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Amending the Constitution of the Republic of Iraq (2005)

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Abstract. The authority that have the right to amend the constitution have to be restricted to two points: the first is to abide by the restrictions which the constitutional legislator imposed for the amendment, and the second is that the amendment should goes through the stages stipulated by it in the constitutional document. Both are found in the Iraqi constitution amendment, so the constitutional legislator imposed a set of restrictions on the amendment, which must be started with the proposal, the initiative approval and finally the final approval, whether the amendment is normal or extraordinary; each has its terms of success which may cause the difference between them.

Keywords. Constitution, amendment, parliament, extraordinary amendment, normal amendment, proposal of the amendment, referendum

1. Introduction

Constitution amendment is one of the requirements of the development of human life in its various fields; it is also one of the rights of the people. The constitutions therefore, (usually) recognize the right of the peoples to amend the constitution through amendment legislation, and state their foundations in its text, even that differed who owns the right of the amendment in addition to jurisprudence disagreement upon them.

Some argued that the amendment is the right of the people, and another, after adopting the idea of nation sovereignty, went to give this power to the nation rather than the people. The overwhelming view is that the constitution determines the authority of the amendment which must follow the procedures and the formats that are required to modify it ;thus we will have two founder authorities: the authority of drafting the constitution which is called the "the original constituent authority", and the authority of amending the constitution which is called the "the established constituent authority" which differs according to the difference of the constitutions, where some constitutions give it to the parliament, such as the Lebanese constitution (1926) and the Soviet constitution (1936), while some give it to an elected constituent assembly, such as the French constitution (1848). Some of the constitutions give the amendment to the people through the constitutional referendum ⁽¹⁾ as in the Iraqi constitution (2005) which would be the subject of this research.

Research Problem

The problem of this research revolves about many important questions, such as "Does the Iraqi constitution take only one type of amendment? or it adopted more than one type? And, if they are many types, what are they?"

As the amendment goes through three important stages which are 'proposal, initiative approval and the final approval, so which party or authority has the right to propose an amendment? which party must have its initial approval on it? Which party has the right of the final approval? Then, do these types of amendment share the conditions or differ at them?

We will attempt to answer all these questions in this study.

Research Methodology and Scope

In this research we used descriptive and analytical approaches, plus the synthetic method one in which we will build the results of the idea of the research and we will limit the scope of the study to the amendment of the Iraqi constitution (2005).

Research plan:

The research will be divided into three topics, We begin with an preface topic that shows two important aspects that are part of the general theory of amendment the constitutions, then we study the extraordinary amendment which the Iraqi constitution (2005) took it as a first topic, then the second one will search in the normal amendment.

2. The amendment of the constitution

As the amendment of the constitution is a necessity for the society movement and development; two important questions should be dealt with: The first is "what are the restrictions that the authority of the amendment of the constitution faces?"

And the second is "what are the stages of the amendment?"

The answers for these two questions will be through previewing each in a special branch and as follow:

2.1. The restrictions that face the authority specialized in the amending of the constitution:

There are two kinds of restrictions :The first is the objective restrictions ,and the second is the formalities or nominal restrictions, which are the procedures that must be followed at the amendment of the constitution, and these procedures are provided for in the constitution itself⁽²⁾,

These procedures represent the main difference between rigid and flexible constitutions, which have been discussed previously. So the objective restrictions will be dealt with at the following: The objective restrictions relate to determining the scope of the amendment of the constitution from established constituent authority. "and this scope of the amendment the constitution or the objective restrictions may embodied in prevent or prohibit the amendment of the constitutional rules. This prohibition is from two kinds; total and partial, which means that they may prohibit amendment some of the texts of the constitution or may prohibit amendment all the texts of the constitution.

The first prohibition called the objective one, and the second, the chronological. Both will be explained at the following:

2.2. The Objective Prohibition

This kind of prohibition means prohibit or forbid the amendment some of the constitution texts, which basically concerned with the substantial provisions of the constitution, especially those which concerned the regime and the form of the state.

