

Amendments to the Constitution and the extent to which the constitutional judiciary has power over them

By

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Abstract

The research objective is to examine the idea of constitutional amendments, constitutional jurisprudence, and comparative constitutional judiciary from the perspective of the legal value of constitutional restrictions placed on the authority of the constitutional amendment, and to consider these restrictions as a legal basis for imposing the constitutional judge's control over the constitutionality of constitutional amendments. The study focused on the most significant legal arguments made before the constitutional courts of the Federal Republic of Germany, the Arab Republic of Egypt, and the United States of America about the legality of constitutional amendments. In the portions of this study where we used the comparison and analysis approach, these nations were likely chosen as a topic for comparison because of their extensive constitutional and legal systems, as well as their sound judicial practices that deepened the experience in the area of judicial control of the constitutionality of laws in general and the judicial control of constitutional amendments in particular. This experience can be used to improve Iraq's early experience in this area. We concluded that the principle of constitutional inflexibility and supremacy requires that constitutional amendments be subject to the control of the constitutional judiciary as a result of our study of the applications of the comparative constitutional judiciary and our analysis of the texts of the Iraqi constitution for the year 2005.

Introduction

One of the conditions for the creation of a legal state is the presence of a democratic constitution. This constitution alone won't be enough to protect rights and freedoms or guarantee the survival of this state. A functioning constitutional judiciary to exert oversight over the constitutionality of public authorities' actions, and that as democratic constitutions become established, it is necessary to maintain the constitution's enforcement and safeguard it from manipulation and dissolution. Without effective constitutional monitoring to compel the authorities and rulers to comply to and abide by the constitution's requirements, it is hollow and stays meaningless in establishing the legal and political life of communities and governments. Keeping in mind that one of the authorities has the authority to modify the constitution the government entity defined by the constitution as well as the boundaries of its authority.

Importance of the research

The importance of this research is evident in the subject it deals with, as the subject of judicial oversight all Constitutional on constitutional amendments is one of the new and vital legal issues in jurisprudence Contemporary constitutional and comparative constitutional

judiciary, because judicial control over the constitutionality of amendments constitutionality, it is one of the basic guarantees for the enforcement of constitutional rules, accordingly, a principle is achieved Legitimacy and constitutional legitimacy in the state, where the constitutional judge prevents the power of amendment from Make any amendment to the constitution unless it takes into account the restrictions of the constitutional amendment approved by the constituent authority the original constitution. What increases the importance of this research is the adoption of the Iraqi constitution of 2005 for a topic Constitutional oversight and its endorsement of the specialized constitutional judiciary system represented by the Federal Supreme Court Charged with the task of protecting the constitution from all kinds of breaches and violations, and that the decisions issued by these They are final and final decisions that have absolute authority and enjoy the power of constitutional obligation towards all court the authorities.

Research problem

The constitution and laws governing Iraq's constitutional judiciary are the source of the research problem. There is no explicit text describing the constitutional judge's power to extend his influence over the judge in the comparator countries. The validity of constitutional amendments, which gave rise to judicial application disagreements and jurisprudential conflict In this sense, comparative constitutional.

There are two main questions that represent the core of the research problem

- A- Is it possible to imagine that the constitutional violation occurred by the authority to amend the constitution?
- B- Is it conceivable to add these modifications to the scope of constitutional control before the constitutional court given that the constitution does not regulate the issue of regulating the monitoring the constitutionality of constitutional amendments?

Research Methodology

For the purpose of providing the appropriate logical solution to the problem of the study, we relied on two main approaches:

- A- The comparative approach: which is predominant in this research, which we used to explain and clarify the position of the judiciary in the countries under comparison, the extent to which constitutional amendments are subject to the oversight of the constitutional judge
- B- Analytical Approach: We used this approach to analyze the position of contemporary constitutional jurisprudence on the legal value For the constraints of the constitutional amendment, we analyzed the conflicting jurisprudential opinions and weighting among them about the extent Possibility of including constitutional amendments within the scope of constitutional judiciary oversight. This has also been taken advantage of The research methodology for analyzing the texts of the constitution and judicial applications in this regard.

Research Plan

The nature of this research requires that it be divided into three sections preceded by an introduction and ending with a conclusion

The research is as follows

The first section of it is devoted to clarifying the concept of constitutional amendment and the types of restrictions

Constitutionalism imposed on the power of amendment, and through it we focus on the position of contemporary constitutional jurisprudence from the legal value of those restrictions as a basis for checking the constitutionality of constitutional amendments. And in the research second, we will discuss the position of the constitutional courts in the countries under comparison regarding the appeals submitted to it regarding the validity of the constitutional amendments. In the third and final section, we discuss To the provisions of the Iraqi constitution of 2005, which affirm the principle of the supremacy of this constitution, as we discuss Constitutional texts that contain the restrictions of constitutional amendment, and we try as much as possible to analyze and determine the value The legality of these restrictions and the extent to which the federal constitutional judge in Iraq can extend his control over The constitutionality of constitutional amendments.

