

Extension of provincial councils' work

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ABSTRACT

At the end of each parliamentary session of the provincial councils in Iraq, calls for postponing the elections and extending the work of those councils escalate. Thus, the political parties differ in alternative solutions to postponement, some call for an extension while others call for the dissolution of those councils due to the expiry of the councils' work period. The Provincial and District Council Elections Law No. (12) in 2018 in force has indicated in (Article 48) that the electoral cycle for the Provincial and Judicial Council is four calendar years starting with its first session, however, Article (6 Second) of the above law indicated that the possibility of postponing the elections is within the powers of the Council of Ministers in consultation with the Independent High Electoral Commission. This article did not specify the duration of the postponement and left it to the general public. Hence, we find that the calls of the members of the Independent High Electoral Commission, as well as the calls of members of the House of Representatives for the possibility of extending the work of the provincial councils, are completely dependent on the text of Law No. (12) and not on a constitutional text as in the elections of the House of Representatives.

Keywords: constitution, provincial councils, parliament, law.

Introduction

The Iraqi Council of Representatives decided to terminate the functioning of provincial councils by promulgating Law No. (27) in 2019, which is explained in Article 1 which is to amend the third paragraph of Article 44 of the Provincial Councils Elections Law, which granted the continuation of the work of the provincial councils until the time of holding new elections so that the text of Article (1) of Law (27) is to terminate the work of those councils, as well as the councils of the affiliated districts and sub-districts.

The Iraqi Constitution provided for the reconstruction of new formations, including the Union Council, which was part of the legislature, but the Council of Representatives did not legislate a law for councils, also, the Constitution does not explicitly provide for provincial councils, as it indicated the importance of the Federation Council through its paragraphs. Moreover, the competencies of provincial councils No. 21 of 2008 as amended provide for the election of the council's president and his deputy, dismissal of the president, drawing up general policies for the governorate, announcing the draft budget, reading the draft budget, as well as the other competencies.

The research importance

The provincial councils are one of the vital issues relating to the Iraqi individual. These councils represent

the administrative decentralization of individuals. Although these councils exist, their role has been weak. This has led us to focus our attention on this subject, which is related to extending the work of these councils and focusing on the constitutional articles on which the Council of Representatives was based.

The research problem

The issue of extending the work of the provincial councils is very problematic since the existence of these councils is not an act of law but is based on an explicit constitutional provision. Thus, to formulate a complementary problem on the subject, we ask the following questions:

1. On what did the House of Representatives rely on to extend the provincial councils' work?
2. What are the legal implications of extending the work of provincial councils?
3. Is the extension of the work of the provincial councils compatible with the Constitution or is it a measure contrary to the Constitution?
4. Why does the majority reject the idea of extending the work of provincial councils?

The research Hypothesis

The research is based on the premise that " the provincial councils' existence is constitutional, and their

lack is a breach of the Constitution, thus, no one can cancel their work as per the Constitution".

Research limits

1. Time limits: These limits relate to the period after 2017 and to the present time.
2. Spatial limit: Iraq.

Research Methodology

To verify and prove the hypothesis of the study, and reach the results, we have relied on:

1. The descriptive approach: this study is describing and depicting the studied phenomenon through collecting data and information.
2. The systemic analysis approach: By defining the inputs and analyzing the outputs and feedback for the provincial councils.

Research structure

The research which is entitled (Extension of provincial councils' work) was organized into two chapters as well as the introduction and conclusion, chapter one is entitled (**Motives for extending the work of the provincial councils**), which was divided into two demands: the first requirement included (**Disagreement with electoral law between blocs**) and the second requirement: (**the desire of the political blocs to extend the work of the provincial councils**), while the second chapter was entitled (**the legal impact of the existence of provincial councils after 2019**), and it was divided into two requirements: the first requirement: (**A constitutional breach due to the extension of the provincial council**), and the second (**the Federal Court ending the work of the provincial councils**).

Chapter one

Motives for extending the work of the provincial councils

Provincial councils are organized with inhabitants residing in a given geographical area with permitted organization, a governing body, as well as an independent legal personality and the power to provide certain public or government services with a significant degree of independence, including a legal and effective authority to reap at least part of their income¹. These

¹ George.S.Blair: Government At the Grassroots (California, palisades Publishers, 1977),p4.

councils were last elected in 2013, due to the demonstrations that took place throughout the governorates of Iraq, the Iraqi Council of Representatives worked to end, freeze or stop the work of these councils, knowing that the Council of Representatives, before abolishing these councils, extended their work. The decisions taken by the Iraqi authorities to contain the popular protest movement that began in October 2019, the Iraqi parliament decided to freeze the work of the provincial councils and end the district and sub-district councils². We will recognize this through the following requirements:

The first requirement

Disagreement with electoral law between blocs

Electoral system: a set of principles, rules, institutions, and organs governing and influencing the election process, or a set of procedures whereby voters' votes are translated into seats in representative bodies³. The reason for the absence of provincial councils after 2017 contributed to the extension by the House of Representatives of the work of these councils, which contributed to their survival, although elections are the key and important entry point for the reform and change process and the decentralization of the work of the bodies. It is important not only to hold elections but also for the administrative system. Elections are important to the participant and the operationalization of the institutional administrative system for the functioning of local bodies. The importance of administrative decentralization for Iraqis is highlighted by the election of provincial councils in Iraq to entrust the management of the interests and fate of the population of the governorates and administrative units to elected councils representing those entities⁴.

