

## النظام الدستوري العراقي: أعلى برلمانية ام فصل بين السلطات؟

المدرس الدكتور

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### الخلاصة

وافق العراق على دستور جديد في استفتاء شعبي يوم 15 تشرين الأول/أكتوبر 2005، ودخل حيز التنفيذ في عام 2006، استنتج كاتبوا الدستور العراقي أن النظام البرلماني سيكون أكثر فاعلية وملائمة في دولة العراق الجديدة ، حيث وصفوا دولة العراق ، كديمقراطية تمثيلية برلمانية اتحادية، تعمل سلطاتها على أساس مبدأ الفصل بين سلطاتها الثلاث ، ومبدأ الفصل بين السلطات من شأن تطبيقه ان يعزز انتشار السلطة ، في حين أن النظام البرلماني التقليدي يعزز توحيدها او دمجها او تركيزها لدى البرلمان. وبالتالي ، فإن محاولة خلق التوازن بين تطبيق النظامين ليست بالمهمة السهلة، مع ذلك صدر الدستور ونفذ وكان من المفترض أن تتم عملية بناء وعمل النظام الدستوري بشكل أساسي وفقاً لمبدأ الفصل المعتدل بين السلطات والذي يتضمن التعاون فيما بينهما ، ولكن بخيبة أمل كشف تطبيق الدستور ان هناك اختلال واضح جداً في البناء الدستوري للنظام السياسي والدستوري للدولة. يشهد العراق مؤخرًا محاولات للتحويل نحو دولة المؤسسات ليكون دولة مؤسسية ، وليس دولة توافقية ، حاولنا في هذا البحث تسليط الضوء على أخطاء التجربة الدستورية في الفترة الماضية ، لتحفيز القادة السياسيين نحو تصحيح الأخطاء عن طريق تعديل الدستور والقوانين، او تعديل الية تطبيقها. اوضحنا هذا الخلل ، واقترحنا بضعة امور تكون اتجاهات نحو الإصلاح الدستوري ، ومواضيع للأبحاث المستقبلية.

# Iraqi Constitutional System: Is a Supreme Parliamentarianism or Separation of Powers?

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## **ABSTRACT**

Iraq approved a new constitution in a popular referendum On 15 October 2005, and entered into force in 2006, Iraqi constitutional designers concluded that parliamentary system were indeed more effective and fit to the new state of Iraq, they described the state of Iraq,as federal parliamentary representative democratic ; working on the ground of the principle of the separation of powers, separation of powers foster the diffusion of power, while parliamentary system foster its unification. Thus, create the balance between the two is not easy mission. The constitutional system process , was supposed to be carried out basically in accordance with principles of moderate separation and cooperation among authorities, but disappointedly there was a very obvious imbalance in constitutional construction of political, constitutional system of the state. Iraq is witnessing a transactional process towards an institutional state, not a consensual state, highlighting the mistakes of the constitutional experiment for the past period, motivates political leaders to correct mistakes by amending the constitution and laws. We will highlight that imbalance, and suggest directions for constitutional reform ,and future researches .

## 1-Introduction

The Iraq's constitution of 2005, is the first legal document to be approved by an elected Constituent Assembly and a national referendum since 1924. This process represents shifting point at Iraqi history, from monarchy to a representative constitutional government based on peaceful transfer of power and separation of powers. The permanent Constitution distributed federal powers among three authorities, and provided to exercise their competence according to the doctrine of power separation<sup>(1)</sup>.

The decision to adopt either a presidential or a parliamentary system is a critical aspect of constitutional design specially for Post-dictatorship systems, to identify which type is best for democratization. Taking all possible causal effects into account; Iraqi Constitution explicitly adopted the parliamentary system<sup>(2)</sup> as a method of governance, and Required to be functional according to the doctrine of the separation of powers<sup>(3)</sup>, as first and most important pillar in the democratic systems of modern times. Accordingly parliamentary system must be based on separation of powers not fusion, and must contain cooperation and balance between the legislative and executive branches, in order to work properly. The ongoing interaction between parliamentarianism and public administration holds the promise of a more constructive relationship between democracy and professionalism<sup>(4)</sup>.

As to some jurisprudence, developed Parliamentary system based on the balance and equality between authorities, rigid separation or fusion and Inequality in powers will create imbalance in the in whole constitutional system and concentrate powers in one body.

