

The Problem of Forming Federal Powers in Light of the 2005 Constitution of Iraq

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Abstract: The 2005 Constitution of Iraq comprises (144) articles divided into six sections. Section three, entitled "Federal Powers", refers to federal authorities which, according to Article (47), "consist of legislative, executive, and judicial powers" exercising their "competencies and tasks on the basis of the principle of separation of powers." This article illustrates how the relationship between these powers is based on the principle of separation of powers, which is one of the fundamental principles of establishing a democratic system. Although the separation of the executive and legislative powers does not mean independence from each other, mutual influences make each power subordinate to the other. This is achieved through effective supervision to ensure that these powers do not deviate from their legal boundaries. The constitutional founder, however, has fortified the parliamentary system from the domination of the executive power by not allowing it to dissolve Parliament (Article 64). Although this is a breach of the balance between the two powers in favor of the legislative one, many of the constitution makers find it justifiable and even necessary in a country with a long heritage of despotism and dictatorship.

Keywords: Federal powers, 2005 Constitution of Iraq, executive power, legislative power, judicial power.

Importance of the Study: The 2005 Constitution of Iraq is considered a turning point in Iraq's history, as it has shifted from a centralized-system simple state to a decentralized federal-parliamentary composite state that adopts the principle of separation of powers. The bicameral system forms federal powers.

The Problem of the Study: Although the 2005 Constitution of Iraq emphasized the separation of powers, we can clearly see the imbalance between the executive and legislative powers in favor of the latter. Additionally, some constitution clauses have not been implemented, especially those related to the formation of the Federal Council, the second chamber of the legislative power.

The Objectives of the Study: To highlight the relationship between the federal powers, which were formed according to the 2005 Constitution, the mechanism of their formation, and the problems that accompanied it, which led to an imbalance in that relationship in favor of some powers at the expense of others.

The Limits of the Study: It includes three determinants: temporal determinant, the period of the study extends from 2005 to 2024, i.e. from the issuance of the 2005 Constitution of Iraq to the present time. Spatial determinant, the study deals with federal powers in Iraq after 2003. Thematic determinant, the study is limited to the field of political systems.

Study Methodology: The study relies heavily on legal and analytical approaches to analyze the texts of the 2005 Constitution of Iraq and determine the relationship between the federal authorities and the mechanism of their composition.

The Structure of the Study: The study is divided into three axes. The first deals with legislative power, the second with executive power, and the third examines judicial power, followed by the conclusion and recommendations.

1. INTRODUCTION

Article (47) of Chapter Three of the 2005 Constitution states that the federal powers are three (legislative, executive, and judicial). This followed the declaration of the Iraqi state as a federal parliamentary republic, in the first article: "The Republic of Iraq is a single federal, independent and

fully sovereign state in which the system of government is republican, representative, parliamentary, and democratic”¹. Also, Iraq's transformation into a federal state required it to adopt the bicameral system, which is considered a requirement of federal states to maintain a balance between the interests of the federal state and the interests of the states. Accordingly, the 2005 Constitution makers formed the federal powers (Al-Mufarji, *Constitutional Law*, 105).

1.1. First: The Legislative Power

Countries' constitutions differ in terms of organizing the legislative power, some make it a single council called (the single-chamber system), while in other countries it is formed by two councils called (the bicameral system) (Al-Mufarji, *General Theory*,131). In the 2005 Constitution of Iraq, Chapter One of Section Three, entitled “The Legislative Power”, Article (48) stipulates: “The federal legislative power shall consist of the Council of Representatives and the Federation Council”. As a general rule, the purpose of the presence of two chambers in the legislative power is that (the first chamber) represents the people and is often called (the Council of Representatives) or (the lower chamber) and its seats are distributed according to the number of residents in each state or province. As a result, one can notice that the states with large populations win more seats, and thus this chamber represents the people. On the other hand, (the second chamber) is called (the Council of States) or (the higher chamber) where the states are represented equally regardless of their importance in terms of size, population, or natural resources. The purpose of the two-chamber system is to achieve balance. If the Council of Representatives leads to the control of the large states over the small ones, then the Council of States, with its equal representation, guarantees the small states the defense of their rights and interests before the large states.

As for the powers of the two councils, they may vary from one country to another; however, at present most countries consider both councils to be equal in legislative power, as the approval of both councils is required as a condition for legislating federal laws before they are issued, as is the case in the United States of America and Mexico (Al-Limon 206-7). However, the makers of the 2005 Constitution have overlooked the importance of the (Federation Council) in the legislative power, as we find, through our reading of Chapter One in Section Three, that the legislator has devoted the entire chapter to demonstrating all matters related to the Council of Representatives, with merely (Article 65) to discuss the Federation Council. It states: “A legislative council shall be established named the ‘Federation Council,’ to include representatives from the regions and the governorates that are not organized in a region. A law, enacted by a two-thirds majority of the members of the Council of Representatives, shall regulate the formation of the Federation Council, its membership conditions, its competencies, and all that is connected with it.”² In other words, details of the composition, purpose, powers, and selection of the Federation Council were completely omitted from the Constitution, leaving it to the Council of Representatives to issue a legislative regulation to fill this matter.

On the other hand, Article (137) of the Constitution stipulates the postponement of the implementation of the provisions of the articles related to the Federation Council until a decision is issued by the Council of Representatives by a two-thirds majority at its first electoral session, which shall be held once the Constitution enters into force. Consequently, this left the Council of Representatives with absolute power to control and form the other half of Parliament, thus losing the balance between the two councils, which is the main goal in forming federal countries (Al-Barzanji 744).

