

**IRAQ'S CONSTITUTION OF 2005,
BETWEEN ESTABLISHMENT
FAILURES AND REFORM
REQUIREMENTS**

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NOVEMBER 2021

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Introduction

As the supreme legal and political instruments, States' written constitutions are of distinct importance. The constitution is the master of all laws. It stipulates national objectives and goals, regulates governance within the State and the relationship between its authorities, and outlines the rights and freedoms of citizens. Therefore, as part of its main function, the constitution must encompass and comprehensively regulate the general and specific rules on governance, as well as rights and freedoms.

Drafting a new constitution or amending an existing are historic events that mark people's lives, particularly during transitional phases. For the States that emerge from an authoritarian, military, colonial, or apartheid rule, the constitution-making process carries a huge significance and a special symbolism, as it effectively marks the beginning of the state-building process

Drafting the Constitution entails a set of requirements, most importantly allocating a sufficient timeframe for each stage of the drafting process. The process of drafting the legal content of the constitution also requires high technical expertise in the legal and linguistic fields, as it is a purely technical process that is an integral part of the overall drafting process, and accompanies the process of defining the contents, provided that procedural components are compatible based on public interest.

However, some states with recent experience in democratic constitution-drafting offer constitutional texts that are clearly lacking. Aside from failing to keep up with the latest developments, these texts are full of discrepancies and ambiguities, causing loopholes in the constitutional document that could lead to disputes or conflicts. Thus, the constitutional text itself would not be able to provide a solution for an existing or new legal matter

and could be inconsistent with the people's aspirations.

In all cases, the constitution must undergo reform. Parties that have the power to amend the constitution should follow the measures stipulated therein regarding amendments, in order to address the inadequacies and tackle the ambiguities and discrepancies within the constitutional text, in addition to fulfilling the people's demands for amendments.

The 2005 Iraqi Constitution is by no means different than other constitutions, as it overflows with inadequacies, ambiguities, discrepancies, and conflicts due to numerous factors that came into play at the time of drafting. Among these factors were the exceptional security circumstances in Iraq following the fall of the regime before 2003. Most of the constituent assembly's members lacked expertise in the constitution-making and drafting process. Likewise, the short timeframe allocated to the process negatively affected the unity of thought and the consistency and coherence of drafts. In fact, according to the Head of the Constitution Drafting Committee, drafting the Constitution only took forty-two days. In reality, the process of drafting a permanent constitution should take much longer. Therefore, drafting the first constitution which was passed during the republican period, during which exceptional and temporary constitutions were adopted over a period of forty-five years, requires a longer timeframe.

The failures that accompanied the establishment of Iraq's 2005 Constitution and its reform requirements are considered a critical issue, both in theory and in practice. In theory, the issue lies in the scarcity of research in Iraq's law library. Additionally, the constitution did not receive sufficient attention from constitutional jurisprudence when looking into its inception themes. Likewise, the development of a general and comprehensive theory on the said failures was not discussed either.

In practice, the study explains the effects of these failures on the reality of the constitution, brought about by its actual application, as it has led to a paralysis in several constitutional institutions, at the expense of public and citizens' interests.

The study's problematic sheds light on the failures in the establishment of the Iraqi Republic's 2005 Constitution and its reform requirements. Several fundamental questions arise from this problematic: What were the failures that accompanied the development process of the abovementioned Constitution? What are their effects on the Constitution's reality? What are the reform requirements for this Constitution?

This study adopts an analytical research methodology, in which the failures that accompanied the drafting of the 2005 Iraqi Constitution are analyzed and their effects on the said constitution examined.

Understanding the failures in the drafting process of the Constitution and its reform requirements is not sufficient nor complete unless all relevant aspects of the subject are addressed. Thus, the available research data had to be divided into three sections. In section one, the study discusses the failures that accompanied the establishment of the Constitution. In section two, it examines the effects of these failures on the Constitution's reality. In section three, the study analyzes the rationale for Constitutional reforms. And finally, this study concludes with a summary of the most important findings along with a set of recommendations.

Section One:

Failures that Accompanied the Establishment of the Constitution

Constitutions are born from needs, which vary from one state to another. In many countries, there is a need to establish a constitution to regulate the powers of authorities and protect rights and freedoms. Interestingly, there are no recognized rules for the development of constitutions, as these rules differ according to the political conditions of the state in question. Therefore, it is difficult to agree on a method that can apply to all countries, whether democratic or non-democratic¹. Constitutions are needed in three main cases: First, forming a new state requires a written constitution that determines the authorities and their competences, as well as the rights and obligations of citizens, such as the USA's 1787² Constitution and the UAE's 1971 Constitution, among many other written constitutions of other countries. Secondly, a new constitution is needed following the dissolution of one state and the birth of another, as was the case with the Russian Federation, Belarus, Ukraine, Uzbekistan, and the rest of the Soviet republics which became independent States following the dissolution of the former Soviet Union³. And finally, the development of a constitution is required following the collapse of a given state's political system. For example, following the invasion of Iraq in 2003 and the collapse of its political system and Constitution, there was a need for a new Constitution. The task of drafting the new Iraqi Constitution under the 2004 Law of Administration for the State of Iraq for the Transitional Period

1 Dr. Al Sayyed Khalil Haykal, Constitutional Law and Constitutional Regulations, no publisher, 1983, p.280.

2 Dr. Sarhang Hamid Al-Barzanji, The Elements of Democratic Constitution and the Defending Mechanisms (a comparative critical analysis in light of the general principles of contemporary constitutions), Zein Legal Publications, Beirut, Edition 2, 2019, p.51.

3 Dr. Ali Youssuf al-Shoukry, Principles of Constitutional Law and the Constitutional System in Iraq, Dar-ALMurtadha, Lebanon, Edition 5, 2018, p.289.

was entrusted to the elected National Assembly⁴. The 2005 permanent Constitution for the Republic of Iraq was drafted under exceptional circumstances, but some of its content was ridden with inadequacies, ambiguities, and sometimes, discrepancies, which affected the work of constitutional institutions on the one hand and caused conflict between the Center and the Iraqi Kurdistan Region on the other. Before delving into the circumstances that accompanied the making of the Constitution, it is first important to explain the mechanism of drafting the Constitution.

The Law of Administration for the State of Iraq for the Transitional Period established the drafting mechanism by setting the legal framework for the process of drafting Iraq's permanent constitution. It obligated the National Assembly to write the draft of the Constitution, encourage discussions regarding the draft through meetings across the country, as well as use the media and receive proposals from Iraqi citizens during the drafting process. The aim was to ensure public participation in drafting the constitution, especially with Iraq being far from familiar with developing democratic constitutions⁵. A mechanism was thus set up and the National Assembly was obligated to draft the permanent Constitution by August 15, 2005, at the very latest⁶.

