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THE JUDICIAL BASIS FOR THE BRANCHING OUT OF CONSTITUTIONAL RIGHT

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ABSTRACT

The bifurcation of the constitutional rights of one of the techniques used by the constitutional court to expand the scope of the constitutional right to explicit, and access to the fact that guarantees constitutional rights, and establishes the constitutional elimination of this technique on a particular bond is the constitutional terms of reference, and in the light of his discretion in the exercise of the constitutional powers of , and tends at times To the adoption of a broad branching approach, which confers on the constitutional text containing constitutional rights a wider scope than the scope of an explicit right.

Introduction

The constitutional judiciary, or whatever takes its place in the countries that do not take into account judicial oversight, exercises a set of competencies stipulated in the constitution. These competencies allow it to refer to the constitutional text, and to deal directly with it, to find out what it is, and to use multiple methods to achieve the goal that granted this jurisdiction from Order to achieve it. To begin with, it must be said that the branching does not have an explicit constitutional basis, as is the case in the interpretation, as some constitutions explicitly state the jurisdiction of the supreme constitutional courts to interpret the constitution, including the Constitution

of Iraq for the year 2005, but is the branching not based on a text, or is it included in functions or tasks Constitutional judiciary: To answer this question, it is necessary to present the terms of reference of the constitutional judiciary to clarify the extent to which the constitutional judge can branch out on the basis of it, along with an explanation of the judicial trends that the text is based on the competencies of the constitutional judiciary.

literature review

- **The legal basis for branching**

If we acknowledge the authority of the judiciary to branch out constitutional rights regardless of the source of the branching, that is, whether this branching out is a right, freedom, or principle explicitly stipulated in the constitution, then it is necessary to know the source of this authority, i.e. the authority to branch out rights, then when can the judiciary carry out the branching process until it is prepared A legitimate process within constitutional frameworks? , Starting must Subsidiarity rights and freedoms by the constitutional judge on the occasion of practicing tasks that respect it, if it represents the first bond for the process of subsidiarity, as determined by the constitutional power of the judge in the framework of these terms of reference, so it requires us to search stand on the terms of reference of the constitutional judiciary they represent a welcome area in which The reason prepares the constitutional judiciary to perform branching, and then clarifies the limits of the judiciary's authority in light of these competencies.

1. The jurisdiction of the constitutional judiciary to oversee the constitutionality of laws

One of the most important powers entrusted to the constitutional judiciary is the competence to oversee the constitutionality of laws. Indeed, it is this jurisdiction that established the constitutional judiciary (Yahya, 2000), as it was initially the authority to control the constitutionality of laws exercised by the ordinary courts. Monitoring the constitutionality of laws means establishing a specialized judicial authority or court to look into the compatibility of legislation and regulations with the provisions of the constitution (Muhammad, 2007). The function of oversight is part of the constitutionality of the law and the regulation, that is, making sure that they do not violate the constitution, as it is fundamentally necessary, especially with the development of The functions of the state and the expansion of its scope, as it represents an effective guarantee for the enforcement of the law, and at the same time it is an appropriate sanction for the ordinary legislator's violation of the constitutional text or rule (Ibrahim, 2016) . The constitutionality of laws is monitored in two ways (Saad, 1954), the method of direct litigation and the method of subsidiary payment.

- **Censorship by direct lawsuit**

Censorship by direct lawsuit means a direct request to the judiciary to rule the invalidation of the law that violates the constitution, for it is censorship of an abstract nature, that is, it is not related to a previous dispute before the judiciary (Essam, 2014

) . , Since the person concerned moves it directly, and it is objective, unlike the general rule in legal cases, as most of them are of a personal nature, since the opponent is the law in which the ruling is to be ruled unconstitutional (Abdul-Ghani, 2004) . The ruling issued in the original lawsuit is described as being absolutely authentic, and applies to all without exception, and the issue of the constitutionality of the law that has been canceled cannot be raised again, so this type of constitutional oversight can only be exercised based on an explicit provision in the constitution requiring it. (Nauman, 2009)

▪ **Control by sub-payment method**

Supervision is achieved by means of subsidiary pleading on the occasion of a dispute brought before the judiciary, so one of the litigants argues that the law to be applied to him is in violation of the constitution, and if the judge assesses the seriousness of the defense, it excludes the application of the unconstitutional law (Raed, 2010), and gives the plaintiff of the unconstitutionality of the law a period to file his case before the Supreme Constitutional Court .