Conceptual framework

First Topic

Definition of constitutional amendments, and the legal value of amendment restrictions

This topic consists of four demands, we devote the first requirement to the definition of amendments Constitutional, and the second requirement relates to determining the basis upon which to amend the constitution, and relates to The third requirement is about the types of constitutional amendment restrictions and deviating the legal value of those restrictions The fourth and last is devoted to presenting the conflicting legal opinions on the possibility of imposing judicial oversight Constitutional on constitutional amendments.

The first requirement

Definition of constitutional amendments and their basis

This requirement consists of two branches there are two main sections, the first section of which relates to the definition of constitutional amendments, while the second section relates to the foundations on which the constitutional amendments were based.

The first section

definition of constitutional amendments / first: definition of amendment language: amendment (singular) plural (Adjustments), it means the meaning of settlement and straightening, it is said: I modified the thing, an amendment, so he moderated, i.e.: I asked him So He leveled, and He justified the rule and the thing, justly: He established it and other than it, as it is said: "Just the scale or the measure: other than it." So moderate it also comes with the meaning of acclamation, so it is said: justice of the witness or narrator, i.e.: his zakat and attributing him to justice described it.

And a man who is just and just, that is: it is permissible to testify, and the excuse is from the people: the upright who accepts His saying and ruling [1] notes that "the modification in the structure of something in terms of form and content may be intended by it Make some changes to it, by increasing or decreasing, in order to adapt to the new conditions, either

Removing the structure from its foundation and erecting another in its place does not carry the meaning of modification, but rather it is something different from it, at least insofar as it is distinguished by specific characteristics that are consistent with each other and with The main objectives envisaged by them. By comparison, the meaning of the amendment is linguistically and idiomatically Its requirement is to address some of the rules of the constitution in force by deleting them, or by adding them provisions for it” [2].

Second-Defining constitutional amendments idiomatically

Constitutional amendments can be defined as Partial changes appended to a text or some of the provisions of the Constitution, whether by addition, cancellation or replacement. The switch is initiated by a group of voters, the legislative authority, the executive authority, or these two the two powers together. The amendment is subject to the ratification of the representatives of the nation or the people directly [3]. The method is modified Constitutions differ according to whether the constitution is flexible or rigid, because flexible constitutions are amended by themselves The procedures to be followed in amending ordinary laws, sometimes by the same authority, and therefore The difference between them and ordinary laws in terms of amendment may disappear, as the constituent authority

Second Section- The Basis of Constitutional Amendments

The constitutional amendments are an indispensable thing It imposes itself, because constitutions, as the French jurist (Cf-Royat-Collard) says, "are not Absolutely tents that we put up for sleeping, "they erode with time, and that is why they must adapt, and they should Constitutions are a reflection and response to the social, political and economic circumstances and situations that exist society and the state. Because the permanence of the constitution depends on that, and therefore, says one of the pioneers of the theory The social contract, which is (Jean-Jacques Rousseau) "The original founding authority must be consulted because It is the people who can change laws, even the best of laws” [4], taking into account that The constitution is the supreme law of the state established by the people in a democratic manner. To confirm this, it has Chapter 28 of the French Constitution promulgated in 1793 states that “the people always have The right to review, reform and change its constitution, as no generation can impose its laws on generations Therefore, the fact that the constitution document did not include a text or texts that allow for amendment, contradicts the principle of popular sovereignty, because the people cannot give up their right to amend the constitution in any way previews. In addition, the absolute inertia of the constitution may open the way for amendment by illegal means and the use of force through popular revolutions or military coups [5].

The Second requirement

Types of constitutional restrictions imposed on the power of constitutional amendment:

There are three main types of constitutional amendment restrictions, namely:

First-Procedural Restrictions

It is a set of restrictions of a formal or procedural nature stipulated by it The constitution and addresses an authority that upholds the constitution to follow and abide by it if it makes any amendment to the constitution, These restrictions are related to the entire constitutional amendment procedures, starting with defining the party or authority The competent authority to propose amendments, since the constitution may decide the right to propose amendments to the executive branch, or The legislative authority or the two authorities together, as the constitution may decide the right to propose amendment to a

group of Members of the political people (voters) based on the fact that the constitution represents the social contract, and that any amendment The constitution is considered as a renewal of this contract, and through determining the body that drafts the amendment, is it Parliament, an elected constituent assembly, or a specific committee, and the nature of the method adopted by this body To prepare the draft amendment in terms of the availability of a special majority required, as is usually the practice in countries Federalism, and ending with the approval and approval or ratification of the amendment, and is it granted the right of approval The final decision of the head of state or the people through a revision referendum, and other related issues The constitutional amendments adopted by the state in light of the prevailing legal idea of individuals and situations The political, social and economic life of society and the state. And jurisprudence goes to the inadmissibility Amendment of these procedures, even if the constitution does not expressly stipulate that the power of amendment is prevented from preventing change Modification procedures. [6]

