THE POWERS OF THE FEDERAL SUPREME COURT IN LEGAL SUPERVISION AND INTERPRETATION ON THE COSTITUTIONALITY OF LAWS: A CASE STUDY OF THE IRAQI CONSTITUTION

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A Thesis submitted to the College of Law, Government and International Studies in fulfillment of the requirements for the degree of Doctor of Philosophy
Universiti Utara Malaysia

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DEDICATION

This thesis is dedicated to my husband Fathil and to my children Fadek and Rateel. May Allah bless them with good health. Ameen.

ABSTRAK

Perlembagaan Iraq 2005 memberi Mahkamah Agung Persekutuan (selepas itu dikenali sebagai "FSC") kuasa pengawasan undang-undang dan interpretasi keperlembagaan undang-undang. FSC membentuk mahkamah tinggi dalam piramid kehakiman Iraq. Selain mempunyai kuasa pengawasan undang-undang dan interpretasi keperlembagaan undang-undang, FSC juga menentukan keperlembagaan tindakan eksekutif. Tesis ini membincangkan tentang masalah seperti kemuktamadan dan sifat mengikat keputusan yang dilakukan oleh FSC iaitu isu bagi mengatasi konflik di antara undang-undang persekutuan dan serantau , dan pemilihan/pengubahan ahli FSC. Berdasarkan masalah ini, salah satu objektif utama tesis ini adalah menganalisis keputusan FSC dalam menjalankan kuasa pengawasan undang-undang dan interpretasi dalam keperlembagaan undang-undang adalah muktamad dan terikat ke atas semua pihak berkuasa. Dari sudut kaedah penyelidikan, tesis ini mengambil penyelidikan undang-undang doktrin dan pendekatan penyelidikan empirik. Kesimpulannya, tesis ini mendapati bahawa kuasa FSC dalam pengawasan undang-undang dan interpretasi keperlembagaan undang-undang adalah dijejaskan oleh Perlembagaan Iraq sendiri. Sebagai contoh, Artikel 61 (6) mempersoalkan kemuktamadan dan sifat mengikat keputusan FSC. Artikel 121 (2) wujudkan untuk undang-undang serantau sekiranya terdapat konflik di antara undang-undang perlembagaan berkaitan perkara luar kuasa eksklusif kerajaan persekutuan.Tesis ini mencadangkan supaya Perlembagaan Iraq 2005 diinterpretasikan secara meluas. Ia bukanlah satu statut yang mana interpretasi sempit harus dilakukan. FSC Iraq dijangka akan menentukan undang-undang termasuklah makna Perlembagaan.

Kata kunci: Perlembagaan Undang-undang, Mahkamah Tinggi Persekutuan, Perlembagaan Iraq 2005, Undang-undang Pengawasan, Iraq.

ABSTRACT

The Iraqi Constitution 2005 gives the Federal Supreme Court (hereinafter referred to as "FSC") the powers of legal supervision and interpretation on the constitutionality of laws. The FSC constitutes the apex court in the Iraqi judicial pyramid. Apart from having the powers of legal supervision and interpretation on the constitutionality of laws, the FSC equally determines the constitutionality of the executive actions. This thesis revolves around a wide range of problems such as the finality and binding nature of the decision of the FSC, the issue of which law is to prevail in case of a conflict between federal and regional law, and the composition of the members of the FSC. Based on these problems, one of the main objectives of this thesis is to analyse the decisions of the FSC in terms of exercising its powers of legal supervision and interpretation on the constitutionality of laws as to its finality and binding nature on all authorities. In analysing this objective, a corresponding research question is asked that is, whether the decisions of the FSC in terms of legal supervision and interpretation on the constitutionality of laws are final and binding on all authorities. In terms of research methodology, the thesis adopts a doctrinal legal research and empirical research methodologies. As to the findings, the thesis concludes that the powers of the FSC in terms of legal supervision and interpretation on the constitutionality of laws are practically undermined by the Iraqi Constitution itself. Take for instance Article 61(6) seems to question the finality and binding nature of the decision of the FSC. Also, Article 121(2) appears to be in favour of a regional law in case there is a conflict with a federal law in respect to a matter outside the exclusive powers of the federal government. The thesis recommends that the Iraqi Constitution 2005 must be interpreted broadly. It is not a statute where a narrow interpretation may be justified. The Iraqi FSC is expected to determine the law, including the meaning of the Constitution.

Keywords: Constitutionality of Laws, Federal Supreme Court, Iraqi Constitution 2005, Legal Supervision, Iraq.

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Malaysian Federal Constitution 1957.

USA Constitution Year 1789.

List of Abbreviations

FSC Federal Supreme Court

GC Governing Council

CPA Coalition Provisional Authority

MPS Members of Parliament

SOP Separation of Powers

HJC Higher Juridical Council

US United States

UK United Kingdom

FC Federal Constitution

RG Regional Government

FL Federal Law

CHAPTER ONE
INTRODUCTION

1.1 Background of the Study

Constitution of a country represent sacred document from which all laws and actions derive their legitimacy. As a sacred document, it must be respected by all authorities or persons, in order to foster the spirit of constitutionalism. The Constitution separates the functions of law making, administration and interpretation of the laws between the three arms of government, namely the legislature, the executive and the judiciary. While the law making function is vested in the legislature or the parliament, the administration of the laws is the preserve of the executive. Legal supervision and interpretation on the constitutionality of laws is vested in the judiciary that comprise of the courts. It follows, therefore, that the three arms of government and all authorities must keep and act within the confines of the powers given to them by the Constitution.

In all democracies, especially for countries with a written Constitution the Constitution is of crucial importance because it is superior to all laws and guides the operation of government. Being superior, the Constitution prevails over other laws. Thus, when ordinary laws conflict with the Constitution, the Constitution

prevails and the ordinary law becomes null and void to the extent of its conflict with the constitutional provisions. In all Constitutions, such as the US, a provision deciding the supremacy of the Constitution over other laws exist.[1] The supremacy provision in the Constitution of Iraq can be found in Article 13(1) of the Iraqi Constitution 2005. Article 13(1) that provides:-

> "This constitution shall be considered as the supreme and highest law in Iraq. It shall be binding throughout the whole country without exceptions. Article 13(2) No law that contradicts this Constitution shall be enacted. Any text in any regional Constitutions or any other legal text that contradicts this Constitution shall be considered void."[2]

From the above provision of Article 13 (1) of the Iraqi Constitution 2005, it's important to note that an exception exist by virtue of Article 121(2) provides that:-

> "In case of a contradiction or conflict between regional and federal law in respect to a matter outside the exclusive powers of the federal government, the regional power shall have the right to amend the application of the national legislation within that region."[3]

In each country, the judicial power is housed in the courts. These courts are hierarchical with the apex court being the Supreme Court or Federal Court. In the case of Iraq, the Federal Supreme Court (hereinafter referred to as FSC) is declared under the 2005 Iraqi Constitution is the highest court of the land. The FSC in the exercise of the judicial powers constitutionally vested on it, supervise and interpret the Constitution and other statutory enactments to determine the constitutionality or otherwise of such laws passed by the legislature. The FSC equally can determine the constitutionality of the executive actions. Thus, individuals and institutions can

[1]Paul Gewirtz, "Approaches to Constitutional Interpretation: Comparative Constitutionalism and Chinese Characteristics," *Hong Kong Law Journal* 31, no.2 (2001):200. www.law.yale.edu /.../Approaches to Constitutional Interpretation.pdf . (accessed March 26, 2015). See also Article 4(1) of the Malaysian Federal Constitution on the "supremacy of the constitution".
[2] Article 13 of the Iraqi Constitution 2005.
[3] Article 121(2) of the Iraqi Constitution 2005.

approach the courts to seek for the determination of the constitutionality of laws and the guarantee of their fundamental freedoms. How settled and acceptable are the powers of a court to interpret any action or legislation to ascertain the constitutionality viewed? The decision of the United States Supreme Court in *Marbury* vs. *Madison*,[4] remains the most celebrated in the area of powers of legal supervision and interpretation of the constitutionality of laws and executive actions. The case of *Marbury vs. Madison* is a judicial authority that stressed the importance of the Supreme Court in Constitutional democracies. According to the judicial authority in *Marbury v. Madison*, is one where:-

> "The Supreme Court asserted its power to review the legality of both legislative and executive actions; the ways in which the court has upheld personal liberty and equality (especially in the de-segregation litigation); and the political role of the court as an instrument of reform in a variety of fields."[5]

The history of Constitution and Constitutional making in Iraq goes as far as 1925 with the Constitution of 2005 being the current operational Constitution. The 1925 Iraqi Constitution was the first Constitution for the country. Coming into force during the British military occupation in 1925. The 1925 was established a constitutional monarchy and remained in force until 1958 revolution which established a republic.[6] Interim Constitutions were adopted in 1958, 1963, 1964,

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[4] 5 U.S. (1 Cranch) 137, 2 L. ED, 1803, 60

[5] C. H. Sherrin, "Archibald Cox, The role of the Supreme Court in American government, (Chicago: University of Chicago Press, 1976):366.

[6] Abdul Haq Al-Ani,The constitutional legacy in Iraq, Al niqash Maqazin, 20 May,2005, 15, http://www.niqash.org/uploaded/documents/al-ani.constitu.heritage.iraq.htm. (accessed December 17, 2014). See also, Abdul Ghani Delly, A comparative overview of in the constitution of Iraq in 1925 and the Constitution 2005, *Journal of Alhawar Alamtmdn* 14, (May 2005): 23 http://www.ahewar.org/debat/show.art.asp?aid=50509. (accessed December 17, 2014). Ahmad Saeed, Iraq Constitution and the state of occupation to occupation, Aleahram Magazin, 22 (March 2005), http://www.ahramdigital.org.eg/articles.aspx?Serial=221399&eid=2834. (accessed December 18, 2014).

1968 ,1970 and 1990 draft Constitution could not be promulgated due to the commencement of the gulf war.[7]

The current Constitution that is the 2005 Iraqi Constitution was a product of the work of the Iraqi Constitution Drafting Committee. The Constitution was a replacement to the Law of Administration for the State of Iraq for the transition period. The 2005 draft Constitution was approved by 78% of the 9.8 million registered voters following the referendum of October 2005.[8] The Transition Administrative Law (TAL) was drafted between December 2003 and March 2004 by the Iraqi Governing Council (IGC). The GC as a body was selected by the Coalition Provisional Authority (CPA) following the Iraq War and Occupation by the US and the Coalition forces.[9]

Like any Federal Constitution, the 2005 Iraqi Constitution created the executive, the legislature and the judiciary.[10] The Constitution delineated the powers and responsibilities of these arms of government. Law making was left to the parliament, execution of the in the executive. The powers of control, supervision and interpretation on the constitutionality of laws was left to the FSC. The Constitution declares in strong terms that the FSC "is an independent judicial body, financially and administratively."[11]The FSC is the independent judicial body responsible for the interpretation of the constitutional provisions and determination of constitutionality

[7] Mazen Lillo, Guarantees respect for the constitutional bases in Iraq, (2008),www.ao-academy.org/docs/quarantee_for_constitution.doc.(accessed Decmber 18, 2014), 11.
[8]CNN, Iraqi Constitution Passes Officials say, http://edition.cnn.com /2005/WORLD/ meast/10/25/iraq.constitution/index.html?section=cnn_latest (accessed December 19, 2014).
[9]Saad N. Jawad,The Iraqi Constitution: Structural Flaws and PoliticalImplications,no 3 (May 2013),4.www. lse.ac.uk/middleEastCentre/.../SaadJawad.pdf. (accessed Deceember 19, 2014). See also, David Wippman, Matthew Evangelista, New Wars new Laws? Applying the Laws of War in 21st Century Conflicts, 116, no. 3 (February 2005):246.www.rushingwalker.com/.../PJW%20chapter%20in%20. (accessed Deceember 19, 2014).
[10]Part III, Part IV; Articles 47, 48, 66 and 87 of the Iraqi Constitution 2005.
[11] Article 92 of the Iraqi Constitution, 2005.

of laws and regulations. Acts as the final court of appeal, settles disputes among or between the federal government and the regions or the governorates, the municipalities and local administrations. Equally settles accusation against the President, the Prime Minister and Ministers. Also has the powers to ratify the final results of the general election to the Council of Representatives.

It's important to note from the very beginning that the FSC, as established by the Iraqi Constitution 2005, was initially a creation of the Coalition Provisional Authority's TAL.[12] The law formed the FSC and gave it jurisdiction to rule on (1) disputes between the transitional government and regional governments, (2) inconsistencies between the Transitional Administrative Law and other laws, and (3) ordinary appeals as prescribed by law.[13] Thus, when the 2005 Constitution's ratification, the FSC already existed as created by the Transitional Administrative Law in 2004 and established under an implementing "Supreme Court Law" in 2005.[14]

This thesis is about the powers of the FSC of Iraq in legal supervision and interpretation on the constitutionality of laws under the text of the provision of the Iraqi Constitution 2005, the thesis focused on the powers of the FSC in legal supervision and determination of constitutionality of laws, the thesis also examined the finality and binding nature of the decision of the FSC on all authorities and persons in Iraq.

[12] See Article 44, Law of Administration for the State of Iraq for the Transitional Period of 2004.
[13] Ibid.
[14] Article 44, Law of Administration for the State of Iraq for the Transitional Period of 2004; Article 1, Federal Supreme Court Law No. 30 of 2005 (Iraq).

The Iraqi Constitution 2005 gives the FSC the power of legal supervision and determination of constitutionality of laws.[15] This powers of the FSC to examine and determine the constitutional validity of legislation and actions of the other arms of government has been a subject of criticisms amongst constitutional experts and political scientist especially those who believe in the separateness and independence of the three arms of government.[16] The issue of legal supervision and interpretation of laws is a bit problematic in developing countries with weak public opinion and authoritarian executive.[17] Legal supervision and control of laws in developing countries such as Iraq is not as convenient as in developed countries.[18] In fact, the issue of legal supervision and interpretation of the Constitution by the judicial arm of government is relatively new in the constitutional history of Iraq. The 2005 Iraqi Constitution has a novel provision compared to the previous Iraqi Constitutions. The 2005 Iraqi Constitution for instance seeks to unite the divided Iraq has enacted in it some positive and progressive clauses, these include: no law should be drawn that contradicts the principles of democracy and the rights and liberties of the citizens,[19] the people are the source of power and its legitimacy,[20] the prohibition of torture,[21] the independence of the legal system,[22] and the importance of civil society organisations.[23] Although some of these rights existed in the previous Constitutions, but the setting differs under the 2005 Constitution because it is possible they would gain real meaning in the current democratic environment compared to the

[15] See Article 93 of the Iraqi constitution 2005.
[16]Ghazi Faisal Mahdi, Iraqi Permanent Constitution and ambitions of ideas,Alsabah Magazin, January 23,(2005), http://mcsr.net/activities/004.html. (accessed December 22, 2014).
[17] Ibid.
[18]Tisar Abdul Jabbar, Constitutional situation and developments in Iraq,Alsomerian Magazin, March,14,(2009,) http://www.somerian-slates.com/p592law.htm. (accessed December 23, 2014).
[19]Article 15 of the Iraqi constitution 2005.
[20]Article 5 of the Iraqi constitution 2005.
[21]Article 37 of the Iraqi constitution 2005.
[22]Article 19 of the Iraqi constitution 2005.
[23]Article 45 of the Iraqi constitution 2005.

environment under the previous Iraqi Constitutions.[24] This thesis, therefore, is timely in view of the nascent democracy in Iraq.

1.2 Problem Statement

The Iraqi Constitution 2005, established the FSC. The FSC constitutes the apex court in the Iraqi judicial pyramid. The FSC has vital functions under the Iraqi Constitution 2005, which are the protection of minority rights, disputes settlement between federation and regions and most important of them of overseeing the constitutionality of laws and any regulation in Iraq.[25] The 2005 Iraqi Constitution declares the FSC as final and independent financially and administratively.[26] However, a careful perusal of the Iraqi Constitution, 2005, reveals a number of problems in respect of the powers of the said FSC. The following are the problem statements flowing from the said examination of the powers of the FSC:-

Firstly, the FSC being the apex court its decision ought to be final and binding on all authorities and persons within Iraq.[27] This mean that, the decisions issued by the FSC is final for all authorities because it is the highest court and the decisions should not be subject to any appeal.[28] Court decisions are intended to put a real guarantee for the Iraqi people by requiring authorities to respect the provisions of the Iraqi Constitution 2005 and the application of its provisions in this democratic era.[29]

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[24]Saad N. Jawad, The Iraqi Constitution: Structural Flaws and Political Implications,no.3 (2013):15, www.lse.ac.uk/middleEastCentre/publications/Paper.../SaadJawad.pd.(accessed March 26, 2015).
[25]Article 93 of the Iraqi Constitution 2005. See also John McGarry and Brendan O'Leary, "Iraq's Constitution of 2005: Liberal Consociation as Political Prescription," *International Journal of Constitutional Law* (January 2007): 696. See also Tom Campbell, Separation of Powers in Practice, (California: Stanford University Press, 2004), 178.
[26]Article 61(6), 92, 94, and 121(2) of the Iraqi Constitution 2005.
[27]Article 94 of the Iraqi Constitution 2005.
[28]Medhat al-Mahmoud, Arab constitutions rich democracy but suffers from, (2015),http://www.iraq2020.org/print_top.php?id_top=218&p=topics&parm=id_top%202/2.(accessed March 26, 2015).
[29]Sahar Hussein,The role of the Federal Court in regularity of performance of the constitutional institutions, *Sabah Newspaper article* on January 23, 2015, www.alsabaah.iq/ArticleShow.aspx?ID=87902, (accessed March 27, 2015).

Although the Iraqi Constitution contains a provision in that regard, such as Article 94 of the Iraqi Constitution 2005, that provides:- "Decisions of the Federal Supreme Court are final and binding for all authorities."[30] a careful reading of other provisions in the same Constitution appears contradictory.[31] In one aspect, the Constitution sanctions the finality and binding nature of the decision of the Iraqi FSC. On the other hand, the 2005 Iraqi Constitution contains provisions exempting certain decisions against the President of Iraq in certain cases from the finality.[32] For example, under the Iraqi Constitution 2005, the conviction of the President or the Prime Minister by the FSC on certain offences is not automatically binding the members of the Council of Representatives. In other words, the Constitution subjects the decision or conviction of the FSC to the debate and voting of the members of the House of Representatives. Thus, is stated in Article 61 (6) which provides that the Council of Representatives can:-

> "Relieve the President of the Republic by an absolute majority of the Council of Representatives after being convicted by the Federal Supreme Court in one of the following cases: (1) perjury of the constitutional oath; (2) violating the Constitution; (3) high treason.[33]

It is important to point out from the very beginning that each lawsuit starts from the allegation phase, followed by evidence collection and investigation of the case, the judicial ruling, and finally the execution of the sentence. Article 61(6) of the Iraqi Constitution 2005, gives the Iraqi parliament power to file a charge allegation the President at the request of the majority of the members of the House of Representatives, then, the House of Representatives would refer the case to the

[30]Article 94 of the Iraqi Constitution 2005.
[31]Article 61(6) of the Iraqi Constitution 2005.
[32]Ibid.
[33] Ibid.

Federal Supreme Court with all documents and evidence of the said case.[34] After charge the President of the State, the trial by the FSC begins as stipulated in the Iraqi Constitution 2005. When the FSC tries the case, and takes a decision against the President, the president must be punished about these crimes, the decision of the FSC in this time not applying on the president of the republic, except this decision by FSC displays on subject to a debate and vote of the members of the House of Representatives.[35] The Iraqi Constitution of 2005, contains provisions for exempting certain decisions against the President in certain cases from the finality clause of the decision of the Federal Supreme Court.[36] As mentioned earlier, it would appear that the Iraqi Constitution 2005 allows the President of the Republic to be tried for perjury of the constitutional oath, violating the constitution and high treason by the FSC. However, the decision of the FSC cannot be final and binding on the President of the Republic. This is because the Council of Representatives by an absolute majority can relieve the President of the Republic from such a conviction by the FSC due to the proviso of Article 61 (6) of the Iraqi Constitution 2005. Perhaps, it could be argued that although the decision of the FSC is said to be final and binding in nature, this is not always the case in Iraq as far as the office of the President of the Republic is concerned.

"The decision of the FSC should be final in the public interest because of the need to bring an end to litigation. In all jurisdictions the decision of the highest court are final and cannot be subject to any appeal. In the context of this thesis when the FSC exercises its power by deciding cases against the actions of the legislative and executive organs of the government, her decisions as obtainable in other

[34] Maha Bahgat Younis, Procedures issuing constitutional rule, *"Magazine legal studies'*, May 2009: 34.
[35] See Article 61(6) of the Iraqi Constitution 2005.
[36] Ibid.

jurisdictions should be final and binding. This is necessary to ensure respect for this Iraqi Constitution 2005 and the application of fair democracy to the Iraqi people".

Secondly, the Constitution created another problem in a situation where there exist a conflict between federal law and regional law. The 2005 Constitution provides that the regional courts can modify the application of the federal law in the region by virtue of Article 121(2) which states:-

> "In case of a contradiction or conflict between regional and federal law in respect to a matter outside the exclusive powers of the federal government, the regional power shall have the right to amend the application of the national legislation within that region."[37]

The practice globally is that whenever and wherever a provision of the Federal law and state are found to be conflicting to each other, the federal law prevails. This is however not the case under the Iraqi Constitution 2005. This is because Article 121 (2) of the Iraqi constitution in 2005 gives a regional power the right to amend the application of federal law in the region, in respect to a matter outside the exclusive powers of the federal government,[38] this is considered contrary to all federal states that adopt the federal system in the world. Ordinarily if there are conflicts between

[37] Article 121(2) of the Iraqi Constitution 2005.

[38] Article 110 of the Iraqi Constitution 2005 stated that: (The federal government shall have exclusive authorities in the following matters:- First: Formulating foreign policy and diplomatic representation; negotiating, signing, and ratifying international treaties and agreements; negotiating, signing, and ratifying debt policies and formulating foreign sovereign economic and trade policy. Second: Formulating and executing national security policy, including establishing and managing armed forces to secure the protection and guarantee the security of Iraq's borders and to defend Iraq.
Third: Formulating fiscal and customs policy; issuing currency; regulating commercial policy across regional and governorate boundaries in Iraq; drawing up the national budget of the State; formulating monetary policy; and establishing and administering a central bank.
Fourth: Regulating standards, weights, and measures. Fifth: Regulating issues of citizenship, naturalization, residency, and the right to apply for political asylum.
Sixth: Regulating the policies of broadcast frequencies and mail. Seventh: Drawing up the general and investment budget bill. Eighth: Planning policies relating to water sources from outside Iraq and guaranteeing the rate of water flow to Iraq and its just distribution inside Iraq in accordance with international laws and conventions. Ninth: General population statistics and census).

federal law and state law, the federal law shall prevail, because of Article 1 of the Iraqi Constitution 2005. Article 1 of the Iraqi Constitution 2005 states that:-

The Republic of Iraq is a single federal, independent and fully sovereign state in which the system of government is republican, representative, parliamentary, and democratic, and this Constitution is a guarantor of the unity of Iraq.

According to John and Brendan, the Iraqi Constitution 2005 favours "regional paramountcy" as opposed to the federal in cases of conflict.[39] According to Abdul Rahman Zeberi, Article 121 has the effect of creating a dual judicial authority in Iraq and this is a threat to the powers of the FSC in the future.[40] This duality according to Patrick is not good for the Iraqi judicial system. Patrick therefore advocated on the need for the coordination between regional and Federal courts.[41] He argued that the FSC is the best suited in resolving conflicts between Federal and regional laws in the regions.[42] Hence, it would suffice to note that this is indeed a serious problem because it goes against the basic fundamental principle of federalism. In other words, this arrangement is considered to be contrary to all Federal states that adopt the Federal system of governance in their administration, especially in matters relating to Federal laws versus state laws. True even if the large use of Article 121 (2) is very clear, i.e. in respect to a matter outside the executive powers of the Federal

[39]John McGarry and Brendan O'Leary, "Iraq's Constitution of 2005: Liberal Consociation as Political Prescription," *International Journal of Constitutional Law* (January 2007): 693.
[40]Abdul Rahman Zebari, "Methods for the Formation of Judicial Authority in the Federal Regimes," *Journal of Legislation and Judiciary* 3,(May 2009):47.http://tqmag.net /body. asp? field= news arabic&id=25.(accessed November20, 2014). Qasim Aosman, Conflict of laws between the federal state and the Kurdistan region in Iraq, *Journal of Legislation and Judiciary* 3 (May 2009): 51.
[41] Ibid.
[42]Patrick Glenn, "Coordinate Judicial Structures,"*Journal of Legislation and Judiciary* 3 (January 2010):22. www.tqmag.net/%5Ckermaser%5Cno-03%5Cpdf%5Cp1.pdf. (accessed November 22, 2014).

government, but still it could be argued that based on the spirit of Article 1 of the Iraqi Constitution 2005, Federal law should still prevail over state law.

The FSC is having a serious problem to solve a case involving Article 121 of the Constitution 2005. Law No. 188 of 1959 on Personal Status of Iraqi allows the man to practise polygamy, i.e. marrying up to four wives. However, Kurdistan Parliament changed the law through the Law No.15 of 2008, the Act of Iraq, as follows: "the husband is not allowed to marry more than one, only, if the wife cannot have children, or the wife fulfills her legal duties towards the husband. All of this is subject to the wife's formal consent and the second marriage is null and void." Thirdly, the issue of who gets appointed as a judge of the Supreme Court has been an issue of great concern to democracies and stakeholders such as lawyers and the public.[43] The court being the final in the appellate system require judges who are versed and experienced in the law, especially on the issue of interpretation of laws. This is very necessary because the court is the final arbiter in determining and interpreting the issue on constitutionality of laws and the protection of individual liberty. The composition of the Justices of the FSC of Iraq seems to be imbalanced and may likely impact on the performance of the court. By the provision of the 2005 Iraqi Constitution, membership of the justices of the FSC is to be drawn from persons experts in Islamic jurisprudence and other jurists.[44] "The imbalance is seen from the perspective of training and expertise of the two types of justices of the FSC. While all the justices can validly sit and decide on the constitutionality of law, there seems to be an imbalance in terms of the appreciation of the rules of interpretation

[43]Anees Iqbal Siddiqui, "The Process of Judicial Appointments under the Constitution of Pakistan 1973, *"Journal of Humanities and Social Sciences",* 12, (June2012):19. AvailableatSSRN: http://ssrn.com/ abstract=2088373 or http://dx.doi.org/10.2139/ssrn.2088373 (accessed December 1, 2014).
[44]Article 92 of the Iraqi Constitution 2005.

known to the scholars and the rules known by the experts in Islamic law. Furthermore, the issue as to why the experts in Islamic Jurisprudence are appointed justices of the FSC and whether the sectarian spread of Syiah and Sunni are considered in their appointment." Also, Some of these justices do not have the requisite knowledge and skills to interpret the constitutional provisions and statutory enactments in the resolution of disputes submitted to the court and this has been an issue of concern.[45] Article 92 (2) of the Iraqi Constitution 2005 provides:-

> "The Federal Supreme Court shall be made up of a number of judges, experts in Islamic jurisprudence, and legal scholars, whose number, the method of their selection, and the work of the Court shall be determined by a law enacted by a two-thirds majority of the members of the Council of Representatives."

From the above Constitutional provision, there is no doubt that the FSC comprises of experts in Islamic jurisprudence. Hence, this kind of argument seems to be disturbing bearing in mind that Iraq is a secular state and the 2005 Constitutional rests on that notion. This being a problem, the researcher in the course of this study carried out a fieldwork in order to find out the reason behind such an arrangement, i.e. whether it has something to do with the sectarian spread of Shia and Sunni in terms of the appointment of the FSC judges.

Fourthly, like in other jurisdictions, the role of the Iraqi FSC in legal supervision and interpretation on the constitutionality of laws is viewed as a threat to the concept of

[45]Mackie Naji, The Philosophical Foundations for the Control on the Constitutionality of Laws: The Proposed Constitutional AmendementshtAlhawwar Alamtmdn Magazin, June 12 2005. tp ://www.iraqja.iq/view.21/. (accessed August4, 2014). Salem Roudhan, "The Formation of the Federal Supreme Court in Iraq Between the Constitution and the Law," Alhawwar Alamtmdn Magazine, July 13 2009. http://www.ahewar.org/debat/show.art.asp?aid=158837. (accessed December 5, 2014). Hadi Aziz Ali, Muslim scholars their presence in the Federal Court makes it non-judicial,Newspaper Tayar democratic Iraq, January 23. 2013,http://www.tdiraq.com/?p=905. (accessed December 5, 2014).

separation of powers and democracy or representative government. This is because constitutional law experts, political scientists and policy analysts view the FSC as a body comprising of unelected and unaccountable representatives.[46] In the context of this research, it is not the objective of research to suggest that judges should be elected. The point that the research is trying to put forward is that, unlike Members of Parliament (MPs) who are elected by the people, this happens not to be the case with judges who are viewed as acting as a stumbling block to the legislators who are representing the voice of the people in the House. This representation extends to the law making process, which of course has to be supremacy and interpreted by unelected judges. Also, this study is on the partiality or impartiality of judges or the guarantee of impartial decisions of the FSC. However, because the research is examining the powers in the FSC legal supervision and interpretation of constitutionality of laws under a separation of powers arrangement, that made it necessary to highlight the arguments for and against allowing judges in a democracy to set aside laws passed by the parliamentarians who are viewed to be the voice of the majority and being elected by people. For example, the comparison with MPs was made based on the facts that these are elected and represented as opposed to FSC judges who are not elected. In other words, the MPs have the right to play the role of a check and balance while addressing the relationship between the executive

[46] Berger Raoul., "*Government by Judiciary: The Transformation of the Fourteenth Amendment,*" (Cambridge: University of Harvard Press, 1977): 410. See also, Robert Bork, *Neutral Principles and Some First Amendment Problems, Indiana Law Journal* 47, no.4 (June1971):6. Rehnquist, The Notion of a Living Constitution, Texas Law. Review. 54, no. 3 (June 1976): 695-696. Joseph D Grano. "Judicial Review and a Written Constitution in a Democratic Society," Wayne law. Review. 28 (1981).1.Alexander Tsesis., 'Footholds of Constitutional Interpretation," *Texas Law Review* 91, no 7 (June 2013):1596. Bickel Alexanderm, The Least Dangerous Branch(1962), 16-17, cited in Friedman, Barry. "Dialogue and Judicial Review," *Michigan Law Review* 34, no.12 (March 1993): 579.Barry Friedman, "Importance of Bein Positive:The Nature and Function of Judicial Review," *Law Review* 72, no.7 (2003): 1257. Jeremy Waldron., "The Core of the Case against Judicial Review," *The Yale Law Journal* 121, no. 4 (July 2006): 1346.

organ and the legislative organ whereas this is not the case in terms of the relationship between the legislative organ and the judicial organ".

1.3 Research Questions

Guided by the above problems, this study seeks to answer the following questions:-

1. Are the decisions of the Iraqi Federal Supreme Court in terms of exercising its powers of legal supervision and interpretation on the constitutionality of laws final and binding in nature on all authorities?
2. Can the Iraqi Federal Supreme Court modify the application of the federal law in the regions if there is a conflict between the Federal law and the regional law on issues outside the exclusive jurisdiction of the Federal authorities?
3. Should the Iraqi Federal Supreme Court comprising of experts in the area of Islamic Jurisprudence be allowed to monitor the constitutionality of laws in terms of legal Supervision and interpretation?
4. Should the Iraqi Federal Supreme Court comprising of not-elected judges be allowed to monitor the constitutionality of laws in terms of legal supervision and interpretation?

1.4 Research Objectives

This study seeks to achieve the following objectives:-

1. To analyse the decisions of the Iraqi Federal Supreme Court in terms of exercising its powers of legal supervision and interpretation on the constitutionality of laws as to the finality and binding nature of such decisions on all authorities.

2. To examine the extent of the powers of the Federal Supreme Court in cases of conflict between the Federal law and the regional law and to find out whether the Federal Supreme Court can modify the application of the Federal law in the regions if there is a conflict between the Federal law and the regional law on issues that does not fall within the exclusive powers of the Federal authorities.
3. To analyse the arguments against having experts in the area of Islamic Jurisprudence seating as members of the Federal Supreme Court monitoring the constitutionality of laws in terms of legal supervision and interpretation.
4. To analyse the arguments against the exercise of powers by not- elected judges of the Federal Supreme Court in monitoring the constitutionality of laws in terms of legal supervision and interpretation.
5. To recommend necessary improvements on the role of the Iraqi Federal Supreme Court in the legal Supervision and interpretation on the constitutionality of laws passed by the legislative authority.

1.5 Significance of the Study

The Iraqi Constitution 2005 represents an important landmark in the constitutional development in Iraq. For one thing, it represents and attempt at making sure that all sections of Iraqi society are taken care of. Although, the Basic Law 1925 may be said to have provided for such, but the 2005 Constitution clearly spelt out the fundamental freedom and rights of central and regional governments in Iraq. Such Constitutional provisions may go well in determining the peaceful co-existence in Iraq. Despite the criticism levelled against the FSC, the appellate court is still in the best position to act as a check on the legislature and the executive. In this way, the principle of S.O.P can be established. This is the most important aspect of the

Constitution. In addition, looking at the previous constitutional developments in Iraq, one may be confident to say that the Iraqi Constitution 2005 takes care of the rights and freedom of all Iraqis. Given the workings of the legislature, judiciary and executives under the Iraqi Constitution 2005, it may be inferred that the rule of law based on the S.O.P can be a potent force in restoring order to Iraqi society.

A study on the issue of interpretation and legal supervision in Iraq under the 2005 Constitution, which is the current Constitution in operation would, therefore, benefit several stakeholders in the Iraqis young and fragile democracy. This thesis would, therefore, be of significance in the following ways: -

1.5.1 Justice verification: - By protecting the Constitution and establishing the rule of law, the law would be maintained, and the freedom of the general public guaranteed. This study will be of significance that the judicial authority will play the role of a check and balance in the exercise of the legislative power preventing abuse of power that may arise from the part of the legislative body. :-" It would be tantamount to violation of the provisions of the Constitution or the oath a Representative takes or the Representative Council as a whole if he or the Council were to usurp or interfere with the judicial independence guaranteed under Article 19 of the Iraqi Constitution 2005. Another check and balance provided by the Iraqi Constitution 2005 in favour of the judiciary is the power of the Iraqi FSC to review any decision of the Council of Representatives confirming the authenticity or otherwise of the status of a member as Representative in the Council."

1.5.2. Contribution to the academic literature: - From the academic point of view, the thesis would also add value to the existing literature on Iraqis

constitutional law, especially by checking legislative arbitrariness in the powers of enacting laws. This thesis proposed that the FSC is need play a pivotal role in terms of legal supervision and constitutional interpretation on the constitutionality of laws as far as the 2005 Iraqi Constitution is concerned. The thesis would, equally, serve as a reference material for other researchers, students of constitutional law, political scientist etc.

1.5.3. Contribution to the Iraqi government:- This thesis will contribute significantly to the operation of Iraqi government institution is concerned. The findings of this thesis will provide constraints on government powers. The Iraqi Constitution 2005 under Article 93 provides that the FSC shall be competent to handle cases such as, settling matters arising from the application of the federal laws, decisions, regulations, instructions, and procedures issued by the federal authority. The law shall guarantee the right of direct appeal to the court to the Council of Ministers, those concerned individuals and others, also, settling disputes that arise between the federal government and the governments of the regions and governorates, municipalities and local administrations, settling disputes arising between the governments of the regions and the governorates, settling accusations directed against the President, the Prime Minister and the Minsters and this shall be regulated by law. It's important to note that it is the province of the judicial branch of government to determine the law in terms of legal supervision and constitutional interpretation. Hence, the Iraqi FSC is expected to determine the law, including the meaning of the Constitution. It has the ultimate power to act as a check and balance in respect to the exercise of governmental powers, which would eventually curtail or limit

abuse of powers by the executive arm of the government. For example in Article 93 of the Iraqi Constitution 2005, the FSC played a major role in limiting the overriding of the legislative and executive branches to protect these rights, which is the ultimate objective of the constitutionality of laws. Detail discussion on Article 93 in chapter four (4.3.1). The procedural rules of the Federal Supreme Court provided for in its Rules of Procedure No. (1) of 2005 have given the right of individuals to institute direct constitutional proceedings against the executive power in respect of violation of individual rights.

1.6 Research Methodology

Under this section, the discussion focused on several issues related to research methodology such as research design, research scope, types of data, data collection methods and data analysis.

1.6.1 Research Design

This research being a research in constitutional law adopted socio-legal research. It combined the doctrinal approach to research and qualitative research methodology of the social science. Qualitative research methods were developed in the social sciences to enable researchers to study social and cultural phenomena. Also Qualitative research aims to explore and to discover issues about the problem on hand, because very little is known about the problem. There is usually uncertainty about dimensions and characteristics of problem. The socio-legal research design was adopted because it was suitable in answering the research questions and in the realisation of the research objectives. The doctrinal approved was chosen because this research involves analysis of laws and cases as well as other relevant

enactments. It was a library based research as the bulk of the legal materials were gathered from the library.[47] On the qualitative aspect of the research design, interview as opposed to observation, a survey, or examination of records was selected.[48] The method of interview was face to face interview, in face-to-face interviews, the researcher can adapt the questions as necessary and ensure that the responses are properly understood by repeating or rephrasing the questions. Also, qualitative interview assisted the current researcher in getting the views of experts in the area of legal supervision and interpretation on the constitutionality of laws by the FSC. In particular, the interview assisted the researcher in getting more insightful information needed for the purpose of this thesis/study, i.e. the views of the interviewees regarding the powers of the Iraqi FSC in terms of legal supervision and interpretation on the constitutionality of laws. All objectives were achieved by both methods of doctrinal and qualitative interview.

1.6.2 Research Scope

The scope of this research focused on examining the powers of the Iraqi FSC in terms of legal supervision and interpretation on the constitutionality of laws in Iraq in the light of the provisions of the 2005 Constitution. For the purpose of this research, the 2005 Iraqi Constitution, the Basic Law of Iraq 1925 and other relevant laws in that regards were analysed. Furthermore, relevant cases relating to the area of

[47]Terry Huchinson and Nigel Duncan, "Defining and Describing What We Do: Doctrinal Legal Research," *Deakin Law Review 17*, no. 1 (June 2012),83. See also Mohd Hashim Darbi, "Bridging the Doctrinal and Non-Doctrinal Divide in Legal Research and Scholarship," *UiTM Law Review* 3, no.6(April 2008),175. See also Vick Douglas W, "Interdisciplinarity and the Discipline of Law," *Journal of Law and Society* 31, No. 2 (June 2004), 177. See also *Schuck Peter H., "Why Don't Law Professors Do More Empirical Research?,"Journal of Legal Education 39, no.8 (July1989), 329.* See also Gestel Van and Hans – W. Micklits, "Revitalizing Doctrinal Legal Research in Europe: What About Methodology?" European (University of Institute Florence, 2011), 2.

[48]Johnny Saldaña, *Fundamentals of Qualitative Research* (New York: Oxford University Press, 2011), 31. See also Mira Crouch, and Heather McKenzie, "The Logic of Small Samples in Interview-Based Qualitative Research," *Social Science Information* 45, no. 4 (Junary 2006), 484.

the research were analysed. The scope of this research was limited to the 2005 Iraqi Constitution and the Basic law of Iraq 1925 is because, these two laws explicitly provided for legal supervision and interpretation on the constitutionality of laws.[49]

1.6.3 Types of Data

The source primary of the data for the purpose of this research is the text of the Iraqi Constitution 2005, the Basic Law of Iraq 1925. In the context of this study being a study on the legal supervision and interpretation on the constitutionality of laws, the Iraqi Constitution 2005, the Basic Law of Iraq and judicial authorities on constitutional issues relevant to this research formed part of the primary legal materials for this research.[50] The data collected through interviews, being first hand information sourced from stakeholders also formed part of the primary data for this research.[51]

Data from textbooks, government publications, academic journals, constituted the secondary materials for this research. Newspaper articles, internet sources, and guidelines relevant to the area of this research were also referred to in the process of conducting the research/study.[52]

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[49]Daulah Ahmad Abdallah and Beida Mohammed, "The Role of the Federal Court in the Protection of Human Rights in Iraq," *Online Journal of Rafidain Law* 13, no.49 (May 2010):34, www.iasj.net/iasj?func=fulltext&aId=32232. (accessed November 22, 2014).
[50]Marci Hoffman and Mary Rumsey, *International and Foreign Legal Research: A Course Book* (Leiden: Njoff Publishers, 2007),8.
[51] Elias, S., Legal Research: *How to Find and Understand the Law*, 15th ed. (U.S.A: NOLO, 2009):23.
[52]Carol M. Best and Margie Hwakins, *Foundation of Legal Research and Writing*, 4th ed. (New York: Delmar, 2010):14.

1.6.4 Data Collection Methods

The research depended on university libraries in Iraq and the Sultanah Bahiya Library, Universiti Utara Malaysia to collect some of the primary data. Thus, some of the primary data were collected through a library-based approach. This approach enabled the researcher to gather Iraqi Constitutions, relevant statutes and case law in the area of legal supervision and interpretation on the constitutionality of laws as well as the powers of the Iraqi Federal Supreme Court. Apart from collecting some of primary data from the University libraries, interview was also used in the data collecting process. According to Hollway and Tony, interview "is the most common qualitative method used in the social sciences."[53] Hence, interview being an important method for data collection in qualitative research also provided a form of primary data as far as the process of collecting the data for this research is concerned.