The draft of the permanent constitution is then presented to the Iraqi people for approval in a general referendum. In the period leading up to the referendum, the draft constitution is published and widely disseminated to encourage a public debate around it⁷.

4 Rizkar Jarjis al-Shawani, *Constitutional Legitimacy in Iraq: Between Theory and Practice*, Dar Al-Hikma, London, 2015, p.275.

5 Article 60 of the repealed 2004 Law of Administration for the State of Iraq for the Transitional Period states that: "The National Assembly shall write a draft of the permanent constitution of Iraq. This Assembly shall carry out this responsibility in part by encouraging debate on the constitution through regular general public meetings across Iraq and the media and receiving proposals from the citizens of Iraq as it drafts the constitution."

6 Article 61/a of the repealed 2004 Law of Administration for the State of Iraq for the Transitional Period stipulates that: "The National Assembly shall write the draft of the permanent constitution by no later than August 15, 2005."

7 Article 61/b of the repealed 2004 Law of Administration for the State of Iraq for the Transitional Period.

For the constitution to be endorsed during the referendum, the majority of voters in Iraq must approve of it, provided that two-thirds of the voters in three or more governorates do not reject it⁸.

As for the required procedures following the success of the referendum and the approval of the permanent constitution, elections for a permanent government should be held by December 15, 2005, at the latest, and the new government takes office by December 31, 2005, at the latest⁹.

If the draft of the constitution is rejected, the National Assembly is dissolved and elections for a new national assembly are held by December 15, 2005, at the latest. The new National Assembly and Iraqi Transitional Government then take office by December 31, 2005, at the latest, and continue to work under this Law. However, the deadlines for a new draft might change to make it possible to develop a permanent constitution within a period that does not exceed one year. The National Assembly will then be entrusted with writing a draft for another permanent constitution¹⁰.

The president of the National Assembly, and with the approval of the majority of its members' votes, may ask the Presidency Council by August 1, 2005, for additional time to complete the draft. The Presidency Council then extends the deadline for drafting the

8 Article 61/c of the repealed 2004 Law of Administration for the State of Iraq for the Transitional Period stipulates that: "The general referendum will be successful, and the draft constitution ratified if a majority of the voters in Iraq approve and if two-thirds of the voters in three or more governorates do not reject it."

9 Article 61/d of the repealed 2004 Law of Administration for the State of Iraq for the Transitional Period stipulates that: "[...] If the permanent constitution is approved in the referendum, elections for a permanent government shall be held no later than December 15, 2005, and the new government shall assume office no later than December 31, 2005."

10 Article 61/e of the repealed 2004 Law of Administration for the State of Iraq for the Transitional Period stipulates that: "If the referendum rejects the draft of the permanent constitution, the National Assembly shall be dissolved. Elections for a new National Assembly shall be held no later than December 15, 2005. The new National Assembly and new Iraqi Transitional Government shall then assume office no later than December 31, 2005, and shall continue to operate under this Law, except that the final deadlines for preparing a new draft may be changed to make it possible to draft a permanent constitution within a period not to exceed one year. The new National Assembly shall be entrusted with writing another draft for the permanent constitution."

constitution for only six months. However, the deadline cannot be extended again¹¹.

The procedures are to be followed in the event the National Assembly does not complete drafting the permanent constitution by August 15, 2005, and does not request an extension of the aforementioned period. The National Assembly is then dissolved, and elections for a new National Assembly are held no later than December 15, 2005. The new National Assembly and the Iraqi Transitional Government would then take office by December 31, 2005, and continue to work under this Law. However, the deadlines for developing the new draft may change in order to establish a permanent constitution for a period not exceeding one year. The new National Assembly would be entrusted with writing another draft for the permanent constitution¹².

After explaining the mechanism for establishing a permanent constitution for Iraq in accordance with the procedural constraints set by the Law of Administration for the State of Iraq for the Transitional Period, it is now important to understand the circumstances that accompanied the development of the Constitution.

After the successful election of National Assembly members in accordance with the mechanism established by the Law of Administration for the State of Iraq for the Transitional Period mentioned above, and after entrusting it with legislative and oversight powers, a committee of (55) members was formed

11 Article 61/f of the repealed 2004 Law of Administration for the State of Iraq for the Transitional Period stipulates that: "If necessary, the president of the National Assembly, with the agreement of a majority of the members' votes, may certify to the Presidency Council no later than August 1, 2005, that there is a need for additional time to complete the writing of the draft constitution. The Presidency Council shall then extend the deadline for writing the draft constitution for only six months. This deadline may not be extended again."

12 Article 61/g of the repealed 2004 Law of Administration for the State of Iraq for the Transitional Period stipulates that: "If the National Assembly does not complete writing the draft of the permanent constitution by August 15, 2005 and does not request an extension of the deadline mentioned in Article 61(d) above, the provisions of Article 61(e), above, shall be applied."

to draft the constitution. However, the elections did not lead to a real emergence of political forces in Western Iraq due to them boycotting the elections, which prevented the participation of major political forces. This led to many difficulties in achieving political consensus among all components of the Iraqi people. The National Assembly had to include the political forces boycotting the elections in the Constitution Drafting Committee¹³. It added 15 titular members and several advisory members from boycotting forces. Decisions in the Constitution Drafting Committee were taken by consensus to provide legal guarantees for the main components, especially for boycotting forces, so that they would not be marginalized in the committee in which they were not elected¹⁴.

1- After clarifying the mechanism of establishing the 2005 Iraqi Constitution, it is now necessary to explain the reasons for the failures that accompanied the emergence of the Iraqi Constitution.

2- Time: The deadline imposed on the Constitution Drafting

13 It is worth noting that the constitution-writing committee started its work late but completed the draft constitution early. The substantive discussions, however, did not start to involve the representatives of the "Sunni Arabs" until the end of June. On August 8, negotiations within the Constitutional Committee turned into a series of special meetings between the leaders of the Kurdish and Shiite parties, with the "Sunni Arabs" negotiators being often excluded. In addition, the nominations of the "Sunni Arabs" in the Constitutional Committee do not reach the level of democratic representation for the Western regions. See Dr. Raad Naji Al-Jedda, *The Constitutional Catastrophe (A Study on the Iraqi Constitutional Affairs*, Dar Al-Manahej for Publishing and Distribution, Amman, 2018, p.119-122.

14 It should be noted that determining the period for writing the Iraqi constitution negatively affects the constitutional process because there is a substantial difference between the constitutional process and the drafting of the constitution. The constitutional process requires sufficient time and political experience, especially in a country like Iraq, which has emerged from war and a security vacuum. It requires a longer period of time (two years for Germany, five years for South Africa, and eight years for the United States) in order to ensure the participation of the components of the Iraqi population in a comprehensive national dialogue to discuss the main contentious issues and to reach common ground and convictions in order to establish a new political (social) contract upon which the Iraqi State will be built. For details on the constitutional process in Iraq, see: United States Institute of Peace's report No. 155 for November 2005, p. 8, published on the Internet: www.usip.org, last visited 22/10/2021.

