

The legislator's discretionary power and the safeguarding of the Constitution

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Summary:

The discretionary authority of the legislator is among the most important topics of constitutional law, because the legislator does not have all absolute freedom to enact laws, although the political system is characterized by democracy, this is democratic, because most of the countries of the world have imposed on the authority to confront the legislation, the need to respect the Constitution and the principles of justice to which states are adhered. Among its most important pillars is that the legislator is the only one entitled to intervene in the enactment of laws that express the public interest, but this is governed by the need to observe the Constitution and the accepted principles. Most countries are also work to give the executive authority to enact laws in certain cases, which makes it necessary, which made the constitutional judiciary address such issues in order to achieve respect for the constitution. The purpose of the purpose of the research seeks to clarify the discretionary authority enjoyed by the legislator, which we concluded.

Introduction:

The democratic system, which most or some countries are trying to apply under the pressure of the will of the peoples is based on the fair division of powers and prevent the concentration of powers and competencies at the expense of the other, but this principle and concerned with the separation of powers occupies the basic position being the cornerstone in the democratic construction of the countries that adopt it is the guarantor of the work of those authorities and determines the

competencies of each of them in a way that ensures mutual respect between them, each authority has its competencies, whether legislative, executive or judicial. And the legislative, which is the basis of the focus of our study, is the one that represents most of the people expressing the will of the nation in the elections with the presence of the parliamentary system, the deputies and what they do in representing the people are addressing the competencies on which the state depends, which is the legislation by enacting.

laws that the state and all other authorities are going on, provided that the legislation will undoubtedly be restricted by the need to respect the provisions of the constitution, which represents the supreme document in the countries of the world as it shows the form of the state and the system of government and the relationship of authorities with each other and the rights and freedoms of individuals, hence the importance of the constitution because of its place in the legal state being the basis that creates other authorities and because it represents the real guarantee of the organizational structure of the state, which everyone must respect and abide by. Because the Constitution, as the supreme legislation within the principle of hierarchy of legal rules, undertakes the task of maintaining balances between the authorities and all state institutions, it guarantees the principle of peaceful rotation of powers and the resolution of disputes that occur in case of disagreement with a legal or political issue.

In light of the developments facing the State in conjunction with the changes taking place at the political, economic and social level, it was necessary for him to have freedom of choice to face those developments imposed by the rhythm of daily work.

The discretionary power of the legislator (parliamentary legislation) is the one that undertakes the task of drawing up the general policy of the state and therefore the legislator has the right to choose any particular aspect of life to enact a law for it,

although there is confusion in constitutional jurisprudence in its validity between permissibility and restriction of the limits of the provisions of the Constitution by respecting those texts and not exceeding them in the enactment of a specific law, but this aspect of the legislative aspects is no longer commensurate with the reality of parliaments, especially in light of The so-called rigid constitutions, which made all laws subject to the rule of control over the constitutionality of laws, hence the constitutional judge emerges as the one who addresses the research on what these laws are and whether they are appropriate to the provisions of the constitution or not.

The significance of research: The reason for our research on this topic is the exclusive role of the legislator in creating laws independently, without assistance from the other party. However, the executive authority also plays a role in legislation due to the evolving relationship between the legislative and executive branches. This makes this topic one of the most crucial and precise areas, despite not receiving thorough studies in constitutional law.

The problem of research: The problem of research lies in the statement of the extent of the freedom of the Iraqi legislator to address the topics of the enactment of laws unconditionally?

We are also trying to discuss the role of the judiciary represented by the constitutional judiciary in placing restrictions on the ordinary legislator in the mechanism of enacting laws and not exceeding them?

Research methodology: The descriptive and analytical approach was taken in explaining the importance of discretion and its ability to address the laws and was also relied on the comparative approach in some paragraphs of the research to indicate the countries that adopted the issue of discretion or not. The subject of the discretionary power of the legislator is characterized by importance in theory and

practical terms as it is exercised by the representatives of the people and expressed their will and here we will take over in our research as follows:

The first section : The nature of discretionary power

first requirement: introducing the discretionary power of the legislator and its sources. Subchapter I: The Concept of Discretion

Subchapter II: Sources of Discretion

Second requirement: determinants of the exercise of discretion.

Subchapter I: Respect for the Constitution and Achieving the Public Interest

Subchapter II: Adherence to and Respect for the Principles of Justice

second section: the establishment of discretionary power and its application in Iraq

First Requirement: Legal and Social Foundation

Section I Legal basis

Section II Social Basis

Second requirement: the application of discretion in Iraq Subchapter I:

Legal Application

Subchapter II: Constitutional Application

The first section: The nature of discretionary power

Despite the fact that the constitutional rules are a priority among other legal rules in one country, the legislation issued by the House of Representatives is an effective tool in drawing up the general state policy as it is of great importance in the legislative hierarchy of one state, as it undertakes the task of putting the rules of the constitution into practical application as it regulates the behavior of individuals in society, which makes the field of legislative authority to enact laws a wide field at all levels, and this is the general rule that Some exceptions may be made, including subjects regulated exclusively by the Constitution ⁽¹⁾

However, most of the jurisprudential studies in this regard went to the fact that the legislator, with his discretionary power, is the generality and comprehensiveness of

all topics, and the exception that responds to this is the restriction in some areas that the legislator may not address; Laws that aim to achieve that end, which is to satisfy the general needs of all citizens, despite the quasi-absolute agreement, which stipulates the absolute authority of the legislator in his discretion, but there are some exceptions that respond to that authority.⁽²⁾

This made the legislator's authority restricted in cases that began to increase, but this does not affect what the legislator enjoys discretionary power, and this is what we will try to discuss in the following and as follows:

First requirement: introducing the discretionary power of the legislator and its sources:

Subchapter I: The Concept of Discretionary Power:

Comparative constitutional jurisprudence considers the discretionary power of the legislator as a trade-off between several alternatives made by the legislator to choose what he estimates and considers it the most appropriate for the interest of the community and the most appropriate to meet its requirements regarding the subject he adopts⁽³⁾

