Originally, the basis of the repugnancy clause is constitutional values, as well as other American laws that fueled the territorial application of relevant laws. While judicial review is rooted in repugnancy, it has evolved into something else. No longer can a judge set aside a statute because it is "repugnant" to reason, or some other external indicia, but only if it is contrary to the Constitution. As Hamilton explained "the power of the people" is superior to both legislative and judicial power. Judges are to be governed by the will of the "people … declared in the Constitution," and "no legislative act, therefore, contrary to the Constitution, can be valid."[2] Hence, the components of the United States repugnancy doctrine derive from the values and principles are affirmed by the Constitution itself and protect the fundamental integrity of democratic government and republican form.[3] This is true even if the Supreme Court invokes natural law under Chief Justice Marshall, but it is used to complete provisions of positive law in cases not fully determined by positive law.[4] Realistically, in America, when judges interpret these values and principles, they have a great deal of discretionary power. They can examine legislative history, fidelity to the text, previous judicial decisions, public policy considerations and even simple common sense. Also, they are likely to be

(1) Ibid,180.

(2) The Federalist No. 78, at 394(Alexander Hamilton) (Clinton Rossiter ed., 1961).

(3) Art. IV, § 4.

(4) Stephen E. Gottlieb, "Does What We Know About the Life Cycle of Democracy Fit Constitutional Law?" Rutgers Law Review 61, 595, (2009);622.

influenced by temperament, emotion, experience, personal background, and ideology.[1]

The United States judiciary has been subject to competing theories in relation to the application of judicial review. It is unclear which theory explains the application of the judicial review process. The scholar Tara Smith helpfully categorizes the approaches as textualism, public understanding, originalism, democratic deference or popular constitutionalism, perfectionism or living constitutionalism, and minimalism.[2] These categories are a reflection of the preferences of the judges of the Supreme Court. No judge is ever exclusively dominant at any given time but depends on how the judicial branch examines the case.[3] For example, in the view of one notable scholar, Richard Posner, whose work is influential but controversial, in light of economic realities, the American approach is not solely based on constitutional values but has been extended to include basic democratic principles and economic realities.[4] That this claim can even be made by one as influential as Posner demonstrates that the American scope of judicial review is very flexible, which, in turn, can lead to vagueness or uncertainty in application. This vagueness entitles a

(1) Richard A. Posner, How Judges Think. New Delhi (Universal Law Publishing Co. Pvt. Ltd., 2008):174.

He has discover eight theories refer to political, economic, sociological, psychological ,organizational ,strategic, pragmatic and attitudinal impact on the judge behavior. 19-59.

(2) Tara Smith, Judicial Review in an Objective Legal System. (Cambridge Univ Press, 2017):46-66 Also, see Jack M. Balkin, Living Originalism. (Cambridge: Harvard University Press, 2011):55.

(3) Wolcher, A Philosophical Investigation into, 250. He described these elements as external points of view on law.A text can always be viewed, from the external standpoint of an observer, as being a function of history, culture, and personal circumstance.

(4) Posner, How Judges Think ,35.

constitutional judge broad space for interpretation in light of social, political and economic shifts.[1]To see this in action, consider the Tillman Act, passed by Congress in 1907. At the time, no one objected to this law.[2] This act prohibited corporations and national banks from making monetary contributions to national political campaigns,[3] and stated that "corporations are only fictitious persons laid down by law, do not have the same First Amendment rights to political activity as real people do"[4] However, in a recent case, the court found that "a limitation on a corporation's ability to make independent expenditures in a political election is an unconstitutional ban on free speech."[5] This example illustrates the United States judicial review method and its relevance in present day, still involved in the process of criticism and evolution.

Historically, as a backlash to the wide scope of the judicial review process in the United States, some opponents claim that it undermines democracy on the ground that it

(1) Sanford Levinson, and Steven Mailloux. Interpreting Law and Literature a Hermeneutic Reader. (Evanston, IL: Northwestern University Press, 1998.):155.

(2) However, looked at this expanse role of judge. In 1997, Scalia wrote that the situation in America was "not customary or a reflection of the people's practice, but is a law developed by the judges." Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law,(Princeton, NJ Princeton University Press, 1998.):7.