Observation indicates that the adoption of parliamentary system by the Iraqi constitution is still debatable. While many believe that system is suitable for Iraq because of the Religious and ethnic diversity, others believe that parliamentary system is a complete failure which has negatively affected the functional roles of the Iraqis institutions. This study therefore, examines the constitutional organization of the authorities, their competencies and the relations between them, in order to understand how the constitution established the parliamentary system according to the principle of separation of powers, which is explicitly stated in the constitution, and analyzes the elements of Iraqi parliamentary system.

Generally speaking, it is concerned with the central question of any parliamentary system, whether there is fusion or separation of powers. so the research, will highlights the structure of the state as dictated by the provisions of the Constitution, and focus on the imbalances that have taken place in this structure, the issue has two dimensions, theoretical and practical. None of them can stand without the other, it is

not possible to search for an effective parliamentary system without balanced texts, and there is no meaning to balanced texts without a democratic reality.

## 2-Strengthen the House of Representatives

In modern times, the doctrine of separation of powers was the most important, intellectually and in terms of its impact on institutional structures<sup>(5)</sup>. Separation of powers means the distribution of the powers of the national government among three distinct and coordinate branches-the executive, the legislative, and the judiciary, and the standard conception of it presumes three organically independent branches, with equivalent ambitions of maximizing their powers<sup>(6)</sup>.

The theory of the framers was that each branch would serve as a check on the other two, thereby assuring the accountability of government and the liberties of the people<sup>(7)</sup>. This system of "checks and balances" was designed, in the words of Justice Brandeis, "not to promote efficiency but to preclude the exercise of arbitrary power".

Iraqi Constitution stated in article (47) the doctrine of the separation of powers, as most of modern constitutions, so it distributed powers among three branches : the executive, the legislative, and the judicial. Each of these three branches must have a check on the powers of the others. These checks provide a system of balance in the government, and that is why we call the system checks and balances as we mentioned before, but when we look at the wide scope competences of the House of representatives, we find that the constitution has strengthened the parliament to a large extent, by granting the House of Representatives a variety of specialties in addition to its traditional competencies in contemporary parliamentary systems.

The Iraqi constitution awards the parliament a tremendous amount of latent authority. It allows the parliament significant leeway in another respect: many of its provisions are hollow, establishing only the vaguest principles and structures and leaving all the details to legislation. Although it is not unusual for a constitutional document to concentrate on general principles, the Iraqi document is extreme in allowing the parliament to determine the shape even of fundamental governmental structures (the Supreme Federal Court, independent commissions, the council of federation) with little guidance. The same is true with most rights and freedoms. The meaning of the constitution will not become clear until the relevant legislation is written<sup>(8)</sup>.

### 2.1. Legislative powers

Parliament in any democratic political modern system is considered as the main institution because it plays an important role in the expression of the electorates' wills in accordance with the rules of constitution. One of its main functions is to legislate

laws, according to the will of the people as stated in the constitution ,and to ensure accountability while paying attention to the interests of diverse groups<sup>(9)</sup>.

It is known that most parliaments of federal states consist of two chambers, the first being formed according to the inhabitants of each region or state, the second representing states or regions by an equal number of members, provided that the texts organizing the two councils are included in the constitutional document.

The Constitution stated that the legislative power is vested in two bodies, the House of Representatives and the Federation Council, The House of Representatives "Majlis an-Nuwwab" consists of members (one representative per 100,000 inhabitants) elected for four years, with two sessions in each annual term. the Federation Council "Majlis al-Ittihad", will consist of representatives from Iraq's regions. Its precise composition and competence; not stated in the constitution, but was left to be regulated by a law enacted by the house of Representatives. this represent one of the most predominant manifestations to strengthen House of Representatives against Federation Council. The latter is the second part of legislative branch which is supposed to represent the federal regions, but the

Constitution left its organization to a consensual law issued by the House of Representatives, which is extraordinary approach, because Federation Council is an essential constitutional institution and must be organized by the Constitution itself. Creating an upper house in parliament is based on regional representation would give regions a voice at the center, check the centralization of power, and, by providing a second set of local elites, minimize regional corruption<sup>(10)</sup>. At the same time the Constitution postponed establishing the Federation Council to the second electoral legislative session. we may ask how is it fit to organize certain constitutional system and then postponed the implementation of it?

This is presumably an effect of the hurried drafting process<sup>(11)</sup>,and it's definitely a strengthening factor for the House of Representatives against of the second chamber in the legislative branch "the federation council" and this is one of the most prominent signs of imbalance in the Iraqi federal system, because all powers of parliament wither legislative or non-legislative; where vested in the House of Representatives nothing left to federation council .