Among the three broad qualitative interviews are structured, unstructured and semi-structured interviews. This research adopted the semi-structured interview. The research adopted the semi-structured interview because it comprises of elements of the two other types of interviews.[54] For better understanding of the research issues, the respondents for the interview comprised, judges of the FSC, lawyers who work in the FSC and legal academics specialization in the area of constitutional law. The reason why these types of respondent were chosen because, the sample enabled the researcher to obtain rich data that helped in understanding the perspectives,

[53] Wendy Hollway, and Tony Jefferson., *Doing Qualitative Research Differently: Free Association, Narrative and the Interview Method* (London:Sage, 2000), 1.

[54]Moira Cachia and Lynne Millward., "The Telephone Medium and Semi-Structured Interviews: A Complementary fit," Qualitative Research in Organizations and Management: *An International Journal* 6, no. 3 (June 2011):268-269.

experience of the judges of FSC, lawyers who work in the FSC and constitutional law professors on the phenomenon of legal supervision and interpretation on the constitutionality of laws under the 2005 Iraqi Constitution.

For the selection of the interviewees, this research being qualitative adopted the purposive sampling method, because this method helps qualitative researchers to select interviewees who have the substantive information in the area of the research.[55] purposive sampling (also known as judgment, selective or subjective sampling) is a sampling technique in which researcher relies on his or her own judgment when choosing members of population to participate in the study.

Purposive sampling is a non-probability sampling method and it occurs when "elements selected for the sample are chosen by the judgment of the researcher. Researchers often believe that they can obtain a representative sample by using a sound judgment, which will result in saving time and money" Although quality rather than quantity was the basic consideration, several arguments on sampling in qualitative research abounds. According to Berteux, he argued that fifteen participant sample is the smallest sample for all qualitative research, but that less than 20 suffices.[56] In that light, fifteen interviewees were selected. Five judges of FSC, five lawyers expearts who work in the FSC, and five constitutional law lecturers across Iraqi Universities. "Because, the sample enabled the researcher to obtain rich data that helped in understanding the perspectives, experience of the

[55]John W. Creswell, Educational Research: Planning, Conducting and Evaluating Quantitative and Qualitative Research, 4th ed. (Boston: Pearson, 2012): 205; Sharan S. Merriam, ed., Qualitative Research in Practice: Examples for Discussion and Analysis, (San Francisco: Jossey-Bass, 2002):12.

[56] Bertaux, Daniel, "From the Life-history Approach to the Transformation of Sociological Practice," in Biography and society: The Life History Approach in the Social Sciences, Daniel Bertaux (Ed.), (London: Sage, 1981), 29 cited in Mark Mason, "Sample Size and Saturation in Phd Studies Using Qualitative Interviews," Forum Qualitative Sozialforschung/Forum: Qualitative Social Research 11 (2010); Crouch, Mira, and Heather McKenzie, "The Logic of Small Samples in Interview-Based Qualitative Research," *Social Science Information* 45, no. 4 (May 2006): 483.

judges of FSC, lawyers who work in the FSC and constitutional law professors on the phenomenon of legal supervision and interpretation on the constitutionality of laws under the 2005 Iraqi Constitution". Also the student used a single set of questions for all types of respondents during interview and the respondents answered the questions one by one.

In the process of the interview, questions were drawn from the statement problem, the research questions and the research objectives. This guided the researcher as to what data to be sourced from the chosen interviewees. The rationale for drawing the research questions from the research problem, the research questions and objectives was to ensure that emphasis was on sourcing useful data that would assist the researcher to meet her research objectives as well as to answer the research questions.[57]

The nature of most of the questions were open ended. This was useful as the open-ended questions format assits researchers using interviews "to build upon and explore their participants' responses to the (research questions). The goal was to have the participant reconstruct his or her experience within the topic under study."[58] This approach assisted the researcher in exploring the experience of the interviewees on the current research on the powers of the FSC on legal supervision and constitutioal interpretation on the constitutionality of laws. "

The major themes underlying the construction of the interview questions are based on the research questions and objectives, these include:-

[57] Wendy Hollway and Tony Jefferson, Doing Qualitative Research Differently: Free Association, Narrative and the Interview Method, (London: Sage, 2000), 1.
[58]Irving Seidman, *Interviewing as Qualitative Research: A Guide for Researchers in Education and the Social Sciences* ,3ed (New York: Teachers College Press, 2006), 15.

a. Theme 1 “the decisions of the Iraqi Federal Supreme Court.”

b. Theme 2 “the federal law and the regional law”.

c. Theme 3 “the Iraqi Federal Supreme Court comprising of experts in the area of Islamic Jurisprudence”.

d. Theme 4 “Iraqi Federal Supreme Court comprising of unelected judges”.

The researcher allowed the interviewees to talk freely in answering research questions posed by researcher. In so doing, the researcher got enough information from the interviewees. This was in line with what *Bertaux* said. According to Bertaux, “people if given a chance to talk freely, people appear to know a lot about what is going on.”[59]

1.6.5 Data Analysis

The interpretive approach has been adopted in the analysis of the 2005 Iraqi Constitution, the 1925 Basic Law of Iraq, and all the secondary and tertiary materials sourced from textbooks, government publications, and academic journals. Both the primary and secondary legal materials sourced from the library and the internet were critically analysed and interpreted to identify the deficiency and limitations of the provisions of the Iraqi Constitution on the powers of the FSC in the legal supervision and interpretation on the constitutionality of laws. The data collected from the interview, was the small number of interviewees i.e. data from the five judges of the FSC, five lawyers expertise in constitutional law and five constitutional law lecturers across Iraqi Universities. The above data analysis was adopted because this was a legal research that relied on the text from statutes, and the text of the data

[59] D. Bertaux, *Biography and society: The Life History Approach in the Social Sciences* (Beverly Hills, CA: Sage, 1981), 39.

collected from the interview. The interview data which have been obtained are analysed by using thematic method. The thematic Analysis used in this study because it is considered the most appropriate for any study that seeks to discover using interpretations. It provides a systematic element to data analysis. It allows the researcher to associate an analysis of the frequency of a theme with one of the whole content. This will confer accuracy and intricacy and enhance the research's whole meaning, Also, it allows the researcher to determine precisely the relationships between concepts and compare them with the replicated data. By using, thematic analysis, there is the possibility to link the various concepts and opinions of the learners and compare these with the data that has been gathered in different situation at different times during the project, In other words, thematic analysis is still the most useful in capturing the complexities of meaning within a textual data set. It is also the most commonly used methods of analysis in qualitative research.

The interview data obtained are analyzed by using thematic method. In this study, thematic analysis was used to analyze the data collected from the interviews. Thematic analysis is defined as a method for identifying, analyzing, and reporting patterns (Themes) within the data.It minimally organizes and describes the dataset in (rich) detail. Thematic analysis as an approach dealing with data that involves several stages. These stages were strictly observed in this study by arranging the recorded information collected from the interviews according to themes and coding it for ease of analysis. The interviews conducted have to provided answers to the research questions on the powers of the FSC in legal supervision and interpretation of the laws. The time, dates and venues were arranged by the researcher with the respondents involved.

Were also classified themes for ease of interpretation, namely the powers of FSC in legal supervision and interpretation on the constitutionality of laws. The recorded version of the interview was transcribed into themes for easy analysis on the four research questions.

The thematic approach was however employed in the analyses of the interview data. The data from the interview transcripts was thematically organised following the major themes and ideas in the research. These include:

a. Theme 1 “the decisions of the Iraqi Federal Supreme Court”.

b. Theme 2 “the federal law and the regional law”.

c. Theme 3 “ the Iraqi Federal Supreme Court comprising of experts in the area of Islamic Jurisprudence”.

d. Theme 4 “Iraqi Federal Supreme Court comprising of unelected judges”.

These themes were derived from the research objectives of the research. In other words, theme 1 and 2 tallied with the research objectives 1 and 2 of this research, while theme 3 and 4 covered objective 3 and 4.

As stated in the aforementioned section that this study used the fifteen participants whom were categorized into five academic lecturers of the constitutional law, five judges of the FSC and five lawyers. The themes of this research therefore, were categorized into four; the participants answer these themes. Moreover, extracts from the interviews were included in the analyses in order to develop the research findings.

In addition. The documentary data obtained in this study are analyzed by using the descriptive analysis method[60], as well as, comparative analysis method when needed. the analytical descriptive method allowed the researcher to systematically and scientifically explain, define, examine, determine and even provide conclusions for example from the point of problems, research questions, current situations and several reasonable solutions. In this study all the data strengthened each other, this also prevents misinterpretation of the data or data that is unconnected with one another.

By using this approach, the researcher was also able to answer the research questions and achieve the research objectives. Hence, the textual materials have been interpreted and analysed in order to answer the research questions as well as to achieve the research objectives

Also historical approach was conducted within the critical analysis of data. The historical method, was used to explain the origin of the concept of historical background of the separation of powers.

1.7 Limitation of the Study

The present insecurity in Iraq was one in the limitations of this research as it involved fieldwork, that was the face- to face interview with stakeholders connected with the research. However, the researcher overcomed this limitation by conducting the interview in Baghdad, a city which is considered to be a bit safe in terms of security. The location of the headquarter of the Iraqi FSC being in Baghdad was a plus point in overcoming the insecurity problem the country is currently going through. Furthermore, most of the Iraqi Universities for the purpose of data

[60] Ramsay, James O. "Functional Data Analysis". (2006).

collection happened to be located in Baghdad and the University professors were readily available to grant the researcher face- to face interview. Thus, avoiding the need to travel to other parts of Iraq.

1.8 Literature Review

The literature review for the purpose of this research has been classified according to themes such as the definition of operational terminologies, legal supervision, judicial independence, judicial review and interpretation on constitutionality of laws.

1.8.1 Definition of Operational Terminologies

According to Macmillan English Dictionary, the word "legal" is defined as "something connected with the law".[61] For the purpose of this research, however, the word "legal" means laws and application of the same. According to the Legal Dictionary, "supervision" means "administration, care, charge, control, direction, government, inspection, jurisdiction, management, oversight".[62] The Oxford Advance Learners Dictionary, however, defines it being "in charge of somebody/something and make sure that everything is done correctly or safely".[63] For the purpose of this research, the word "supervision" means control of the exercise of the powers of the executive and the legislature.

Put together, "legal supervision" in this research has been used to represent the process of determining the meaning and effect and constitutionality of laws in Iraq under the purview of the 2005 Iraqi Constitution.

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[61] A..S. Hornby Oxford Advance Learners' Dictionary, http://www.oxfordlearnersdictionaries.com/definition/english/legal .(accessed September 15, 2014)
[62] http://legal-dictionary.thefreedictionary.com/supervision (accessed September 15, 2014).
[63] http://www.oxfordlearnersdictionaries.com/definition/english/supervise#supervise__23 (accessed September 20, 2014).

As to the word "interpretation," according to the Free Legal Dictionary, it is defined as "the art or process of determining the intended meaning of a written document, such as a Constitution, statute, contract, deed, or will."[64]In this research, the word " interpretation" was used in the context of determining the meaning and purport of laws in the light of the provisions of the 2005 Iraqi Constitution.

Judicial review is defined by the Oxford Advance Learners' English Dictionary as the "power of the Supreme Court to decide if something is allowed by the Constitution or a "procedure in which a court examines an action or decision of a public body and decides whether it was right."[65] In this research, "judicial review" has been used to represent the powers of the FSC of Iraq to interpret and determine the constitutionality of laws in Iraq involving the exercise of powers vested on public bodies and authorities.

"Judicial powers refers to the powers vested in the FSC as provided by the 2005 Iraqi Constitution. The FSC has vital functions under the Iraqi Constitution 2005, which are the protection of minority rights, disputes settlement between federation and regions and most importantly overseeing the constitutionality of laws and any regulation in Iraq."

The different between the two concept of judicial review and legal supervision are Judicial review concerns the court's power to supervise the legality of government actions (executive branch). On the other hand, "legal supervision" is broader than review. The term "supervision" can include review, but is not limited to it. We can say that the supervision is the action, process, or occupation of supervising;

[64]http://legal-dictionary.thefreedictionary.com/interpretation (accessed September 20, 2014).
[65]http://www.oxfordlearnersdictionaries.com/definition/english/judicial-review (accessed September 20, 2014).

especially: a critical watching and directing as of activities or a course of action, but judicial review is the power of courts of law to review the actions of the executive and legislative branches, also a supervisory body can also take the initiative to review and investigate cases on its own. Thus, the scope of "legal supervision" is therefore broader than that of "judicial review", the Iraqi system fits a "supervision" model of constitutional review, rather than the judicial review standard common in the West, Art 91 the first proviso of the Iraqi Constitution 2005, stated that: The Higher Judicial Council shall exercise the following authorities: First: To manage the affairs of the judiciary and supervise the federal judiciary. Under the authority of the Higher Judicial Council (HJC) which is the administrative body which also oversees the affairs of federal courts and court staff. The federal court system comprises the ordinary civil, labour, personal status and criminal courts. Also in (Section One), (Section three) and (Section Six) of the Order No. 35 of year 2003,[66] Conclusively clarified: the Higher Judicial Council is responsible for the supervision of the Juridical System in Iraq and to execute its tasks independently from the Ministry of Justice) and (to perform its tasks and responsibilities independently from any censorship or supervision from the Ministry of Justice and to suspend any text in any Iraqi law that might conflict with the texts of the aforementioned Order and specially the Judiciary Organization Act No. 160 of year 1979 and the Public Prosecution Law No. 159 of year 1979).

[66] The Coalition Authority Order No. 35 – date of legislation: 09/18/2003 - Title of Legislation: Re-establishment of the Supreme Judicial Council - Paul Bremer, director of the Coalition Provisional Authority.

1.8.2 Legal Supervision

Tyranny and arbitrariness are two evils according to Fombadd that impede the promotion of constitutionalism, good governance, democracy and the rule of law."[67] Fombad however believed that separation of powers S.O.P was the most enduring measure to check these evils in all constitutional democracies.[68] But the reality of S.O.P being the enduring measure to deal with the evils of tyranny remains debatable even among scholars.[69] For example, scholars such as Geoffrey Marshall criticised the theory of S.O.P as imprecise and inchorent to be a basis of analysing Constitution or the determination of completeness.[70] Geoffrey Marshall stated that S.O.P theory "is infected with so much imprecision and inconsistency that it may be counted little more than a jumbled portmanteau of arguments for policies which ought to be supported or rejected on other grounds."[71] Geoffrey Marshal is not alone in criticising the theory of S.O.P. Even great constitutionalist and scholars such as A.V Dicey has reservations on the utility of the S.O.P theory in checking the evils of tyranny and arbitrariness in government. A.V. Dicey viewed the theory of S.O.P as the "offspring of a double misconception."[72] This S.O.P in modern constitutional law could be said to have been promoted more by Baron de Mostesquieu. The fact of Montesquieu being the father of S.O.P since his "*Treatise in the Spirit of the Laws*" is not in doubt. Montesquieu believed that separating the three important functions of law making, its execution and adjudication is the foundation of protecting

[67]C M Fombad, *Separation of Powers in African Constitutionalism, Stellenbosch Handbooks in African Constitutional Law,* (New York,: Oxford University Press, 2016), 19, https://books.google.com.my /books?id=MTvcCwAAQBAJ.
[68]Ibid.
[69]Ibid. See also Geoffrey Marshall, *Constitution Theory* (Oxford: Clarendon Press, 1971):43.
[70] Ibid.
[71]Ibid.
[72]A V Dicey and J W F Allison, *The Law of the Constitution* (New York: Oxford University Press, 2013): 33.

constitutional liberties and avoiding tyranny.[73] This view has been accepted among scholars, including scholars on the Iraqi constitutional system. According to Fathi Al-Jawary, the Federal system in Iraq distribute the powers between the legislative, executive and judicial authorities in Iraq to guarantee the supremacy of the 2005 Constitution over all persons and authorities in Iraq.[74]

Scholars such as Haider, Essam, Abdul Jabar have written on control and legal supervision on the constitutionality of laws in Iraq. Essam has written on the need for legal supervision on the constitutionality of laws especially in Iraq.[75] According to Essam judicial control is necessary for the purpose of establishing a firm constitutional structure in Iraq.[76] Abdul Jabbar, explained the importance of judicial control on the constitutionality of laws in Iraq under the 2005 Iraqi Constitution.[77] Abdul Jabar, believed that, the judicial control on constitutionality of laws is important in the present day Iraq because it is one of the sure ways of guaranteeing the protection of the rights and freedoms of the people of Iraq.[78]

According to Haider, legal supervision is to nullify laws that are unconstitutional.[79] However, he made a distinction between constitutional supervision and interpretation powers of the courts. According to him, constitutional supervision is to nullify

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[73]Jeremy Waldron, "Separation of powers in thougth and practice?," *Boston College Law Review* 10, no. 54 (June 2013):434,www.bc.edu/content/dam/files/.../pdf/01_waldron.pdf. (accessed December 22, 2014).Tej Bahadur Singh, Principle of separation of powers and constitution of authority,4,no. 8 (March 1996),1,www.ijtr.nic.in/articles/art35.pdf. (accessed December 20, 2014).

[74]Fathi Jawary, "The Impacts of the Federal Judicial System," *Journal of Legislation and Judiciary* 22, no. 3(May,2009): 43, www.tqmag.net/%5Ckermaser%5Cno-03%5Cpdf%5Cp1.pdf. (accessed November 22, 2014).

[75] Essam Saeed Ahmed, Control Over the Constitutionality of Law," *Rafidain Law Journal* 15, no. 53 (June 2012):1, www.iasj.net/iasj?func=fulltext&aId=32232. (accessed December 22, 2014).

[76]Ibid.

[77] Abdul -Jabbar Allush, "Glances on the Subject of Control on the Constitutionality of Laws of Iraq and its Future in the Protection of Public Rights and Freedoms," *Journal of the Faculty of Law* 7, no. 14(June 2005): 8, http://www.iasj.net/iasj?func=issueTOC&isId=4142&uiLanguage=ar. (accessed December 14, 2014).

[78] Ibid.

[79] Haidar Abdul Hadi, "Readings in the Control of Constitutionality and Interpretation of Laws," *Journal of Legislation and Judiciary* , 12, no. 3 (March 2009):143.

unconstitutional laws while the interpretive powers are to interpret the text of the Constitution and the laws.[80]

According to Mahmoud, of S.O.P can be trace from the time of the Caliphs. Caliph Umar Bin Khattab was the earliest caliph that separated the executive from the judiciary. This was the occasion of his appointment of Abi Dar'daa, Sharih and Abu Musa to serve as judges in Medina, Kufa and Basra respectively.[81]

1.8.3 Legal Interpretation on the Constitutionality of Laws

It is important to note from the very beginning that a thorough knowledge of the Constitution and its application are precondition for judges in interpretation of the Constitution and the determination of the constitutionality of judicial decisions and executive actions.This has been stressed by scholars such as Rik Peters.[82] As for jurists such as Frankfurter the job of courts in the interpretation of statutory and constitutional provisions is an all important one this is because the courts in "their construction of the will of the legislatures, the court breathes life, feeble or strength into the inert pages of the Constitution and the statute books."[83] This is because it is not all the constitutional or statutory provisions that are so straight forward. The wordings of the Constitution in the words of Robert A Dahl may be:-

> General, vague, ambiguous or not clearly applicable; (or cases) where precedent may be found on both sides; and where experts differ in predicting the consequences of the various alternatives or

[80] Ibid.
[81] Madhat al-Mahmood, The Judiciary in Iraq, 2nd, (Iraq ,Baghdad, 2011):30.

[82] Rik Peters, "Constitutional Interpretation: A View from a Distance," History and Theory 50, no. 4 (December 2011), 117.
[83] Felix Frankfurter, *The Supreme Court in the Mirror of Justices* (University of Pennsylvania: law Review ,1957), 973.

> degree of probability that the possible consequences will actually ensue.[84]

The above quotation on the nature of constitutional and statutory provisions further supported the position of scholars such Rik Peters on the need for knowledge and skills on the part of judges, especially of the FSC Court of Iraq being the final court in Iraq. But it needs to be asked how is it proper for the constitutional provision of the Iraq Constitution 2005 to include of Islamic experts on the bench of the Iraqi FSC? Did the framers of the Constitution took into cognizance of the note of the wordings of the provisions of the Constitution and statutes that would be brought to the judges of the FSC who are in some quarters alleged not to have the requisite training to handle cases bordering on constitutional and statutory interpretation? These posers are examined in this thesis in chapter four.

The debates about the appropriate method courts are to adopt in the interpretation of constitutional and statutory provisions has been with us for over a century. According to Andrew,[85] the debate is traced to the celebrated case of *Marbury v. Madison*.[86] According to Keith, courts in interpreting the provisions of the Constitution should adhere to the discoverable intention of the founders of the Constitution.[87] But Carter condemned the legislative intent idea as "a most slippery and misleading concept",[88] because it is the legislator as opposed to the legislative that can have intent. This argument was accepted by Janice and Deborah, who linked

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[84]*Robert A Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*," *Journal of Public Law* 6, no.47(October 1957): 279.
[85]Andrew B Coan, "The Irrelevance of Writtenness in Constitutional Interpretation*," law Review*, 158, no. 102, (2010): 1026.
[86]Ibid.
[87] Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent and Judicial Review* (University of Kansas: Press, 1999):34.Available at SSRN: http://ssrn. com/ abstract=203335.(accessed September 10, 2014)
[88]Carter Lief H., Reason in Law, (1984): 105.J. R. Franke and Deborah A Ballam, "New Applications of Consumer Protection Law: Judicial Activisim or Legislative Directive," *Santa Clara Law Review* 32, no.2 (January1992): 349.

the slippery issue of the idea to the difficulty of ascertaining what exactly motivated each legislator to support the passage of the law. While politics might play a role in some legislators' decision, there could be legislators who only supported the law without caring to read the bill before its passage into law.[89]

Writing on the concept of originalism, Lawrence asserts that the meaning of the concept is even debatable amongst its proponents.[90] Lawrence further asserted contemporary originalists are in agreement that adhering to the original meaning of constitutional text "constraint judicial practice."[91] The debate on the meaning of originalism and its inadequacies notwithstanding, scholars such as *Tsesis*, posited that the originalism or textualism idea simply asserts that the courts must in interpreting Constitution limits their approach to the text and the original intent of the framers.[92]

But from the perspective of scholars such as Herman and Hill, the Supreme Court or judges in interpreting the Constitution cannot be restricted to the text alone but also the context.[93] The courts should, therefore, go beyond the constitutional text and even the history of the Constitution.[94] According to Herman, the courts should be at liberty to consider extra-textual factors in their job of the interpretation.[95] Justice Scalia, however, believed that granting the courts the liberty to go beyond of the constitutional text is undesirable as it violates the separation of powers in a

[89] Janice R. Franke and Deborah A Ballam, "New Applications of Consumer Protection *Law:* Judicial Activisim or Legislative Directive," *Law Review* 32, no. 4 (May 1992): 349
[90] Lawrence B. Solum, *The Challenge of Originalism: Theories of Constitutional Interpretation* , ed. Grant Huscroft and Bradley W Miller (New York: Cambridge University Press, 2011):12.
[91]Ibid.
[92]Alexander Tsesis, "Maxim Constitutionalism: Liberal Equality for the Common Good," *Law Review* 92, no.20 (February 2013):1609
[93]Jessie B. Hill, "Resistance to Constitutional Theory: The Supreme Court, Constitutional Change, and the Pragmatic Moment," *Law Review"* 91, no.181 (September 2013):1818.
[94]Ibid.
[95]Herman Philipse, "Antonin Scalia's Textualism in Philosophy, Theology, and Judicial Interpretation of the Constitution," *Law Review* 3, no.2 (December 2007): 175.

democratic setting.[96] Writers such as Herman, however faulted Justice Scalia's position. According to Herman, textualism seems to be too restrictive because it tends to demonstrate that the sole objective of statutory interpretation is to establish the original meaning of the text of the statute.[97] Again, Herman concluded that textualism should come to play in cases where the text of the statute is so clear, but not in case where the text is unclear or the text alone cannot help the court in reaching a decision.[98]

From the other side of the divide are scholars such as Alexander, who maintained that the courts in interpreting the Constitution should not be limited to the text of the Constitution, but be guided by "normative maxim" which utilizes the historical analysis though independent from any individuals past or present mind frame.[99]

According to Richard, the relationship between textualism and originalism is a central issue in constitutional interpretation.[100] That connection runs across the full range of issues that deal with institutional structure and individual rights the two central concerns of constitutional law. It is possible, of course, to steep oneself in the vast literature developed by judges and scholars of all political persuasions. But to do that, is to engage in a deadly form of provincialism that treats the question of interpretation as though it were somehow distinctive in the field of constitutional law. That hasty conclusion is misguided because the rules of interpretation are necessary to deal with any spoken statement or written document. There is, in his

[96]Herman Philipse, "Antonin Scalia's Textualism in Philosophy, Theology, and Judicial Interpretation of the Constitution,"*Law Review* 3, no.2 (October 2007):174.
[97]Ibid.
[98]Ibid.
[99]Alexander Tsesis, "Maxim Constitutionalism: Liberal Equality for the Common Good," *Law Review* 92, no.3 (February 2013):67.
[100] Richard A. Epstein, "Beyond Textualism: Why Origanalist Theory must Apply General Principles of Interpretation to Constitution," *Harvoard Journal of lawand public policy*, 37, no.3(University of Chicago: law School, 2012):2, http://www.harvard-jlpp.com/wp-content/uploads /2010/01/ Epstein final. pd ,(accessed March 30, 2015).

view, no distinctive set of tools of interpretation that are, or should be, used in constitutional law, and only constitutional law.[101]

According to Ricky,[102] the judge can check the evidence the dictionary provides against a brief yet broad survey of contemporary usage. The purpose of this shallow survey should be to test the dictionary definition; judges should not hand pick usage examples for the purpose of shoring up dictionary-driven arguments.[103] The quick survey may satisfy the judge, or it may convince the judge that a more thorough study is required. The judge should strike the appropriate balance. Again, the judge should acknowledge the various interpretive decisions inherent in the process. From the evidence provided by the dictionaries and the survey of usage, combined with the contextual evidence the statute yields, the judge likely can induce an accurate description of the contemporary, common understanding of a word in a statute while not forsaking entirely the tenets of the new textualism.[104]

According to Michael, English system in court interpretation, argued that judges also play a role in interpreting Acts of Parliament and secondary legislation.[105] This is often necessary because words can sometimes have more than one meaning and so interpretation can be confusing or ambiguous. The traditional approach to statutory interpretation has been a literal approach where the words are given their plain, dictionary meaning. This stands in contrast to the approach that tends to be favored in Europe, where the judges look to interpret the purpose of the law makers.[106] This

[101] Ibid.
[102]Ricky Sonpal, "Old Dictionaries and New Textualists," *Fordham Law Review* 17, no.5 (March 2003): 2220, ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=3903&context=flr ,(accessed March 30, 2015).
[103] Ibid.
[104] Ibid.
[105] Michael Holdsworth, "Introduction to the English Legal System ,2nd,(Oxford:University press,2016),54.
[106] Ibid.

is known as taking a purposive approach. The literal approach tends to produce a very gradual, conservative and restrictive attitude towards legal development; the idea being that judges should not make law but simply implement what Parliament has decided. It is now commonly accepted that judges do in fact make law and the purposive approach allows judges to interpret what they think Parliament was trying to achieve. It would be fair to say that there has been a steady move towards a more purposive approach in the English courts.[107] Despite all the above arguments and counter arguments, Barry believed that integration of the three branches of government is what the court achieve in its daily interpretation of the Constitution as opposed to violation of the doctrine of S.O.P.[108] There is also literature on the judicial arrangement in Iraq under the 2005 Iraqi Constitution. According to John and Brendan, the Iraqi Constitution 2005 favours "regional paramountcy" as opposed to the federal in cases of conflict.[109] According to Ihsan, the constitutional interpretation of the Constitution is very important because, when the judges interpret any text of the legislation, they explain the meaning of the words in that text. Hence, judges must know what was – the intention of the legislature or legislative body when it passed the law in question. Also, constitutional interpretation means that the judges do not override a limit of the text when they find out its meaning.[110] According to Dhia, there is problem about which authority has the right to interpret the Constitution in Iraq, law No.30 of the FSC 2005, there is no article mentioning about the interpretation of the Constitution, but the

[107] Ibid.
[108]Barry Friedman, "Dialogue and Judicial Review," *Michigan Law Review* 91, no.5 (February1993): 578.
[109]Ibid.
[110] Ihsan Mafraji, *General Theory of Constitutional Law and Constitutional System in Iraq,2nd*, (University of Baghdad: Baghdad Center for Studies , 2007), 242.

Constitution of Iraqi 2005, mentions clearly about this issue and it gave the power to the FSC to interpret the Constitution in Article 93.[111]

The issue of the appointment process of justices of the FSC is regulated by the Iraqi Constitution 2005. Article 91 vests the powers of appointing the justices of the FSC in the Higher Juridical Council established under Article 90 of the Iraqi Constitution 2005. By virtue of Article 91, the appointment of all justices and members of the FSC is done by the Higher Juridical Council. However, the Constitution of Iraq 2005 is silent on the qualification of judges of the FSC. The need for FSC judges who have the expertise to interpret the laws in the light of facts submitted to them to minimise error, especially when the case before the FSC involves fundamental constitutional guarantees. Since there is no specific limitation, the judges of the FSC should also be appointed from the Iraqi University professors, senior lawyers with practical legal experience in law, especially in the area of constitutional law, and even legal personnel who work in government departments".

There are many cases that show the judge of the FSC had misinterpreted the constitutional provisions. Examples of such cases has been added in p.38 of the thesis including issues relating to the operation of Central Bank of Iraq, High Commission for Elections, Human Rights Commission and Integrity Body. The Constitution of Iraq 2005 does not state that the responsibility to maintain all these institutions rest on the Cabinet. It is clearly stipulated that the responsibilities are within the jurisdiction of the House of Representatives. This is because the House of Representatives is seen as representing the Iraqi people, and constitutionally these independent bodies must be placed under the legal administration of the House of

[111] Dhia al-Saadi, "The Federal Supreme Court between the Constitutional Composition and the Right to Exercise Legal Jurisdiction," *Iraqi Dental Journal*, 5,no.4 (Sebtember 2012), www.iraqij/veiw.1518, (accessed March 22, 2015).

Representatives. These bodies was subject to the Council of Ministers during the administration of Nuri al-Maliki. The decision reached by FSC, was that these bodies should be independent and must be subject to governmental decision and not subject to the House of Representatives. This has been interpreted by the FSC that the Central Bank of Iraq and Electoral Commission are subject to executive power. Here we see that the influence of the executive power on the decisions of the FSC in Iraq is quite strong. Beside these, the FSC's interpretation of laws in this case is arguably not legal".

The history of the Constitution making in Iraq and other extra-textual factors should be useful to the FSC in the constitutional interpretation of the 2005 Iraqi Constitution.

1.8.4 Judicial Independence

Literature equally exists on the need for judicial independence for a smooth operation of S.O.P system. According to Salem, Iraqi Constitutions especially the current Constitution 2005 has provisions on the independence of the judiciary.[112] For justice and democratic development in Iraq, Salem cautioned the executive and legislature not to interfere with judicial independence.[113] Similar writings exist. EliM Salzsberger argued that judicial independence is necessary in a system of

[112] Salem Roudhan, "The Principle of Judicial Independence in Iraqi Legislation," *Online Journal of Legislation and Judiciary* 3, no.1 (January2009):12, www.tqmag.net/%5Ckermaser%5Cno-03%5Cpdf%5Cp1.pdf. (accessed November 22, 2014).

[113]Ibid.

S.O.P.[114] The judiciary, according to Salzsberger must be allowed to carry out its functions without interference from the executive or the legislature.[115]

The value of having a strong Supreme Court such as the FCS of Iraq has received the attention of scholars. In this category are scholars such as Alfred, John and Brendan, and Anees.[116] According to Alfred, institutions such as the FSC are very necessary for multi ethnic and plural societies such as Iraq.[117] According to these scholars, they serve as checks on the domination of any level of government federal or state or any community from dominating the other.[118]John and Brendan equally supported the protectionist role of the FSC on the minorities' right. They equally argued that the FSC has two other vital functions. It has a duty of "overseeing the constitutionality of laws and regulation" of federal and regional governments and the other duty of being an umpire in disputes between federation and regions and disputes between regions and federation.[119] Writing on the proper role of Supreme Court of the US, Jamin asserted that the role of the court is to faithfully interpret the provisions of the Constitution and to guarantee the protection of fundamental freedom of American citizens.[120]

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[114] EliM Salzsberger, *A positive Analysis of Doctrine of Separation of Powers, or: Why Do we Have an Independent Judiciary*? (UK:College Lincoln Oxford, 1993),13.
[115]Ibid.
[116]Anees Iqbal Siddiqui, "The Process of Judicial Appointments Under the Constitution of Pakistan 1973," Electronic Journal. 20, no.4 (June 2012):23. Available at SSRN: http://ssrn.com /abstract =2088373 or http://dx.doi.org/10.2139/ssrn.2088373 (accessed December 1, 2014). See also John McGarry and Brendan O'Leary, "Iraq's Constitution of 2005: Liberal Consociation as Political Prescription," *International Journal of Constitutional Law* 5, no. 4 (2007): 695.
[117]Alfred C. Stepan, "Federalism and Democracy: Beyond the Us Model," *Journal of Democracy* 10, no. 4 (March 1999):19.
[118]John McGarry and Brendan O'Leary, "Iraq's Constitution of 2005: Liberal Consociation as Political Prescription," *International Journal of Constitutional Law* 5, no. 4 (June 2007): 695. See also Alfred C. Stepan, "Federalism and Democracy: Beyond the Us Model" *Journal of Democracy* 10, no. 4 (Juanuary 1999): 19.
[119]Ibid.
[120]Jamin B. Raskin, *Overruling Democracy*: *The Supreme Court Versus the American People* (London: Routledge, 2004),6.

The work of scholars such as Anees emphasised on the issue of appointment of justices especially of superior courts such as the FSC. According to Anees, such appointments have been of great concern to democracies and stakeholders such as lawyers and the public.[121] This interest proceeds from the fact that the process of judicial appointment is invariably linked with judicial independence which is the corner stone of almost all types of democracies. We must remember that the primary objective of judicial independence is to allow courts to decide cases on the basis of impartial assessment of facts and application of law over it.

In the Iraqi context, Judge Dara of Arbil Court Kurdistan region of Iraq in his writings emphasized on the importance of judges selection based on competence, experience and expertise in legal work especially on interpretation and application of laws.[122] The work did not however deal with the composition of the judges of FSC and the procedure of the selection of judges of the Iraq FSC.[123] However, in the current work the researcher has addressed this issue in-depth by way of making reference to the Iraqi Constitution 2005.

1.8.5 Judicial Review

Judicial review has been considered as a fundamental constitutional doctrine by scholars such as Carl and Linda.[124] The application of the power seems to originate from the US in cases such as *Marbury v. Madison*.[125] In fact, some scholars such as

[121]Anees Iqbal Siddiqui, "The Process of Judicial Appointments under the Constitution of Pakistan *1973* *Electronic Journal*.2,no.4(June2012).AvailableatSSRN: http://ssrn.com/abstract=2088373 or http://dx.doi.org/10.2139/ssrn.2088373 (accessed December 1, 2014),2

[122]Dara Jessen Amin, "Judicial Administration," *Journal of the Legislation and the Judiciary* 3, no.1 (February2009): 28. http://tqmag.net/body.asp?field=news_arabic&id=258 (accessed 12 December, 2014).

[123] Ibid.

[124]Carl F. Stycin and Linda Mulcahy, *Legal Methods and Sytems: Text and Materials* (London: Thomson and Reuters, 2010):45.

[125] 5 U.S (1 Cranch)137, 2L.ED.60.

Mark Tushnet believed that the power of judicial review operating under countries Constitutions across the globe originated from or rather is been copied from the US experiment.[126] This according to Barry, is linked to the fact that judicial review has been fully entrenched and has shaped the working of the US constitutional system that has been operational for over two hundred years now.[127] Carl and Linda believed that judges principally use the power of judicial review to control governmental actions.

According to Mark, the power of judicial review is a supervisory one.[128] In fact, arguments against the judicial review of legislative decisions and actions of the executive are not new in Constitution and administrative law. Scholarly works exist in that direction. In this group are scholars such as Bickel, Rebeca, Williams, Robert and Raoul, Tsesis.[129] These scholars are against allowing the courts comprising of unelected representatives in overriding the decisions of the elected representatives. To start with Bickel, he argued that judicial review is counter majoritarian.[130]Bickel believed that when the courts through the instrumentality of judicial review set aside

[126]Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (New Jersey: Princeton University Press, 2009):8. See also Edward Corwin, *The Doctrine of Judical Review: its Legal and Historical Basis and other Essays* (New Jersey: Clark, 1999):3. https://books.google.com.my/books?isbn=1584770112(accessed 15 December, 2014).

[127]Barry Friedman, "Dialogue and Judicial Review," *Michigan Law Review* 91, no.577 (February 1993): 578.

[128] Mark Elliott, *The Constitutional Foundations of Judicial Review* (Oregon: Hart Publishing, 2001):248.

[129]Berger, Raoul., *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Cambridge: University of Harvard Press, 1977):410. See also Robert Bork, "Neutral Principles and Some First Amendment Problems," *Indiana Law Journal* 47, no. 1 (1971): 6. See also Rehnquist, "The Notion of a Living Constitution, *Texas Law Review* 54 (March1976), 695-696. Joseph D Grano, "Judicial Review and a Written Constitution in a Democratic Society," *Wayne Law Review* 28 (1981): 1. See also Alexander Tsesis, "Footholds of Constitutional Interpretation," *Texas Law Review* 91, no 7 (June,2013):1596.

[130] Bickel Alexanderm, The Least Dangerous Branch, cited in Friedman, Barry. "Dialogue and Judicial Review," *Michigan Law Review* 12, no.4 (July 1993): 579.

the laws and decisions of the other branches of government, they violate the concept of representative governance.[131]

Scholars, however, exist who do not share the counter majoritarian role of the Supreme Court in the exercise of judicial review. According to Dahl, Segal and Spaeth and Mathew the Supreme Courts rarely invalidate laws that enjoyed majority support.[132] The laws declared unconstitutional are either outdated or unimportant. According to Dahl, the Supreme Court in so doing is not counter majoritarian.[133] This view is shared by scholars such as Dahl and Ura, who argued that the Supreme Court in the exercise of the power of judicial review is promoting majority interest not counter to it.[134]

Rebeca argued that while some constitutional theorists, supporters of majoritarianism and political accountability theory such as Bickel, consider the power of judicial review as "deviant institution" especially under democratic arrangement, she does not think it a deviant or illegitimate.[135]Rebecca further argued that majoritarianism is not the main goals of constitutions and that the Constitution contains limitation to the majority rule in some occasions. The power of judicial review is one of such limitations.[136] It is the view of Chemerinsky that even the democracy ideals upon which those against the power of judicial review rely "does not require pure majoritarianism and that our system was designed in many ways to avoid purely

[131]Ibid.
[132]Matthew EK Hall and Joseph Daniel Ura, "Judicial Majoritarianism," *Journal of Politics*, (2015): 43. See also Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited. New York* (Cambridge: University Press, 2002), 23.
[133] Dahl, Robert A., "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker," *Journal of Public Law* 6 (March 1957): 293.
[134]Ura, Joseph Daniel., "Backlash and Legitimation: Macro Political Responses to Supreme Court Decisions," *American Journal of Political Science* 58, no. 1 (June2014):110.
[135]Rebecca L. Brown, "Accountability Liberty and the Constitution," *Columbia Law Review* 52, no.10 (December 1998): 579.
[136]Ibid., 534.

majoritarian outcomes."[137]Tom also captured the arguments of this group of scholars. Tom posited that those against the exercise of the power believed on counter majoritarian principles that judicial review lacks democratic legitimacy.[138] To this group, it is against the tenets of democracy.

From the perspective of those in support are scholars such as Erwin, Lynch, Dworkin, etc. Dworkin, for instance, argued that the judiciary plays an important role in the constitutional practice in the United States and in fact, has a final interpretive authority.[139] As for Tom, those who supported judicial review justified and legitimised, judicial review because according to them it serves as a check on questionable policies and the excesses of the majority thereby guaranteeing minority protection.[140] According to Lynch, the supreme court in the exercise of the powers of judicial review constitutes itself as a third legislative chamber.[141] Erwin, however saw the whole debate against the legitimacy of allowing the courts comprising of unelected representatives to determine the constitutionality of laws is "misdirected, futile, disingenuous and dangerous." Erwin justified judicial review on the premise that it enhances and safeguards democratic values.[142] The arguments in support of judicial review seem to appeal to reason especially in countries such as Iraq that has a baby democracy.

