



تعديل الدستور دراسة في ضوء الدستور العراقي لسنة ٢٠٠٥ النافذ



اسم الكتاب: تعديل الدستور.. دراسة في ضوء الدستور العراقي لسنة ٢٠٠٥ النافذ

اسم المؤلف: النائب محمد احمد محمود

من منشورات: الدائرة الاعلامية في مجلس النواب

سنة الطبع: ٢٠١٠

عدد النسخ المطبوعة: ٢٠٠٠

جمهورية العراق/ بغداد

طبع على نفقة مجلس النواب العراقي



جمهورية العراق
مجلس النواب
الدائرة الاعلامية

تعديل الدستور دراسة في ضوء الدستور العراقي لسنة ٢٠٠٥ النافذ

النائب
محمد احمد محمود

طبع على نفقة مجلس النواب العراقي

الإهداء

إلى مروح والدي . . . إلى والدتي . .

إلى أهلي وأولادي . .

إلى أستاذي الفاضل الدكتور فوزي المجبوري الذي أُرشدنا في سبيل نجاح هذا البحث . .

إلى أخي العزيز محمد مرزقي فاضل الذي ساعدني في طباعة البحث . .

إلى كل من مد لي يد العون لإكمال هذا البحث . .

إلى كل من يقدم أي خدمة للشعب والوطن مرضاةً لله تعالى . .

إلى كل هؤلاء اهدي ثمرة هذا الجهد المتواضع .

النائب

محمد احمد محمود



مقدمة رئيس مجلس النواب

كانت قضية كتابة الدستور واحدة من اهم القضايا التي شغلت بال الرأي العام العراقي والعربي، وقضية مفصلية في مراحل اعادة بناء العراق بعد عام ٢٠٠٣، وقد كان الباحث في خضم احداث تلك المرحلة ومطلعاً على تفاصيلها الدقيقة من واقع كونه عضواً في مجلس النواب العراقي وقد تناول في مجته القيم قضية تعديل الدستور بابعاده السياسية والقانونية والواقعية والظروف التي صاحبته بمنهج يتمتع بالرصانة العالية والإحاطة بكل جوانب الموضوع، وتماً لهذه الرسالة الرائدة إضافة حقيقية للمكتبة العراقية.

أياد السامرائي
رئيس مجلس النواب

شكر وتقدير

أتوجه بالشكر الجزيل والامتنان إلى كل من سيادة الدكتور اياد السامرائي رئيس مجلس النواب العراقي لما تفضل به من كتابة المقدمة الطيبة والمبادرة الجميلة لطباعة الرسالة والسيد اجدد عبد الحميد عبد المجيد رئيس ديوان مجلس النواب العراقي لتجاوبه الكبير مع القضية والسيد محمد أبو بكر مدير عام الدائرة الإعلامية حيث اخذ على عاتقه تفاصيل تفاصيل الطباعة من إعادة ترتيب وتنضيد وتصميم المحتوى والغلاف وحرصه الشديد كي يصدر الكتاب بأحسن ما يمكن، مراجياً من الله سبحانه وتعالى أن يجعل جهودهم الكريمة في ميزان حسناتهم .

النائب

محمد احمد محمود

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الفصل الأول

التعديل الدستوري بشكل عام



الفصل الأول

التعديل الدستوري بشكل عام

المبحث الأول : ماهية التعديل الدستوري

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المبحث الثاني : ضرورات التعديل ومقتضيات الثبات في الدستور

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الفصل الأول

التعديل الدستوري بشكل عام

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(3) The oxford companion law ,David waker ,claran action press.

(4) Dictionary of law ,peter collin Third edit 2001- p16 – oxford 1980 pp51-52.

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المطلب الثاني

التعديل الدستوري عبر التاريخ

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(3) Richard H. Leach American federalism W.W. Norton & company. inc New York 1993 pp4-5.

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(3) Peter Oliver ,Canada Quebec and constitution amendment copyright university of Toronto Law Journal ,1999,p5.

(4)Washirgtn: Canadian Embassy Government of Canada 20-5-2003.
Available At:<http://www.canadianembassy.org/government/constitution>.



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(1) Government of Canada ,Intergovernmental Affairs The history of Canada’s constitutional Development, 20-5-2003 available at:<http://www.pco-pcp.ca/lalal?language=E&page=scons_file_&sub=the_history_of_constitution.