The assessment and the multiplicity of options available and under the command of the disposer and the possibility of choosing from them the decision that is consistent with his orientations, provided that what that authority means from the absorption of legislative activity, which authorizes the legislator to regulate all matters of concern to the interest of the community without any restriction or condition except what is reserved for the Constitution.⁽⁴⁾

In the sense that the legislator adheres to the constitution, if the constitution does not restrict him with certain restrictions, the authority has discretion in many laws that concern public life, and this is the origin of choice and differentiation that there is a scope for this authority or restrictions, which the constitution sets and restricts the movement of the legislator because the agreement of legal rules with the

constitution is a duty, otherwise the laws are and nothingness, whether when they violate the provisions of the constitution.⁽⁵⁾

Thus, the role of the ordinary legislator in the enactment of laws is manifested, which is thus completely different from the constitutional legislator, which is concerned with the constitution, which makes the jurisdiction of the ordinary legislator absolute freedom in matters regulating daily life and those related to the interest of the group as a whole and not a specific individual and without there being a restriction or exception for this we see who tended to define discretion as the authority or body that exercises a certain activity and enjoys a degree of freedom as long as it is bound by its legal powers.

With what it means of control and control, it must adhere to the need to adhere to the ideals and values of society or it will turn into a dictatorial state.⁽⁶⁾

There are those who defined it as the freedom of choice granted to an authority in the exercise of its powers, That is, this definition has emphasized the freedom of choice and thus the discretionary power enjoyed by the legislator is the most able to balance in the matters subject to legislation in all its aspects, as at the same time it puts on it a minister represented in the need to respect values and ideals, which makes it, although widespread, but it is handcuffed by the need to respect those values and the constitution, and this does not mean On the contrary we find there are those who tried to explain its meaning as the freedom enjoyed by the legislator in regulating a subject and his freedom to choose between alternatives and options for the legislative organization he seeks without imposing a specific path that must be followed⁽⁷⁾

Therefore, the discretionary power of the administration exists when the administration enjoys a margin of freedom in the exercise of its powers, but the legislator necessarily acquires that power when he can regulate or enact any law

without being restricted by the constitution or a certain condition of the legislator and makes his hand dependent in relation to the enactment of laws.⁽⁸⁾

The jurisprudence has agreed that the discretionary power of the legislator is the origin and restriction is the exception, The discretionary power almost takes up the entire legislative activity and based on that some of the jurists considered that there is a kind of overlap in the definition between the discretionary power of the legislator and the discretionary power of the administration; Any discretionary authority is the one that has the time to intervene and freedom in determining its goals and achieving them, but on the other hand, there are those who considered that this power is the case in which the law leaves the administration the freedom of discretion in carrying out its activity without imposing a certain method on it, i.e. granting it the freedom of choice.⁽⁹⁾

The principle of the discretionary power enjoyed by the legislator is not due to the nature of this power or the nature of the legislative law issued by it, but is primarily due to the nature of the legal text defining the competences of the legislator, since the constitutional text refrains from specifying the policy to which the legislator must adhere^{10.}

It also means the freedom enjoyed by Parliament when it exercises the powers and powers entrusted to it, and thus the discretionary power appears as a kind of freedom or freedom of action allowed to the legislative authority. It is a difference in degree alone, not in nature.⁽¹¹⁾

Therefore, discretion for the legislator means freedom based on the principle of differentiation between several alternatives or objective options for the legislative organization he seeks without imposing on him a path in itself that he must follow or a specific directive that he must abide by. It is limited by the general restriction guaranteed by the Constitution by the text of the article, according to which no law regulating the exercise of rights and freedoms may restrict them in a way that affects

their origin and essence, including the necessity that the organization approved by the legislator must abide by the principles governing his authority in this regard, the achievement of which is the goal of every organization enacted, foremost of which is justice, equality and equal opportunities.⁽¹²⁾

Therefore, the discretionary power of the legislator is achieved when the constitutional legislator fails to determine the pillars or conditions of the legislator's work and thus the discretionary power of the legislator expands or narrows depending on the extent of the failure of this binding determination, which is the main source of discretionary power⁽¹³⁾ But the silence of the Constitution about placing a restriction on the legislative authority and it is in the process of exercising legislation and did not impose on it a specific directive that must be followed, here the legislative authority is free to choose what it deems to be solutions included in the legislative text and the legislator has his discretion for the requirements of the good General Establishment of conditions by which the legal status of individuals is equal before the law shall be determined¹⁴

However, if the legislator has, at its discretion, the power to establish conditions that determine and regulate the legal status of individuals as equal before the law, it may not lose the original rights or freedoms of individuals as a valid subject for legislative regulation.¹⁵ Otherwise, it is considered unconstitutional and therefore the approval of the Head of State will be rejected. However, legislators, in the exercise of their discretion, must seek out public interests and not deviate from those interests in the legislation they enact, since if the opposite happens, this is known in constitutional law as a defect in the deviation of power. Dr. Abdul Razzaq Al-Sanhouri is considered the first to put forward the theory of bias in the use of legislative power. The⁽¹⁶⁾ Optional Protocol to the Convention on the Elimination Dr. Al-Sanhouri compared the idea of legislative deviation with the theory of administrative deviation, which leads to the deviation of legislators from the spirit of the

constitution, as laws are not applicable according to their nature if they do not aim to achieve the public interest because the legislator is obligated to seek the public interest when exercising his legislative powers, while excluding the idea of self-purposes or personal goals in the act of the legislative authority.⁽¹⁷⁾ Power in the general sense has always represented the freedom enjoyed by the State to assess the appropriateness of its activity without being subject to other institutions.