▪ **Censorship by way of countering**

This method verifies the methods of judicial oversight of the constitutionality of laws when the constitutional judiciary addresses the consideration of the constitutionality of a text or legislation, provided that it is in connection with a dispute before it, that is, it cannot rule on the constitutionality of a text without an occasion that prepares for it that way or method of monitoring the constitutionality of laws (Muhammad, 1989). The Egyptian legislator adopted censorship by way of confrontation in Article (29) of the Egyptian Constitutional Court Law No. 48 of 1979, while the Iraqi legislator did not provide for censorship by way of confrontation among the forms of monitoring the constitutionality of laws (Ali, 2014). These methods represent the most prominent methods of judicial oversight over the constitutionality of laws, and the Egyptian constitutional legislator has adopted this type of oversight, as the Egyptian constitution stipulates that even though the Supreme Constitutional Court Law is among the mechanism of confrontation in its rulings, while the Iraqi constitutional legislator only mentioned the method of the original lawsuit and the subsidiary payment, The Federal Supreme Court Act clarifies the methods for challenging the constitutionality of laws.

2. Judicial jurisdiction over constitutional interpretation

The task of interpreting the constitution is entrusted to it as we have previously explained in the subject of self-branching of the Supreme Constitutional Court so that the interpretation of the constitution is not left to all, and the constitutional judiciary works to clarify the provisions and texts of the constitution. The issue of interpreting constitutional texts is a matter of importance and seriousness, as interpretation may be expanded or narrowed. Therefore, the importance of the body entrusted with the task of interpreting the constitution appears (Ibrahim, 2016). Therefore, the supreme constitutional courts are granted this jurisdiction.

3. Competence for adjudication of disputes

The constitutional judiciary in the federal state grants unparalleled jurisdiction in simple states, and it is the competence to settle disputes that arise between the federation and the regions, since the jurisdiction of this authority is stipulated in the constitution, so the court that settles the dispute must be the supreme court in the state, as the constitution of Iraq has been granted In force for the year 2005, the Federal Supreme Court has jurisdiction to settle disputes that arise between the federal government and the governments of the regions, governorates, municipalities and local administrations, granting them the jurisdiction to adjudicate disputes that arise from the governments of the regions and governorates, while the Egyptian constitution does not stipulate the competence to settle disputes between the ruling authorities, which is appropriate With the form of state adopted by the Egyptian constitutional legislator, it stipulated the jurisdiction of the Supreme Constitutional Court to separate between two contradictory final rulings, and the dispute over the implementation of two rulings issued by different parties. The aforementioned represent the most prominent competencies of the constitutional judiciary that makes it in direct contact with the constitutional text, and prepares It has reasons for the constitutional division, as the branching is a means in the hand of the judge to resolve the disputes before him, since the judiciary's contact with the constitutional text prepares for him the first step First, the division, as this contact has an explicit constitutional basis, exemplified by these competencies, however it is necessary to clarify the authority of the constitutional judge in the exercise of these competencies. According to the foregoing, the branching may be necessary to monitor constitutionalism, so that in order for the constitutional judiciary to protect a right or freedom, this requires it to clarify its limits and the contents that it contains, so legislation may be ostensibly not in violation of the right, freedom, or principle explicitly stipulated in the constitution, but When the judiciary considers it and the use of a number of methods reaches the unconstitutionality of legislation, and these methods, as previously mentioned, are imposed by the specificity of the constitutional text in terms of drafting, so the branching finds its support in the jurisdiction of constitutional oversight, since the latter allows the judiciary to use various means to reach the protection of the constitutional text. As for the competence of interpreting the constitution, through which the constitutional judge can make branching, and this does not mean that we confuse the branching with the interpretation, but rather that the judiciary can branch the right or freedom on the occasion of submitting a request for interpretation to it, if the interpretation requires that, to refer to the text, showing its meaning, scope, or Its limits, so that it can branch out, since the branching leads to the constitutional will (the will of the group). As for the other specializations that we have mentioned, the judiciary can branch through it as long as it relates to a constitutional text, so disputes and jurisdiction are defined between judicial authorities if their jurisdiction is defined by the constitutional text. It provides the

