RESEARCH ARTICLE

Judicial Review of Law-Making Process in Iraq under the Constitution of the Republic of Iraq-2005

Adnan Amin Qadir

Department of Law, Faculty of Law, University of Sulaymaniyah, Kurdistan Region, Slemani, F.R. Iraq.

Corresponding author's email: adnandalawi@gmail.com

Received: 22/07/2019 **Accepted:** 06/02/2020 **Available online:** 30/06/2020

ABSTRACT

In the presidential form of government, constitutions vest law-making process in the legislative power, while in the parliamentary form of government, the executive power participates in law-making through introducing bills. The Constitution in Iraq grants an original authority to legislate federal laws to the Council of Representatives. Nevertheless, the executive power, namely the President and the Council of Ministries, participates in the process through introducing government bills to the Council of Representatives. Although the Constitution clearly identifies two methods through which bills shall be presented to the Council of Representatives, there have been disagreements over the constitutionality of laws legislated on the basis of legislative initiatives not government bills. The Iraqi Federal Supreme Court has decided differently on different occasions by depriving the legislative power of its right to initiate in some cases or by putting restrictions in some other cases. This research analyzes the line drawn between the Council of Representatives and the executive power in the process of law-making at its first stages and then examines the Federal Supreme Court's understanding in the light of the text of the Constitution.

Keywords: Law-Making Process, Initiatives, Bills, Judicial Review in Iraq

1. INTRODUCTION

The doctrine of separation of powers is adopted into the constitutions of countries around the world differently on the basis of the form of government. In the presidential form of government, the doctrine is in its rigid form, whereas in the parliamentary form of government, soft separation is upheld. Unlike the rigid separation, the soft separation of powers guarantees that the legislative, executive, and judicial powers exercise their authorities but with cooperation and participation of other powers.

Access this article online	
DOI: 10.25079/ukhjss.v4n1y2020.pp37-49	**e-ISSN:** 2520-7806

Regarding the law-making process, the legislative power reserves an original jurisdiction to legislate. However, the executive power participates in the process at the first stage through introducing government bills and at the last stage through approval and issuance of laws. The participation of the executive power in law-making increases the possibility of infringement from one power on another. It is for this reason that established legal criteria is needed to determine the scope of the original power of law-making and its extent of cooperation. In case of disagreement over exercising the authority, the role of the

Constitutional Court as an interpreter of the Constitution comes in to settle/give the last word on such disputes.

In Iraq, the Constitution of 2005 adopts a parliamentary form of government, in which the three powers of government are established on the basis of the doctrine of separation of powers and "checks and balances" have been set up among them. The main question here, therefore, is to determine whether the legislative power or executive power or both powers have the authority to initiate bills to the Council of Representatives and, further, to what extent the Federal Supreme Court plays a role in establishing a line between these powers.

Research Problem: The Iraqi Constitution addresses the issue of participation of the executive power in the law-making process. However, there have been disagreements between the powers in interpreting the eligible authority to introduce legislative initiatives and bills. This problem still exists because the Federal Supreme Court has reached different interpretations on different occasions regarding the issue in question.

Research Aims: The research aims to draw a precise line between the legislative and executive powers in the law-making process in the light of the Iraqi Constitution and guarantee that they do not collude. It also aims to reach a consistent interpretation of the issue by the Federal Supreme Court.

Importance of the research: This issue has been chosen because of the following reasons:

- The implementation of the law-making process as structured in the Constitution has caused disagreements between the executive and the legislative powers over their authority to introduce bills.

- The Federal Supreme Court has upheld many laws and struck down a number of laws because they were legislated on the basis of legislative initiatives; therefore, there has been inconsistency in the Federal Supreme Court's decision regarding this matter.

- This research strives to draw a line between the legislative and executive powers regarding the law-making process.

Research Methodology: The research uses an analytical approach in analyzing the text of the Constitution and then examining the precedents. Along with that, the research incorporates practices in the parliamentary form of the United Kingdom in a comparative form on a number of occasions.

Research Structure: This research starts with an introductory part on the law-making process in parliamentary systems, then analyzes the law-making process under the Constitution of the Republic of Iraq – 2005, examining the judicial review of the law-making process in Iraq, and finally goes on to conclusions and consequent recommendations.

2. Law-Making Process in Parliamentary Systems

In this part, the research will provide an overview on the law-making process in parliamentary systems in an attempt to observe its link to the doctrine of separation of powers. It is essential to find out how the executive participation in the law-making process is rooted in laws and practice in highbred parliamentary systems, especially in the United Kingdom. This will then be helpful to analyze and examine the parliamentary form of government adopted by the Constitution of Iraq.