² Salam Makki, The Constitution, and the provincial Councils, published on Monday, May 17, 2021, <https://alsabaah.iq/46508/>

³ Abd al-Amir Abbas al-Hayali and Waheed Anaam, Geography of Elections, Diyala University Press, Baqubah, 2012, p.49.

⁴ Qassem Khalil, The Experience of Local Governance in Iraq and Ways to Strengthen It, Unpublished Master's Thesis, College of Political Science, University of Baghdad, 2017, p. 46.

- (January 30, 2005 elections): The High Commission supervising the elections has set

an electoral system for the provincial councils, which is System No. 8 of 2004 AD, which states that provincial council elections are held in all parts of Iraq on the same day as the National Assembly and the election of The Kurdistan National Council in January 2005. Provincial councils are elected by general and direct secret ballot, and each governorate is considered one electoral area to elect the provincial council. Seats in each provincial council are distributed to the winning political entities according to the proportional representation system in the same way that was adopted for the distribution of seats in the National Assembly election scheduled for the same day. Seats are allocated to the winning candidates and not to the political entities to which they belong. The elections were organized based on the proportional representation system, which was approved by the Governing Council in accordance with Resolution (78) of 2004 issued on May 30, 2004 AD. The work of this system for all elections in the transitional period was also confirmed in Order No. (96) issued by the Coalition Provisional Authority, and the rule of the proportional representation system is that each list wins several seats according to the percentage of votes that the list won. Based on this rule, there is no single winning list, but all lists that get votes that qualify them to win one or more seats are considered winners, and the losing lists are the ones that get fewer votes than the minimum to win one seat. See Paragraphs 1, 2, 3, and 4 of the second section of the electoral system, System No. 8 of 2004

The (January 30, 2005 elections)* are the first pluralist elections to be held in the country. These elections, which were the subject of intense political controversy before they were held, are seen as an important step towards accelerating the building of the new State's institutions and thereby strengthening the aspiration to end the occupation and other views calling for its boycott as taking place under the umbrella of the occupation. These views were expressed by the announcement by some Iraqi political forces of their boycott of the elections, while terrorist groups in Iraq promised to expand their operations in various areas to thwart the electoral process, intimidate citizens and discourage them from participating in and casting ballots¹.

and Saad Jawad Qandil, Elections Guide, without a printing press, Baghdad, 2005, p. 18.

¹ The Cairo Institute for Human Rights Studies, a report on the Iraqi elections, a step towards democracy or perpetuation of sectarianism.

- (Provincial Council Elections 2009) Provincial council elections were held in 2009, in accordance with Elections Law No. (36) for the year 2008 AD, and based on the Law of governorates not organized in a region No. (21) for the year 2008 AD, and the Constitution of Iraq for the year 2005 AD, as well as the electoral systems Issued by the Independent High Electoral Commission, related to the electoral process, starting with updating the voter register, registering and certifying political entities, passing through the voting, counting and sorting system, and the mechanism for distributing seats to the winning political entities, and then ratifying and announcing the election results, Riad Ghazi Fares, the electoral system in Iraq and its role in the process of democratic transition after 2003, unpublished MA thesis, College of Political Science, University of Baghdad, 2011, p. 105.

Thereafter (2009 provincial council elections)*, then the Provincial Councils Act No. 21 of 2008, as amended by Act No. 19 of 2013, addresses the issue of the continuation of the work of provincial councils, chiefs, administrative units, and chairpersons until the election of new councils in article 55 ter of the final provisions, as stipulated in article 30 of the Act (The governor, his two deputies and heads of administrative units shall continue to administer the daily affairs after the end of the councils' electoral cycle and until their successors are elected by the new councils), that is, the situation remains as it is for the governorate and the provincial council until the elections. Here, it is explicitly permissible to postpone the elections, but without mentioning the causes.

In the 2013 provincial council elections*, the Provincial, District, and Sub-district Council Elections Law No. (36) in 2008 (3) was issued, and then four amendments were made until the beginning of 2013¹. The Provincial Council Elections Act No. 36 of 2008, as amended, stipulates the final provisions of article 46 ter, which stipulates that if elections are postponed, the provincial district and sub-district councils shall continue to practice their work until new councils are elected. Here, the text of the law, which is in force despite four amendments that did not address the essence of this article, is clear that there is a trend and a political agreement to postpone the elections in the

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- (Provincial Council Elections 2013), the most important amendment is the electoral denominator, and the Sainte Lague method was adopted in distributing parliamentary seats to the winning candidates, and it is a method adopted within the framework of the application of the proportional representation system in many countries, perhaps including Norway, the Federal Republic of Germany, and the Republic of Tunisia. Ali Al-Shakrawi, Saint Lago's method of distributing seats in the 2013 provincial elections, Journal of the University College of Islamia, No. 22, 2013, p. 19.