judiciary with the possibility of branching, and through it it may reach branching principles based on the constitutional texts that distribute the competencies, so the constitution adopts a method of distributing competencies from which certain principles are branched out. The branching is not related to constitutional rights only, but rather to other constitutional texts. If the authority of the constitutional judiciary by branching is based on the powers entrusted, then the scope of this authority is not defined, meaning that the constitution does not stipulate the limits of the constitutional judge's authority, and he is dealing with the constitutional text, but provides him with the legal basis for this dealings that is governed only by the principle of separation of powers and respect for the other authority's competencies. Even the principle of the supremacy of the constitution also applies to the judicial authority, including the constitutional judiciary, that is, it is obligated not to violate the constitutional texts, and in light of these restrictions that represent a framework for the authority of the constitutional judiciary, we can define its authority in the branching. The authority of the constitutional judge in the constitutional text derives from his power in general as a judge, and the Supreme Constitutional Court law did not specify the limits of the court's authority when exercising its competencies, but rather enumerated its competencies, but the Egyptian legislator stated in Article (51) of the court's law that the provisions of the Civil and Commercial Procedure Law apply On judgments and decisions that do not conflict with the nature of those rulings and decisions, as no special text is mentioned in its law. This means that we must refer to the Egyptian Law of Procedure to clarify the limits of the constitutional judge's authority to settle the disputes before him, and when returning to the Egyptian pleading law, as it is governed by the rules of the pleading law. While there is no text regarding the rules governing the Constitutional Court, and neither law specifies the judge's authority to decide on a dispute, except for a provision in the Iraqi Civil Procedure Law No. 83 of 1969 as amended, it came with an absolute ruling that no court should abstain from ruling under the pretext of ambiguity or Loss or lack of text, and then the provision of this article is applied to all courts that apply the law of civil procedures, including the Federal Court, and thus the provision of this article gives the court wide authority over. The constitutional text is a green light for the court for jurisprudence, so removing ambiguity and completing the deficiency, regardless of the mechanism that the court uses to reach this, is only a form of judicial jurisprudence, and the text is binding on the judge, so the matter is not permissible, but rather the judge must do so, when he is challenged. In front of him regarding the unconstitutionality of a text, he must search the constitutional text and the legal text in search that will reach a ruling on constitutionalism. He may adopt various mechanisms that lead to an end to protect the will of the group that is represented by the desired constitutional text, so he can protect the contents of the constitutional text, that is, he must strive to clarify these the contents are for the purpose of protecting

them, and it derives from their general rights that are not explicitly mentioned in their expressions. Hence, we can say that the authority of the judge in general, and the constitutional judge in particular, lies in his duty to resolve the dispute. The judge is not satisfied with the application of the law, but rather he must resolve the dispute before him. Dispute separation is one of the most important manifestations of a judge's assumption of his powers, as the constitution gives him the function of adjudicating Conflicts (Karima, 2003), and in this sense the Supreme Constitutional Court went to (... and since the jurisdiction of this court in the matter of Article (27) of its law, it authorizes it to rule the unconstitutionality of a text in a law or a regulation to which it is presented: that its application presupposes the existence of An original litigation has been brought up against it according to the conditions stipulated in the law of its establishment, and that there is a logical relationship established between this dispute, and what may arise accidentally regarding the suspension of the decision on the constitutionality of the stipulated laws, and then the original dispute is what is originally intended for the litigation ..), and the Constitutional Court The Supreme Court does not take the direct lawsuit, but rather the subsidiary defense, and considers that the condition of litigation and dispute is fulfilled from the outset, and that the ruling on the constitutional case is necessary to settle the lawsuit that initiated the constitutional lawsuit on its occasion, and whatever it is, the description of the dispute is fulfilled in both cases, as submitting a petition For a lawsuit before the court that has important legal implications for the litigants and the court, on the one hand the court is obligated to decide the case brought before it, and not to delay it, so if the court abstains or delays in issuing the judgment without a legitimate reason, then it has failed to fulfill the right (Imad, 2019) . As well as constitutional judge binding dismissal of constitutional Mounazaah of his duties as a judge, and does not affect that the different nature of the constitutional dispute for other disputes, being a case in kind and Almkhasam the contested legislation is unconstitutional, and the jurisdiction of the Court in which often has an absolute authoritative, it is limited to its effect parties to the case (Zaid, 2012) , and then he is also obligated to resolve the dispute brought before him, since the obligations of the judge's duties in accordance with the law apply to the constitutional judiciary, so he is obligated to resolve the disputes brought before him. Contrary to what the Federal Supreme Court went to in one of its rulings when it rejected a lawsuit that was within its jurisdiction, and the dispute regarding it was not resolved, when some members of the provincial councils that were dissolved by the House of Representatives appealed according to its decision issued on 28 / November / 2019 for contradicting the text of Article (122) of the constitution that was granted to the provincial councils, as the court rejected the lawsuit due to the issuance of the Second Amendment Law to the Provincial Councils Elections Law, as the following was stated in the court's ruling (.. The court finds that the consideration of the original