Subchapter II: Sources of Discretionary power

The trade-off and freedom of choice in assessing the importance of legislation that the legislative authority has the right to address is among the most important things that the authority enjoys, but it is nevertheless governed by the need to respect the constitution and adhere to the supreme principles and values that it must not exceed. The work of the legislator must be within certain limits that do not exceed them, which are those set by the constitution in light of what is allowed to them, They have the right to intervene that this intervention must be to achieve the public interest, and the best example of this is those laws that constitutions allow the legislative authority to regulate with its discretionary power. Therefore, we will address in this regard the most important of those resources that the legislator must enjoy before addressing a particular topic:

First: The Constitution:

The origin of the discretionary power enjoyed by the ordinary legislator is due to the legal text specifying its competencies, in accordance with the Constitution being the first and most important source of that authority, as it is committed, adhered to and respected. This document being the basis of the state and the code of honor among all authorities. This is considered as a general asset, as the determinants of the discretionary power of the legislator lie through the constitutional relationship formulated by jurisprudence, i.e. The relationship that combines the constitution

and the law, the legal rule is represented as the image of the supreme rule and the role of the legislator puts the constitution into practice by enacting the law..⁽¹⁸⁾

Which necessitates that there be a balance between the need for the legislator to adhere to the principle of legality as a basis for protecting the rights and freedoms of individuals, and that this principle is not prepared or not applied negatively, i.e. by obstructing the work of legislation. The area of discretionary power of Sharia is the discretionary power it enjoys in the exercise of its legislative competence.

The virtuous between several alternatives, the options from which he chose the most appropriate and appropriate, provided that the law, being a legislative process, must have the elements, which are the ones that prepare. These elements relate to the project of the law, the economy, form, procedures, local reason and the forest, they are elements related to the project in the law to be a project must be based on the authority or authority entrusted to the Constitution, but the law according to the form, which is the requirement of the procedures specified by the Constitution, as there are restrictions Read the Constitution The validity of this law with the need to have motive reasons for the enactment of the law..⁽¹⁹⁾

Second: Constitutional Judiciary:

The discretionary power of the legislator is determined by the nature of the intervention of the constitutional judge and he is in the process of exercising constitutional control

over the laws issued by the legislator, if the constitutional judge tends to interpret the constitutional texts that include general principles that carry more than one interpretation in a way that restricts the legislator's choices and limits it to a specific framework, the authority of the legislator in this case is restricted.

However, if the constitutional judge merely examines the compatibility of the solution chosen by the legislator with the constitutional text or principle, respecting that solution chosen by the legislator, the constitutional judiciary shall be considered

in this case as a source of discretion for the legislator without imposing a specific interpretation on it.⁽²⁰⁾

The constitutional judiciary, represented by the Federal Supreme Court in Iraq and other countries of the world, is among the most important determinants that restrict the work of the legislator, since legislation issued by Parliament and becomes effective is subject to challenge for unconstitutionality in the event that it violates the provisions of the Constitution.⁽²¹⁾

Which went some of the constitutional jurisprudence to consider that the judiciary is the other among the most important sources that must be respected by the legislator and restricted by the constitutional judge may tend towards restriction to abide by what is stipulated in the Constitution and in the narrow sense and may expand in that and make there a margin of legislative freedom in the adoption of laws.

Therefore, we see that the constitutional judge, through his interpretation of the legal texts or his assessment of the facts and the work of interpretation of the constitutional provisions, can impose an obligation on the legislator to adhere to it and not violate it, that is, by examining the compatibility between the constitution and the law that has been approved, which is the subject of the dispute presented, and here the will of the constitutional judge is compatible with the legislator to conduct public affairs and not to obstruct government work, that is, by overlooking some details that are controversial and subject to interpretation and interpretation because the constitutional texts are not clear in them

However, the matter does not always apply in this way, as the constitutional judge may abide by the provisions and details of the constitution, which deprives the legislative authority of the issue of assessment or not of important issues that require the enactment of laws.⁽²²⁾

In application of this, the judicial authority adjudicates disputes that may arise between individuals or between individuals, the State and public bodies, and the

role of the judge here is limited to the application and application of the law to find a solution to the dispute and to adjudicate what has been requested of him.

As long as the role of the judge is to apply the law, this requires the existence of the legal rule, in the absence of the latter, the judge finds himself in front of two things, the first to leave the matter before him, and the second thing is to rely on diligence to find a solution to this dispute, and the judge often relies on the second solution, whether by referring to all the legal rules in the state and the higher values of society to deduce from them the rule that helps him in to adjudicate the case before him. Therefore, by relying on the general principles to derive the conflict or not of the legal texts, which makes the legislative authority in a state of embarrassment.⁽²³⁾

Second Requirement: Determinants of Exercising Discretionary Power:

There is no doubt that the exercise of discretionary power is to regulate the rights and freedoms of individuals, which means that that authority respects those rights that it approved, and seeks to approve them in the form of laws intended to satisfy public needs and to achieve the public interest that the organization of the rights and freedoms of individuals must be within the framework of equality and in a way that ensures the achievement of solidarity of opportunities among all citizens of the same state and through that we see that the determinants of discretion lie in the restriction of the provisions of The Constitution, achieving the public interest and emphasizing equality among those addressed by the provisions of these laws, as follows:

Subchapter I: Respect for the Constitution and Achieving the Public Interest

The constitution is the supreme document in the state, which contains a set of general principles that show the form of the state, the system of government, the relationship of the authorities with each other, the relationship of these authorities with individuals, and the statement of rights and duties, and according to the nature of the political system followed by the state, its constitutions may be democratic and may be the opposite heading towards the dictatorial state; To be imposed on him by

a certain path, except as imposed by the Constitution. The general principle and the general rule is that freedom of discretion between what is among the important topics that are consistent with the constitution and that lead to the establishment of rights and freedoms and between what is contrary to that and deviates from legislation when issued or enacted to achieve one goal is not disputed, which is to achieve the public interest approved by the constitution and this matter is very difficult because the legislator and the representative in parliament is a human being and a person may err or deviate from achieving the public interest that Stipulated in the Constitution, which makes the parliamentary legislator to agree between logical bases between the alternatives put forward, which in the end aim to achieve the public interest.⁽²⁴⁾

Therefore, we believe that the process of legislating laws is among the most important things that the legislative authority can do, as it must investigate accuracy in work through the provisions of reason and achieve the goal desired by the constitution and that there should be an extensive study of all constitutional texts that may oppose the legislation of this law or not so that the law does not encounter disruption or failure.⁽²⁵⁾