2.1 Parliamentary Systems and the Doctrine of Separation of Powers

Generally, the Constitution of every state outlines the structure of the national government. Despite the fact that there are various structures, there are two mainly recognized forms of government, namely, the presidential and the parliamentary systems. Adopting the doctrine of separation of powers draws the line between these forms; either it completely separates the legislative, executive, and judicial powers with very limited interference, or it establishes separation between these powers with incorporation of checks and balances between them. These checks and balances will be guaranteed by giving participatory and reviewing role to the

three powers beside their main authorities and jurisdictions. The latter type is commonly called *soft* separation of powers, which is a characteristic of the parliamentary systems (Amin, 2007). It is worth mentioning that there are other forms of government in between the presidential and the parliamentary forms, referred to as "semi-presidential," in which the political regions established in the Constitution adopt different elements of each form of government (Duverger, 1980).

In the light of the above-mentioned, Arabic jurisprudence defines the parliamentary form of government as a system aimed to ensure balances and cooperation between the legislative and executive powers for the two not to control or dominate each other (Hassan, 2006). In such a system, the government powers reserve original authorities that are mainly vested in one body of the government. However, the Constitution has provided means through which the different powers can influence, monitor, and cooperate with each other. It is very important to note that the parliamentary form of government is commonly referred to as a system that guarantees the supremacy of the parliament as described by Jean-Jacques Rousseau as "popular will" or "popular sovereignty" (Rousseau, 1761, 74). According to Rousseau, legislative power comes from general will; only the will of people has the right to say what the law is; the government/the executive power is there only to implement the will of the people. It must be noted that in practice, there are influencing factors such as electoral systems that play a key role in weakening the supremacy of the parliament. For example, in Great Britain, the two dominant parties remain in power on the basis of the winner-takes-all electoral system, which is why the Prime Minister has always had a majority support in the parliament to pass government bills (Sargentich, 1993, 581). A similar pattern has been observed in Iraq, where the Prime Minister usually is guaranteed with the support of parliamentary coalition since 2005, and it has not happened that the Council of Representatives have seriously considered the withdrawal of confidence from the government. In the meantime, it is worth knowing that the Council of Representative has colluded with the government bodies, especially on acts that the government did not support in a particular form.

In the government structure, the executive power is selected by the legislative power in parliamentary systems. However, the doctrine of separation of powers ensures that the legislative and the executive powers are equal bodies with their own functions, and that neither of them is controlled by the other, because it may otherwise lead to the prime minister's dictatorship or parliamentary dictatorship (Hafedh, 2005). The separation of powers in such systems is not rigorous; there are areas where the powers need to cooperate and work together in order to guarantee that the authority is not misused by one power. For example, the parliament is guaranteed with the right to question and/or withdraw confidence from the government, and the government is also given right to dissolve the parliament. The most important authority that the legislative possesses, and the executive power participates in, is the law-making process, in which the government participates through presenting bills and approving and issuing laws. This will be further examined below.

2.2 Law-Making Process in Some Parliamentary Systems

Law-making is a process through which an idea is transformed into a law, and this transformation either creates a new law or revises an existing legal norm. At first sight, one may think that the whole process of law-making is conducted by the legislative power. However, it must be noted that the transformation occurs through different stages that may be initiated by both the legislative and executive powers. In general, the first stage of the process starts with an initiative or a bill. The legislative power then legislates, and finally, the executive power ratifies, issues, and publishes the law. For the purpose of this study, the first stages of the law-making are put at the center of the research question.

In the light of that, the first stage of law-making is the first place where a transformed idea is presented in an initiative or a bill. In most of the parliamentary systems, this can be through either an initiative from the legislative itself or a bill from the executive. From this perspective, the parliament – whether it is bicameral or unicameral – reserves an original function of legislation, including introducing initiatives. According to jurist Paul

Laband, the idea that the parliament reserves an original function of law-making returns to the struggle in the eighteenth and nineteenth centuries between the legislative councils [parliaments] controlled by the bourgeois and the government on the other hand controlled by the aristocrats and also because legislation creates legal rights and statues, Paul Laband believes that it was intended to be exercised by an independent body representing popular constituents (Said, 2013).

An initiative is an act that pushes legislation procedures forward, providing its materials, and it is described as the first brick in the law-making process (Mohsen, 2014). Some jurists such as Esmein believe that initiatives are not elements of the law-making process because they are not included within the authoritative decision resulted from the passed law and they are parts of administrative work outside the legislative process. This idea is, however, rebutted by other jurists who claim that the law-making process does not start in a vacuum, but rather depends on an idea where its content and essence are developed until it reaches completion (Abdul-Rahman, 2006). These initiatives by the parliament can be introduced by a number of parliament members or one of the parliament committees. The idea that the parliament reserves a power to introduce initiatives by its members or one of its committees stems from the fact that its main authority is to make laws on behalf of the people. As such, the authority of law-making will be impended if the parliament does not reserve an authority to introduce initiatives. With this regard, jurist Kolar describes this function of the parliament as that "who has the right to propose [initiate] is who rules" (Mohsen, 2014). As a result, the authority of the legislative power to introduce initiatives is essential and complementary for its power to legislate laws.