lawsuit and consolidated cases with it has become irrelevant after the issuance of Law No. 27 of 2019 / Second Amendment Law of the Provincial, Districts and Sub-District Council Elections Law No. (12) of 2018, as Article (1) of it stipulates that clause III of Article (44) of the law was amended and replaced by the following text: (Third: Terminating the work of the provincial councils These are not organized in a region and the district councils and sub-districts affiliated with them; therefore, the law has superseded Resolutions (5) and (6) issued on November 28, 2019, and consideration of their unconstitutionality is irrelevant ...). We find that the court did not decide. In the conflict the fact that the conflict still exists on the one hand, and on the other hand, the court did not address an unconstitutional jurisdiction exercised by the House of Representatives, which is to issue legislative decisions that have the force of law, even if the parliament corrects the matter by issuing a law, but it grants itself jurisdiction not stipulated in the constitution. Therefore, it was the first for the court to discuss this, in addition to ending the work, even if it was for one session, but it is the subject of discussion because unconstitutional councils made up of members of the House of Representatives were created for the governorate and these do not represent the people of the province, but rather the whole of Iraq.

- **Judicial trends in branching**

Since the judiciary was based on the specializations entrusted to it to carry out the branching out of constitutional rights, the branching was not an order taken for granted by the constitutional judiciary. Rather, it passed in two phases in its branching in the first phase. It took the formal concept of the constitution, standing at the appearance of the texts and rejecting the process of branching out rights. This is because it does not recognize except the rights mentioned in the constitutional document, and then there is no value for a right outside the constitutional document. It is necessary to examine both stages during this section, with an explanation of the position of the constitutional judiciary in Egypt and Iraq.

- 1. the narrow judicial trend of the concept of constitutional rights**

In the early stages of judicial dealing with constitutional rights, the reliance on determining them was based on the will of the constitutional legislator, as it appeared in the form of the constitutional text, which is called the formal basis of constitutional legitimacy, and this trend depends on the search for the true intention of the constitutional legislator, and prevailed in the countries that practiced The ordinary judiciary has the power to control the constitutionality of laws, without a constitutional text that gives it this jurisdiction, so I turned to restricting the concept of constitutional rights (Ahmed , 2000). It is natural for the judiciary to be careful at its beginning in monitoring constitutionalism from expanding its understanding of the constitutional text related to constitutional rights, as it initially sought to prove its competence in overseeing the constitutionality of the law, so it cannot go far from this purpose, especially if it finds opposition from other authorities Because it interferes with its work. Therefore, this trend was imposed by the circumstances in