So the constitutions of this kind try to keep the form of the state within the royalist or republican, and its presidential or parliamentary or whatever else, and the philosophy of this kind of prohibition is to add protection on the basic texts which the constitution contains and forbid them from being touched ⁽³⁾. Some of the constitutions adopted this kind of prohibition such as the French amended constitution (1958) which prohibited amendment the republican formality of the government ⁽⁴⁾.

This prohibition has two parts ;the first is the permanent objective prohibition, which means that it is unpermitted to deal with some of the provisions permanently and absolutely, and the second is that :the temporary objective prohibition which means not allowed to amend some of the texts of the constitution during a specific period of time ⁽⁵⁾, such as in the Iraqi constitution (2005) in article 126 /item 2, which prevented any procedure or amend meant for the basic rules in the first chapter ,and the rights and liberties in the second chapter of the constitution except after two consecutive election cycles.

2.3. Temporary Prohibition

Unlike the objective prohibition which forbids the amendment of some of the texts of the constitution; the chronological prohibition forbids amendment of all the texts of the constitution, thus, this forbidding is a temporary and not permanent or absolute.

According to this kind of prohibition ,the amendment for any of rules and judgments in the constitution is not allowed for a period of time sufficient to give these rules stability and steadiness in the conscious of the political group and in the ideology of the nation ⁽⁶⁾.

The American United States constitution (1787) might be the first which dealt with the chronological prohibition whereon the 5th article prevented the amendment of the texts of the constitution before (1808) .Many of other constitutions adopted the same kind of prohibition such as the first constitution for the French revolution (1791), which prevented any amendment for its texts before proceeded four years ⁽⁷⁾.

3. The Stages of the constitution amendment

To achieve the existence for the project of the amendment the constitution and being accomplished ,it must goes through some stages which may differ from a constitution to another whence the increasing and the decreasing .But all the constitutions agree on three main stages which are as follows:

3.1. The first stage: The proposing the amendment

The initiative of proposing the amendment of a text of the constitution by an authorized party is the significance of amendment proposal ⁽⁸⁾. The important point here is the party that has the right in presenting the proposal of the amendment, where not all the constitutions agreed upon. In general there are four parties that have this right which are:

1-The executive authority: Some of the constitutions may permit the executive authority (Government) the right to propose the amendment to perform it individually, and the constitutions adopt this method when they want to grant the executive authority more strength

and progress and overbalance it on the legislative authority .This method was adopted at the period which the democracy has not been found yet. The constitutions which adopted this method ;the Romanian one(1938)⁽⁹⁾ and the Japanese (1946)⁽¹⁰⁾.But after the spread of The democracy principals ,this method has backtracked.

2-The Legislative authority(the parliament):The political system and the countries adopted the principle of strengthen the parliament against the executive authority, therefore their constitutions state that the right of the amendment the constitution is only for the parliament, The reason of giving the parliament the right of the amendment is not exclusive to give it more strength only ,but to a more realistic reason that the constitutions which adopt the principle of differentiation between the authorities ,makes the parliament the accompanied of the entire jurisdiction in legislation field ,such as in the amended American united states constitution (1787)⁽¹¹⁾, and the Argentinian constitution (1853)⁽¹²⁾.And this jurisdiction is not limited to the normal legislation only, but also comprises the constitutionally.

3-The parliament and the executive authority :this method may be the most following one in the modern age ,and it is adopted by the constitutions which seek for a kind of balance between the parliament and the executive authority ,whence it gives the right of proposal the amendment of the constitution to both the authorities ;the parliament and the executive one.

An example of these constitutions; the amended French constitution (1958)⁽¹³⁾ ,and the constitution of the Arabic Egyptian republic (1971)⁽¹⁴⁾.Also the Iraqi constitution (2005) has adopted the same method ,whence permitted the executive authority represented by the president of the republic and the prime minister together ,with the fifth of the members of the parliament to present the proposal of the amendment ⁽¹⁵⁾.

4-As for the constitutions that up look to the right of the people in determining their fate through the constitutional articles ,which believes in the semi-direct democracy ,adopt giving the right of the constitutional amendment to people as participant with the parliament ,such as the Italian constitution (1947) which the Italians people participated with the parliament in the constitutional amendment.