As stated earlier, the law-making process is not monopolized by the parliament in the parliamentary systems; the executive power also participates in the process (Abdul-Rahman, 2006). The role of the executive power appears at the first stage of the process, where the government has given an authority to submit bills to the parliament (Al-Rafahi and Hussein, 2010). There are many reasons behind vesting the right to introduce bills in the government alongside the legislative power. First, through bills, the government is able to introduce to the parliament the agenda and views on current matters, and this will include the government's understanding of issues, causes and results, and measures needed to be taken. Through this, the government reserves some measures to defend its views regarding a particular matter before the parliament. Second, the government has sufficient capacity, resources, and public entities that put it in a better position to identify the needs and then address them, unlike the parliament, which does not have such capacity. Third, the majority of acts create different types of obligations on the government, which is why the government needs to have a word regarding its capacity to fulfill the obligations created by laws.

In practice, it is also very likely that the first stage of law-making process may also be politicized and a greater role in the law-making is guaranteed for the executive power. This happens where the government has a parliamentary majority and presents bills that serves the government agenda and interests. For example, in Great Britain and during 2016-2017, 25 government bills received royal assents, and only eight private member's bills received royal assents (see, the UK Parliament surveys of 2016 and 2017).

In a nutshell, the law-making process in parliamentary systems starts with an initiative from the legislative power through the members or one of its committees or as bills from the government. It is noted that in the majority parliamentary systems these two methods are set in the system in order to make sure that both the government and parliament have authority to introduce initiatives and bills.

2.3 Law-Making Process in the Constitution of the Republic of Iraq – 2005 and Applicable Laws

After 2003, Iraq became a federal state in which the government system was declared as republican, representative (parliamentary), and democratic (The Constitution of the Republic of Iraq of 2005, Article 1). It is stated that this system is a "form of government that is based on equality of functions between the legislature, executive, and judiciary branches of government, and in which the political

direction for public affairs results from a complete cooperation between the legislative and the executive powers through a responsible cabinet before the parliament" (Amin, 2007). Therefore, the Constitution sets up the law-making process in Iraq between the legislative and executive power of government. In addition to that, the Constitution provides the doctrine of separation of powers in its soft form, separating the three powers, considering them as equal powers but also guaranteeing balance and cooperation in certain functions, *inter alia*, with regard to the law-making process.

This research bases its law-making analysis in Iraq in a triangle shape between the parliamentary form of government in Iraq, the doctrine of separation of powers, and finally the cooperation between the legislative and executive in the law-making process. However, before going into the analysis and in order to have a better understanding of the law-making process in Iraq, the study first briefly explains the structure of the legislative and executive powers in the federal government as the main bodies involved in the law-making process.

The federal legislative power in Iraq is bicameral and is composed of the Council of Representatives and the Federation Council (see Article 48). The Council of Representatives represents the entire population of Iraq, and members of the Council are elected directly through a popular election for a term of four years (see Article 49 of the Iraqi Constitution). In contrast, the Federation Council, which is the second house of the legislative power, is composed of representatives from the regions and the governorates that are not organized in a region. Similar to other federal states, the purpose of the second house is to protect the interest of the regions, especially small regions which do not have many representatives in the other house. The Iraqi Constitution provides in Article 65 that *"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."* It is noted that the Constitution was not successful in establishing this body of government and left it to be regulated by law – and since the establishment of the Constitution in 2005, the Council of Representatives – because of political disagreements and the fact that apart from the Kurdistan Region of Iraq, no other regions have been established in Iraq.

The federal executive power is composed of the President and the Council of Ministries. The President is elected for one renewable term of four years by the Council of Representatives with two thirds of all votes. It should be noted that the Iraqi Constitution provides in the transitional section, namely, in Article 138, that the Council of Presidency replaces the President in the Constitution for one term after the Constitution comes into effect, which is why for the first formed government under the Constitution of 2005, the Council of Presidency exercised the powers of the President as stated in the Constitution. The Council of Ministries exercises the real authorities of the executive power and is given confidence on individual basis by the Council of Representatives with a simple vote (see Article 76). Following an explanation of the structure of the legislative and executive powers in Iraq, the research will analyze the law-making process in the Constitution.

First, the Constitution guarantees the republican, representative, and parliamentary form of government. It is agreed that unlike the presidential form of governments such as the United States where the law-making is solely vested in the Congress (Article I, Section 1), the parliamentary form of government ensures some influences of the executive power in the law-making process, similar to most parliamentary systems.

Second, Article 61 of the Constitution provides that: *"The Council of Representatives shall be competent in the following [inter alia]:*

First: Enacting federal laws.

Second…"

It is understood from the above Article that the Council of Representative is the only federal legislature representing the Iraqi people's will and will be granted an original power to legislate laws. In this process, no government body participates in any matter.

Further, in Article 60, the Constitution provides that *"First: bills shall be presented by the President of the Republic and the Council of Ministers.*

Second: Legislative Initiatives shall be presented by ten members of the Council of Representatives or by one of its specialized committees."