We can summarize the legislative powers of House of Representatives as following:

### 2.1.1 Legislating federal laws.

In a large majority of countries, parliaments have the constitutional right to initiate legislation, yet most laws originate by the executive. Parliament has the power of scrutiny of executive proposals. The principal legislative powers of the House of representatives are set out in Article 60 and 61 of the Constitution. it has jurisdiction

to make laws which do not fall within the exclusive legislative authority of the regions and provinces.

The draft of a new law has to be presented to the House of Representatives. A law can be introduced in four ways: (1) by the President of the Republic, (2) by the Council of Ministers (government), (3) by a group of at least 10 members of the House of Representatives, or (4) by a specialized parliamentary committee.

Each law will be voted on by the House of Representatives. According to Article 59 of the Iraqi Constitution, in order to pass laws, a parliamentary quorum has to be reached (i.e. more than 50% of the members of parliament have to be present) and the law has to receive a simple majority of "yes" votes. That means that a little over 25% of the parliamentarians can pass a law .

The laws, regulations, and amendments will become effective with their announcement in the official publication "Al-Wiqa'i al-iraqiyah". The Parliamentary Bylaws regulate the details of the legislative process, such as how many readings a law will undergo in parliament, whether the President of the Republic has to sign every law etc.

From what mentioned above, we can obviously notice no participation in legislating federal laws by the Federation Council, House have the complete control on the legislating operation. In most federal states, the two chambers share legislative functions, taking into account the differences in legislative competencies between the two chambers in the various federal states; the legislative process includes debates and voting in the House and a similar process in the Senate, This is the approach followed by most federal constitutions<sup>(12)</sup>.

### **2.1.2 Legislating laws regulating the ratification process of international treaties and agreements.**

House of representatives also enjoys the power to legislate laws for approving and implementing any treaty or agreement with any country. There was no mention of the participation of the Federation Council in this regard, the constitution made the ratification of the international treaties and conventions a privilege confined to the House of Representatives. No participation by the Federation Council, and the government cannot complete any agreement of any kind without the consent of the House of Representatives, even in treaties that may concern the territories, the Constitution does not expressly refer to any role of the Federation Council. This issue is kind of riskiness to the federal system and may create an opportunity to ignite crisis between the central government and federal territories.

### 2.1.3 Legislating Budget Law.

The state's financial function is considered to be the oldest of the historical parliamentary functions, Parliament has great importance in financial affairs and this because of the importance of public money to provide a better life for citizens and to fund the government's programs and functions. The general budget of the State shall be considered as the basic document of the State's finances and the implementation thereof shall be approved by the Parliament.

According to the constitution; Council of Ministers shall submit the draft of general budget bill and the closing account to the House of Representatives for approval; The House may conduct transfers between the sections and chapters of the general budget and reduce the total of its sums, and it may suggest to the Council of Ministers that they increase the total expenses, when necessary.

It would have been better if the constitutional legislator authorized the approval of the budget by a special committee, including financial experts and consultants, to approve the budget away from partisan and political influences and also to avoid delays in its approval and implementation so as not to disrupt public funding and the government shutdown. This is what happens in Iraq when House of representatives tries to approve the budget for each fiscal year. The voting on the budget is always delayed due to the differences of political parties and blocs within the parliament. Since 2006 and until now (2018), the parliament failed to approve any budget at the specified constitutional date.

### 2.2 Powers relating to executive authority.

The Constitution empowers House of Representatives to exercise many competence relating to executive fields, some of them relating to the president of the state, others relating to the prime minister and council of ministers .

In relation to the president, House of Representatives have the power of Electing the President of the Republic. House of Representatives shall elect the President of the Republic from among the candidates by a two-thirds majority of its members. By an absolute majority of its members; House of Representatives has the power of Questioning the President, based on a petition with reasons cited; and has the power of Exemption from office after being convicted by the Federal Supreme Court in one of the following cases:

1-Perjury of the constitutional oath. 2-Violating the Constitution. 3-High treason.

There is almost consensus in the constitutional jurisprudence that one of the main characteristics of the parliamentary system is the irresponsibility of the head of state. The parliament cannot accuse or question the president politically or exempt him from

office. On the contrary, the parliamentary government is the one responsible for the public administration of the state and accordingly, is politically accountable to the parliament. In this sense, Maurice Duferger defines the parliamentary system as a system divided executive authority into two parts: the head of state, and the ministry or the government, the latter is politically accountable to the parliament<sup>(13)</sup>. This will put the president in a weak position in front of the House of Representatives because they are the ones who elect and dismiss him, and will lead to imbalance in the political system, and the president will not be able to play its neutral role as an intermediary between the two authorities when there is a dispute between them.