The parliamentary legislator, if it is true, is the one who puts the constitutional texts into practical application by clarifying their meaning and simplifying their application on the ground because the drafters of the constitution aim through it to achieve the public interest and satisfy public needs, which is the reason for the existence of states, the ordinary legislator is the closest and most connected to the rights and freedoms of individuals and the most understanding of the intention of the constitutional legislator, who seeks through those laws to emphasize the protection of rights and freedoms and satisfy public needs, which makes the constitution a guarantee The truth is to protect these laws instead of opposition or

violation that makes these laws vulnerable to abortion by challenging them as unconstitutional.⁽²⁶⁾

Justice of Principles the for Respect and to Adherence :II Subchapter

The ordinary legislator has the discretionary power to organize and present rights and freedoms, but abstract general rules that do not involve any discrimination or differentiation between those whose legal positions are equal, and there is no waste of rights and freedoms.

He also has the power to set objective conditions that determine the legal positions with which individuals are equal, to achieve the public interest, meaning that there are conditions that when they are met, they are entitled to exercise these positions.

The constitutional legislator does not refer the matter of enacting laws to the ordinary legislator based on the fact that the legal text is the one that undertakes the task of clarifying it and determines its controls and general impact, and accordingly, the organization and restriction of rights and freedoms is within the framework of equality for all, so there is no discrimination between citizens, but on the contrary, we find that the legislator is moving towards the principle of equality and equal opportunities.⁽²⁷⁾

However, the subject of equality is meant to be relative equality and not absolute, In other words, it may apply to one group without another when they meet the conditions specified by the law. All of these are those who meet the conditions without taking into account one person over another.⁽²⁸⁾

The answer to such leniency was followed by jurisprudence, where the legislator could deviate from this general rule as long as the aim was to achieve the public interest, where to achieve the public interest, it is permissible to deviate from the principle of equality, and this is what the law assumes, for example, deprives the person sentenced to a penalty of moral turpitude of the right to vote.⁽²⁹⁾

However, the legislator's departure from this rule requires that there be an interest that justifies this, in other words, ensuring the proper functioning of public utilities regularly by a cruiser that sometimes seeks to achieve excellence.

The importance of legislative drafting lies in the fact that it does not take care of the formal procedural aspect only, but its goal is to reach the enactment of laws in a regular manner represented by clarity and harmony and is not inconsistent with the rest of the legislation, meaning that the legal texts are understandable and achieve the desired goal of justice, equality and taking into account legal security, which is one of its aspects of legal certainty, which is to enable individuals to take note of the legal rules that apply to them, for example, the legal certainty in the criminal law is that those addressed by the law know in advance what the orders are The prohibitions stipulated therein and the penalties to which they may be subjected when violating it.⁽³⁰⁾

The goal of the ordinary legislator is to abide by the constitutional provisions to achieve supposed justice, which would not undermine rights and freedoms, even if there is a kind of discrimination and differentiation that is aimed at achieving the public interest or the public interest of all members of society.

The second section

The basis of discretion and its application in Iraq

The subject of the discretionary power of the legislator is among the most important topics addressed by jurisprudence by study and analysis for the purpose of research in the establishment of sound law, which gives the legislator the right to estimate some issues based on the democratic state and vice versa if the state is not democratic.

As the knowledge of the pillars of the law is of great importance, no less important than the research on the basis of the discretionary power through which the legislator grants Parliament the right to confront the laws because his authority is a

legal authority exercised under the Constitution to the extent that he exercises his work with a kind of freedom.

For example, but not limited to, determining the basis of the discretionary power of the administration differs between it and determining the basis of the discretionary power of the legislator because the three authorities share some points and differ on others and based on the idea that the legislator is the holder of the general mandate in legislation, and that the comparison between the scope of the law and the administrative decision leads to the inadmissibility of analogy between the discretionary power of the legislator and the discretionary power of the administration. However, the concept of discretionary power and its nature are the same for all public authorities in the State, whether for the legislative, executive or judicial authority, with the difference in the scope of that discretionary power, and to know the basis of the discretionary power of the legislator, we will address this in detail and as follows:

First Requirement: Basis of Discretion:

In this requirement of this section, we deal with the basis on which the discretionary power was built between what is political and legal and what is socio-cultural as follows:

Section II: Socio-Cultural Basis:

The great role played by the state was and still is in organizing aspects of social life to establish a balance between rights and freedoms and to emphasize the need to respect others by refining the morals of people through the binding power it enjoys in enacting deterrent laws that reconcile conflicting interests.⁽³¹⁾

Through the refinement of societal behavior, these countries can achieve the public interest, because the behavior of individuals, if they meet, leads to achieving the public interest, and this is what countries seek through the legislation they enact,

which does not violate the constitution and expresses the state's policy of adopting democracy or not.⁽³²⁾

Whether or not the scope of intervention depends to a degree on the political, economic and social approach or trend on which the state relies and is framed by various legal rules.⁽³³⁾

The necessity of organizing human societies falls on the shoulders of the state as it is the one that has the right to do so to achieve societal peace and this will only be possible by adhering to the provisions of the constitution and what has been specified in that supreme document in the country, the legislator is the only person capable of organizing rights and freedoms by enacting laws that address the problems that arise in case of conflict of interest, as it shows the owner and what you have to within the framework of the constitution, which allowed the organization of those rights to be approved by the people .⁽³⁴⁾

The basis of the idea of legislative intervention in the field of public freedoms is due to the relativity of the idea of public freedoms of all kinds, which need to be organized, controlled and reorganized, as freedom itself requires regulation, which is a necessary condition for its exercise and the idea of public order, which requires a balance between the activity of the individual and his freedom and between the interests and freedom of others.⁽³⁵⁾