(2) Government of Canada Intergovernmental Affairs op ,cit.
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المطلب الثالث

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المبحث الثاني

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ضرورات التعديل في الدستور

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(2)Prof.carlo bfusaro, Italy Index, 12/5/2003 ,Available at:-
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الفصل الثاني

كيفية التعديل الدستوري



الفصل الثاني

كيفية التعديل الدستوري

المبحث الأول : طرق وآليات التعديل

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المبحث الثاني : النتائج المترتبة على تعديل الدستور

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المبحث الأول

طرق واليات تعديل الدستور

المطلب الأول

الاعتبارات والإجراءات لتعديل الدستوري

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النتائج المترتبة على التعديل الدستوري

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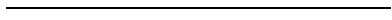
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المطلب الثاني

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(4)Section 88 from the Denmark constitution of 1992.

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المطلب الثالث

أنواع الحظر على تعديل الدستور والقيمة القانونية لنصوص الحظر

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(2)Article (139) from the Italy constitution of 2003 Adopted: 22 December 1947.

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الفصل الثالث

تعديل الدستور العراقي الجديد

بين الواقع والطموح



الفصل الثالث

تعديل الدستور العراقي الجديد بين الواقع والطموح

المبحث الأول: الظروف والملابسات السياسية المؤثرة على كتابة الدستور

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المبحث الثاني: طرق تعديل الدستور العراقي الجديد وأوجه الإصلاحات المطلوبة فيه

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المبحث الأول
الظروف والملايسات السياسية المؤثرة على كتابة الدستور

المطلب الأول
الوضع السياسي السائد وتأثيره على كتابة الدستور



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المطلب الثاني

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المبحث الثاني

طرق تعديل الدستور العراقي الجديد وأوجه الإصلاحات المطلوبة فيه

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المطلب الأول

طرق تعديل الدستور العراقي الجديد

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المطلب الثاني

أوجه الإصلاحات المطلوبة للدستور العراقي الجديد

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 90. Government of Canada, Intergovernmental Affairs, op, cit.
 91. Prof. carlo bfusaro, Italy Index, 12/5/2003 ,Available at:- <http://www.offer.Unibe><ch//Aw/Icl/It0000.Html.>>.
 92. Section 88 from the Denmark constitution of 1992.
 93. Philips, power-sharing in Iraq ,p21.

the fifth trend differentiate between the impact of the ban for the original constituent authority and its impact for the authority constituent treaty.

Chapter III: We dedicated this chapter by a brief and cursory study on amending the Iraqi constitution between reality and ambition through shedding light on the impact of political conditions and circumstances on writing the constitution explaining various and different attitudes and trends on the new Iraqi Constitution and its amendments and the criticism directed to it and available ways to be amended, highlighting some sided of the required reforms which we see them suitable for developing new Iraqi constitution.

Finally and through offering our analytical studies we can say that the nature of the present political system of Iraq with the presence of foreign occupation and the nature of the components of people with complex and affected by the sectarian conflict and the transitional phase through which Iraq going through on the road transition from a simple state of being highly centralized authoritarian dictator state to the form of composite federal with weak central authority , as well as the effects of the circumstances surrounding Iraq at the level of international, regional and intricacy and an intersection of interests in a contrary way, all this make the current Iraqi constitution of the very rigid solid type in a way that it has reached at least estimation to the extent of the current situation , Any amendment in the Constitution in its natural and legal form is almost impossible, unless political equations intervened or the current political process stopped and changes happened to overcome all these red lines and existing veto rights ,otherwise amendment will remain a pure fantasy cannot be carried out.

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- Ways of amending the Constitution, such as (formal amendment, customary amendment).
 - Stages of the constitutional amendment, such as (stage of proposing the amendment, estimating the principle of amendment, the preparation of the amendment, final approval).
 - Consequences caused by amendment, among the division of constitutions based on their liability to amendment to the flexible constitutions and rigid constitutions.
 - Identifying the competent authority for the amendment:- views of jurists differ on determining the authority that has the right to amend the Constitution, several trends appeared in this regard, such as (making the amendment authority to all individuals of the people, giving the amendment authority to the majority of the people or its representatives, is done in the way stated by the Constitution itself and by the means of authority defined by). Those that perform the constituent power established on (legislative power, the Constituent Assembly, the people referendum).
 - Types of ban on amending the Constitution, such as (the time linked ban, the substantive ban, the substantive ban may be for life (everlasting) or temporarily or may be is totally or partially).
 - The legal value of the texts of which prohibit the amendment. There are several views in this regard:
First view the legality of the amendment banning **second view** illegality amendment banning and **third trend** with the legality of the amendment banning , but with no possibility of amending constitutional provisions that prohibit the amendment **fourth trend**, which states that there should be distinction between images of banning, then according to him there is no legal value for substantive banning with politically significant, as for the case of the time banning, the cause of legitimacy is due to the prohibition of amendment during a certain period of time or during exceptional circumstances, as

provisions that do not accept the ijihad did not accept the amendment).