¹ Ali Al-Shakrawi, Saint Lago's method of distributing seats in the 2013 provincial elections, the Journal of the Islamic University College, No. 22, 2013, p. 19.

usual way through a decision of the Council of Ministers that is justified or based on a proposal from the Independent High Electoral Commission for technical considerations. The Council of Ministers considers postponing the elections until these matters are completed and giving powers to the councils to work without mentioning that it is a caretaker. It did not address the suspension of financial privileges², to expand and ensure the representation of components and minorities, the second amendment No. 54 of 2012 and the third amendment No. 55 of 2012, and the fourth amendment No. 114 of the year 2012, then Law No. 12 of 2018, which was amended twice in July and November of 2019, did not make the blocs agree on the electoral system³. Although three electoral processes preceded 2017, the provincial councils and the House of Representatives failed to organize a law that contributes to the election of these councils, which led to the consensus of the political blocs on extending the work of the provincial councils based on political consensus among the blocs. Therefore, on November 26, 2019, the Iraqi Council of Representatives voted on the second amendment to the Provincial Council Elections Law No. 12 of 2018 and decided to suspend the work of all provincial councils, and the decision came two years later to confirm the constitutionality of that step and end the controversy. While the Federal Court indicated that "Provincial councils are administrative and local bodies concerned with implementing financial and administrative powers within the principle of administrative decentralization. The constitution did not grant the exercise of legislative powers."⁴

The second requirement:

The desire of the political blocs to extend the work of the provincial councils

After the political blocs have reached a closed road in the legislation of electoral law for the provincial

² Ahmed Adnan Al-Mayali, Ending the work of the provincial councils: a legal constitutional vision, Future Center for Studies, Baghdad, Thursday, June 18, 2020.

³ The same source, p. 21_24.

⁴ Kirkuk Now, the Federal Court decides that the provincial councils were not abolished, but their work was suspended/published on 2021-06-05, <https://kirkuknow.com/ar/news/65718>.

councils, the blocs gathered until they agreed among themselves. The members of the combined entities in an alliance may agree to present a topic in the council's session and pass it by voting if they are a majority. The political agreement may cause difficulty in taking decisions, which disrupts the sessions of the Council, and because the experience is still young and not yet mature, it did not allow for more practices that show positive diversity in parties or entities, which means presenting new ideas and solutions and means optimal use of available resources, as well as that Flexibility in dealing with crises that occur in the governorate¹.

The political blocs have worked to extend the provincial councils to keep the members of these councils in their places, and this extension was based on Article 46 III of the effective Provincial Councils, Districts and Sub-districts Elections Law, which gave the right to continue the work of the councils until the election of new ones, that "The Provincial Councils Elections Law in force No. 36 of 2008 gave the right to extend the work of the provincial councils until new councils are elected"². Although local governments have entered a constitutional vacuum since 2017, due to the expiration of the mandate of their councils, several opinions have emerged towards the provincial councils and the extension of their work.

First Opinion: This Opinion directs Parliament in administering the affairs of provincial councils instead of provincial councils. This position is supported by the Legal Committee of the House of Representatives through a proposal by which Parliament issues a resolution enabling it to administer the affairs of governorates instead of their councils.

Second Opinion: This view says that the work of the provincial councils is left to the Parliament and the view is supported by the Parliamentary Territories Committee based on article 46 ter of the Law on the Election of Provincial Councils since the extension of the work of the local councils "is up to the legislative authority". The Supreme Coordinating Body among the governorates issued circulars to the local councils, on June 13, 2017, legitimizing their continuation to work until elections are held. The document stated that "Based on the inquiries received about the powers of the provincial councils to continue to work, we would

like to state the following: The provincial, district, and sub-district councils will continue to manage their affairs until new councils are elected as stated in the text of Article {46/Third} of the Provincial Councils Election Law Districts and Sub-districts No. 36 of 2008, as amended, in the event of postponing the elections. The commission confirmed that the continuation of the work of the provincial councils "does not require a decision from the Council of Ministers or the State Shura Council."³

Kirkuk as well as the district and sub-district councils did not witness the holding of local elections for three sessions, thus, the extension is based on the provincial councils' law. The Provincial Council Elections Law (Article 23) sets out to organize local voting in Kirkuk and stipulates that elections for Kirkuk Governorate and its districts and sub-districts shall be held after the implementation of the process of sharing administrative and security authority and public functions, including

³ Muhammad Sabah, the government surprised the parliament by extending the work of the provincial councils, Sawt al-Iraq newspaper, Baghdad, 06-18-2017.