Committee made the task of this committee difficult, as even though the 2004 Law of Administration for the State of Iraq for the Transitional Period set a period of six months, the actual timeframe allocated to drafting the constitution was six weeks. The National Assembly voted on selected 55 of its members to become members of the Constitution Drafting Committee¹⁵. The Constitution Drafting Committee held its first meeting on June 4, 2005, and the Transitional National Assembly appointed 15 members as representatives of the political component due to the absence of their representation in the committee. The appointed members only assumed their work in the committee on the fifth of July of the same year¹⁶.

- 3- Granted, setting a time in accordance with this mechanism to write the provisions of the constitution reduces time and leads to focused discussions, but it will surely come at the expense of the unity of the thought and the harmony and consistency of the wording. It will also lead to variation in the style in which each of the chapters will be written and possibly to repetition in topics. This explains the difference in the style of drafting between one section and another and between them and the preamble, which is an integral part of the constitution¹⁷.
- 4- Thus, not all members of the committee had enough time to review what was written. Checking and reviewing prevent poor formal and substantive writing in constitutional drafts, such as errors, ambiguities, discrepancies, and inadequacies. By giving enough time for the process, we ensure that the provisions of the constitution are drafted correctly and elaborately, even though it makes the drafting of the provisions slower. However, consistent provisions

¹⁵ Minutes of the Iraqi Constitution-Writing Committee for the Year 2005, Volume One, Al-Asry for Artistic Printing, Baghdad, Edition 1, 2018, p. (c).

¹⁶ Minutes of the Iraqi Constitution-Writing Committee for the Year 2005, *ibid.*, p. (c).

¹⁷ Dr. Ali Yousuf al-Shukry, *The Arcana of Constitution-Making*, Zein Legal Publications, Lebanon, Edition 1, 2020, p.33.

that are closer to achieving public interest, and mistake-free constitutional drafting usually make up for the slower pace. The drafting of the constitution should have taken longer because the constitution is what guarantees the rights of citizens and sets their customs while regulating their lives, and thus, more time should be allocated to drafting it.

5-Lack of Specialization in Constitution Drafting:

Whoever takes part in drafting constitutions must be a specialist in Constitutional Law and that whatever their experience is in the political field, the drafters of the constitution must surround themselves with a group of legal experts and people with technical competence so that the complementarity of their efforts can help them complete the dimensions and objectives of the text, choose the exact words to determine its goal, and succeed in achieving its effects and its results. Specialization is an unmatched criterion through which the desired results are achieved¹⁸.

6- There was inadequate experience and specialization among the members of the Constitution Drafting Committee for the Republic of Iraq for the year 2005, as none of the members of the committee who were representing the National Iraqi Alliance Bloc specialized in drafting constitutions. None of their advisors had any academic constitutional background either. Some were specialized in Law, but not in Constitutional Law. Similarly, none of the members of the committee representing the regions boycotting the elections had any expertise in Law, while only one advisor was specialized in Constitutional Law. The Kurdistan Alliance Bloc, on the other hand, made sure to choose the most competent people in the Constitutional Law field, for both members of the committee and experts, which explains the constitutional

¹⁸ Dr. Bilal Akl Sandid, *Constitutional and Legal Approaches*. Tripoli - Lebanon: Al Mouassassa al Haditha lil Kitab, 2018, p.433.

text's tendency to prioritize the interest of the Region over the Federation in many instances¹⁹.

7- Some authors criticized the chair of the constitution-writing committee, as they believed that the committee should be headed by those who specialize in Constitutional Law. This, along with other reasons, including the lack of specialization of most members in Constitutional Law on the one hand, and their failure to seek assistance from Constitutional Law scholars, on the other hand, led to confusion in the drafting process²⁰. This, in turn, led to ignorance among most members of the drafting committee of the principles of constitutional drafting, as they should have been familiar with the content of the Constitution and the nature of its rules, and the topics it deals with. This was, of course, reflected in the manner in which this important document was drafted, which led to major and grave errors in the provisions of the Constitution²¹.

This was reflected in the inability to differentiate between terms. For example, the constituent assembly used the term representative as a synonym for parliamentarian. However, there is a difference in meaning between both terms. The representative works in political systems that have a parliament elected by the people, regardless of whether the government is presidential, parliamentary, council, or mixed. When a parliament is elected by the people, the system is called a representative system of government. On the other hand, a parliamentarian takes part in one form of political system that is based on duality

19 Dr. Ali Yousuf al-Shukry, *The Arcana of Constitution-Making*, op.cit., p.16.

20 Dr. Nadim al-Jabiri, *The Political and Intellectual Dimension in Writing the Permanent Iraqi Constitution*, Al-Fadhila for Studies and Publishing, Baghdad, 2018, p.15.

21 Dr. Hanan Mohammed Al-Qaisy, *Legislative Drafting Mistakes in the 2005 Iraqi Constitution, Article 65 as an example*, research published in *Law Journal*, College of Law, Mustansiriyah University, Vol.4, 18, 2012, p.146.

in executive power, cooperation, reciprocal oversight between the parliament and the government, and the secondary role of the president, who usually assumes the role of arbitrator and mediator between the government and parliament if a dispute between them escalates and leads to the point of dissolving the parliament or dismissing the government. In addition, the president is authorized to assign a specific candidate to form the government²².

On the other hand, the Constitution Drafting Committee members that were selected should have been well-informed legal experts in the field, with extensive knowledge of constitution samples from different countries in the world, and with a deep understanding of Iraq's history, social heritage, conflicts, and political problems. However, these experts do not need to be elected by the people. They are selected by the committee tasked with drafting the constitution, based on specialization and competence. After the experts finish writing the draft, it is presented to an elected body. Upon its approval of the draft, it is presented in a referendum.

3. Security Threat: The security challenge was the biggest challenge that the members of the constituent assembly faced, as terrorists began to threaten the Constitution Drafting Committee and managed to assassinate three of its members as well as several employees. These threats, however, increased the resolve and determination of the members of the committee to complete the national mission that was entrusted to them. The completion of the draft of the first permanent constitution was the first pillar of the rise of the new political system, as over forty-five years, the coup regimes were unable to establish themselves permanently, and questions about their legitimacy remained²³.

22 Dr. Ali Yousuf al-Shukry, *The Arcana of Constitution-Making*, op.cit., p.105.

23 Dr. Ali Yousuf al-Shukry, *The Arcana of Constitution-Making*, op.cit., p.33-34.

Section Two

The Impact of the Circumstances on the Constitution

Upon examining the circumstances that accompanied the development of the Iraqi Constitution, it became clear that it was written hastily and under extremely complicated circumstances. And upon implementation, we noted that some of its provisions were ridden with inadequacies, discrepancies, and ambiguities that prevented its proper implementation. Among the provisions that appeared to have contradictions, ambiguities and discrepancies were those related to the form of the federal state and those that regulate the nature of the political system, as well as the provisions related to the effectiveness of the authorities.