From the organizational aspect, stipulates presenting the proposal of the amendment by a specific number of individuals as a minimum limit to avoid chaos that may be happen and waste of time and effort when there is no minimum limit for the number of individuals who have the right to present the proposal of the constitution amendment⁽¹⁶⁾ such as in the Switzer constitution and the American one.

3.2. The initial approval on the amendment.

After the amendment is proposed ,this proposal must be examined by a legally authorized entity , then this entity decides on the proposal to amend the constitution ,and the one which the initial approval is associated with is the parliament ,And because of the extreme importance of the constitution amendment ,many procedures should imposed on to allow a wide rage study for the proposal of the constitution amendment and deporting the hasty and inaccurate amendment. In another words the initial approval of the proposal of the constitution amendment means deciding whether there is or is not a necessity for this amendment, and the constitutions usually give the parliament the right of this decision, so it legislate its initial approval on the proposal of the amendment.

The reason for granting this right to Parliament is its characteristic as it includes representatives of the people who gave them the right to legislate, this makes it the most component bodies in

the country to consider and amend the constitution proposal, Hence, the Parliament will examine and discuss the amendment proposal and then vote on it with approval or rejection.

One of the constitutions that gave parliament the right to issue initial approval of the proposal to amend the constitution is the Iraqi Basic Law (1925)⁽¹⁷⁾ and the amended constitution of the Republic Of Iraq (2005)⁽¹⁹⁾.

3.3. Final approval of the amendment:

Which means deciding the proposed constitutional amendment as final?

Constitutions differed in who gave them the right to the final approval of the proposed amendment to the constitution, Some constitutions went to grant this right to the authority that gave it the right of initial approval of the amendment proposal, that is the parliament itself. Other constitutions granted this right to the same people, and these are the constitutions that adopt the semi-direct democracy. Whereon the opinion of the people on the proposal to amend the constitution is taken through the constitutional referendum, and many constitutions adopted this kind of amendment, such as the Italian constitution (1947)⁽²⁰⁾ and the constitution of the Arab Republic of Egypt (1971)⁽²¹⁾ and the constitution of the Republic of Iraq (2005)⁽²²⁾, and the amended constitution of the Arab Egypt Republic (2012)⁽²³⁾.

It is noteworthy that Iraq constitution introduced a temporary objective prohibition, which means preventing or prohibiting the amendment of some provisions of the constitution for a certain period of time, so it prohibited any constitutional amendment to the basic principles of Part One and the rights and freedoms set forth in Part Two. The prohibition continues and is lifted only after two consecutive election cycles⁽²⁴⁾. It identified two types of amendment to its rules; the first is the extraordinary amendment and the second is the normal amendment, And we will examine each of the following:

4. The extraordinary amendment

We have noted above that the constitution has introduced a temporary objective prohibition, whence it prohibited any amendment for the first and second sections of it for two consecutive cycles, but as an exception to this prohibition⁽²⁵⁾, the amendment was approved at the beginning of the work of the parliament at its first cycle. We shall examine the phases of this extraordinary amendment.

4.1. The constitution amending Proposal

The Constitution granted the right of the of the constitutional amendments to a committee formed by the parliament at its first session and the beginning of its rule, and this committee is responsible for submitting a report to the parliament containing its recommendation of the necessary amendment to the constitution.

It is not required for this committee to be elected, so it permitted the parliament to form it and without any necessity for election, and it is not required to be its members from the members of the elected parliament itself, but it must be representative to all the main components of the Iraqi society, and when we repossess the history of the Iraqi elections (2005), which produced the patriotism assembly; we find that the Sunni component boycotted the elections, so there were no representatives of it in the patriotism assembly that one of its missions is to write the permanent constitution for the country. The assembly included some of the Sunni

leaders to the committee of writing the constitution in order to allow all the components of the Iraqi people. The Arab Sunni participants are un elected; so the constitutional legislator wanted to grant them the opportunity to participate actively in its writing. Therefore, the constitutional legislator allowed preceding an amendment on it after the election of the parliament which has the Arab Sunni represented. This extraordinary amendment and this way of forming the committee of writing the recommendations or the proposals of the constitution amendment, provided being a representative of all the main components of the Iraqi society⁽²⁶⁾, so it was a lawful to allow the committee the right of proposing the constitution amendment. The committee was restricted to a time condition; it has only four month to accomplish its works.