- Freezing, cancellation, and disagreement between the blocs: Through the last amendment to the Provincial Councils Law of 2019," and it is proposed to "focus on the Provincial Councils Law, amend it and read it first to be able to finish its work on November 1 of this year, instead of March 1, 2020." Representative Abbas Al-Zamili asserts that "the issue of whether or not provincial councils exist needs a constitutional amendment, and the constitutional amendment procedures are difficult and need to be presented to the people and there should be a referendum." He points out that "what is currently available is to work through the first paragraph of the provincial councils' law, which allows reducing the number of council members, and the second paragraph, which allows them to end their work.

¹ Provincial Councils Monitoring Report, Provincial Councils Monitor, Umm al-Yateem Foundation, 2012, p. 65.

² Article 46 third of the Provincial, District, and Sub-district Council Elections Law No. 36 of 2008.

the position of the Provincial Council Chairman, Governor and Deputy Governor among the components of Kirkuk Governorate in equal proportions among the components".

Third Opinion: The councils were operated through legislative intervention or amendment to the constitutional vacuum. To solve this legal problem and avoid resorting to courts to solve the dispute over the decision to freeze local councils, the "Al-Fateh" parliamentary bloc proposes amending the new election law instead of freezing or canceling¹. The disagreement of the blocs over the selection of a new electoral commission and the adoption of a new law for local elections led to consensus on calling on provincial councils to continue their work until the election of new councils."²

¹ Omar Sattar, Article: Freezing the provincial councils... an "unconstitutional" decision to calm the protesters in Iraq, Monday 14 October 2019 14:53, link: <https://www.independentarabia.com/node/63731>

² Muhammad Sabah, the government surprised the parliament by extending the work of the provincial councils, Sawt al-Iraq newspaper, Baghdad, 06-18-2017.

*The position of the Liberal bloc: The lack of limitation of powers by-laws caused great chaos for local governments, through the installation and appointment of general managers, which prompted these parties and blocs to employ them in electoral propaganda, "political blocs have been discussing merging elections for a long time," The Liberal bloc attributes the reason for the delay in announcing the merger of the elections until this period to the "crisis of the Electoral Commission," stressing that "the blocs agreed to refer their members to retirement in exchange for granting them full pension rights."

**The position of the Kurdistan Alliance: Representative Soran Ismail says that "Provincial Law No. 21 is complementary to the Provincial Council Elections Law, and there is no intersection between the two laws," noting that "the government has tried,

Differences have been evident in the statements of certain political blocs, such as the position of the Liberal Parliamentary Bloc*, the large blocs insist on keeping the provincial councils for another year, taking advantage of the procedures for the transfer of powers, while the position of the Parliamentary Kurdistan Alliance** appears in the statement of Representative Soran Ismail, "The government is trying to solve the crisis of the constitutional vacuum that was generated due to the inability of the political blocs and parliament to legislate the provincial elections law,"³, the position of the Islamic Virtue Party*** tended to "the constitutional vacuum and the reluctance to provide services to citizens created by the political forces".⁴

Chapter two

The legal impact of the existence of provincial councils after 2019

The local government system achieves a set of goals, including democracy, pluralism, efficiency, contributing to the creation of the economic, social, and political structure, and members of democratic

through this circular, to give a legislative image to the work of local councils during the coming period." MP Soran derives from the Provincial Council Elections Law, which stipulates that "setting the date of the elections shall be by a decision of the Council of Ministers based on a proposal from the Commission, which shall be announced in the various media outlets 60 days before the date set for holding it.

³ Article (46 / first) of the Provincial Councils Law No. (21) of 2008.

*** The position of the Islamic Virtue Party: The mismanagement and political conflicts that led to chaos hit the provinces, and that "mismanagement and extending the work of the provincial councils without setting a time limit led to serious mistakes in the Iraqi state."

⁴ Muhammad Sabah, The government surprised the parliament by extending the work of the provincial councils, Sawt al-Iraq newspaper, Baghdad, 06-18-2017.

societies, this necessitates the existence of this system¹. It enables local communities the management of their affairs, thus, will feel that they participate in decision-making with the central government, which increases oversight and people's participation, reduces tension, establishes stability, saves effort and time, and then achieves development and prosperity.²

The first requirement:

A constitutional breach due to the extension of the provincial council

The violation of the Constitution means any act of the Head of State or of any other entity which constitutes an express or implied violation of any of the provisions of the Constitution and works contrary to what is stated therein through the use of the powers conferred upon him by those provisions, which results in such a violation. Some others argue that the President's failure to perform his constitutional duties constitutes a violation of the constitution. The violation of the Constitution also takes place in the form of abstinence and negative image and can occur - positive image - also, as the use of its powers in contravention of the provisions of the Constitution. Therefore, any violation of the Constitution's provisions may be regarded as a violation of the Constitution, whether or not the violation is a positive or negative act.³

¹ Jamal Fathi Darbek: Municipalities around the world, origin, and development, the municipal system is the most sensitive, expeditious and responding to the needs of citizens, Al Jazeera Saudi Magazine, Issue 73/32 March/2004.