In view of the above, we will address, in this research, the three abovementioned ideas.

First: Form of the State: In its first article, the 2005 Iraqi Constitution adopted the federal system as the form of the State. The article stipulates that: "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, and this Constitution is a guarantor of the unity of Iraq"²⁴. The distribution of competencies between the levels of government in the federal state is one of the most important characteristics of the federal system of government. The federal constitution based on which the federal state is founded distributes competencies between all governing bodies of the federation and governing bodies in regions or states²⁵. The constitutions of federal states are different in terms of the methods used to distribute competencies between the federal government and the regions or states. This difference is based on the political circumstances and the different motives that were behind the emergence of the federation. A federal state that is born as a result of several independent countries joining each other has a strong tendency

²⁴ Article 1 of the Constitution of the Republic of Iraq of 2005.

²⁵ Dr. Muhammad Tai, Constitutional Law, and Political Institutions, Zein Legal Publications, Beirut, Edition 8, 2013, p.140-141.

to expand the competencies of the member states and narrow the competencies of the federal state. The reason for this is that the member states of the federation are always keen not to give up but the necessary and required number of competencies for the establishment of the federation. On the contrary, a federal state that is born as a result of the dissolution of a simple united state and its transformation into a federal complex state has a stronger tendency to expand the competencies of the federal state to detriment of member states competencies, as it considers that these states had all the competencies before their dissolution and transformation into a federal state²⁶.

Considering the methods of distribution of competencies in the federal state between levels of government and to clarify the method of distributing competencies in Iraq between the federal authorities and the authorities of the regions and governorates that are not organized into a region, a reading of the provisions of the 2005 Iraqi Constitution reveals that it has mainly adopted the method of determining the competencies of the federal authorities exclusively, in addition to introducing shared competencies between the federal authorities and the authorities of the regions, and making the rest of the competencies within the jurisdiction of the region's authority.

The 2005 Iraqi Constitution stipulated that the federal authorities have exclusive jurisdiction in preserving the unity, integrity, independence, and the sovereignty of Iraq and its federal democratic system²⁷.

The Iraqi Constitution set exclusive competencies for the federal authorities, including²⁸: "Formulating foreign policy and diplomatic representation; negotiating, signing, and ratifying international treaties and agreements; formulating foreign sovereign economic and trade policies, formulating and executing national security

26 Dr. Adnan Al-Zankaneh, Legal Status - Head of the Federal State, Iraq as a model, Al-Halabi Legal Publications, Beirut, Edition 1, 2011, p.47-48.

27 Article 109 of the Constitution of the Republic of Iraq of 2005.


28 Article 110 of the Constitution of the Republic of Iraq of 2005.

policy, including establishing and managing armed forces to secure the protection and guarantee the security of Iraq's borders and to defend Iraq, formulating fiscal and customs policy, issuing currency and regulating commercial policy across regional and governorate boundaries in Iraq, drawing up the general budget of the State, formulating monetary policy, establishing and administering a central bank, regulating standards, weights, and measures, regulating issues of citizenship, naturalization, residency, and the right to apply for political asylum, regulating the policies of broadcast frequencies and mail, drafting the general budget, planning policies relating to water sources from outside Iraq and guaranteeing the rate of water flow to Iraq and its just distribution inside Iraq in accordance with international laws and conventions, and conducting general population statistics and census.”

It is clear from the above that the 2005 Iraqi Constitution set 10 exclusive competencies for the federal authorities, including preserving Iraq's unity, integrity, and federal system, and everything related to foreign policy, national security policy, defense policy, fiscal and customs policy, standards, weights, and measures, as well as everything related to citizenship and migration, policies of broadcast frequencies and mail, general budget, the planning of water sources from outside Iraq, and the general population census.

In addition, the Constitution also determined the shared competences between the federal authorities and the authorities of the regions and governorates. They included: “Managing customs, regulating the main sources of electric energy and its distribution, formulating environmental policy to ensure the protection of the environment and preserving its cleanliness, formulating development and general planning policies, formulating public health policy, formulating the public educational and instructional policy, and formulating and regulating the internal water resources policy in a way that guarantees their just distribution.”²⁹

29 Article 114 of the Constitution of the Republic of Iraq of 2005.



The Constitution also stipulated that “the federal government, with the producing governorate and regional governments, shall undertake the management of oil and gas extracted from present fields, provided that they fairly distributes its revenues in proportion with the population’s distribution across the country, specifying an allotment for a specified period for the damaged regions which were unjustly deprived of them by the former regime, in a way that ensures balanced development in different areas of the country, and this shall be regulated by a law.”³⁰

In addition, the Constitution stipulated that “the federal government, with the producing regional and governorate governments, shall together formulate the necessary strategic policies to develop the oil and gas wealth in a way that achieves the highest benefit to the Iraqi people using the most advanced techniques of the market principles and encouraging investment.”³¹

The Constitution also stated that “antiquities, archaeological sites, cultural buildings, manuscripts, and coins shall be considered national treasures under the jurisdiction of the federal authorities and shall be managed in cooperation with the regions and governorates.”³²

Ultimately, the Constitution settled the issue of the distribution of powers, as it stated that “all powers not mentioned in the exclusive competencies of the federal government belong to the authorities of the regions and governorates that are not organized in a region.” With regard to shared competencies, the Constitution gave “priority to the law of the regions and governorates in case of dispute between them and the central government.”³³

In view of this, several observations can be made on the method adopted by the Iraqi Constitution of 2005 in distributing competencies, and on the constitutional provisions in this regard, summarized by the following:

30 Article 112/1 of the Constitution of the Republic of Iraq of 2005.

31 Article 112/2 of the Constitution of the Republic of Iraq of 2005.

32 Article 113 of the Constitution of the Republic of Iraq of 2005.

33 Article 115 of the Constitution of the Republic of Iraq of 2005.



- 1- Inaccuracy in the legal drafting of the constitutional provisions related to the distribution of competencies. For example, in article 112, specifically, when the exploitation of natural resources (oil and gas) was addressed, no other natural resources, such as sulfur, phosphates, mercury, uranium, etc. were mentioned. The inaccuracy was observed when only the discovered and currently tapped fields were mentioned. But what about the undiscovered and untapped fields?
- 2- The constitutional provisions related to the distribution of competencies equated legal status in the regions with the legal status in governorates that are not organized in a region, despite the significant difference between them. This was part of the compromise between the partisan forces that were pro-federalism and the forces that were anti-federalism.
- 3- With regard to shared competencies, the Constitution gave the implementation priority to regional or local legislation in the event of a conflict with federal legislation. It also went as far as giving the regions the right to amend the enforcement of the federal law if it contradicts or clashes with a regional or local law with regards to an issue that does not fall within the exclusive competencies of the federal authorities. This is contrary to what all federal states have done.
- 4- The Constitution of Iraq did not provide, with regard to the management of shared competencies, which of the two wills will be prioritized in the event of conflicting views in the management of some shared competencies. For example, can the regions enact a law defining water shares despite the objection of the federal authority to these shares, or will regional legislation and local be prioritized over the will of the central authority on the basis that the Constitution has given priority in implementation in the event of conflict to local or regional law?