As for the formation of the Council of Representatives, Article (49/First) states: “The Council of Representatives shall consist of a number of members, at a ratio of one seat per 100,000 Iraqi persons representing the entire Iraqi people. They shall be elected through a direct secret general ballot. The representation of all components of the people shall be upheld in it”³. Reading the article makes it clear that the legislator did not set a specific restriction in determining the members of the Council of Representatives; therefore, we see that the number varied from one electoral cycle to another from 2005 to 2020, as this article states that the members of the Council of Representatives represent the Iraqi people at a rate of one representative for every (100,000) one hundred thousand people of Iraq. In the

¹ Article (1) of the 2005 Constitution of the Republic of Iraq.

² Article (65) of the 2005 Constitution of the Republic of Iraq.

³ Article (49/First) of the 2005 Constitution of the Republic of Iraq.

Council of Representatives elections held in 2005, the number of members' seats was (275) seats according to Elections Law No. (16) of (2005), considering the population census according to the statistics of the Iraqi Ministry of Trade in the ration card. In the elections of (2010-2014), the members of the Council of Representatives reached (325) seats according to Elections Law No. (26) of (2009), taking into account the increase in the population by (2.8%)⁴, then the number rose to (328) in the elections of (2014-2018) according to Elections Law No. (45) of (2013)⁵, and then it rose in the elections of (2018-2022) to reach (329) according to the amendment of Elections Law No. (12) of (2018). Although the government that emerged from the elections of (2018) did not last long due to the October demonstrations that led to government resignation in December (2019), Elections Law No. (9) of (2020) did not change the number of seats in the Iraqi Council of Representatives⁶.

The problem lies in the adoption of the issue of the census itself. It is known that the census adopted by the Independent High Electoral Commission in this context was based on the ration card announced by the Iraqi Ministry of Trade, whether in the previous Council of Representatives, elections (15/12/2005) or the parliamentary elections held on (7/3/2010). This census was undoubtedly inaccurate due to the inaccuracy of organizing the ration card for the Iraqi people in general. Moreover, there were many cases of fraud, in addition to the inclusion of many deceased persons whose names were still registered. Therefore, relevant authorities, primarily the Ministry of Planning, were supposed to conduct an accurate and comprehensive population census before any elections could be held (Al-Barzanji 748).

As for the mechanism for the convening of the Council of Representatives, Article (54) stipulates that "The President of the Republic shall call upon the Council of Representatives to convene by a presidential decree within fifteen days from the date of the ratification of the general election results."⁷ The electoral cycle of the Council of Representatives shall be four years, beginning with the first session and ending at the end of the fourth year. The Council of Representatives shall have an annual session with two legislative terms, each lasting eight months, the first of which shall begin on (1/ February) and end on (30/ June), while the second shall begin on (1/ September) and end on (31/ December) (Marwa 176). The term of the session in which the general budget is presented shall not end until it is approved. As for the legal quorum, it shall be achieved by the presence of the absolute majority of its members, and decisions shall be taken in the sessions of the Council of Representatives by a simple majority after the quorum is achieved, unless otherwise stipulated. If the votes are equal, the side with which the President voted shall prevail (Al-Attar 142).

Regarding the powers and competencies of the legislative power, it is known that the most important jurisdictions of the legislative power are the legislation of laws, and legislation is defined as "the process of enacting legal rules by the competent authority according to the established procedures and limiting the legislative authority to Parliament" (Suleiman 27). Although the legislative power has the sole competence to legislate laws, the executive power can enact laws under what is called (Decree-Law). Accordingly, the legislation of the law is the exclusive work of the legislative power, while the decree-law is the competence of the executive power (Al-Kadhim 145). Concerning the Iraqi Council of Representatives, the constitution has confirmed its legislative competence, as stated in (Article 61/First) of the 2005 Constitution of Iraq "Enacting Federal Laws", and as is known, the process of enacting laws goes through several stages, namely proposing laws, passing through discussion, and ending with ratification and publication in the official gazette.

As for proposing laws, the 2005 Constitution granted the authority to submit draft laws to both the legislative and executive powers, under the text of Article (60) First: "Draft laws shall be presented by the President of the Republic and the Council of Ministers". Second: "Bills shall be presented by ten members of the Council of Representatives or by one of its specialized committees"⁸. Article (80/Second) also stipulated: "The Council of Ministers shall exercise the following powers: To propose bills."⁹ Under the above provisions, the right to propose laws is submitted by ten members of the Council of Representatives or by one of its specialized committees, whereas bills shall be submitted by

⁴Ahmed Al-Dabbagh, "Six Parliamentary Sessions since 2003", Al-Jazeera News, 27 March 2023, www.aljazeera.net.

⁵ Iraqi Council of Representatives Elections Law (No. 45 of 2013), Official Gazette of Iraq, no. 4300 of 2013.

⁶ Iraqi Council of Representatives Elections Law (No. 9 of 2020), Official Gazette of Iraq, no. 4603 of 2020.

⁷ Article (54) of the 2005 Constitution of the Republic of Iraq.

⁸ Article (60) of the 2005 Constitution of the Republic of Iraq.

⁹ Article (80/Second) of the 2005 Constitution of the Republic of Iraq.

the President of the Republic and the Council of Ministers. Therefore, according to the Constitution and the internal regulations of the Council of Representatives, both the legislative and executive powers have the right to submit draft laws. However, after the issuance of the Federal Supreme Court's decision No. (44/Federal/2010) that interprets Articles (60) and (80) of the Constitution, bills must be submitted by the executive power and not the legislative power and the bill must be submitted by the executive power (the President of the Republic and the Council of Ministers exclusively), and if it is submitted by anyone else, this is considered a constitutional violation. Thus, the right of the legislative power in Iraq to propose laws was restricted by the above-mentioned Federal Court decision. The scope of submitting bills was limited to the executive power, since the fate of the draft laws submitted by the legislative power is subject to the opinion and will of the executive power, thus the legislative power cannot exercise its authority to legislate laws except after the proposed law is submitted in the form of a bill by the executive power.¹⁰

It is also noted that the tendency in the interpretation of the Federal Court affects the principle of separation of powers adopted by our Constitution in Article (47), which states: "The federal powers shall consist of the legislative, executive, and judicial powers, and they shall exercise their competencies and tasks based on the principle of separation of powers."¹¹

Although the Constitution adopted the parliamentary system that allows the executive power to participate with the legislative power in submitting bills, the decision of the Federal Court above restricted the submission of bills to the executive power without the legislative power, with inherent jurisdiction, to legislate laws (the right to propose laws). This matter is a violation of the principle of separation of powers since the legislation of laws is exercised by the will of the executive power.