Second-Objective Restrictions

This is the prohibition or prohibition of amending some provisions of the constitution, which are:

Well-established constitutional texts related to the essential provisions of the constitution and the foundations on which it is based political system or some aspect of that system. It is forbidden to touch it permanently or temporarily [7]. These restrictions often differ from one country to another, depending on its concept of adopting a particular political system And its philosophy in this regard, or because of its attachment to basic rights and freedoms that the original constituent authority wanted The constitution is infallible for amendment because it is not dispensed with for any period. [8] An example of this is that

Article (5) of the US Constitution explicitly prohibited the power of amendment from prejudice to the "principle Equality of the States within the Senate." [9] Whereby, the power of amendment may not make any An amendment to the US Federal Constitution if it would deny any state the right of representation An equal vote in the said House without the consent of the state that may detract from the amendment It is their right in this field, and the modification authority cannot override this limitation except after the approval of the state concerned whose right to equal representation in the Senate may be adversely affected by the amendment Federal. [10]

The Third requirement

The legal value of the constitutional amendment restrictions: the constitutional jurisprudence differed on the value Legal restrictions on constitutional amendment power, especially time and substantive restrictions From them, different opinions appeared in this regard, and there were many directions that reduce or increase this Value, some even strip these restrictions of any value and consider them obligatory towards the power of modification Change exist ,while others see the exact opposite . The need to adhere to procedural restrictions Postulates regarding the power to amend the Constitution. Accordingly, several questions are raised here about the possibility and extent of the jurisdiction of the constitutional judiciary monitoring the constitutional amendments, including: Can the restrictions of the constitutional amendment be considered as a basis? Is it legal to exercise control over the constitutionality of constitutional amendments? Is that constitutional amendments about through the popular referendum subject to the supervision of the constitutional judiciary? Is it possible for a constitutional judge to It extends its control over the content or subject matter of the constitutional amendments despite the commitment of the authority to amend the constitution Procedural restrictions for modification? It can be

said that the constitutional organization of the state controls the answer to all these questions raised above, where if the Constitution had regulated the subject of censorship Constitutional amendments, so there is no problem in this area. This organization is represented by one of the two hypotheses the following [10]:

The first hypothesis

The constitution entrusts the judicial body concerned with oversight with the task of oversight Constitutional amendments, in which case the constitutional judge may and must observe constitutionality Constitutional amendments and ensuring the extent to which the amendment authority adheres to the restrictions and controls of amending the constitution.

The second hypothesis

The constitution explicitly prohibits the constitutional judiciary from supervising constitutional amendments accordingly; the existence of this censorship cannot be said or assumed. Thus, it is not permissible for any constitutional judge enter into this field. Here, the constitutional amendment is effective even if it violates the power of amendment Constitutional restrictions and controls regulating constitutional amendments. But the light is not included The constitution for a text or texts that allow or prevent the issue of judicial oversight of constitutional amendments Discussion and jurisprudential debate about the possibility of imposing control over the constitutionality of constitutional amendments, and Constitutional jurisprudence in this regard was divided into two opposing directions, each with justifications and grounds legal claim, we try to display and analyze in the fourth requirement.

The fourth requirement

The position of constitutional jurisprudence regarding the control over the constitutionality of constitutional amendments This requirement consists of two main branches, the first of which relates to presenting the position of constitutional jurisprudence Those who refuse to impose control over the constitutionality of constitutional amendments. The second section is devoted to presenting Jurist opinions in favor of imposing constitutional control over constitutional amendments.

The first section-the trend rejecting the judicial oversight of the constitutional amendments

See the supporters of this The trend is that the legislative texts that are monitored by the constitutional judiciary are represented by laws The lowest rank of the constitution, because the constitutional judge is competent to rule on the compatibility of texts As for the judicial control of the constitutionality of constitutional amendments, it leads to Monitoring the conflict between constitutional texts, and monitoring this kind of conflict comes from the mandate Constitutional judiciary, and therefore it does not fall within the scope of control over the constitutionality of laws [11], where The laws amending the constitution do not have the status of laws subject to constitutional control The same legal value possessed by the Constitution.

The second section-the trend in favor of judicial oversight of constitutional amendments

Advocates of this the trend is a set of legal justifications and arguments that support judicial oversight of the amendments constitutional, most notably:

1. The actual implementation of the idea of a legal-democratic state, which is a legitimate and constitutional state in its core, It requires the existence of a judiciary that guarantees that all state authorities respect the will of the constitutional founder, and since the authority of Amendment is An authority established by the constitution

(established constituent authority) and it is subject, like others, in its movement the constraints imposed by the original constituent authority, so it must abide by the constraints of the constitutional amendment, Because these restrictions are contained in the constitution.