As such, we find that the Constitution of Iraq of 2005 was not successful in the process of distributing competencies, as its provisions were ambiguous and inaccurate. In addition, it adopted an unfamiliar way of distributing competencies and confused the legal nature of the regions with the governorates that are not organized in a region.

Second: The Nature of the Political System: The Iraqi Constitution in force established that the political system of the state is parliamentary. Article 1 of the 2005 Iraqi Constitution stipulates that “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, and this Constitution is a guarantor of the unity of Iraq.”³⁴ Labeling the system as parliamentary necessarily requires the conformity of the name with the content of the constitutional provisions that regulate it, as one of the most prominent cornerstones of the parliamentary system is the balance between the legislative and executive authorities. Each of these two authorities has its constitutional means to control the other authority. The executive authority has the right to dissolve the parliament, while the legislative authority has the right to decide the ministerial responsibility. Dissolution means the termination of the parliament’s term before the end of the legal period set for it. The right to dissolve is one of the most dangerous types of control that the executive authority has over the legislative authority because it is a weapon compared to the ministerial responsibility established before the parliament. The right of dissolution is necessary to create a balance between the executive and the legislative authorities in the parliamentary system³⁵.

As for the constitutional provisions regulating the dissolution of the Council of Representatives, article 64/1 of the 2005 Iraqi

34 Article 1 of the Constitution of the Republic of Iraq of 2005.

35 Dr. Ali Saad Omran. *The Constitutional Boundaries of Dissolving the Parliament (a comparative study)*. Amman - Jordan, Redwan for Publishing and Distributing, 2016, p.68-75.

Constitution stipulates that “the Council of Representatives may be dissolved by an absolute majority of the number of its members, or at the request of one-third of its members, or at the request of 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.”³⁶

Upon analyzing the aforementioned provision, we find that the party who has the final word and the final decision in the dissolution is the Council of Representatives, which makes the entity tasked with drafting the constitution adopted a system of self-dissolution by the Council of Representatives. This is not consistent with the nature of the parliamentary system.

We believe that the reason for not entrusting the power of ministerial dissolution is that the work of the constituent National Assembly entrusted with drafting the constitution in Iraq was not limited to drafting the constitution only. It also had the right to exercise other powers, in particular the powers of the legislative authority.

Third: Effectiveness of Authorities: Constitutions usually lay the foundations for the authorities to ensure that they continue to perform their functions in order to prevent a vacuum and the consequent paralysis in institutions and disruption of the interests of citizens. Therefore, institutions are considered to be in a state of flux. As for inertia or vacancy, they are often not what is on the mind of the drafter of the constitution, who does not establish provisions for vacuums or disruptions. It would not occur to the drafter that those in charge of authorities would strive to disrupt institutions or create a vacuum in them.³⁷

In general, the constitutional founder determines the mechanism for the transfer of power and sets solutions for sudden emergencies, or for cases of delay in providing a replacement for

36 Article 64/1 of the Constitution of the Republic of Iraq of 2005.

37 Dr. Issam Nehmeh Ismail, *Constitutional and Administrative Disputes According to Lebanese Jurisprudence*, Al-Mouassassa al-Haditha Lil Kitab, Tripoli, Lebanon, Edition 1, 2018, p.35.

the official whose position has become vacant due to the end of the mandate, resignation, death, or any other reason. However, what happened in Iraq was that the exception turned into the general rule, as the authorities showed non-commitment to their competencies, including non-compliance with the constitutional deadlines. The legislative authority was at the forefront of these authorities whose failure to convene within the specified constitutional periods had an impact on the work of other constitutional institutions. It also failed to legislate many laws. This practical reality resulted in:

1- The principle of the continuity of the work of constitutional institutions: The 2005 Iraqi Constitution regulated the mechanism of convening the first session of the Council of Representatives and specifying the periods necessary to carry out its duties after each election. The Constitution declared the obligation of the President of the Republic to call on the Council of Representatives to convene within fifteen days from the date of ratification of the election results³⁸, while another article of the Iraqi Constitution clarified the duties of the Council of Representatives in this session³⁹.

8. Upon analyzing these provisions, it became clear to us that the President of the Republic is obligated to call on the elected Council of Representatives to convene within fifteen days from the date of ratification of the results of the general elections. The eldest member chairs the session to elect the speaker of the Council and his

38 Article 54 of the Constitution of the Republic of Iraq of 2005 stipulated the following: "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. Its eldest member shall chair the first session to elect the speaker of the Council and his two deputies. This period may not be extended by more than the aforementioned period."

39 Article 55 of the Constitution of the Republic of Iraq of 2005 stipulated that "The Council of Representatives shall elect in its first session its speaker, then a first deputy and second deputy, by an absolute majority of the total number of the Council members by direct secret ballot."

two deputies. This period cannot be extended by more than the aforementioned period. Thus, the Council of Representatives, in its first session, must commit to elect its speaker, and then a first deputy and a second deputy, by an absolute majority of the number of members of the Council, by direct secret ballot.

9. It should be noted that in the second elections, the Federal Supreme Court in Iraq ratified the election results on May 31, 2010, and pursuant to article 54 of the Constitution, the late President Jalal Talabani call on the Council of Representatives to convene on June 14, 2010. The first session was thus held and, indeed, the constitutional oath was taken. However, due to the lack of consensus between the political blocs, the session turned into an open session and lasted over four months without a constitutional justification. Had it not been for the Federal Supreme Court's decision No. 55 / Federal / 2010, issued on October 24, 2010, which included the unconstitutionality of the decision of the Council of Representatives in the 2010 session, considering the session is open and obligated the eldest member to call on the Council to convene and continue the work of the first session, which was stipulated in article 55 of the Constitution, and other constitutional tasks⁴⁰, the open session of the Council of Representatives would have not been canceled. And pursuant to the aforementioned Federal Supreme Court decision, the Council of Representatives held its session on 11/11/2010 and took up its entrusted functions.