which the judge was found. It cannot be said that the judiciary was rejecting the policy of expanding the understanding of constitutional rights, as much as this expansion was feared, that is, not preparing suitable grounds for judicial jurisprudence, despite the fact that the Federal Court in Iraq often appears. With this trend in many of its provisions, and this can be justified by the newness of this court in terms of its emergence, especially since the constitutional judiciary in Iraq is newly established in comparison with the comparative judiciary, and if it is found, it has roots in the Basic Law of 1925 which adopts oversight over the constitutionality of laws, even before censorship in Egypt, however, these roots are not sufficient to strengthen the arm of the Federal Supreme Court in Iraq in protecting rights and freedoms. In some cases, I followed a narrow literal doctrine in the interpretation of rights, an approach rejected by the Supreme Constitutional Court in Egypt, as one of its rulings stated the following: (. ... and the defense guarantee was thus no longer a luxury that can be overlooked, because attachment to its formal fringes without delving into its objective facts is a denial of its content of right, clashing with the meaning of justice and in contradiction to its requirements ...), since rights are one of the most important topics of the constitution, a Which must be addressed by the Federal Supreme Court in protecting it and in light of the authority of the ordinary legislator in regulating rights, that is, activating the text of Article (46) of the Iraqi constitution that delineates the scope of organizing rights and freedoms, and the space that the ordinary legislator must not enter with restrictions, since the activation of this text can be. The court can protect rights, and in order to enable it to subdivide rights, and then access to subsidiary rights, even if this article confuses restriction and regulation as it states: (Restricting or limiting the exercise of any of the rights and freedoms stipulated in this Constitution shall only be by law or based on it, Provided that this limitation and restriction does not affect the essence of the right and freedom.) The phrase the essence of right and freedom understands what the constitution legislator intends to express, meaning that it is concerned with organizing within the framework of the restrictions stipulated in the constitution, because the restriction determined by the ordinary legislator may affect the essence of the right and freedom, and we mean the constitutional restriction. The restrictions stipulated in the constitution, as other restrictions are not considered, so long as the right is specified in the constitution, then its restriction must be included in the constitution as well, and we are not in the framework of analyzing the text of Article (46), but to the extent that this relates to the approach of the Federal Court in the matter of I hope with constitutional rights, as the essence of the right or freedom provides the broad field for differentiation, so based on the essence of right or freedom it is possible to imagine different ramifications for them, such as the idea of the vital field of the constitutional right that brought the Egyptian Constitutional Court to multiple ramifications as it came in one of its rulings that made it on the one hand a constraint on the The legislator, on

the other hand, is seeking it to gain access to the subsidiary rights, as it states: (... and the basic principle with regard to the rights guaranteed by the constitution is that they are not differentiated between them, nor are they organized into a hierarchy that makes some of them inferior to others or in a lower rank than them, but are equivalent in terms of That each of them has a vital area that cannot be broken into by the restrictions imposed by the legislative texts ...) , when the Federal Court did not expand the understanding of the right to defense contained in an explicit provision in the Constitution of Iraq of 2005, when the text of Article (57 / a) of the Code of Procedure for Proceedings was appealed before it. The amended Iraqi, who authorized the judge to make confidential procedures, if necessary, i.e. prevent the accused, the complainant, the civil plaintiff and their agents from attending, provided that he informs them of the investigation minutes, the appellants argued that they contradict the right to defense contained in Article (19 / Fourth) of the Constitution, except that The court dismissed the case The court ruling stated the following: (... that the restriction established by the legislator in accordance with Article 57 / A) mentioned above regarding the attendance of respondents to the investigation sessions is a temporary restriction for specific cases related to the security and safety of society and to preserve the public interest, and that what happens in their absence It will be declared after the circumstance of secrecy has been removed, and they can appeal this procedure ..), and we see that the court did not branch out the right to defense mentioned in (19 / fourth) of the constitution despite the possibility of branching out the right to if it was possible that the right of the accused and his agent to attend All investigation procedures so that the right to defense is complete; Because it needs many foundations, and according to the text of Article 57 / A, the judge granted the ability to make the procedures secret and does not cancel the branched right. Rather, he will restrict this procedure - making the procedures secret - to the narrowest scope, because the court created restrictions that were not present in the legislative text, as Article (57 / A) permits the judge to make the procedures secret if necessary, for reasons that are recorded in the record, and then pronounced the wording, and therefore the trial was negligent in protecting the contents of the right to defense. We conclude from the foregoing that the narrow direction of branching required certain circumstances to be followed at the beginning of the monitoring of the constitutionality of laws, and that the Federal Court tended in many cases to this direction, and by this we do not mean that the court did not branch. But on a small scale compared to comparative judiciary, and it can explain the court's approach to its newness, as well as other reasons, the sovereignty of the legislative and executive authorities at the expense of the judicial authority, as the independence of the judicial authority is in fact more theoretical than practical. For these reasons the court adopted a direction A narrow understanding of constitutional rights .