2. And while it was said that restricting the people to the restrictions of constitutional amendment contradicts the principle of popular sovereignty, this statement is true And if it is correct from the philosophical and political side, then it confronts the legal logic, because the people do not exercise their right himself except through the legal authorities created by the constitution, so it is not logically conceivable that this would be established Authorities to do an act contrary to the provisions of the Constitution unless they aim to do so Unconstitutional through the use of force and physical violence (revolution and military coups).
3. Even if the people can exercise their right to amend the Constitution directly through an amending referendum, Despite the fact that the people are sovereign and the true founder of the constitution, there is nothing to prevent it That the people restrict themselves to some restrictions and procedures that they adhere to when they undertake to amend the rules organizing the system established rule. These constraints are not required for themselves, but rather to ensure the relative stability of the constitution it should remain at the top of the hierarchy of the legal system.
4. The lack of judicial oversight of the constitutional amendments may lead to extremely dangerous consequences for the constitutional and political system of the state and the basic rights and freedoms of individuals, as in far in which a hard-line majority makes constitutional amendments under the pretext of the principle of popular sovereignty, targeting the It destroys the very essence of democracy which is "meaningful participation in self-government "Participation in self-government. The constitution has always been assumed to include principles Sophisticated and incubating basic rights and freedoms, then, it is necessary that he does not leave the power of amendment to be enjoyed With its absolute freedom, restrictions must be placed on it by the constitutional founder to prevent its rise This authority narrows the circle of basic rights and freedoms of individuals, and changes them to the relevant constitutional principles The high value, which represents an effective mechanism for preserving the constitutional identity of the state, such as the form of the state, and the type Political system, official religion, rule of law, peaceful transfer of power. [12]

We, in turn, agree with the trend in favor of judicial oversight of constitutional amendments, but what we would like to point out here that the supporters of this trend, despite their unanimity on the need to submit to restrictions procedural constitutional control [13], but they disagreed about the legal value and the binding force of the restrictions Objectivity and temporality and the extent to which they are a reference for the oversight of the constitutional judiciary. Well did Supporters of this approach agree on the possibility of extending judicial control over the content of the constitutional amendment To be sure the extent to which the amendment complies with the provisions of the constitution objectively, in the absence of any substantive or temporal limitation on the power to amend the Constitution? Accordingly, they were divided Jurists are divided into the following three groups:

The first group

believes that the amendment authority must abide by the time restrictions, because these restrictions correct from a constitutional and legal point of view, it has the same reasons that justify the relative stagnation of the constitution, It is one of the permissible and

legitimate matters out of respect for the will of the original constituent authority and in order to guarantee the legitimacy of the establishment The constitutionality of the power to amend. Substantive restrictions do not have any mandatory constitutional value because they lead to The absolute stagnation of some provisions of the constitution, which made it similar to the total stagnation The constitution, which jurisprudence agrees to reject, bearing in mind that the difference is between partial and absolute stagnation The totality of the constitution is the difference in degree, and the same arguments that lead to their rejection apply to them, because The restrictions on the power of amendment in both cases refer to an eternal concept of the constitutional text and lead to Eternal confiscation of the will of future generations, which justifies its rejection, and not subjecting it to the oversight of the constitutional judiciary.

The second group

recognizes the legal value of objective restrictions of both types, permanent and temporary, because they focus on some texts and provisions of the Constitution without affecting the entire constitutional document, as for time restrictions It has no legal value [14] because it leads to confiscating the will of the people in a procedure in their constitution for a period specific, or in some circumstances, meaning the total stagnation of the constitution during this period or in those conditions. This is not permissible and unacceptable. The power of amendment cannot be bound by time restrictions. The third party: acknowledges that the texts that contain the restrictions of the constitutional amendment are of both substantive types The temporal one enjoys, like other constitutional texts, the binding constitutional force with regard to the authority Amendment, and it cannot be violated except after it has been amended by following the procedural restrictions and controls related to the amendment.

But despite all of the above, we still have a fundamental question, if he had the authority to amend the constitution According to the established constitutional procedures; can the constitutional judge monitor the constitutionality of these Substantive modifications under the absence of explicit objective or temporal restrictions on the text or texts to be modified? To answer this question, contemporary constitutional jurisprudence has divided into two conflicting opinions, as follows:

The first opinion

rejects the supervision of the constitutional judiciary on the content of the constitutional amendments, because it is in light of Dropping the objective and temporal restrictions on amending the constitution, we cannot imagine the existence of a gradient between Constitutional rules. In light of the absence of this gradation, all constitutional rules have legal value one and equal. Accordingly, there is no constitutional basis left that the constitutional judge can rely on To him to extend his control over the constitutional amendment from the objective point of view (the content of the amendments constitutional), taking into account that the constitutional judge cannot create a hierarchy between the rules Constitutional institutions of the same value and rank [15].