It must be noted that the Article 60 provides two methods for initiatives; the first clause states that bills will be presented by the President or the Council of Ministries, and the second clause states that legislative initiatives will be introduced by ten members of the Council of Representative or one of its specialized committees. Understanding the text of these two clauses of Article 60 may be different owing to whether or not it is read in the light of other articles of the Constitution. According to one interpretation, it is noted that the Constitution provides two separate methods in clause 1 and 2 and that there is relationship between these two clauses as the founders wanted to ensure that both the Council of Representatives and the President and the Council of Ministries have the authority to introduce initiative and bills. This interpretation is very likely if linked to Article 61, where the Council of Representatives reserves the original authority to legislate laws. If the Council of Representatives is deprived of its authority to introduce initiatives and has to wait for the President and the Council of Ministries to introduce bills, its original authority to legislate laws will be significantly paralyzed and become dependent on the will of the executive power. However, according to the second interpretation, it is believed that Article 60 needs to be read in the light of Article 80 providing the Council of Ministries with the authority to introduce bills, which is why the legislative power does not have the authority to introduce initiatives and it must be sent to the executive in order to be presented as bills all times. It is also worth mentioning that the interpretations of Article 60 may be different depending on how legislative initiative or bills are defined.

2.3.1 Legislative Initiatives

in general, in federal states, both houses have a right to present legislative initiatives to the legislative power. However, in the absence of the second house in Iraq, only the Council of Representatives has the right to present legislative initiatives. But what does an initiative mean? Initiative is the first brick and the initial stage of law-making process, in which an idea is presented to the Council of Representatives to uphold it as law; as such, the initiative is part of the process and cannot be read outside the law-making process (Mohsen, 2014). As far as the initiative regulates an issue in the framework of the Constitution and sets the fundamental component of an act, it can change to a bill and then be legislated by the Council of Representatives.

In jurisprudence, initiative is defined as presenting bills to the legislature in order to legislate an act following the legal and constitutional procedures or as presenting bills to the authority determined by the Constitution (Yousuf et al., 2017).

Some constitutions such the Constitution of the United States (Article 1) vest the authority to present initiatives in the legislation; as an application of rigid separation of powers in such constitutions, the government does not have any legal authority to present bills. The Great Britain is an example of soft separation of powers, in which both the legislature (both houses) and the government have the right to present initiatives and bills together.

In Iraq, however, the legislative initiatives can be presented either by ten members or one of the specialized committees of the Council of Representatives to the Speaker of the Council of Representatives. The Council of Representatives By-law of 2007 provides that an initiative needs to be formulated in articles including the reasons of issuance (Article 120 of the CoR By-Law). Then, if the Speaker of the Council accepts it, they submit the initiative to the Legal Committee to prepare a full report. If accepted by the Council, the initiative will then be referred to the specialized committee for further study (see Article 122 of the CoR By-Law). It is noted that initiatives will not be presented to the Council of Representatives unless examined and reviewed by the legal and specialized committees.

2.3.2 Government bills

the executive initiatives are separated from legislative initiatives and are called "bills" because they are submitted after adequate research and

study by the government (Shubbar and Hameed, 2014). These technical complexities of some laws require technical capacities and resources that only the executive power possesses (Khalil, 2014). The purpose of entrusting this authority within the executive power is that the government, through daily execution of laws and the running public utilities, is in a better position to understand the needs of the society and the shortages and defects in the existing laws compared with other bodies of the state (Said, 2013). And this is a reason the "initiatives" are separated from "bills" in the two clauses of Article 60; bills are introduced by the executive power, whereas legislative initiatives are introduced by the legislative power.

As stated earlier, the issue in question is also linked to the doctrine of separation of powers and the nature of this separation in the Iraqi Constitution. The Article 47 provides that,

"The federal powers shall consist of the legislative, executive, and judicial powers, and they shall exercise their competencies and tasks on the basis of the principle of separation of powers."

In the light of the above Article, the Constitution has adopted the doctrine of separation of powers by creating three independent powers exercising their authorities and tasks. In its first meaning, the doctrine guarantees that each power is equipped with all required means to exercise its authorities, and it is agreed that the authority to legislate laws needs an authority to introduce initiatives by the legislative power. Similar to the path taken by majority of parliamentary systems, the Constitution did not solely reserve the authority to present initiatives in the Council of Representatives; rather, it ensures that the government also participates through presenting bills to the Council of Representatives for the reasons explained earlier. As a result, both powers have authorities to present initiatives and bills.

This general rule, however, is not absolute because in some instances the Constitution restricts the Council of Representatives from presenting initiatives. For instance, the Article 80/4 of the Constitution states that the Council of Ministries is exclusively authorized to prepare the draft of the general budget, the closing account, and the development plans. With this regard Article 62 provides that:

"First: The Council of Ministers shall submit the draft general budget bill and the closing account to the Council of Representatives for approval.

Second: The Council of Representatives 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."

Therefore, in such subject matters, the authority of the Council of Representative is restricted and only the Council of Ministries have authority to present such bills.

It also noted in Iraq that political parties and coalitions in the parliament play a role in advancing the role of the government in the law-making process. For instance, a government with a secure parliamentary majority is able to use the majority to accelerate and decelerate the passage of any law proposal, and in particular cases, the government can take measures to guarantee the passage of a law through the parliament rapidly – even in a single day (Laver, 2008).