² Saif Al-Asal: Local Government and the Tribe in Yemen, 26 September newspaper, Yemen, No. 1240/26/January/2006.

³ Ardalan Nouredin Mahmoud, The Criminal Responsibility of the Head of State in Internal Legislation: A Comparative Study, The National Center for Legal Studies, Cairo, 2013, p. 237.

* Tariq Harb: He was born in Baghdad in 1945 AD, grew up there, and obtained a Bachelor's degree in Public Law from Al-Mustansiriya University in Baghdad in 1975, then obtained a Master's degree in Law from Baghdad University in 1980. Then he

Perhaps the end of the work of local councils in the Iraqi governorates since 2017, gives legitimacy to the parliament's decision to end an unconstitutional situation represented in the continuation of the work of the expired councils, especially since Parliament is the reason for extending their work more than two years ago. The legal expert, Tariq Harb*, believes that "The continuation of the work of the provincial councils after

obtained a master's degree in law from the University of Baghdad in 1980. He previously served as the president of the Iraqi Legal Culture Association. He also worked as a law teacher in several former colleges and institutes, contributed to many literary and social activities, and has many heritage and legal books / Tariq Harb died in Baghdad after suffering a heart attack on February 2, 2022 AD <https://ar.wikipedia.org/wiki/%D8%>.

*Intisar Al-Jubouri, a deputy in the Iraqi parliament for Nineveh Governorate and her duties in the Iraqi parliament, Chair of the Women, Family and Childhood Committee in the Iraqi Parliament, Chair of the Steering Committee for the Project to Provide Livelihood Support and Psychological and Economic Support implemented by the International Organization for Migration (IOM) Iraq Mission, member Observer at the Higher Population Council, member of the committee drafting a charter of cooperation between public authorities and civil society organizations under the auspices of the United Nations and the European Union, and a member of the Legal Amendments Committee of the Iraqi Institute. Al-Jubouri had obtained a Bachelor of Laws in 1988 from Tikrit University and worked as a research assistant on the staff of the Ministry of Higher Education and Scientific Research / practicing the legal profession for twenty years in the Nineveh Courts of Appeal with all its primary degrees, appeal, Sharia and criminal, misdemeanors and felonies, investigations within Nineveh Governorate and outside it. <https://www.cwpar.org/node/20>

the parliament's voting to freeze their work is against the law, and that all the decisions of the provincial councils are void.", "Provincial council members staying and continuing to work violates the parliament's decision that was voted to freeze their work.", he points out that "there are councils that have been established after freezing their work and accepting the resignation and dismissal of the governors and voted on some paragraphs and projects, and this matter is null." Also, extending the work of the provincial councils put the parliament in embarrassing situations, including:

First: The extension contributed to stopping the peaceful transfer of power

The extension of the work of the local provincial councils is a constitutional violation, and a member of the committee, Intisar al-Jubouri, said, "The extension of the work of the provincial councils for six months, as deliberated by the media, is a constitutional violation. According to legal experts," the extension of the duration of the elections to the local councils is contrary to several articles, including:

1. The sovereignty of the law, the people is the source of the powers, and the elections shall be exercised by direct public secret ballot and through its constitutional institutions.¹
2. Power shall be transferred peacefully through the democratic means stipulated in this Constitution.²
3. Citizens, both men, and women have the right to participate in public affairs and to enjoy political rights, including the right to vote, elect, and be elected.³

These constitutional articles are related to the peaceful transfer of power." "With the expiry of the four years, local councils become outside the constitutional framework and all of their decisions become subject to appeal before the administrative court. The Electoral Commission had announced the impossibility of holding provincial elections during the first half of next year for logistical reasons while noting that "the continuation of the work of the current councils is legal and legitimate."

Second: The extension of the provincial councils is unjustified

¹ Article No. 5 of the permanent Iraqi constitution of 2005.

² Article No. 6 of the permanent Iraqi constitution of 2005.

³ Article No. 20 of the permanent Iraqi constitution of 2005.

The extension of the work of the provincial councils must be justified, convincing, and extended for a period not exceeding one year. The duration of the provincial councils cannot be left to the whims of the members of the House of Representatives and their wishes and opinions. The role of these councils is increasingly important in the light of the operationalization of the transfer of powers from some ministries to provincial councils. When their task will be essential, they cannot be dispensed with or freeze their work. At the same time, (extension) has several problems, the most prominent of which are⁴:

1. An unjustified and indefinite extension of time repeated the problem.
2. The extension places councils in a critical legal and constitutional position because their duties are expired.