What is the destiny of this committee after it finishing its work and presenting the report which includes the necessary recommendations to the parliament ?The Constitution solved this matter by deciding to dissolve it directly after determining its proposals⁽²⁷⁾.

4.2. Second Branch

The initial approval on the amendment proposal

The Constitution of the Republic of Iraq (2005) granted the right of proposing the amendment to the committee which the parliament form, then it came back to the general rules of the constitution amendment, where it granted the parliament(represented by the council of deputies) the right of the initial approval⁽⁵¹⁾ for the amendment proposals to be done as follows: The committee presents its recommendations or proposals of the amendment of the constitution to the parliament ,and the tender should be in one time and in one session the committee show all of its recommendations of the amendment, after that the council of the deputies vote on these recommendations, which regarded acknowledged from the council of the deputies if the majority of the members approved on them⁽⁵²⁾, by this ,the initial approval of the amendment of the constitution has been done, or more precisely, it is issued from the specialized authority.

4.3. The Final Approval on the constitution amendment

Regarding that the style of writing the constitution (2005) is the democratic style, and it had been written by following the popular referendum, the same method was also used in amending this constitution, where the final approval of the constitutional amendments had been granted to the people itself through the referendum.

And according what is mentioned above, the council of deputies submits the amended articles to the people for the referendum which must be done within two months after the date of confirming the amendment by the council of deputies⁽³⁰⁾.

To assure the referendum success, two points are provided which are:

*Firstly: Achieving the approval of the majority of the voters.

*Secondly: do not refuse the amendment by two thirds of the voters in three provinces or more. The last condition quoted from the administration of the Iraqi State for the transitional stage ,where the public referendum should be successful and the draft of the constitution approved about by the approval of most of the electors in Iraq ,and if it is nor rejected by two-thirds of the electors in three provinces or more⁽³¹⁾.The motive to put these two conditions ; the success of the referendum on the constitution and in the case of the success of the extraordinary amendment ,many reasons and circumstances to make the people more confident about the constitution.

5. The Normal Amendment

This amendment accomplished after the expiry of the period of time for the temporary objective prohibition ,and we will examine the stages of this kind of the constitution amendment ,which they are ;the proposal of the amendment ,the initial approval and the final approval ,through three branches :

5.1. The proposal of the amendment

Through the extraordinary amendment, we noted that the Constitution granted the right of the proposal of the amendment to a committee formed by the council of deputies in the beginning of its work ,and this is discrepant to the general rules in the proposal of the amendment in the article (126),So we can say that the exemption doesn't limited with only the amendment ,but on the organization of the amendment proposal ,As for the normal amendment ,the constitutional legislator went back to the general rules.

The constitution granted the right of initiative in the amendment proposal to two authorities; the executive authority and the legislative one.

As for the proposal of the executive authority, it should be presented by the president of the republic and the prime minister together ⁽³²⁾ that means the president is not permitted to propose the amendment individually ,as well as for the prime minister .

The council of deputies has the right of proposed the constitution amendment,and by telling so we mean its members ,and the constitution clarified that the less proportion of the members of the council of deputies has the right of proposed the amendment is the fifth ,so fifth (1/5)of the members of the council can present the proposal of the constitution amendment ⁽³³⁾.

5.2. The initial approval of the proposal of the constitution amendment

The Constitution made this approval is of the Council deputies specialties, where it conditions to get the initial approval of the proposal of the constitution amendment by getting the approval of the majority two-thirds of the council deputies, ⁽³⁴⁾ . This shows that both of the initiative approval and the extraordinary one are alike.