(3) Tillman Act, Pub. L. No. 59-36, 34 Stat. 864, 865 (1907) (codified as amended at 2 U.S.C. § 441b(a) (2006).

(4) Ronald Dworkin, "The Decision That Threatens Democracy." The New York Review of Books. Accessed March 5, 2018. http://www.nybooks.com/articles/2010/05/13/decision-threatens-democracy. Dworkin suggested, institutional mechanisms to ensure respect for legal principles "must be guided by principle by some theory of why speech deserves exemption from government regulation in principle."

(5) Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010).

restricts the rights of the majority in the legislature.[1] John Hart Ely claimed that in judicial review "a body that is not elected or otherwise politically responsible in any significant way is telling the people's elected representative that they cannot govern as they like."[2] Ely suggested judges should strengthen the democratic process by using a "participation-oriented, representation-reinforcing approach to judicial review."[3] Ultimately, he admitted that popular reaction against the judicial review has not in fact, materialized in more than a century and a half of the American experience.[4]

(1) Robert Lowry Clinton, Democracy, the Supreme Court, and Our Two Constitutions, Faulkner Law Review 8, no.1, (2016):15.See also, Ilya Somin, Democracy & Judicial Review Revisited the New Old Critique of Judicial Power, Green Bag 7, no. 2, (2004):293.The overriding point, however, is that representation-reinforcement considerations must be taken seriously in any analysis of the possible anti-democratic impact of judicial consent decrees. This is particularly true in cases involving the interests of groups that are largely barred from participation in the political process.

(2) Ely, Democracy and Distrust,5. Some might argue that at least in the United States, the theories of Ely and Chemerinsky are not correct. The judges are chosen by elected representatives primarily on political, rather than legal, grounds. Also, Democracies can make bad decisions, and those decisions can undermine important democratic rights, values, and procedures. See, for example, Annabelle Lever, Democracy, and Judicial Review: Are They Really Incompatible? (Perspectives on Politics 7, no.4, 2009).

(3) The same idea about the judicial review was detailing in European, In France, "constitutional supervision originally emerged as a function of the legislature and not of the judiciary, as prerevolutionary judicial activism had led most French democrats to view the judiciary as a potential bastion of privilege and reaction." In Sweden and Norway, "the parliament played a major, often preponderant, role in constitutional supervision." Nathan Brown, "Judicial Review and the Arab World." Journal of Democracy 9, no. 4 (1998): 86.

(4) Ibid,47-48.

In contrast, Chemerinsky described the role of judicial review in a democratic system as follows: "The Constitution protects substantive values from majoritarian pressures, and judicial review enhances democracy by safeguarding these values."[1] Therefore, Supreme Court decisions that strongly promote democracy perform an important and justifiable function in the United States. In the same context, Dworkin asserted that "robust judicial review is a potentially progressive check on the tyranny of the majority, and it is also consistent with the protection of democracy."[2] This debate has influenced the Supreme Court's tendencies on issues that address individual rights.[3] Thus, the American judicial review process has been most active in the protection of democracy itself and as a vital corrective to unlimited democracy.[4]

Indeed, the idea of using judicial review to validate some core values of the republic survives in constitutional theories to date, including in the views of John Hart Ely and Erwin Chemerinsky, as concerning democracy. One of the complex concepts the Supreme Court addresses is great flexibility in relation to the concept of repugnancy standard. Specifically, in relation to how repugnancy is used to protect governmental integrity or the republican form of

(1) Erwin Chemerinsky, Interpreting the Constitution. (New York: Praeger, 1987):7. He defined democracy broadly " democracy is seen as a system of government in which majoritarian procedures operate within a structural framework that promotes tolerance for minorities, freedom of expression and respect for the worth and dignity of the individual.

(2) Ronald Dworkin. Freedoms Law: The Moral Reading of the American Constitution. (Oxford University Press, 1996.) 15.

(3) See for example, Luther v. Borden, 48 U.S. 1, 12 L. Ed. 581 (1849).