In conclusion, the legislative and the executive powers have authority to present initiatives and bills in parliamentary systems, and there is no difference between the two terms of "legislative initiative" and "bills." The difference is rather, in the power that presents the two. This view is also supported by the fact that Iraq has adopted a soft separation of powers in its Constitution. It is true that the role of the executive power in this regard has been increasing because of the capacity, resources, and expertise available to the government. Because of the nature of the parliamentary system and fact that the Council of Ministries usually have the majority support, legislature is considered an essential factor for the increasing role of the government in law-making. For example, according to a survey comparing the passed laws by the Council of Representatives during 2006-2010, out of the 186 laws passed, only 39 were based on the legislative initiatives from the members of the Council, whereas the rest (147

laws) were presented by the government (Said, 2013). Similar figures were mentioned above in part two; In Great Britain during 2016-2017, 25 government bills received royal assents, whereas only eight private members' bills received royal assents (see, the UK Parliament surveys of 2016 and 2017).

3. The Role of the Federal Supreme Court of Iraq in the Law-Making Process

The fact that the Constitution addresses law-making in different chapters and articles using different terms for legislative and government bills and the increased role of the executive power in presenting bills create disputes over who has the authority to introduce initiatives and whether a legislative initiative is different from bills. These disputes have brought the role of the Federal Supreme Court in as a judicial reviewer of the Constitution, examining the constitutionality of laws that may violate the separation of powers in the process of law-making.

The research first explores the judicial review and its nature in Iraq and then examines the Federal Supreme Court's interpretations of the Constitution with regards to the law-making process.

The Law of Iraqi State for Transitional Period of 2004 granted judicial review power to the Federal Supreme Court in Article 44, and on the basis of that, the Prime Minister issued decree No. 30 of 2005, establishing the Federal Supreme Court. After that, the Constitution of the Republic of Iraq of 2005 re-established the Federal Supreme Court, and it provides in Article 92 that,

"First: The Federal Supreme Court is an independent judicial body, financially and administratively.

Second: 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."

Furthermore, Article 93 provides

"*The Federal Supreme Court shall have jurisdiction over the following:*

First: Overseeing the constitutionality of laws and regulations in effect.

Second: Interpreting the provisions of the Constitution…"

It is noted from the above articles that the Constitution of 2005 orders to establish a new Federal Supreme Court, replacing the previous Court that had been established by decree No. 30 of 2005. The new Federal Supreme Court is different from the prospective that its composition is different and it has new authorities including interpretation of the Constitution. The Constitution was not successful in establishing the Court itself and left it to be regulated by a law to be issued by the Council of Representative with two thirds of votes. However, since the establishment of the Constitution, it has not been able to enact the concerned law (Al-Maliki, 2011). Some believe that the current Federal Supreme Court does not have power to practice the judicial review under the Constitution of 2005 because it has been established before the Constitution was upheld in 2005 (Al-Mussawi, 2010). However, the Federal Supreme Court clarified in case no. 37 Federal 2010 that the legal basis for the continuance of the Federal Supreme Court lies in Article 130 providing that *"Existing laws shall remain in force, unless annulled or amended in accordance with the provisions of this Constitution."* According to the decision, this research agrees that it is true that the Constitution of 2005 promises to establish a new Federal Supreme Court. However, since the Council of Representative has not been able to establish the new court, the current Court continues because it is based on a valid decree, decree no. 30 of 2005.

In this part, the research examines the Federal Supreme Court's interpretation of law-making process, including the Court's understanding of the basis of the parliamentary system, the doctrine of separations of powers, and the participation of the executive in the law-making process. However, before that, it must be noted that the nature of judicial review and interpretation of a constitution is characterized by its political feature, and politics

undoubtedly plays a role in the Supreme Court decisions (Al-Shawi, 1981; Al-Mahmoud, 2015). The role of politics rises when the Supreme Court is intended to be established by the legislative power, as in Iraq, or when the executive power reserves a great deal of power in appointing the Federal Supreme Court judges.

First: Narrow Interpretations of the Law-Making Process: In line with what was stated in the previous part, the Council of Representatives enacted two laws, namely, "Law of Disengagement of Directorates of Ministry of Municipalities and Public Works" and "Law of Disengagement of Directorates of Women Affairs in the Ministry of Labor and Social Affairs" in 2010. These two laws were enacted on the basis of legislative initiatives from the Committee of Labor and Public Services and then approved and issued by the Council of Presidency as per Article 60/2 of the Constitution. The government brought a claim before the Court regarding the constitutionality of the concerned laws. The Federal Supreme Court decided that these laws are unconstitutional in decisions 43 and 44 Federal 2010. The research will take main excerpts of the decisions and analyze the reasoning that the Federal Supreme Court reached.