However, it is noticeable in the Iraqi Parliament that political disputes and tensions have long overshadowed the Parliament sessions, and the bill should be submitted to the Presidency to ratify the law, which means that each member of the Presidency has the veto to approve the law, and this is dangerous. The solution is to consider the ratification of two members of the Presidency Council as valid ratification by the majority or for the draft to be ratified by the President of the Republic and one of his deputies to be ratified by law. The ratification of the President of the Republic or the Presidency Council is called (issuance).

It is worth noting that most of the laws issued by the Council of Representatives during its term are amendments or repeals of previous laws. Even the legislation that was issued after labor, was issued through procedures and negotiations between the blocs, like what happened in the vote on (the security agreement concluded between the United States of America and the Iraqi government), as well as (the general amnesty law), (and the law of regions and governorates in 2008) (Hussein 19).

According to Article (62), the second jurisdiction of the Council of Representatives is the financial jurisdiction. Based on this article, the Council of Representatives is responsible for approving the draft general budget law and the final account submitted by the Cabinet. Accordingly, the role of the legislative power is not limited to approving the general budget. Still, it extends to participating with the executive authority in determining the necessary expenditures for the state, the mechanism for distributing them, and amending the budget texts if necessary (Shehata 2). In addition, Parliament has the right to ratify all the final accounts at the end of the fiscal year, to identify the government's spending mechanism within the state's general budget (Abdul Wahab 374).

The third jurisdiction of the Council of Representatives is the supervisory jurisdiction over the executive power, known as political oversight. It is important because it represents the will of the people and expresses their desires. In its oversight of the executive power, the Iraqi constitution granted the parliament the right to supervise both the President of the Republic and the ministers, individually or jointly (Al-Muhammadawi 64).

1.2. Oversight of the President of the Republic

The Head of State, whether King or President of the Republic, is known to be politically irresponsible in the parliamentary system, while the permanent 2005 Constitution of Iraq made a different approach in (Article 61/Sixth/A) which referred to the issue of the President of the Republic based on a reasoned

¹⁰Decision No. (44/Federal/2010), Federal Supreme Court, Iraq.

¹¹ Article (47) of the 2005 Constitution of the Republic of Iraq.

request by an absolute majority of the members of the Council of Representatives. According to Article (61/Sixth/A), the Council of Representatives may submit a request to its President to question the President of the Republic if he violates his powers stated in Article (73) of the Constitution, provided that the request contains the reasons justifying this request, and is submitted by an absolute majority of its members. However, after reviewing the powers of the President of the Republic stated in Article (73), it was found that they are (honorary) powers that do not contain any executive powers, and therefore there is no justification for these powers from the Iraqi Council of Representatives.

Article (61/Sixth/B) also stipulates that the Iraqi Council of Representatives has the authority to relieve the President of the Republic by an absolute majority of its members after his conviction by the Federal Supreme Court in one of the following cases: "Perjury of the constitutional oath- violating the Constitution- high treason."¹² According to this text, if the Council of Representatives does not decide by an absolute majority of its members to relieve the President of the Republic despite his conviction by the Federal Court for such serious crimes, then the decision of the Federal Court becomes worthless, and the President of the Republic can continue his work despite his conviction by the highest judicial authority in Iraq. It is assumed that the decision of the Federal Court to condemn the President of these crimes is automatically followed by his relief from his position without the need for the approval of the Council of Parliament because it is assumed that the judicial power is independent in exercising its work.

This constitutional ruling received considerable attention after the president's involvement in political disputes, and questions were raised about the possibility of his relief. Some political forces preferred to relieve the president of the republic at that time, but were unable to do so, which raised questions about the possibility of amending the aforementioned law.

1.3. Oversight of the Ministry

Article (61/Seventh) of the 2005 Constitution of Iraq stipulated the right of Parliament to oversight the executive power through interrogation.¹³ Interrogation means criticism and accusation of the government or one of the ministers. It is more than questioning because it includes the meaning of accountability for the government or ministers (Al-Shawi 28), which was confirmed by Article (1) of the internal system of the Iraqi Council of Representatives,¹⁴ where it established the Council of Representatives as the supreme legislative and supervisory power that exercises the specialties stipulated in Article (61). In the same article, the constitution addressed the tools and means of oversight in Iraq, which were determined as (questioning - raising a general topic for discussion - interrogation), and the constitution considered them effective oversight tools for the actions of the executive power.

The political reality of the Iraqi parliamentary experience is that most cases of parliamentary questioning, investigation, or any parliamentary oversight in Iraq have resulted in no action by any official, whether political or ministerial and no minister or government official has been held accountable, except for the Minister of Trade (Abdul Falah Al-Sudani), who was questioned based on financial and administrative corruption and the import of food products unfit for human consumption. Confidence was withdrawn from the minister and he was deemed resigned on 16/5/2009.

In fact, many members of the previous and current Council of Representatives do not have the basic knowledge of legal or parliamentary culture, so the government has become immune from accountability, exploiting the ignorance and failure of the members of the Council to exercise oversight, and even in the interrogation and summoning sessions, the government lacked methodology and seriousness, and it seems that the motive behind this was more political than professional (Khalil 391). The Iraqi legislator is criticized for not having established in the constitution a constitutional mechanism for questioning the members of the Council of Representatives and monitoring its work in case it exceeds its powers, the constitution, and the law, or if it no longer represents the interests of the people. Such a mechanism prevents the legislative power from exceeding by restraining it. The constitution was also supposed to stipulate a mechanism for removing a representative or a group of representatives if they do not represent the interests of the people by specifying a certain percentage of the people who have the right to remove them if they are available based on Article (5) of the constitution: "The people are the source of authority and legitimacy" (Muhammad 7).