10. Based on the foregoing, it became clear to us that the period of disruption of the work of the legislative authority exceeded 145 days, which led the caretaker government to continue its work for an extended period of time. This made the adherence of the Council of Representatives to some provisions that indicate the periods necessary

40 Federal Supreme Court's decision No. 55/Federal/2010 issued on 24/10/2010.

for the continuity of the authorities' work a misstep, as it negatively affected the higher interest of the State and the interests of citizens.

2- Legislative Abstention: It is quite evident that the main and most important work undertaken by the legislative authority is the enactment of ordinary legislation. In fact, it is perhaps because of its task of legislating laws that it earned this name. The 2005 Iraqi Constitution confirmed this, as it stipulated in article 47 that “the federal legislative power shall consist of the Council of Representatives and the Federation Council”⁴¹. It also defined in article 61/1 the competency of the Council of Representatives, stipulating that it “enacts federal laws.”⁴² However, despite this, the legislative process in Iraq was full of aberration in various aspects, represented by the failure to enact some important laws, and by the delay in enacting some of them, as explained below:

Failure to enact some important laws: With regard to the failure to enact or legislate some laws, the 2005 Constitution in force stipulated, nearly sixteen years before the referendum and the Constitution's entry into force, that the legislative authority shall consist of the Council of Representatives and the Federation Council⁴³. It also clarified, in the article commissioning the ordinary legislator to enact the law of the Federation Council, that a law shall regulate the formation of this Council, the conditions for membership in it, its competencies, and all that is related to it, by a law enacted by a two-thirds majority

41 Article 47 of the Constitution of the Republic of Iraq of 2005.

42 Article 61/1 of the Constitution of the Republic of Iraq of 2005.

43 Article 48 of the Constitution of the Republic of Iraq of 2005 stipulates that “The federal legislative authority shall consist of the Council of Representatives and the Federation Council.”

of the members of the Council of Representatives⁴⁴. In this constitutional provision, it appears that the Federation Council represents the second half of the legislative authority and is supposed to co-enact federal laws with the Council of Representatives and co-control the work of the executive authority. However, this law has not been considered of importance by members of the Council of Representatives throughout the successive parliamentary sessions since 2005. In fact, this law was not enacted, and therefore, the Federation Council was not established. This undermines the composition of the federal legislative authority in Iraq in the absence of the Federation Council, which is considered the Supreme Council that guarantees the rights of regions and governorates that are not organized in a region, as it has as members representatives of these regions and governorates, compared to the Council of Representatives, which is formed based on the population ratio in the country.

If this Council had such a critical role to play in legislation and oversight, it is quite odd that the parliament stalled the legislation of the Federation Council law. This, to us, is a flaw in the legislative process in Iraq. In addition, it is also odd that the constitutional provision in article 65 stated that the establishment of the Federation Council hinges on a law issued by the Council of Representatives. This is the reason behind not establishing the Federation Council, as it would have been more proper for the constitutional founder (the constitution-drafting committee) to handle the issue of establishing the Federation Council, using the same constitutional mechanism adopted in the establishment of the Council of Representatives in accordance with article 49/1

44 Article 65 of the Constitution of the Republic of Iraq of 2005 stipulates that "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."

of the Constitution. This article defined the method of directly forming the Council of Representatives, without referring to a law legislated by the Representatives. Therefore, it would have been more proper for the constitutional founder to ensure the same mechanism in the formation of the Federation Council, similar to the Council of Representatives, especially since both represent the two elements of the legislative authority in the country. In addition, there are also other laws that are as important as the Federation Council law, including, but not limited to: the oil and gas law⁴⁵, the Federal Supreme Court law⁴⁶, the formation of ministries law⁴⁷, and the multiple nationalities law⁴⁸. These laws are still pending legislation by the Parliament.

45 Article 112/1 of the Constitution of the Republic of Iraq of 2005 stipulated that “the federal government, with the producing governorate and regional governments, shall undertake the management of oil and gas extracted from present fields, provided that it distributes its revenues in a fair manner in proportion to the population distribution in all parts of the country, specifying an allotment for a specified period for the damaged regions which were unjustly deprived of them by the former regime, in a way that ensures balanced development in different areas of the country, and this shall be regulated by a law.”

46 Article 92/2 of the Constitution of the Republic of Iraq of 2005 stipulated that “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.”

47 Article 86 of the Constitution of the Republic of Iraq of 2005 stipulated that “a law shall regulate the formation of ministries, their functions, and their specializations, and the authorities of the minister.”

48 Article 18/4 of the Constitution of the Republic of Iraq of 2005 stipulated that “an Iraqi may have multiple citizenships. Everyone who assumes a senior, security, or sovereign position must abandon any other acquired citizenship. This shall be regulated by law.”

Section Three

The rationale for Constitution Reforms

Constitutional reform is of foremost importance, as no reform can be achieved without constitutional reform. The constitution regulates governance in the state and the relationship between its authorities and outlines the rights and freedoms of citizens⁴⁹. Thus, the constitution must contain and comprehensively regulate the general and specific rules on governance, as well as rights and freedoms, as this is its main function. However, some countries with recent experience in drafting democratic constitutions have constitutional provisions that are full of inadequacies and that cannot keep up with the latest developments. This obviously creates holes in the constitutional document, and the constitutional text in itself would not be able to provide a solution for an existing or a new legal matter.

And in all cases that lead to inadequacies or ambiguities in the constitutional document, it is not possible to infer the true will of the drafters of the constitution. To fill this void, the authorities that have the power to amend the constitution should follow the measures stipulated therein regarding amendments, in order to fix the inadequacies and remove ambiguities within the constitutional document. Iraq's Constitution of 2005 is no different than other constitutions of other states whose constitution drafting process was accompanied by extraordinary circumstances, as it is full of inadequacies, ambiguities, and discrepancies, due to a range of factors at the time of writing, all of which we have addressed in section one.

Understanding the foregoing is not sufficient nor complete unless the mechanism for amending the Constitution and the rationale

⁴⁹ Dr. Hazem Sabah Hamid, *Constitutional Reforms in Arab Countries*, Dar Al-Hamed for Publishing & Distribution, Amman - Jordan, 2010, p.85.

for the amendment are explained in light of the resolution of constitutional inadequacies and the population's demand for the amendment.

First: Constitution Amendment Mechanism

The 2005 Iraqi Constitution expressed two ways to amend the Constitution in force. The first is a partial amendment of the Constitution, and the second is a comprehensive or total amendment of the Constitution. For the purpose of clarifying these two methods, we will discuss them in detail as follows:

1- Partial Amendment of the Constitution:

Traditionally, an amendment is partial and relative, otherwise, it would be considered cancellation and replacement, as amendments are done on only some provisions of the constitution, and not all. There is a clear difference between these terms. This difference leads to a difference in governance, procedure, and authority. In terms of governance, and if the amendment is relative, the constitution remains in place with its framework, structure, year of issuance, and the effects thereof. Some specialists in constitutional jurisprudence consider that the Constitution in force is a rigid constitution, due to the challenging amendment mechanisms and procedures. Article 126 of the Constitution of Iraq of 2005⁵⁰ stated the procedures of amendment of the Constitution as follows:

- a- "The President of the Republic and the Council of the Ministers collectively, or one-fifth of the Council of Representatives members, may propose to amend the Constitution."