The second opinion

praises the ability of the constitutional judge to supervise constitutional amendments from the point of view Objectivity based on the spirit of the constitution and the constitutional texts firmly rooted in the conscience of the nation It represents the constitutional identity of the state, and that prejudice to these provisions can threaten the constitutional system By imbalance or change. Note that the constitutions of some countries do not place any objective or temporal restrictions on such texts, despite their great

importance; their implicit immunization from modification has become self-evident in the political community. And that prejudice to it goes beyond the description of the amendment, but turns into a change the entire constitution, because changing these important and fundamental texts, may have an impact on the rest Texts and the consequent contradiction and inconsistency necessary for the whole constitution [16].

"Un Constitutional Amendment" constitutional amendments: And can

Learn about the theory of unconstitutional constitutional amendments in a better way by distinguishing between Procedural requirements (procedural restrictions) and substantive requirements for amending the constitution. We find in most constitutional systems, once the power to amend the constitution is bound by procedural constraints, it is considered an amendment correct and constitutional, and there is no judicial oversight of the content of this amendment. This approach is based on the idea that "the legitimacy of amending the constitution lies in the source of the amendment, not in its content Amendment." But the theory of "unconstitutional constitutional amendments" does not depend on the source of these amendments, but skips them and also focuses on the content of the amendments. Because it can - according to these Theories - Amendments are made following proper constitutional procedures, but the amendment is nonetheless considered "unconstitutional" by a decision of the constitutional judge, due to the unconstitutionality of the subject matter of this amendment, Based on the text or texts of the existing constitution. The theory of non-constitutional amendments is founded constitutionalism" on something other than the text of the constitution, but within the constitution (i.e. the spirit of the constitution), such as overreaching constitutional principles" or basic principles 'Fundamental Principles', or 'Basic Structure' and these Principles, although not expressly stipulated in the Constitution, can be derived or deduced from During the interpretation of the Constitution as a whole We, in turn, support the second opinion, because it is consistent with the legal principles of the state and justifications for residence Constitutional judiciary and the achievement of constitutional justice. Since despite dropping objective restrictions or the temporal texts are well-established and of fundamental importance in the constitution, but they enjoy with a higher legal value than all other constitutional texts based on the principle of objective gradation among the constitutional rules. In addition, the constitutional amendment power usually remains as a constituent power Established and emanating from the constitution, and obtained prior authorization from the original constituent authority to introduce some amendments to the constitutional document.

Second Topic

The position of the comparative constitutional judiciary on monitoring the constitutionality of constitutional amendments:

This research consists of three main demands, the first of which relates to presentation and analysis The position of the American constitutional judiciary on the constitutional amendments, and the second requirement relates to a statement Analyzing the position of the German Constitutional Court on constitutional amendments, as for the third requirement The last is related to defining the position of the Egyptian constitutional judiciary regarding the oversight of the amendments constitutional.

The first requirement

the position of the American constitutional judiciary regarding the constitutional amendments

That the article 5 Of the US Constitution, the power to amend the Constitution is bound by procedural and substantive limitations and temporality ,in accordance with the provisions of this constitutional article, the US Federal Constitution may only be amended After the amendment authority is committed to taking special procedures, the amendment will be passed in two stages Two essentials: The first: the stage (proposing the amendment), by a two-thirds majority of the members in each council of both houses of Congress. Or by convening a Constituent Assembly by Congress Especially at the federal level at the request of two-thirds of the members of the state legislatures. The second stage is (the ratification of the amendment), when the amendment proposals are approved, either with approval by legislatures in three-fourths of the states, or by constituent conventions in three-quarters States, the power of amendment was also restricted from making any constitutional amendment prior to 1808 thousand and Eight hundred and eight in any way whatsoever, if this amendment is likely to affect the first clause and The fourth of the (ninth) paragraph of the (first) article, and the two referred to items prohibited the Congress interfered with the interstate slave trade (2). As for the objective restrictions imposed On the power of amendment, we find the only substantive limitation provided by the US Constitution Explicitly, it consists in: “ensuring the principle of equality between the states within the Senate” (3) - as we have mentioned above - In addition to this substantive limitation, it can be said that the US Constitution lacks any limitation Another objective imposed on the power of amendment expressly by the original constituent power [17]. With regard to the time limit referred to in Article 5 of the Constitution, we find that this limitation It did not remain in effect regarding the power of amendment, and what is known is that the American Constitution did not explicitly provide for it Although the judiciary has the right to exercise constitutional oversight, the Federal Supreme Court has incorporated the amendments to the scope of its oversight, and that, based on the provisions of Articles (Third) and (Sixth) of The constitution itself, which the court relied on to prove its authority to supervise the constitutionality of laws At the federal and state levels.