According to Mackie Naji while acknowledging the existence of conflicting provisions in the Iraqi Constitution, argued that the exercise of judicial review

[137]Erwin Chemerinsky, "Foreword: The Vanishing Constitution," *Harvard Law Review* 103 (1989),74.
[138] Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge: University Press, 2003), 21-25.
[139]Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard: University Press, 1996), 35.
[140]Ibid., 25.
[141]Lynch, Gerard E, "Government by Judiciary: The Transformation of the Fourteenth Amendment," *Cornell Law Review* 63, no.12 (Sebtember 1977): 1091
[142]Erwin Chemenrinsky, *Interpreting the Constitution* (New York: Praeger, 1987), 2.

power by the court in Iraq is support by the text of the Iraqi Constitution.[143] He further argued that judges of the FSC applied the provisions of the Constitution in resolving conflicting provisions in the Iraqi Constitution.[144] There are many examples where the FSC in Iraq has declared the law made by legislature null and void such as the case of MPs Mithal al-Alusi Chairman of the Board of Representatives.[145] In this case, the FSC ruled in its resolution No. (34 / federal / 2008) dated 24/11/2008 on the unconstitutionality of the Iraqi Parliament's decision to suspend the membership of one of its members on the simple ground that he visited Israel. The FSC decision was in line with constitutional guarantees declared under Article 44(1) dealing with the freedom of Iraqis to travel and move inside and outside Iraq unconditionally. No Iraqi shall be restricted unless following due process.[146]

Counter majoritarian principle has been used as a basis against allowing the courts to determine and to set aside the laws enacted by the majority parliament. Barry argued that it has been very difficult for even the academics justifying the allowance of "unelected and ostensibly unaccountable judges," reviewing or setting aside the laws passed by the parliament.[147] Barry argued that some scholars believe that the power of judges to determine the constitutionality of laws is inconsistent with democratic tenets.[148] In fact, Luc believed that there is no way in a democracy the power of

[143] Mackie Naji, "The Philosophical Foundations for the Control of the Constitutionality of Laws: The Proposed Constitutional Amendments of the Federal Judiciary of Iraq, 2, no.4(May 2010), February, http://www.iraqja.iq/view.21/. (accessed December 22, 2014).
[144]Ibid.
[145] Issue Number: 34 / Federal / 2008.

[146]The Federal Supreme Court decision No. (34 / federal / 2008) dated 24/11/2008)), http://www.iraqja.iq/view.2614/, (accessed March 30, 2015).
[147]Barry Friedman, "The Birth of an Academic Obsession:The History of the Countermajoritarian Difficulty, Part Five," *Yale Law Journal* 112, no. 153 (February 2002): 155.
[148]Ibid., 156.

judicial review can be legitimised.[149] However, some group of scholars do not share the counter majoritarian argument. Barry for instance, argued that the endless search for legitimacy to the counter majoritarian positions is pointless. In fact, he believed that it is a distraction from more practical and important questions of constitutional importance.[150] From the above and as rightly observed by Bruce, the difficulty of justifying the counter majoritarian principle is insoluble. It has been and will continue in the field of constitutional law.[151]

Although the courts can check the legislature and executive branches of government and the decisions of the Supreme Court are binding on all no matter how unjust they appear, but the beauty of S.O.P is the checks the legislature and the executive can exercise in changing or reversing those court decisions through the instrumentality of lelgislation.[152] In fact, not only can the legislature initiate such reversal, pressure groups have assisted in getting unjust decisions reversed.[153]

1.8.6 Research Gap

Although literature abound on the history, debates and arguments on the issues surrounding the exercise of the powers of the court in terms of legal supervision and

[149]Luc B. Tremblay, "The Legitimacy of Judicial Review: The Limits of Dialogue between Courts and Legislatures," *International Journal of Constitutional Law* 3, no. 4 (October 2005): 617.
[150]Barry Friedman, "Dialogue and Judicial Review," *Michigan Law Review* 91, no.453 (May1993),581.
[151]Bruce A. Ackerman, "The Storrs Lectures: Discovering the Constitution," *Law Journal* 93, no. 1013 (May 1984): 1016.
[152]Joseph Ignagni and James Meernik, "Explaining Congressional Attempts to Reverse Supreme Court Decisions," *Political Research Quarterly* 47, no. 2 (1994): 353 See also Solimine, Michael E, and James L Walker, "Next Word: Congressional Response to Supreme Court Statutory Decisions," *Temple Law Review* 65, no.11 (May1992): 425. See also Meernik, James, and Joseph Ignagni, "Congressional Attacks on Supreme Court Rulings Involving Unconstitutional State Laws," *Political Research Quarterly* 48, no. 1 (June1995): 43. See also Hettinger, Virginia A., and Christopher Zorn, "Explaining the Incidence and Timing of Congressional Responses to the U.S. Supreme Court," *Legislative Studies Quarterly* 30, no. 1 (February2005): 7.
[153]Hettinger, Virginia A., and Christopher Zorn, "Explaining the Incidence and Timing of Congressional Responses to the U.S. Supreme Court," *Legislative Studies Quarterly* 30, no. 1 (February2005): 7.

interpretation on the constitutionality of laws. Moreover, the methodology that the research has adopted, i.e. combining doctrinal legal research and qualitative approach has not been used in the previous literature in the context of the powers of the Iraqi FSC under any Constitution. Hence, this research is timely in filling the gap that previous studies failed to address. This is the contribution of the current research to the literature in this area.

1.9 Outline of Chapters

This thesis has been divided into five chapters. Chapter One:- it covered the background of the study, problem statement, research questions, research objectives, significance of the study, research methodology, research design, research scope, types of data, data collection methods, analysis of data, limitation of the study, and literature review.

Chapter Two:- covered the historical background of the doctrine of separation of powers, judicial supervision and interpretation on the constitutionality of laws. This chapter laid down the theoretical foundation of the study, especially in dealing with chapter three of the study.

Chapter Three:- this chapter addressed the historical background of constitutional law in Iraq. The chapter further devoted a discussion on a critical analysis of the powers of the FSC in legal supervision and interpretation of laws in view of their constitutionality. This chapter also answered the first and second research questions as well as achieved the first and second research objectives.

Chapter Four:- this chapter analysed the concept of separation of powers under the Iraqi 2005 Constitution. Also, the chapter discussed the establishment, functions and composition of the Federal Supreme Court of Iraq under the 2005 Iraqi Constitution.

This chapter answered research question three and four as well achieve research objectives three and four respectively.

Chapter Five is the concluding chapter. It contained a summary of the findings, conclusion and recommendations of the thesis. This chapter answered research questions one up to four since the overall findings of the thesis have been presented here. Furthermore, the chapter also specifically achieved the fifth research objectiv

CHAPTER TWO

HISTORICAL BACKGROUND OF SEPARATION OF POWERS

2.1 Introduction

Under all democracies and in the Constitution making process, the Constitution makers have always strove to put measures that will control and check arbitrariness and tyranny in government.[154] Arbitrariness and tyranny are two evils in government. Several measures through concepts and theories have been devised to check these evils and S.O.P according to Fombad has proven to be a cure to this evils. According to Fombad, he pointed out that "of the numerous theories of government that have been devised to address the evils, the most enduring has been the doctrine of separation of powers."[155] Little wonder that today the importance of the concept of S.O.P featured in most countries of the world. This is the case of Africa, Asia and even Europe. In fact, all the enacted African countries' Constitutions from the 1990s have incorporated the S.O.P in their Constitution.[156] The appreciation of the importance of the S.O.P as checks for arbitrariness and tyranny in government could be better explained using the French revolution. Scoring the usefulness of S.O.P, Article 16 of the French Declaration of the Rights of Man and of the Citizen 1789 declares that a Constitution without a provision for S.O.P is not a Constitution.

[154]Charles Manga Fombad, "Separation of Powers in African Constitutionalism," *International journal of constitutional law*, 25, no.2 (June 2005): 58.
[155]Ibid.
[156] Ibid.

According to Article 16 of French of the Rights of Man and the Citizen 1789, it further stipulates at:-"Any society in which the guarantee of rights is not assured, nor the S.O.P determined, has no Constitution".[157]

S.O.P is one of the oldest concepts in the field of Constitution and Administrative Law. It is a distinctive feature of constitutional democracies. It is within the realm of S.O.P that the issue of the powers of the courts (especially the supreme court) in terms of legal supervision and the constitutional interpretation on the constitutionality of laws arise. In this chapter, we analysed the historical roots of the concept of S.O.P.

This chapter laid down the theoretical foundation to the other chapters, especially chapter three of the thesis, as the discussed the concept of S.O.P under the Iraqi

[157] Article 16 of the French Declaration of the Rights of Man and of the Citizen 1789.

Constitutional system. The concept of S.O.P in a democratic system is meant to curb abuse of power and to protect freedom of the people. This concept S.O.P divides the tasks of state into three powers; legislative, executive and judicial. These branches, the legislative, executive and judicial, can check and balance the other to curb the concentration of power.

2.2 The History and the Philosophy behind the Doctrine of Separation of Powers

Under this section, the discussion focused on the history and the philosophy behind the doctrine of separation of powers.

2.2.1 The History of the Doctrine of Separation of Powers

The origin of the concept of S.O.P can be linked to the classical Greece practice and afterwards adopted in the Constitution of the Roman Republic, which signified its importance in governing the Roman Empire at the time.[158] S.O.P is a principal element of a good Constitution and this may be seen in the work of Aristotle titled "*The Politics*".[159] The work stressed that there should be three most important features that define a good Constitution, which must be taken into consideration by would-be administrators and judicial panels. It needs to consider the advantages of the constitution of such society and such Constitution has to be properly arranged. In identifying the three basic elements that should constitute a constitution, Aristotle was of the view that the Constitution has to be drafted with deliberation with other important groups in a society; it has to give credence to important issues within the society and lastly a Constitution must contain judicial feature.[160]

[158] Madhat al-Mahmood, The Judiciary in Iraq, 2nd, (Iraq ,Baghdad, 2011): 12.
[159] Ahamed Mohammed, *The Separation of Powers* (University of Baghdad: Baghdad Center for Legal Studies, 2004), 44.
[160] Ibid.

2.2.2 Historical Development of the Doctrine of Separation of Powers

The brilliant centuries of adoption of democratic ethics and practice by the Greeks, centred on Athenian city, sealed the practice of democracy which led to gross human rights abuse.[161]Such led to the limitless abuse of rights of man in subsequent centuries in Europe through the introduction of religion as state practice. The introduction of religion limited the capacity of people to react to issues bordering on development and rights. Those who stood to oppose clergy, monks and priests were usually charged for hearesy and might eventually be excommunicated.[162] The development of meaningful constitutional development became a perennial feature of European social and political landscape with the indefinite suspension of monarchy and religion as state practice. The reformation and Counter Reformation period of the 15th and 16th centuries led to the abandonment of religion as the main driver of the political and social fabric in the European society.[163] In the first place, the adoption of Magna Carta in 1215 in England heralded the period of libertarianism in Europe and such was later followed by the French revolution of 1789. The French revolution later paved way for popular sovereignty, democracy, the rights of man and popular suffrage.[164] This historical milestone led to the adoption of the Constitution that is clearly embedded with the spirit of S.O.P. Hitherto, the powers in Europe were concentrated in a single authority and church dominated the entire affairs of the society. Such S.O.P assured the citizens in Europe the rights to participate in the issues that affected their lives directly. This was done through electoral participation

[161] Ibid.
[162] Mohamed Osman, *The Theory of Separation of Powers,* (University of Baghdad: Baghdad Center for Legal Studies, 2014),76.
[163] Ibid.
[164] Ibid.

and voting. For the first time in the history of Europe, the power of decision makers were decentralised and thus gave way for accountability and probity.[165]

Thus, the principle of S.O.P, which guarantees the autonomy of each arm of government- executive, legislature and the judiciary- dictated the direction of explaining and drafting of Constitution for 200 years after the French revolution in Europe. Such development later assisted in the theoretical and practical approach to the Constitution. The three arms of government later become fashionable in all civilised societies where they function together as the major apparatus of the statecraft.[166] It needs to be said here that despite the absence of implicit existence of these three major arms of government in the ancient societies, there existed a system by which the society was governed according to the requirement of the time. Disputes were usually amicably settled while the law breakers and offender were punished according to the stated laws and regulations. In reality, what makes the previous generations different from the present is the explicit constitution that clearly stipulates the function of each organ of government where no one is allowed to infringe on the rights of others.[167] In the previous generations, a king, emperor, priest and so on might combine the functions of all organs of government and such system did not allow for rule of law that is supposed to be the harbinger of society. Notwithstanding this shortcoming, from Aristotle and Polybius to Locke and Montesquieu history has revealed that the principle of S.O.P can be gleaned from various civilisations and state practices and theory. This suggests that societies from

[165] Ibid.
[166] Abdullah Ahmed, *The Principle of Separation of Powers* (University of Baghdad: Baghdad Center for Legal Studies, 2015),43.
[167] Ibid.

the earliest period have been compelled to device a working societal mechanism to manage their affairs effectively.[168]

As it has been stated earlier, the practice of the principle of S.O.P coincided with the establishment of Greek city-states with headquarters in Athens. It was an important element that upheld the society for centuries before it was displaced by the Roman Empire. The Greek produced many of the ancient known philosophers who had keenly studied the art of statecraft. One of such philosophers is Aristotle who studied closely what were the basic elements of good government.[169] According to Aristotle, for the principle of S.O.P to be included in the working of the Constitution, there should be an element of deliberation, consensus, agreement and inclusiveness.[170] If all these ingredients are present, then the Constitution can be acceptable to the would-be community or society. Such thinking influenced the works of subsequent philosophers like Polybius and Cicero. For Polybius, the constitution had to be of mixed origin in order to proffer a lasting solution to the problems bedeviling a given society.[171] It was Polybius, who later fashioned out how each section of societal rule can exercise their power under a Constitution. He proposed that Rome should be governed under three basic governmental elements that drove the society.[172] He opined that Monarchy should be an elected ruler while oligarchy/aristocrat should be elected as member of senate. The last functionary should be from popular assembly who should uphold the pillar of democracy. In this arrangement therefore the functions of each were clearly stated in the Constitution to allow for S.O.P. This

[168] Ibid.
[169] Ibid.
[170] Najib Abdul Rahman, *The History of Separation of Powers,* (University of Diyala: Diyala Center for Studies and Researches, 2012), 55.
[171] Ibid.
[172] Abdullah Ahmed, *The Principle of Separation of Powers* (University of Baghdad: Baghdad Center for Legal Studies, 2015),43.

system of governance was later adopted by Cicero and Thomas Aquinas. It was Aquinas, who advocated for the S.O.P between legislature and executive.[173]

Thus, a typical example is Polybius, who developed a socio-political theory. Another philosopher who was influenced by Aristotle is Marsilio, who defined the responsibility of rulers in terms of commitments to the society.[174] Although, there were serious intention on the part of various philosophers and ancient societies to guide against any form of impunity in the government, the concept of S.O.P as its known today was grossly deficient in the ancient societies.[175] As it has been said, societies developed working government apparatus to govern themselves, but it was the realisation on the part of the governed on the need to fight against abuse of power that led to gradual adoption of mechanism that will cater for general good of the society. This is exactly what happened during the French revolution. The society was replete with all sorts of state corruption and irregularities and such led to revolution that inspired the mind of Napoleon Bonaparte.[176] The aftermath of such revolution was the realisation on the part of the European leaders and monarchs the need to embrace popular constitution that will uphold the rights of man. In drafting such constitution therefore the principle of S.O.P became an important element. The idea was that if separation of powers was not clearly entrenched in the French constitution, the corrupt practices that pervaded the political landscape cannot be adequately prevented. Such idea radiated to all parts of Europe and across the Atlantic to the Americas, most importantly the United States of America. Since the successful quelling of the French revolution, with fierce battle of waterloo, the

[173] Najib Abdul Rahman, *The History of Separation of Powers,* (University of Diyala: Diyala Center for Studies and Researches, 2012), 55.
[174] Ibid.
[175] Ibid.
[176] Ibid.

fundamental rights of man have become an important element of global Constitutions.[177] It needs to be stressed here that S.O.P are inextricably intertwined with good Constitution as the duties and responsibilities of each organs of governments are normally clearly stated to prevent any form of oppression and repression.

Furthermore, it needs to be reiterated that like all other mechanisms of social and political decorum, the agitation for separation of power can be linked to socio-political and historical underpinnings of state formation and governance.[178] In the earliest centuries, the monarchies in Europe combined the duties of governance with finance, which contradicted the principle of SOP. It was this system that existed before Locke and Montesquieu came up with liberal theories that promoted the need for transparency in governance. It was in this circumstance that Lock, in the late 17th century proposed the need to separate the workings of each of the arms of government as performing double tasks by a king or emperor gave rise to abuse of power.[179] It was in this circumstance Locke proposed that the bourgeoisie should be allowed to govern the affairs of state.[180]

This is not a strange development in Europe as such issue had been resolved in England after the Glorious Revolution of 1688. The revolution which occurred in England in 1688 paved the way for the adoption of S.O.P. In this way, the Locke's prescription in the 17th century in France was after all not a strange idea. A book written by Baron de Montesquieu was grossly a reflection of the principle which was widely acclaimed as the first of its kind in the history of political theory and state

[177] Ibid.
[178] Ibid.
[179] Ibid.
[180] Aziz Mahdi, *The History of the Principles of Separation of Powers* (University of Baghdad: Baghdad Center for Studies 2011),33.

formation and governance.[181] The book titled "*De l'esprit des lois*" later became hotcake in most libraries in Europe and Americas as it clearly delineate the functions of each organs of government and how such separation can be utilised to prevent abuse of power and corruption in a state. Although the idea of Montesquieu may reflect originality in France, it needs to be stressed that his education and stay in England might have influenced him to develop such philosophical thinking.

In his book therefore political system of governance are distinctly dichotomised into three separate *foci*. They are despotism, monarchy and democracy. In his elaboration of the stated three types of political regimes, he was of the view that despotism is when the leader govern a state without the appropriate consent from the citizen.[182] In such an instance, the ruler is bound to rule according to his whims and fancies.[183] The second type, monarchy, was the order of the day in the European politics in the medieval period. Montesquieu was of the view that the monarchical government did not represent popular sovereignty of the people and that such sovereignty belonged to the people alone.[184] In this case, he was of the conviction that monarchy should be checked for its excesses in government. The last one, democracy, was the ideal type of government proposed by Montesquieu. He was of the conviction that as long as democracy exists the principle of S.O.P will be allowed to stay.[185] The idea implies that it is only in democracy that the principle of S.O.P as espoused by Montesquieu can adequately function well. In this manner, the adoption of the principle of S.O.P can counterbalance the powers of despots and monarchies in Europe. But a caveat has to be made here. There is no way the power of a despot can be curbed as long as

[181] Ibid.
[182] Ibid.
[183] Najib Abdul Rahman, *The History of the Separation of Powers* (University of Diyala: Diyala Center for Studies and Researches, 2012), 58 .
[184] Ibid.
[185] Abdul Haq Mohammed, *The History of the Principles of Separation of Powers between the Present and the Future* (University of Baghdad: Baghdad Center for Studies, 2014), 32.

the system of governance is not democratic in nature. It is only in democracy that the principle of S.O.P can adequately apply and function.[186]

Thus, the espousal of the principle of S.O.P led to the application of balance of power among the aristocracy, the court body and religious representatives in Europe. Despite this prophetic assumption, Montesquieu himself acknowledged the human factor in the application of the principle. He was well aware that it was in the human nature to descend to despotic order and defied the law governing a state. Although Montesquieu might be right in this way but he was not aware that such degeneration of human natural tendency could be tamed by awarding penalties to the defaulting leader. This is exactly what happens today in healthy democracies.[187] A leader cannot just behave the way he/she wants as the power has been explicitly stated in the constitution. An attempt on the part of a leader to descend to despotism may invite penalty from the would-be authority, most importantly the legislature and the judiciary. It needs to be stressed further that Montesquieu exercised a little restraint in his philosophy. He did not advocate for complete autonomy of each arms of government but instead acknowledged the need for cooperation and healthy relationship among the three organs of government. In this way, he was of the conviction that each could work harmoniously together to act as checks and balances on one another.[188] This position implies that power must be used to check power in order to disallow an organ from becoming recalcitrant and despotic in nature. By employing power to check power each organ will know its boundary and will not definitely go off the limit of their prescribed power in accordance with the Constitution. It needs to be stressed that this proposal has been found to work

[186] Najib Abdul Rahman, *The History of the Separation of Powers* (University of Diyala: Diyala Center for Studies and Researches, 2012), 58.
[187] Ibid.
[188] Ibid.

excellently well in a democratic setting as military and monarchical regimes may be resistant to such principle. If the principle is allowed to work effectively such can also promote the freedom within a given society with subsequent peace and order. Where freedom is guaranteed, the philosopher assumed, there bound to be freedom of thought, religion, property etc and in effect such can promote societal peace and order. Thus, the prevention of arbitrary use of power promotes societal peace and order invariably.[189]

Moreover, in a state where the three organs of government are empowered based on the Constitution, the independence of the judiciary must be guaranteed. Each organ must be allowed to work within its own limit without interfering in the affairs of other. This does not suggest that there should not be cooperation among them, as stated earlier, but such cooperation should be done within the limit of the law. This is necessary in order to prevent and forestall a situation where there will be unnecessary meddlesomeness among the organs which may ultimately cause chaos and anarchy within a state.[190] In this scenario, the power of legislature should be clearly separated from that of executive and the same person should not be allowed to perform the same function and role. If such occurs there may be power corruption which may not augur well for societal well being and governance. Thus, for healthy governance to exist, according to Montesquieu, the same person should be restrained from performing the roles of executives and the judiciary. It needs also to be stated that executive and legislature have to be separated from each other in order to give

[189] Abdul Haq Mohammed, *The History of the Principles of Separation of Powers between the Present and the Future* (University of Baghdad: Baghdad Center for Studies, 2014), 32.
[190] Ibid.

way for a healthy alliance among the various organs of government which will in the end promote the principle of S.O.P as espoused by Montesquieu.[191]

It should be noted here that if the executive and legislative powers are concentrated in the same hand, there may be partiality in the way the justice is administered which may in turn lead to violence and oppression within a given society. If this submission is right, it thus safe to assume that S.O.P is a veritable mechanism in maintaining peace and order in a state.[192] According to the French philosopher, Althusser, in his criticism of Montesquieu's work, the bottom-line of the principle of separation of power is the ability to limit the state power on the citizen, govern the state according to the stated rules and regulations and to democratically distribute powers among the various sections of the society, most especially among the king, the nobility and the people.[193] In this way, one may conclude that it was the English system that inspired the mind of Montesquieu to propound such lofty theory. Despite Montesquieu outstanding intellectual prowess, some scholars are of the view that the idea espoused by him was a copy of Polybius' "mixed constitutional order".[194] It can thus be said that the idea of S.O.P has its origin in the work of Polybius but popularised by Montesquieu. Such criticism therefore points to the fact that the idea of S.O.P has always been there from the earliest period but it was Montesquieu that gave it the necessary popularity as political scientists later come to know.[195] It was the demand and requirement of French society in the 17th century that compelled Locke and Montesquieu to promote the idea in order to challenge the *status quo* that eventually led to revolution. The idea was promoted in order to arrest the society from social

[191] Ibid.
[192] Ibid.
[193]Ahmed Mohamed, *The Separation of Powers* (University of Basra: Iraq Center for Research Strategy,2008),76.
[194] Ibid.
[195] Ibid.

injustice and decadence which gained worldly attention. Countries in Europe, Americas and in some parts on Asia and Africa began to adopt and modified the principle to suit their domestic political circumstance. Its emergence in Africa and Asia was possible through imperialism and colonisation.[196] It was the Europeans that later sold the idea to the Asian and African people, which was later adopted in the process of state formation. One needs to recognise that the bottom-line of the principle is freedom from injustice and oppression and most contemporary Constitutions of states reflect this ideal.[197]

The French revolution provided a basic background for the spread of the principle of S.O.P to the other side of the Atlantic. The French revolution which occurred between 1789 and 1815 produced many refugees and many crossed the Atlantic in a large ship to the US and other parts of Americas.[198] Some of these French people imported the idea of separation of powers into the Americas which is contained in the French document "Article 16 of the Declaration of the Rights of Man and the Citizen of 1789". The American societies and states began to buy the semblance of idea in 1774 when it was declared in the Philadelphia conference of 1774.[199] Between 1776 and 1795 nearly all American states have adopted the idea in their various Constitutions.[200] Although it needs to be noted that the constituent assembly of France seemed to have falsified the way the principle was adopted in a strict manner which did not give any chance for change and adoption.[201] This was reflected in the way each organ was explicitly separated without any form of cooperation. They interpreted the principle in a very ambiguous manner which did not allow for

[196] Ibid.
[197] Ibid.
[198] Ali Mustafa, *The Philosophy of Separation of Powers* (University of Baghdad: Baghdad Center for Studies, 2013),77.
[199] Ibid.
[200] Ibid.
[201] Ibid.

better modification. But when it got to the United States of America in 1776, the north American started its adoption in the federal constitution and later formed an important aspect of the constitution. The idea was that any state that does not have strict law and principle of S.O.P has no Constitution.[202] Such an idea may be premised on the assumption that the main role of the Constitution is to prevent tyranny and oppression. And if at the end of the day a society cannot prevent that then its constitution is not working well.[203]

After the adoption of the Constitution in Americas and in various European countries, it became an important issue in the drafting of constitutions in various parts of the world. The ideal of the S.O.P is simple, it guarantees the freedom of individual and guide against oppression and tyranny. Thus, the spread of the principle to other parts of the world is as a result of its efficacy in preventing chaos and anarchy in the society. It was first formally introduced in French constitution in1830 while America adopted it in the federal Constitution in 1791.[204] Most European countries followed suit and became part of the constitution of any given state. This is because of its advocacy for S.O.P among the legislature, executives, and the judiciary. It is assumed that if the three organs can be made to work separately in unison, the fundamental human rights of people can be assured. If that is assured then peace, harmony and tranquility can be maintained in a society. Where peace and tranquility exist, the development and progress will become part of the society[205].

[202] Ibid.
[203] Ibid.
[204] Ibid.
[205]Hamza Mohammed, *The Separation of Power* (University of Baghdad: Baghdad Center for Studies, 2011),87.

2.3 The Philosophy behind the Doctrine of Separation of Powers

The dangers of combining so many powers in one body or person necessitated the evolution of the idea that the powers of the state be separated from persons or bodies to exercise them. Madison explained that "the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[206] Thomas Jefferson had a similar argument. According to Thomas,"concentrating these legislative, executive, and judicial powers in the same hands was precisely the definition of despotic government."[207] According to Muray Dry, "the aim is to maintain civil liberty and avoid tyranny."[208] Fombad observerved that "excessive concentration of powers is arguably one of the greatest impediments to the promotion of constitutionalism, good governance, democracy, and the rule of law in Africa."[209] The US courts seem to adopt or follow the reasoning of Madison, Thomas and Fombad. This could be seen in a host of cases.[210]

Justice Earl Warren one time Chief Justice of the US Supreme Court in the case of *USA v. Brown*,[211] supported the idea of preventing tyranny among the reasons for the inclusion of the doctrine of S.O.P in the US Constitution. Warren C.J. said that "The separation of powers under the American Constitution was obviously not

[206]Alexander Hamilton, John Jay, James Madison,The Federalist, ed.Mead Earle 47, (New York: The Modern Library, Random House:1937), 313.
[207] Notes on the State of Virginia, Query XIII, No. 4, reprinted in T. Jefferson, Writings 245 (M. Peterson ed. 1984).
[208] Murray Dry, "The Separation of Powers and Representative Government," *The Political Science Law Reviewer* 33, no.1(May 1973): 43.
[209]Ibid., 58.
[210]*Mistretta* v. *United States*, 488 U.S. 361,380-81 (October 1989); *Bowsher* v. *Synar*, 478 U.S. 714,733-34 (1986); *Commodity Futures*, *Trading Comm'n* v. *Schor*, 478 U.S. 833, 859-60 (1986) (Brennan,J., dissenting); *Thomas* v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 594 (1985) (Brennan,J., concurring in judgment); *INS* v. *Chadha*, 462U.S. 919, 960 (1983) (Powell, J., concurring); *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co*., 458 U.S. 50, 57 (1982).
[211]381 US 437, 443 (1965). https://supreme.justia.com/cases/federal/us/381/437/case.html (accessed 3 March,2016).

instituted with the idea that it would promote government efficiency. It was on the contrary, looked as bulwark against tyranny." [212]

The doctrine of S.O.P deals with the common relations among the three organs of the government specifically legislature, executive and the judiciary. The reason for this tenet retreats to the season of Plato and Aristotle. It was Aristotle who interestingly portrayed the Government's components into three classes viz., deliberative, legitimate and judicial.[213] Locks sorted the Government's strengths into three segments to be specific: continuous executive force, discontinuous administrative force and federative force. Continuous executive power" implies the executive and the judicial power, discontinuous legislative power" implies the rule making power, "federative power" signifies the power regulating the foreign affairs.[214] Baron Acton (a historian and moralist) commonly known as Lord Acton has for centuries captured the dangers of fusing so many powers in one individual or body. Acton believed that when the power invested in a person was absolute it tends to corrupt such a person or body absolutely.[215] Acton was quoted in a letter he sent to Bishop Mandell Creighton in 1887 expressing his opinion. According to Acton, "Power tends to corrupt, and absolute power corrupts absolutely. Great men are almost always bad men."[216] Justice Frankfurter, wrote on the tendency of individuals to carry their power as far as they could go to that state, he "had no illusion that our people enjoyed biological or psychological or sociological immunities from the

[212] Ibid.
[213] Ibid.
[214] Ibid.
[215] John Emerich Edward -Acton, Power corrupts; absolute power corrupts absolutely, http://www.phrases.org.uk/meanings/absolute-power-corrupts-absolutely.htm, (accessed February 14, 2015
[216] The Phraes Finder, "The Meaning and Origin of the Expression: Power Corrupts; Absolute Power Corrupts Absolute ,"http://www.phrases.org.uk/meanings/absolute-power-corrupts-absolutely.html (accessed February 14, 2015)

hazards of concentrated power."[217] This was in the case of *Youngstown Sheet & Tube Co*. v. *Sawyer*.[218] This case was, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), also commonly referred to as The Steel Seizure Case, was a United States Supreme Court decision that limited the power of the President of the United States to seize private property in the absence of either specifically enumerated authority under Article Two of the United States Constitution or statutory authority conferred on him by Congress. It was a "stinging rebuff" to President Harry Truman.

Justice Hugo Black's majority decision was, however, qualified by the separate concurring opinions of five other members of the Court, making it difficult to determine the details and limits of the President's power to seize private property in emergencies. While a concurrence, Justice Robert H. Jackson's opinion is used by most legal scholars and members of Congress to assess executive power. The case is colloquially referred to as the Youngstown Steel case or the Steel Seizure case.[219]

It has been observed that the above quote of corrupting tendencies of absolute power did not start with Lord Acton. Those who trace the origin of the quote found some quotes that resemble that of Acton only that the quote was more popular with Lord Acton. William Pitt the Elder, Earl of Chatham (British Prime Minister from 1766 to 1778), is among those who are found to have used similar wordings in one of his

[217] 343 U.S. 579, 593 (1952) (concurring opinion).
[218] Ibid.
[219] Ibid.

speeches in the House of Lords in 1770 when he said:[220] "Unlimited power was apt to corrupt the minds of those who possess it."[221]

It is further argued that even Lord Acton is believed to have borrowed the quote from the writings of earlier scholars who have used the same or similar quote. For example, the French republican poet and politician, Alphonse Marie publication of 1848 had this quotation:- "It is not only the slave or serf who is ameliorated in becoming free the master himself did not gain less in every point of view, for absolute power corrupts the best natures."[222]

Montesquieu's idea and philosophy behind advocating for S.O.P took from the above premise of philosophers such as Acton. Montesquieu has the same understanding of the likely abuse of power against the liberty of citizens when so much of it is invested in one individual or body. The emphasis of Montesquieu on political liberty is seen in his stance on the issue. Montesquieu feared abuse of power when the three types of powers in the modern constitutional system are invested in one person. Montesquieu argued that liberty could be found when powers are not abused, but often the powers are abused. According to Montesquieu:-

> "Political liberty is to be found only in moderate government, and even in these it is not always found. It is there only when there is no abuse of power. But consistent experience shows that every man invested with power is apt to abuse it, and carry his authority as far as it will go. Is it not strange, though true, to say that virtue itself has a need for limits".[223]

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[220]The Phrases Finder, "The Meaning and Origin of the Expression: Power Corrupts; Absolute Power Corrupts Absolutely," http://www.phrases.org.uk/meanings/absolute-power- corrupts-absolutel.html (accessed February 14, 2015).

[221] John Emerich Edward -Acton, Power corrupts; absolute power corrupts absolutely, http://www.phrases.org.uk/meanings/absolute-power-corrupts-absolutely.htm, (accessed February 14, 2015

[222] Ibid.

[223] Thomas Nugent, trans., *The Spirit of the Laws* (Boston: Digireads, 2010),137.

From the statement above, it could be argued that the doctrine of S.O.P is very important for a state. Hence, Montesquieu's theory included some principles such as divided authorities in the state for legislative, executive and judiciary and he went further to explain the basic tasks of these authorities. Montesquieu's emphasised the distribution of powers and S.O.P is necessary because if clumped in one body this will lead to tyranny.

To prevent this abuse, it is necessary from the nature of thing that power should check power. A government may be so constituted as no man should be compelled to do things to which the law does not oblige him, nor forced to abstain from things that the law permits.[224]

The docrine of S.O.P between the three arms of government is a global trend. The concentration of the three powers in the same hands creates a despotic government. According to Madison,"[t] he accumulation of all powers, legislative, executive, and judiciary, in the same hands may justly be pronounced the very definition of tyranny."[225]

In the words of Abner, it is the citizens that would be in trouble if one of the three government institutions that exercise either the legislative, executive of judicial powers grows too strong. [226] The demonstration of the S.O.P is practically seen across Constitutions of the world. The US is a good example, as the US Constitution

[224] Ibid.
[225]Federalist Papers, No. 47 (Madison), 43 Great Books of the Western World, Hutchins, Encyclopædia Britannica (1952):153.
[226] Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking* (Chicago: University of Chicago,1994),125.

was grounded on the S.O.P.[227] This much was stated by Buchanan in 1968. Buchanan stated that:-

> "All Constitutions break down the whole governmental institution into parts with specific, limited powers, but the Constitution of the United States is well known for its unusually drastic separation of powers."[228]

S.OP. is real and not abstract under the US Constitution. The US Supreme Court has restated this in a number of cases. In *Bucley v. Valeo*, the Court held that:-

> "The principle of the SOP was not simply an abstract generalization in the minds of the framers. It was woven into the document that they drafted in Philadelphia in Summer of 1787.[229] It has been vigorously enforced by the supreme court of the US which has a number of occasions disallowed congregational acts and decisions of the President".[230]

The concept was incorporated in a countries' Constitution for several reasons. According to Professor Straus, the preservation and prevention of the arbitrary exercise of power was what underpins the doctrine of SOP.[231] The doctrine was a safety net for the rise of totalitarian.

government and the danger of investing a single individual or body with so many powers in modern times.[232]According to Campbell, S.O.P ensures the protection of the citizens against the tyranny of government.[233] As a constitutional practice of countries, S.O.P is guaranteed to ensure that the government is accountable, efficient

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[227]Stephanie P. Newbold, "Why Constitutional Approaches Matters for Advancing New Public Governance," in New Public Governance: A Regime-Centered Perspective, (New York: Taylor and Francis, 2015),13.

[228] Scott Milross Buchanan, "So Reason Can Rule: The Constitution Revisited, Center for the Study of Democratic Institutions Some Aspects of Separation of Powers," *Law Review* 1, no.35 (1976): 371.

[229] 424 US 1, 124 (1976).

[230] Laura S. Fitzgerald, "Cadenced Power: The Kinetic Constitution," *Duke Law Journal* 46, no.7(1997): 679.

[231] Richard Epstein, "Why the Modern Administrative State is Inconsistent with the Rule of Law," *Nou Journal of law and Liberty* 1, no.3 (2008),491, available at: http://www.law.nyu.edu /sites/ default/ files/ECM_PRO_060974.pdf. (accessed March 8, 2015) .

[232] Edward H. Levi, "Some Aspects of Separation of Powers," *Law Review* 76, no.3 (1976): 372.

[233] Tom Campbell, *Separation of Powers in Practice* (California: Standford University Press, 2004), 1.

and that opportunistic behaviours are minimized through checks and balances.[234] In other words, S.O.P is one of the surest ways of promoting citizens liberty and the rule of law,[235] and is believed to be a tool for ensuring democratic accountability is institutionalized.[236] Montesquieu believed that when the powers are fused there would be fear among citizens of the holder of such powers and liberty would not be guaranteed. In this direction Montesquieu was quoted as saying: "{t}he political liberty of the subject,' said Montesquieu, was a tranquillity of mind arising from the opinion each person has of his safety. In order to have this liberty, it was requisite the government be so constituted as one man need not be afraid of another."[237] According to Abner:-

> Just as the framers saw their structural choices as parts of a package sepa- rating legislative from executive power to protect liberty and avoid governmental tyranny, so should we view checks and balances doc- trine as a package, its specific elements subject to revision to en- sure fidelity to the constitutional premise of divided governmental powers."[238]Mashele Rapatsa aptly stated this:"The purpose of S.O.P was to constrain a concentration of power in the hands of either of these spheres of government and to also facilitate political accountability."[239] Checks and balances are other reasons for the inclusion of the S.O.P. The Supreme Court of the US in *Buckley v. Valeo* stated that:-
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> "[t] he Framers regarded the checks and balances that they had built into the tripartite federal government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other."[240]

[234]John Mukum Mbaku, "Judicial Independence, Constitutionalism and Governance in Cameroon," *European Journal Law Review* 1, no. 4 (2014): 357.
[235] Laurence Claus, "Montesquieu's Mistakes and the True Meaning of Separation," *Journal of Legal Studies* 25, no. 3 (2005): 419.
[236]Domingo Pilar, "Judicial Independence: The Politics of the Supreme Court in Mexico," *Journal of Latin American Studies* 32, no. 03 (2000):705.
[237]Charles de Secondat, Baron de Montesquieu, "The Spirit of the Laws," *Journal of Legal Studies* 25, no. 3 (2005): 419.
[238]Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking* (Chicago: University of Chicago,1994),123.
[239] Mashele Rapatsa, "Transformative Constitutionalism in South Africa: 20 Years of Democracy," *Journal of Social Sciences* 5, no. 27 (2014): 887.
[240] Ibid.

For the most part, the court was accepted to have the last say in the understanding of constitutional procurements.[241] The court constitutional obligation of supervision was basic and an acknowledgment of this was as integral to the general task of constitutional translation which was additionally an eclusive of the court with the Supreme court having general forces in that respects.[242] According to Jonathan, allowing the judiciary with the power of interpretation was useful because the judiciary using traditional methods of statutory interpretation, inevitably checks legislative excess by serving as a mechanism that encourages passage of public regarding legislation and impedes passage of interest group bargains. According to Williams,"judicial review of legislative action acts not as a counterweight to the tyranny of the majority, but as a proof to the tyranny of the minority."[243]

For Marchamont Nedham, he explained that the separation of legislative and executive powers should be given to different persons not the same person. As utilised by him, the distinction looks like the sharp dichotomy between the development of strategy and its organisation favored by mid-twentieth century, American managerial scholars. Division for Nedham, was a fundamental means for finding obligation and settling responsibility.[244] An official, unambiguously accused of executing an arrangement set by the "Legislators," could be held at risk for its execution or non performance. Let that reasonable line of distinction and obligation be obscured, and freedom and the general population's advantage are similar in peril. Consequently Vile, saw particularly enough the sort of self-assertive oppressive principle against which the representative must be secured. The cure he thought lay

[241]Henry P. Monaghan, "The Supreme Court, 1974 Term," *Harvard Law Review* 89, no.1(1975): 1-2.
[242]Gillian E. Metzger, "*The Constitutional Duty To Supervise*," *The Yale Law* Journal 124, no.6 (2015): 1836
[243] William F. Shughart II and Robert D. Tollison, *"Interest Groups and the Courts*," *George Mason Law Review* 6, no.2 (1998): 969.
[244]Marchamont Nedham, *Separation of Powers*, (Chicago ,University of Chicago:press,1987),51.

in a partition of administrative capacities cast as far as "the governing power," "the legislative force," and "the judicative force."[245]

S.O.P was also vital because it was one sure way of guaranteeing the judicial independence, which was highly desirable if the rule of law and democratic accountability was to be guaranteed.[246] An autonomous was the thing that the majority rule government constitution has advanced for keeping up the standard of law and for securing essential human rights. Access to equity is the essential enthusiasm of each living creature and in politically sorted out social orders, it was the essential commitment of the State to guarantee as expansive and shifted a plan as would be prudent to offer access to equity. By this procedure, not just the general population's rights are secured yet the extension for vicious, damaging clashes were minimized. The political, legislative and authoritative procedures in changing degrees do give access to equity especially in strategic matters.[247]

Although S.O.P was a positive idea or concept, caution was needed to prevent too severe exercise of the separated powers as this could lead to a deadlock.[248] This happens when one branch of government deliberately refuses to discharge its constitutional duty that only that branch could exercise. This gave birth to what

[245]The Founders' Constitution, Volume 1, Chapter 10, Introduction, (Chicago: University of Chicago,1987), 311. http://press-pubs.uchicago.edu/founders/print_documents/v1ch10I.html (accessed March 8, 2015).
[246] Pilar Domingo, "Judicial Independence: The Politics of the Supreme Court in Mexico," *Journal of Latin American Studies* 32, no. 3 (2000): 705.
[247] Fathima Beevi, *The Judiciary in democratic governance: some insights from the Indian experience*, (Switzerland, Inter Parlimentary Union:1998),31.
[248]Mashele Rapatsa, "Transformative Constitutionalism in South Africa: 20 Years of Democracy," *Journal of Social Sciences* 5, no. 27 (2014): 887.

experts in constitutional law call the need for cooperation and coordination between the three arms of government.[249]

2.4 The Doctrine of Separation of Powers from Montesquieu Postulation

It was settled that Charles de Secondat, Baron de la Brede et de Montesquieu (hereinafter referred to as Montesquieu) is the father of SOP.[250] Asserting the place of Montesquieu on S.O.P, Madison argued that "the oracle who was always consulted and cited on this subject (S.O.P) was celebrated Montesquieu."[251] He was a French philosopher, political theorist and was considered as first modern political scientist. Montesquieu's postulation on S.O.P was contained in his book "*The Spirit of Laws*" a book in which he described three types of government and their principles.[252] The theory of division of powers, as per Charles De Montesquieu, was established on the craving for political freedom for the nationals in a state. Thus he advocated that the three powers of the organs of government the lawmaking body, the official and what ought to be kept an eye on by diverse persons and their capacities appropriately co-composed such that freedom is accomplished with no powers subsumed in the other. They must keep up their independence to accomplish their motivation. According to Robert Shackleton, he said that "S.O.P was one of the most important contributions to check and balance between three arms of government, legislative, executive and the judiciary."[253]

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[249] Ibid.