¹² Article (61/Sixth/A) of the 2005 Constitution of the Republic of Iraq.

¹³ Article (61/Seventh) of the 2005 Constitution of the Republic of Iraq.

¹⁴ Article (1) of Internal Regulations of the Iraqi Council of Representatives (No. 1 of 2022).

Accordingly, it seems that the 2005 Constitution of Iraq has established the foundations for consolidating the legislative power by providing mechanisms for oversight, interrogation, and withdrawal of confidence from ministers or the Prime Minister (Article 61/Seventh and Eighth), even if this was subject to partisan bargaining according to the traditional overlap between the legislative and executive powers in the parliamentary system, the questioning and dismissing of the President of the Republic (Article 61/Sixth), and preventing the executive power from exploiting states of emergency (Article 61/Ninth) to the extent that Parliament thwarted the government's attempts to implement this article during the ISIS occupation crisis. The constitution has also relatively succeeded in subjecting the government to financial accountability according to almost regular annual budgets (Article 62), and it has also succeeded in preventing immunity and independence for members of the Council of Representatives and protecting them from political repression (Article 63). This privilege in empowering the legislative power intentionally caused the vertical weakening of the government's powers, as it deprived the Prime Minister of the right to dismiss his ministers and even imposed them on him by voting on them individually (Abdul Hussein 58), as stated in (Article 76/Fourth): "The Prime Minister-designate shall present the names of his members of the Council of Ministers and the ministerial program to the Council of Representatives. He is deemed to have gained its confidence upon the approval, by an absolute majority of the Council of Representatives, of the individual Ministers and the ministerial program."¹⁵ Similarly, (Article 78): states that "The Prime Minister is the direct executive authority responsible for the general policy of the State and the commander-in-chief of the armed forces. He directs the Council of Ministers, presides over its meetings, and has the right to dismiss the Ministers, with the consent of the Council of Representatives."¹⁶

1.4. Second: The Executive Power

Chapter Two of Section Three dealt with the mechanism of its formation as stated in (Article 66): "The federal executive power shall consist of the President of the Republic and the Council of Ministers and shall exercise its powers in accordance with the Constitution and the law." Accordingly, the Constitution adopted the duality of the executive power, which is one of the rules of the federal system. They can be addressed according to the 2005 Constitution as follows:

1-The President of the Republic: In parliamentary regimes, the President of the Republic is considered the head of the executive power. Although Article (1) of the Iraqi constitution dealt with the regime as republican, parliamentarian, and democratic,¹⁷ the President of the Republic, according to Article (70), is elected by Parliament by a majority of two-thirds of its members,¹⁸ according to the conditions mentioned in Article (68) to choose the President of the Republic.¹⁹ Because the Iraqi constitution adopts the dualism of power, the President of the Republic must be someone other than the prime minister or the minister, as the parliamentary system is based on the necessity of the organic separation between the two positions (Shiha 288-9). As for the President of the Republic's term in office, it is one of the problems found in the 2005 constitution when the presidential elections were linked to the parliamentary elections, as stated in Article (72): "The President of the Republic's term in office shall end with the end of the term of the Council of Representatives" which is four years, as stated in the same article. This created a major problem in the elections of (2010 & 2014), where it was found that the president participated with one of the parties in the process of forming the government at the expense of the other parties. For this reason, the legislator must make the president's term in office (7) years with no reelection to ensure that the presidential elections do not synchronize with the parliamentary elections on the one hand and to reduce the possibility of the president's participation in the process of forming a government based on party interest on the other hand (Al-Ali 69).

As for the Vice President of the Republic, it is one of the matters that the 2005 Constitution overlooked, as the Constitution did not specify the number of deputies for the President of the Republic, although Article (75/Second and Third) referred to the Vice President of the Republic replacing the President of

¹⁵ Article (76/Fourth) of the 2005 Constitution of the Republic of Iraq.

¹⁶ Article (78) of the 2005 Constitution of the Republic of Iraq.

¹⁷ Article (1) of the 2005 Constitution of the Republic of Iraq.

¹⁸ Article (70) of the 2005 Constitution of the Republic of Iraq.

¹⁹ The candidate for the presidency of the Republic must be (Iraqi by birth, fully eligible, over forty years of age, of good reputation and political experience, known for his integrity, uprightness, justice, and loyalty to the country, and not convicted of a crime that violates honor). See Article (68) of the 2005 Constitution of the Republic of Iraq.

the Republic in the event of his absence or in the event of his position being vacant for thirty days.²⁰ However, what happened in Iraq made the Vice President a mechanism for distributing ministerial portfolios to political parties during the process of forming the government. Therefore, the legislator was supposed to remove any mention of the position of Vice President from the Constitution. In the event of the President's absence for any reason, the Council of Representatives must elect a replacement for him within a period specified by the Constitution. However, if the position of Vice President remains, the legislator must emphasize not deviating from his basic mission, which is to replace the President of the Republic in the event of his absence (Al-Ali 69).

Concerning the political responsibility of the President of the Republic, i.e. the inadmissibility of questioning him about the affairs of government, it is well known in parliamentary systems that the President of the State is not questioned before the legislative authority. In other words, the latter authority does not have the right to use its oversight tools represented by questioning, interrogation, and withdrawing confidence from the President of the Republic (Khalaf 31).