Professor Walter Dellinger holds that judicial oversight is constitutional amendments in the United States of America have a history older than the history of censorship The constitutionality of laws passed by Congress, as the court monitored the constitutionality of the amendment 11 of the US Federal Constitution in the case (Hollingsworth v. Virginia) of the year 1798, five years before Marbury v. Madison of 1803 It built upon the system of judicial control over the constitutionality of laws in the United States of America (2). Accordingly, the case (Hollingsworth v. Virginia) is considered the first precedent for censoring amendments before the Federal Supreme Court in the United States, whose facts are briefly summarized: That a Pennsylvania native by the name of Hollingsworth was in a lawsuit against the state of Virginia. Before the federal courts, the state (Virginia) argued that the federal judiciary does not have jurisdiction to consider this the dispute is based on the provisions of the (Eleventh) Amendment to the Federal Constitution, which grants states "immunity." Sovereign" against being sued by citizens of one of the other states or by nationals of foreign states Residents of the state, and on the other hand (Hollingsworth) filed an appeal on the constitutionality of this amendment to Support from that paragraph (seventh) of Article (first) obligated sending all draft laws that Approved by both houses of Congress to the President of the Republic to sign it or veto it temporarily, and it has been claimed The appellant states that "based on examining the legislative history of the aforementioned

amendment, it was found that it has not yet been submitted to the President of the Republic in order to sign it.

The second requirement

the German Constitutional Court's position on constitutional amendments

In Germany, the federal constitution is considered "law" in formal terms, as it is promulgated in the Gazette official. Moreover, the Founder of the Federal Constitution expressly affirmed that this Constitution is done amended by "Law". Paragraph (1) of Article (79) of the Constitution stipulates that "this The Basic Law may not be amended except by a law that clearly amends its text or complements it "Thus, if constitutional amendments in Germany are "laws," the Constitutional Court is It can constitutionally review these amendments, although there is no special constitutional provision granted to the court Competence oversight of these amendments [18].

This position of the German constitutional judiciary was consistent with what the German jurisprudence is heading towards in the system Post-Nazism, which was characterized by support for the ideas of natural law, and according to what this trend sees, even The basic constitutional principles contained in the constitutional document are bound by a "higher law", which is natural law. However, after 1953, the Federal Constitutional Court refused to refer to Constitutional supreme principles resulting from natural law, and focused on the express limitations of power Amendment, and these restrictions are contained in the core document of the Constitution Accordingly, "if the German Constitutional Court had known the idea of supreme constitutional principles which Obliges The original constituent authority and the [derived] establishment have known these principles in the framework of supervision On ordinary laws, not constitutional. The original constituent authority is: an absolute authority that cannot be To be restricted based on the idea of natural law, just as the power to amend the Constitution cannot be It is bound by things other than what is expressly stated in the constitution." [19].

Moreover, it has placed objective restrictions on the validity and enforceability of these amendments in order to avoid For the potential abuse of the parliamentary majority rule to allow barbaric amendments to undermine The fundamental principles of the constitution in force (1). Therefore, Paragraph (3) of Article (79) of the Constitution states: However, "no amendments to this Basic Law [i.e. to this Constitution] that affect berührt on the division of the Federation into Lander, or on principled participation in the legislative process, or on the principles contained in Article 1 and Article 20." So, that original constituent power of the Constitution The German established substantive restrictions to prevent any constitutional amendment that would prejudice the principle of federalism or The basic principles contained in Articles (1 and 20). In addition to these formal limitations And the objectivity imposed on the authority to amend, there is a time limitation mentioned in Article (81) Paragraph (4), In case of legislative necessity or emergency, it is forbidden to introduce any amendment to the constitution during this period The time period [20].

We conclude from the foregoing, that the German constitutional judiciary when exercising control over the constitutionality Constitutional amendments begins by ascertaining the procedural integrity of these amendments and then looking for the extent to which the text of the amendment conforms to the objective restrictions imposed on the power of amendment. In other words, that the scope of control exercised by the German constitutional judge over constitutional amendments was not limited In controlling the extent

to which the amendment authority adheres to formal restrictions without substantive restrictions, as it is followed by the constitutional judiciary in the United States of America, for example. Thus, the court German constitutionalism ensures that the will of the original constituent power is respected, as the court does not. It allows the derivative constituent authority to deviate from the formal and substantive constraints it has set. The original constituent authority to control the process of formal amendment of the constitution and protect it from the whims of the majority Parliamentary, taking into account, that constitutional amendment power under the Constitution of the Republic of Germany Federalism for the year 1949 confined to the Federal Parliament.