Any conduct in which any violation of the Constitution or the law in force means that any call for the abolition of the provincial councils can only be accepted by amending the Constitution to which clear and unchangeable references have indicated. Any call for an extension of the work must be under the amendment to the Provincial Council Elections Act in force No. 12 of 2018. Any invitation not attributed to the Constitution and the Act is illegal and unconstitutional. Article (126) first of the Iraqi constitution regarding constitutional amendments stipulates the right of the President of the Republic and the Council of Ministers collectively, or one-fifth of the members of the Council of Representatives, to propose an amendment to the constitution, while the second paragraph of the article stipulates that it is not permissible to amend the basic principles contained in Part One, and the rights and freedoms contained therein, only after the passage of two successive electoral cycles and with the approval of two-thirds of the members of the House of Representatives, the people in a general referendum and the President of the Republic.⁵

The second requirement:

⁴ Tariq Abdul-Hafiz Al-Zubaidi, The duration of the provincial councils' session extension or termination, Al-Nabaa Network, Baghdad, Sunday, December 30, 2018.

⁵ Moayad Al-Tarifi, "Provincial Councils" Confuse the Iraqi Political Scene, published on Tuesday, May 4, 2021,

<https://www.independentarabia.com/node/218886>.

The Federal Court terminate the work of the provincial councils

The Federal Supreme Court has decided that the work of the provincial councils is unconstitutional after the end of their electoral cycle, and the Supreme Judicial Council issued a statement that "The Federal Supreme Court issued its decision in Case 155 / Federal / 2019 which includes that the existence of provincial councils is a constitutional fact that cannot be avoided, therefore the legislative authority may not legislate a law that includes the abolition of these councils in contravention of the provisions of the constitution, the principles of democracy and the peaceful transfer of power, however, the continuation of the work of the elected councils, whether they are national councils or local bodies, after the end of their electoral cycle, represents a violation of the people's right to vote, elect and be nominated, and transgresses the will of the voter."¹

On June 2, 2021, the court issued its decision in Case 155 / Federal 2019 which included that the existence of provincial councils is a constitutional fact that cannot be bypassed, and therefore the legislative authority may not legislate a law that includes the abolition of these councils in contravention of the provisions of the constitution and the principles of democracy and the peaceful transfer of power. According to article 93 of the Iraqi Constitution, the Basic Court's jurisdiction is to oversee the constitutionality of laws and regulations in force, interpret constitutional texts, adjudicate cases arising from the application of laws and instructions issued by the Federal Authority, adjudicate disputes between the Federal Government, and the governments of the regions, governorates, municipalities and local administrations, and endorse the election results.²

It considered that the continued functioning of elected councils, whether national councils or local bodies, after the end of its election session constituted "a violation of the right of the people to vote, elect, and nominate, and transgresses the will of the voter." The Court indicated that "the period specified for the work of the provincial councils is obligatory and cannot be exceeded, as it is the right of the people and is exercised

¹ Muhannad Abdul-Wahhab and Shaima Rashid, The Federal Court confirms the constitutionality of ending the work of the provincial councils, Al-Sabah newspaper, Baghdad, Thursday, June 03, 2021, p. 2.

² Muayyad Al-Tarifi, "Provincial Councils" Confuse the Iraqi Political Scene, published on Tuesday, May 4, 2021, <https://www.independentarabia.com/node/218886>.

by them in periodic direct elections," and continued that "what was stated in the third paragraph of Article 1 of Law No. 27 of 2019 the Second Amendment to the Provincial and District Council Elections Law No. 12 of 2018 does not mean the abolition of the existence of the provincial councils as a local constitutional body³, rather stopping the continuation of the work of those councils for exceeding the specified period, and this constitutes a return to the will of the people to renew their election." The Court stated that "the Governor is the Chief Executive Officer of the province and is obliged to follow the general policy of the State established by the Council of Ministers and subject to its supervision", adding that, "the concept of caretaker must be understood in the framework of ensuring the functioning of public facilities and not disrupted to ensure the provision of services to the public under the public policy of the State and the parliamentary and administrative oversight required by administrative decentralization". According to the court, the provincial councils "are "Administrative and local bodies are entrusted with the implementation of financial and administrative powers only within the principle of administrative decentralization and are not authorized by the Constitution to exercise legislative powers". Thus, Act No. 27 of 2019 is the Second Amendment Act to the Provincial Council Elections Act and Case No. 12 of 2018, amending the continuity of the work of the provincial councils in accordance with the Constitution, thus, based on that, the court decided to dismiss the case.⁴

³ The Federal Court blocks the path of the Iraqi parliament by enacting a law abolishing the provincial councils, Horizon News follow-up, published on 06-02-2021, <https://shafaq.com/ar/%D8%B3%DB>

⁴ See: Federal Court Decision 155/Federal/2019 and its units 157, 160, 161, 162, 164, 165, 166, 167, 168, 171/2019 and 5/Federal/2021.