However, the 2005 Constitution granted the Council of Representatives the right to question the President of the Republic after an absolute majority, according to Article (61/Sixth/A), in the event that he is convicted by the Federal Court in one of the following cases (perjury, violation of the Constitution, high treason).²¹ The Federal Court's interpretation of Article (93/Sixth), which is related to adjudicating the accusations directed at the President of the Republic, the Prime Minister and the Ministers, was that the article is not activated except by the issuance of a law by the legislative authority that specifies the dimensions and mechanisms of its implementation. Since the law has not been enacted, the accusations directed at the titles mentioned in the text of Article (93/Sixth) are adjudicated under the laws currently in force.²²

1.5. The Prime Minister

The Council of Ministers is the second body of the executive authority, consisting of the Prime Minister and ministers, the number of whom has not been specified, as stated in Article (66) of the Constitution.²³ The 2005 Constitution referred to the law the task of forming ministries, their functions, jurisdictions, and the powers of each minister, by Article (86).²⁴ According to the 2005 Constitution, the Prime Minister is directly responsible for the country's general policy, the Supreme Commander of the Armed Forces, and chairs the Council of Ministers and its meetings. He also has the right to dismiss the ministry (Qaddouri 65). It is worth noting that the implementation of general policy by the Prime Minister is within a ministerial program, as stated in Article (78) of the Constitution²⁵.

It seems that the constitutional legislator ignored many of the matters that are customary in the constitutions of political systems, such as the number of vice presidents of the republic, the mechanism for the resignation of the prime minister, or even the bloc that can form the government if the position of the prime minister becomes vacant, and other cases that were ignored by the 2005 Constitution and reinforced by vague interpretations of the Federal Supreme Court, which were influenced by the political and psychological circumstances surrounding the Iraqi experience (Al-Ali 57).

The 2005 Constitution of Iraq was unclear regarding the executive authority, and this is related to the mechanism of forming the Council of Ministers, as stated in (Article 76/First) concerning what is meant by the largest parliamentary bloc: "The President of the Republic shall charge the nominee of the largest Council of Representatives bloc with the formation of the Council of Ministers within fifteen days from the date of the election of the President of the Republic."²⁶ The question to be raised here is what the constitution meant by the largest parliamentary bloc, as the constitution did not specify the identity of the alternative assignees or the final period for forming the cabinet, and did not adopt fixed dates or

²⁰ Article (75/Second and Third) of the 2005 Constitution of the Republic of Iraq.

²¹ Article (61/Sixth/A) of the 2005 Constitution of the Republic of Iraq.

²² Decision No. (35/Federal/2012), Federal Supreme Court, Iraq.

²³ Article (66) of the 2005 Constitution of the Republic of Iraq.

²⁴ Article (86) of the 2005 Constitution of the Republic of Iraq.

²⁵ Article (78) of the 2005 Constitution of the Republic of Iraq. For more, see Jawad Al-Hindawi, *The Political System in Light of the Federal Constitution*, Baghdad: Al-Aref, 2006, p. 49.

²⁶ Article (76/First) of the 2005 Constitution of the Republic of Iraq.

threatened to dissolve Parliament if the latter failed to adhere to the constitutional periods for forming the government.

Although there were no constitutional problems regarding this mechanism in the first parliamentary session, the situation changed starting from the second parliamentary session (2010-2014) and this debate ended with the presentation of the subject of interpreting (Article 76) to the Federal Supreme Court to issue the decision (No. 25/Federal/2010 on 25/3/2010) which stated (The Federal Supreme Court finds that the expression “the largest Council of Representatives bloc” means: either the bloc that was formed after the elections through a single electoral list, entered the elections with a specific name and number and won the largest number of seats, or the bloc that was formed from two or more electoral lists that entered the elections with different names and numbers and then coalesced into a single bloc with a single entity in the Council of Representatives, whichever is more numerous. The President of the Republic shall assign the candidate of the parliamentary bloc whose parliamentary seats in the first session of the Council of Representatives became more numerous than the other bloc or blocs to form the Council of Ministers based on the provisions of (Article 76) of the Constitution.²⁷ Thus, the court has two concepts for the largest parliamentary bloc. The first concept is determined according to the (traditional criterion), as the largest parliamentary bloc is the electoral bloc that wins the elections with the highest number of seats. The second concept is the (numerical criterion), which refers to the bloc that was formed from two or more electoral lists that entered the elections with different names and numbers and then coalesced into a single bloc with a single entity in the Council of Representatives, whichever is greater in number.

Despite the clarity of the decisions of the Federal Supreme Court and their binding nature according to (Article 94) of the Constitution, the Council of Representatives enacted Elections Law (No. 9) of 2020, which violated the concept of the largest parliamentary bloc in (Article 45), which states: “No representative, party or bloc registered within an open list that wins the elections has the right to move to another coalition, party, bloc or list except after the formation of the government immediately after the elections, without violating the right of open or individual lists registered before the elections to form a coalition with other lists after the elections are held.”²⁸ However, based on Article (13) of the 2005 Constitution, which stipulates that the Constitution is the supreme law in the country, we can consider Article (45) of the Elections Law void because it conflicts with the constitutional text²⁹.

After the work in the previous parliamentary sessions settled on announcing the largest parliamentary bloc in the first session of the Council of Representatives, the matter ended with the judicial amendment of the Federal Supreme Court in Decision (No. 7 and its unified 9 and 10 / Federal / 2022 issued on 2/3/2022), which stated: “since the nomination of the candidate tasked with forming the second part (the Council of Ministers) is from the largest parliamentary bloc, the list that includes this bloc is submitted to the Presidency of the House of Representatives for review and to ensure that it has the largest number of representatives, then it is sent to the President of the Republic to exercise his role following Article (76) of the Constitution. This does not prevent the list of the largest parliamentary bloc from being submitted in any session of the House of Representatives, even if it is after the session to elect the President of the Republic, because the list of the largest parliamentary bloc is subject to change according to the alliances between the parties and lists until the announcement of the largest bloc by the Presidency of the Council of Representatives and then submitting it to the President of the Republic. Since the President of the Republic was not elected constitutionally until the date of filing this lawsuit, and the Presidency of the Council of Representatives did not announce the name of a certain bloc given that it is the largest bloc, parties and independent figures can join each other according to the provisions and conditions of the Council of Representatives Elections Law No. (9) of 2020, and submit this list to the Presidency of the Council of Representatives, which announces the name of the largest bloc clearly by stating the names of those who signed it (parties, lists, or independent figures),

²⁷ Decision No. (25/Federal/2010), Federal Supreme Court, Iraq.