[250]Benjamin F. Wright, "The Origins of the Separation of Powers in America," *Law Review* 2, no. 40 (1933): 169. Dunn, John, The Meaning of the Separation of Powers. An Analysis of the Doctrine from its Origin to the Adoption of the United States Constitution.(Tulane Studies in Political Science,(Tulane University: Press, 1965), 159.

[251]*Bernard Martin , Balances and Boundaries: The Separation of Powers in the Constitutional Debate of 1787,(ed.)27* (Cambridge: Cambridge University Press, 1994),45.

[252] Thomas Nugent, trans., *The Spirit of the Laws*, (London:University Colege Cork, 2010), 137.

[253] Robert Shackleton, "Montesquieu, Bolingbroke, and the Separation of Powers," *French Studies* III, no. 1 (1949): 25.

Montesquieu believed that there are three types of powers, namely legislative, executive and the judiciary.[254] This division of powers into three was a universal conception in the field of S.O.P.[255] The doctrine of S.O.P is a system that regulates the distinct powers of the three branches and how they relate with each other.[256] The law making functions resides in the legislature. They enact new legislation and amend or repeal existing ones. As for the executives, they deal with security and the protection of the territorial borders of the state in peace and war situations and handle the foreign policy and relations with the state. The judiciary, however, punishes offenders who have violated the laws and adjudicate disputes that may arise between government bodies and disputes between government and individuals.[257]

It should be stated that although Montesquieu was believed to be the father of S.O.P, the statement does not erase the link of the doctrine to scholars such as Plato and Aristotle. Traces of the idea can be located in the Plato's book "*The Republica*,"[258]as well as the writings of *Aristotle* in which he classified governmental functions into "the deliberative, the magisterial, and the judicative."[259] Some later scholars such Willian Bondy and A.T. Vanderbilt argued that Aristotle was the founding father of S.O.P.[260]

The need to separate the three governmental powers is to ensure that, none of the three powers accumulate excessive powers that it could abuse. This was captured by Magill, who says:-

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[254] Thomas Nugent, trans., *The Spirit of the Laws*, (London:University Colege Cork, 2010),137.
[255] Neal Kumar Katyal, "Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within," Yale *Law Journal*, 115, no.2314 (2006):100. M Elizabeth Magill, "The Real Separation in Separation of Powers Law," *Law Review* 86, no.6 (September 2000):127.
[256] Ibid.
[257] Ibid.
[258]George Holland Sabine, *A History of Political Theory* (Oxford: IBH Publishing, 1950), 45.
[259]Charles M. Fombad, "Separation of Powers in African Constitutionalism," *Law Journal* check the full name of the journal 25, no.2 (March 2005): 301.
[260]Ibid,76.

> "It holds that separation of powers was a way to prevent a single institution of government from accumulating excessive political power; the way to achieve that objective was to disperse the three governmental powers, legislative, executive, and judicial among different institutions and equip each department with select powers to protect itself and police the other departments."[261]

The idea of protecting liberty shaped Montesquieu's postulation of the doctrine of S.O.P.[262] For there to be a Constitution of liberty, Montesquieu believed that the different governmental responsibility must be separated between different actors. Although this has been criticised by scholars such as Laurence Claus,[263] but still Montesquieu's postulation remains a key in the world of constitutional law dealing with separation of powers. According to Montesquieu:-

> "{w} hen the legislative and executive powers are united in the same person; or in the same body of Magistrates there can be no liberty, because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner."[264]

Again, there was no liberty if the judicial power was not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subjects would be exposed to arbitrary control, for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

There would be an end to everything were the same man or the same body, whether of the nobles or of the people, to exercise those three powers that of enacting laws, that of executing the public resolutions, and trying the causes of individuals.[265] The above Montesquieu's postulations received acceptance across jurisdictions. It has been adopted and practiced across jurisdictions, developed, developing and even the

[261]Ibid.
[262] Thomas Nugent, trans., *The Spirit of the Laws*, (London:University Colege Cork, 2010),137.
[263] Laurence Claus, "Montesquieu's Mistakes and the True Meaning of Separation," *Journal of Legal Studies* 25, no. 3 (2005): 419.
[264] Ibid.
[265] Thomas Nugent, trans., *The Spirit of the Laws* (London:University Colege Cork, 2010), 138

less developed. The United States, Columbia and Malaysia are good examples. Evidence of adopting the doctrine in Iraqi*s* constitutional law abounds. This was seen in some of the Iraqis Constitutions, such as the Iraqi Constitution 2005. A detailed examination of the adoption and demonstration of the doctrine of S.O.P under the Iraqi's constitutional experiment has been provided in the next chapter.

In the United States, the framers of the 1787 US Constitution clearly incorporated the doctrine of S.O.P between the three government institutions the legislative, executive and the judiciary.[266] The doctrine of S.O.P has been provided in Articles I, II and III of the US Constitution. Article I deals with the legislative powers. It vests all legislative powers in the United State Congress, which consists of the Senate and the House of Representatives. Article II, regulates the executive powers of the United States and unambiguously vests the executive powers to the President of the United States. The judicial powers vestes in the Supreme Court of the United States and such inferior courts as may be established from time to time by the Congress of the United States of America.[267] For clarity, Articles I, II and III are reproduced below Article I:-"All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."Article II:- The executive Power shall be vested in a President of the United States of America."Article III:- "The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." In summarizing the provisions of Articles I,II and III Buchanan aptly stated thus:-

[266] Steven G Calabresi and Justin Braga, "Judge Robert H. Bork and Professor Bruce Ackerman: An Essay on the Tempting of America," *Law Review* 13, no.5 (2015): 1.
[267] Articles I, II and III, The Constitution of the United States of America.

> "The Constitution distinguishes three great offices, powers or functions: the legislative, the executive, and the judiciary; and to them are assigned respectively three uses of practical reason: the making of laws, the executing or administration of laws, and the adjudication of laws. Furthermore, the Constitution not only divides these functions, but also separates them by making the institutions equal and independent."[268]

In the Federalist No. 47, James Madison emphasized the importance of establishing and maintaining the S.O.P of the Constitution of the United States:-

> "The reasons on which Montesquieu grounds his maxim, are a further demonstration of his meaning. 'When the legislative and executive powers are united in the same person or body,' says he, 'there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner.' Again: 'Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor."[269]

According to Madison, separating the legislative and executive power serves as essential protection of citizens against tyranny. That was why the framers of the US Constitution carefully demarcated the area of legislative and executive and executive responsibility by placing law making function power in the hands of legislative (Congress) and executive power in the executive comprising the President and his cabinet. In *Buckley v Valeo,*[270] the Court held that:- The Constitution was nonetheless true to Montesquieu's well known maxim that the legislative, executive, and judicial departments ought to be separate and distinct.[271]

By the doctrine of S.O.P, the three distinct powers of the government, namely the executive, the legislature and the judicial should be kept separate. The Federalist was an endorsement of the position and understanding that law making should be left to

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[268] Scott Milross Buchanan, So Reason Can Rule*:* The Constitution Revisited, 1 no.4 (Center for the Study of Democratic Institutions, 1968), 442, cited in Edward H. Levi, "Some Aspects of Separation of Powers," *Law Review* 435, no.371(1976): 371.
[269] Federalist No. 47, (James Madison) (Hamilton et al. 1961), 303
[270] Thomas Nugent, trans., *The Spirit of the Laws*, (London:University Colege Cork, 2010),137.
[271] 424 US 1, (1976), 120.

the legislature, administration and execution should be the business of the executive. Adjudicative, however, should be the duty of the judiciary. In other words, the duty of the adjudicative function should be within the exclusive province of the judiciary on which neither the executive or the legislature is welcome.[272] The caution about S.O.P of government was restated in The Federalist 47, quoting Montesquieu with approval Madison stated that:- "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator."[273] The idea of conferring to the courts the business of interpretation is as Mathew Robinson put, it was because "just as federal agencies regulate sectors of the economy, judges often act as regulators of the legislative system itself. In the legislative context, the judicial function was very much about accounting for externalities the costs and benefits that the other branches have not considered."[274]

In most jurisdictions that practices S.O.P, the judiciary has always and successfully demonstrated its judicial supervision of the other branches of government. In fact, it has always mediated between the executive and the legislature in a conflict situation and when there exist competing interests between the two. This is demonstrated by the US Supreme Court on conflict of powers to declare war between the executive and the congress,[275] and issues dealing with competing interest between executive privilege and Congress power to demand for information from the executive in what

[272]Matthew Robinson, "Deferring to Congressional Interpretations of Ambiguous Statutory Provisions," *Journal Legislation and Public Policy*, 16, no.565, :2013): 563.
[273] The Federalist No. 47, (James Madison) (1961), 326.
[274]Matthew Robinson, "Deferring to Congressional Interpretations of Ambiguous Statutory Provisions," Journal Legislation and Public Policy, 16, no.565 , 2013): 570-571.

[275] Eric Talbot Jensen, "Future War and the War Powers Resolution," *Law Review* 29, no.3 (2015): 499.

was called the Solyndra Congressional investigation.[276] In this, there was struggle between the executive and the Congress in what the Congress believed was an act of withholding of information by President Obama on the one hand and the belief by the executive that the Congress does not have the power to demand for the information not to talk of the fact that same is with held here the US Supreme Court came in and held that though executive privilege was not clearly stated in the US Constitution and so is the power of Congress to demand for information from the executive branch but that both are "rooted in the Constitution's system of checks and balances."[277] This was a clear demonstration of the adjudicative role of the Supreme Court, in reconciling between what Jason termed competing "interests of presidential confidentiality and congressional accountability" that have always conflicted.[278]

2.5 The Pronouncements of Scholars and Courts on the Doctrine of Separation of Powers Across the Globe

The inclusion of the doctrine of S.O.P in Constitutions across different jurisdictions is a settled issue. The same applies to its existence in the writing of philosophers and scholars of constitutional law and politics. The inclusion of the concept was well known under the American jurisprudence. The US Constitution reveals that the term S.O.P was not used, but the structure of the distribution of the powers in the constitution indicates that. According to Jonathan, the term 'separation of powers' appears nowhere in the Constitution.[279] Nevertheless, the design of federal authority among the three distinct branches is one of the defining features of the American

[276]Jason M. Crawford, "Solar Power Struggle: The Inter-Branch Dispute over Information in the Solyndra Congressional Investigation," *Law Review* 39, no.5 (2015): 1.
[277]Ibid.
[278] Ibid.
[279] Jonathan L Entin,"Separation of Powers, the Political Branches, and the Limits of Judicial Review," *Ohio State Law Review* 51, no.75(1990): 175.

governmental system.[280] Rebecca L. Brown equally argued that "The principle of S.O.P was a prominent feature of the body of the US Constitution, dictating the form, function and structure of a government of limited powers."[281] Demonstrating the inclusion of the concept in the US The US Supreme Court per Justice Louis D. Brandeis in *Myers* v. *USA* stated that:-

> "The doctrine of separation of powers was adopted by the Convention of 1878 not to promote efficiency but to preclude the exercise of arbitrary powers. The purpose was not to avoid friction, but by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."[282]

Gerhard believed that the doctrine of S.O.P in the United States was something that existed since the time of the revolution.[283] Gerhard posited that S.O.P was core to the American constitutional system and argued that "the separation of governmental powers along functional lines has been a core concept of American constitutional law ever since the Revolution."[284] Further evidence of the existence of the doctrine of S.O.P "as a fundamental normative principle" in the US for centuries could be seen from the examination of ealier Constitution of some of the states within the United State. The reference here could be made to the State of Maryland and Virginia.[285]

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[280] Ibid.
[281]Rebecca L Brown, *Separated Powers and Ordered Liberty* (University of Pennsylvania: Law Review, 1991), 1513.
[282] 25,no.2 (1962) 272.
[283] Ibid.
[284] Gerhard Casper, "Essay in Separation of Powers: Some Early Versions and Practices," *Law Review* 30, no.2 (1988): 211.
[285]Article VI of the Maryland Declaration of Rights of 1776 thus provided "that the legislative, executive and judicial powers of government, ought to be forever separate and distinct from each other." In the case of Virginia, theVirginia state restressed in its Constitution, its commitment to the concept of separation of powers. The 1776 Virginia Bill of Rights declared that "the legislative, executive, and judiciary department, shall be separate and distinct, so that neither exercise the powers properly belonging to the other: nor shall any person exercise the powers of more than one of them, at the same time..." The New Hampshire Bill of Rights is also instructive. displayed a deeper appreciation of the problem than the more barren assertions in all the other state constitutions: Article XXXVII of the Constitution provides that "In the government of this state, the three essential powersthereof, to wit, the legislative, executive and judicial, ought tobe kept as separate from and independent of each other, as the nature of a free government will admit, or as is consistent withthat

Similar provisions are evident in other state Constitutions across the US. The states of "Massachusetts, New Hampshire, North Carolina," etc are other good examples. In fact, a study suggests that a review of most state constitutions enacted between the year 1776 to 1787 had provisions for S.O.P.[286]

Not only was S.O.P a feature in the US Constitution, it was a fundamental concept under the French Constitution. The French Declaration of the Rights of Man of 1789 clearly stressed the importance of the concept under the French constitutional system. The French Declaration declared in its Article 16 that a country cannot be said to have a Constitution when its constitutional system does not have the S.O.P contained in it. The Article provides "A society in which the observance of the law was not assured, nor the S.O.P defined, has no Constitution at all."[287]

Although scholars such as Robert Dahl argued that the Supreme Court is the apex court, the US Supreme Court "was a policy making institution,[288]" the US Courts clearly explained the role of the separated branches in several cases. On the issue of legislative powers the US Supreme Court stated the function of the legislature in the case of *Yakus v. United States*.[289] According to the court "the essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct." On the judicial powers

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chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity."

[286]Gerhard Casper, "Essay in Separation of Powers: Some Early Versions and Practices," *Law Review* 30, no.2 (1988): 214.

[287] Article 16, French Declaration of the Right of Man, 1789.

[288]Robert A. Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker," Journal of *Public Law*, 57, no.1(1957):280.

[289] Ibid.

in contra distinction from the legislature, the US Supreme Court opined in the case of *Prentis V. Atlanctic Coast Line*,[290]

> A judicial inquiry investigates, declares and enforces liabilities as they stand in present or past facts and under laws supposed already to exist. That was the purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter.[291]

Warning on the likely encroachment and the need for the legislature to desist from interfering on the exercise and the powers of the judiciary the US Supreme Court stated in *Springer* v. *Government of the Philippine Islands*,[292] that:-

> It may be stated then, as a general rule inherent in the American constitutional system that unless otherwise expressly provided or incidental to the powers conferred, the legislative cannot exercise powers either executive or judicial power."

Amids the warnings for non encroachment, scholars are of the view that the judiciary still has the added responsibility of ascertaining whether one branch in the exercise has encroached the "turf" of the other branches.[293] Among the writings on the doctrine of S.O.P . Vile offered one of the best description of the doctrine of S.O.P between the three branches of government and the need for each branch to keep within the limits and bounds of its constitutional responsibility. According to Vile:-

> "A "pure doctrine" of separation of powers might be formulated in the following way: It was essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments, the legislature, the executive, and the judiciary. To each of these three branches there was a corresponding identifiable function of government, legislative, executive, or judicial. Each branch of the government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch. In this

[290] 321 US 414 A 424.
[291]211 US 210 at 226 (1908).
[292] 277 US 189, 201.
[293]Rebecca L. Brown, *Separated Powers and Ordered Liberty* (University of Pennsylvania: Law Review,1991):1519.

> way each of the branches will be a check to the others and no single group of people will be able to control the machinery of the State.[294]

Even under the UK constitutional system, evidence abound that the separation of powers exist to certain extent. According to Lord Diplock in the judicial authority of *Duport Steels v. Sirs exist,*[295] he said that "it cannot be too strongly empahsised that the British Constitution, though largely unwritten, is firmly based on S.O.P."[296] Philosophers and thinkers are not left in the discussions on separation of powers. Writers such as Godechot believed that a country cannot be said to have a Constitution if it does not separate the three departments of powers i.e. the executive, the legislature and the judiciary. According to Godecthot, he said that: "A society in which the guarantee of rights was not assured, nor the separation of powers provided for, has no Constitution."[297] S.O.P according to Gerhard Casper "is a functional concept; separation is a necessary, if not a sufficient, condition of liberty. Its absence promotes tyranny."[298] The whole idea about the doctrine of S.O.P was to avoid over concentration of powers in the hands of one branch of the government over and above the other branches. This was to avoid and prevent dictatorship. According to Carl J. Friedrich, he warned that combining the powers on a branch of the government leads to dictatorship.[299] Carl stated that "many who today belittle the S.O.P seem unaware of the fact that their clamour for efficiency and expediency

[294] B.M. J. C. Vile, *Constitutionalism and the Separation of Powers* (Oxford: Clarendon Press, 1967), 87. See also W.B. Gwyn, "The Separation of Powers and Representative Government," *The Political Science Reviewer* 3, (1973): 45.
[295] (1980) 1 ALL ER 529.swarb.co.uk/duport-steels-ltd-v-sirs-hl-3-jan-1980/ (accessed 12 March,2016).
[296] Ibid.
[297] Jacques Godechot, Les Constitutions de La France Depuis 1789. 228 (1970). See also Gerhard Casper, "Essay in Separation of Powers: Some Early Versions and Practices," *Law Review* 30, no.2 (1988): 212.
[298] Gerhard Casper, "Essay in Separation of Powers: Some Early Versions and Practices," Law Review 30, no.2 (1988): 214.
[299] Carl J. Friedrich, Constitutional Government and Democracy (1946), 175.

easily leads to dictatorship."[300] Similar reasoning was reached in Australia in the case of *Polyuchowich v. The Commonwealth*.[301] The court held that:-

> The separation of judicial from the executive and legislative powers had long been recognised at the time of the Federation. It is to ensure that the life, liberty, and property of the subjects was not in the hands of arbitrary judges, whose decisions are then regulated only by their own opinions and not by any fundamental principles of law. Parliament cannot usurp the judicial powers of the commonwealth by itself purporting to exercise judicial powers in the form of legislation".

The need to secure the liberty of citizens is one of the reasons, according to the US Supreme Court and scholars such as L. Brown. According to Rebecca L Brown, the inclusion of separation of powers was, the first step towards securing the liberty of the Americans. Rebecca posited that the makers of the American Constitution "already made provision for the requirements of ordered liberty through the structure of the government (S.O.P) they had crafted in the original Constitution."[302]

2.6 The Pillars of the Doctrine of Separation of Powers

The working of S.O.P under constitutional democracies depends on vital pillars that support the structure of separation of powers. The existence of these pillars is considered as preconditions for the working of the doctrine of S.O.P. These pillars include the concept of judicial independence, and checks and balances.

2.6.1 The Concept of Judicial Independence

Judicial independence is considered a key concept in the smooth working of the doctrine of S.O.P. In other words, for the better working of the doctrine of S.O.P under any constitutional democracies such as Iraq, the judicial branch of the

[300] Ibid.
[301] (1991) 172 CLR 501, at 606-607.
[302] Rebecca L Brown, *Separated Powers and Ordered Liberty* (University of Pennsylvania:Law Review, 1991), 1513.

government like the others i.e. legislative and executive necessarily needs to have institutional independence. The judiciary must have the authority to handle its internal affairs without any undue interference by either the executive or the legislative branches of government. This does not in any way implies that the judiciary should be exempted from the vigilance and scrutiny of the other branches in deserving circumstances. The independence of the judiciary should not be limited to the independence in managing its affairs free from the interference of the other branches, but should extend to the issues of independence of judges manning the courts. Judges need to be independent in cases being handled by them or cases filed before them. This is to prevent subversion of the cause of justice in cases that the judges may be personally interested or in those cases the "politicians" may be interested in or even the government of the day. Independence of the judges is a crucial issue in the discussions of constitutional democracies and S.O.P. It is crucial because it insulate judges from the interference of the other branches and from involving in partisan politics. The independence of judges in discharging their functions is brought to test in cases of government interest bearing in the issue of their appointment/selection which involves the other branches of government. This presupposes that the appointment process must be based on merit and not on party affiliations or the interest of the other branches of government.[303] Where the appointment process of the judges is not transparent and is organised in such that links are established between the judges and their appointing bodies, the neutrality of the judges is highly questioned. This was well captured by Garoupa and Ginsburg. According to them, "an appointment mechanism that appears to link the selected

[303]Nuno Garoupa and Tom Ginsburg, "Comparative Law and Economics of Judicial Councils," *Journal International Law* 27, (2009): 53.

judge too closely to the appointing body calls into question whether the judge can be relied upon to deliver neutral, legitimate, high-quality decisions.[304]

In safeguarding judicial independence, the appointment and removal process must be fair and transparent. Neither the executive alone nor the legislature be conferred with the sole powers of appointment and removal. Judges must be assured the security of their tenure. The funds for the judiciary must not be subject to whims and caprices of the other branches of government. In other words, the judiciary must be guaranteed financial independence to function effectively without the temptation of dancing to the tune of any of the other branches. The judiciary must never be allowed to run out of funds to the extent that they are seen going "cap in hand" looking for funds. This is necessary and vital for the smooth running of the court affairs an in enthroning a judicially independent arm of government in the discharge of its functions. Happily, the Iraq Constitution 2005 in unambiguous terms declares the Iraq's court independence in both administrative and financial terms. This is seen in Article 92 of the Iraqi Constitution 2005. The Article provides that the "Supreme Court is an independent judicial body, financially and administratively."[305] Whether in reality the Iraq FSC is independent as declared above is a matter of fact to be ascertained.

The other factor to be considered in enthroning an independent judicial arm of government is the need for the establishment of a transparent disciplinary mechanism or process for judicial officers. The process must not be open to abuse and should be transparent. Judges should be able to discharge their functions without fear of any victimisation through the instrumentality of the disciplinary process. Holding sittings in public is another aspect of guaranteeing judicial independence. Courts must not

[304]Ibid., 54.
[305] Article 92 of the Iraqi Constitution 2005.

be allowed to hold their sittings in secret. The general public must be allowed access so that the common man may witness and be able to say that justice is done, but that was manifestly shown in the way the cases are publicly handled and decided. The next segment is on the checks and balances-vital elements in ensuring the working of the doctrine of SOP.

2.6.2 Checks and Balances

The operation of the doctrine of S.O.P, thrives only in democratic settings. According to Kurland, S.O.P system and checks and balances system are interconnected.[306] Under the democratic arrangement, the majority if left unchecked, could be tyrannical against the minority interest. Checks also become necessary because the three powers aspires to compete towards maximising their powers. Kumar citing James Madison echoed the sentiment that "Ambition must be made to counteract ambition."[307] Power should check the power. This is necessary for the assurance of a healthy and stabilized system of government and the protection of liberty.[308] In other words, while the doctrine of S.O.P tries to keep the powers of the three institutions of government, a system of interdependence is created between them with each branch having some powers to check the excesses of the other.[309] This was achieved through the check and balance system and is a sure way of protecting the public interests from the tyranny.[310]

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[306]Philip B. Kurland, *The Rise and Fall of the Doctrine of Separation of Powers* ((Chicago: University of .Chicago Press, 1986), 593.
[307]The federalist no. 51, at 321-22 (James Madison) (1961) cited by Neal Kumar Katyal, "Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within," *Law Journal* 115, no,23, (2006): 65.
[308]Ibid., 2.
[309] Edward H. Levi, "Some Aspects of Separation of Powers," *Law Review* 76, no.3(1976): 376.
[310] Ibid.

Montesquieu does not only advocate the value of checks and balances for the protection of fundamental liberties in S.O.P system. Other writers like Benjamin has equally seen such value and preached the need for checks and balance.[311] Montesquieu aptly preached the need for checks and balances once powers are separated. According to Montesquieu, to prevent abuse of power, " it was necessary from the nature of thing that power should check the power."[312]

The checks between the three distinct powers come in several fashions. For example, the legislature could control the executive in two basic and important ways. These are powers of the Congress to veto the executive and power to appropriate funds. As for the judiciary, they are controlled by the legislature through the power of the legislature to define the courts' jurisdiction and the power to confirm or reject an executive nomination of judges of courts.[313] These checks serve as "devices create a stabilising mutual dependency between the two branches."[314]

But these checks and balances system is not easily operational as thought. This is because in some occasions the party system may be a clog in the check and balance system. This occurs where the executive and the legislature are, for instance, controlled by one party. Neal Kumar believed that in these circumstances "considerations of loyalty, discipline, and self-interest generally preclude inter-branch checking."[315]

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[311] Benjamin F. Wright, "The Origins of the Separation of Powers in America,(*Chicago:University of Chicago Press, 1978)*: 169.
[312] Thomas Nugent, trans., *The Spirit of the Laws*, (Boston: Digireads, 2010), 137.
[313]Harold H.Bruff, "Balance of Forces: Separation of Powers Law in the Administrative State, Law Legal Studies,"(University of Colorado: School of Law ,1996):14;.Available at SSRN:http://ssrn.com/abstract=902664(accessed Junuary 3,2016).
[314] Ibid.
[315] Neal Kumar Katyal, "Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within," *Law Journal* 115, no.4 (2006):107.

2.7 The History and Role of the Supreme Court in Advancing Constitutional Democracies

The institution of the Supreme Court was a feature in all constitutional democracies. Historically, the court is more often a creation of the Constitution. This is evident in jurisdictions such as the United States. In other jurisdictions such as Canada, the Supreme Court, although today is a constitutional creation, but its historical roots are traced to an Act of the Canadian Parliament.

The role that the Supreme Court has played in shaping the constitutional and social systems in places such as the US cannot be quantified. Today, one can say that the decision of the US Supreme Court in *Mabury vs. Madison* is a key in explaining the jurisprudence on the S.O.P and the powers of judicial review of the Court across the globe, especially in the area of Constitutional and Adminstrative law.[316] However, scholars such as C.H. Sherrin argued that the role of the court in bringing social changes and moral education far outweigh the role legislation has played in that regard. According Sherrin:-

> "That the great opinions of the Supreme Court help to make the people what they are by telling them what they may be; that many decisions have brought about social changes and greater equality at an earlier time than could have been achieved by legislation; and that the court is a powerful force for moral education."[317]

The role of the US Supreme Court transcend the civil sphere. The role of the court in the interpretation of the New York execution law within the purview of the Constitutional provisions of the New York State and the US Federal Constitution on the issue of cruelty in the use of the electric chair in carrying death penalty is very relevant. In 1890, the Supreme Court while upholding the constitutionality of the first ever execution by electrocution, the court rejected William Kemmler's (accused)

[316]C. H. Sherrin and Archibald Cox, *The Role of the Supreme Court in American Government* , "*Marquetle Law Review"*,50.no,4(1967), 366.
[317] Ibid.

lawyers argument to the effect that electrocution through the use of electric chair violates the New York state's constitutional provision banning "cruel and un usual punishment,"which was similar to the contents of both the Eighth Amendment and the Fourteenth Amendment that guarantee American the "privileges and immunities and due process." In stating the duty of the court, Chief Justice Fuller stated the duty of the court, in the determination of constitutionality of punishments and what the State is prohibited by the Contitution was:-

The imposition of cruel and unusual punishments, and that such punishments are also prohibited by inclusion in the term 'due process of law.' So that, if the punishment prescribed for an offense against the laws of the State were manifestly cruel and unusual as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition. And we think this equally true of the Eighth amendment, in its application to Congress. Punishments are cruel when they involve torture or a lingering death, but the punishment of death is not cruel within the meaning of that word as used in the Constitution. It implies something inhuman and barbarous, something more than the extinguishment of life. The decision of the state courts sustaining the validity of the act under the state Constitution was not examinable here, nor was that decision against any title, right, privilege, or immunity specially set up or claimed by the petitioners under the Constitution of the United States.[318]

2.8 Conclusion

The phrase "separation of powers" implies that whatever measure of political powers that exist in any given state, it ought not be consumed or combined in one individual

[318] Quoted in Michael Parrish, *The Supreme Court and Capital Punishment* (Washinton:CQ Press, A division of SAGE, 2010), 33.

or group of persons. This implies that the current powers must be isolated into diverse organs, and that whatever power gathering to any organs ought not be meddled with by another organ. By this precept of "division of powers", the elements of government in any specific state or nation can be isolated in three legislature, executive and judiciary. The legislative power is the power to make laws; the executive power is the power to implement the laws made by the legislature; and the judicial power is the power to decipher and apply the laws to the people whom the official accused of violation of laws. In other words, the three functions of government: legislature, judiciary and executive are indicated in the idea behind the doctrine of S.O.P. These functions must not only be separated but must also be implemented by different individuals or groups. This indicates that the three powers must not be vested in the hand of a single individual or a group of person, but should be entrusted to a three different agencies for coordination, implementation and common independence. The whole idea of the doctrine of S.O.P in modern times stems from the writing of Mostesquiue entitled *De l'esprit des Lois* (The Spirit of Laws). The idea was that never should an individual or body of persons be vested with so many powers under a constitutional government. This is vital if the liberty of the people was to be protected and a stabilising and despotic government was to be prevented. The idea has been accepted across the world and can be found in country's constitutions. The US and the Republic of Iraq are good testimonies. Connected with the separation of powers was the system of checks and balances which is institutionalised to stabilise the government, and to check the ambitions of the respective institutions and to check the tyranny of any of the said institutions. The above historical milestone revealed that the doctrine of S.O.P had its root in English political social cultures and given popularisation by Frenchman. The

adoption of the principle had been in existence in England since the time of King Edward I while its popularisation gained momentum after the devastating French revolution that disrupted the nooks and crannies of European political landscape in the 18th century. It was therefore the French revolution of the 18th century that promoted the idea to all corners of the globe including the United States of America. Although, it needs to be stressed here that most countries that adopted the principle in their Constitutions do so, according to the political culture but the main philosophy of its adoption remain the same- the need to prevent concentration of powers in a single hand. So, if the idea is effectively adopted it has the potential of curbing anarchy and chaos in any given society which will ultimately promote political decorum and such prophetic claim can be better applied in a democratic settings. The doctrine of S.O.P is very important for any state, especially for Iraq because it prevents the government from abusing power and serves as a safeguard to protect freedom for everyone. The next chapter examined and analysed the incorporation of the doctrine of S.O.P under selected Iraqi Constitutions.

CHAPTER THREE

SEPARATION OF POWERS UNDER THE IRAQI CONSTITUTIONAL SYSTEM

3.1 Introduction

The idea of vesting of powers of legal supervision and interpretation on constitutionality of laws is linked to constitutional democracy and the doctrine of S.O.P. This chapter addressed the historical background of constitutional law in Iraq. In this chapter, the researcher provided a brief historical account of constitutional law in Iraq. In the same chapter, an analysis has been made on the doctrine of S.O.P under the Iraqi Constitutions specifically the discussion on S.O.P was limited to the Basic Law of 1925 and the Iraqi Constitution 2005. The analysis in the chapter was by way of making reference to the responses of the interviewees from the transcripts of the interviews and also, from both primary and secondary data, i.e. laws, books, articles, textbooks, government publications, academic journals, newspaper articles, Internet sources. Under this chapter, the researcher answered the first and second research questions as well as achieved the first and second research objective.

3.2 Historical Background of Constitution of Iraq

Iraq has an ancient legal tradition.[319] It has been ruled by the Babylonians, the Hittites, the Kassites, the Chaldeans, the Greeks, the Romans, and finally the Muslims who

began their conquest in the early 7th century.

[319]Saad N. Jawad, The Iraqi Constitution: Structural Flaws and Political Implications, (2013):6.ssuu.com/lsemec/docs/saadjawadfinal/3 (accessed March 26, 2015).

3.2.1 Ancient Times (24th century BCE)

The ancient cities have become an important source of the history for those who lived in the distant centuries before the present generations. In this way there existed a form of political organisation which can be likened to today's states.[320] Such states as it existed in the past evolved a mechanism through which the society could be governed. This was seen in the manner with which each state worshiped gods and at times the most powerful state would subjugate its adjacent weaker states and subjected them to tributary states.[321] One of such states was Akkad, which was dominated by a king named Sargon in the 24th century BCE.[322] The city state encompassed the present day Iran, Syria, and Turkey, as well as Iraq and he (King Sargon) dominated the affairs of governance in the adjoining territories.[323] Thus, his government was so elaborated that the historian identifies it to be the first real empire or kingdom that had many tributary states under its control. As it existed over centuries, when a community or society is founded there is need to evolve a mechanism to govern the society through the maintenance of peace and order. Thus, a form of writing was evolved which used some forms of picture writings like that of hieroglyphic which was formed by Egyptian. But the form of writing created in the city of Sumeria is cuneiform. The act of writing paved the way for the effectiveness in government over long distance. In this way, King Sargon ruled the tributary states through some appointed officials together some officials whose responsibility was to keep records of all the happenings in the empire.[324] The complex political system

[320] Taha Baqer, *The Ancient History of Iraq*, (University of Baghdad: Baghdad Center for Studies, 1999),16.
[321] Ibid.
[322] Ibid.
[323] Ibid.
[324] Ibid.

designed by Mesopotamia is its major legacy the art of bureaucracy and international governance.

3.2.2 Babylon and Hammurabi (18th century BCE)

Southern Mesopotamia began to be ruled in the 18th century BCE by powerful rulers from the city of Babylon.[325] Gradually, the southern part of Mesopotamia lost its control to the rulers of Babylon, where existed the centuries-old legacy of legal proceedings. In the city of Babylon existed the law governing contracts, dispute resolution and property which made the city to be governed without chaos.[326] Besides, the city also developed some kind of laws governing private and public life and such evidence is gleaned through codes discovered by researchers.[327] The codes were not adequately understood until the time of Hammurabi (1795-1750 BCE). Such codes were publicly available on a stone monument during the reign of Hammurabi. Those scholars who discovered the some of these monuments in 20th century were of the view that the Mesopotamia civilisation had great influence on the succeeding generations and all adjacent territories.[328] In a related development, law which is an effective mechanism to ensure justice and good governance said to have the history liked to the Code of Hammurabi.[329] Such code allowed people to have a say in the eventual drafting of law under which they would be governed and such historical milestone remains the unique social and political heritage of the entire region.

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[325] Ibid.
[326] Ibid.
[327] Ibid.
[328] Tqi Aldeavaj, *The Pre-historic Era* (University of Baghdad: Baghdad Center for Studies, 2000), 22.
[329] Claude Hermann Walter Johns, Babylonian Law–The Code of Hammurabi, ENCYCLOPEDIA BRITANNICA 11th ed. (1910-1911),available at http://www.fordham.edu/halsall/ancient/hamcode.html(accessed 21 March, 2015).

With 282 provisions, the Code had a section where gods were thanked and Hammurabi praised. It also in addition divided the society into classes and some kind of punishments were designed for offenders. The society has thus developed a long tradition in act of governance which was based on law.[330] Apart from awarding punishment for the law-breakers and the accused who were found guilty of committing a heinous crime, it also devised mechanism for detecting false accusation which was rooted in article one. False accusation was not allowed and if a person was accused wrongly the accuser was liable to death. Thus, there was an instrument evolved to determine the truthfulness of an offence. This was tested through the sinking of the accused into the water. If he was able to survive the accuser would be dealt with by hanging and the wrongly-accused person would be set free and he took the property of the accuser.[331] There was also learning process which was devised to guide against illegality and wrong judgement from the judges. It was well codified that if a judge administered wrong judgment through omission or error he would be asked to pay twelve times the fine he had previously imposed and would also be stripped of his position as judge.[332] In fact, the effectiveness of the Code radiated to all aspects of society at the time including marriage and family relations, property, robbery and other crimes, minimum daily wage, purchase and sale of slaves and the owner's obligations to the slaves, and even the fees charged by doctors, lawyers, and accountants.[333] Such constitutional coverage can still march the contemporary needs of society. Within the society, capital punishment was usually awarded for those who

[330]Code of Hammurabi, 1790 BC, *The Code of Hammurabi is the sixth-kings of the ancient kingdom of Babylon - of the oldest laws written in history* . www.arageek.com/.../8-things-you-may-not-know-about-hammura (accessed 24 March, 2015).
[331] Ibid.
[332] Morris Jastrow, Older and Later Elements in the Code of Hammuapi, American Oriental Society, (1922),33, https://archive.org/stream/journalofamerica36ameruoft/journalofamerica36ameruoft_djvu.txt (accessed, July 9,2015).
[333] Ibid.

commit serious offence and those found guilty would be hanged to death. The Code also provided for "an eye for an eye" punishment, which was rooted in equality and justice.[334] For example, a building engineer who built a house by using poor building materials was subjected to death penalty and if the son of the owner of the house was killed in the process of the house collapsing, then the son of the builder would be killed.

3.2.3 Kassite Dynasty Legal Documents (16th-12th centuries BCE)

It needs to be noted that the Hittites subjugated and overpowered Hammurabi's dynasty from Turkey and the all-time powerful empire crumbled and yielded to foreign invasion in Circa1600 BCE.[335] Such invasion did not terminate the law established by Hammurabi, it was instead adopted by the invader to govern the society.[336] The later empire encompassed Mesopotamia, Palestine and Syria and went as far as all parts of the Mediterranean world for commercial activities. Such activities later allowed the empire to spread its culture, law and traditions to other parts of the known world. The empire was, however short-lived, with another powerful empire subjugated it by Kassites and the city was later renamed with capital city called Durkurigalzu (1530 to1170 BCE).[337] Although little is known about this later empire, but their activities in terms of legal writings have been discovered by scholars. The legal writings found in the empire were basically commercial and transactional agreements and contracts which include the purchase of slaves, as well as cattle, and of disputes related to purchases. Such documents indicated the empire

[334]The Code of Hammurabi:. 1790 BC, The Code of Hammurabi is the sixth-kings of the ancient kingdom of Babylon - of the oldest laws written in history. www.arageek.com/.../8-things-you-may-not-know-about-hammura (accessed, July 10,2015

[335] Ibid.

[336] Ibid.

[337]Richard Hooker, The Kassites mesopotamia, 11,no.5 (July2010), *at* http://www.wsu.edu/~dee/meso/kassites.htm.(accessed July23,2015).

was a prosperous one as it evolved legal proceedings to govern its commercial activities.[338]

Apart from commercial legal activity, there was also evidence of dispute resolution and bill settlement which involved court orders which was presided over by the city prefect, a priest, an official, or the king.[339] The empire also evolved a kind of collateral security in the form of a guarantor who would promise to pay the aggrieved in case of default from the offender.[340] It should be reiterated that some aspects of legal proceedings established by Hammurabi such as river ordeal, was retained to determine the identification of the accused and the accuser in a given case.