1- *"Through reading the text of the Constitution, the Court found that the Constitution adopted the doctrine of separations of powers in Article 47 and bills need to be presented by the executive power or executive bodies because it is related to financial, political, international and social obligations, and the power who fulfills these obligations is the executive power as per Article 80 not the legislative power"*

2- *"the Constitution of the Republic of Iraq draws in Article 60 two methods through which bills are introduced, and they are the President and the Council of Ministries, and if introduced by other than these two, it will be in violation of Article 60/1."*

3- *Article 60/2 of the Constitution allows the Council of Representatives to introduce legislative initiatives by ten members or by one of the specialized committees, and legislative initiative is an idea, and an idea is not a bill and needs to take one of the two methods [of Article 60/1] mentioned above."*

4- *"the Court found that the law was presented as an initiative by the Labour and Services Committee [of the Council of Representatives] and it was not a bill introduced by the executive power."*

On the basis of the above reasoning, the Federal Supreme Court decided in cases number 43 and 44 Federal 2010 that the "Law of Disengagement of Directorates of Ministry of Municipalities and Public Works" and "Law of Disengagement of Directorates of Women Affairs in the Ministry of Labor and Social Affairs" are unconstitutional.

The Court first reads the Constitution, determining passages through which bills are introduced, and these two passages are exclusively reserved by the executive power, namely, the President and the Council of Ministries. Therefore, if they are presented by any other body, they will be in violation of Article 60/1. It is clear that the Federal Supreme Court reads that no law is enacted except those based on bills introduced by the executive power, because the executive power has an exclusive authority to introduce bills to the Council of the Representative (Al-Akili, 2010). Furthermore, the Court believes that a legislative initiative is an idea and idea is not a bill; if there is a legislative initiative by the members of the Council of Representatives or its committees, it needs to be sent to the executive power to examine it and turn it to a bill.

The research believes that the decisions of 43 and 44 Federal 2010 were not correct interpretations of the Constitution because of the following reasons:

- The Court mentioned the doctrine of separation of powers in Article 47, but did not, however, make an effort to explain how the doctrine works in the Iraqi parliamentary system. If the Council of Representatives has an original power to legislate laws as per Article 61/1 and other powers are prevented to participate in that authority, it is not correct to understand that

the legislative power legislates laws only if the government introduces bills, otherwise the legislative power's authority to legislate laws will actually be taken away significantly from the legislative power.

- The Court does not differentiate between legislative initiatives and bills on the basis of the body that presents them; rather, the Court based its definition on the content of initiatives and bills, believing that a legislative initiative is an idea and an idea is different from a bill. The Court depends on linguistic meaning of the terms instead of their conceptual meaning, where the legislative initiatives and bills are commonly used in the same meaning in Arabic e.g. the Kuwaiti and Egyptian Constitutions (Al-Qazwini, 2015). It was also suggested that the Court could have returned to the documents and the founders of the Constitution for its interpretation of Article 60/ 1 and 2 to clarify the ambiguity concerning the correct meaning of legislative initiatives and bills (Al-Qazwini, 2015).

- It was observed that this decision was in conflict with the previous decisions of the Federal Supreme in case no. 6 Federal 2010. As per the applicable laws and in case of judicial review claims, the Court firstly looks into the procedural requirements, and if these are approved, it then proceeds to the substantial part of the law. There was a claim that some of the articles in the amendment no. 26 of 2009 of the Law of Election No. 16 of 2005 were unconstitutional and were, therefore, reviewed by the Court. Regardless of the fact that the law was issued on the basis of a legislative initiative and did not go through the executive power, the Court did not touch upon the procedural part to declare the unconstitutionality of the law as it did with the latter in cases 43 and 44 Federal 2010. Instead, the Court went on to review the constitutionality of the content of the concerned law (Yousuf et al., 2017).

Second: Current Interpretation of law-Making Process: In 2015 and 2018, the Federal Supreme Court reviewed the same question regarding "Law of Replacement of Members of the Council of Representatives" enacted in 2006 and "Law of Third Amendment of the Law of Electing Members of the Council of Representative no. 45 of 2013." Similar to its preceding laws mentioned above, these two laws were enacted by the Council of Representatives on the basis of legislative initiatives, not introduced as bills by the executive power, and therefore, their constitutionality was challenged in the Federal Supreme Court. Referencing the precedents, the plaintiff argued that these laws did not go through the constitutional passages to the Council of the Representatives. In the 2015 decision, the Court found that the Constitution adopted the doctrine of separation of powers in Article 47 and the correct application of this Article requires that every power of the government exercise its authorities and jurisdictions stated in the Constitution. On the basis of this, the legislative power is granted the authority to legislate federal laws for public interests and can enact laws on the basis of legislative initiatives. However, in exercising this power, the Council of Representatives is obliged not to directly legislate laws infringing on the doctrine of separation of powers. The Court believes that the laws infringing on the doctrine are laws creating financial obligations on the government not incorporated in its planning or in the budget, laws that are in conflict with the ministerial plans, and laws that infringe on the authorities of the judicial power. The Court found that "Law of Replacement of Council of Representative Members" did not create any financial obligation on the government and was is not in conflict with the general policy of the government, and as such, it was constitutional.