50 Article 126 of the Constitution of the Republic of Iraq of 2005.

- b- “The fundamental principles mentioned in Section One and the rights and liberties mentioned in Section Two of the Constitution may not be amended except after two successive electoral terms, with the approval of two-thirds of the members of the Council of Representatives, the approval of the people in a general referendum, and the ratification by the President of the Republic within seven days.”

A closer look at the abovementioned paragraph reveals that the provision set a substantive and temporal interdiction when it prevented an amendment to rights and freedoms for a period of eight years. But perhaps the reason for the aforementioned interdiction was to guarantee the stability of the provisions of the Constitution in order to ensure that its provisions remain in effect for a certain period of time.

2- Total Amendment of the Constitution:

The drafter of the 2005 Constitution introduced a comprehensive amendment to all the provisions of the Constitution, according to article 142⁵¹, which referred to a number of procedures for implementation. The article stipulated the following:

- a- “The Council of Representatives shall form at the beginning of its work a committee from its members representing the principal components of the Iraqi society with the mission of presenting to the Council of Representatives, within a period not to exceed four months, a report that contains recommendations of the necessary amendments that could be made to the Constitution, and the committee shall be dissolved after a decision is made regarding its proposals.”

51 Article 142 of the Constitution of the Republic of Iraq of 2005.

A closer look at the abovementioned paragraph reveals that the Constitution was full of inadequacies, discrepancies, and ambiguities when it was drafted by the committee in charge of drafting the Constitution. And after analyzing the text, we noticed that it indicated that the Council of Representatives should form a committee at the beginning of its work, but we do not know when that period begins and ends. We also found that the four months period that was given to the Council of Representatives to submit its report is not sufficient because making amendments is not an easy task. And despite the fact that four electoral terms for the Council of Representatives took place, the committee was unable to finish the amendments.

- a- “The proposed amendments shall be presented to the Council of Representatives all at once for a vote and shall be deemed approved with the agreement of the absolute majority of the members of the Council.”

A closer look at the abovementioned paragraph has entailed the following observations: The committee presents the amendments all at once to the Council of Representatives for a vote, but it would have been better for the committee to present the amendments gradually and not all at once because some of the amendments could be made objectively and others non-objectively.

- a- “The articles amended by the Council of Representatives pursuant to item “Second” of this Article shall be presented to the people for voting on them in a referendum within a period not exceeding two months from the date of their approval by the Council of Representatives.”

We learned from the aforementioned paragraph that the people’s referendum on the proposed articles for amendment is a mere formality. In fact, the people’s referendum being done on the proposed articles all at once proves it, as they were supposed to be done gradually. In addition, the two months period, starting from the Council of Representatives’ proposition of articles to the

people's referendum, is a noticeably brief period of time, as the people would not have the chance to familiarize themselves with these articles.

- a- "The referendum on the amended Articles shall be successful if approved by the majority of the voters, and if not rejected by two-thirds of the voters in three or more governorates."

A closer look at the abovementioned paragraph reveals a contradiction with the principles of democracy, which means the rule of the majority. As such, if all governorates agree to the proposed amendments and only three governorates reject them, the opinion of the three governorates is adopted, according to the aforementioned text.

- a- "Article 126 of the Constitution, concerning amending the Constitution, shall be suspended, and shall return into force after the amendments stipulated in this Article have been decided upon."

This paragraph shows us that article 126 of the Constitution was rendered ineffective, and thus, it is not possible to recourse to the aforementioned article until after the enforcement of article 142, as according to the article, "it shall return into force after the amendments stipulated in this article have been decided upon".

Second: Resolution of Constitutional Inadequacies:

Constitutional amendment contributes to resolving inadequacies and removing ambiguities and discrepancies in the Constitution. Amendments also contribute to increasing the effectiveness of the work of constitutional institutions and redistributing competencies between the federal authority and the authority of the region under the federal state.

According to the foregoing, it is clear that the provisions of the Iraqi Constitution presented many problems at the practical level when

it came to implementation, as there were clear discrepancies, ambiguities, and inadequacies in many issues, which were not addressed by the drafters of the Constitution, including, for example:

1- Amending the provisions related to the distribution of competencies between the federal authority and the authority of the region under the federal state:

Looking at the text of the articles on the distribution of competencies, we propose the following:

- a- Amending the text of article 111 of the 2005 Iraqi Constitution, to read: “Natural resources are owned by all the people of Iraq in all the regions and governorates.”
- b- Amending the text of article 112/1 of the 2005 Iraqi Constitution, to read: “The federal government, with the producing governorate and regional governments, shall undertake the management of extracted, non-extracted, discovered and non-discovered natural resources – after discovery - provided that it fairly distributes its revenues in proportion to the population’s distribution across the country, in a way that ensures balanced development in different areas of the country, and this shall be regulated by a law.”
- c- Amending the text of article 115 of the 2005 Iraqi Constitution, to read: “All competencies not stipulated in the exclusive competencies of the federal government belong to the authorities of the regions and governorates that are not organized in a region. With regard to other competencies shared between the federal government and the regional government, priority shall be given to the federal law in case of a dispute.”

2- The Nature of the Political System: We believe that

it is necessary to review article 64 of the Constitution regarding the procedures for dissolving the Council of Representatives, and to grant the Prime Minister a wide jurisdiction to dissolve the Council, as this creates leverage and forces the Council to fulfill its constitutional obligations, and to legislate many important laws that contribute to putting the general State policy into effect.

3- Composition of the Legislative Authority: We recommend amending the text of article 65 of the 2005 Iraqi Constitution regarding the Federation Council, to include a provision on the membership composition, conditions, and competencies, and the Council's relationship with the Council of Representatives and other authorities.

4- Enacting new provisions addressing some of the unmentioned matters, such as:

- a- The Constitution's failure to state the measure that will be taken in the event that the President of the Republic does not call on the new members of the Council of Representatives within the constitutional period to convene after the ratification of the results of the elections.
- b- The constitution drafter's failure to address a particularly critical issue: the failure of the Council of Representatives to convene at the request of the President of the Republic.
- c- The Constitution's failure to address the issue of vacancy in the position of the Speaker of the Council of Representatives during the session.
- d- The failure of the Iraqi Constitution in force to address the issue of the Parliament's abstention from enacting laws, a task entrusted to it by the constitutional founder.
- e- The failure of the Iraqi Constitution in force to regulate the mechanism for submitting the resignation of the Prime

Minister and the entity to which the resignation is to be submitted, which is considered a hole in the Constitution. And as such, a few questions arise: should the resignation be submitted to the President of the Republic, who is the one who assigns the Prime Minister, or to the Council of Representatives through its presidency? Does the Council or the Speaker of the Council of Representatives have the authority to accept or reject the resignation or is the resignation considered accepted once a certain period of time has passed from the date of its submission?