Most presidents in parliamentary systems, like the constitutional monarchs in democratic parliamentary monarchies, have only limited powers and functions<sup>(14)</sup>. So, the traditional type of parliamentary system, vests the real power in the Council of Ministers, so the responsibility lies with the government, not the president. On the other hand, some French jurists have another opinion they say that the parliamentary system does not contradict the view that the head of state should participate actively in the administration of government, and that he has the right to have special political role, and may perform functions independently of government.

In relation to the government, House of representatives has expanded role in the appointment of state employees according to the Constitution of 2005. The Constitution put in the hand of the House; the appointment of senior officials in the state, including the most important members of the government- the Prime Minister and his deputies and ministers- based on article 76, which explicitly referred to the role of the House in approving the selection of the Prime Minister and members of his ministry and granting them confidence. In addition to other members of the government; the agents of ministries; head of the National Intelligence Service and heads of security agencies who occupy degrees subject to civil authority; The Iraqi Army Chief of Staff; his assistants, those of the rank of division commander and above, and the director of the intelligence service, ambassadors and those with special grades, based on a proposal from the Council of Ministers. This approach is incorrect because the appointment of military commanders will be subject to political consensus. Away from efficiency and Libra, it would be better to leave such appointments to the General Commander of the Armed Forces. We note here the unilateral control of the House of Representatives on most of the important official appointments in the government. This created a problem in administration of the Iraqi state because of the lack of consensus among politicians in the House of Representatives on the candidates in these jobs, candidates nominated by the Prime Minister, is often rejected by the political blocs. which prompted the Prime Minister to run ministries by agents appointed directly by him, instead of ministers approved by House, in some ministries, especially Security & financial ministries- Ministry of Defense; Ministry of Interior; Ministry of Finance- at Mr. Al-Maliki and Mr. Al-

Ebady's government, because of the dispute between the political blocs and their desire to gain these positions, for their political party's followers.

In addition to that, House of Representatives has wide control powers over the performance of the government up to the dismissal of the prime minister and the overthrow of the government. House of Representatives monitoring the performance of the executive authority; Representatives may direct questions to the Prime Minister and the Ministers on any subject within their specialty; House of Representatives may raise a general issue for discussion in order to inquire about a policy and the performance of the Council of Ministers or one of the Ministries .

House of Representatives, may direct an inquiry to the Prime Minister or the Ministers to call them to account on the issues within their authority. The House of Representatives may withdraw confidence from one of the Ministers by an absolute majority and he shall be considered resigned from the date of the decision of withdrawal of confidence .

House of Representatives may withdraw confidence from the Prime Minister by an absolute majority based on the request of one-fifth of its members after an inquiry directed at the Prime Minister. In contrast, these broad powers of the House of Representatives, neither the President of the Republic nor the Council of Ministers has the right to dissolve the House of Representatives, they only have the right to submit a request to dissolve the House and this request is to be subject to the vote of the Council itself, certainly this will make the strength of the House of Representatives exceeds the strength of the government and the presidency.

### **2.3 Powers relating to judicial fields**

Relating to judicial fields, house of representatives exercising many functions, the latter have the power to Approve the appointment of the President and members of the Federal Court of Cassation, the Chief Public Prosecutor, and the President of Judicial Oversight Commission by an absolute majority, based on a proposal from the Higher Juridical Council. As for The Federal Supreme Court, despite of being financially and administratively independent judicial body, the founders of the constitution left the establishing and the work of the Court to be determined through a law enacted by a two-thirds majority of the members of the House of Representatives.

It's Constitutional default, the supreme court of the state must be constitutionally regulated, the constitution must define the principal organs of state and their jurisdictions, Federal supreme court is indeed a principal organ because It's the court that specialized in high level of judiciary, and exercise very important powers, and it's decisions and resolutions are final and binding for all authorities. It's also is a key player in the dynamics of most federations, and they can affect centralization and decentralization directly by ruling on the constitutional distribution or powers and

indirectly by ruling on social issues, individual rights, economic affairs, and other matters. And because federalism is a constitutional arrangement in which powers (or competences) are divided and shared between two or three orders of government, courts – as arbiters of constitutional disputes – have a potentially very important role in policing the distribution and sharing of powers. To the extent the courts are independent and vested with a duty to maintain the constitution, they might be expected to uphold the constitutional distribution of powers against political forces bent on altering that distribution in a more centralist or decentralist direction<sup>(15)</sup>. Federalism necessarily implies “legalism” and the “predominance of the judiciary”<sup>(16)</sup>.