In the second case no 99 Federal 2018, the Court addressed the plaintiff's argument that "Third Amendment of the Law of Electing Members of Council of Representatives" of 2018 was enacted on the basis of a legislative initiative and not a bill. The Court briefly addressed the motion and provided that "*another procedural appeal is that the law was in the initiative form, not a bill by the government, and regarding this appeal, the Court finds that this is permitted by Articles 61/1 and 60/2 of the Constitution and the Council of*

Representative By-law wherein the Council exercised its authority stated in the mentioned articles."

The Court in these two decisions overruled the previous interpretation in 43 and 44 of 2010, that all laws must go through the executive power, and provides that legislative initiatives can be a method for legislating laws by the Council of Representatives without going through the government. The Court also creates a strong tie between Article 60/1 and 2 and Article 47 and states that any interpretation of Article 60 must be in the light of Article 47. The purpose of the connection is to draw a line between the two powers in the law-making process in examining the constitutionality of a particular law. It means that the legislative power is separated by the doctrine of separation of powers in Article 47, and the Constitution guarantees that it exercises its authorities without any infringement by one power on another power. So, what is that line? The Court believes that the separation of powers and Article 60/2 guarantee the Council of Representatives' power to legislate laws on the basis of initiatives from its members or the specialized committees as far as the subject of the law does not infringe on the doctrine of separation of powers. This infringement occurs when the initiatives put financial obligations on the government not incorporated in its planning or in the budget or initiatives that are in conflict with the ministerial plans. It should be said that the Court overcame the dilemma of linguistic meaning of initiative and bills and finally agreed on the fact that these two terms mean the same but are used differently because of the different source of initiative.

Although the new test overruled the previous test and drew a new line in the law-making process, this research believes that this line is not correctly drawn and it faces many legal challenges. First, the legislative power has an original authority to legislate laws, and this authority is original and not derived from any other authorities, and putting limitation on it not provided for in the Constitution is unconstitutional. The Constitution in Article 80/4, for instance, provides that only the Council of the Ministries is authorized to prepare the general budget bill and close account and the development plans. This the only part where the power of Council of Representative to introduce initiatives is limited, as it is mentioned in the Constitution.

Also, the Court addressed the example of laws that creates financial obligations on the government. One may ask, what if the law creates other obligations such as political, social, and international obligations on the government? This blurred line between the legislative and executive powers that the Court established will certainly bring new cases to the Court in the near future. Having said that, these last decisions of the Federal Supreme Court are considered as good steps toward the correct understanding that the legislative power in the parliamentary form of government has an original authority to initiate laws, which should not be taken away from it.

4. Conclusions

This article has come up with the following conclusions:

1- The doctrine of separation of powers draws the line between the forms of government; either it completely separates the legislative, executive, and judicial powers with very limited interference, or it establishes a soft separation of powers, which is a character of the parliamentary systems. The Constitution of the Republic of Iraq has adopted a representative and parliamentary form of the government and established three federal powers of legislature, executive, and judiciary on the basis of the doctrine of separation of powers.

2- Law-making is vested in the legislative power in Iraq, and therefore, the legislative power has authority to enact, revise and amend, and abolish federal laws. With this regard, there are two methods of introducing initiatives – legislative initiatives by the members of the Council of Representatives or its committees or bills by the government.

3- The executive power of the government in Iraq has claimed on many occasions that the Council of Representatives cannot

enact laws unless introduced as bills by the government. This article concluded that this question is related to the doctrine of separation of powers, the adoption of the parliamentary form of government in Iraq, and the text of the Constitution, which provides two methods of presenting initiatives by the Council of Representatives and the government.

4- Because of disagreement, some cases were brought to the Federal Supreme Court. In 2010, the Court decided that the Constitution determines the passages through which an initiative will be presented; these two passages are *exclusively* reserved by the executive power, namely, the President and the Council of Ministries, and if they are presented by another power, it will be in violation of Article 60/1. This decision stated that legislative initiatives are different from bills, and in order to be law, they need to go to the government first. In doing so, the Court deprived an essential component of the original authority of the Council of Representatives to legislate laws in Iraq.

In 2015, the Court overruled the previous understanding that all laws must be based on government bills. The new interpretation guarantees that the Council of Representatives can present initiatives directly to itself through its members and/or specialized committees, and it can therefore legislate laws on the basis of legislative initiatives but with a number of limitations, including occasions where a law creates financial obligations on the government.

The new understanding of the Court is considered a good step toward the correct interpretation of the law-making process, which is that there are no limitations on the authority of the Council of Representatives to legislate laws on the basis of its initiatives, unless prohibited by the Constitution, such as in case of the general budget-related laws.

5. Recommendations

In line with what is common in presidential forms of government around the world and to avoid further disagreements between the executive and legislative powers in Iraq on the authority to initiate bills, it is recommended that Article 60 is amended. This amendment will also put an end to different interpretations of the Federal Supreme Court as analyzed in the research.