Third Topic

Constitutional amendments in Iraq, and the extent to which they are subject to the supervision of the Federal Court

By extrapolating the constitutional and legal texts regulating the competences of the constitutional judiciary In Iraq, we do not find a special provision granting the Federal Supreme Court jurisdiction over constitutional oversight Amendments to be made to the Federal (Federal) Constitution. Since this constitution (Constitution of 2005) has not been amended so far, the court has not issued any decision announcing the extent Its competence is to supervise the constitutionality of the amendments to be made to the current constitution in The future However, it should be noted that the Iraqi constitution of 2005 is a rigid constitution In order for any amendment to be introduced to the original document of the constitution, the amendment authority must comply with a set of provisions The formal, substantive and temporal restrictions stipulated in the core of the Constitution and what should be noted His observation is that the existing Iraqi constitution includes two different articles regarding the amendment of its articles, namely Article (126) and Article (142) and which of them regulates how to amend the constitution differently from The other and each of these two articles has its own strictures and limitations in the face of authority Amendment, as follows:

First Restrictions: on the power of amendment in light of the provisions of Article (126)

Article (126) of the constitution is the basis for amending the Iraqi constitution, on a regular basis It is not transitional with a specific time and ends after that. So, the origin of the constitutional amendment is on According to this article, the exception is the amendment according to Article (142) of the Constitution because it is transitional It is temporary and is destined to disappear after the completion of the task entrusted to it and accordingly, Article (126) stated Restrictions (formal, substantive and temporal) on the power to amend are as follows:

A- Formal restrictions

1. It is not permissible to propose amending the constitution except by: The President of the Republic and the Council of Ministers jointly or For five (1/5 (members of the House of Representatives).
2. The amendment proposal may not be submitted to a general referendum unless it is approved by two-thirds of the members of the House of Representatives.
3. The text of the amendment shall not become part of the constitution except after the approval of the people in a general referendum, and its ratification by the President of the Republic within seven days. The amendment is approved by the President of the Republic After the expiry of the staid period in case he is not ratified.

B- Substantive restrictions

It is not permissible to make any amendment to the articles of the constitution that would detract from it. One of the powers of the regions that are not within the exclusive competence of the federal authorities. Except with the approval of the legislative authority in the concerned region and the approval of the majority of its population in a general referendum.

C- Time restrictions

It is not permissible to amend the basic principles mentioned in Part One and the rights and the freedoms stipulated in Part Two of the Constitution, except after two successive elections. Given Because the duration of each electoral cycle is four years, in accordance with the provisions of Article (56/First) of the Constitution which It stipulates that “the duration of the electoral cycle for the House of Representatives shall be four calendar years, beginning with the first A session for him, and it ends at the end of the fourth year.” So, this time limitation has de facto ended and is no longer for him. No effect in confronting the amendment authority since 2014.

Second: The restrictions on the power of amendment in light of the provisions of Article (142): Article (142)

From the Iraqi Constitution of 2005, Temporary article ends with the first amendment to the existing constitution which is conducted in accordance with it, and includes only formal restrictions [21], as follows:

1. The House of Representatives must form a committee for constitutional amendments, provided that this committee is formed. One of the representatives of the main components of Iraqi society.
2. The Constitutional Amendment Committee should submit proposals for constitutional amendment to The House of Representatives within a period of four months and with one package, and the House must vote on it by an absolute majority of its members. And the absolute majority of the number of members according to the decision of the court Federal Supreme Court No (33 / Federal / 2007) dated (21/10/2007) is (half +1) to the number of members of the House of Representatives present in a plenary session.
3. The House of Representatives must submit the draft amendment to a popular referendum within a period not exceeding 30 years within two months from the date of the Board's approval of the amendment.
4. The amendment shall not become effective until after the approval of the majority of the voters in the revisionist referendum national level.
5. The amendment shall not become effective if it is rejected by two-thirds of the voters in three or more governorates.

There is an opinion among researchers and specialists in constitutional jurisprudence in Iraq that Article (142) of the Constitution has become suspended due to the expiry of the constitutional period (four-month period) which Determined by paragraph (First) of the same article, and it is necessary to return to the mechanism mentioned in Article (126) of the Constitution as one of the general provisions in the amendment, which does not include the right to veto the amendment For three provinces or more. [22] There is another opinion - which we support - that goes to say that transgression the constitutional deadline set for Article (142) of the Constitution cannot be considered expired or invalid effect without achieving the tasks for which it was initiated [23], and this is what the Federal Court went to. The Supreme Court said: “..... That the application of the provisions of Article (126) of the

Constitution when submitting a proposal to amend an article or Most of the articles of the constitution shall be provided only after deciding on the amendments recommended by the committee Paragraph (First) of Article (142) according to the procedures drawn up in this article. [24] Operative this interpretative decision of the Federal Supreme Court in the interpretation of these two articles, the application the constitutional amendment mechanism stipulated in Article (142) must be prior to application The mechanism contained in Article (126). So, the provisions of Article (142) of the Constitution remain effective

Until the completion of its mission and the achievement of its goal, which is to secure the interest of the main components of the people in society Iraqi by amending the provisions of the constitution in accordance with the procedures and steps drawn up therein? Hence, this article is deemed to have ended by virtue of achieving the goal of its legislation, and it is not permissible to refer to it at all.