This young court, was founded with the new political system after the collapse of Saddam Hussein regime in 2003, it was better placed in the previous constitution. This court was founded on Article (44) of the Iraqi Transitional Administrative Law of 2004 (which is known by Mr. Brimer's Constitution) This article organized most of the matters related to the Court in terms of composition and jurisdiction, The Court began its work since its establishment in accordance with that formation until the present time, because the drafters of the Constitution did not feel the pressure imposed by the importance of this court, they only made modest references to how to form, with the enumeration of its terms of reference, and sent its detailed composition and method of work to the approval of the House of Representatives, , And here we are clearly diagnosed a constitutional error that was committed against this court by leaving its organization and way of function to ordinary law rather than to include it in the texts of the Constitution as the comparative constitutions did.

The Constitution was supposed to guarantee the judicial independence, by clarifying all necessary details can help an independent judiciary to decide cases free from popular passion and political influence, especially in the overseeing the constitutionality of valid laws and regulations, Interpreting the provisions of the Constitution, Settling matters that arise from the application of the federal laws, decisions, regulations, instructions, and procedures issued by the federal authority, Settling disputes between state and regions and other competences.

### 3. Self-Dissolution of Parliament

Among the most problematic traits of the 2005 constitution is the self-dissolution of parliament. The dissolution of the Parliament is the termination of the term of the House of Representatives before the legal period prescribed for his tenure. It's An effective means in a parliamentary system based on a balance between the legislative and executive branches. The fundamental mechanism for mediating conflicts between the two powers, executive and legislative is a no-confidence resolution by the parliament against the cabinet, and a dissolution of the parliament by the government .

The dispute between the government and parliament, is the most common in the parliamentary systems and is promoted if the government loses the necessary supportive majority in parliament when the latter tends to Withdraw confidence from the government. Therefore, the weapon of Dissolution in the face of the parliament serves as an arbitration of the people and when the results of the election produce an explicit majority support the government; dissolution would be achieved its purpose. For example; Government in England used the mean of dissolution to resolve the disputes with the House of Commons for several periods, the most important of which was the solution for 1841 and 1909.

However, in comparison with the British system, this authority will be exercised by the president on the advice of the prime minister, this is called the model of the presidential dissolution, or we can formulate another model called the model of the ministerial solution when the prime minister has the power to dissolve the parliament. This is what the French constitutionalists call a monistic parliamentary system, but with the increase of the parliament's power, the power of the dissolution tends to be restricted or even deny it, and the government becomes more and more subordinate to the parliament. If this process of dependency is completed, the result is what the French constitutionalists call the assembly-system<sup>(17)</sup>. As for the Iraqi constitution of 2005, it has adopted the self - dissolution of parliament, in Article (64)/ First: "The Council of Representatives may be dissolved by an absolute majority of its members, upon the request of one-third of its members, or by the Prime Minister with the consent of the President of the Republic. The Council shall not be dissolved during the period in which the Prime Minister is being questioned."

It is clear to us from the constitutional text that the Iraqi legislator has given the right to dissolve the House of Representatives to the House itself, many Iraqi constitutional jurisprudence considered the purpose behind this is to strengthen the hegemony of the house against the Council of ministers. Some of the Iraqi jurisprudence finds it difficult to imagine the approval of the House of Representatives to dissolve itself, whatever was the authority Proposed the dissolution. The practical reality indicates the desire of most members of the House of Representatives to complete the term of the Council without being cut by self-dissolution because the issue of renewal the membership in the Council by voters really not guaranteed because of the change in public opinion of candidates.

According to what mentioned above and as the power of dissolution is restricted, the parliamentary system moves from the equilibrium type to the predominant-assembly type. Generally, the separation-of-powers doctrine has a natural tendency to idealize the state of equilibrium. Therefore, the predominant-assembly type looks like a kind of deviation.

#### 4. Limits to the powers of Prime Minister

Parliament supremacy in parliament system would be reasonable fact, because parliament have the right to decide on choosing and continuation of the prime ministers and other ministers in office, the latter depend on the confidence of the parliament<sup>(18)</sup>. But Prime ministers still have the opportunity to become the dominant political authority in the state when he or she has a strong majority in parliament, for party discipline and majority rule have generally guaranteed that whatever the prime minister desires will in fact be enacted<sup>(19)</sup>.