References

Books:

Dana Abdul-Karim Said, (2013). The Role of Parliament in Contemporary Parliamentary Systems [دور البرلمان في الانظمة البرلمانية المعاصرة]: Al-Halabi Legal Publications, Beirut.

Jaffar Kadhm Al-Maliki. (2011). Reference in the Federal Supreme Court [المرجع في قضاء المحكمة الاتحادية العليا]: Atik for Book Creation, Baghdad.

Latfi Mustfa Amin (2007).The Doctrine of Separation of Powers and its Unity and their Implementation in Iraqi Constitutions [مبدا الفصل بين السلطات ووحدتها وتطبيقهما في الدساتير العراقية]: Hamdi Print and Publication, Sulaimanayah.

Madhat Al-Mahmood, (2014). The Judiciary In Iraq: iUniverse LLC, Bloomington.

Mundhr Al-Shawi, (1981) Constitutional Law (Theory of Constitution) [(القانون الدستوري (نظرية الدستور]: Al-Qadisa House for Publication, Baghdad.

Mureed Ahmed Abdul-Rahman. (2006) The Balance between the powers of legislative and executive [التوازن بين السلطتين التشريعية والتنفيذية]: Dar Al-Nahda Al-Arbia, Cairo.

Articles and Journals:

Abdul-Azim Jabir Hafedh. (2015). The Problem of Political Parliamentary System in the Republic of Iraq's Permanent Constitution of 2005, Journal of International Studies, (63).

Maurice Duverger. (1980). A new political system model: semi-presidential government, European Journal of Political Research, (8).

Michael Laver. (2008). Legislatures and parliaments in comparative context, The Oxford Handbook of Political Economy, (15).

Mohamad Abbas Mohsen (2014). Law proposals between the legislative and the government initiatives [اقتراح القوانين بين المبادرة التشريعية البرلمانية والمبادرة الحكومية], Academia for Social and Human Studies, 11.

Mohamad Hilal Al-Rafahi and Mohamad Hussein. (2010) Development of the role of the executive power in law-making process in the us presidential system [تنامي دور السلطة التنفيذية في العملية التشريعية في النظام الرئاسي الامريكي], Journal of University of Damascus for Economic and Legal Sciences, (26) 2.

Mohsen Al-Qazwini (2015). The right of the parliament in legislating laws in iraq's constitution of 2005 [حق مجلس النواب في تشريع القوانين في دستور العراق لعام ٢٠٠٥], Ahl Al-Bait Journal, (1) 18.

Raafii Khudher Saaleh Shubbar and Waleed Hassan Hameed (2014) The legal organization of parliamentary system in the constitution of republic of Iraq, Al-Mouhakiq Hilli Journal for Legal and Political Studies, (6).

Sahar Kamil Khalil (2014) The legislative power in the Iraqi constitution of 2005 [السلطة التشريعية في العراق في ضوء دستور ٢٠٠٥], Journal of Political Issues- Al-Nahrain University, 14.

Shahab Ahmed Abdula, (2018). The Role of the Federal Supreme Court in Strengthening the Doctrine of Separation of Powers [دور المحكمة الاتحادية العليا في تعزيز مبدا الفصل بين السلطات], Journal of Political Issues- Baghdad University, 2.

Thomas O. Sargentich, (1993). The presidential and parliamentary models of national government, American University International Law Review, (8) 2/3.

Mohamed Yousuf, Mohamed Ganam and Firas Makia (2017). The Legislative Power of the Council of Representatives [السلطة التشريعية لمجلس النواب], The Arab Association of Constitutional Law. Tunisia.

Constitutions and Laws:

The Constitution of the Republic of Iraq- 2005

The Iraqi Council of Representatives By-law of 2007

The Law of Iraqi State for Transitional Period of 2004

Decree no. 30 of 2005

Judicial Decisions:

The Federal Supreme Court of Iraq, Decision No. 21 Federal 2015

The Federal Supreme Court of Iraq, Decision No. 43 Federal 2010

The Federal Supreme Court of Iraq, Decision No. 44 Federal 2010

The Federal Supreme Court of Iraq, Decision No. 99 Federal 2018

The Federal Supreme Court of Iraq, Decision No. 06 Federal 2010

The Federal Supreme Court of Iraq, Decision No. 37 Federal 2010

Online Sources:

HOUSE OF LORDS PUBLIC BILL SESSIONAL STATISTICS FOR SESSION 2016-2017, available at <https://www.parliament.uk/documents/publications-records/House-of-Lords-Publications/Records-activities-and-membership/Public-bill-statistics/HL-Public-Bill-stats-2016-17.pdf.pdf> [Accessed on 16.01.2019]

UK parliament, available at <https://www.parliament.uk/site-information/glossary/royal-assent/> [Accessed on 16.01.2019]

Rahim Hassan Al-Akeli, No Law but through the executive power [لا تشريع الا عن طريق السلطة التنفيذية], available at <http://burathanews.com/arabic/articles/104785> [Accessed on 16.01.2019]