Therefore, legislation is one of the most important legal mechanisms regulating social relations in society. In addition to regulation or regulation, the legislator has broad discretion in this regard, and includes regulation and reorganization specifically and restriction, and even detracting from them in some cases for the necessities of the public interest as the organization of social relations, individual activities and freedom and determines the scope or circle of its practice. If the principle is that the regulation of social relations and the restriction of public rights and freedoms fall within the scope of the legislator's work, the administrative

authorities may, on the other hand, intervene in this area through independent regulations, unless this is contrary to the provisions of the Constitution and the law.⁽³⁶⁾

Since the legislator's assessment is only a direct result of the broad and indispensable power of the modern state, after the role of the state was limited to maintaining security inside and outside the state, its activity extended to interfering in private activities, aiming on the one hand to protect the social, political and economic situation of the country and protect society from threats to public order, and on the other hand, to regulate individual activities and guarantee the exercise of individual freedom. Therefore, the law enacted by the legislator contains the rules which regulate social relations, in particular public rights and freedoms and private activities, as well as its powers; It is a form of appreciation that has its roots in a responsible social foundation. The development of the theory of public freedoms, including the right to confiscate property, was used to enjoy a sacred status, but now it has been limited to the rights of others, since this right can be confiscated for the common good.³⁷

Thus, this basis has an effective impact on the discretionary power through its influence on legislators and politicians from the country's leaders, as the impact of the cultural factor has a great role that appears in the transformation of the state into a civil state that respects the freedoms of others and maintains their rights, which is integrated with the social basis, the more the society has a high cultural good, the more this is reflected in what is issued by the legislative authority to enact laws to preserve the gains enjoyed by individuals.

Subchapter II: Political and Legal Basis:

Since the legislative authority depends on a social basis, its basis also depends on the political motive, because there is an integral relationship between the social and cultural factors and the political dimension in the adoption of legal legislation by the

legislative authority represented by the parliament., As a legal act of Parliament, expressing the general will of the people, and the people are the real sovereign and authority in the country.

Since legislators have broad powers to enact laws within the framework stipulated by the Constitution, especially in the field of public rights and freedoms, legislators have been keen to ensure in their legislation the exercise of individual freedom without restrictions, restrictions or derogation from these freedoms, and the intervention of legislators in this area is in itself a guarantee of these public rights and freedoms, considering that legislators, according to their political positions, are better able to achieve a balance between conflicting interests and guarantee public rights and freedoms.

Freedom of individuals. It is understood from the text of Article IV of the Declaration of the Rights of Man and the Citizen of 1789 that the exercise of each human being of his natural rights has no limits except those that guarantee others the enjoyment of the same rights, and these limits are determined only by the law. In this regard, a trend in French jurisprudence sees that the competence of the legislator alone to impose administrative license is a precondition or restriction on the exercise of freedom finds its basis in the jurisdiction of the parliament not defined before the French Constitution of 1958, but after the entry into force of the French Constitution of 1958, the role of Parliament declined and, as a result, the relationship of the regulations to the law developed. Despite this, the competence of the legislator to regulate public freedoms finds its basis in that the spirit of the law is in line with freedom.

while the regulation issued by the administrative authority is in line with the interest of the administrative authority, since prior legislative intervention in this case is necessary to allow the administrative authority to use administrative licensing measures and procedures, as well as noting the text of Article 34 of the French

Constitution of 1958 that it refers to the law by setting detailed rules or principles. fundamental to both national rights and the fundamental guarantees granted to citizens for the exercise of the freedoms imposed on them. In this regard, the Egyptian Constitution was influenced by the French Constitution regarding granting the legislator broad discretionary power in regulating public rights and freedoms, which was stipulated in Article 101 of the Egyptian Constitution issued in 2014, and Article 140 of the constitutional amendment of 2016. In fact, what came out of these constitutional texts and others only indicates the uniqueness of the legislator and his general mandate in enacting legislation regulating the various legal relations in society, but on the other hand, the idea that the legislative authority in its organic sense is no longer the original competence in regulating public rights and freedoms is acceptable now, given the decline and decline of the role of the parliament elected by the people and expressing their will, in addition to the growing role of the executive authority in the field of legislation, especially its control at work.

Legislative where the Prime Minister, for example, can develop general and abstract legal rules alongside the legislators alike, which prompted part of the professors of public law to say that the law itself is no longer the only expression of the general will, in addition to the nature of the composition of members of parliament, which often-expresses the interests of the various forces within the parliament more than it expresses the general will.

Accordingly, if the social basis of the legislator's discretionary power to regulate social relations is subordinate to the basis of the State's intervention in the organization of societies as a legal political authority that intervenes in life and social relations, the political basis of that authority derives its dimension from the social basis, since the legislation issued by the legislator as a legal act is an expression of the general will in the formulation or development of general and binding legal rules. And abstraction.

The legal basis

The legal basis What was said by the constitutional jurists regarding the legal basis of the discretionary power of the legislator was nothing but a description of the discretionary power of the administration, but the legislator did not have his own theory as much as most of the attention was focused on the executive authority represented by the administration that undertakes the task of issuing subsidiary legislation and which undertakes the task of putting the law into practice and thus abide by the law and respect the constitution and abide by it. Through browsing the books of jurists, we see that most of them focused on legality and did not address the discretionary power.

The basis adopted in this regard is the provisions of the Constitution and the general principles that the legislator must adhere to, if there are some details left to the legislator for the purpose of regulating them as long as they did not violate the supreme document in the country and the principles of justice.

Freedom of discretion to establish a kind of balance between the conflicting interests of the state on the one hand, and the need to respect international obligations imposed by international norms on the other hand. The discretionary power also finds its basis in the law, given its distinctive nature and as the regulator of the social relations of individuals, and the expression of the values of the legal framework of state policy. The role of the legislator is not limited to the mere application of the constitutional texts or rules formulated by the constitutional legislator at a certain stage in response to specific circumstances, which requires the recognition of the legislator part of the freedom of discretion in the exercise of his legislative competence to protect the rights of individuals and the other hand, keep abreast of developments that express the needs of the people and organize their daily and future affairs and between the developments witnessed by international rules, especially since we are in the era of globalization and the market economy, and

based on the above, we can say that the basis of the discretionary power of the legislator is achieved through the failure of the legal determination of the legislator's activity in a way The constitutional founder does not impose a specific path on the ordinary legislator or obliges him to follow a certain method or achieve a specific purpose, because this lack of specificity means leaving a large space for the legislator to express the content of the constitutional text in line with the constantly evolving reality of public life.