It is clear from the foregoing, if the authority to amend the constitution proceeded to amend the Iraqi constitution for a year 2005, it must abide by the constitutional amendment restrictions set by the original constituent authority At the heart of the constitutional document, because the original constituent authority represents the complete sovereignty of the people and it is that Authorities are established and their competencies are determined. As for the constitutional amendment authority, it is all An institution like the legislative power, the executive power, or the judicial power, it should authority It operates within the framework of the constitution that established it, so amendments must be made according to formal constraints And the objectivity stipulated in the constitution, and thus the principle of constitutional legality is achieved. [25]

Conclusions

Despite the fact that making amendments to the original document of the Constitution is indispensable in The development of conditions and the radical changes that society and the state are witnessing in terms of politics Social and economic, in order for the constitution to keep pace with these developments and reflect the wishes and aspirations members of the people, as well as so that the constitution does not become an obstacle to these changes, otherwise they will move away Constitutional texts on the reality of life, and that this distancing may lead to a devaluation of these texts, their loss of effectiveness and their inability to perform their functions in regulating political and legal life in state framework. On the other hand, the constitution, as the highest law in the state, must remain Its texts are relatively rigid and stable, and enjoy the power of legal obligation towards rulers in all cases, as The provisions of the constitution serve as an effective mechanism for creating a balance between the conflicting political forces Authority, so the principle of political and legal stability requires that the constitution not be subject to many successive amendments, otherwise the constitution will lose the value of its provisions and the strength of its provisions, which may affect Negatively on the principle of the rulers holding power being subject to the provisions of the constitution, noting that this principle is The aspiration of free and conscious peoples, and it cannot be guaranteed to be achieved without monitoring the constitutionality of the amendments constitutional.

There is similarity in the position of the constitutional judiciary in both the United States of America and Germany regarding the imposition of constitutional control over the constitutional amendments that will be introduced into the federal constitution, From a formal point of view, since the two courts have established for themselves the authority to control

the constitutionality of those Modifications in terms of form and procedures. However, the face of the difference in the judiciary of both courts As for the oversight of constitutional amendments, it lies in the extent to which these amendments are monitored, from the point of view Objectivity, as we find that the German Constitutional Court considers and decides on all formal appeals And the objectivity raised before it regarding the validity of the constitutional amendments. While the US Supreme Court it did not consider the substantive appeals raised before it regarding the validity of the amendments added to the Constitution Federal, despite the fact that these objections were raised before it more than once.

Contrary to what was applied in the American and German constitutional courts with regard to censorship Constitutional judiciary On the constitutionality of constitutional amendments, we find that the Egyptian constitutional judiciary It took the position of absolute rejection of monitoring the constitutionality of these amendments, and did not extend its control over them Considering that it does not have the meaning of the legal text subject to constitutional control.

As for Iraq, although the constitution and the law regulating the Federal Supreme Court did not stipulate Explicitly stipulates the jurisdiction of the court to monitor the constitutionality of the amendments that will be made to the constitution Iraqi for the year 2005 - currently in force -, however, the court can extend its formal and objective control On the constitutionality of any amendment to be made to this constitution, as the constitution provided for a method Specific and specific procedures for amending its texts that the amendment authority must follow and abide by All stages of amendment, and the constitution objective restrictions on the power of amendment. And to say otherwise This leads to the transformation of the amendment authority from a “derived constituent authority (establishment)” into a constituent authority Original.” Accordingly, if the amendment authority violates these restrictions, the amendment becomes unconstitutional and null It must be abolished by the constitutional court. Therefore, we see that the Federal Supreme Court is entitled to Iraq may decide for itself to supervise the constitutionality of the constitutional amendments in terms of formality And objectivity, given that there is no explicit constitutional provision that prevents the court from extending competence to exercise this control. Since the original text of the Constitution did not enter any Amendments, then, the court did not indicate its position in this regard.

Recommendations

- We call on the Iraqi Federal Supreme Court to work to increase its keenness to carry out the tasks entrusted to it and extend its oversight over the constitutional amendments to be made to the constitution the current Iraqi.
- The authority of constitutional amendment in Iraq by amending Article (93) of the Constitution, which The scope of constitutional oversight exercised by the Federal Supreme Court has been limited to laws And the systems in force and adjudication of cases arising from the application of federal laws and decisions And regulations, instructions and procedures issued by the federal authority. And add modifications constitutional to the scope of this oversight.

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