3.2.4 Assyrian Conquest (12th-9th century BCE)

One of the most powerful ancient empires was Assyrian who later dominated the political affairs Babylon.[341] Unlike previous conquerors of Babylon, the Assyrians were of Semitic stock who started their conquest through dominating Syria and Armenia in the 12th century BCE.[342] The Assyrians monarchs moved further to overpower Palestine, Babylon, and southern Mesopotamia which later strengthened their hold in the Mediterranean and near east. The empire later stretched eastwards as far as present day Iran, which resulted in compelling people to relocate from one area to another. Such relocation was necessary in order to bring people closer to the constituted authority to forestall any form of rebellion from tributary states.[343] In this manner, there was a real cultural mix which included legal matters. The relocation of

[338] Ibid.
[339] Ibid.
[340] Ibid.
[341] Babylonia, An Introduction to Babylonia and the Law Code of Hammurabi, http://ancienthistory.about.com/od/babylonia/a/aa031400aBabyln.htm, (accessed July,13, 2015).
[342] Ibid.
[343] Ibid.

people from one domain to another remain steadfast under the leadership of King Nebuchadnezzar (604-562 BCE) who conquered Jerusalem with attendant captivation of 7,000 Jews brought under his serfdom in Babylon.[344] With the Assyrians in place, some rules, most especially the one relating to family matters were altered in Mesopotamia and other constituted territories.[345] It is on record that the Assyrians came up with a legal framework that made the life of women more restricted to a certain extent. For example, the right to use women as pawns and collateral security was moderated under Hammurabi, but worsened and unrestrained under the Assyrians.[346] Women of lower class were not allowed to put on purdah and it was only the reserve of upper class women.[347] Live was made difficult for women to get divorce and this made some men to abuse their marriage. Despite all these legal anomalies against women, they were allowed to own property.[348] Such legal pervert was almost unknown in the previous empire under the leadership of Hammurabi.[349]

3.2.5 Other Conquerors (from the 6th century BCE)

The Assyrian empire reached the epoch of its power around 500 BC and made downward trend with the Babylon occupied and subjugated by Cyrus of Persia, the present day geographical location of Iran. The geographical extent of the empire was one of the largest of its kind in the history of the globe. It extended from Egypt in the west and India in the far east.[350] In this circumstance, the Jews who had been under the serfdom of Nebuchadnezzar regained their freedom and returned to their

[344]Haiet Ibrahim, *History of Nebuchadnezzar,* (University of Baghdad, Baghdad Center for Studies, 1986):45.
[345] Ibid.
[346] Ibid.
[347] Ibid.
[348] Ibid.
[349] Ibid.
[350] Ibid.

homeland. This Persian hegemony in the near and far east persisted for a long time and later supplanted the ferocious personality of Alexander the Great who took over the mantle of leadership in Mesopotamia in 333 BCE.[351] As soon as Alexander died, the leadership turned to one of his generals, Seleucus. Thus, in the course of succession dispute between various powers like the Persians, Romans, and Greeks, Mesopotamia lost its glory as it was deserted. Thus, the complicated political system introduced by many conquerors in Mesopotamia, later enriched and reflected in the history of the legal system. It has been argued by scholars that the legal status of women under the leadership of Persia was in a sorrow state as women were not allowed to serve as witness and became the object of the legal system as opposed to the subject.[352]

3.2.6 Early Arab Era (7th century CE)

As rich and powerful the Mesopotamia was, it lost its grandeur and splendour to Islamic civilisation in the 7th century and the name of the empire subsequently changed to al-Iraq.[353] The Arab invasion and proselytisation of Islam was not limited to Iraq alone, it moved out forcefully from the Arabian peninsula to all close and far locations. As the Muslim army invaded other territories so also the need to monitor their activities. The rights of women, children, the old and some other minority groups were clearly identified. For instance, the people of the books, i.e.[354] were allowed to practice their religion and govern themselves.[355] The extent of the Islamic empire encompassed parts of southern Europe, Africa, Western Asia and central

[351] Ibid.
[352] Ibid.
[353] Abdul Aziz Hameed Saleh, *A Brief History of Ancient Iraq* (University of Baghdad, Baghdad Center for Studies, 2010), 23, http://www.aljazeera.net/specialfiles/pages/fc87a796-5e7c-4eb8-ae03-deced819e104 (accessed March 22,2015).
[354] Ibid.
[355]Taha Baqer, *The Ancient History of Iraq*, (University of Baghdad: Baghdad Center for Studies, 1999),19.

Asia. With the expansion in territory and the introduction of Islamic religion, came new rules and regulations that would govern human society according to Islamic injunctions. This Islamic injunction was gradually applied to all conquered territories where Islam was established as the state religion. With the death of the holy prophet Muhammad arose a succession dispute in the Islamic empire and this led to the division that Muslims are witnessing today throughout the Arab world.[356] This division later reflected in the dichotomy between Shia and Sunni. In Iraq, most of the people in the antagonist camp comprised the majority Shia while the rest belong to the Sunni camp.

3.2.7 Abbasid Caliphs (8th-13th century CE)

The division that started after the demise of the holy Prophet resurfaced during the Abbasid period as the revolt was staged against the ruler in Damascus in the 8th century.[357] Hence, with this revolt the Islamic capital was transferred from Damascus to Baghdad, Iraq. The lost glory of Mesopotamia (now Iraq) was regained and Baghdad became a splendid capital city with trading and social interactions with other parts of the world, most especially the far east and the Mediterranean world.[358] During the Abbasid reign, Islam as a religion and way of life witnessed tremendous progress in the areas of Arts, religion, science, philosophy, medicine and in frastructural facilities for all categories of people were provided.[359] In the study of religion, however, law was made an important aspect which the regime developed in order to have proper codification of Islamic law. It was under this research culture and scholarship that Hanafi School emerged in Baghdad, though of Sunni tradition.

[356] Ibid.
[357] Ibid.
[358] Ibid.
[359] Ibid.

The Abbasid rule lasted for 500 years and came to halt with the foreign invasion from the Turks and subsequently by the Mongols in the 13th century.[360] In this case, most of the infrastructure put in place were destroyed and the major trading routes were also lost to invaders.[361] Thus, Baghdad lost its glory as the centre of Islam and scholarship.[362]

3.2.8 Ottoman Empire (14th -20th centuries CE)

As Turks became an important force to reckon with in central Asia they humiliated the Byzantines and established the Ottoman Empire in 1326.[363] The Turkish forces continued their expansion and such led to the capture of Constantinople in 1453 and the empire was renamed Istanbul under the commander of Mehmed.[364] At the height of its prosperity and reign, the empire expanded to three continents i.e. Asia, Africa and Europe.[365] It is important to note here that the geographical location of the empire being at the centre made it accessible to the three continents and some countries like Egypt, countries in eastern Europe and central Asia became an important appendages of the Ottoman empire. The empire was being controlled centrally from Istanbul and the socio-political activities within the empire centered around Istanbul. It was during the reign of Mehmed that succession to the throne by killing was legalised and this received the approval of some jurists within the empire.[366] The government of the empire was basically on the philosophical

[360] Ibid.
[361] Ibid.
[362] Ibid.
[363] Abdul Aziz Hameed Saleh, *A Brief History of Ancient Iraq* (University of Baghdad: Baghdad Center for Studies, 2010), 26, http://www.aljazeera.net/specialfiles/pages/fc87a796-5e7c-4eb8-ae03-deced819e104 (accessed March 22,2015).
[364] Ibid.
[365] Tawfiq al-Saadi, *Half a Century of the History of Iraq and the Arab Cause* (University of Baghdad: Baghdad Center for Studies,1969), 20.
[366] Ibid.

conviction four poles which represented the four pillars of the empire under the head of Grand Vezir[367].

Some other pillars were led by professionals like accountants, treasurers and the chancellors, who were charged with the responsibility of drawing up the Sultan's edicts, the military commander and the judges, responsible for the administration of justice.[368] During Mehmed administration, some of these rules were codified to represent the law of the empire, which was rooted in tradition and customs of the Turks. In the law, there existed, what was termed as criminal law which was normally employed during criminal charges against the subjects.[369] Under Mehmed, the regulation and governing of the empire was divided into the organisation of the government and the military and the other with taxation and treatment of the citizens.[370] This was of necessity because they were not covered by *sharia* law and the *Qu'ran.* Thus, the Sultans did not have constitutional power to alter the course of justice or any part of *sharia* law.[371]

3.2.9 Iraq under Ottoman and Safavid Rule (15th-19th centuries CE)

As mentioned earlier, Iraq formed an integral part of the Ottoman Empire and Basra, Baghdad, and Mosul provinces were for several years under the Administrative tutelage of the empire. All these provinces were indirectly governed under military administration and they had some measures of autonomy to decide on some pertinent issues. Between 16th and 20th centuries, a complicated political situation arose wherein the governance of Iraq was dominated by two foreign powers i.e. Ottomans

[367] Ibid.
[368] Ibid.
[369] Ibid.
[370] Bid.
[371] Ibid.

and the Safavids.[372] This political situation was further aggravated by the religious divide as Ottoman and Safavids prophesied different ideologies as regard Islam. While Safavids were Shia the ottoman on the other hand, were Sunnis. Thus, by the time Safavids occupied Baghdad in 1509, they began the persecution of Sunnis and such atrocity was perpetrated by Iranian shah.[373] This led to bitter confrontation between both rulers of Safavids and Ottoman and the later regained the control of entire Iraq in 1514.[374] It needs to be stated that despite the eventual control of Iraq by the Ottoman Empire, the Safavids still retained the control of some parts of Iraq. Where Safavids maintained their stronghold in Iraq many Shia migrated there from Iran and later formed the majority in Iraq.[375] This time represented an important episode in the history of religious divide in Iraq as each power trying to assert its control over Iraq. Again, another incursion occurred in 1623 where Safavids re-conquered Baghdad under Shah Abbas, but were repelled again by the forces of Sultan Murad IV.[376]

Thus, the treaty which was later signed between both parties confirmed the region formally as Ottoman possession.[377] Notwithstanding this treaty, the internal strives remained predominant against Ottoman occupation and this gave Iran some leverage to have some influence in southern parts of Iraq. In this manner, the Ottoman's greater control was basically more effective in the major cities. It needs to be recognised at this point that in the 18th century, some of the rulers who governed the provinces of Basra and Baghdad were the Pashas from Georgia.

[372] Sanderson Beck, Africa and the Middle East 1300-1615,(1998), at http://www.san.beck.org/AC4-MidEastAfrica. htm(accessed March 20,2015).
[373] Ibid.
[374]Ibid.
[375] Ibid.
[376] Ibid.
[377] Ibid.

3.2.10 Reform in the Ottoman Empire (mid 19th century CE)

The Turkish control in the most of its empire dwindled towards the beginning of the 19th century. Such weakness was as a result of the emergence of Russia and Greek forces in the eastern part of Europe. [378] And as such, some of the previous~~ly~~ domains occupied by the Ottoman were occupied by Russia. Gradually most of the territories under the control of Ottoman's began to gain their independence and such compelled the Ottoman Empire administrator to devise a working mechanism based on the European model to revitalise their empire.[379] Parts of the changes made were equality of all subjects, regardless of religion, in taxation, military service obligations, eligibility for civil service jobs, and entrance to institutions of higher education run by the state. In addition, every citizen was guaranteed security of life, property, and honour within the empire.[380]

Also, Prussian method was adopted in the conscription process and additional ministries were formed to oversee the development of the legal system. Many changes occurred which enhanced the ability of the citizens to have access to a fair trial and justice. Schools based on secular ideology were also established to ensure the efficacy of European model.[381] In a sense, the unlimited power of the Ottoman monarch became threatened and challenged. There was nothing like absolute power anymore. Some of European laws adopted were: a Penal Code in 1858, modeled on the French Penal Code; a Commercial Procedures Law of 1861, a Civil Code of 1876, and the Criminal Procedures Law of 1979.[382] It needs to be stated at this juncture that some of the changes within the Ottoman Empire had a resounding legal

[378] Ibid.
[379] Tore Kjelien, Tanzimat,Ottoman Empire, (2000):43,http://i-cias.com/e.o/tanzimat.htm, (accessed March 25,2015).
[380] Ibid.
[381] Ibid.
[382] Kadhim al-Moussawi, *Pages in the Political History*, the fourth edition,(University of Baghdad: Baghdad Center for Studies, 2013), 30.

influence on Iraqi society most especially the Land Law of 1858 and the Vilayet Law of 1864. Some of the reforms, most importantly the ones related to land tenure system, was to ensure land security for farmers in order to enhance productivity in the agricultural sector.

3.2.11 Midhat Pasha and Tanzimat in Iraq (mid 19th century CE)

The 19th century witnessed the beginning and the end of the Ottoman control of Iraq. By this time some provincial governments have been exercising some measures of independence over their domains. It is on record that a provincial governor had such independence that he embarked on reforming his territory by building canals, industries, army and printing press.[383]But by 1839, the Ottoman administration was further consolidated to bring Iraq under total control.[384] Thus, despite the consolidation there was gradual attempt to arrange some form of local governance and reorganisation within Iraq. Reforms were embarked upon which led to the establishment of secular schools, organisation of election for local authority and assembly was set up. Land tenure system was also reformed to ensure property rights as opposed to feudalism being practised formerly. It needs to be stated that the individuals under the land reforms did not have rights to own land but he/she could register under a local chief who had a stake in government. Some of these chiefs or Sheiks were influential mainly because of their affinity with their tribesmen.The land reform under Midhat Pasha became a success story that the Istanbul authority began

[383] Ibid.
[384] Sabah Al Mukhtar, "The Rule of Law in Iraq," *Alhowar Journal* 75, no.4 (2000):15. www. allhower. com index,phd.id?4327(accessed 3May,2016)

to suspect his influence in Iraq. Eventually, in 1872 he was asked to come back to Istanbul.[385]

3.2.12 Modern Iraq: Early 20th Century Developments (1908-1918 CE)

In the first decade of the 20th century, there was an attempt by some young Turks to push forward the modernisation process.[386] This they did by proposing the Turkification which was resisted by the Iraqis. At the same time in Baghdad, leaders of secular mind began to emerge from the secular schools formed by Midhat Pasha.[387] Some of them advocated for decentralisation and devolution of power within the Ottoman Empire in order to enhance local participation in the governance in Iraq. Part of their mission was also to push forward the elevation of Arabic as official language which would stand at par with Turkish language. In the midst of this came the World War which spurred the growth of nationalism in the entire Middle East region. During the war, the Turkish was an ally of Germany in opposition to Britain, France, and Russia.[388] Thus, one of the battle fronts in the Middle East was Iraq, which became the target of Britain to settle scores with Germany. In this way, the British army invaded Iraq in 1914 and with little resistance on the way to Baghdad.[389] By this token, the British eventually took the control of the major provinces of Basra Baghdad and Mosul in 1918.[390] In its quest to take control of Iraq from the Turkish, the British entered into covert treaty with Germany to divide the territory. With the zeal of the agreement France wrest the control of

[385] Ibid.
[386] Ibid.
[387] Ibid.
[388] Ibid.
[389] Ibid.
[390] Ibid.

Syria and Lebanon from the Turkish and the British took control of Iraq, Jordan and Israel. Such agreement thus led to the partition of Middle East among the so-called European powers in the second decade of the 20th century.[391] As soon as the agreement was entered into, successfully, the British did not rest and it eventually in tactical manner informed Egypt and Saudi Arabia to rebel against the Ottoman rule.[392] Both countries were promised to be independent as soon as they agreed with the British. In a similar version, a distinct conspiracy was also entered into with the Jewish leaders with the promise that the British would assist in carving out homeland for Jewish in the Palestinian territory. Thus, the agreement between Arab leaders and the British did not materialise and it was purely an act of deception. Surprisingly the Jews agreement was upheld and finally came to fruition. [393]

3.2.13 British Mandate (1920-1932CE)

In this manner, Iraq became the colonial territory of Britain under the leadership of Sir Percy Cox. Because of his busy schedule in Iran, he left the governance of Iraq to be carried out by his deputy Arnold Talbot Wilson.[394] As soon as the British took over the mantle of governance in Iraq, many outstanding issues resurfaced which included disunity among the villagers, the need for effective legal system, land tenure system, and the power sharing.[395] In addition, some parts of the country were not effectively under any government and in this way anarchy set in in some villages among the tribes. In fact, it took sometimes before British authority could be effectively established in the rocky region of Kurdistan. Thus, the British administrator who was charged with the responsibility of governing Iraq decided to

[391] Ibid.
[392] Ibid.
[393] Ibid.
[394] Mazen Mohammed, *Historical Setting in Iraq* (Universty of Basra: Basra Center for Legal Studies,1999), 32.
[395] Ibid.

employ the India bureaucrats instead of Iraqis to fill some lesser administrative positions. In order to deface the remnants of Turkish administration from Iraq, some of the institutions established by the Turkish were dismantled. Instead, British government introduced a Tribal Civil and Criminal Disputes Regulation as it obtained in India at the time.[396]

This was in order to empower some few Sheiks as a ploy for indirect rule process, most especially in dispute resolution and tax collection. Thus, Iraq was not ruled as a mandate, but as an extension of British territory.[397] In 1918, in the second decade of 20th century, a Baghdad Penal Code came into force and the following year saw the enactment of Companies Law.[398] Despite robust British leadership, Iraq was not able to achieve the status of common law governing state. With few modifications, civil law jurisdiction was entrenched. In the course of time the Iraqis were not happy with the British in the manner they administered Iraq as a colonial territory instead of mandated territory. In this way, nationalist movements sprang up which included three secret vociferous societies.[399] It was in this process that one of the religious leaders came up with proclamation that it was against the injunctions of Islamic law for non-Muslim to rule an Islamic state.[400] Such declaration led to the call for *Jihad*, meaning war against the foreigners. Such open revolt against British rule led to violent which culminated in deaths of 6,000 Iraqis and 500 British and Indian soldiers.[401] Despite the settlement of the problem, the revolt brought together various factions in Iraq against the British authority. This was the first attempt at creating the

[396] Ahmed Shujayri, *"Basic Law (Constitution of Iraq) for the Year 1925-An Analytical Study," journal Voice of Iraq* 3, no7 (June 2012),http://www.sotaliraq.com/mobile-item.php?id=111410#axzz3ZYsn1c3s (accessed March 15, 2015).
[397] Ibid.
[398] Ibid.
[399] Ibid.
[400] Ibid.
[401] Ibid.

identity of national Iraqi state. Based on previous division under the Turkish government, the British integrated Mosul with its Kurdish population, Basra, and Baghdad into one unit. It needs to be reiterated that the division that is presently affecting the unity of Iraq was sown during the British administration where the minority Sunnis entirely dominated administrative and political domain. Again in 1920, an attempt was made to constitute government through the Council of Ministers which was headed by the British officials. Although, there were other groups in the running of the governments, but Sunnis dominated it. Thus, local government administration later came into being and there was gradual handing over of power most especially at local level. Monarchical government, modeled after the British was introduced and in this manner Prince Faisal bin Hussein was selected by the British which they hoped would be acceptable to the Iraqi people. [402]

The King was an influential person and the agreement to select him to the exalted position was made at the Cairo Conference in March 1921. [403] Subsequently, the Council of Ministers formally declared him the King afterwards. With the King in place there was a trouble to determine the geographical boundary of the state of Iraq. This was true of the Iraq-Turkish border where the majority of Kurds lived and the British took daunting steps to integrate Kurdish citizens. Thus, in the Mosul area the Kurdish adopted Kurdistan language as their official one while planning ahead to secure independence from Iraq.[404] Unfortunately, in 1923, the Treaty of Lausanne, refused to acknowledge the statehood of Iraq. [405] The modus with which Iraq would be governed was spelled out in a 1925 Basic Law in cooperation with Britain, which

[402] Kadhim al-Moussawi, *Pages in the Political History* (University of Baghdad: Baghdad Center for Studies, 2013), 36.
[403] Ibid.
[404] Abdul Hussein Shaaban, the Problems of Iraq's Interim Constitution, Individual Rights and Political Structures, Brochures Strategy," *Al-Ahram Center for Political and Strategic Studies* 34, no. 140 (March 2004): 4.
[405] Ibid.

stated that Iraq would be under the supervision of Britain for two decades. [406] With this agreement Iraq would continue to follow British advice and admonition in all related matters pertaining to governance. This agreement could be attributed to the fact that Iraq should adopt fiscal policy that would enabled her repay its debt to the British. As time went by, another protocol was signed which eventually reduced the agreement to four years.[407] Thus the Constituent Assembly elected under a May 1922 Electoral Law, met for the first time in March 1924.[408] In addition to ratifying the Protectorate Treaty by a very narrow margin, the Assembly passed the Organic Law, a constitutional document. The King signed it on March 21, 1925, and it went into force right away.[409] This Law established that the government of Iraq consisted of a representative system and a hereditary constitutional.

Much of the discussion before its passage centered on how much of a ruling role the monarch would have.[410]

3.2.14 The Iraqi Constitutions from 1958 to 2000

The establishment of a Republican regime in 1958 marked the end of a permanent Constitution and the introduction of transitional (provisional) Constitutions which lasted until the Iraq invasion of 2003. The first provisional Constitution was promulgated on 27 July 1958 and the Constitution contained only 30 Articles. The

[406] Ibid.
[407] Abdul Hussein Shaaban, "The Problems of Iraq's Interim Constitution, Individual Rights and Political Structures, Brochures Strategy," *Al-Ahram Center* 34, no.140 (May 2004): 4.
[408] Ibid.
[409] King Faisal 1, declared, in coronation speech that, the first thing to do was to direct the conduct of council elections, who will make use of his advice by putting the country's Basic Law into action. Thus, he lamented, would be based on the tenets of democracy and good governance. Under him he established a number of committees which included both Iraqis and Britons. The appointment was based on the need to study and develop the Basic Law of Iraq which came into effect in 1925.
[410] British Occupation and Mandate, at http://www.cogsci.ed.ac.uk/ siamakr/Kurdish/ KURDICA/ 1999/FEB/ iraq-policy.html.(accessed March 12, 2015).

main innovations of the 1958 Constitution was that apart from stressing the republican nature of the Iraqi state, the Constitution declares that Iraq is part of the Arab nation.[411]The most important change in the Iraqi Constitution 1958 was in the ruling system, which changed from a monarchial system to a republican system.[412] The most important happened in this revolution in 1958 was achieved many things to the Iraqi people, such as, a change, the system in Iraq and protect human rights and freedoms to the Iraqi people.[413] In addition democracy started to flourish through the writing of this Iraqi Constitution 1958, because the framers of the Constitution wanted the Iraqi people to have a say in the constitutional making process by way of a referendum.[414]

In 1963, the first republican regime was toppled.[415] The new regime introduced a new provisional Constitution in 1964, which again was replaced in 1968 and 1970 by other provisional Constitutions following coupes.[416] All the three Constitutions contained almost the same ideas and principles included in the first provisional constitution of 1958.[417]

In February 1963, the political system of the Revolution of July 14 was changed and a new political system announced.[418] This gave the National Council of the Revolution Command, the chance to exercise powers that included the legislative and the leadership of the armed forces in the Republic of Iraq as well as the election of the President and the formation of the government. It was published in the Iraqi

[411]Ibid.
[412]Aseel Saicd, Dalia M. Mahir, Federalism in Challenges and Prospective Iraq, 5,no.3(May 2005):1.. http://www. thomasfleiner.ch/fi les/categories/1 ntensivkurs 11/ Asecl.pd f (accesed May 11, 1015).
[413] Ibid.
[414]lhsan Hamid AL-Mafrage,Ktran Saxer Nemaha, *Public Theory of Constitutional Law and Constitutional System of Iraq* (University of Basra: Basra Centre for Legal Studies, 2007), 350.
[415] Bid.
[416] Ibid.
[417]Ibid.
[418]Ibid.

Official Gazette number 797 in 25/04/1963.[419] The Iraqi Constitution 29 April 1964, was another important Constitution in discussing the historical development of Constitutional law in the country. The most important advantages of the 1964 Constitution was that it established a new Republic of Iraq for the first time as a democratic state. The Constitution was also known to the people of Iraq as part of the overall aim of the Arab nation and Arab unity, which the government was committed to work on its implementation, starting with the United Arab Republic.[420] Although the Constitution stipulated democratic principles, but the eight successive governments failed to govern Iraq democratically during the Constitution i.e. there was no public participation.[421] It was direct rule and the Iraqis were not given the chance to effectively contribute in the political process. Constitution of September 1968 was in many respects similar to the 1964 Constitution on the average. Despite the four amendments, but was replaced after less than two years with a new constitution.[422] After two years of the issuance of the 1968 Constitution, the so-called (the dissolved Revolutionary Command Council) commissioned a committee to draft a temporary Constitution.[423] This committee consisted of a Chairman of the Office of Legal Affairs of this council, and professors from the Faculty of Law, University of Baghdad. The Committee held a series of meetings and developed a draft Interim Constitution. Subsequently, another committee was formed with new members as well as former professors from the Faculty of Law and Politics, University of Baghdad. Additionally, the new committee included the president and vice-president of the dissolved revolutionary command council. The new committee sat and then

[419]Newspaper Almutmar,(2014), http://www.almutmar.com/index.php?id=20076210(accessed May 5,2015).
[420] Ibid.
[421] Ibid.
[422]Abdul Haq Al-Ani, "The Constitutional Legacy in Iraq,"newspaper alniqash,3,no.5 (March 2005), http://www.niqash.org/uploaded/documents/al-ani.constitu.heritage.iraq.htm (accessed May 8, 2015).
[423] Ibid.

discussed the draft Constitution and was approved by the council in its resolution No. 792 issued on July 16 1970.[424]

In 1990 the Ba'th Party government of Saddam Hussein formed a committee of specialists to draft a permanent Constitution which was designed to maintain its rule.[425] The draft was never approved and thus the 1970 Constitution remained in force until the regime was removed in 2003.[426] After the fall of Sadam, Iraq had an interim Constitution entitled "Law of Administration for the State of Iraq for the Transitional Period." The Law was commonly known as "Transitional Administrative Law (TAL).[427]

When Iraq was occupied in 2003, by the United States and the United Kingdom, the political parties started writting a new Constitution. This Constitution included some powers to protect the Iraqi people, such as, S.O.P and independence of the judiciary, this so-called Constitution was referred to as Transitional Administrative Law (TAL) and after getting the approval of the political parties, it became the interim Constitution of Iraq.[428] TAL was the result of negotiation between members of the Governing Council of Iraq under the United States of America supervision. The law was ratified by Paul Brenner the then Coalitions of Provisional Authority Administrator. From its inception, the drafters of TAL avoided calling it a Constitution. In fact Ladkar Brahimi special advisor to the UN stated that "no one said it was a Constitution."[429] Notwithstanding the avoidance of calling the

[424]Newspaper Almutmar,(2014), http://www.almutmar.com/index.php?id=20076210(accessed May 4, 2015).
[425] Ibid.
[426]Saad N. Jawad, The Iraqi Constitution: Structural Flaws and Political Implications, (2013):6. ssuu.com/lsemec/docs/saadjawadfinal/3 (accessed March 26, 2015).
[427] O'Leary, Brendan, John McGarry, and Khaled Salih, *The future of Kurdistan in Iraq* (Oxford: University of Pennsylvania Press, 2006),47.
[428] Ibid.
[429]Ibid.

document a constitution, TAL provided the structures that clearly spelt out the procedures under which a constitutional document in permanent form could be drafted, providing in it how the government would be organised and how to regulate the three arms of government on the one hand and the federal state and regional arrangements and the amendment process.[430] It is these characteristics that prompted some scholars to deem the TAL as a Constitution.[431] The characteristics of the TAL being a document containing rules for the establishment and regulation of a government qualifies it as a Constitution. The TAL was considered a very important document because it showed the representation of all the factions in Iraq i.e. Arab Sunni, Arab Shia, and Kurdistan.[432]

In March 2004, a new move for a new Constitution was initiated in Baghdad by the members of the (Governing Council).[433] The move lasted for about a year until the end of 2005. It was guided by a document which seeks to remove the effects of policies and practices of racism and sectarianism. The document emphasised the federal system of government, pluralism and democratic sharing of power between the center, and the regions and the provinces on the basis of historical and geographical facts.[434] It was in two phases. The first from June 2004 and until the election of the legislative Assembly. During this stage, the country was under the management of an interim government chosen by the Iraqi Governing Council (IGC), and the Coalition Provisional Authority (CPA), in consultation with the United Nations. The second stage was between the Legislative Assembly elections,

[430] Ibid.
[431] Ibid.
[432] Ibid.
[433] Ibid.
[434]Salah Badr al-Din, "*The Iraqi State Administration Law for the Transitional Period, Journal ahewar*, 3, no.6 (June2004): 43. www.ahewar.org/debat/show.art.asp?aid=15723,(accessed May 12, 2015).

and until the end of December 2005 .[435] On August 28, 2005, Iraq's constitutional commission approved a draft Constitution.[436] The draft was then read in a session of the National Assembly (although no formal vote was taken). The draft was submitted to a popular referendum on October 15 2005.[437] The current constitutional law climate in Iraq is governed by the Iraqi Constitution 2005.

The 2005 Iraqi Constitution is very important document in the history of Iraq because, it represents nearly all the factions i.e. the Arab Sunni, Shia, Turkmen, Kurds and others.[438] Also the historical background shaped the modern Constitution of Iraq in some point such as :- 1. Official codification: It means that the codification of the legal rule has been formally made by the ruling authority in society such as the Hammurabi Code in ancient Iraq, the aim of this was to determine the political and legal unity in Iraq 2. The legislation has appeared in the form of binding orders issued by Hammurabi, and the publication of the law in modern times is what makes it binding. The current publication is the writing of the legislation in the Official Gazette. The legislation is binding from the date stipulated in the publication. 3. Multiplicity of Judges: Practicing the function of the judiciary in a number of judges and not the hand of one person to adjudicate disputes, 4. Some other codes, such as the Hamorabi Code, have been drafted in a conditional manner, namely, the rule of law in the matter presented and the ensuing punishment. The code Hammurabi, consists of 282 laws, with scaled punishments, adjusting "an eye for an eye, a tooth for a tooth" for example law No. 1: If any one take a male or female slave to the court, or a male or female slave to a freed man, outside the city gates, he shall be put

[435] Shaker Al-Nabulsi, The Interim Iraqi Constitution- The First Steps to Achieve the Promised Political Modernity,(2004). www.m.ahewar.org/s.asp?aid=49001&r=0 (accessed Jaunuary 12,2015).
[436] Ibid.
[437] Ibid.
[438] Ibid.

to death . 2. If anyone is committing a robbery and is caught, then he shall be put to death. Similarly in the Article 19(2) of the Iraqi Constitution 2005 stated that: "There is no crime or punishment except by law. The punishment shall only be for an act that the law considers a crime when perpetrated. A harsher punishment than the applicable punishment at the time of the offense may not be imposed." Above examples show similarity in terms of the crime and its punishment. Also Hammurabi Code, stated about Family rights similarity in Iraqi Constitution Article 29 (1) stated: A. The family is the foundation of society; the State shall preserve it and its religious, moral, and national values. B. the State shall guarantee the protection of motherhood, childhood and old age, shall care for children and youth, and shall provide them with the appropriate conditions to develop their talents and abilities".

The above examples also confirm the similarity and basis of laws in Hammurabi code and the current Iraqi Constitution 2005.

3.3. Separation of Powers under the Basic Law of Iraq 1925

The Basic Law of Iraq 1925 was structured on the pattern of separation of powers. Under the Basic Law of Iraq 1925, the legislative, the executive as well as the judicial powers were separated.[439]

3.3.1 The Legislative Powers

Part III dealt with the legislative powers. Under the Basic Law of Iraq 1925, the legislative powers of the country were vested in two bodies, namely the parliament,

[439] Part III Legislative, Part IV Executive (Council of Minsters) and Part V Judicature, Basic Law of Iraq 1925.

which comprised of the Senate and the Chamber of Deputies on one hand and the King on the other hand.[440]

The appointment process of the parliamentarians was different in nature. Members of the Senate were appointed and not elected. They were appointed by the King from among the members of the society with impeccable character and respect in the eyes of the members of the public.[441] The chosen Senate members, twenty one in all were to serve for a period of 8 years.

Unlike the Senate members, the members of the Chambers of Deputies were elected by the people. One Deputy to 20,000 males.[442] One interesting provision of the Basic Law of Iraq 1925, was that it stated in clear terms that the elected Deputies were not representative of the constituency they came from but are rather representatives of the entire Iraq. In other words, for each deputy, Iraq as a whole constitutes his constituency.[443]

The Basic Law of Iraq 1925, stipulated the qualifications for those who were to hold the office of parliamentarians i.e. Senate or the Chambers of Deputies. Article 30 dealt with the issue of qualification and provided that:-"{n}o person may become a member of the Senate or Chamber of Deputies:-

1. Who is not a national of Iraq.
2. Who claims foreign nationality or protection.
3. Who is less than 30 years of age in the case of deputies and less than 40 years of age in the case of senators.

[440] Article 28, Basic Law of Iraq 1925.
[441] Article 31, Basic Law of Iraq 1925.
[442] Article 36, Basic Law of Iraq 1925.
[443] Article 48, Basic Law of Iraq 1925.

4. Who has been adjudicated bankrupt and has not been legally rehabilitated.
5. Who has been interdicted, such interdiction being still in force.
6. Who has lost his civil rights.
7. Who has been sentenced to a term of imprisonment, for a period not less than 1 year in respect of any offence not of a political nature, or has been sentenced to any imprisonment for theft, bribery, breach of trust, forgery, fraud or any other crime incompatible with personal honor.
8. Who has a material interest, direct or indirect in any contract with a public department of Iraq, unless such interest arises from his being a shareholder in a company composed of more than 25 persons. Farmers of land tax and lessees of Government mulk (2) and miri(3) lands shall be excepted from the operation of this clause.
9. Who is a lunatic or an idiot.
10. Who is related to the King in such degree as may be prescribed by special law: Provided always that no person may be a member of both assemblies at the same time.

A deadlock could arise in parliament in the exercise of the legislative powers. Where a deadlock existed between the two assemblies (Senate and Chambers of Deputies) upon a law submitted twice, in this circumstance, a joint sitting was to be organised

with the Senate President presiding to iron out the issues. A vote of 2/3 of the joint assembly legitimises the law. However, subject to the approval of the King.[444]

3.3.2 Executive Council of Ministers

The executive powers were vested in the Council of Ministers headed by the Prime Minister. This was provided for under Article 64 which stated that:- The number of the Ministers of State shall not exceed 9 nor be less than 6. No person may be a Minister who is under any of the disqualifications mentioned in article 30. A Minister who is not a member of either assembly shall not. remain in office for more than 6 months, unless appointed member of the Senate or elected to the Chamber of Deputies before the expiration of flint period. A Minister who is receiving a salary as a Minister shall not at the same time be entitled to his allowances as member of one of the assemblies. A Minister shall not be allowed to buy or lease any of the property or possessions of the State. Being the executive branch of the government, the council of Ministers was vested with the responsibility of running the state affairs.

The Council comprised of members not exceeding 9. The qualifications of members of the parliament stipulated under Article 30 above apply also to the members of the Council of Ministers.

3.3.3 The Judiciary

Every state in all democracies needs a judicial body that would be responsible for the consideration of the constitutionality of its laws. This judicial body to function as such needs to be independent from political influences. Across the globe most constitutions create constitutional courts and then choose the best of the judges. The

[444] Article 63, Basic Law of Iraq 1925.

Basic Law of Iraq 1925 is not an exception. It established the High Court as the highest court.[445] The High Court has control over the determination of constitutionality of laws in Iraq.[446]

Part V of the Basic Law of Iraq 1925 dealt with the position of the courts. Under the Basic Law of Iraq 1925, the courts were headed by judges appointed based on Royal decrees. The courts included the civil courts, the religious courts as well as the special courts.[447]Article 88 provided for the establishment of special courts and committees for trying military personnel, cases for the disposal of issues involving the different tribes, boundary disputes etc. The Basic Law of Iraq 1925, clearly vested the powers of interpretation of the Constitution in the High Court. Other courts with the requisite jurisdiction also entertained cases on the interpretation of the Constitution and the determination on the constitutionality of laws.[448] The appointment of the judges of the High Court was done by the Senate.[449] In the event of any need for the interpretation of the provisions of the Constitution or the need to determine the constitutionality of any law or regulation, a court shall be convened by a Royal Decree.[450] The same process for the determination on the constitutionality of laws may also call for a special court in circumstances to entertain the interpretation of any law or regulation at the request of any Minister concerned. This special court composed of three member's designation from the judges of a court of Cassation and three other senior administrative officials in accordance with special laws. The Basic Law of Iraq 1925, provided that the decision of the High Court is arrived at only

[445] Abdel Baqi Al-Bakri and Zuhair A-Bashir, *The Entrance to the Study of Law* (University of Baghdad: Baghdad Center for Studies, 2003), 105.
[446] Article 83, Basic Law of Iraq 1925.
[447] Article 68, Basic Law of Iraq 1925.
[448] Article 121, Basic Law of Iraq 1925.
[449] Article 82, Basic Law of Iraq 1925.
[450] Ibid.

when 2/3 majority of the judges agree and it was not appealable.[451] The same rule applied to any decision for interpretation of the provisions of the Basic Law of Iraq 1925, or any decision on the constitutionality of any law or regulation determined by the High Court.[452]

3.4 Separation of Powers under the Iraqi Constitution 2005

Like most democratic Constitutions especially democracies that operate a federal arrangement, the Iraqi Constitution 2005 was designed in such a way that the powers of the three arms of government are separated. The law making function vested in the legislature, the execution function in the executive while the adjudicatory functions in the judiciary headed by the FSC of Iraq. This was simply S.O.P that Jonathan argued, was a constitutional design aimed at promoting the protection of liberties and efficiency in the running of government.[453] Scholars such as Fombad believed that the division of the governmental powers to these three departments of governments was the heart of the S.O.P. Fombad asserted that "at the heart of the S.O.P was the division of powers between three branches the executive, the legislature and the judiciary in order to repel the different threats to liberty that comes with a concentration of powers".[454] In the subsequent subheadings of this chapter, the research examined the relevant provisions of the Iraqi Constitution 2005 to ascertain whether the heart metaphor according to Fombad was reflected in the division of governmental power under the current Iraqi Constitution 2005.

3.4.1 The Legislative Powers

[451] Article 85, Basic Law of Iraq 1925.
[452] Article 86, Basic Law of Iraq 1925.
[453] Entin Jonathan L, "*Separation of Powers, the Political Branches, and the Limits of Judicial Review," Ohio state Law Journal, 51, no. 176 (May 1990): 175.*
[454] *Ibid.*

The legislative power of the Iraqi federation is vested under the Iraqi Constitution 2005 in the Iraqi parliament comprising of two distinct bodies namely the Council of Representatives and the Federation Council.[455] As provided under the Basic Law 1925, the election process of the members of parliament differs. Members of the Representative Council are elected for a term of four years,[456]. A new council shall be elected 45 days to the expiry of the term of the existing members of the Council.[457] It should be noted that the legislative session of a given Council may be extended by the President, Prime Minister of the Republic or the President of the Council of Representatives for a period of not more than 30 days where the Council has a pending legislative issue of constitutional importance.[458]

The election criteria under the Iraqi Constitution 2005 is one representative to 100,000 Iraqis (i.e. 1:100,000 Iraqis).[459] It is important to note that the approach in the Basic Law 1925, regarding the candidate to be elected is that he should be a male not just an Iraqi citizen.[460] The Iraqi Constitution 2005, also followed the approach of the Basic Law 1925, by making the Representatives not representative of the constituency where they come from, but representatives of the entire Iraq. In other words, for each Representative, Iraq as a whole constitutes his/her constituency.[461]

Under the Iraqi Constitution 2005, an Iraqi qualifies to hold the office of a Representative Council if he/she is an Iraqi citizen. And once elected, it is illegal for such a Representative to hold any position or work.[462] Equally, a successfully elected member cannot assume duties as a representative he/she must swear to a prescribed

[455] Article 48 of the Iraqi Constitution 2005.
[456] Article 56 of the Iraqi Constitution 2005.
[457] Article 56(2) of the Iraqi Constitution 2005.
[458] Article 58(2) of the Iraqi Constitution 2005.
[459] Article 49 of the Iraqi Constitution 2005.
[460] Article 36, Basic Law of Iraq 1925.
[461] Article48, Basic Law of Iraq 1925.
[462] Article 49(2) and (6) of the Iraqi Constitution 2005.

oath of allegiance to the Iraqi state which equally doubles as oath of impartiality and neutrality in ensuring the protection of the liberty of the people of Iraq, non-interference with judicial independence and adherence to the rule of law.[463]

The Council of Representative is to be convened by a decree under the directive of the President of the Iraq 15 days after the ratification of the results of the general election.[464] The Council of Representative once inaugurated is given certain powers of drafting laws and investigation. These include the Council's power to enact laws regulating elections, and laws to guide the operations of the Council.[465] The Council has the powers to decide where a case is raised off the authenticity or otherwise of the status of a member as Representative in the Council.[466]

Unlike the Council of Representative, the Federal Council members are neither appointed nor elected. The Federal Council (FC) is to be established by the Council of Representatives. As for the formation of the FC, conditions for membership of the FC is to be determined by a law to be passed by 2/3 majority of the members of the Council of Representatives.[467] This is opposed to the arrangement under the Basic Law 1925, where the Senate the equivalent of the FC under the Iraqi Constitution 2005, are appointed by the King from among the members of the society with impeccable character and respect in the eyes of the members of the public.[468]

[463]Article 50 of the Iraqi Constitution, 2005. The oath runs as follows; "I swear by God the Almighty to carry out my legal tasks and responsibilities devotedly and honestly and preserve the independence and sovereignty of Iraq, and safeguard the interests of its people, and watch over the safety of its land, skies, waters, resources and federal democratic system, and I shall endeavor to protect public and private liberties, the independence of the judiciary and adhere to the applications of the legislation neutrally and faithfully. God is my witness."
[464] Article 54 of the Iraqi Constitution 2005.
[465] Article 51 of the Iraqi Constitution, 2005.
[466] Article 52 of the Iraqi Constitution 2005.
[467] Ibid.
[468] Article 31, Basic Law of Iraq 1925.