The power of the prime minister in comparative parliamentary systems, seems to be rising. Several factors have been said to contribute to this development; Prime ministers are more and more involved in international cooperation and summit politics. They are more and more in the focus of the media; General elections seem to be more personalized and focused on

potential prime-ministerial candidates<sup>(20)</sup>. Furthermore, there is a consensus that parliamentary democracies are becoming increasingly prime ministerial<sup>(21)</sup>. Though the Prime Minister has a great deal of political power, this power is also balanced by the fact that there are limitations to that power. While a Prime Minister has the support of majority, his position is secure; if he loses that support, then his position becomes very vulnerable. The position of the Prime Minister in relation to Parliament is largely determined by the party-position in the parliament. Whether his party has an absolute majority in the parliament or not, will make a qualitative difference. In case his party does not have a majority, the Prime Minister's recommendations about the summoning and proroguing of Parliament, and dissolving of parliament may not always be accepted. That's why modern democracies hinge on majority rule, but In Iraqi political system, the majority has not been strong enough to get its way and this situation was the result of two main factors, multi-party system and Proportional Representation(PR) system.

Recent history shows that the electoral system chosen can has a significant impact on election results, the system of parties and the way parliament is formed<sup>(22)</sup>. In diverse societies, ensuring the election of a comprehensive legislative council representing all the spectrums of the people should be a decisive consideration, and proportional representation is undoubtedly the best way to do so<sup>(23)</sup>. Adopting PR system will usually produce multi-party arrangements, Parliamentary nations that use 'first past the post' voting usually have governments composed of one party<sup>(24)</sup>. According to the Independent High Electoral Commission in Iraq<sup>(25)</sup>. (IHEC), 143 Iraqi parties within 28 political alliances till now, will participate in the legislative elections of 2018 !!.If we assume that 70% of the parties got enough votes and won a number of parliamentary seats, it is inconceivable for any party to have majority in parliament and they will be enforced then to make Consensual alliances with each

other; so what kind of government will be formed? How can the prime minister lead such a coalition government?

As Iraq one of inhomogeneous countries; many politicians and researchers consider the consensual Form of Government is fit for Iraqi political system due to the presence of various sectors and ethnicities. But that consensual democracy is responsible for the complete failure of the Iraqi democracy, it has a negative impact on the Iraqi parliamentary system at all levels, it has given opportunity for all parliamentary blocs to have quotas in the government and this has negatively reflected on the role of Prime Minister to run the government. This argument can be clearly seen from way the political blocs take cover under their unsuccessful Ministers as well as the defending process and justifying minister's mistakes and wrong doings while in the office. Traditionally, prime ministerial government is responsible to parliament. The prime minister is the agent of parliament and ministers are agents of the prime minister<sup>(26)</sup>.

Unlike this approach, the Iraqi prime minister does not have any kind of control over ministers. The Prime Minister has never been able to recommend the exclusion of any minister proved to be deficient or corruption in the administration of his ministry as required, because this will constitute a threat to the consensus within the House of Representatives and may push the rest of the political blocs to move towards the threat of withdrawal of confidence from the Prime Minister to defend its ministers and prevent the Prime Minister From making any recommendation to dismiss any minister.

Lacking the control on his ministers, and losing the chance to question them and replace them, definitely weakens the prime minister and pushes him to remain under the control of political blocs in the parliament.

#### **4.1 restricted subsidiary legislative powers of executive branch**

If the legislative authority, as stated, has the original legislative competence, this does not mean that it is the only body that has legislative jurisdiction in the State, but is shared by that executive authority. The constitutional legislator grants the latter a subsidiary legislative competence, which is intended to facilitate its performance. And this is known as the competence to issue Subsidiary Legislation.

In general, the administration or the executive authority has the task of achieving the public interest and satisfying the general needs of the public. In order to fulfill these obligations, various means and methods, called the work of the administration, are carried out. These include administrative decisions issued by the administration, Or known as regulations, of various types. The executive branch can enact sub-legislation; It is not different from the ordinary legislation in terms of objectivity, because both are general and abstract legal rules. Formal legislation, is within the

jurisdiction of the legislature or the parliament, and the sub-legislation or regulations is within the jurisdiction of the executive branch as an administrative authority .

Subsidiary legislation can be passed very speedily as it does not have to undergo the various stages of procedure which has to be followed in Parliament or the State Legislative Assemblies. Similarly, if the need arises, subsidiary legislation can be just as speedily rescinded to meet the changing needs of society. That is why the government relies heavily on regulations to facilitate the implementation of its work, and many of comparative constitutions granted the power of enacting different types of subsidiary legislative to the government.