²⁸ Article (45) of the Election Law No. 9 of 2020.

²⁹ Article (13/First) of the 2005 Constitution of the Republic of Iraq states: “This Constitution is the preeminent and supreme law in Iraq and shall be binding in all parts of Iraq without exception”. Second, “No law that contradicts this Constitution shall be enacted. Any text in any regional constitutions or any other legal text that contradicts this Constitution shall be considered void.”

then it is submitted to the President of the Republic after his constitutional election to exercise his role in assigning the candidate of this bloc to form the Council of Ministers.”³⁰

The Federal Court’s interpretation of the largest parliamentary bloc has caused several problems: The first problem has contributed to constitutionally codifying consensual democracy by defining its mechanisms and requiring majority consensus for nomination without resorting to the traditional decisive mechanism, i.e., the electoral results. The second problem is practical and it contributes to creating a constitutional vacuum or vortex by suspending the largest blocs on parliamentary coalitions, which are variable, and this is where the contradiction lies, as in the crisis of the resignation of Adel Abdul Mahdi’s government, where the largest bloc – according to the court’s interpretation – that nominated Adel Abdul Mahdi no longer existed when he resigned, and therefore who had the right to nominate, i.e. any bloc. The third problem is that there is an objection to granting the President of the Republic, who is an individual, a “representative” of a national component in a country with national and sectarian sensitivities, and a representative or party leader in a country with party polarizations, the right to assign the candidate of the largest bloc to form the Council of Ministers because this creates endless problems and conflicts causing a political disaster. In addition, the constitution has limited the President of the Republic to be a judge rather than a ruler with an almost honorary position which never allows him to hold critical powers such as naming the Prime Minister (Abdul Hussein 59-61).

The peaceful transfer of power is one of the most important goals of the 2005 Constitution, as stipulated in Article (6), which states: “Transfer of authority shall be made peacefully through democratic means as stipulated in this Constitution.” Although electoral legitimacy seems acceptable in Iraq, we cannot ignore the fact that the lifespan of governments has been decreasing from 2005 until the present, and the process of forming a government has become more difficult and prolonged after each election. In addition, the failure to hold provincial council elections from 2013 to 2023 is a major failure, although the performance of the constitution seems good at the federal level, which raises concerns about the future.

1.6. Third: The Judicial Authority

The Federal Supreme Court was formed under the Law of Administration of the State for the Transitional Period of 2004, under Legislative Order No. (30 of 2005) per the legislative powers granted to the Council of Ministers and not issued by the Council of Representatives at that time.³¹ The Constitution of 2005, though criticized, followed to organize the judiciary clearly, as Chapter Three of Part Three was assigned to this authority and seemed keen on its independence and the independence of its judges. The constitutional provisions that organized the judiciary in Iraq, which include Articles (87-101), came to establish an independent judiciary that adopts a comprehensive legal organization, whether at the level of the constitution or ordinary legislation and establishes the principle of judicial independence, such as how judges are appointed and dismissed and the extent of their financial and judicial independence (Al-Ali 58).

The Constitution referred to the components of the judiciary in Article (89): “The federal judicial power is comprised of the Higher Judicial Council, the Federal Supreme Court, the Federal Court of Cassation, the Public Prosecution Department, the Judiciary Oversight Commission, and other federal courts that are regulated in accordance with the law.”³² Thus, the Constitution considered both the Higher Judicial Council and the Federal Supreme Court as components of the judiciary.

The Constitution then granted the Higher Judicial Council the management of the affairs of the judicial bodies and the supervision of the federal judiciary. It also granted the Council the authority to propose the draft annual budget for the federal judiciary and submit it to the Council of Representatives for approval under (Article 91/First/Third) of the Constitution.³³ However, what is held against the constitutional legislator is that he did not indicate the method of forming this council (in terms of the

³⁰ Decision No. (7 and its unified 9 and 10/Federal/2022), Federal Supreme Court, Iraq.

³¹ Khamoush Omar Abdullah, “The Impact of the Decisions of the Federal Supreme Court on the Iraqi Political Reality”. *Al-Sharq for Strategic Research*, July 2022. www.research.sharqforum.org/ar/2022/7/28.

³² Article (89) of the 2005 Constitution of the Republic of Iraq.

³³ Article (91) states that the Higher Juridical Council shall exercise the following authorities: First, “To manage the affairs of the judiciary and supervise the federal judiciary” and third “to propose the draft of the annual budget of the federal judicial authority, and to present it to the Council of Representatives for approval”. See Article (91) of the 2005 Constitution of the Republic of Iraq.

number of members, the conditions for their selection, and their powers), leaving that to the ordinary legislator. Accordingly, the Higher Judicial Council Law No. (112 of 2012)³⁴ was issued. Before the issuance of this law, there was a constitutional, political, and legal debate in Iraq about the issue of the presidency of the Higher Judicial Council, whether it would be for the President of the Federal Supreme Court or the President of the Court of Cassation. However, the law settled the debate in favor of the President of the Court of Cassation, thus the law separated the presidency of the Federal Supreme Court and the Higher Judicial Council. The Federal Supreme Court overturned the law, declaring it unconstitutional pursuant to Decision No. (87 of 2013) on 16/9/2013. Accordingly, the President of the Federal Court would continue as the President of the Judiciary³⁵.