The chapter contains necessities of amendment such as (convenience and keeping up with the developments and new ideas in the society organizing it, filling gaps in the Constitution, the redistribution of the constitutional authorities in the Federal State, developing the political system, achieving social and economic equality, expanding the participation of a broader sections of society in the political process, especially women section).

We mean by requirements of consistency in Constitution (the stability of the rights and legal centers, ensuring individual rights of citizens, be patient and being calm, the Protection of the Constitution against those who exercise power and the legislature, Highness of constitutions, preventing the amendment by personal motives and reasons and political considerations).

Chapter II: This chapter includes:-

- How the constitutional amendments are done from the methods and mechanisms of amendment and considerations upon which the amendment procedures depend on such as (political considerations, technical considerations, scientific considerations, considerations relating to the constitution itself in determining the difficulty or ease of procedures for amending the Constitution).
- Followed Procedures in the amendment, such as (a having meeting of both Houses of Parliament, the approval of both of the Houses of Parliament on the proposed amendment with the same formula, and if there is any dispute between the two houses in this regard, so the proposed amendment would end, and voting will take place on the proposed amendment, but more than once with long intervals, the availability of special majority, consent of the people on this amendment in a referendum, and in the constitutions of the federal states , the approval of the amendment is conditional with the consent of the member affected by the amendment).

indicate the stage that may require ratification or referendum on the amendment.

Procession(march) of constitutional amendment through the history of the constitutions from the oldest written constitution constitutions of the Greek Constitution, such as Athens constitution or of the most famous written constitutions is the constitution of the United States of America which began to be written since 1778 and the amendments that have occurred with the direct ratification and the so called the (Declaration of Rights) as (the French Declaration of Rights of 1789, or The Bill of Rights of

Britain in 1689), and amending Canadian constitution in 1982 who addresses Basic rights.

As for the Basic Iraqi Law for 1925, which is considered as the first constitution of Iraq that ensures a way to amend it or the followed procedures according to articles (118, 119) of it.

As for the concept of the constitutional amendment and how to it in the Islamic Sharia, which is meant to modify any issue or a provision stated in the constitutional declaration or in Quran or Sunnah which is the only revelation with the later legislation abolishing the earlier legislation this is what scientists have called invalidation(abolish, cancel, annul)whether the abolition or amendment issued by Quran or Sunnah . From examples of that The Declaration of Madeena State's constitution, which the texts guarantee coexistence(living together) of idolaters as citizens under the Islamic State but the revelation came after by amending legislation in the Quranic verse ((freedom from(all) obligations (is declared) from Allah and His Messenger to those (polytheists, pagans, idolaters, disbelievers in the oneness of Allah) with whom you made a treaty)).

The amendment of constitutional provisions in the period of mission (period of revelation) was abolition and have actually occurred. But the amendment of the constitutional provisions after the period of revelation there is no way without any endeavor(Ijtihad) (any constitutional provision that accepts the ijthad(endeavor) accepts the amendment, and all constitutional

Summary

This research includes ideas about amending the Constitution as an analytical study in the light of the valid Iraqi constitution for year 2005.

The selection of this subject is in response to the existent invitations for reforms and doing further actions with the purpose of opening the door for extensive participation and achieving national consensus through constitutional amendment in a particular way, to shed light on the general foundations of the constitutional amendment, and based on what preceded we follow the following plan in our research and it is divided into three chapters:

Chapter I: Talks on the nature of constitutional amendment in general as well as referring to the meanings and implications of the amendment. The amendment linguistically means evaluation (correction), and there are many other expressions indicate the meaning of amendment as (revision, second thought, review, replacement, defeasance or invalidation).

The amendment terminologically is the revision of the constitution by changing, replacing, omitting or addition and there is a difference between a broad sense amendment and amendment in the narrow sense. Amendment in a broad sense means any change in the Constitution weather it led to a new provision of a new rule in a subject that was not being organized by Constitution or to change organized constitutional provisions for a subject by addition or deletion.

So the constitutional amendment carries more than one meaning, simply only by being provided among articles of the Constitution can be understood from it all changes that happen to the Constitution among which are (addition, deletion, replacement and change). As for the meaning of review and reconsideration happening to the Constitution, it is under consideration as well as it is not accurate. Therefore we support the view that uses the term expression which indicates the stage during which the project was presented to the parliament for voting and passing as also could