As for the Iraqi constitution, it empowered the government to enact regulations only for the purpose of implementing the law. executive regulations are only one of the types of regulations that are issued by the executive authority and are intended to facilitate the implementation of laws and cannot be exercised any other role. It seems that the constitution restricted authority of Council of Ministers to issue only executive regulations and the Constitution did not explicitly mention the right of the administration to issue any other type of regulations. This is strict limitation of the power of the Council of Ministers to issue regulations, with the sole purpose of implementing laws is criticized because it will chains the government, and turns it into a silent machine.

In addition to what mentioned above ;Article 86 of the Constitution stated that the law shall regulate the formation of ministries, their functions, and their specializations, and the authorities of the minister. for analyzing this approach , we provide the following observations:

It would have been better if the constitutional legislator had left the ministries in terms of formations, development, abolition or integration, as well as their powers and organization of work, for the Council of Ministers, because only the prime minister can determine the estimate number and kind of ministries required for the purpose of implementing the program of the government, through regulations, which are issued for the purpose of organizing public utilities. The recognition of the executive branch's right to issue this type of regulation does not usually raise controversy, since the operation of public utilities is one of the main tasks of this authority. Therefore, granting the Council of Ministers the competence to issue regulations regulating all matters related to ministries and their work is not heresy, but is common in many comparative constitutional systems.

Given that the administrative or regulatory decision includes general rules that are binding, it is difficult to say that there are matters of substance in nature and others that can only be regulated by law. But there seems to be a jurisprudential agreement that certain issues of particular importance, such as the issues of public freedoms, war,

criminalization and taxation, can only be regulated by the legislature as the supreme authority representing the will of the nation. On the other hand, there appear to be organizational or substantive issues that must be left to the Executive, such as the detailed rules of a technical nature that are difficult for the legislator to decide, or that the time is short for issuing them. However, we did not see this in the provisions of the Constitution of the Republic of Iraq, we have not seen any explicit reference to the competence of the Council of Ministers to issue any other type of regulation.

It is clear to us from all the foregoing the limited jurisdiction, of the Council of Ministers in normal circumstances- in return for the multiple tasks entrusted to the executive authority, and we ask here about the possibility of the government, to implement its program submitted to the House of Representatives, and has gained confidence in its formation in accordance with this ministerial platform, which represents the government action plan In the management of plans and public policy of the state, it is the most important program of government, the latter must be enabled to implement it by been granted a space of freedom without restricting all its steps with legislations passed by the House of Representatives

#### **4.2 .The limited role of the Prime Minister in state of emergency .**

Every state may go through extraordinary circumstances, which require exceptional means to confront them, which is known as a state of emergency. This situation arises when the legal organization is exposed at some point to exceptional risks, that weren't available in the legislator's vision, and therefore did not guarantee means of dealing with them. The legal bases for the protection of the Statute of the State-the violation of which jeopardizes the security and integrity of the State- pushing the public authorities of the State to sacrifice legitimate considerations and concentrate the power in the hands of the Government alone to ensure prompt action and determination. For prevention without prior authorization or license is under any parliamentary mandate.

In light of the inability of the legislative tool to meet the demands of the modern state, both in times of war and peace, the parliament is forced to relinquish a large part of its legislative powers to the government .

In light of the above, we will clarify the way in which the constitutional and ordinary legislators have taken steps to address the exceptional circumstances facing the State and whether the Council of Ministers has been given the necessary powers to deal with these conditions. Item (9) of Article (61) of the Constitution states the following:

House of Representatives have the right to approve the declaration of war and the state of emergency by a two-thirds majority based on a joint request from the President of the Republic and the Prime Minister. The state of emergency shall be declared for a period of thirty days, which can be extended after approval each time.

The Prime Minister shall be delegated the necessary powers which enable him to manage the affairs of the country during the period of the declaration of war and the state of emergency. These powers shall be regulated by a law in a way that does not contradict the Constitution. The Prime Minister shall present to the Council of Representatives the measures taken and the results during the period of the declaration of war and the state of emergency within 15 days from the date of its end.

What we notice in the advanced text is the complexity of the issue of declaration and managing the emergency, we can explain it briefly:

First: the demanding of presidential Approval for presenting a request to the House by the Prime Minister, for declaring the state of emergency. The Prime Minister must convince the President of the Republic to submit a request for a declaration of a state of emergency, but the Constitution did not indicate the case of a difference between them. Political differences between the two may overcome the thinking of the state interest. The constitution should have regulated this situation.