The Federal Supreme Court believes that it is independent of the Higher Judicial Council according to Article (92/First) of the Constitution, which states that “The Federal Supreme Court is an independent judicial body, financially and administratively.”³⁶ However, we do not share what the Court has concluded because the term financial and administrative independence appears more than once in the Constitution and means technical independence, i.e. non-interference in its work and influence. Since the Federal Supreme Court is one of the components of the federal judicial authority according to Article (89) of the Constitution, it cannot be considered financially independent from the Higher Judicial Council. In contrast, the Federal Supreme Court ruled the opposite when it issued on (11/4/2017), that Article (3/Second) of the Higher Judicial Council Law No. (45) of 2017 is unconstitutional, which stipulates that the Higher Judicial Council shall propose the annual budget project for the judiciary, accusing it of violating the provisions of the Constitution, while its decision constitutes a violation of the Constitution itself. Therefore, the independence of the court that the constitution makers wanted was intended to confront authorities, institutions, and parties outside the judicial authority. Otherwise, they would not have considered the Supreme Court one of the components of the judicial authority³⁷.

Article (88) affirmed the independence of judges stating that they “are independent, and there is no authority over them except that of the law. No power shall have the right to interfere in the judiciary and the affairs of justice.”³⁸ However, the Constitution makers made a mistake when they allowed the Council of Representatives to interfere in the powers of the Higher Judicial Council following Article (91/Second and Third), which is related to nominating the President, members of the Federal Court of Cassation, the Chief Public Prosecutor, and the Head of the Judicial Supervision Authority and presenting them to the Council of Representatives for approval of their appointment, in addition to the condition of obtaining its approval of the draft annual budget for the judiciary proposed by the Higher Judicial Council. Therefore, to ensure its independence, the role of the Council of Representatives must be abolished or restricted.³⁹ Concerning the members of the Supreme Court, as stipulated in Article (92/Second), we need to amend this article to include judges and legal scholars as members of the court while ensuring that they are selected according to objective criteria without the executive authority interfering in their appointment⁴⁰.

The jurisdiction of the Federal Supreme Court is to monitor the constitutionality of laws and regulations in force, as stated in Article (93/First),⁴¹ which means that it is a constitutional court. However, the phrase “regulations in force” means that the jurisdiction of the court extends to monitoring administrative work because, as is known, the system is an administrative work issued by the executive authority based on law, meaning that the jurisdiction of the court is administrative as well as constitutional judiciary. It seems that the legislator wanted the court to dominate by monitoring (federal laws, decisions, regulations, instructions, and procedures issued by the federal authority). Despite this

³⁴ Higher Judicial Council Law No. (112 of 2012).

³⁵ Decision No. (87/Federal/2013), Federal Supreme Court, Iraq.

³⁶ Article (92/First) of the 2005 Constitution of the Republic of Iraq.

³⁷ Ghaleb Amer Al-Gharibawi, “Commentary on the Ruling of the Federal Supreme Court No. 38/Federal/2019”. *Higher Judicial Council*, 17 Dec. 2020. www.sjc.iq.

³⁸ Article (88) of the 2005 Constitution of the Republic of Iraq.

³⁹ Article (91/Second and Third) of the 2005 Constitution of the Republic of Iraq.

⁴⁰ Article (92/Second) of the 2005 Constitution of the Republic of Iraq states: “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 shall be determined by a law enacted by a two-thirds majority of the members of the Council of Representatives”.

⁴¹ Article (93/First) of the 2005 Constitution of the Republic of Iraq.

dual jurisdiction of the Federal Court, the legislator did not allow it to interfere in disputes between the three authorities (Al-Zuhairi 18). Article (93/Sixth) indicated the right of the court to adjudicate the accusations directed against the President of the Republic, the Prime Minister, and the ministers, and this article was supposed to include the Speaker of the Council of Representatives, his deputies and members of the Council of Representatives to ensure that the actions of the Council of Representatives are held accountable by the judicial authority (Al-Obaidy 5).

2. CONCLUSION

The 2005 Constitution of Iraq established a political system based on the separation of powers, as stipulated in Article (47) of the Constitution. The parliamentary system should be based on the balance between the executive and legislative powers while ensuring the independence of the judiciary; however, through our observation of the parliamentary experience in Iraq, we have found many constitutional texts that violated this balance in favor of the legislative power. For example, granting the Council of Representatives the right to question the government and withdraw confidence in ways that served the legislative power. There was also an imbalance in the formation of the legislative power itself when the constitution formed it from two councils, one of which represented the people, which was the Council of Representatives while the other represented the states and was called the Federal Council, leaving the formation of the second council by a law enacted by a two-thirds majority of the members of the Council of Representatives, noting that this law has not been enacted since 2005 until the present day. The legislator also has to amend Article (76) to clearly confirm that the largest parliamentary bloc is the bloc that wins the elections, as it reflects the decision of the people, not the bloc formed after the elections, as it reflects the decision of the political forces.

On the other hand, the constitution stipulated the enactment of (72) laws to implement its provisions, while there were still (6) laws that had not been enacted in the Third Chapter related to the federal authorities, namely (the Emergency Law - the Federal Council - the National Intelligence Service - the Federal Supreme Court - the trial of the President of the Republic, the Prime Minister, and the Ministers - Communications and Media Commission). As for the judiciary, although the constitution confirmed for the first time the independence of the judiciary and even greatly exaggerated when placing it above accountability and outside the balance between the authorities, its texts are still weak in organizing the judiciary and determining the status of both the Federal Court and the Supreme Judicial Council. It therefore needs an explicit text that makes the Supreme Judicial Council the sole authority responsible for forming the Federal Supreme Court, with the necessity of keeping the judiciary away from political conflicts.