* Bahar Mahmoud: Member of Parliament's Legal Committee, I discussed with the Regions Committee a proposed law to amend the Provincial Council Elections Law and to hold provincial elections either at the same time as the Parliament elections or ten days later. She indicated that the committee decided to submit the law to the Presidency of the Council. A first reading is done and then it is discussed, and it remains for the Presidency to set the date, and it may be after the

Accordingly, "The Federal Supreme Court issued a decision on the case No. 118 / Federal / 2019 on May 2, which is related to the provincial councils, as it indicated the unconstitutionality of Article 14 / First of Law No. 10 of 2018 (The Third Amendment Law to the Law of Governorates Not Organized in a Region No. 21 in 2008), the statement noted that the article that the court decided to rule unconstitutional "relates to the continuation of the work of the provincial and district councils", as stated by Member of the Legal Committee of the Iraqi Parliament, Bahar Mahmoud*, also confirmed that "under article 14 of the Provincial Councils Act, if elections to provincial councils have not been held, the legal mandate has been completed since 2017, and no provincial council elections have been held since 2017, thus, the court's decision is binding and everyone must abide by it."¹

This means the constitutionality of the parliament's decision to dismiss members of the House of Representatives, and that the councils remain in their work after completing the four years, i.e. after the year 2017, is constitutionally illegal and it is not permissible to extend the governorate council as the Federal Court has taken several decisions towards the provincial councils, including the following:

First: The Federal Court stated that Article 14 - First of the Third Amendment Law is unconstitutional. In a statement (May 2, 2021), the court issued its decision regarding the lawsuit numbered 118/Federal/2019 on 5/2/2021 regarding the provincial councils and indicated the unconstitutionality of Article 14/first of Law No. 10 of 2018 (the third amendment law to the law on governorates not organized in a region). No. 21 of 2008 related to the continuation of the work of the provincial and district councils.²

Second: "The court considered on (April 29, 2021) a case related to a request for the unconstitutionality of several articles of the Law (Third Amendment to the Law of Governorates Not Organized in a Region)

legislative recess," noting that "the Presidency of the Republic is working on a proposal to amend the electoral law, and if it comes from the Presidency, it will be merged with this proposal. see.

<https://www.todaynewsiq.net/37596--.html>

¹ Salam Makki, The Constitution, and the provincial Councils, published on Monday, May 17, 2021, <https://alsabaah.iq/46508/>

² See Federal Court Decision in Case No. 118/Federal/2019 on 5/2/2021.

Amended No. 21 for the year (2008)." and the statement added, "The plaintiff is battling the Speaker of Parliament in addition to his job" and after reviewing the case, the court decided to postpone it to the second of next May for auditing.³

Third: The court considered stopping the continuation of the work of the provincial councils as constitutional. In the court's statement, it was stated: "The continuation of the work of the elected councils, whether they are national councils or local bodies, after the end of their electoral cycle represents a violation of the people's right to vote, elect and be nominated, and transgresses the will of the voter, as the statement indicated that "what was stated in the third paragraph of Article 1 of Law No. 27 of 2019 the second amendment to the Provincial and District Council Elections Law No. 12 of 2018 does not mean canceling the existence of the provincial councils as a local constitutional body, but rather stopping the continuation of the work of those councils for exceeding the specified period, this represents a return to the will of the people to renew the elections, and this court's decision came in response to an appeal submitted by the Iraqi provincial councils, including Kirkuk and Nineveh, against the approval of the amendment of the election law in 2019, which included the suspension of the work of the provincial councils.

Fourth: The Federal Court affirmed that the Governor is the Chief Executive Officer of the province and is obliged to follow the State's general policy established by the Council of Ministers and subject to his supervision, besides, the concept of caretaker must be understood within the framework of ensuring the functioning of public utilities not disrupting them that guarantees the provision of services to the public in light of the state's general policy and parliamentary and administrative oversight required by administrative decentralization. The court explained that the provincial councils are administrative and local bodies entrusted with the implementation of financial and administrative powers only within the principle of administrative decentralization, and the constitution did not authorize them to exercise legislative powers. Thus, Law No. 27 of 2019 Law of the Second Amendment to the Provincial and District Council Elections Law No. 12 of 2018, the amended law that ended the continuity of the work of the provincial councils is in accordance with

³ Rudaw Digital, Federal Court: The Law on Ending the Continuity of Provincial Councils' Work is in accordance with the Constitution, published on 06-02-2021,

<https://www.rudawarabia.net/arabic/middleeast/iraq/>

the Constitution and based on that the court decided to dismiss the case.¹

In October 2019, the Iraqi House of Representatives voted to suspend the councils as a result of the escalating wave of popular protests and widespread demands to abolish them. Parliament's decision to suspend councils had provoked a wide-ranging constitutional and legal controversy *at the time, prompting a committee of some dissolved councils to appeal Parliament's decision to the Federal Court more than a year ago, but the incomplete quorum of members of the Court suspended the issuance of the ruling until the quorum is complete². A group of provincial council members challenged the law to abolish the provincial councils, which was approved by the House of Representatives before the Federal Court, but the Federal Court had not decided on the matter due to the lack of a quorum after the retirement of one of its members and the recent death of another member, which affected the possibility of holding its sessions or

¹ See: Law No. 27 of 2019 Law of the Second Amendment to the Provincial and District Council Elections Law No. 12 of 2018.