5.3. The Final approval of the proposal of the constitution amendment

The normal amendment of the final approval is not different from the proposal of the extraordinary amendment from which the party which has the right in it ,so the constitution final approval is referred to people in a public referendum, but the difference is in the way of approving the amendment .We noted in the extraordinary amendment that the constitution conditioned two things to regard the referendum successful; the first is the approval of the majority of the voters .and secondly is being not rejected by the two thirds of the majority of the voters in three provinces .And the constitution took in the normal amendment , with first condition that it conditioned for the success of the referendum ,the approval of the majority of the voters, and it did not conditioned being un rejected by the two-thirds of the voters in three provinces.

In another words ,the general constitutional referendum regarded successful and the final approval on it was done whit the approval of the majority of the blackballs ,even if it is rejected by the two-thirds of the voters in three provinces ,because this rejection has no value, as in article (126),which said ((It is not permitted to amend the basic principles coming the first chapter ,and the laws and liberties coming in the second chapter of the constitution before two

consecutive sessions ,and according to approval of two thirds of the members of the council deputies ,and the approval of people by the general referendum, with the assertion of the president of the Republic through seven days))⁽³⁵⁾

Also it said ((it is not permitted to amend the other articles unmentioned in the second chapter ,except after the approval of the tertian of the members of the council deputies ,and the approval of the people through the general referendum and the assertion of the president of the republic in seven days))⁽³⁶⁾.

The difference between the two types of the amendment; the extraordinary and the normal is an essential and very important difference .Being conditioned not rejected the amendment by the two-thirds of the voters in three provinces is a real obstacle and a serious inhibitor at the way of the constitutional amendments ,also it regarded out of the principals of democracy whereon opens the way widely in front of the fewest to impose its opinion and controls the majority what makes the destiny of the five sixth of the Iraqi society in the hand on one sixth of it, and this is an obvious infraction with the principals of democracy which its basics the opinion of the majority.

The constitution made the assertion of the president on the amendment is formative, because it regarded the amendment already asserted after seven days even the president did not assert it after the period determined at the "secondly" and "thirdly"

From article (126) finished, in the case of being un asserted⁽³⁷⁾.

6. Conclusion

With the end of this research, we conclude a number of results and recommendations that could be summarized as following:

6.1. The Results

1-There are two types of restrictions may impose on the constituent authority, which are, the objective and the formative ones.

2-The restrictions on the amendment authority represent the obvious difference between the two types of the constitutions; the rigid and the flexible.

3-The objective prohibitions (which means prohibit the amendment some of the texts of the constitution)essentially concerned with the essential judgments in the constitution especially those which concerned with the system of the governorship ,and the form of the state.

4-The chronological prohibition stands on the basic of prohibited amendment all the texts of the constitution, but this prohibition is temporary and not permanent or absolute.

5-The amendment of constitutions has three main stages which they are the proposal of the amendment, the initial approval on it and the final approval.

6-The Iraqi Constitution adopted two types of amendments, the extraordinary and the normal amendment.

7-The constitution determined the start of the council deputies work in its first session to form the committee of the extraordinary amendment, and determined a specific period of time for it to represent its report to the council of deputies about its proposals for the extraordinary amendment ,which it is only four months since the date of its forming.

8 -The most important conditions for the success of the referendum on the extraordinary amendment; are the approval of the majority of the voters and being not rejected by the two-thirds of the voters in three provinces or more.

9 -The normal amendment which contains the two chapters, the first and the second, is allowed to accomplished after passing two cycles added to the rest of chapters.

10-The referendum on the normal amendment of the constitution is regarded successful only after getting the approval of the majority of the blackballs and the assertion of the president of the republic ,and eliminate the condition of the not rejected the amendment from the tertian three provinces or more.

11-The Constitution made the approval of the president of the republic is formative, because it is already will be asserted after seven days .

6.2. The Recommendations:

1 The constitutional legislator, at the constitution amendment, has to adopt the popular proposal for the constitution amendment and put the main fundamentals and the most important conditions such as specifying the appropriate number of individuals initiative to present the proposal.