3.4.2 The Executive Powers

The executive powers of the Iraqi Republic is vested in the President and the Council of Ministers, Article (66) of the Iraqi constitution 2005 stated that: The federal executive power shall consist of the President of the Republic and the Council of Ministers and shall exercise its powers in accordance with the Constitution and the law. [469] The President is elected by the members of the Council of Representatives out of nominees to be submitted to it and he is to serve as the Head of State and represent the symbol of unity and sovereignty of the country.[470] It is the responsibility of the President to safeguard the unity, sovereignty and the entire territories of Iraq.[471] The President is to deputised by such number of vice to be determined by a law to be enacted. [472] The President serves as the ceremonial head. He equally exercise a wide range of powers under the Iraqi Constitution 2005 such as convening the Council of Representative, accreditation of ambassadors, ratification of death sentences passed by the courts of competent jurisdiction awarding medals and decoration, issuing state pardon all based on the recommendation of the Prime Minister of the Republic; are part of the powers of the President.[473] The President also, appoints the heads of courts, Chief Public Prosecutor.[474]

As to the Council of Ministers, it is headed by the Prime Minister who is the member of the Council of Representative with the highest number of votes. He shall be named by the President of the Republic. Once named he shall, within 30 days of his naming constitute his cabinet comprising his ministers.[475]Where he fails to form a

[469] Article 66 of the Iraqi Constitution 2005.
[470] Article 61 of the Iraqi Constitution 2005.
[471] Article 67 of the Iraqi Constitution 2005.
[472] Article 69(2) of the Iraqi Constitution 2005
[473] Article 73 of the Iraqi Constitution 2005
[474] Ibid.
[475] Ibid.

cabinet within that 30 days the President of the Republic has the powers under the Iraqi Constitution 2005, to nominate a new member for the post of the Prime Minister.[476] It is important to note that only Iraqi citizens who satisfy the requirements of being appointed as President of the Republic qualify to be appointed as Prime Minister.[477] Once appointed, the Prime Minister assumes the status of the Commander in chief of the armed forces and exercises direct and full executive powers of the government and double as the head of the Council of Ministers. In fact, he presides over the Council of Ministers. He is responsible for the formulation of key and general policy of government.[478] Like members of the Council of Representatives, the Prime Minister and all the members of the Council of Ministers must subscribe to the Constitutional oath as couched under Article 79.[479]

3.4.3 The Judicial Powers

This section explain the independence of the Iraqi judiciary, composition of the Iraqi FSC, and the finality and binding decisions of the Iraqi FSC:-

The judicial authority of the country is vested in the courts. The courts are independent under Article 87 which stated that: "The judicial power is independent. The courts, in their various types and levels, shall assume this power and issue decisions in accordance with the law." Article 19(1) equally provides for independence of the Iraqi Judiciary. The Article 19(1) provides that:- "The judiciary is independent and no power is above the judiciary except the law."[480] Additionally, Article 88 reinforces the independence by declaring this time around the

[476] Ibid.
[477] Article 77 of the Iraqi Constitution, 2005.
[478] Article 78 of the Iraqi Constitution 2005
[479] Article 79 of the Iraqi Constitution 2005.
[480] Article 19 of the Iraqi Constitution 2005.

independence of the judges who are not under anybody but the law. In fact, interference from any authority is declared unconstitutional under Article 88.

The Iraqi Constitution 2005, declares that the Federal Judicial Authority of the Iraqi Republic shall comprise of the Higher Juridical Council, Iraqi FSC, the Federal Court of Cassation of Iraq, the Iraqi Public Prosecution Department, the Judiciary Oversight Commission and any other federal courts established under the law.[481]

In addition to the above, there is also a body called the Higher Judicial Council (HJC) tasked to monitor the affairs of judicial committees [482] In fact, the Iraqi Constitution 2005, vests the managing of the whole affairs of the Iraqi judiciary and the supervision of the federal judiciary of Iraq to the Higher Judicial Council.[483] The nomination of the heads of the courts and other key judicial officers in Iraqi and preparation of the judiciary's budget for presentation before the Council of Representative lies in the HJC.[484]

Decisions handed down by the FSC are by virtue of Article 94, clothed with finality. It has a binding force on all authorities and person within the territory of Iraq. Speaking on finality and binding nature of the decisions of the FSC in Iraq. Interviewee No. 2 stated that:-

> "The decisions of the FSC in Iraq are binding on all no matter the peoples' view on the decisions. It must be binding and final on all authorities and persons. Thus, in the public interest because of the need to bring an end to litigation. In all jurisdictions the decisions of the highest court are final and cannot be subject to any appeal. When the Federal Supreme Court exercises its power of interpretation or supervision on the constitutionality of laws, its decisions as obtainable in other jurisdictions should be final and

[481] Article 89 of the Iraqi Constitution 2005.
[482] Article 90 of the Iraqi Constitution 2005.
[483] Ibid.
[484] Article 91 of the Iraqi Constitution 2005.

> binding. This is necessary to ensure respect for Iraqi Constitution 2005 democratic ideals."[485]

Responding on the finality of the decisions of the FSC and the need to respect the same decision regardless of who is involved, Interviewees No. 4 and No. 5 made comments in that connection. Interviewee No. 4 for instance stated that:-

> "The ideal practice across jurisdictions is that a final court exists. In the case of Iraq, the FSC is the highest court in the Iraqi judicial hierarchy. Hence, all decisions regarding legal supervision and interpretation on the constitutionality of laws should be binding and final on all authorities and persons. The decisions ought to be final and binding regardless of the person or authority involved. This is the practice across matured and developing democracies."[486]

Interviewee No.4 considered that the FSC of Iraq the highest court in the Iraqi judicial hierarchy, so the decisions of the FSC must be final and binding on all authorities. In addition to the above, Interviewee No. 5 had this to say:-" in my opinion, the decisions of the FSC in legal supervision and interpretation on the constitutionality of laws should be binding and final on all authorities in Iraq, and any authority should not interference in the decisions of the FSC because the aim of FSC is to achieve justice for the Iraqi people."[487] Also, Interviewee No.5 was of the opinion that the decisions of the FSC must be binding and final on all authorities in Iraq because, the aim of this court is to achieve justice for the Iraqi people.

According to interviewee No. 6 on the issue regarding the finality of the decisions of the FSC, he opined that the decisions of the FSC in Iraq should be final and

[485]Interviewed Hind Ali Mohammed with a professor of Constitutional Law No 2, Baghdad University, Baghdad, Iraq, on March 15th, 2016.
[486]Interviewed Hind Ali Mohammed with a professor of Constitutional Law No 4, Baghdad University, Baghdad, Iraq, on March 20th, 2016.
[487]Interviewed Hind Ali Mohammed with a professor of Constitutional Law No 5, School of Law, Mustansiriya University, Baghdad, Iraq, on March 21th, 2016.

binding on all authorities, because this is found in Article 94 of the Iraqi Constitution 2005, then we must not violate the provisions of this Constitution."[488]

Interviewee No. 8 viewed the decisions of the FSC should be final and binding on all authorities in Iraq. He stated that: - "In my opinion the decisions of the FSC in Iraq should be binding and final on all authorities and persons, the legislator of Iraq made the Federal Supreme Court decisions are final and definitive not be challenged in any aspect of the appeal, also make them binding on all state authorities, because the text of the Article 94 of the Iraqi Constitution 2005 is clear and explicit on the effect of the decisions of the FSC."[489]

Interviewee No. 9 responded to the issue of finality and binding nature of the decisions of the FSC in Iraq by saying:-" From the reading of the Iraqi Constitution 2005, especially Article 94 in it I see this Article shows the finality of the decisions of the FSC on all authorities, also if we read Article 13 of the same Constitution, it shows that this Constitution is the highest law in Iraq, then the decision of the FSC by all means has to be binding and final on all authorities in Iraq, so we understand that this Constitution must be respected and not to violate its provisions, because this Constitution is the highest law in Iraq."[490] It would thus suffice to note that Interviewee No. 9 seem to argue that we must respect the decisions of the FSC because if we respected the decisions of the FSC, then the implication is that we are respecting the Iraqi Constitution 2005.

Interviewee No. 12 also supported the idea of the decisions of the FSC as being binding and final in Iraq. He stated that:-"It's important to note that, the decisions of

[488] Interviewed Hind Ali Mohammed with a judge No 6, Baghdad, Iraq, on January 28th, 2016.
[489] Interviewed Hind Ali Mohammed with a judge No 9t, Baghdad, Iraq, on January 27th, 2016.
[490] Interviewed Hind Ali Mohammed a judge No 6. Interviewed, Baghdad, Iraq, with on January 28th, 2016.

the FSC is binding on all authorities in Iraq, the provisions of the Federal Supreme Court with regard to the constitutionality of laws are final and may not be challenged in any aspect of the appeal, these provisions are also binding on all public authorities and everyone must respect their application in Iraq."[491]

Interviewee No. 13 equally shared the belief of Interviewee No. 12, when he considered the decisions of the FSC being binding and final on all authorities and persons in Iraq. According to Interviewee No.13, he stated that:-" in my opinion the decisions of the FSC are binding and final on all persons in Iraq, the Iraqi constitution is the (constitutional document) and is a source of the laws and regulations in force, the commitment to the Constitution is our duty, according to Article 94 it considers the decisions of the FSC as final and binding on all authorities and persons in Iraq."[492]According to Interviewee No. 15 speaking about the decisions of the FSC in Iraq, he stated that:-" In my opinion the Federal Supreme Court in Iraq is fully independent in the performance of its judicial functions and in the financial budget, then the judgments or decisions issued by FSC should be binding on all authorities and that the decisions are not subject to any appeal. "[493] Hence, Interviewee No. 15 seems to suggest that the decisions of the FSC should be binding on all authorities in Iraq, because these decisions are not subject to any appeal.

Interviewee No. 7 looked at the powers of the Federal Supreme Court in terms of legal supervision and interpretation on the constitutionality of laws from the perspective of the binding nature of its decisions. The Interviewee, however,

[491]Interviewed Hind Ali Mohammed with a lawyer No 12 at the Federal Supreme Court, Iraq, Baghdad, Iraq, on February 10th, 2016.
[492] Interviewed Hind Ali Mohammed with a lawyer No 13 at the Federal Supreme Court, Iraq, Baghdad, Iraq, on February 17th, 2016.
[493] Interviewed Hind Ali Mohammed with a lawyer No 15 at the Federal Supreme Court, Baghdad, Iraq on February 24th, 2016.

cautioned that much as the decision of the Federal Supreme Court is binding and final, should it still remain even when it is manifestly unjust? The Interviewee said:-

> "That the decisions of the FSC in terms of legal supervision and interpretation on the constitutionality of laws are binding. However, the problem is at times the decisions may be unjust. Although these decisions are final and not appealable since Article 94 of the Iraqi Constitution of 2005, said so, are such decisions worth following from a justice perspective.[494]

The decisions of the Iraqi FSC are final and binding and cannot be further appealed. This is by virtue of Article 94 of the Iraqi Constitution 2005 stating that "decisions of the FSC are final and binding on all authorities." However, as mentioned earlier there are exceptions to this provision. A good example of such an exception is Article 61(6).[495] of the Iraqi Constitution 2005. In the later part of this research, the researcher analysed the justification for such an exception in a democratic environment. For instance, whether such an exception could be viewed as good or bad in terms of the operation of the rule of law in a country like Iraq.

3.5 Checks and Balances under the Basic Law of Iraq 1925 and the Iraqi Constitution 2005

Checks and balances are pillars that link and support the S.OP.[496] Montesquieu the father of separation of powers under modern constitutional democracies, considered checks and balances in the operation of the separation of governmental powers as

[494] Interviewed Hind Ali Mohammed with a judge No 7 at the Federal Supreme Court, Baghdad, Iraq, n January 24th, 2016.
[495] Article 61(6) of the Iraqi constitution 2005, which stated that:-" Relieving the President of the Republic by an absolute majority of the Council of Representatives after being convicted by the Federal Supreme Court in one of the following cases: 1- Perjury of the constitutional oath. 2- Violating the Constitution. 3- High treason."
[496]Serhat Altinkok "Constrained Parliamentarism versus Semipresidentialism in the Context of the Principle of the Separation of Powers," *Law Review* 15, no.4 (2015):127.

condition to prevent abuse of power.[497] Speaking on the need for proper checks and balances, Oscar argued that:-

> "A little attention to the subject will convince us, that these three powers ought to be in different hands, and independent of one another, and so balanced, and each having that check upon the other, that their independence shall be preserved."[498]

In this regards an overlap in the exercise of the governmental powers is envisaged. Here each branch performs its main functions. This what checks and balances entails. This is found in all the countries that have a constitutional design with S.O.P. Examples across the world abound. The US, Hoduras, Kosovo, The Constitution of the Republic of South Africa generally provides for separation of powers that demarcates the powers and roles of all the three branches of government. Although there was distinction between the three arms of government, Constitution ensured that a separation of powers arrangement which included real checks and balances was included in the Constitution. The Interim Constitution (1996), had distinct chapters for each of the branches of government. It provided for the power of judicial review of both legislative and executive action and the supremacy of the Constitution. The South African judiciary plays a crucial role in transformative constitutionalism which involves righting the wrongs of apartheid as well as ensuring that the spirit, values and provisions of the Interim Constitution were implemented to the letter. This duty goes hand in hand with its role of overseeing and ensuring that all exercise of governmental power is in line with the Constitution". [499] The system is well ingrained in the U.S. Constitution and supported by jurists such as Madison,

[497]Oscar Handlin, The Popular Sources of Political Authority (Cambridge: Harvard University Press, 1966), 337.
[498] Ibid.
[499]Jason M. Crawford, "Solar Power Struggle: The Inter-Branch Dispute over Information in the Solyndra Congressional Investigation," *Seton Hall Legis Journal* 39, (2015):1. See also Visar Morina, "The Legislative Veto from the Perspective of the Kosovo Constitution,"Denning *Law Journal*, 2, no. 6 (2014): 19.

Hamilton, and Jay.[500] Although power is separated under the Basic Law of 1925 between the three arms of government, certain checks are put in place. In other words, power is allowed to check the power. These checks are to prevent one branch of government from usurping the powers of another.[501] Article 62 for instance, dealt with checks and balances in the law making process. According to Article 62, no draft can be submitted to parliament to be becomes law until it is passed by the two assemblies Senate and Chambers of deputy and subsequently assented to by the King.[502] The same power of King's approval in the legislative process is stated in Article 119 of the Basic Law of 1925.[503] The fact that the draft remains a draft even after passage by parliament with the King's approval, the Basic Law of 1925 took care of situation where the King may arbitrarily withhold his approval, same can be vetoed by parliament. Another example of checks and balances under the Basic Law of 1925 can be seen in the appointment process of the judges of the courts which had to be executed by the Senate.[504]

Like the Basic Law of 1925, the Iraqi Constitution 2005 has made provisions to serve as a bulwark against the usurpation or interference of the exercise of one power by another. To start, it would be tantamount to violation of the provisions of the Constitution or the oath a Representative takes or the Representative Council as a whole if he or the Council were to usurp or interfere with the judicial independence guaranteed under Article 19 of the Iraqi Constitution 2005.[505] Another check and balance provided by the Iraqi Constitution 2005 in favour of the judiciary is the

[500] Ibid.
[501] Stephanie P. Newbold, "Why Constitutional Approaches Matters for Advancing New Public Governance," in New Public Governance: A Regime-Centered Perspective, D. Morgan and B. Cook ed (Taylor & Francis, 2015),13.
[502] Article 62, Basic Law of Iraq 1925.
[503] Articles 62 and 119, Basic Law of Iraq 1925
[504] Article 82, Basic Law of Iraq 1925.
[505] Article 19 of the Iraqi Constitution 2005.

power of the Iraqi FSC to review any decision of the Council of Representatives confirming the authenticity or otherwise of the status of a member as Representative in the Council.[506]

Additionally, the Iraqi Constitution 2005 confers a power of checks and balances on the legislature over the executive. In the first place, it is the Council of Representatives that elect the President of the Republic.[507] In detailing the powers of the Council of Representatives, Article 61 of the Iraqi Constitution 2005 empowers the Council of Representatives to monitor the performance of the executive branch of government.[508] The Council equally holds the power to ratify all appointments made by the executives.[509] In fact, the Council of Representatives exercises check in the appointment process of the President of the Republic. Under the Iraqi Constitution 2005, not every person can be presented to the Council of Representative for appointment as the President of the Republic. A number of conditions are stipulated acting as checks and balances on the Council of Representative who without it might arbitrarily deny an authentic Representative his status.[510]

Article 68 of the Iraqi Constitution 2005, states that not every person that can be nominated for the office of the President of the Republic. Before a person qualifies he must meet the following conditions:-

"A. Must be an Iraqi by birth, born to Iraqi parents.

B. Must be fully eligible and has completed forty years of age.

[506] Article 52(2) of the Iraqi Constitution 2005.
[507] Article 58(1) of the Iraqi Constitution 2005.
[508] Article 61(2) of the Iraqi Constitution 2005.
[509] Article 58(5) of the Iraqi Constitution 2005
[510] Article 52(2) of the Iraqi Constitution 2005.

C. Must be of good reputation and political experience, and known for his integrity, righteousness, fairness and loyalty to the homeland.

D. Must not have been convicted of a crime involving moral turpitude."[511]

The executive and legislative check on the judiciary in the area of appointment of the heads of courts and the confirmation process. While it is the executive that appoints the heads for example the Federal Court of Cassation, such appointment are not constitutional until ratified by the Council of Representative.[512] In fact, the number of judges of the FSC and the criteria for their selection is to be determined by a law to be enacted by the Council of Representatives. This is clearly a way of checking both the powers of the executive of appointment and the judiciary itself.[513]

In another dimension, the executive and legislature, check each other in the law making process. No law can be enacted by the Council of Representatives or international treaty or agreement entered into between the Iraqi Republic and any country until it is passed in the case of local legislation by the Council of Representatives or approved in the case of treaty or agreement by the Council of Representative and later assented to or approved by the President.[514]Additionally, the Council of Representatives by way of check and balance has a role in approving a declaration of war or state of emergency in Iraq. The Iraqi Constitution 2005 provides that 2/3 of the members of the Council of Representatives must consent to any joint request for such declaration from the President and the Prime Minister.[515] This is a check and balance in the hands of the Council of Representatives to protect the citizens and Iraqi democratic institutions from the arbitrariness of the executive.

[511] Article 68 of the Iraqi Constitution 2005.
[512] Article 61(5) of the Iraqi Constitution 2005.
[513] Article 92(2) of the Iraqi Constitution 2005.
[514] Article 73(2) of the Iraqi Constitution 2005.
[515] Article 61(9) of the Iraqi Constitution 2005.

3.6 The Working of Separation of Powers under the Iraqi Constitution 2005

Although as seen above, the Iraqi Constitution 2005 provides for separation of powers between the three branches of government, but still certain interference with the powers of one branch by another exist. This has been supported by the interviews conducted in the course of this research. Specifically the interviewees emphasised that the interference is seen more from the other branches on the work of the judiciary. Interviewee No. 1 while agreeing on the existence of S.O.P under the Iraqi Constitution 2005 highlighted the mandate of the judicial branch of government when he stated that " the work of the judiciary in Iraq is the legal supervision and interpretation of laws."[516] Interviewee No. 5 also restated the powers of the FSC of legal supervision and interpretation on the constitutionality of laws in the following words; "the FSC is the highest judicial body in Iraq, it has the authority of supervision and interpretation on the constitutionality of laws, then, it has other powers stipulated in the Iraqi Constitution 2005, such as, settling matters arising from the application of the federal laws, decisions, regulations, instructions, and procedures issued by the federal authority. The law shall guarantee the right of direct appeal to the court to the Council of Ministers, those concerned individuals and others, also, settling disputes that arise between the federal government and the governments of the regions and governorates, municipalities and local administrations, settling disputes arising between the governments of the regions and the governorates, settling accusations directed against the President, the Prime

[516] Interviewed Hind Ali Mohammed with a professor of Constitutional Law No 1, Baghdad University, Baghdad, Iraq, on March 13th, 2016.

Minister And the Minsters and this shall be regulated by law. Ratifying the final results of the general elections for membership in the Council of Representative "[517]

Commenting on the interference of the other branches on the work of the judiciary, Interviewee No. 2 stated that although S.O.P exists under the Iraqi Constitution 2005, but still there is an element of interference. The interpretation of laws by the FSC has not been based on any pattern and such has rendered the constitutional interpretation inconsistent over time. Such inconsistency can be discerned in the way the FSC interpret number (5/ federal/ 2009), of (4/2/2009).[518] The FSC rejected the request from the province of Babylon based on the interpretation of Article (55). The rejection of such case may be explained by several interpretations given by the FSC and such indicates the interference of government in the judicial process."[519]

Interviewee No. 3 clearly stated the existence of S.O.P under the Iraqi Constitution 2005, but argued that in real sense there is no S.O.P. According to Interviewee No. 3, he stated that:-

> "In my opinion, although there is S.O.P in the Iraqi Constitution 2005, stated in its articles, I think that, after Iraq transmission from a (simple state) to a (federal state), also, transition from a (presidential system) to a (parliamentary system), Iraqi Constitution 2005 has adopted the principle of separation of powers in chapter III, to an attempt to get rid of the principle of the unity authority of the three functions that have been devoted to political despotism, such as, in Article 47 of the Iraqi Constitution 2005, the Constitution has adopted the principle of S.O.P between three arms of government to ensure independence of the judiciary in Iraq, Article 47 of the Iraqi Constitution 2005, stipulates that:- federal authorities consist of the legislative, executive and judicial powers, they exercise their competencies and tasks based on the principle of S.O.P. But there are defects. I see it in the practical reality is that there is no real S.O.P between the legislative, executive and judiciary in Iraq because of

[517]Interviewed Hind Ali Mohammed with a professor of Constitutional Law No 5, Baghdad University, Baghdad, Iraq on March 21st, 2016.
[518] This Case is a request from the province of Babylon to the FSC based on the interpretation of Article 55 of the Iraqi Constitution 2005.
[519]Interviewed Hind Ali Mohammed with a professor of Constitutional Law No 2, Baghdad University, Baghdad, Iraq, on March 15th, 2016.

> interference in the work of the judiciary by the legislative, executive and judicial power and political effects. The main job of the FSC in Iraq is to interpret the Constitutional texts of 2005, and its job is not to interpret the texts of ordinary laws. Because the latter jurisdiction should be given to the State Consultative Council in Iraq in accordance to Article 6 Act of the State Consultative Council of 1979. This position has been confirmed by the FSC in a number of its decisions, namely decision number (18/ federal/ 2007) of (11/9/2007).[520] This was when the House of Representatives interpreted Article 22 from the Provisional National Council. The Federal Court issued its decision that the terms of reference of the Federal Court in Article 3 of the Constitution of Iraq 2005, and Article 4 of the Act of the FSC number 30 of 2005, was not found in the term of reference. Expressing an opinion in that request, State Consultative Council number 30 for 1979, shall decide on this request, and not the FSC."[521]

For there to be real S.O.P and for the FSC in Iraq to have the freedom to exercise its powers of legal supervision and interpretation on the constitutionality of laws, there is a need to stop the interference in its work by the other branches of the government. This view was stated by Interviewee No. 3. According to the Interviewee, he had this to say:

> "There must be S.O.P in Iraq and non-interference in the work of the FSC especially from Parliament. Such act occurs in the manner legislature interferes in the affairs of the FSC by disrupting the new Federal Court Act. This Act, it is based on a Constitution, but the legislative body's interference in delaying the decision of the Court Act is a clear supervision of the principle of S.O.P. In addition, quotas and partisan interference from Kurds against the Federal court Act also represent an important impediment to the full operationalisation of the court system in Iraq."[522]

Interviewee No. 4 equally commented on the S.O.P and the issue of interference. He stated that in Iraq:-

> "There is a clear interference by parties and executive in the affairs of the FSC and decision-making process in Iraq. This has led to the fusion of powers among three arms of government. Every governmental authority interferes in the affairs of one another, sometimes there is cooperation between all concerned

[520] Request from House of Representatives of FSC interpreted Article 22 from the rules of procedure Provisional National Council.
[521] Interviewed Hind Ali Mohammed with a professor of Constitutional Law No 3, Baghdad University, Baghdad, Iraq, on March 17th, 2016.
[522] Ibid.

authorities. Through the powers of the legislative and executive provided in the Constitution of Iraq 2005, the powers of the legislative authority which is composed of the House of Representatives and the Federation Council, the Council of Representatives according to (Article 61) have the right to legislation federal laws and control over the performance of the executive authority, elected President of the Republic, the organisation of the ratification of international treaties and conventions process, to approve the appointment of the Chairman and members of the Federal Cassation Court, also Council of Ministers have the right to put the planning and implementation of public policy of the State and supervising the work of ministries also, the Council of Ministers recommend to the House of Representatives to approve the appointment of ambassadors. This signifies that SOP in Iraq is not absolute. For example, the FSC has the right to litigate in Iraq, which is considered one of the fundamental rights of a person in Article 19(3) of the Constitution of Iraq 2005. In some cases it is found that the interpretations given to cases by the FSC are not the same based on the legal text in Article 19(3). It is discovered that the legal texts which emphasises the right of litigation are violated by the FSC. Similarly, the FSC often prevent the courts from the right to litigation and this is varies from one case to another. This is found in the case of the FSC number (4/ federal/ 2007) of (2/7/2007).[523] Therefore, we should ask ourselves a simple question: Why the FSC determines the right to litigation which is sometimes applied in different forms? Such complication may be rooted in an attempt to intervene in the legislature to favour party members in the parliament. Another case is the interference and influence in the transfer of judges from one location to another. The executive branch may exercise control over the transfer of judges to influence their independence and impartiality. A judge may be transferred from one place to another based on personal motives and thereby exercising the executive power under the pretext of disciplining judges. The fact that judges are investigated or disciplined for accountability is not because of the failure to perform their duties or jobs, but because of the attempt at trampling upon their independence and impartiality. In most cases, this may be as a result of judges calling for reform of the political system, fighting of corruption or cases of fraud in elections. In doing this, there is always cooperation between authorities and all these has led to the abuse of S.O.P in the state.[524]"

Interviewee No. 5 also stated that:-

"The Constitution of Iraq 2005, did not decide the principle of complete S.O.P between the authorities in Iraq, especially between the executive and legislative power, but there is cooperation between them. But this balance is integrated but suggests the

[523] Case number (4/ federal/ 2007) of (2/7/2007)' Samer, Sameh, Susan, Serine v. Iraqi Interior Minister

[524]Interviewed Hind Ali Mohammed with a professor of Constitutional Law No 4 , Baghdad University, Baghdad, Iraq, on March 20th, 2016.

> legislature (House of Representatives), should monitor the performance of the executive branch. Such as, the executive branch if it made a request to dissolve the parliament the Council of Ministers here shall "be considered resigned, "thus, here balance will not be achieved between the legislative branch and the executive branch. [525]

Interviewee No. 1 stated that the exercise of the powers of legal supervision is not in any way a violation of the principle. Interviewee No. 1 went further by stating that:-

> "In my opinion, the powers of the FSC in legal supervision and interpretation on the constitutionality of laws is not considered a violation of the principle of S.O.P under the Constitution of Iraq 2005, judicial control on the constitutionality of laws is very important in Iraq. It means that the judge must know how he can protect the law through the decisions that he makes in any case. So I think that the judiciary is very important in the presence of the rule of law in Iraq, and this is to ensure that rights and freedoms are protected in Iraq. As to statutory interpretation, I think its very important and we all know that judicial interpretation is a theory or mode of thought that explains how the judiciary should interpret the law, particularly constitutional documents and legislation so the FSC when interpreting any law it is not a violation of the principle of S.O.P under the Constitution of Iraq 2005."[526]

Interviewee No. 1 believed that it is through this principle of S.O.P that the FSC applies rule of laws" and hence there is need for the independence of the Federal Supreme Court in this regard. Interviewee No. 1 believed that it is very important in the state of Iraq for FSC to be independent. The power of legal supervision and interpretation according to Interviewee No. 1:- "Cannot be applied without independence of the judiciary and independence the FSC in Iraq. The Court shall exercise its function fully independent as mentioned in the Iraqi Constitution 2005. I think of the most basic guarantees for the establishment of a civil society, should be based on the principle of the rule of law, and an independent judiciary, so that judge of the FSC in the exercise of his function should be free to take his decision in any

[525]Interviewed Hind Ali Mohammed with a professor of Constitutional Law No 5, Baghdad University, Baghdad, Iraq on March 21th, 2016

[526] Interviewed Hind Ali Mohammed with a professor of Constitutional Law No 1, Baghdad University, Baghdad, Iraq, on March 13th, 2016.

case. I think also, the judge cannot exercise his function freely unless he feels that he is independent in the performance of his function. I mean the independence of the judiciary here as an institution in Iraq, that the judiciary is independent administratively and financially in decision-making. Also, most important factor for the independence of the judiciary is to establish a Judicial Council which will administer matters of justice and the affairs of the judges in terms of appointment, transfer and removal without the interference of other powers."[527]

Interviewee No. 5 also shared the belief that the power of legal supervision and interpretation on the constitutionality of laws does not violate the principle of S.O.P. The Interviewee stated that:-

> "In my opinion the exercise of the powers of legal supervision and interpretation of laws by the FSC in Iraq does not violate the principle of SOP because the presence of the Supreme Court is to guarantee fundamental rights and freedoms in Iraq. Also, the FSC examines laws and to see if this laws are constitutional or not. It also works for the protection of human rights and it keeps the principle of separation of powers."[528]

In addition to the above, while Interviewee No.1 and Interviewee No. 5 saw the FSC's exercise of the powers of legal supervision and interpretation of laws as legitimate, Interviewee No. 3 held a different opinion. Interviewee No. 3 stated that:-

> "The exercise of powers by the FSC is illegal because, when the legislature issued legal orders and the FSC declares them unconstitutional, this is an intervention in the work of parliament. The Court's action in cancelling some of the laws made by parliament under the pretext of (arguing) that this law is a violation of the Iraqi Constitution, the FSC is considered as violating the concept of S.O.P."[529]

Interviewee No. 4 equally shared the belief of Interviewee No. 3 when he considered the exercise of the powers of the FSC in legal supervision and interpretation on the

[527] Ibid.
[528] Interviewed Hind Ali Mohammed with a professor of Constitutional Law No 5, Baghdad University, Baghdad, Iraq, on March 21th, 2016.
[529] Interviewed Hind Ali Mohammed with a professor of Constitutional Law No 3, Baghdad University, Baghdad, Iraq, on March 17th, 2016.

constitutionality of laws as a violation of the principle of separation of powers. According to Interviewee No. 4:-

> "In my opinion, I consider the powers of the FSC Court in the determination of the constitutionality of laws as a violation of S.O.P. This is because the FSC in Iraq to me threatens the manifestations of S.O.P. Let us ask ourselves why? Because it interferes in the work of the parliament and the work of the executive. Some decisions of the FSC in Iraq are illegal, and not fair to the right of individuals because it, to authoritarianism when FSC exercises the powers of legal supervision and interpretation on the constitutionality of laws. Looking at the way the FSC takes decisions in Iraq, there is a phrase, "the decision was made by agreement", and this phrase implicitly indicates the absence of consensus in the decision making process. The absence of such consensus thus indicates lack of strength in the judicial operation of the judges of the FSC in the decision-making process. One can also infer that there is political interference in the work of the FSC. Here, the decisions of the FSC is not a majority-based one. For example, the decision by the FSC number (5/ federal/ 2006) of (29/5/2006),[530] where it was stated that except the decision to be reached by majority with reference number (73/federal/ 2010) on (19/10/2010).[531] This case is related to General Population Census and such decision must take into consideration overall number of people who support certain decision as it is stated in Article 5 of the FSC Act No. 30 of 2005. The Article reads: " meeting holds by the FSC is not acceptable until all members are present. That is, all members of the FSC must be in attendance before any decision can be reached. This has led to authoritarianism because the FSC exercises powers over the legal supervision and interpretation on the constitutionality of laws. In a related development, the FSC issued decision number (21 / Federal / 2015).[532]

In addition, Interviewee No. 4 stressed further, stating that:-

> "When we consider the role of the House of Representatives in the resolution and legislation which is pertaining to the House of Representatives Law No. 6 of 2006, it can be said that FSC action is illegal and should as such be declared null and void. It has been said that the House of Representatives initial house decision is a proposal towards the law and not bill. Thus, the action of the FSC shows that it has initiated no constitutional process as stipulated by the Constitution in Article 60(I) and II and Article 80. The proposed law needs to be sent to the executive branch and such should be in form of a bill and asked the parliament not the court to complete the process for it to become law. In addition, between

[530] Case (5/ federal/ 2006) of (29/5/2006), *Jassim Salim Shaheen* v. *Authority Suits of the Iraq Property*.
[531] Case (73/federal/ 2010) on (19/10/2010 request of the Iraqi Council of Ministers statement opinion of the FSC subject matter the general population.
[532] Case (21 / Federal / 2015), *Ahmed Bassam* v. *Iraqi Parliament Speaker*.

> 2005 and 2015, the Iraqi Constitution 2005 also regarded court's decisions as final and binding, and have decided also that it is not the jurisdiction of the House of Representatives to legislate, in the form of a proposed law. House of Representatives only passed the legislation in the form of proposed law under Constitutional Law No. 6 of 2006. Thus the decision of the Federal Supreme Court to stop the right to legislate in the form of a proposed law by the House of Representatives was dangerous and illegal decision and the text of Article 60(II) of the Constitution gave the House of Representatives jurisdiction over proposed laws among the committees. Thus, this has led to authoritarianism in the area of legal supervision and interpretation on the constitutionality of laws in Iraq."[533]

The interviewees also made reference to checks and balances under the Iraqi Constitution 2005. This is because as seen above checks and balances are vital in any democratic setting, especially where there is S.O.P. The current Iraqi setting is a good example. Speaking on the importance of checks and balances, Interviewee No. 3 stated that: -"Supervision and balance are important elements of the separation of powers principle. They are also important elements in any democratic country that believes that the legislative authority, judicial, and executive have a mutual role"[534] According to Interviewee No. 1, the S.O.P contained under the Iraq Constitution 2005 is not absolute but has checks and balances between the three arms of government. Interviewee No. 1, stated that **"**The Constitution of Iraq 2005, does not mention about S.O.P, but there is a check and balance between the three arms of government legislative, executive and judicial."[535] Interviewee No. 2 explained the check and balance issue between the three arms of government. According Interviewee No. 2, he had this to say:-

> "Of balance arises from the type of supervision between the three authorities of the State. That is the legislative, executive and the judiciary. While the FSC can declare any law passed by parliament unconstitutional if it sees the law as unconstitutional,

[533]Interviewed Hind Ali Mohammed with a professor of Constitutional Law No 4 ,Baghdad University, Baghdad, Iraq, on March 20th, 2016.
[534] Interviewed Hind Ali Mohammed with a professor of Constitutional Law No 3, Baghdad University, Baghdad, Iraq, on March 17th, 2016.
[535] Interviewed Hind Ali Mohammed with a professor of Constitutional Law No 1, Baghdad University, Baghdad, on March 13th, 2016.

> on the other hand, the judges of the FSC are appointed with input of the parliament. In other words, the parliament supervises the appointment of the judges though parliament cannot stop them from performing their jobs on the basis of the principle of judicial independence. In my opinion, every authority works to check the other authorities."[536]

Interviewee No. 4 viewed the checks and balances between the three arms of government from different angles. The angle of the exercise of veto powe by the executive on the laws passed by parliament and the other angle is the angle of the judiciary in its exercise of the powers of legal supervision and the determination on the constitutionality of laws. According to Interviewee No.4, he stated that:-

> "In my opinion the principle of balance of powers as a concept differs in application from one democratic system to another. But generally it creates a kind of control and mutual balance so that the executive power can veto proposed laws also it can resort the right to veto laws that may be taken by the legislature because the right to sign and ratification is usually in the hands of the executive power, whether the President of the Republic or the Council for the presidency. On the other hand, the legislative authority shall have the right to object to the decisions of the executive branch and canceling the decision. The worst case is the withdrawal of confidence. In this case, the judiciary can have authority to sanction the legality of any decision taken."[537]

The executive branch gives assent to laws passed by Parliament and has the right to declare unconstitutional any law that contradicts the stated provisions in the Iraqi Constitution 2005. Although judicial members are appointed by the legislative body, which oversees the appointment and promotion, but still there is availability of a check and balance i.e. being separated in accordance with the principle of independence of the judiciary. Such independence guarantees that the decision being made by the judiciary should not be subjected to any party within a state. The independence of the judiciary in Iraq will thus enhance probity, accountability and justice.

[536]Interviewed Hind Ali Mohammed with a professor of Constitutional Law No 2, Baghdad University, Baghdad, Iraq, on March 15th, 2016.
[537]Interviewed Hind Ali Mohammed with a professor of Constitutional Law No 4, Baghdad University, Baghdad, Iraq on March 20th, 2016.

3.7 Kurds' Position in the Building of the State of Iraqi before Independence

The first seeds of Kurdish rebellion against the Iraqi State appeared in 1922 when Sheik Mahommod Al-Barazanjy 's mutiny lasted for a short period in that the Britons put an end to his mutiny because of fear of the expansion of his influence.[538] Due to his alliance with the Britons, they promised him to establish an autonomy in the regional area in the northern part of Iraq in turn of taking the Turkish troops out of the area.[539] The Britons were committed to restoring security and order to the area. However, this did not put an end to the Kurdish Issue. Demonstrations and protests among Kurds emitted under the leadership of Sheik Mahommod Al-Barazanjy once Iraq signed the 1930 Treaty.[540] The same happened with the Kurdish representatives in the Iraqi Parliament because the Treaty did not touch upon the Kurds' rights. The demonstrations were annihilated by the Iraqi Army with the help of Britain. The surrender of Sheik Al-Barazanjy put an end to the Kurdish munity in 1934.[541]

After the outbreak of the Second World War, Germans attempted to open a front in Iraq against allies by encouraging Rashid Ali Gailany to carry out a hostile movement against Britons. The latter, on their part, did not hesitate to make such a movement to fail by convincing the Kurdish officers to rebel against the commands of Rashid Ali Gailany's government. Besides, Britons brought back Mustafa Al-Barazany to Erbil to lead the rebellion in return of promising the Kurds with independence after the end of the war. As usual, Britain reneged on the promises she made to Kuds as this pushed Al-Barazany to declare a rebellion against the Iraqi

[538] Umar Farooq, *Federalism in Iraq* (University of Basrah: Basra Centre for Legal Studies, 2003),33.
[539] Ibid.
[540] Ibid.
[541] Ibid.

authorities and Britain in 1943.[542] Al-Barazany insisted on United Kingdom to respond to his demands to form a self-administration in the Kurdistan region due to the reason that the Iraqi army eliminated the rebellion and ended the second part of the Kurdish insurgence.[543]

What distinguishes the Kurdish Movement and the position of Iraqi government between 1921-1958 was that the Movement was a local feudal-family oriented. Its locality was clear in that Suleimania witnessed two rebellions led by Al-Barazanjy and Al-Barazany. Being feudal-family oriented, the Movement was always under the leadership of the heads of tribes and dignitaries where Kurdish parties and association were kept far away from the political scene. The continuity of cooperation of a large number of Kurds with the British authorities and the Iraqi government, the involvement of a large number of Kurds in the various state institutions and their integration in, and limited external support for the Kurdish movement, the Iraqi government's willingness to recognize the initial rights of the Iraqi Kurds, provided that this does not negatively affect the geographic and political unity of Iraq, and continuing dialogue between the Iraqi authorities and the Kurdish leadership did not lead to a solution to the Kurdish problem.[544]

The success of the 1958 revolution that formed a sharp political turning point left their mark on the domestic, regional and international situations may transfer the Kurdish question into a new phase. After the adoption of the Constitution of the Revolution and the recognition of the rights of Kurds and issuing a general amnesty to Kurdish rebels and allowing some of the cultural and media freedom in the Kurdish region, Barzany announced his support of the revolution and his readiness to

[542] Ibid.
[543] Ibid.
[544] Ibid.

support it, where has spared no effort to do so, especially his participation in suppressing AShawwaf movement in 1959, and the suppression of rebellions among some Kurdish tribes.[545] However, the cooperation links between the government and the Kurds did not go in line with Al-Barazany's attitudes in that he demanded Abdul Karim Qasim to grant the Kurds expanded autonomy .[546] This made Qasim to refuse such a demand, as a consequence, the Kurds ~~to~~ rebelled against the government in 1961, where battles between the two sides lasted until the fall of (Abdul Karim Kassem) in February 1963.[547] After that, there was a truce between the new government and the Kurds during which the first proved its inability to resolve the situation to their advantage and the second needed time to regain breath and control of the new authority that recognised the national rights of the Kurds on the basis of decentralisation through the formation of local administration to them and the release of political prisoners and the abolition of deportation decisions taken against some of them.[548] This paved the way before both parties to start a new dialogue with very heavy and new demands; the most prominent of which: (1) immediate recognition of autonomy for Kurds, (2) Delimiting the geographic borders of the autonomy, (3) the recognition of the Kurdish language as being the official one of the autonomy, (4) the establishment of the political institutions of the autonomy, etc. Such demands were refused by the Iraqi government. This had led to the rise of the Kurdish rebellion against the government sporadically until 1968 revolution.[549]

When the Baath party came to power in 1968, one of its announced goals was to solve the Kurdish problem peacefully. On this basis, negotiations were held between

[545] Ibid.
[546] Mustafa Daoud, *The Future of Federalism in Iraq* (University of Baghdad: Baghdad Center for Studies, 2004),54.
[547] Ibid.
[548] Ibid.
[549] Ibid.

the new government and the Kurds, which resulted in the declaration of 11th of March 1970, which grants the Kurds broad rights that allowed them to establish Kurdish administrative institutions in Erbil, Sulaymaniyah and Dohuk, and lasted for four years ahead.[550] Later, the Kurdish leaders realised that the autonomy was ink on paper when the Iraqi government passed the law of autonomy which cleared the 11th declaration from its content. As a result of this, the Kurds declared rebellion and insurgence where they achieved great victories over the governmental troops. The Iraqi government, on its part, regained the initiative by signing Algeria Treaty with Iran in 1975 where Iraq's government conceded half of Shata alArab to Iran in turn that the latter stopped the support to the Kurds who were greatly defeated. This made Al-Barazany leave Iraq for good.[551]

After the outbreak of Iraqi-Iran war, the Kurdish Movement recharged its activity against the Iraqi government, but the latter's re-action is the toughest of its predecessors in that military campaigns were launched not exclusively against Peshmerga forces, but civilians were targeted. A lot of civilians were killed and displaced. Such a tough action led to the destruction of the political force of the Kurdish Movement and forced its leaders and militants to flee to Iran.[552]

After the blows it received at the hands of the Baathist government, the Kurdish Movement needed an unexpected event to return to their previous positions. This happened when the former president (Saddam Hussein) invaded Kuwait. Such an invasion (1) inflamed the uprising in the southern and northern regions of Iraq: and (2) enabled the Kurds to establish the status quo State in the northern regions under

[550] Ibid.
[551] Ibid.
[552] Mohammad Omar, *Federalism between the present and the future*, (University of Baghdad: Baghdad Center for Studies, 2007), 45.

international protection.[553] The Iraqi government unwillingly called the Kurds to a dialogue whose goal was to grant them autonomy with reference to the Self-government Act of 1974.[554]

Irrespective of the reasons behind the negotiations, the two parties held three rounds of negotiations that ended with deadlock due to the desire of the Kurds to amend the acts of the law of autonomy. Such amendments involved delimiting the regional area which included Kirkuk province. The absence of United States' support led to the collapse of such negotiations which resulted in withdrawing the government's military forces, officials, administration and funding the Kurdish area. Besides, economic blockade was imposed on the region; this had created political, security and military vacuum that was filled by the Kurdish leadership later on. It took the form of the establishment of private administration and the declaration of federalism as being the formula under which the legal relationship between the Kurds and central government was defined to preserve the national unity of Iraq.[555]

Federalism did not bring stability to the Kurdish area: on the contrary, it added more complication by the rise of the conflict of interests between the Kurdistan Democratic Party (KDP) headed by (Massoud Barzani) and Patriotic Union of Kurdistan (PUK) headed by (Jalal Talabani). [556] Consequently, both parties fought fiercely from 1994-1998 as the war became over by international mediation that gave rise to the division of the Kurdish region with two administrations: one in Erbil and the other in Suleimania.[557]This had deepened the conflict between both parties. Such a gap between both parties needed a great event to bridge it with the American

[553] Ibid.
[554] Ibid.
[555] Ibid.
[556] Ibid.
[557] Ibid.

occupation of Iraq. There were various reasons that led to the aggravation of the Kurdish Question and made its solution difficult during the Republic ruling. The reasons were: (1) the absence of real constitutional mechanism to execute the projects to solve the Kurdish Question, (2) the treatment with the Question by an executive authority which was ~~is~~ distinguished by instability and counter-coups, (3) the reliance of the Kurds on the external support where the latter employed the Kurds to achieve its interests in Iraq, (4) the domination of non-trust on Kurdish leaders' minds and Iraqi governments due to the ill-intent between both, (5) the over hard-work of Iraqi governments to establish a highly centralized state, ignoring the diverse demographics of Iraqi society and the practice of the policies of brutal repression and merging policy (6) the absence of the political volition on the part of the government and finally (7) the implicit signals introduced by Kurds for independence. [558]

3.7.1 The Kurdish Strategic view for the Establishment of Iraqi Government after 2003

It appears from the outset that the Kurds had planned after the US occupation to achieve their ambitions through:-

A. Reviving the hope to establish the Kurdish State to be the first brick in building the independent Kurdish State in future.