(4) Brown , Judicial Review and the Arab World, 85-99.

government, which should be considered as a protector of basic individual rights and liberties.[1]

In contrast, the Iraqi Constitution does not view judicial intervention, when there is a political question, as a problem. Unlike Iraq, the Supreme Court of U.S., in some cases, considers Guarantee Clause, which is most notably related to the protection of democracy, claims as political questions and nonjusticiable, it does not treat all Guarantee Clause claims in the same way.[2] The FSC in Iraq has direct judiciary power to protect democracy as one of the components of the repugnancy clause and in other parts of the Constitution as well. For example, the Law of the Independent Electoral Commission of Iraq No. 11 of 2007 granted the Higher Juridical Council a primary duty to nominate Judges to serve Electoral Judicial Panel. This panel has the sole jurisdiction to adjudicate appeals on the Board

(1) Erwin Chemerinsky, Why Cases Under the Guarantee Clause Should Be Justiciable, University of Colorado Law Review 65 (1994): 851.

(2) Vieth v. Jubelirer, 541 U.S. 267, 288, 124 S. Ct. 1769, 1782, 158 L. Ed. 2d 546 (2004)" also see New York v. United States, 505 U.S. 144, 184 (1992). For an argument that the Guarantee Clause should be justiciable, see Michael W. McConnell, The Redistricting Cases: Original Mistakes and Current Consequences, Harvard Journal of Law & Public Policy 24 (2000):106-107. He argues" if the Court were to develop judicially manageable standards under the Equal Protection Clause, it could do so equally well under the Republican Form of Government Clause. He concluded that the shift ground to equal protection was made for no reason other than to avoid the appearance of a departure from the nonjusticiability precedents" See also, Ann Althouse, Time for the Federal Courts to Enforce the Guarantee Clause?--A Response to Professor Chemerinsky, University of Colorado Law Review 65, (1994) 884.She notes that "The Court began to realize the danger with the concern Justice Douglas expressed in Baker v. Carr, that "leaving the political branches to determine whether a government is republican in form invites factional and partisan collusion with no constitutional remedy."

of Commissioners final decisions. In addition, the Supreme Court has the authority to ratify the final results of the general elections for the Council of Representatives. Practically, In the election of 2018, Iraq's Supreme Judicial Council named nine judges to take over election body after fraud allegations.

The next section, therefore, will ignore the American legal debate about the role of the court when facing a political question, and instead will focus on the positive role of the U.S. Supreme Court, in light of its protecting democratic values. Examining the U.S. Supreme Court's method of employing constitutional values is helpful in the context of the discussion of how to develop a convenient and efficient mechanism for applying the repugnancy clause in the Iraqi Constitution. Despite the value of these theories in the United States context, the next section claims that if the Iraqi legal system imitated the American approach, a number of obstacles would need to be addressed. In Iraq, wholesale adaptation of the American judicial model is not feasible. However, some aspects of existing judicial approaches can be used, individually, rather than as a complete system, to ensure the application of the repugnancy clause jurisprudence in a consistent manner.

Comparison of the Iraqi and United States Methods of Judicial Review

As mentioned above, the model of judicial review in the United States, as a common law system, would face many obstacles if applied in Iraq. This section will explain those obstacles to implementing the U.S. model of judicial review in Iraq, in textual and practical ways. These arguments will be supported by examining United States judicial review methods and considering whether there is a method to adopt some features of the United States system that would be appropriate in Iraq and be consistent with a transparent application of Article 2.

After the Iraq War, the Americans, as leaders of a coalition of victorious nations, played an essential role in the drafting of the new Constitution for Iraq.[1] Like all modern constitutions, these Constitutions explicitly stipulated the right of the FSC to review laws as well as, interpret the Constitution. Nevertheless, the previous historical background of judicial review in the United States makes a comparison between the exercise of judicial review in America and Iraq hard to apply because some obstacles would need to be addressed. Judicial review in the United States in light of applying repugnancy standards has a broad scope that Iraq could use to develop its repugnancy clause. However, the entire concept of the flexible scope of repugnancy, a key component of effective judicial review, might need time to become acceptable in Iraq's legal system. There are two difficulties in applying the U.S. model of judicial review in Iraq. The first difficulty is the methods of applying judicial review are contested in Iraq, which makes the outcomes unclear. The other difficulty concerns the nature of the judicial system in Iraq, which was built on a civil law model, with an unusual combination between Sharia and Western law. The result is a system that is radically different from the Anglo-American common law system.[2]

(1) For more information about the role of US in Iraqi Constitution process, see Noah Feldman & Roman Martinez, Constitutional Politics and Text in the Next Iraq: An Experiment in Islamic Democracy, Fordham Law Review, 75, no. 2 (November 2006) 883, 919.