The constitutional recognition of public rights and freedoms in the body of the constitution, for example, is the first legal guarantee to protect them and moves the idea of the right to practice a certain activity or enjoy a certain freedom from a mere political legal principle to a binding constitutional principle that reflects the development of democratic thought of the constitutional founder and followed by the legislator when enacting laws regulating public rights or freedoms.

The second requirement: applications of discretion in Iraq:

Subchapter I: Legal Application:

Legislation is defined as "any written legal text issued by the authorities that have the right to issue it" and in Iraq the public authorities are committed to issuing legislation, as stipulated in the Constitution, to four basic principles, contained in two articles, namely "1. It is not permissible to enact a law that contradicts the constants of the provisions of Islam "Article 2 / I - A" 2. No law may be enacted that contradicts the principles of democracy "Article 2/I-b"3.No law may be enacted that conflicts with the fundamental rights and freedoms contained in this Constitution "Article 2/I-B"4. No law may be enacted that contradicts this Constitution, and any provision contained in the Constitutions of the Regions or any other legal text that contradicts it "Article 13/II" shall be null and void.

The permanent Iraqi constitution also stipulates the distribution of powers to issue legislation between the legislative and executive authorities, as follows (1. The

Council of Representatives... Enacting federal laws "Article 61 / I" 2. The President of the Republic... Issuance of Republican Decrees "Article 66/VII" 3.

The Council of Ministers... Issuing regulations, instructions and decisions with the aim of implementing laws "Article 80/III". to ensure the commitment of the legislative and executive authorities to issue legislation as specified for them, the Iraqi Constitution has entrusted the task of adjudicating the legitimacy of legislation to the Federal Supreme Court (Article 93) as follows : First : - Monitoring the constitutionality of laws and regulations in force. Second: - Interpretation of the provisions of the Constitution. Third: - Adjudicating cases arising from the application of federal laws, decisions, regulations, instructions and procedures issued by the federal authority..."

This means that the permanent Iraqi constitution has mentioned several types of legislation, namely (constitution), (laws), (republican decrees), (regulations), (instructions), (decisions) and (procedures) and can be divided in the degree of compliance with them into the following:

First: Basic legislation or the Constitution: It is the highest and highest degree, and it means a set of basic rules that show the form of the state and the system of government in it, as the constitution shows the distribution of competencies between the public authorities in the state (the legislative authority, the judiciary and the executive authority) and the relationship of each of these authorities to the other, as well as the public freedoms and rights of members of society towards the state. There are four ways to enact constitutions in general.

1. The constitution should be promulgated in the form of a grant from the ruler (the king or the holder of authority in the state).
2. The constitution should be promulgated in the form of a contract between the ruler and the representatives of the people.

3. The constitution should be promulgated by a constituent body specially elected by the people for this purpose.

4. The constitution shall be promulgated by referendum, whereby the executive branch shall draft the constitution and then submit it to the people for approval. The Constitution holds the value of the legal structure in the State, as it is superior to all its laws, and all its powers are subject to it, and no rule may contradict its provisions.

Second: Ordinary legislation: It follows the constitution in rank, and it means everything issued by the legislative authority in the state within the limits of its competence set out in the constitution, and this legislation is called "law" such as the Personal Status Law and the Investment Law... Extra. Ordinary legislation is enacted in four stages through the legislature:

1. Proposing legislation: It is done by preparing draft legal rules and submitting them to the legislative authorities for discussion and approval. The President of the Republic, the Council of Ministers or a member of the Council may propose legislation.

2. Discussing and approving the draft law: where the draft law is discussed by the parliamentary committee, and the draft is submitted to the Council for discussion and voting on it article by article, and then opinion is taken on the draft as a whole.

3. Non-objection of the President of the Republic: The draft law is referred to the President of the Republic, as the Constitution gives him the right to object to the laws enacted by the Council.

4. Promulgation of legislation: Promulgation is an act intended to record the legal existence of legislation, as it serves as the birth certificate of legislation and is a support for its implementation. 3. Subsidiary legislation: legislation established by the Executive Power in accordance with the competence prescribed to it in the Constitution. Although the principle is that the executive branch undertakes the task

of implementing laws enacted by the legislature, such as (republican decrees), (regulations), (instructions), (decisions) and (procedures), the subsidiary legislation is considered the lowest level.

On this basis, the legitimacy of lower legislation depends on its approval of the higher legislation, i.e.

Lower legislation such as (resolutions) may not contravene ordinary legislation such as (law) and ordinary legislation (law) may not contravene the supreme legislation, i.e. the Constitution.

If any of this happens, the rule of higher legislation must prevail. The question here is: Is the executive authority (the Council of Ministers) absolutely authorized to issue subsidiary legislation such as regulations, instructions, decisions and internal regulations, or does it require a provision in the law, so that the executive authority may not issue regulations, instructions, decisions and internal regulations without the existence of this text? First opinion:

This trend believes that the Iraqi constitution gave the right to the Council of Ministers to issue regulations, instructions and decisions to implement laws exclusively, as the constitution stipulated in Article "80 / III" (the Council of Ministers exercises... Issuing regulations, instructions, and decisions with the aim of implementing laws) Since the legislation of laws is the competence of the House of Representatives, based on the text of item (first) of article 61, it is the one who estimates the need for the law to issue a system, education, or decision, and if he wants the law to have a specific system, education, or decision, it must stipulate this in the law itself, and this means that the Council of Ministers may not issue regulations, instructions, and decisions without an explicit provision in the law.⁽³⁸⁾

This is the trend followed by the Council of State, the State Shula Council, and the Legal Codification Bureau, which means that it is not permissible to issue instructions or rules of procedure without a provision in the law authorizing this.