B. Kurds started to declare that they do not accept Iraq's partition as some Arab and Turkmen thinkers claim in that the Kurds took a strategic decision based on reality to remain within a federal united Iraq.

C. Cooperating with Iraqi political forces to get support for achieving Kurdish interests. To fulfill their interests, the Kurds employ the following means[559]

[558] Ibid.
[559] Ibid.

1. Employing the dialogue style to deal with all the parties and avoiding escalations and confrontations.

2. Exerting pressure on the Iraqi government to make decisions in the interest of the Kurds, offset by the weakness of the Iraqi government to take what underestimates or minimises such pressures.

3. Dictating their terms by adding many Acts to the permanent Iraqi Constitution 2005 in order to secure two goals: obtaining big gains for the building of the autonomy, and fulfilling independence in turn of passing the constitution.

4. Accelerating in building their State for fear of changing the Iraqi Constitution in future on the grounds that the constitution was written during the occupation time.

5. Adhering to the US vice-president, Josph Biden's idea of the partition of Iraq.

6. Possessing the ability to Kurdify Iraqi politics where it is not possible to take any decision without the Kurds' opinion and without the risk of using their veto, and it was evident in the temporary and permanent constitution as well as other topics.

7. Preventing the rise of a strong central government and strengthening their autonomy despite the aftermaths of such an action which would give rise to new threats to the security of Iraq as a whole.[560]

3.7.2 Federalism in Iraq

Recognising the bitter truths which impede the establishment of their independent state, the Kurds tended to federalism which was the best real choice to them after the fall of Saddam's regime. In other words, they decided to remain within Iraq provided that they get their rights which are necessary, from their perspective, and the

[560] Ibid.

government to refrain from acts of racism against Kurds in the future. Accessing to such rights of full citizenship is not possible unless a federal state is established.[561] The Kurds supported their eligibility to establish a federal democratic system by referring to the hardships they had undergone under the rule of the former governments. This eligibility was due to the US support, some Iraqi political forces' supported, the Kurds' ability to run their region because of the wide experience they acquired after and before the occupation. This would give them the chance to preserve their cultural identity, and would also grant them more possible competences to make the general policy in their region which was constitutionally preserved.[562]

This formula was rejected by most of the forces of Iraqi political parties, which saw it as the introduction to the separation of the Kurdish region in the future and then to divide Iraq. They asked, instead, a different formula which was federalism, regionalism or the so-called federal provinces as they deem best suited to rule Iraq, where this formula tends not to weaken any one ethnic group to establish regional governments and encourages cooperation between the ethnic components, a formula which was rejected by the Kurds, considering them a threat to national existence.[563]

The difficulty of the solution now lies in the failure of the partners in the homeland to reach a compromise optional formula approved for the type of federalism that ensures the rights of Kurds and to meet at the same time the desire of the Arabs in

[561] Ahmed Abu Bakr, *The Federal and the Political System* (University of Basra: Basra Centre for Legal Studies, 2009), 44.
[562] Ibid.
[563] Ibid.

preserving the unity of the country in the light of the adherence of each party to its proposal.[564]

Shortly after the approval of the Constitution, the contradictions and differences began to surface between the central authority and the authority of the Kurdistan region of Iraq, where the region has the authority and the adoption of the Constitution of the province exceeded the powers of the central authority. Since any contradiction between the permanent constitution and any local constitution or laws would be settled to the benefit of the Region's Constitution and laws (Act 115 and 121, Second). As a result of this arrangement, the central authority has remained powerless since the arrangement allowed the regional authority to come up with decisions favouring the Kurds or to their benefit without consulting the central authority.[565] Accordingly, big problems erupted especially the extension of power and influence of the Region in investing the natural resources not only in the northern area, but to other areas called in the Constitution (disputed areas).[566]Thus, the Kurdistan regional government deemed to have the right to dispose of such areas freely. The Kurdistan region has kept enjoying the revenues and imports which other governorates were deprived of, let alone the hardships these governorates suffer from due to the domination of the parties and the lack of security where the latter prevailed in the Kurdistan region. In addition, the central policy was accompanied by massive and great corruption and mismanagement which made the majority of the country live some sort of instability and lack of services.[567]

[564] Ibid.
[565] Ibid.
[566]Jawad Najy, *Iraqi Federalism: Strengthening the Regions by Weakening the State* (University of Baghdad: Baghdad Center for Studies, 2012),66.
[567] Ibid.

Article 121(2) of the Iraqi Constitution 2005 stipulates that the right to the authority of the province to modify the application of Federal law in the region in case of a contradiction between the Federal law and the law of the territory, on the issue that does not fall within the exclusive powers of the Federal authorities.[568]Article 121 seems to blow up the supremacy of the Constitution provided under Article 13. Besides, it runs counter to the principle of legal hierarchy, and makes the Federal Government submissive to the interests of a territory or province, and makes the regional authority higher than the Federal State authorities. Accordingly, Article 121 of the Iraqi Constitution 2005 gives preference to regional laws since regional governments have the power to rule in favour of federal laws as mentioned above i.e. regional government is the referee to whom is the assessment of whether the federal law contradicts or conflicts with the regional law on an issue that does not fall with the exclusive powers of the federal authorities.[569]

3.7.3 The Powers of the Regions in Iraq to Modify a Federal Law in Cases of Conflict with a Regional law.

Most Federal Constitutions declare the supremacy of the Constitution and the supremacy of the Federal law. Although the Iraqi Constitution 2005 declares the supremacy of the Iraqi Constitution over all laws in Iraq, the Constitution created a situation where the powers of the Federation are limited in cases where a Federal law is found to be in conflict with a regional law especially on matters outside the exclusive authorities of the Federal government. In these circumstances, the Constitution gives the regions the powers to modify the application of such law. This is awkward and has received the attention of experts or academics in the field of constitutional law. Article 121(1) of the Iraqi Constitution 2005, provides that "the

[568] Ibid.
[569] Ibid.

regional powers shall have the right to exercise executive, legislative and judicial powers in accordance with this Constitution, except for those matters stipulated in the exclusive authorities of the Federal government."

Article 121 (2) however, declares the powers of the regions to modify the application of any Federal law in any region in Iraq in the event a conflict is found to exist between the Federal law and state law. The Article declares that "in case of contradiction between regional and national legislation in respect to a matter outside the exclusive authorities of the Federal government, the regional power shall have the right to amend the application of the national legislation within the region." The above is the constitutional declaration in respect of conflict of laws situation between Federal and regional laws. The practice in places such as the United States of America is quite different. In these jurisdictions, priority is given to Federal law in the event of conflict.[570] The interviewees involved in this research bared their minds. Interviewee No. 1 stated that:-

> "Iraq is a federal state. Thus, Federal law should apply in all parts of Iraq, because it is the supreme law in the country, according to the first Article of the Iraqi Constitution. To hold otherwise, it goes contrary to Federal system and arrangements and has the effect of creating duality of the judiciary in Iraq. Such as, authority of Iraq's Kurdistan region show the contradictions and differences between the central authority and the authority of Iraq's Kurdistan region; where the region has the authority to a regional law for the region, in a situation where the central government has no power to legislate on the subject, I see that in any contradiction between the permanent constitution 2005, and any Constitution or local laws, local laws will prevail. At this time, the central authority remains powerless and the regions are at liberty to rule in favour of regional laws without consulting the central authority. Thus it has become a big problem about the powers of the region. So in my opinion, a regional law should not be given preference over a

[570]Henry M. Hart"*The Relations Between State and Federal Law*," *Columbia Law Review* (1954): 489.

> federal law and that regional law should not modify Federal law."[571]

In a similar approach, Interviewee No. 3 agreed on the inappropriateness of giving priority to regional law in the event of conflict. According to Interviewee No. 3, he had this to say:-

> "It is inappropriate because the Federal law is the supreme law of the State. So allowing the Kurdish administration not to comply with the laws of the Federal government is not healthy for Iraqi's democracy. The Iraqi Federal law should apply in all the regions of Iraq just like accepting the Prime Minister is the general commander of the Iraqi armed forces, including any armed force of the regions."[572]

Interviewee No. 4 also does not support the idea of allowing the regional law to be prioritised over federal law in the event of conflict. However, it needs to be stated that the experts interviewed in this study are not unanimous on the prioritisation of regional law over Federal law in the event the Federal law is found to conflict with the regional law. Contrary to the position of Interviewees No. 1, No. 3 and No. 4, Interviewee No. 2 had a different view. In answering the question, he had this to say:-

> "It is okay allowing the application of regional law over the Federal law in event of conflict between the regional law and the Federal law. This is because the Iraqi Constitution 2005 is a federal Constitution that was arrived at following agreements and terms between the Federal law and the regional law. Since the status of regions such as Kurdistan is accepted the provision does not violate the provisions of the Constitution that says it is the supreme law in the country." [573]

It is important to note that Interviewee No. 2 based his argument on the Constitution itself saying that being a federal constitution, the regions and the federal government had to agree or consent to such arrangement during the constitutional drafting

[571]Interviewed Hind Ali Mohammed with a professor of Constitutional Law No 1, Baghdad University, Baghdad, Iraq, on March 13th, 2016.
[572]Interviewed Hind Ali Mohammed with a professor of Constitutional Law No 4, Baghdad University, Baghdad, Iraq, on March 17th, 2016.
[573]Interviewed Hind Ali Mohammed with a professors of Constitutional Law No, 2 Baghdad University, Baghdad, Iraq, on March 15th, 2016.

process. Hence, the constitutional provision ruling in favour of a regional law in the event of a conflict, especially where the federal government has no power to legislate on the subject matter is not a violation of the Constitution as well as the federal structure existing between the regions and the federal government.

> Still on the same issue, Interviewee No. I3 stated that: " I think that the constitutional outcome that the writers of the Constitution is the presence of an Iraq, divided into federal territories accompanied by the presence of central government with weak authorities. The Constitution of 2005 Article 121 gives the territory the right to amend the application of the Federal law if there is a contradiction between the federal law and the provincial law. I think this matter would lead to a situation of giving priority to the interests of the territory over the interests of the Federal government. Moreover, I see that the Kurdistan region has gathered a lot of powers and competences within the Federal structure of Iraq, guaranteeing the Provincial power over that of the Central government." [574]

According to Interviewee No. 14, he stated that: "I think that Iraq Kurdistan region is exceeding its powers over the Federal Government, especially Kurdistan region wants independence as the Kurds have kept saying that they are non-Iraqis. Moreover, they have no link with the Central government because they want to separate from it. This according to my opinion is treachery to Iraq and the 2005 Constitution because the Federal government granted them great powers with reference to the Constitution. Also, I think Iraqi Constitution 2005 involves legal provisions which are explicit enough to weaken the Central authority and to take Kurdish demands into account to the extent that the Kurds are granted wide powers at the expense of the Central Government, especially Article 115 which tackles the destiny of Kirkuk and the disputed areas, and Article 121 which weakens the Central Government"[575] The observation one can make from the statement of Interviewee

[574]Interviewed Hind Ali Mohammed with a lawyer No 13 at the Federal Supreme Court, Baghdad, Iraq, on February 17th, 2016.
[575] Interviewed Hind Ali Mohammed with a lawyer No 14 at the Federal Supreme Court, Baghdad, Iraq, on February 21th, 2016.

No. 14 is that, Kurdistan region seems to be taking advantage of the constitutional provisions to demand for total independence from the central government and by even considering itself as an independent country.

3.8 Conclusion

The idea behind the doctrine of S.O.P of the state to be exercised by a different body or persons is of great antiquity. It is traced to earlier philosophers such as, William Pitt among others. The idea developed on the premise that if powers are not to be arbitrarily and excessively exercised, then power should check power. In other words, even if the powers are separated but there should a mechanism in place for checks and balances. For instance, while the judiciary can review the actions of the other arms of government through the questioning of the constitutionality of laws for example the executive actions and the interpretation of the laws passed by the legislature in the same regards the executive and legislature can check the judiciary. The checks guarantee adherence to the law by all.

Although the Iraqi Constitution 2005 declares the supremacy of the Constitution over all other laws, but it has created a situation where the powers of the Federation are limited in cases where a Federal law is found to conflict with a regional law, especially on matters outside the exclusive authorities of the Federal government. In these circumstances, the Constitution gives the regional powers the right to modify the application of any laws, but we must say, that Federal law should apply in all parts of Iraq, because it is the supreme law in the country. Under this chapter, the researcher answered the first and second research questions as well as achieved the first and second research objective.

CHAPTER FOUR

CRITICAL EXAMINATION OF THE ESTABLISHMENT, POWERS, COMPOSION OF THE JUDGES OF THE IRAQI FSC

This chapter addressed the importance of the Supreme Court in the context of Iraq. For example, specific issues relating to the establishment of the Iraqi's Supreme Court, the appointment processes and the jurisdictional competence of the Federal Supreme Court all under the 2005 Iraqi Constitution as well as the Basic Law of Iraq 1925 were analysed. Legal supervision and interpretation on the constitutionality of laws as distinct powers of the FSC in Iraq was examined. In this chapter the researcher provided a brief historical account of Constitutional law in Iraq. Because of the importance of judicial independence in guaranteeing the sanctity of the powers of the FSC, the independence of the Iraqi Supreme Court in the discharge of its power of legal supervision and interpretation on the constitutionality of laws was examined as well. The analysis in the chapter was by way of making reference to the responses of the interviewees from the transcripts of the interviews and also, from the secondary data, i.e. textbooks, articles, Government publications, academic journals, newspaper articles, Internet sources. Under this chapter, the researcher answered the third and fourth research questions as well as achieved the third and fourth research objective respectively.

4.2 The Supreme Court under the Basic Law of Iraq 1925

It is of paramount importance to have a judicial body that is responsible for finding out the constitutionality of laws. This is due to the fact that the judicial authority is independent, neutral and far away from the politicians' viewpoints. Accordingly, the majority of states' Constitutions tended to establish constitutional courts involving the best judges to pass judgments over whether the laws enacted are constitutional or not.[576] This is because the Judiciary is the professionally qualified body to decide the constitutional control. On this basis, the Basic Law of Iraq 1925 approved the control of the constitutionality of laws. This was executed by the establishment of the FSC whose task were: (1) to prosecute ministers and National Assembly members who are accused of political crimes or crimes related to their public posts, (2) to prosecute Judges of Court of Cassation because of crimes stemming from their posts, and (3) to take decisions related to the interpretations of the constitution and whether laws go in conformity to the Constitution or not. However, the FSC differs with respect to its members who are not necessarily judges; rather, the majority are from House of Lords who are legally and academically not qualified.

4.2.1The Establishment of the Iraqi Federal Supreme Court under the Basic Law of Iraqi 1925

Control is exclusively carried out after the legislations are put into force. The controlling body of law-constitutionality differs according to the constitutional governments that Iraq had passed through. The Basic Law of Iraq 1925, granted the

[576] Dindar Shikhani, *Control over of the Constitutionality of Laws*, (University of Baghdad: Baghdad Center for Studies, 2000),43.

Supreme Court.[577] The task of interpreting its provisions and deciding the conformity of other laws to its provisions or not.

As mentioned in the Basic Law, "The FSC should be established to prosecute ministers and general assembly members who are accused of political crimes or crimes related to their public posts, to prosecute Judges of Court of Cassation because of crimes stemming from their posts, and to take decisions related to the interpretations of the constitution and Whether the laws go in conformity to the constitution or not"[578]

The Basic Law of Iraq 1925 exclusively specifies the FSC competencies as follows:

1. Prosecution of ministers and general assembly members due to two types of crime: political and those crimes relevant to their public posts.
2. Prosecution of the Cassation Court judges because of crimes stemming from their posts.
3. Taking decisions concerning the issues of the interpretation of the Constitution and how Far other laws go in conformity to its items (the Constitution).

As such, the FSC consists of eight members apart from the chairman. Those members were elected by the House of Lords; four of them were from the same House, and the other four were from the Cassation Court Judges or from senior judges. The FSC was held and presided over by the Head of the House of Lords. If

[577] Albakry Ahamed, *An Introduction to the Study of Law*, (University of Baghdad: Baghdad Center for Studies, 2001), 66.
[578] Article (81) of the Basic Law of Iraq 1925.

the head was not able to attend, the vice-head should preside over the court meeting.[579]

The House of Lords authority was very explicit in choosing the FSC members. In this regard, the Basic Law of Iraq 1925 conditions that the members should be from the Cassation Court judges, and the House of Lords has the right to choose other than those of the Cassation Court provided that the chosen judges should be senior members in terms of their career.[580] It is to be mentioned that the FSC was responsible for prosecuting ministers, general assembly members or Cassation Court judges because such crimes were codified in the Constitution. For the FSC to hold its meeting, it was an exclusive responsibility of the House of Lords with no intervention for the royal decree even if the prosecution was held before the FSC.[581] The case of lawsuit should be transferred on the basis of accusatory verdict issued by the Council of Representatives provided that two-thirds of its present members approve each case separately.[582] Accordingly, if the Council of Representatives convened, the case of lawsuit was set in motion depending on the nature of the topic that was presented before the FSC. However, if the Council of Representatives failed to convene a meeting, the Basic Law of Iraq 1925, solved such an issue by virtue of Article 82(2) stating that: "Other cases are transferred to the FSC on the basis of a decree issued by ministers' council or issued by one of the National Assembly councils."[583] In this case, the royal decree was invoked through the ministers' council to constitute the Supreme Council in choosing its members by the executive authority. Definitely, the latter authority would choose those who protect its interests.

[579] Article (82) of the Basic Law of Iraq 1925.
[580] Albakry Ahamed, *An Introduction to the Study of Law*, (University of Baghdad: Baghdad Center for Studies 2001), 67.
[581] Ibid.
[582] Article 82(1) of the Basic Law of Iraq 1925.
[583] Article 82(2) of the Basic Law of Iraq 1925.

This would lead to the involvement of the allegiance factor and obedience to the executive authority so as to fulfill the purpose of the establishment of the Supreme Council.

It is important to note that four judges out of nine were chosen including the chairman of the Court who was the head of the House of Lords plus four Lords. Hence, the members would be five out of nine, in other words, they were not elected, but nominated by a royal decree. Naturally, the verdicts that would be taken were according to the moods of the executive authority.[584]

4.2.3 The Terms of Reference of the Federal Supreme Court under the Basic law of Iraq 1925

The FSC power were codified in the Basic Law of Iraq 1925 where the Court had the power to prosecute ministers, members of the National Assembly (which was composed of the House of Lords and the Council of Representatives), and Cassation Court judges who were charged with political crimes or crimes pertaining to their public posts. In addition, the Basic Law of Iraq 1925, granted the FSC the competence to interpret constitutional texts, control over the constitutionality of laws, to take decisions of cases relevant to the interpretation of the Law, and to decide the conformity of other laws to its provisions. The FSC convened on the basis of a royal decree as far as the interpretation of the constitution and control over the constitutionality of laws were concerned. The Court, according to Article 83(3), consisted of the same number of members of the Cassation Court members and the

[584]Hassan Mohammed Shafiq, *The Control of the Constitutionality of Laws* (Baghdad University: Baghdad Center for Studies, 2003),43.

remaining members were from the House presided over by the head of the House of Lords.[585]

In case, it does not convene, with reference to a royal decree, the ministers' council intervened to choose the Court members. This is what was written in the Constitution as stipulated in Article 3, "If a case pertaining to the interpretation of the provisions of the Basic Law 1925, or one of the other laws is inconsistent with the Basic Law 1925, the FSC convenes according to a royal decree and according to the approval of ministers council. This is in accordance with Act 3 of the Article 82. In case the National Assembly is not convening, the nomination of its members is made by a decision taken by ministers' council and a royal decree".[586]

The FSC exercised its competences in controlling over the constitutionality of laws by appealing against the law of harmful propaganda (No.20/1938). It is to be noted that the court did not consider the constitutionality of legislative decrees issued by the executive authority, although such decrees violated the provisions of the Constitution.[587] Besides, the FSC exercised its competence in interpreting Articles 20 and 22 of the Basic Law of Iraq 1925. Of the judicial applications of the Private FSC, it interpreted Article 22(1) of the Basic Law of Iraq 1925 which prevented any amendment to the regency term concerning the king's rights and inheritances.

4.2.4 The Nature of the Federal Supreme Court Decisions under the Basic Law of Iraq 1925

As mentioned in the Basic Law of Iraq 1925, when the FSC settles the controversy over the constitutionality or non-constitutionality of laws, the Constitution conditions

[585] Ibid.
[586] Article 3 of the Basic Law of Iraq 1925.
[587] Mohammed Ali, *The Constitutional System in Iraq* (University of Baghdad: Baghdad Center for Studies,1999),321.

that the FSC verdicts are taken in accordance with two-thirds of its members. The verdict reads: Any verdict, taken by the FSC concerning the violations of the laws or violations to the provisions of the Basic Law of 1925, should be taken by two-thirds of the members. If such a verdict is taken, the law or parts of its provisions violating the Law shall be considered null and void from the date of the court's verdict. In addition, the government shall pass a legislation that removes the damages stemming from the applications of the cancelled provisions.[588]

The FSC were entrusted with the following terms of reference:-

A. Prosecution of Union Council members and ministers.

B. Settling differences between the Union government and one or more of its members or those differences between the members themselves.

C. Giving legal advice in matters referred by the Prime Minister of the Federation Council.

D. Interpreting the Union's Constitution where the Court's verdicts have the same force and they are binding as the interpreted text is.

E. Controlling the constitutionality of laws and the federal decrees on the basis of a request presented by the Prime minister of the Union or the Prime minister of one of the state members. The verdict of non-constitutionality of the law or the decree, in this regard, is considered null and void from the date of issue of the verdict.

F. Appealing against conclusive judgments issuing from the member states if such judgments involve settling a dispute that contradicts the provisions of this Constitution or any federal law.

[588] Majid Al Ragheb, *Political Systems and Constitutional Law*, (University of Baghdad: Baghdad Center for Studies, 2000), 66.

G. In accordance with laws, appealing against verdicts approved by federal courts.[589]

Although it was of a distinctive constitutional reality, the judicial control over the constitutionality of laws under the umbrella of the Basic Law of Iraq 1925 was a subsequent control. Iraq's experiment was not far away from the political currents, besides, it was weak various influences of the executive authority. This was attributed to the Constituent Assembly not being able to escape from the political currents and conditions when it organised the FSC.[590] Therefore, this organisation became influenced by the general attitude which dominated over the constitution's texts in that the attitude was to strengthen the executive authority at the cost of other authorities. This, as a consequence, made the FSC enjoy no independence due to the quality of its members and it became politically dominated more than legally oriented.

As for the FSC members, it used to be held and presided over by the head of the House of Lords; four of the members were chosen by the same House and appointed by the executive authority.[591]

In terms of the number of members of the Court, the members of the majority of the House of Lords were from the same House of the Lords. This was owing to the fact that the Basic Law of Iraq 1925, did not condition that the member of the House should have some college degree, not even the mastery of reading and writing. Possibly, the law non-conditionally chose from those figures to be members of the Higher Court, and since the Court was held with reference to a royal decree, its

[589] Act 59 of the Arab Union Constitution ratified between Iraq and Jordan on 29th /30/1958.
[590] Majid Al Ragheb, *Political Systems and Constitutional Law* (University of Baghdad: Baghdad Center for Studies, 2000),67.
[591] Ibid.

verdicts would unquestionably be influenced by the attitudes of the executive authority. Moreover, the Court was temporary in that it was held due to a given the case of lawsuit and it (the Court) would be dissolved once it takes its verdict.[592]

4.3 The Supreme Court under the Iraqi Constitution 2005

Constitutional systems based on the SOP have the executive, the legislative and judicial organs separated. The judiciary is often represented by the courts and Supreme Courts are always at the top of the judicial hierarchy. In other words, the Supreme Court is part of the judicial branch of the government that is vested with wide adjudicatory powers over legal disputes submitted to it by individuals, the states or states' organs including the executive or the legislative branch of the government.

dismantling social inequalities and expansion as well as protect individual rights".[593]

In Iraq, the FSC sits at the top of the judicial hierarchy as per the Iraqi Constitution 2005. Below, the study examined the establishment, the functions and composition of the FSC under the Iraqi judiciary.

4.3.1 The Establishment of the Iraqi Federal Supreme Court under the Iraqi Constitution 2005

Like all independent states across the globe, Iraq has a FSC established under the Iraqi Constitution 2005. The Iraqi FSC was initially a creation of the TAL (Transitional Administrative of Law), and through the order of the then Iraqi Transitional Government governed under the TAL. The TAL was signed on March 8, 2004 by the Iraqi Governing Council and became operational on June 28, 2004

[592] Ibid.
[593] Matthew EK. Hall, *Nature of Supreme Court Power* (New York: Cambridge University Press, 2010), 34.

until the operation of the current Iraqi 2005 Constitution.[594] The FSC is a constitutional court established under the Iraqi Constitution 2005. Articles 92 to 94 of the Iraqi Constitution 2005 provide for the establishment, membership and qualifications of the judges of the court and related issues governing the operation of the FSC. As mentioned above, the FSC is established under Article 92 of the Iraqi Constitution 2005. The Article provides that the "Supreme Court is an independent judicial body, financially and administratively."[595]Article 92(2) of the Iraqi Constitution2005 states that:-

> "The Federal Supreme Court shall be made up of a number of judges, experts in Islamic jurisprudence, and legal scholars, whose number, the method of their selection, and the work of the Court shall be determined by a law enacted by a two-thirds majority of the members of the Council of Representatives."

The above Article has been examined in this study since the inclusion of experts of Islamic jurisprudence on the bench has generated and still generates debate and has been of interest in this research. It was one of the issues examined in this study in order to ascertain the merits and the demerits of their inclusion as members of the FSC.

Article 93 of the Iraqi Constitution 2005 sets out the jurisdiction of the Federal Supreme Court as follows:-

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

Second: Interpreting the provisions of the Constitution.

Third:- Settling matters that arise from the application of the federal laws, decisions, regulations, instructions, and procedures issued by the federal authority. The law

[594]Abdul Hamid Mahmahd,*The democracy in Iraq*, 2 nd (University of Baghdad: Baghdad Center for Studies, 2011),54.
[595] Article 92 of the Iraqi Constitution 2005.

shall guarantee the right of direct appeal to the Court to the Council of Ministers, those concerned individuals, and others.

Fourth:- Settling disputes that arise between the federal government and the governments of the regions and governorates, municipalities, and local administrations.

Fifth:- Settling disputes that arise between the governments of the regions and governments of the governorates.

Sixth:- Settling accusations directed against the President, the Prime Minister and the Ministers, and this shall be regulated by law.

Seventh: Ratifying the final results of the general elections for membership in the Council of Representatives.

Eight:- (A) Settling competency disputes between the federal judiciary and the judicial institutions of the regions and governorates that are not organized in a region. (B) Settling competency disputes between judicial institutions of the regions or governorates that are not organized in a region.

The Constitution further stresses the independence of the courts, which include the FSC. Articles 87 and 88 contain the independent declaration of the courts and judges. Article 87 declares that "The Judicial authority is independent. The courts, in their various types and classes, shall assume this authority and issue decisions in accordance with the law". Also, Article 88 declares that "Judges are independent and there is no authority over them except that of the law. No authority shall have the right to interfere in the Judiciary and the affairs of Justice". The Courts in their

various levels, shall assume this power and issue decisions in accordance with the law. It is interesting to note that the Constitution in stating the independence of the judges added the fact that their exercise of powers conferred on them and justice delivery by the judges should be devoid of interference from any power. In the course of this chapter, it has been shown how independent specifically is the FSC in the exercise of its constitutional powers.

The independence of the Supreme Court in the discharge of its functions is a cardinal feature of the Supreme Courts globally. Justice especially by the apex court such as the Supreme Court must be independent of political or other external influences. In other words, the court should not be politically subjected to the ruling party's interest or should ever be weakened by the executive or the legislature. It should be independent in the strict sense of it. But the reality across nations, especially developing nations Iraq inclusive is that the Supreme Courts though always provided in the Constitutions to have significant powers of legal supervision and interpretation on the constitutionality of laws, a handful are truly independent as expected.

In the latter part of this chapter, this study attempted through a qualitative approach using interviews to inquire as to the independence of the Iraqi FSC in the discharge of its all important functions vested on it by the Iraqi Constitution 2005.

4.3.2 The Appointment of Justices and the Composition of the Iraqi Federal Supreme Court under the Iraqi Constitution 2005

The office of a judge is not an ordinary one. It is an office that requires expertise in the understanding, interpreting and applying the provisions of the Constitution, laws and regulations relating to matters submitted before them. Once a judge is appointed his tasks are varied. According to Michelle, the tasks include "making impartial

decisions, ensuring fairness under the law, defending constitutional rights and freedoms and providing justice for the rich and poor."[596] The above task in mind made the criteria or the appointment of justices of the Supreme Court to be a combination of many things. While merit/qualification plays an important role, friendship ethics and ideology as well as representativeness are factors that play a fundamental role in the appointment process.[597] Prior legal experience in the practice of law either as judges or season practitioners are equally important considerations in the appointment of justices. Prior legal experience is justified on the basis that the Supreme Court as Benjamin put "is a leading player in the drafting, amending and interpretation of the various federal rules."[598] These factors shaped the appointment process globally. Representativeness for instance, has been demonstrated in the US Supreme Court during George Washington time.[599]

The appointment process of Supreme Court Justices across the globe is not a one man or one institution show. It involves the President, the Senate and at times a high judicial body.[600] The issue of the appointment process of justices of the FSC is regulated by the Iraqi Constitution 2005. Article 91 vests the powers of appointing

[596] Michelle Maiese, "Principles of Justice and Fairness", (Consortium: University of Colorado, 2013):34.

[597] Epstein, Lee, Jeffrey A. Segal, Nancy Staudt, and Rene Lindstad, *Role of Qualifications in the Confirmation of Nominees to the US Supreme Court* (Florida state: University Law Review, 2004),1145. See also Monaghan Henry Pau, "The Confirmation Process: Law or Politics?," *Law Review* 101, no.6(1988):1202. See also Richard Davis, *Electing Justice* (New York: Oxford University Press, 2005), 43-51. See also Epstein Lee, Jeffrey A. Segal, and Chad Westerland, "Increasing Importance of Ideology in the Nomination and Confirmation," *Law Review* 56, no.23 (2007): 609. See also Cann Damon, "Beyond Accountability and Independence-Judicial Selection and State Court Performance," *Journal of Law Economics and Organization* 90 (2006): 226. See also Stone Geoffrey R., "Understanding Supreme Court Confirmations," *Law Review* 201, no. 1 (2010): 386.

[598] Benjamin H. Barton, "Empirical Study of Supreme Court Justice Pre-Appointment Experience," *Law Review* 64, no.1173 (2012): 1139. See also Struve Catherine, *The Paradox of Delegation: Interpreting the* Federal Rules of Civil Procedure, (University of Pennsylvania: Law Review, 2002), 1099.

[599]George Watson and John A. Stookey, Shaping America: The Politics of Supreme Court Nominations (1995), 214 .

[600] Henry Paul Monaghan, "The Confirmation Process: Law or Politics?," *Law Review* 101, no.6 (1988):1203.

the justices of the FSC in the Higher Juridical Council established under Article 90 of the Iraqi Constitution 2005. By virtue of Article 91, the appointment of all justices and members of the FSC is done by the Higher Juridical Council. Article 90 declares that "the Higher Juridical Council shall oversee the affairs of the judicial committees. The law shall specify the method of its establishment, its authorities and the rules of its operation." Article 91 went on to declare that "the Higher Juridical Council shall

Exercise the following authorities:-

(1) To manage the affairs of the judiciary and supervise the federal judiciary

(2) To nominate the Chief Justice and members of the Federal Court of Cassation, the Chief Public Prosecutor, and the Chief Justice of the Judiciary Oversight Commission, and to present those nominations to the Council of Representatives to approve their appointment.

(3) To propose the draft of the annual budget of the Federal judicial authority, and to present it to the Council of Representatives, for approval.

In the appointment of the judges of the FSC, considerations are required to be fulfilled or met. The judges of the FSC are to compose of jurists and other judges learned in Islamic jurisprudence. This composition is accepted to some experts while others do not accept it. Interviewee No. 4 supported the inclusion of Islamic experts among the judges of the Federal Supreme Court. Interviewee No. 4 argued that the reason why Islamic jurisprudence should be included is the fact that the Iraqi

Constitution 2005 declares "Islam" as the state religion of the country. His response runs as follows:-

> "Although the FSC in Iraq is not a *Sharia* court in the real sense of it, the Constitution of Iraq 2005 that establishes it and guides its operations says Islam is the state religion. So the presence of experts of Islamic law amongst it's judges is very important. The requirement of legal experts and Islamic experts in the composition of the court is further justified because *Sharia* is declared as one of the sources of law in Iraq. The presence of the legal experts and the Islamic experts makes the arrangement complete when the FSC is confronted with matters on Islamic law coming before the court."[601]

Other experts interviewed such as Interviewee No. 2 hold a different opinion. Interviewee No. 2 stated that:-

> "This arrangement in my opinion is unfortunate. Why should the judges of the FSC comprise of Islamic experts since the work of the FSC is the interpretation of the laws which, I mean ordinary laws here? This task requires knowledge and expertise. This is particularly so as the judges must strive to find the intention of the Constitution makers. In my opinion the judges of the FSC should consist of Iraqi University professors, seasoned lawyers with practical legal experience in law, especially in the area of constitutional law, judges of lower courts, and even legal personnel who work in government departments." [602]

Again Interviewee No. 8 also raised the issue of expertise as a consideration in the appointment process of the judges of the Supreme Court. His perspective is from the fact that the court is a final court whose decisions are not appealable. It, therefore, need judges who have the skill to interpret the laws in the light of facts submitted to them to minimise error, especially when the case before the FSC involves fundamental constitutional guarantees. Interviewee No. 8 responded as follows:-

> "The FSC is the final court based on the current appellate system under the constitutional arrangement in Iraq. It follows, therefore, that the court being the final arbiter requires judges who have versed

[601] Interviewed Hind Ali Mohammed with a professor of Constitutional Law No 4, Baghdad University, Baghdad, Iraq on March on 20th, 2016.
[602] Interviewed Hind Ali Mohammed with a professors of Constitutional Law No 2, Baghdad University, Baghdad, Iraq on March 15th, 2016.

> knowledge and experience in law. This will greatly assist them in the proper interpretation of the laws and appreciation of the legal issues."[603]

Politics and other considerations are part of the Supreme Court Justices appointment process. This is seen even in advanced jurisdictions, such as the United States of America. Speaking on the American situation Richard Davis stated that "politics is critical in both parts of the Supreme Court appointment process: Presidential selection and Senate confirmation."[604] In the case of Iraqi, sectarian consideration equally plays a role in the appointment process of the judges of the FSC. Although the justice delivery should not be based on sectarian or political consideration this is not the case in Iraq as sectarian consideration counts in the appointment process. This consideration does not enjoy the acceptance of some experts, including of the interviewees in this study. Interviewee No. 3 felt that since the work of the FSC is not religious, the inclusion of Islamic experts is unnecessary. He also felt that when sectarian considerations are involved, how would the appointment take care of the different sects in the country? Interviewee No. 3 stated that:-

> "The composition of the judges of the FSC should not consist of Islamic experts because the FSC is not governing on religious issues. Additionally, there are different sects and followers of different doctrines in Iraq, then from which sects would these Islamic experts be appointed? Would not, that result in biased decision towards the particular judge's sects? In my opinion expertise, integrity and experience should be the consideration in the appointment process of the judges of the FSC."[605]

Still on the issue of political and other considerations being taken into account in the appointment of the judges of the FSC, apart from Interviewee No. 3 other

[603]Interviewed Hind Ali Mohammed with a judge No 8 the Federal Supreme Court, Baghdad, Iraq. on January 26th, 2016

[604] Richard Davis, *Electing Justice*, (New York: Oxford University Press, 2005), 40.

[605]Interviewed Hind Ali Mohammed with a professor of Constitutional Law No 3, Baghdad University, Baghdad, Iraq, on March 17th, 2016.

interviewees also responded to this issue as well by putting forward their views. For example, Interviewee No. 13 stated that:- "I think that the appointment of the FSC and its Chairman out of nine members does not keep pace with the reality of Iraq in the federal future. This is attributed to the possible establishment of Regions in the future where the lawsuits will be greater in number, and I think that Federal Court members (9) are not enough to consider all lawsuits. In addition, giving the power to the presidential council to appoint the Court members leads to the non-independence of Iraqi judiciary. In the interview, the guest emphasised that the number of the Federal Court members should be increased in future, the body responsible for appointing them should be changed."[606]

From the opinion of Interviewee No. 13, it would suffice to note that the appointment of the FSC and its Chairman out of nine members does not keep pace with the reality of Iraq in the federal structure. He thinks that the FSC members (9) are not enough to consider all the lawsuits coming before it.