Second: the demanding of a two-thirds majority of the House, to declare a state of emergency. It is not easy to get a two-thirds majority in the Iraqi parliament because of the absence of the political majority and the predominance of consensus. It is very possible that there is no consensus despite the fact that the state is exposed to real dangers, especially in case of disagreement with the prime minister or his policy. This is what happened in 2014 when the state was attacked by ISIS, and the fall of three provinces under the occupation of ISIS, Prime Minister, AL-Maliki, failed to obtain a consensus to declare a state of emergency, which exacerbated the seriousness of the situation and the lives of citizens in the three provinces were put at great risk.

Third: the absence of explicit reference to the competence of the Council of Ministers or the Prime Minister during the state of emergency, and the necessary powers authorize the Prime Minister to manage the affairs of the country during the declaration of war and the state of emergency; must be regulated by law in a manner not inconsistent with the Constitution. The following questions are brought to mind: Is the constitutional legislator intended to issue a law specific to each state of war or emergency? Because the text refers to the organization of the powers of the Prime Minister after the declaration of a state of emergency, or is it intended to enact a general law for every state of war or emergency that the country may pass through?

The constitutional text does not specify the nature or scope of powers conferred upon the Prime Minister during the declaration of a state of emergency .

In fact, there is nothing to prevent the House of Representatives from authorizing the Prime Minister to issue the necessary regulations during the state of emergency, under the law that is expected to be legislated by the Council for the purpose of organizing the state of emergency in Iraq. Although the Council of Ministers has already drafted

a bill dealing with the state of emergency<sup>(27)</sup> ,on 18 March 2014 and referred it to the House of Representatives for legislation, the law of emergency has not been enacted so far .

Therefore, a new law should be issued to deal with cases of emergency. The Iraqi legislator must take into account the changes of circumstances in Iraq and the magnitude of the challenges facing the new democratic civil political system. The Constitution requires the legislation of this law in accordance with paragraph (c) of Article (61)/9, of the Constitution of the Republic of Iraq issued in 2005.

Finally, We do recommend an amendment to the constitution; to add specific article dealing with emergency state, by regulating it, clarifying the criteria of emergency state, and to determine the exceptional powers vested in the Prime Minister during the period of the declaration of emergency, including the authorization of the Prime Minister to issue special regulations or the necessity regulations. The declaration of emergency on a specific part of the state (province, governorate, city, etc.), as well as the appointment of the competent authority in case of any conflict about emergency state, such as the refusal of the House of representatives to declare emergency, or the inability to obtain necessary majority and the case when the Council unapproved the procedures taken by The Prime Minister or the case of his failure to wisely and successfully deal with emergency state , it is not acceptable approach to leave all these details to be regulated by enacted law .

## Conclusion

The findings of the study revealed the constitutional faults in House's asserted expansion of its own powers at the expense of the other branches, although the Constitution of Iraq adopted the parliamentary system based of the doctrine of separation of powers, it failed to achieve balance and equality among constitutional institutions, when it distributed authorities and competencies. Which was also reflected in the aspects of mutual cooperation which is supposed to be obtained at least in terms of common competencies, same defect organization can be noticed in the mechanisms of mutual check and balance. In Iraqi Parliamentary system there is no definite separation of powers especially between the Legislature and the Executive. It instead involves a fusion of powers than a reasonable separation of those powers.

The imbalance between the organs of the federal State, in the interests of the House of representatives, have led to the failure to apply one of the fundamental elements of the parliamentary system in practice to equality, balance, cooperation and mutual control.

The aspects of Iraqi Parliamentary system, reviled supreme parliamentarianism; in the expense of executive & judiciary authorities, also in the expense of the upper

chamber(council of federation), as the House is the leading force in legislative affairs, whereas the upper chamber not as significant a player in the legislative process<sup>(28)</sup>.

May be the intent of the constitutional framers was that the largest threat to the maintenance of a democratic society lies in undue centralization of governmental power, and Iraqi state would be secured if they prevented undue concentration of power in the executive branch as it was clearly exist in the former fallen regime of Saddam Hussain . So to secure the state they created a defect form of Parliamentary system.

Finally, we must say that we live in an age of constitutional reform, where core elements of the polity are subjected to continual criticism and not infrequent amendment. There is no constitution above the amendment, the Constitution is a set of legal rules, born in the embrace of a society, so they affect it and effected by it , and they can be amended whenever amendment is necessary and badly needed, Iraqi Constitution is in need of amendment to correct and fixed all falls situations .

We hope that study will contribute in the development of the democratic process in Iraq.

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