(2) Craig R. Giesze, Helms-Burton in Light of the Common Law and Civil Law Legal Traditions: Is Legal Analysis Alone Sufficient to Settle Controversies Arising Under International Law on the Eve of the Second Summit of the Americas?, The International Lawyer32, No. 1 (SPRING 1998):60.

A. The Scope of Repugnancy

As noted above, United States judicial review methods can be criticized because of their polycentric interpretations. Indeed, these methodologies represent the development and needs of the United States community in light of its own circumstances as Justice Scalia asserted.[1] However, these current methods do not indicate a stable and clear case that can be applied in Iraq.

For instance, the Iraqi constitution goes beyond the idea of originalism when it permitted the court to use supreme values (Islamic settled rulings, democracy, and human rights) as criteria to examine the constitutionality of laws alongside the provisions of the Constitution. This requires that the scope of review of the constitutional judge be more comprehensive than the legislator when examining the constitutionality of a law because the judge evokes adaptable general principles, not specific rules.

At the same time, it is important for constitutional judges to have some space to develop and rationalize their judgments, unlike other judges. However, the Iraqi Constitution provides more than one source that a judge can use to ascertain the conformity of a law with the Constitution: Islam's settled rulings, democracy, and human rights. Perhaps these sources would restrict the authority of the judge when he/she attempts to use common law reasoning. This method could open the door to constitutional judges manipulating the interpretations of these three elements in broad ways. At times in the United States, the judiciary significantly supports democracy, and, at other times, the judiciary seems to contradict the will of the ruling majority. This situation, without a doubt, derives from the judiciary being greatly influenced by important political trends in the United States, as Supreme Court judges in the

(1) Scalia, A Matter of Interpretation ,38.

United States are chosen by politicians.[1] Thus, the core challenge for the Iraqi judge is to craft an acceptable concept that involves consideration of democracy, human rights and Islam's settled rulings. By the same token, neither country's Constitution has developed a clear concept of democracy. This opens the door for the judiciary to create a broad meaning of democracy. The U.S. Constitution is conspicuously silent on the contours of democracy.[2] Likewise, the Iraqi Constitution does not provide clear and specific guidelines to synthesize Islamic, democratic, and human rights issues.[3]

Since the Iraqi courts have a history of operating in non-democratic settings, this is a new challenge that Iraqi courts might face. Certainly, there are many philosophical interpretations of these elements, but Iraqi courts could work with the following temporary solutions. First, procedurally, the court could enable parties to submit adversarial briefs describing a specific issue of Islam's settled rulings, democracy, and human rights. The other solution is to accelerate the formation of the court structure through as Article 92 provides: The FSC shall be made up of a number of judges, experts in Islamic jurisprudence, and legal scholars.[4] This solution will ensure that each member of the

(1) The Constitution gives the president the power to nominate and, with Senate approval, to appoint judges. U.S. CONST. art. II.

(2) Samuel Issachar off, Constitutional Courts and Democratic Hedging, The American Journal of Comparative Law 62, No. 3 (SUMMER 2014): 963.

(3) Feldman & Martinez, Constitutional Politics, 916.

(4) IRAQ CONST., art. 92.This article states "First: The Federal Supreme Court is an independent judicial body, financially and administratively.
Second: The Federal Supreme Court shall be made up of a number of judges, experts in Islamic jurisprudence, and legal scholars, whose number, the method of their selection, and the work of the=

court will bear his/ her moral, legal, and intellectual responsibility so that the interpretation of these concepts will align with the needs of the community. It will also ensure that the interpretation secures the operation of the Article and does not disrupt the Constitution. Moving forward, the FSC needs to use the reasoning and/or rational approach adopted from the common law rather than a strictly textual approach to setting a static definition of democracy, human rights, and Islam's settled rulings.