2- The constitutional legislator at the constitution amendment has to reduce the ratio of the initiative approval on the amendment ,so ,takes with ultimate majority (the majority of the number of the members of the council deputies) instead of the descriptive majority(two-thirds majority).

3-We strongly support what the constitutional legislator did regarding the success of the vote on the amendment to remove the condition of non-rejected of two-thirds of three provinces.

References and Margins:

- [1] see:Dr.Hussein Uthman Mahammad Uthman,& Dr.Umar Hure.The constitutional Law 1st edition ,AL-Halabi publishments,Beirut,2010,p57.
- [2] Is it permissible to modify these procedures? Some of the jurespurdence argues that it may not be amended even if the constitution does not provide for it ,and these are called the implicit restrictions ,which means the restrictions that are not provided for in the constitution and related to preventing the amendment authority from changing the amendment procedures,(for more details see: Dr. Munthir AL-shawi. The constitutional law,p2,2nd edition ,The legal library ,Baghdad 2007,p291 and what follows.
- [3] One of the earliest constitutions that adopted the objective prohibition was the French constitution(1875)in the amendment in (1884),This prohibition came against historical and political background, After the fall of Napoleon III ,the conflict intensified between the supporters of the monarchy and the supporters of the republic ,each of them wants to install what goes to support ,When supporters of the Republic won the elections ,they amended the constitution and added an item to article 8,it prohibit the amendment of the republican system as this item stipulates that the republican form of government cannot be the subject of an amendment proposal.(see: epid .p283)
- [4] seeArticle (89) of the French Constitution (1958) The amended.
- [5] See:Dr.Rafi'e Kkhudher Salih Shubbar. General Theory of Constitutional Law.Consultation Office,Babil 2006.p109 and 110.
- [6] See:Dr.Mohammad Ibraheem Darwish,the constitutional law 1st edition, Dar AL-Nahdha AL-arabiya,Qairo,p121.
- [7] See:Article (3)of France constitution(1791)
- [8] It means the legislative initiative.
- [9] See:Article(67)
- [10] see:article (72)

- [11] See:Article (fifth).
- [12] See:Article (30)
- [13] See:article (89).
- [14] See:article(189)
- [15] See:item (firstly) ,article z9 126).
- [16] See:article (71) of The Italian constitution (1947).
- [17] See: article (118) of the Iraqi fundamental constitution (1925) neglected.
- [18] See;The two items (secondly/third)of the article (126)
- [19] See:article (226) of the republic of Egypt Arabia (2012) the amended.
- [20] See;article (138)of the Italian constitution (1947),noticed that this article allowed people to give its opinion on the proposal of the constitution amendment in one case which it is if the amendment proposal did not get (two-thirds)of the members of the parliament.
- [21] See:article (189)of the constitution of Egypt (2012) the amended.
- [22] See:article(126)of the Iraqi constitution (2005).
- [23] See;article (226) of the Egyptian constitution (2012)the amended.
- [24] The item (secondly)of the Iraqi constitution (2005).
- [25] See:the item (fifth)of the article (142) of the Iraqi constitution (2005)
- [26] The item (firstly) of the article (142)of the Iraqi constitution (2005).
- [27] See: The item (firstly)of article (142)of the Iraqi constitution (2005)
- [28] We mean by the initiative approval on the constitution amendment ,the approval of the parliament which depends on it the presentation of the constitution for a general referendum for the people to get its approval on it.
- [29] See:the item (firstly)of the article(142)of the Iraqi constitution (2005).
- [30] See:The item (third)of the article (142)of the Iraqi constitution(2005).
- [31] The item (C) of the article (61) of the law of the Administration the Iraqi State for the transitional phase (2004).
- [32] See:the item (firstly)article (126)of the Iraqi constitution (2005).
- [33] See;epid.
- [34] See:The item (secondly) of the article (142) of the Iraqi constitution (2005).
- [35] The article (651/secondly) of the Iraqi constitution (2005).
- [36] article (126/third)Of the Iraqi constitution (2005).
- [37] article (651/fifth/A) of the Iraqi constitution.(2005).