- f- The failure of the Iraqi Constitution in force to regulate the complete ineptitude of the Prime Minister in the parliamentary system, which causes a major problem, considering that this position represents the highest executive position. This complete ineptitude of the incumbent may end up creating a constitutional vacuum. In addition, constitutional inadequacy also leads to problems, as these inadequacies raise a series of questions about who will request the declaration of this ineptitude: Does the Prime Minister request it? What is the measure taken if the Prime Minister is unable to submit the request? Does the President of the Republic submit it on the Prime Minister's behalf, considering that the former is the one who replaces the latter when the position becomes vacant? Is the request submitted to the Council of Representatives who gave the Prime Minister confidence or to the Federal Supreme Court, considering that it is the party concerned with settling disputes and that the final decision on the request may turn into a settlement of a dispute between a supporter and an opponent? Who has the authority to make the final decision given that this ineptitude is final? Is it the President of the Republic, the Council of Representatives, or the Federal Supreme Court? Can the

Prime Minister appeal a decision they consider invalid or is this decision final and not subject to appeal?

Third: The population's desire for amendment: The Constitution should express the reality of political life and be in line with the people's hopes, as it would grant it respect. However, if the Constitution does not express the reality of political life and is not in line with the hopes and aspirations of the members of society, then its amendment becomes essential so that it becomes responsive to the wishes of the people and in line with the developments in life in all fields. Therefore, the people's demand for amendment is one of the justifications for reforming the constitution⁵².

It is worth noting that the protests in Iraq in 2011, 2015, 2018, and 2019 made the reform of the constitution a necessity so that it becomes in line with the aspirations and hopes of the people.

- 1- Amending the first article related to the nature of the political system:** provided that the amendment includes the conversion of the parliamentary political system into a presidential or mixed system.
- 2- Amending article 122 regarding the governorates councils,** as the protesters demanded that they be abolished completely and that the governor be elected directly. The second part of this demand is the most likely to be achieved as it does not conflict with the philosophy of decentralized governance on which the constitution is based.

Conclusion:

Finally, at the end of our modest scientific work, we have drawn several findings and suggestions from the research,

⁵² Dr. Hazem Sabah Hamid, op.cit., p.87.

which we hope will contribute to reforming the Constitution.

First: Findings:

- 1- The words and texts of the 2005 Iraqi Constitution are full of inadequacies, ambiguities, and discrepancies, due to various extraordinary circumstances, such as the extraordinary security situation that Iraq went through following the fall of the regime after 2003, the lack of specialization in constitution-drafting, and the short period allocated for it, which had a clear negative impact on the unity of thought and the consistency and coherence of the drafts.
- 2- With regard to shared competencies, the 2005 Iraqi Constitution gave the implementation priority to regional or local legislation in the event of a conflict with federal legislation. It also went as far as giving the regions the right to amend the enforcement of the federal law if it contradicts or clashes with a regional or local law with regards to all issues that do not fall within the exclusive competencies of the federal authorities. This is contrary to what all federal states have done.
- 3- The Constitution of Iraq did not define in a paragraph or article the shared competencies, and which of the two authorities' wills will be prioritized in the event of conflicting views in the management of some shared competencies. In other words, it did not specify whether the regions can enact a law on the basis that the Constitution gave priority in implementation in the event of conflict to regional or local law.
- 4- The Constitution did not provide for the principle of striking a balance between the executive and the legislative

authority, which was largely reflected in the success of the public policy plans in the State. The drafter of the constitution created a system of self-dissolution, based on the Council of Representatives' ability to self-dissolve. This is not consistent with the nature of the parliamentary system.

- 5- Article 142 of the Constitution rendered article 126 ineffective, and thus, it is not possible to recourse to the aforementioned article until after the enforcement of article 142. At the time of conducting this study, the Constitution was still not amended in accordance with article 142, which constitutes a deviation in the work of the Council of Representatives.

Second: Suggestions:

- 1- We hope that the 2005 Iraqi Constitution will be amended to remove inadequacies, ambiguities, and discrepancies in the constitutional document found in more than one place, as well as to respond to the demands of the people, provided that this amendment is done based on an extensive study around the provisions to be amended. The entity that has the authority to amend the Constitution must be surrounded by a group of legal experts and people with technical competence so that the complementarity of their efforts can help them complete the dimensions and objectives of the text, choose the exact words to achieve the goal of the amendment, and succeed in achieving its results. The amendment authority must expedite this commitment to put an end to the violations of article 142 of the Constitution, especially since the constitutional time limits are part of the general system. It should be noted that the Federal Supreme Court in Iraq issued a ruling that the provision of the constitutional text, if extraordinary,

does not become obsolete upon expiration or surpassing the specified period.

- 2- We suggest that the authority concerned with amending the Constitution reconsiders the provision of article 64/1 of the 2005 Iraqi Constitution and amend it to read: "The Council of Ministers may dissolve the Council of Representatives when the latter fails to enact laws that are required to implement the government's program or laws provided for in the Constitution, which entrusted the Council of Representatives with their legislation. The request for dissolution shall be submitted to the President of the Republic. The President of the Republic shall then issue a republican decree on the dissolution within fifteen days of the deposit of the request. The Council of Representatives may appeal the dissolution decision before the Federal Supreme Court, within seven days from the date of issuing the dissolution decision," because one of the most important pillars upon which the parliamentary system is built is the balance between the legislative and executive authorities. Both of these authorities have their constitutional means of controlling the other authority. The executive authority has the right to dissolve the parliament, while the legislative authority has the right to decide ministerial responsibility.
- 3- We suggest amending the text of article 65 of the 2005 Iraqi Constitution regarding the Federation Council, to include a provision on the membership composition, conditions, and competencies, and the Council's relationship with the Council of Representatives and other authorities.
- 4- We suggest amending the text of article 112/1 of the 2005 Iraqi Constitution, to read: "The federal government, with the producing governorate and regional governments, shall

undertake the management of extracted, non-extracted, discovered and non-discovered natural resources - after discovery - provided that it fairly distributes its revenues in proportion to the population's distribution across the country, in a way that ensures balanced development in different areas of the country, and this shall be regulated by a law.”

- 5- We suggest amending the text of article 115 of the 2005 Iraqi Constitution, to read: “All competencies not stipulated in the exclusive competencies of the federal government belong to the authorities of the regions and governorates that are not organized in a region. With regard to other competencies shared between the federal government and the regional government, priority shall be given to the federal law in case of a dispute.”

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