On the other hand, judicial review is based on varying issues. There are limits as to how much Iraqi courts can use the American judicial review method because that method does not involve the same religious imperatives as the Iraqi system requires. As Fiss indicates "An equally remarkable feature of the American system is that the freedom of the external critic to deny the law, and to insist that his moral, religious, or political views take precedence over the legal interpretation, is a freedom that is not easily exercised."[1] The American judiciary, when examining any law, bases its examination on protecting the principles and values of the Constitution as well as the values of American democracy rather than religious values because the United States Constitution is largely predicated on separation of church and state through the Establishment Clause of the First Amendment.[2] Unlike the United States Supreme Court, the Iraqi FSC and legislature needs to build their reviews on some of the religious values found in the Iraqi Constitution like considering Islam as the official religion of the state.

=Court shall be determined by a law enacted by a two-thirds majority of the members of the Council of Representatives."

(1) Owen M. Fiss, "Objectivity and Interpretation." Stanford Law Review 34, no. 4 (1982): 739.

(2) U.S. CONST, amend. I: The first amendment of the United States Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

While the United States Constitution adopted a relatively neutral outlook towards religion, the Iraqi Constitution, for social and, perhaps, political reasons, has moved away from neutrality and has adopted religious values as a basis for examining the constitutionality of laws.

Does this mean the methods the Supreme Court uses to interpret religion cannot be used in Iraq, even if they yield a different result? In Iraq, we can employ religious neutrality by rendering the government neutral on established interpretations of religions in the personal status sphere because the personal law mostly depends on morals and culture.[1] The government cannot support or oppose a religion in this area. Specifically, personal law issues require a proper activation of Article 41 which guarantees that "Iraqis are free in their commitment to their personal status according to their religions, sects, beliefs, or choices"[2] Some might argue that the actions of diverse religions may conflict with Islam's settled rulings or democracy or human rights..[3]

(1) Haider Ala Hamoudi, "Resurrecting Islam or Cementing Social Hierarchy?: Reexamining the Codification of Islamic" Personal Status Law, Arizona Journal of International and Comparative Law 33 (2018):382.

(2) Article 41, section 2, Dustour Jumhuriyat al-Iraq [The Constitution of the Republic of Iraq] of 2005.

(3) For example, In Pakistan the held that Muslim Personal Law' must be "the personal law of a particular sect of Muslims, based on the interpretation of Holy Qur'an and Sunnah by that sect." the court here grant people to create their own interpretation of Holy Qur'an and Sunnah which mean having several personal law according to different Islamic school. Jeffrey A. Redding, "Constitutionalizing Islam: Theory and Pakistan," Virginia Journal of International Law 44 (2004):777.

B. The Basis of the Iraqi Legal System

Iraq is a civil law country transitioning to include common law principles, as concerns constitutional review. This transition needs to be thoughtful and methodical. However, no one can claim that the civil law system in Iraq has been irrevocably buried ever since 2003. The former Iraqi Republics inherited their legal system from the civil law tradition of Europe, mixing it with Sharia. As Al-Sanhuri , one of the drafters of the Iraqi Civil Code, asserts, "the new legislation has to look at the new codification of Western standards, [the French legal system] and choose the modern provisions of Islamic law from different schools."[1] The Iraqi legal system still adheres to civil law in most legislative and judicial functions, and there is no robust professional legal or academic discourse that promotes the understanding of judicial precedent. This influences constitutional interpretation. In a civil law state, judges are trained in civil law; getting judges from that same system to adhere to different standards when they are appointed to the constitutional court is quite difficult. For instance, the judges in Iraq rely on a strict palette of positive law without reference to principles of either Islamic or natural law, except where the written law is silent. [2] Judges in civil law countries think they have less power to interpret the law using perfectionism or popular constitutionalism methods.[3]

(1)Enid Hill, "Al-Sanhuri and Islamic Law: The Place and Significance of Islamic Law in the Life and Work of Abd Al-Razzaq Ahmad Al-Sanhuri, Egyptian Jurist and Scholar, 1895-1971." Arab Law Quarterly 3, no. 1 (1988): 182.