But what about the decisions issued by the Council of Ministers? What about the "directives" issued by the Prime Minister, which are the two most applied legislations than others? Second opinion: The second view is that when the Constitution stipulates the competence of the executive authority to issue regulations, instructions and decisions necessary for the implementation of laws, the administration exercises this right without the need for a provision in the law authorizing it to issue such regulations, instructions or decisions. The legislature cannot deprive the executive of it, but there is a view of jurisprudence that it is useless for the law to provide for the issuance of subsidiary legislation as long as the Government always has the right to it on the basis of the Constitution.

However, there are some legislations that are not provided for in the Constitution or ordinary laws, such as what is known as "legislative decisions" issued by the House of Representatives, and such as what is known as "directives" issued by the Prime Minister, so what is the legal basis for them.³⁹

about legislative decisions, the House of Representatives considers that it has the right to issue these legislative decisions, and they are binding on the government by the force of the constitution.

The Law of the Council of Representatives and its formations No. (13 of 2018) indicated in Article (17/VII) that (the Council of Representatives may issue legislative decisions) and this paragraph came as a matter of launch, and that it allows the Iraqi Council of Representatives to issue legislative decisions in any regard, but the Federal Court ruled by its decision No. (140/2018) on 23/12/2018, that the Iraqi Constitution clarifies in article 61/I the authority of the Council of Representatives to legislate federal laws and does not stipulate that it is authorized to issue legislative decisions except for what the Constitution stipulates in its places that it is authorized to issue a number of decisions within the articles contained in the Constitution, including Article (52/II), which allows the Council of Representatives' decision to

challenge the validity of the membership of the members of the Council before the Federal Supreme Court, within thirty days from the date of its issuance.

These powers are stipulated in Article (61) of the Constitution. Therefore, the text of article 17/VII of the aforementioned law has no basis in the Constitution.⁽⁴⁰⁾

As for the directives of the Prime Minister, Article 15 of the Internal Regulations of the Council of Ministers, No. 2 of 2019, issued in accordance with the provisions of Article 85 of the Constitution. Article (33) of the Rules of Procedure of the Council of Ministers stipulates the tasks of the General Secretariat of the Council of Ministers (ninth: Follow up the implementation of the government program and the decisions and directives of the Council, and submit the necessary reports on their implementation).

We conclude from this that the Iraqi Constitution entrusted the task of issuing regulations, instructions and decisions to the executive authority (the Council of Ministers) and entrusted the task of issuing (decrees) to the President of the Republic, but the Constitution did not address other subsidiary legislation, the most important of which are the (directives) of the Prime Minister or internal regulations.

Subchapter II: Constitutional Application:

We knew that the discretionary power of the legislator means freedom of choice, which is granted to it in the exercise of its legislative competence, and it does not mean the absolute power of the legislator, but he has the right to exercise his authority to legislate to the extent that the constitution allowed him to do so, because there are some provisions.

That have been specified by the constitution and the legislator has nothing to do with them, represented by the Council of Representatives, the authority to amend those provisions, because they are not subject to final legislative regulation, including the competencies and powers granted to the authorities, such as the competence of legislation that the Council of Representatives has exclusively in

accordance with the provision of Article (61 / I) of the Constitution of Iraq for the year 2005 or the exclusive powers of the Council of Ministers in accordance with the provision of Article (80) of the Constitution or the competencies of the Federal Supreme Court referred to exclusively in Article (93) of the Constitution, and these provisions the legislator does not have any authority Discretionary towards amending them by decreasing or increasing or canceling, and thus the legislator has discretionary power towards the constitutional principles that the writer of the constitution left to the legislator the authority to regulate them by law, and the browser of the Iraqi constitution finds out that there are dozens of articles left organized by law, including the Federal Supreme Court, which we find within the text of Article Ninety-Two, paragraph II, that there is a restriction of that legislative authority-When a two-thirds most of the members of the House of Representatives was determined to pass it, as well as in the components of the court and the qualities of its members, and the House of Representatives may not amend or violate these restrictions because it does not have authority towards them, and because the draft law of the Federal Supreme Court is still in the legislative stage, we must recall the constitutional principles that must be taken into account when legislating it to avoid challenging its unconstitutionality when it violates those principles later, as the observer to discuss the vocabulary of the law in the House of Representatives and the statements of its members notices, the emergence of ideas among some members of The House of Representatives states that they have absolute authority towards legislation, in addition to the existence of proposals that intersect with constitutional principles that the legislator is not free to violate according to the following:⁴¹

- 1- As long as the judicial body is independent represented by the Constitutional Court, the legislator does not have the discretionary power towards the constitutional principle in accordance with the provisions of Article (92 / I) of

the Constitution, and the legislator must observe that principle by maintaining its judicial capacity and may not change its description explicitly by amending its name or implicitly by amending its components, and whoever claims that the legislator has discretionary power because the Constitution ruled that the matter of enacting the legislation of the Federal Court should be left to the House of Representatives, it is a misplaced claim, because this authority is restricted by the conditions contained in Article (92) of the Constitution related to its composition, as well as Article (93) related to its competencies and Article (94) related to the authority of the judgments issued by it, and the legislator may not change it, as we heard that some seek to make in the project the right to veto decisions issued by it.⁽⁴²⁾

2- The discretionary power of the Iraqi legislator is restricted not to violate the general principles contained in the Constitution that may not be revoked, canceled or amended, including the basic principles contained in Chapter I and the rights and freedoms contained in Chapter II of the Constitution, where it is stated in Article (126/II) of the Constitution that it is not permissible to amend them except under conditions, including the end of two legislative sessions, the approval of two-thirds of the members, the approval of the people through a referendum and the ratification of the President of the Republic, and these conditions made the legislator's discretionary authority restricted towards These provisions, and the legislator must take them into account, including those related to the rights that have been approved for the Iraqi person, as the Constitution mentioned a number of established rights, including that the judiciary that adjudicates disputes in which the Iraqi person is an independent party and has no authority over him other than the law in accordance with the provision of Article (19) of the Constitution and considered this a human right, and since the Federal Supreme Court is a judicial body, this description must be respected and its title may not be implicitly violated when the legislator stipulates in .