2. the expanded judicial approach to the concept of constitutional rights

Due to the special nature of the constitutional formulation, which is limited to explaining the basic principles and foundations of the state, and the impossibility of surrounding them in precise details, and to include a broad organization of constitutional rights, rather than the state's keenness to protect constitutional rights cannot be measured by the number of rights explicitly stipulated in the constitutional document (Muhammad, 2007). The narrow trend of the concept of rights in the constitutional judiciary did not last long, as the judiciary went to expand the understanding and definition of constitutional rights (Ahmed, 2000), but some constitutions went to legalize this trend, and many constitutional courts have gone along with this trend (Simon, 2016), including the Supreme Constitutional Court in one of its rulings until (... the freedom of opinion and political belief, considering that the right to form parties is a constitutional right that derives from it and consequent on it ...), the Supreme Constitutional Court has expanded its understanding of freedom of opinion and political belief, assuming that it includes the right to form political parties, a right that is not explicitly stipulated in the constitution, and thus the Supreme Constitutional Court in Egypt has followed the broad trend of the concept of constitutional rights. As for the Federal Supreme Court in Iraq, it relied on this trend in one of its rulings, and if it did not use the term branching, it understood the constitutional rights in light of the principle of democracy that the constitution adopted in Article Two of it, that is, it branched out according to this principle, which resulted in an expansion of the scope of constitutional rights and access to a constitutional right. The constitution did not explicitly stipulate the enumeration of rights, as this ruling stated the following: (... it is required that the attorneys who belong to have a say in choosing who will manage the administrative affairs of the chambers pursuant to the provisions of Article (2 / First / 4) of the constitution that are not permitted to be enacted. A law that contradicts the principles of democracy, foremost of which is the freedom to express opinion by all means, as indicated in Article (38 / First) of the constitution, and among these means is the right to elect whoever represents lawyers to manage their affairs outside Baghdad ...). The court reached a right that was not explicitly stipulated in the constitution, when it referred to explicit texts requiring this right, which is the right of lawyers to choose whom they represent, and it may be said that this contradicts what we mentioned previously, that the court followed the doctrine or direction narrowing the constitutional rights, and that it adopted a literal doctrine in the understanding of rights Constitutionalism, but what we have proposed does not contradict the aforementioned, because the Federal Supreme Court goes in rare rulings to the theory of subsidiary rights, meaning that I branch out, but on a narrow scale, compared to its counterpart, the Supreme Constitutional Court in Egypt, which went with this trend clearly, in many of its provisions, it sought to expand the scope of the constitutional protection of the rights contained in the constitutional document.

Conclusion

After we finished our research on the judicial basis for branching of rights, we came to a set of results and proposals that conclude with the following:

1. The constitutional judiciary, when performing branching, relies on the constitutional prerogatives entrusted to it by the constitutional legislator, as it represents the first basis for the constitutional judge's dealings with the text containing explicit constitutional rights.
2. The judge in general, and the constitutional judge in particular, is obligated to resolve the dispute or to be deemed a denial of justice, and therefore it is his duty to determine the scope of the constitutional text to resolve the dispute that arises over its determination.
3. The judge is granted discretionary power in resolving disputes, and that the constitutional authority of the judge by branching comes from his authority as a judge under the law of pleadings, which is the basis of the important thing in justifying his authority by the branching out of constitutional rights.
4. The constitutional judiciary was divided over the division of rights into two directions: a traditional approach that does not allow the constitutional judiciary to expand the understanding of explicit constitutional rights, and a modern trend that justifies the judiciary to expand the understanding of the constitutional text that includes explicit rights.
5. We suggest amending the Iraqi constitution by granting the Federal Supreme Court when interpreting constitutional rights to resort to international agreements related to human rights in order to expand the scope of judicial branching of rights.
6. We propose to amend the constitutionality by explicitly stipulating the competence of the Federal Supreme Court to protect rights and freedoms in order to expand its discretionary power to control the constitutionality of laws and regulations.
7. We call on the Federal Supreme Court to move independently in the actual process of constitutional rights, and to expand the scope of protection it adopts for constitutional rights.

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