*Despite the constitutional and legal framework that regulates the work of provincial councils, they often face widespread criticism for being redundant councils and a gateway to wasting money. However, defenders of the existence of the councils consider that they are very necessary if they exercise their functions and powers in the right way, and among those actions is the exercise of control over the executive government (the governor), and it also contributes to the consolidation of federal rule and rid the country of the consequences and problems of the severe central government that it enjoyed. In the capital, Baghdad, during the past decades, see: Law No. 27 of 2019 Law of the Second Amendment to the Provincial and District Council Elections Law No. 12 of 2018.

² Fadel Al-Nashmi, ruling that the work of the Iraqi provincial councils is unconstitutional, Al-Sharq al-Awsat newspaper, Saudi Arabia, Monday - 22 Ramadan 1442 AH - 03 May 2021 AD No. [15497].

meetings to make the necessary decisions³. After the issuance of Law No. 27 of 2019 the Second Amendment Law to the Provincial and District Council Elections Law No. 12 of 2018, which resulted in the following:

1. Termination of the work of the provincial councils that are not organized in a region and the district councils and district councils affiliated to it. The governor, his two deputies, and heads of administrative units continue to exercise the tasks and powers stipulated in Provincial Law No. (21) of 2008, with an exception to Article (30) of the aforementioned law, which refers to each of them to the conduct of business at the end of the councils' electoral cycle, which is (4) calendar years. The above law added that the members of the House of Representatives, according to the province they represent, exercise supervision and control over the work of the governor and his two deputies in each province and submit the necessary recommendations in this regard to the House of Representatives.

2. The members of the House of Representatives will oversee the Governor and his deputies. The House of Representatives must proceed with the procedures for asking questions under Article (27) of Parliament Law No. (13) of 2018 or conducting an investigation with the governor based on the item (sixth) of the above article.

Further to the foregoing, many questions have arisen, some of which have been answered by the Iraqi State Council in its resolution No. 12/2020 of 4/2/2020⁴, which was issued immediately after the termination of the provincial councils as follows:

The council discussed submitting the governor's resignation, and the council decided that it should be submitted to the prime minister. The selection of the new Governor should be assigned to the House of Representatives as an elected House of Representatives representing the People's Will. Moreover, the governor, according to Article (24) in the position of deputy minister and deputy ministers of a special rank, does not justify their appointment by the Council of Ministers, but according to Article (61/fifths of the constitution, it is a power entrusted to the House of Representatives

³ Muhammad Sabah, Parliament intends to return the provincial councils to service, Al-Mada newspaper, Baghdad, No. 4804, 2020.

⁴ Alaa Al-Husseini, Disrupting Local Democracy in Iraq by Legislative Will, published on Friday, December 03, 2021, Adam Center, <https://ademrights.org/news625>

only). Besides, what if the governor dies or suffers from permanent impairment or illness that he is unable to carry out his work, who declares that? Who appoints a replacement? All the above questions need urgent answers or we are moving towards central governance again."¹

Conclusion

The political blocs have moved towards extending the provincial councils, however, it clashed with the Constitution first and the Federal Court second, although the political blocs first penetrated the constitution in extending the members of the provincial councils, they created these councils due to popular pressure. The Federal Supreme Court has also addressed the issue of extension and cancellation by emphasizing the right to the existence of provincial councils, since these councils exist constitutionally and not by law, thus, their abolition requires an amendment to the constitution, despite its support for the idea of ending the work of provincial council members in general. We may note at any time the return of the provincial councils to their normal position in the country and re-election.

Thus, the research reached several conclusions and recommendations:

First: the conclusion

1. Provincial councils and district councils existed by virtue of legal articles and constitutional texts, which were addressed by Iraqi laws and the constitution after 2003, and all of these laws and articles are an explicit indication of the application of administrative decentralization in Iraq.
2. Therefore, these councils existed to implement and replace decentralization in a large way, which led to them being a mainstay within the governorates.
3. The reasons and factors that led to the dissolution of the provincial councils and the subsequent councils, i.e. the Judicial Council and the Municipal Council, differ, as there are circumstances that these councils go through that make them vulnerable to changing one of their members or dissolving those councils, and these solutions depend on a set of rules that the law of governorates has referred to in irregular regions.

Second: Recommendations

1. To achieve local and inclusive development and promote the realities of local communities, it is necessary to find an appropriate formula for the

governance and administration of the State and to take advantage of the State's capabilities.

2. Working on an electoral law that meets the interests of all components of the Iraqi people.
3. Leaving political differences between the blocs and providing service to the Iraqi people.
4. Working on a constitutional amendment.
5. The existence of provincial councils is futile as they constitute a financial and administrative burden on the Federal Government.

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