Its composition is contrary to constitutional principles, because the Federal Court is part of the judicial authority in accordance with the provision of Article (89) of the Constitution when he pointed out that the judicial authority is independent and is assumed by courts of all kinds, and the Federal Supreme Court is a specialized type in the constitutional judiciary, and thus the constitutional conditions must be met by it, because its description (judicial body) necessitates that it be composed of judges when exercising its jurisdiction pursuant to the provisions of Article (96) of the Constitution, when he referred to the composition of courts and the appointment of judges in Thus, it must be taken into account that the work of the Federal Court relates to the judicial aspect of judges exclusively, which it exercises under the competencies contained in paragraphs (third, fourth, fifth, sixth, seventh, eighth) of Article (93) of the Constitution, because the Constitution gave the Court jurisdiction of three types, the first is to monitor the constitutionality of laws and regulations in force in accordance with the first paragraph of Article (93), and the second is related to the interpretation of constitutional texts in accordance with the second paragraph of Article (93) of the Constitution, and we see The court has six competencies related to the adjudication of disputes that are only through a court composed of judges exclusively according to the above, and only two competencies related to constitutional oversight of laws and interpretation of the constitutional text, which is a common jurisdiction between the adjudication of the constitutional challenge and interpretation, and this may need the opinion of experts in Islamic jurisprudence and law referred to in the text of Article (92/II) of the Constitution, a jurisdiction in which the role of experts is exclusively contained because they do not have the capacity of a judge When they practice work in the court, they cannot be counted as judges to enter the process of settling judicial disputes mentioned in the jurisdiction of the judicial court in paragraphs (third – eighth) of Article (93) of the Constitution. Through the presentation, we find that the authority of the Iraqi legislator is

restricted by the draft law of the Federal Supreme Court and the legislator must take into account the constitutional principles to be followed according to the above, so members of the House of Representatives must pay attention to these constitutional principles that restrict their authority to the extent related to the Federal Court Law when issuing and developing legislation that matches the constitutional provisions, because it will be subject to appeal if it includes a constitutional violation, as well as being regulates the work of a judicial body replaced by challenging the constitutionality of laws, and must That legislation should be more in conformity with the Constitution than others⁴³.

Conclusion

We concluded through our previous study in an attempt to research to understand the nature of the discretionary power that assesses the conditions for issuing legislation and which is assumed by the legislator to be the expression of the legislative policy adopted by the country because legislation in all its meanings seeks to put constitutions into practice through a statement of the general principles contained in those constitutions However, the legislative authority faces a problem, which is the discrepancy between the policies of those countries that adopt democracy at times and adopt dictatorship at other times This is evident through the constitutional texts. This research tried to show the nature of authority and its discretionary meaning and how the legislative authority proceeds at one level with other authorities in the executive and judicial state without there being an attack or harm from other authorities that express the state's point of view on private matters, and each according to his competence There was an attempt to understand the role of the legislator and his space in freedom or not by addressing many topics related to daily life, which are considered An obsession among citizens, and we reached through our study the following results:

- 1- The discretionary power of the legislator does not mean absolute freedom to issue legislation to the extent that it must address important topics that affect daily life.
- 2- The legislator's margin of appreciation varies from one country to another, and according to the legislative policy pursued by democratic or dictatorial countries, each according to his method of doing so.
- 3- The Iraqi legislator must not violate the general principles contained in the Constitution, which may not be revoked, abolished or amended.
- 4- The executive authority in Iraq has the right to issue regulations and instructions, which must abide by and abide by the legal and constitutional texts.
- 5- There is no doubt that the Iraqi constitution has granted the executive authority, the right to amend the constitution, but at the same time it has restricted it to a set of restrictions that affect its ability to make amendments as if this represents the abstaining plain.

Through this research, we propose some recommendations, which are as follows:

- 1- Indicate the limits of the parliament's power to enact laws in an inclusive and prohibitive manner
- 2- Not to restrict the freedom of Parliament to make legislation as long as the legislature adheres to the Constitution.
- 3- The legislative authority shall abide by the general principles contained in the Iraqi Constitution, which indicate what is allowed or not in the issuance of legislation.
- 4- Activating the role of the constitutional judiciary by the need to respect the objectives of the legislator not to confront legal texts to challenge them as they reflect the interest of citizens.

- 5- Emphasizing the joint cooperation between the constitutional judiciary and parliament regarding the enactment of laws because both complement the other in achieving the public interest.

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السلطة التقديرية للمشرع وحماية الدستور

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الكلمات المفتاحية: القانون. الدستور. السلطة

الملخص:

تعد السلطة التقديرية للمشرع من بين أهم موضوعات القانون الدستوري كون المشرع لا يتمتع بكل الحرية المطلقة في سن القوانين وان كان النظام السياسي يتسم بالديموقراطية ذلك لأن اغلب دول العالم فرضت على السلطة المتصدية للتشريع ضرورة احترام الدستور ومبادئ العدالة تلك التي تنقيد بها الدول وتعتبر من بين أهم مرتكزاتها على ان المشرع هي الوحيد الذي يحق له بالتدخل في سن القوانين التي تعبر عن المصلحة العامة إلا ان ذلك محكوم بضرورة مراعاة الدستور والمبادئ المتعارف عليه كما ان اغلب الدول تعمل على منح السلطة التنفيذية سن القوانين في حالات معينة تبيحها الضرورة الامر الذي جعل القضاء الدستوري يتصدى لمثل هذه المواضيع من اجل تحقيق احترام الدستور فكانت غاية البحث تسعى لأجل بيان حدود السلطة التقديرية التي يتمتع بها المشرع والتي خلصنا من خلال بحثنا ان المشرع مقيد في بعض المواضيع التي لا يحق له بالتدخل بها احتراماً للدستور والمبادئ العامة من اجل تحقيق المصلحة العامة دون تمييز على ان الالتزام بالوثيق الدستورية يعد من الضرورات الملزمة للدولة.