3. WORKS CITED

3.1. First: Laws and Legislation

1. 2005 Constitution of the Republic of Iraq.
2. Iraqi Council of Representatives Elections Law No. 45 of 2013, Official Gazette of Iraq, no. 4300 of 2013.
3. Iraqi Council of Representatives Elections Law No. 9 of 2020, Official Gazette of Iraq, no. 4603 of 2020
4. Higher Judicial Council Law No. 112 of 2012.
5. Internal Regulations of the Iraqi Council of Representatives No. 1 of 2022.
6. Decision No. 44/Federal/2010, Federal Supreme Court, Iraq.
7. Decision No. 25/Federal/2010, Federal Supreme Court, Iraq.
8. Decision No. 35/Federal/2012, Federal Supreme Court, Iraq.
9. Decision No. 87/Federal/2013, Federal Supreme Court, Iraq.
10. Decision No. 7 and its unified 9 and 10/Federal/2022, Federal Supreme Court, Iraq.

3.2. Second: Books

1. Abdul Wahab, Muhammad Rifat. *Constitutional Law*. Alexandria: Maaref Establishment, 1991.
2. Abdul Hussein, Adnan, et.al. *Evaluating the Effects of the 2005 Constitution of the Republic of Iraq on the State and Society*, the International Foundation for Democracies and Elections. Baghdad: Dar Al-Rawaq, 2023.
3. Al-Ali, Zaid and Youssef Awf: *The Iraqi Constitution: Analysis of Controversial Articles - Solutions and Proposals*. Beirut: Friedrich Ebert Foundation, 2020.
4. Al-Attar, Fouad. *Political Systems and Principles of Constitutional Law*. Cairo: Dar Al-Nahda Al-Arabiya, 1973.

5. Al-Mufarji, Ihsan Hamid; Al-Jadda, Raad Najji; and Na'ma, Ktaran Zghair. *General Theory of Constitutional Law in Iraq*. Baghdad: Al-Senhoury Library, 2011.
6. Al-Mufarji, Ihsan; et. al. *Constitutional Law and Constitutional System in Iraq*. Cairo: Al-Atik, 2011.
7. Al-Kadhimi, Saleh Jawad and Dr. Ali Ghaleb Al-Ani. *Political Systems*: Baghdad: Dar Al-Hikma, 1991.
8. Al-Hindawi, Jawad: *The Political System in Light of the Federal Constitution*. Baghdad: Al-Aref, 2006.
9. Al-Limon, Awad. *Political Systems and Principles of Constitutional Law*: Faculty of Law, University of Jordan, 2nd ed., Dar Al-Wael, 2016.
10. Al-Obaidy, Bushra. *The Principle of Separation of Powers: Its Concept/Center in the Iraqi Constitution*. Baghdad: University Foundation for Studies and Publishing, 2021.
11. Al-Shawi, Munther. *Constitutional Law*. Cairo: Dar Al-Maaref. Vol. 1, 2nd ed., 2007.
12. Hussein, Bakr Ali. *The Legislative Function of Parliament in the Parliamentary System*, College of Law, University of Mosul, 2021.
13. Khalaf, Ali Abbas. *Legal Reasons behind the Weakness of the Executive Power in the Constitution of the Republic of Iraq*: Al-Mustansiriya University, Faculty of Law, 2014.
14. Marwa, Ismail. *Constitutional Law*, 2nd ed. Amman: Jordanian House, 2015.
15. Muhammad, Haider Bassem: *The Principle of Separation of Powers in Iraqi Legislation*: College of Law, University of Mosul, 2020.
16. Qaddouri, Hassan Muhammad. *Prime Minister in Contemporary Parliamentary Systems*. Cairo: Dar Al-Fikr Al-Arabi, 1987.
17. Shehata, Khattab Abdullah and Ahmed Saleh Abdul Rahman: *The General Budget and the Participatory Budget with Application to the Egyptian Budget*, Cairo University, 2008.
18. Shiha, Ibrahim Abdulaziz. *The Principles of Political Systems-States and Governments*. Cairo: Dar Al Nahda Al Arabiya, 2006.
19. Suleiman, Issam. *Parliamentary Systems between Theory and Practice*: Beirut, Al-Halabi Legal Publications, 2010.

3.3. Third: Periodicals

1. Al-Barzanji, Sarhang Hameed. "The structure of the Legislative Power in the Iraqi and German systems". Tah Lai Zanist, Lebanese-French University, Erbil, Volume 4, Issue 4, Fall 2019.
2. Al-Zuhairi, Riyad. "A Legal Opinion on the Iraqi Constitution - Democratic Papers". Opinions on the Iraqi Constitution, Iraq Center for Democracy Information. Issue no. 5, October 2005.
3. Khalil, Sahar Kamel. "The Legislative Power in Iraq in Light of the 2005 Constitution: Reality, Prospects, and the Future". Political Issues, Nahrain University, Issue 35-36, 2014.

3.4. Fourth: Websites

1. Abdullah, Khamoush Omar. "The Impact of the Decisions of the Federal Supreme Court on the Iraqi Political Reality". *Al-Sharq for Strategic Research*, July 2022. [www.research.sharqforum.org /ar/2022/7/28](http://www.research.sharqforum.org/ar/2022/7/28).
2. Al-Dabbagh, Ahmed. "Six Parliamentary Sessions since 2003". *Al-Jazeera News*, 27 March 2023, www.aljazeera.net.
3. Al-Gharibawi, Ghaleb Amer. "Commentary on the Ruling of the Federal Supreme Court No. 38/Federal/2019". *Higher Judicial Council*, 17 Dec. 2020. www.sjc.iq

3.5. Fifth: Theses and Dissertations

1. Al-Muhammadawi, Aya Taha. "The Exercise of the Council of Representatives of its Constitutional Powers between Text and Reality: A Comparative Study. Unpublished master's thesis, Faculty of Law, Middle East University, October 2021.

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