(2) Haider Ala Hamoudi, Negotiating in Civil Conflict: Constitutional Construction and Imperfect Bargaining in Iraq. (Chicago: Univ. of Chicago Press, 2014). 66.

(3) In essence, legal perfectionism as a doctrine provides that the state should promote an interest in each citizen pursuing a well-led life. For more information about perfectionism see, Steve Sheppard, "The State Interest in the Good Citizen: Constitutional Balance=

In this environment, of course, these beliefs can affect interpretive approaches and the power of judges can be limited to determining the facts to which the laws apply. Therefore, in civil law countries, only Supreme Court judges have explicit power of interpretation, unlike common law judges who have more room to interpret even if there is no explicit power in the constitution.[1] Constitutional judges in Iraq require a greater power of interpretation, as opposed to their current role, in order to defeat the basic purpose of these provisions.

In theory, the nomination of judges in Iraq is subject to complex criteria that require a particularly independent judiciary. The Constitution stipulated in four articles that judicial power is independent.[2] For example, the judges of the FSC in Iraq are nominated by the judiciary, not a political body, even though they must be confirmed by Iraqi parliament.[3] This situation might be because the Iraqi judicial system is affected by the judiciary in Islamic constitutional contexts which "[does] not derive from its relationship to majoritarian politics or constitutional limitations on power."[4] Therefore, again in theory, the judge needs to separate his/her political views from his/her judicial

=Between the Citizen and the Perfectionist State," Hastings Law Journal 45(1994):969.

(1) H. Patrick Glenn, Legal Traditions of the World: Sustainable Diversity in Law. (Oxford: Oxford University Press, 2014):161.

(2) IRAQ CONST. Articles 19, 87-88, 92.

(3) At the time of this paper writing,, judges are worked on the FSC according to the provisions established under the TAL which did not adopt the issue of expertise in Islamic law. Also, Law of the Higher Judicial Council No 45 of 2017 art. 3 stated that "The Higher Judicial Council shall perform the following tasks:٣. Nomination of members of the Federal Supreme Court of judges.

(4) Intisar Rabb, "The Least Religious Branch? Judicial Review and the New Islamic Constitutionalism," UCLA Journal of International Law and Foreign Affairs 17(2013):83.

functions because it is the sphere of rules, rights and principles. In addition, the judges in civil law countries are functionaries. They are civil servants and "the judicial process is narrow, mechanical, and uncreative."[1] Even if Iraq adopts judicial review, the court's ability to carry out judicial review may be constrained, unlike judges with the common law apparatus, experience, and bearing to perform the task adequately. Nevertheless, in Iraq it would be more practical if the constitutional judges were granted broader discretion than ordinary judges. Constitutional judges deal with issues concerning the constitutional rights of members of society as a whole, rather than individual cases, as are handled by the judges in the civil law system.

Conclusion

Ultimately, the analysis presented here suggests that we cannot find clear parameters for applying the comprehensive United States judicial review method in Iraq for many reasons, including historical, social, political and legal ones. The most important of these reasons is the legal one because the Supreme Court follows a very broad interpretation method. The inclination of the American judiciary to the rational and reasonable adaptation of cases has moved far from the original concept of the repugnancy clause in the United States, which now follows certain principles and rules according to which the judge can examine a law. If there are any violations of these principles and rules, a law will be invalid. This procedure will certainly not be compatible with the nature of the judicial system in Iraq, which is closely linked to the notion of civil law. The

(1) John Henry Merryman & Rogelio Pérez-Perdomo,"The Civil Law Tradition : an Introduction to the Legal Systems of Europe and Latin America," Fourth Edition."Stanford University Press(4d ed 2018):36-38.

civil law system limits the judge's ability in applying the law only rather than develop or create a law. Even in terms of protecting democracy, the role of the judiciary in Iraq seems somewhat configurable. The main advantage of judicial review in America, which the Iraqi judiciary has proposed to apply, is the rationality of formulating judgments. I hope this logical method will be followed by the Iraqi judiciary to justify applying the substance of legal rule rather than political interests. Because of the difficulties in following the complete model of United States judicial review in Iraq, it is necessary to look at other models from the Islamic world which might be more feasible in Iraq.

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