As to Interviewee No. 14, he stated that, "According to democracy and the Federal system of Iraq, the choice of the Chairman of the Federal Court and its members should be elected by the judicial councils found in the territories in order to achieve the principle of S.O.P, particularly regarding determining the duration of membership because giving the authority to appoint members of the Court to the legislative authority or executive will lead to ~~a~~ violation of the principle of S.O.P. Particularly, this will be a life appointment with our wish to specify the term and I think that, choosing the members should exclusively be done by the Supreme

[606] Interviewed Hind Ali Mohammed with a lawyer No 13 at the Federal Supreme Court, Baghdad, Iraq on, February 17th , 2016.
2016.

Judicial Council and the judicial councils in the territories. Those bodies should choose the figures, and then the choice of the court members will be made. According to my opinion, having been elected, the members of the Court should elect the Chairman."[607]

From the above, one could argue that Interviewee No. 14 appears to suggest that, the choice should be by election only. The election, in turn, should be made by the territories and the provincial judicial councils in the territories without giving the power of choice to the legislative or executive authorities because this would threaten the principle of S.O.P.

Turning to Interviewee No. 15, he stated that:-"I think that the formation of the Federal Court members according to the Constitution, especially Article 92(2) did not come up with the law of the Federal Court No.30 of 2005. This according to our view is a contradiction, because the law of the Court clarifies that the Court consists of chairman and (8) members who are appointed by the presidential Council on the basis of a proposal submitted by the Supreme Judicial Council. I think that consultation with provincial judicial councils and the exclusive appointment of judges without Islamic jurisprudence experts and legal experts (in opposite to Article 92 of the Constitution) is a big problem. The Court is in need of judges to settle lawsuits."[608]

To Interviewee No. 15, there should be some concord between Article 92 of the Iraqi Constitution 2005 and the law of the Federal Court No.30 of 2005 concerning the choice of the judges and all the Court's members should be judges.

[607] Interviewed Hind Ali Mohammed a lawyer No 14 at the Federal Supreme Court, Baghdad,, on February 21th , 2016.
[608]Interviewed Hind Ali Mohammed with a lawyer No 15 at the Federal Supreme Court, Baghdad, Iraq, on February 24th 2016.

By the Iraqi Constitution 2005, the FSC is established under Article 92. The Article declares that the FSC shall be "independent judicial body, financially and administratively." The Constitution declares under Article 92(2) that the FSC shall comprise of judges and scholars learned in Islamic jurisprudence to be appointed based on a law enacted by 2/3 majority of the members of the Council of Representative, the law so enacted is to determine the number of the judges and the criteria for their selection.[609] Furthermore, the Iraqi Constitution 2005 under Article 93 provides that the FSC shall be competent to handle cases for the determination on the constitutionality of laws and regulations, cases for the interpretation of the provision of the Constitution, cases between government bodies or between government and individuals and others cases against the Prime Minister or any member of the Council of Ministers are within the powers of the FSC.[610]

Furthermore, Interviewee No. 12 stated that, "I think that the presence of Islamic jurisprudence experts in the FSC is to address the text of the Constitution in Article 2(1), which states (no law may be enacted that contradicts the established provisions of Islam) and paragraph 2 of the same Article provides that it is not allowed to enact a law that contradicts the principles of democracy."[611]

From the above, Interviewee No. 12 appears to justify the inclusion of experts of Islamic jurisprudence to be members of the bench as far as the FSC is concerned. This is because they have to monitor opposing legislations/laws which are not in line with the principles of Islam.

[609] Article 92 of the Iraqi Constitution 2005.
[610] Article 93 of the Iraqi Constitution 2005.
[611] Interviewed Hind Ali Mohammed with a lawyer No 12 at the Federal Supreme Court, Baghdad, Iraq, on February 10th 2016.

> According to Interviewee No. 11, he was of the opinion that, "I think the text of Article 92(2) of the Constitution has some flaws because it did not specify what is meant by Islamic jurisprudence experts because in Islam, have different schools of thought, so which school of thought the experts will be selected from? What sort of experience is required from the experts? Do we have to rely on academic degree? Or years of employment? Do we have to rely on academic achievement of the experts in Islamic jurisprudence? Or do we have to rely solely on researches and writings carried out by these experts on the field of Islamic jurisprudence? As for legal experts, the constitutional text did not specify the nature or characteristics of the experts, but it left it to the law that will be enacted later. Are legal experts the professors of the field, or the jurist employees working in governmental departments? So, the Court should be exclusively formed of judges".[612]

In addition to the above, a proper and in-depth analysis of the views put forward by Interviewee No. 11 would suggest that, the two phrases i.e. experts in Islamic jurisprudence and legal experts appear not be given a clear and precise meaning. Thus, he emphasised that the formation of the FSC should comprise of only trained judges and not experts in Islamic jurisprudence or legal experts.

Apart from Interviewee No. 11, Interviewee No. 5 also shared his view regarding the composition of the FSC. He stated that, "I think that the Federal Court should compose of all the judges and give them all the legal powers but the existence of Shariah scholars and legal would restrict the work of the Federal Court and possibly religious fractions would control the work of the Federal Court and thus will lead to the spread of sectarianism among the Iraqi people. Sectarianism will tear up the unity of the Iraqi State."[613] To Interviewee No. 5, he saw the presence of Muslim Jurists as members of the FSC could possibly lead to some religious groups controlling the work of the Federal Court and thus will lead to the spread of sectarianism among the Iraqi people.

[612] Interviewed Hind Ali Mohammed with a lawyer No 11 at in the Federal Supreme Court, Baghdad, Iraq. on February 8th, 2016.
[613]Interviewed Hind Ali Mohammed with a professor of Constitutional Law No 5, School of Law, Mustansiriya University, Baghdad, on March 21th, 2016.

The appointment, tenure and dismissal of judges, especially that of the FSC is a serious business in a democracy. It is important because appointment process is one of the ways of guaranteeing the independence of the FSC and the entire judiciary.[614] Nadine justifying the importance of appointment process and related issues stated that "the reason why the procedure is significant for democracy is because the ways in which judges are chosen affects the extent to which judges are motivated to apply the law independently and impartially and to perform their role efficiently.[615] Nadine further argued that "providing stability of tenure for judges means that they are focused on the highly important role that they play in governance rather than concentrating on retaining their office, which could act to hamper their judgment."[616] Therefore, it is argued that political or other considerations should not count in the appointment of justices of the Supreme Court. This was stated by Richard Davis that the Supreme Court of the United States is "The Court is not populated today by politicians but almost exclusively by former lower level judges."[617]Although merit as a consideration in the appointment of justices of the Supreme Court is not acceptable to scholars such as Damon Cann,[618] but "merit and objectivity" should play a vital role in the appointment process because the task of justices as seen above is an enormous one and requires expertise. Additionally, justices are not party men appointment for party interest, but the ministers in the temple of justice. The danger of underplaying merit in the justices of the Supreme Court is that it affects the ability of the judges or the court to protect the rights of its citizens and in its overall

[614]Nadine Najim, "The Separation of Power in Venezuela under Hugo Chávez,"(2015), http://www.grin.com/en/e-book/312466/the-separation-of-power-in-venezuela-under-hugo-chavez(accessed May 26, 2016).
[615]Ibid. See also Inter-American Development Bank, "The Politics of Policies: Economic and Social Progress in Latin America," (2006),85.
[616]Ibid.
[617] Richard Davis, *Electing Justice*, (New York: Oxford University Press, 2005), 39.
[618] Damon Cann, "Beyond Accountability and Independence-Judicial Selection and State Court Performance," *Journal state Politics and Policy Quarterly*, 90 (2006): 226.

functions.[619] Additionally, when unqualified and partisan people get to the Supreme Court or when irrelevant considerations are taken in the appointment of the justices of the Supreme Court, it affects the quality of the judicial arm of government and judicial independence.[620] This issue was argued by experts such as Professor Douglas. Advising the US Senate on what to watch out in the appointment of justices of the US Supreme Court Professor Douglas W. Kmiec admonished the Senate in the following words:-

> "My proposition is simple: the proper Senate inquiry of a judicial candidate is demeanor, integrity, legal competence, and fidelity to the rule of law. It is not partisanship or policy agreement. While textually the Senate is free to inquire and to reject a nominee on any ground even a highly political, constitutionally problematic one like the nominee's views on outcomes in specific cases it should not do so. Undertaking to make nominees carry a type of political burden of proof will over time merely invite a subservience of mind and personality that is contrary to an independent judiciary."[621]

From the above statement echoed by Professor Douglas, one would argue that the whole process of appointing judges of the Supreme Court is not all that an easy task. Hence, for the sake of judicial independence, partisanship or policy, the government should never be given any form of weightage in the appointment process of the judges of the Supreme Court. In other words, political consideration and other factors deemed irrelevant should never be taken into account.

4.3.3 The Functions of the Iraqi Federal Supreme Court under the Iraqi Constitution 2005

[619] Michael R. Dimino Sr, "Worst Way of Selecting Judges-Except All the Others That Have Been Tried," *Law Review* 32 (2005): 267.

[620] Lee Epstein, The Role of Qualifications in the Confirmation of Nominees to the US Supreme Court, (University of Florida, 2005), 43. See also Stephen L. Carter, The Confirmation Mess: Cleaning up the Federal Appointments Process (1994), 89. See also Stephen Choi and Mitu Gulati, "A Tournament of Judges?," *Law Review* 92 (2004), 299.

[621] Douglas W. Kmiec, quoted in Senate Committee Hearings on the Judicial Nomination Process: Hearing Before the Senate Committee on the Judiciary Subcommittee on Administrative Oversight and the Courts on the Senate's Role in the Nomination and Confirmation Process: Whose Burden? *Law Review* 51, no. 5 (September 2002):67.

Article 93 of the Iraqi Constitution 2005, details out the functions of the FSC According to the Article, the FSC shall be responsible for:-

(1) Interpreting the provisions of the Constitution.

(2) Settling matters arising from the application of the federal laws, decisions, regulations, instructions, and procedures issued by the federal authority. The law shall guarantee the right of direct appeal to the court to the Council of Ministers, those concerned individuals and others.

(3) Settling disputes that arise between the federal government and the governments of the regions and governorates, municipalities and local administrations.

(4) Settling disputes arising between the governments of the regions and the governorates.

(5) Settling accusations direct against the President, the Prime Minister and the Minsters and this shall be regulated by law.

(6) Ratifying the final results of the general elections for membership in the Council of Representatives.

(7) (A) Settling competency disputes between the federal judiciary and the judicial institutions of the regions and governorates that are not organized in a region.
(B) Settling competency disputes between the judicial institutions of the regions or governorates that are not organize in a region.

The above Article is the source of the jurisdictional function of settling disputes between the federating units in Iraq. Thus, any dispute in the governing of the

Federal Iraqi government, the governorates or the regions are a matter that can be submitted to the Iraqi FSC. FSC can therefore supervise and determine the constitutionality of a Federal action or the action of the regions. It can also determine the constitutionality of any law or regulation passed in Iraq. The court can question whether the legislative process has been followed in passing the law or whether the law violates the fundamental constitutional guarantees contain in the Iraqi Constitution 2005. Furthermore, even where a law or regulation is constitutional, the FSC can legitimately based on the above Article determine whether such law was rightly applied or the meaning assigned to it or interpretation is in line with the provision of the Constitution or human rights norm. The Constitution did not just vest the powers of overseeing or supervising on the constitutionality of laws and actions of the federating units in Iraq. The Constitution went ahead to seal the decisions with finality once delivered by the FSC. In other words, like all the Supreme Courts across the globe. The decisions of the Iraqi FSC are final and cannot be further appealed. This position is declared by Article 94 of the Iraqi Constitution 2005. It provides "decisions of the Federal Supreme Court are final and binding on all authorities."

4.4 Analysis of the Powers of the Iraqi Federal Supreme Court in Legal Supervision and Interpretation on the Constitutionality of Laws

The determination of whether a legislation is contrary or breaches the provision of the Constitution of a given state is the exclusive right of the courts. This exercise is carried out through the adjudication on the constitutionality of the laws in a given provision, or the ascertainment of whether a rule or regulation is in conflict with the Constitution or the provisions of a higher legislation, not necessarily the Constitution. The powers of the FSC to interpret laws are not doubted and have been

declared by even the heads of the executive branch of matured democracies such as the US. President Reagan of the US in articulating the powers of the Supreme Court in that respects stated that "those who sit in the Supreme Court interpret the laws of our land and truly do leave their footprints on the sands of time. Long after the policies of Presidents and Senators and Congressmen of any given era may have passed from public memory, they'll be remembered."[622]

The duty of legal supervision and interpretation on the constitutionality of laws lies on the Supreme Court. Several decades ago this court's duty of interpretation was restated by Lon Fuller who elegantly stated the functions of the Supreme Court as the highest court several decades ago. According to Fuller, the duty of the Supreme Court is "to interpret law predictably as other lawyers and informed citizens would, and not as agents freely pursuing their own gratification."[623] This position was restated by Interviewee No. 10 who said that:- " the third arm of government headed by the FSC, the judiciary, is there to interpret the laws to determine their constitutionality or otherwise."[624] The powers of the FSC of Iraq in legal supervisions and interpretation on the constitutionality of laws is demonstrated in cases of ambiguous laws. This is one of the situations when the powers of the FSC is seen in operation. These facts have been highlighted by the interviewees. According to Interviewee No. 6 speaking on the question about the powers of the FSC in legal supervision and interpretation on the constitutionality of laws under the Iraqi Constitution 2005, stated that:-

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[622] Ronald Reagan, "Remarks Announcing the Intention to Nominate Sandra Day O'Connor to Be an Associate Justice of the Supreme Court of the United States(July 7, 1981)," The Public Papers of President Ronald Reagan, TheRonald Reagan Library, at http://www. reagan.utexas. edu/resource/ speeches/rrpubpap.asp. (accessed August 3, 2015).

[623]Lon L. Fuller, "The Morality of Law," *Indiana Law Journal*, (1964): 217. See also Cass R Sunstexn, *Legal Reasoning and Political Conflict* (New York: Oxford University Press,1996), 98.

[624] Interviewed Hind Ali Mohammed with a judge No 6 at the Federal Supreme Court, Baghdad, on January 28th, 2016.

> "My opinion is that the powers of the FSC in legal supervision and interpretation on the constitutionality of laws under the Iraqi Constitution 2005 is important because, sometimes the Federal Supreme Court do interpret the constitutional provision in case there is ambiguity in the text or in situation when the executive bodies or any government cannot understand any provisions. In this circumstance, the Court do interpret and clarify the constitutional texts. The court power is also seen in the event of a difference of understanding of the text or content of the Constitution or any provisions by the parties. The courts work in this regards clears and explains or removes ambiguity".[625]

In its task of legal supervision and interpretation on the constitutionality of laws, the FSC is not to be influenced by any party. But as seen above, the FSC in its exercise of the powers of legal supervision as well as interpretation appears to be constrained by interferences from the other arms of government. The need for the court to be free in its exercise of the powers of legal supervision and interpretation of laws is connected to the issue of the court's independence in the discharge of its assigned constitutional responsibility. Speaking on this, Interviewee No. 6 stated that: -

> "The FSC while carrying out its function of interpretation of the constitutional text or any task legally vested in it should not mind the interests of anybody or political party. It means that, the independence of the judge makes his ruling enjoying freedom, so judged based on the facts under the law, away from the interference and influence from the government or any other party or interference and influence which arises between the judges themselves, because of the different administrative position with each other or different levels of their courts. The nature of the judicial function based on the achievement of justice and the protection of individual rights, freedoms and respect for the law. Thus, it leads to not intervene in the work of the judiciary, allowing the judiciary to perform its function well and otherwise, the judiciary will not be able to exercise its duties leading to turmoil in the community, so the FSC when controlling and interpreting the laws should be not mind the interests of anybody or political party."[626]

It seems that, when the FSC exercise its powers in legal supervision and interpretation on the constitutionality of laws, the judges of FSC must be independent in their work and do not favour the interest of any political party. The judges of the

[625]Interviewed Hind Ali Mohammed with a judge No 6 at the Federal Supreme Court, Baghdad, Iraq, with on January 21st, 2016.
[626] Ibid.

FSC must be independent in their work, thus the judges will exercise their work by looking at the facts of the law, away from interference and influence from the government or any party.

The literature on the approaches adopted by Supreme Courts in the interpretation of laws is so clear on the different perspectives of constitutional law experts. As seen in chapter one above, the approaches are originalism and textualism. In other words, courts in interpreting laws are required by one of the approaches to adhere to the discoverable intention of the framers of the Constitution. Put differently while one of the approaches insist that the courts should limit their approach to the text of the Constitution, others allow the courts to go beyond the text to find the original intent of the framers.[627] In the course of this study, efforts was made to ascertain which approach has to be adopted by the FSC of Iraq and the opinion of judges, constitutional lawyers and academics as to which of the approaches could be considered most appropriate in the context of Iraq. Speaking on the approach regarding the issue of interpretation, Interviewee No. 1 stated that: - the FSC in the interpretation of the Constitution is constrained by the text of the constitution. The Interviewee stated that:-

> "In the interpretation of laws, the FSC in Iraq is constrained by the constitutional text. In other words, the court does not look outside the text of the Iraqi Constitution 2005. It does not take into consideration the factors and causes leading to the establishment of the democratic structures in the country and/or historical reasons when it interprets the law."[628]

Regarding this issue of how the textualists approach is appropriate in the interpretation of the provisions of the Iraqi Constitution 2005 or any law, experts

[627]Alexander Tsesis, "Maxim Constitutionalism: Liberal Equality for the Common Good," *Law Review* 92, no.4 (2013):1609

[628]Interviewed Hind Ali Mohammed with a professor of Constitutional Law No 1, Baghdad University, Baghdad, Iraq, on March 13th, 2016.

who were interviewed in this study responded and stated their opinions. Responding on the need of the courts, especially FSC to look beyond the text of the Iraqi Constitution or any law it interprets as the occasion demands, Interviewee No. 1 stated that:-

> "In my opinion, depending on the facts and circumstances of each case, the FSC must look beyond the text of the Constitution in its interpretation of the constitutional text. This is desirable in order to achieve justice for Iraqi people concerned in a given matter. At times, the history of the Constitution and the laws made should count in the interpretations done by the court. However, history and external considerations in my opinion should not count if the FSC found that the text of the Constitution, it is interpreting is clear and unambiguous."[629]

According to Interviewee No. 1, the FSC in interpreting the constitutionality of the laws should look beyond the text of the Iraqi Constitution 2005, because this is good in the attainment of justice for the Iraqi people. In other words, by going beyond the text of the Constitution the FSC would be in a position of coming up with just decisions and thus protecting the interests, rights and freedoms of the Iraqi people.

The power of the FSC in legal supervision and interpretation are equally seen in disputes between the federal and regional governments. Speaking on this, Interviewee No. 8 stated that: "the Court has the authority to adjudicate on a conflict between the federal and regional or provincial authorities".[630] In other words, being the highest court of the land, the FSC is expected to play an important role in settling or adjudicating on disputes between the federal/central government and the regional governments. However, it is equally important to note that there are still areas of

[629] Ibid.
[630] Interviewed Hind Ali Mohammed with a judge No 8 at the Federal Supreme Court, Baghdad, Iraq, on January 26th, 2016.

contention between the federal government and regional governments as discussed earlier in this thesis. For example, in a situation where conflict arises between federal and regional law especially in terms of legislative powers. This dilemma can be seen in the operation of the Iraqi Constitution 2005 by virtue of Article 121 giving priority to regional laws in terms of conflict between federal law and regional law on the basis of federal government having no power to legislate on the subject matter.

From a comparative point of view between the powers of the FSC Iraq under the Iraqi Constitution 2005 and the powers of the FSC under the Basic Law of Iraq 1925, the views of the interviewees differed. While some believed that the powers of the court are more elaborate and wide under the Iraqi Constitution 2005, others held different view.

According to Interviewee No. 9, he stated that:- "the Constitution of Iraq 2005, gave to the FSC more powers rather the Basic Law of Iraq 1925."[631]

Speaking on the comparison between the extent of the powers of the FSC in legal supervision and interpretation on the constitutionality of laws, Interviewee No. 10 (a judge) also argued that the powers of the court are more wide under the 2005 Iraqi Constitution than the Basic law of Iraq 1925. According to the Interviewee, "this Constitution (the Iraqi Constitution 2005) gave more power to this Court (FSC). Today any Iraqi can submit a complaint to the court on the grounds of unconstitutionality of a law. This was not the case in the Basic Law of Iraq 1925."[632]

[631] Interviewed Hind Ali Mohammed with a judge No 9 at the Federal Supreme Court, Baghdad, Iraq, on January 27th, 2016.
[632] Interviewed Hind Ali Mohammed with a judge No 6 at the Federal Supreme Court, Baghdad, Iraq, on January 28th, 2016.

One of arguments based on the issue that the parliamentarians are the voice of the people, theerefor the laws passed in parliament should reflect the will of the people, and on the other hand, unelected judges in FSC cannot have the powers to strike out these laws passed in parliament.

Interviewee No. 8 considered the exercise of the courts power as "antidemocratic in nature. Interviewee No. 15, however, argued that "the powers of the FSC in legal supervision and determination on the constitutionality of laws is that the Court is undermining democratic governance."[633]

The above responses indicate that the judges of the FSC may not be independent due to their unelected position. When the FSC exercise its powers in legal supervision and interpretation of the constitutionality of law, such work may may be interfered by external powers and weakens the FSC standing under the Iraqi Constitution 2005.

This position is supported by Interviewee No. 9 highlighted the arguments in some quarters that the exercise of the powers of the FSC in legal supervision and the determination on the constitutionality of laws is against the spirit of S.O.P and democracy. The Interviewee stated that:-

> "The role of the Iraqi FSC in legal supervision and interpretation on the constitutionality of laws is viewed as a threat to the concept of separation of powers and democracy or representative government. This is seen especially from the perspective that the FSC a body comprising of unelected and unaccountable representatives. Unlike the members of parliament (MPS), they are elected from the people."[634]

It seems above, the powers of FSC in legal supervision and interpretation on the constitutionality of laws, is a threat the concept of S.O.P, here the judges of FSC

[633]Interviewed Hind Ali Mohammed with a lawyer No 15 at the Federal Supreme Court, Baghdad, Iraq, on February 24th, 2016.
[634]Interviewed Hind Ali Mohammed with a judge No 9 at the Federal Supreme Court, Baghdad, Iraq, on January 27th, 2016.

must be elected same the members of parliament who are elected by the people, this happen not be the case with judges of FSC in Iraq.

The powers of legal supervision and interpretation on the constitutionality of laws are still opposed from the perspective that the judges who exercise the powers lack what Paul called "the absence of political accountability.[635] This is one of the reasons some scholars view the exercise of the powers of legal supervision and the determination on the constitutionality of laws as counter-majoritarian. In this regard, Interviewee No. 12 stated that:-

> "In my opinion the powers of the FSC in the determination of the constitutionality of laws are considerd to violate the concept of separation of powers, because the FSC in Iraq becomes more important authority among the other arms of government as it supervises the action of the other arms of government and determines the constitutionality of laws that could be passed by elected parliamentarians."[636]

The simple reason is that scholars in this group queried as to why should the Supreme Court comprising of "unelected" and "unaccountable" people have the power to determine the constitutionality of laws that is a product of the parliament and the executive arms of government? But allowing the judiciary headed by the court the power of legal supervision and interpretation on the constitutionality of laws in Iraq is supported because of the status of the FSC or the courts being the "least dangerous branch," among the other branches.[637] It would be recalled that Alexander Hamilton emphasised the least dangerous nature of the judiciary in the

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[635] Paul D. Carrington, "Restoring Vitality to State and Local Politics by Correcting the Excessive Independence of the Supreme Court," *Law Review* 4, no. 5 (1998): 400.

[636] Interviewed Hind Ali Mohammed with a lawyer No 12 at the Federal Supreme Court, Baghdad, Iraq, on February 10th, 2016.

[637] Alexander. M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics 100 -02* (New York: Yale University Press, 1986), 23. Alexander's title was taken from the Federalist no. 78, at 504 (Alexander Hamilton) (Edward Mead Earle, 1976). Paul D. Carrington, "Restoring Vitality to State and Local Politics by Correcting the Excessive Independence of the Supreme Court," *Law Review*, 50 (1998): 400.

Federalist 78. According to Hamilton, he stated that: -"the judiciary, from the nature of its functions, will always be the least dangerous branch to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them."[638] Hamilton further stated "the simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to defend itself against their attacks."[639]

4.5 The Need for Independence of the Federal Supreme Court in the Exercise of its Powers of Legal Supervision and Interpretation on the Constitutionality of Laws

For a nascent democracy such as that of Iraq to thrive, the FSC and all courts need to be independent.[640] This is a condition precedent as rightly observed by Nadine. According to Nadine, "for a vigorous and thriving democracy to flourish, alongside other factors there needs to be a separation of institutional powers, including an independent judiciary."[641] Recently Paul opined that:- "it is vitally important to have sufficient safeguards against outside pressures (on the judicial powers) from executive branch authorities, to maintain the independence of the judiciary and respect S.O.P."[642] This may be the reason why under the establishment section of the Iraqi FSC it is stated that independence of the Iraqi FSC is a cardinal principle in the work of Supreme Court. Therefore, efforts have been made in this research to

[638]Alexander Hamilton, The Federalist 78 , (1961), quoted in Matthew EK. Hall, The Nature of Supreme Court Power (Cambridge University Press, 2010),2.
[639] Ibid.
[640]Michael Coppedge, "Venezuela: Popular Sovereignty Versus Liberal Democracy," (2002):14. http://kellogg.nd.edu/publications/workingpapers/WPS/294.pdf; (accessed May 25,2016).
[641]Nadine Najim , Th Separation of Power in Venezuela under Hugo Chávez, (January2015),10. http://www.grin.com/en/e-book/312466/the-separation-of-power-in-venezuela-under-hugo-chavez.(accessed May 25,2016).
[642]Paul Bovend'Eert, "Judicial Independence and Separation of Powers: A Case Study in Modern Court Management," *Public Law* 22, no. 2 (2016): 333.

ascertain how independent is the FSC in the exercise of its powers of legal supervision and interpretation on the constitutionality of laws through the interpretation of the text of the Constitution or any other provision that is brought before it for consideration. These issues have been answered by the judges and experts on constitutional law interviewed in the course of conducting this research. Most of the interviewees if not all questioned the independence of the FSC in its operations. Interviewee No. 10 answering a question on the strength and independence of the FSC, said that: - "in my opinion about this question as a judge, the Iraqi FSC in pronouncing its judgment/decision, may be said to be strong, but the truth be told its not independent. Because there is interference from some parties in some of the decisions/judgments it pronounces.[643]" Even Interviewee No. 9 believed that the FSC in Iraq is not independent in pronouncing its decisions. According to him, "the FSC is not independent at the present time because there is interference in its work and decisions from the parliament. I think the FSC is not independent."[644]

Another dimension of the lack of strength and independence of the FSC is seen in cases of conflict between the federal and regional laws. The Constitution prioritizes the provincial court. This is an erosion of the supremacy of FSC. On this, Interviewee No. 10 said that:-

> "The Constitution created another problem where a conflict exists between the federal law and the law of the regions. The Iraqi Constitution 2005 prioritizes the regional authorities. In fact, the regions can modify the application of federal law in their region in case of a contradiction or conflict between federal law and the

[643]Interviewed Hind Ali Mohammed with a judge No 10 at the Federal Supreme Court, Baghdad, Iraq, on January28th, 2016.
[644]Interviewed Hind Ali Mohammed with a judge No 9 at the Federal Supreme Court, Baghdad, Iraq on, January27th, 2016.

> regional law. This is especially on the issue, not included in the exclusive powers of the federal authorities."[645]

Furthermore, Interviewee No. 7 equally commented on the prioritisation as a violation of the independence of the FSC. The interviewee stated that: - "I think there is no independence in the decisions of the Federal Supreme Court in Iraq if one looks at the provision of Article 121 which gives more authority to regional law than the federal law in event of conflict. There is equally executive interference with the job of the FSC."[646]

In the spirit of federal arrangement and in the light of the finality and supremacy features of the FSC, Article 121 needs to be revisited and amended. The FSC should have more powers over the regional courts in the resolution of any conflict that might arise between the federal law and that of the regions. The current position of prioritising the regional judicial bodies to the extent of allowing them to even modify the application of federal laws to suit the conflicting circumstance is contrary to the hallowed features of the Supreme Court the world over. The FSC in Iraq should be a final and a Supreme Court. In support of this position, Interviewee No. 8 also stated that:-

> "Article 121, gives more powers to regions in Iraq and this is not healthy for Iraqi democracy. This Article of the Constitution must be changed to give the Federal Supreme Court in Iraq the Supreme powers to interpret and settle any conflict between either the Constitution with any law or the federal law with a regional law. This should not be left to the regional judicial bodies."[647]

It can be safely concluded that although the Iraqi Constitution 2005 like the constitution of most developing countries made provision for an independent FSC

[645] Interviewed Hind Ali Mohammed with a judge No 10 at the Federal Supreme Court, Baghdad, Iraq, on January28th, 2016.
[646]Interviewed Hind Ali Mohammed with judge No 7 at Federal Supreme Court, Baghdad, Iraq, on January24th, 2016
[647]Interviewed Hind Ali Mohammed with a judge No 8 at the Federal Supreme Court, Baghdad, Iraq, on January26th, 2016.

and in a way coequal judicial branch with other branches such as the executive and the legislature with a clearly defined powers, the evidence suggests that like in other countries the FSC is not truly independent.[648] The FSC as an arbiter should as a matter of fact be independent. Again, the judges of the FSC are referees as such should be disinterested in all cases brought before them be they against the state or any Iraqi. This need was emphasised by Paul, who stated that:-

> "Law, as we understand it, requires judges be seen as referees, disinterestedly applying its texts to facts accurately discerned. As the rules of games universally confirm, referees' roles require not only dispassion by those who perform them, but civil acceptance and obedience by those who are disappointed by their decisions."[649]

The role of the FSC in the development and protection of the Iraqi nascent democracy cannot be quantified. However, one fundamental ingredient for the realisation of these objectives is an independence which it can be said the Iraqi FSC lacks from the responses of the interviewees in this study. The FSC therefore needs to be independent and impartial as emphasised by Nadine. According to Nadine, for the judiciary to effectively and efficiently conduct its role in a democracy, it must be independent and impartial.[650]

4.6 Arguments Regarding the Composition of the Federal Supreme Court Comprising of Judges Learned in Islamic Jurisprudence Supervising and Interpreting on the Constitutionality of Laws?

Expertise, experience and grounding in the rules of interpretation of statutes is important or something that the justices of apex courts such as the FSC must possess.

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[648]Verner, Joel G., "The Independence of Supreme Courts in Latin America," *Journal of Latin American Studies* 16, no. 2 (1984): 463.

[649] Paul D. Carrington, "Restoring Vitality to State and Local Politics by Correcting the Excessive Independence of the Supreme Court," *Law Review* 50, (1998): 400.

[650]Nadine Najim , The Separation of Power in Venezuela under Hugo Chávez, (January2015),10, http://www.grin.com/en/e-book/312466/the-separation-of-power-in-venezuela-under-hugo-chavez(accessed May 25,2016).

Prior judicial experience is a necessary qualification for the judges of Supreme Court. This position was stressed by Justice Frankfurter speaking on the US Supreme Court. According to the Justice, "the Supreme Court is the highest judicial tribunal. Prior 'judicial service is not only desirable, but an indispensable qualification."[651] The Supreme Court, Frankfurter continued is a special kind of court and "the interpreter of the Constitution and, thereby, for all practical purposes, the adjuster of governmental powers in our complicated federal system."[652]

One time Attorney General of the US captured more vividly what to consider in the appointment of judges of the Supreme Courts whose decisions are final and unappeasable. Mastery of laws and skills to appreciate the laws of states in a federation were what the Attorney General suggested should be considered. According to the Attorney General, he had this to say:

> "Those who pronounce the law of the land without appeal, ought to be pre-eminent in most endowments of the mind. Survey the functions of a judge of the Supreme Court. He must be a master of the common law in all its divisions, a chancellor, a civilian, a federal jurist, and skilled in the laws of each State."[653]

The rule of interpretation such as the literal, the golden, the mischief, and other rules of interpreting statutory enactments is a must to modern day judges. They assist immensely in the work of judges who on daily basis as case come to them have the duty to construe text of these enactments. The composition of the judges of the Iraqi FSC consisting of Islamic experts and jurists has been a source of debate among political analysts and legal scholars. Some felt it was ~~is~~ wrong to include the experts

[651]Felix Frankfurter, "The Supreme Court in the Mirror of Justices," *Law Review* 105, no. 6 (1957): 783.
[652]Ibid,p793.
[653]American states Papers 23-24 (1834) (report of the Attorney General on the judiciary system, read in the House of Representatives, (Decemeber 31, 1790). Quoted in Felix Frankfurter, "The Supreme Court in the Mirror of Justices," *Law Review* 105, no. 6 (1957): 790.

while others raised the issue of how to address the issue of sectarian divide in the country with such an arrangement being put in place or practiced. Questions such as from among which sect are you going to choose the judges? Whose doctrine or ideology would be used in the resolution of the cases? Is it Sunni or Shii? The Court is supposed to work with civil laws that have been enacted for decades in Iraq. What would the clergy be doing here, if they don't know anything about these kinds of laws?[654]

Speaking of the likely conflict and confusion, Interviewee No.7 stated that: " The inclusion of Islamic scholars among the judges of the Supreme Court of Iraq would create more problems to the nascent and fragile democratic Iraq. Among the judges there would be Shiite as well as Sunni. How the issue of the various sub-doctrines in both sects would be accommodated. Who nominates the judges among the top leadership of the two sects? What would be the role of the organisations that manage the Sunni and Shiite seminaries, mosques and shrines."[655] It would suffice to note that this issue of composition of the judges of the FSC comprising of experts in Islamic jurisprudence has something to do with the declaration of Islam as the religion of the state. In other words, the experts are expected to uphold the position of Islam as the religion of the state. But again, it is important to note that we have different sects of Muslims in Iraq i.e. the Sunnis and the Shiites.

How grounded are the judges of the Iraqi Supreme Court, especially the judges learned in Islamic jurisprudence in these conventional rules that are always needed in

[654] Mustapha Habib, One Court To Rule Them All: Why Not All Iraqi Politicians Want Their Supreme Court To Work Properly," December 10, 2015. http://www.niqash.org/en/articles/politics/5179/ (accessed 1 June, 2016).
[655] Interviewed Hind Ali Mohammed with a judge No 7 at Federal Supreme Court, Iraq, Baghdad, on January 24th, 2016.

the construction of the Iraqi Constitution 2005 as well as, the laws that are passed by the Iraqi Parliament? These were some of the questions answered by the Interviewees involved in this research. The responses were aimed at answering the third research question which reads "Should the Iraqi FSC comprising of non-elected judges be allowed to monitor the constitutionality of laws in terms of legal supervision and interpretation?" The responses were also used in meeting the corresponding third research objective.

Interviewee No. 9 emphasised on knowledge, skills and even judicial experience as a precondition for appointment as a judge of the Iraqi FSC. According to Interviewee No. 9:-

> "In my view and considering the position of the Iraqi FSC as the final court and arbiter and final authority in constructing and giving meaning to the Iraqi Constitution 2005, experience, skills and knowledge of interpreting the law should be made a precondition for appointment. I am not comfortable with the inclusion of persons who have no such training and skills on the bench of the Iraqi FSC. Their presence will affect the quality of the decisions of the Iraqi FSC. We need seasoned and experienced persons to man the court. I say so because the FSC is an important institution in sustaining democracy, especially a nascent democracy such as the one operating in Iraq today."[656]

Interviewee No. 15 considered intellectual grounding and reliability and impartial people to be appointed to the bench. Thus, the Interviewee considered the herculean task on the shoulders of the judges of the Supreme Court who are the last point of resort for vindication of the rights of the citizens. The Interviewee stated that:-

> "The responsibilities of the Iraqi FSC in constitutional interpretation and upholding the rule of law surely call for people with capacious minds and who are reliable, disinterested and fair-minded. These qualities appear lacking in the criteria for appointing the justices of the Iraqi Federal Supreme Court. I think this is disastrous. Knowledge and versatility in Islamic law without knowledge in the conventional

[656] Interviewed Hind Ali Mohammed with a judge No 9 at the Federal Supreme Court, Iraq, Baghdad, on January27th, 2016.

> methods of interpreting statutes and constitutional provision would lead to delivery of pervasive decisions and will affect the jurisprudence on the issues that may be submitted to the court."[657]

According to Interviewee No. 14, knowledge of the basic rules of interpretation which the judges learned in Islamic Law lack is a problem in the interpretation of the constitutionality of laws brought before the Iraqi Federal Supreme Court. The Interviewee stated that:-

> "Through knowledge of the Constitution, the rule of interpretation of statutes as obtainable under the conventional legal system and its application are precondition for judges in the interpretation of the Constitution and the determination on the constitutionality of judicial decisions and executive actions. Unfortunately the judges learned in Islamic jurisprudence lack this vital tool in the discharge of their responsibility."[658]

According to Interviewee No. 12, he was of the opinion that we are bound to face some serious problems in addressing the composition of the FSC comprising of experts learned in Islamic jurisprudence since in Iraq there are different doctrines. The Interviewee stated that:-

> "The FSC of Iraq is not governed in the issues of doctrine, also we can see that, there are different doctrines/schools of thought in Iraq, then the so-called Islamic experts will of course represent different doctrines/schools of thought, definitely there will be conflict of interest. In other words, as a judge of the FSC he will tend to favour the doctrine or school of thought that he belongs to. In Islam, there are different schools of thought and hence, it will be difficult to know how they are going to choose these experts to be members of the."[659]

In the selection of the judges of the apex court, considering their functions, the suggestions of Frankfurter provide a useful guide on what to look out for. Frankfurter stated that:-

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[657] Interviewed Hind Ali Mohammed with a lawyer No 15 at the Federal Supreme Court, Baghdad, Iraq, on February 24th, 2016.
[658] Interviewed Hind Ali Mohammed with a lawyer No 14 at the Federal Supreme Court, Baghdad, Iraq, on February 21th, 2016.
[659] Interviewed Hind Ali Mohammed with a professor of Constitutional Law No 2, Baghdad University, on Baghdad, March 15th, 2016

> "Since the functions of the Supreme Court are what they are and demand the intellectual and moral qualities that they do, inevitably touching interests, not less than those of the Nation, does it require an explicit statement that in choosing men for this task no artificial or irrelevant consideration should restrict choice"?[660]

In addition, Frankfurter posited that "selection (of judges of the Supreme Court) wholly on the basis of functional fitness not only affords the greatest assurance that the Court will best fulfill its functions. It also will, by the quality of such performance, most solidly establish the Court in the confidence of the people, and the confidence of the people is the ultimate reliance of the Court as an institution."[661] This are guides for countries especially Iraq if the court is to meet the objectives behind its establishment.

4.7 Arguments on the Appropriateness of Allowing Unelected Judges of the Federal Supreme Court to Supervise and Interpret on the Constitutionality of Laws?

Globally, constitutional systems are based on democratic ideals guided by the majority rule.[662]In these Democracies, parliament the arm of government comprising the elected representatives of the people are charged with the responsibilities of making law. The laws passed by parliament are viewed as the will of the people because they are elected by the people. These laws are passed executed and/or implemented by the executive. The laws as passed and the executive decisions could be questioned on the grounds of their constitutionality and other legal considerations by the courts through the instrumentality of legal supervisions and interpretation in

[660]Felix Frankfurter, "The Supreme Court in the Mirror of Justices,"(University of Pennsylvania,1957): 793.
[661] Ibid., 796.
[662]Burt Neuborne, "*Judicial Review and Separation of Powers in France and the United States*,(New York University: Law Review 1982),363.

that regards. This is the function of the court, especially the FSC. But the FSC justices unlike the parliamenetariaan and the president (executives) are unelected. This is the cause of several debates. While some scholars see this exercise as a counter- majoritarian others see it proper and important in all democratic processes. The value of the existence of the Supreme Court is to maintain the rule of law and to see that the other branches keep within the bounds of the provisions of the Constitution. The majoritarian and countermajoritan arguments for and against the powers of the FSC to review and determine the constitutionality of laws and actions of the other branches also featured in the responses of the Interviewees involved in this research. Interviewee No. 7, is a proponent of the countermajoritan argument. According to Interviewee No 7, he had this to say:-

> "Setting aside a law duly passed by the legislature by the Supreme Court comprising of nominated and/or selected representative is tantamount to setting aside a majoritan decision of the elected and accountable representative of the people."[663]

Among the Interviewees who saw no harm in allowing the FSC the powers of legal supervision and interpretation on the constitutionality of laws were Interviewee No.6 According to Interviewee No. 6, he stated that :-

> "I think it is basic and elementary that within the constitutional systems where the powers of the three branches are separated that the judiciary hold the balance and possess the powers to set aside any legislation find unconstitutional. The actions of any judicial branch *ultra vires* its delineated constitutional powers is not also exempted from the powers of the FSC to be declared unconstitutional. In my opinion, it is illogical to allow any unconstitutional legislation simply because of the separation of powers and the believe of other scholars that is countermajoritarian."[664]

[663] Interviewed Hind Ali Mohammed with a judge No 7 at the Federal Supreme Court, Baghdad, Iraq, on January24th, 2016.
[664] Interviewed Hind Ali Mohammed with a judge No 6 at the Federal Supreme Court, Baghdad, Iraq, on January21th, 2016.

Interviewee No. 6 considered the exercise of the FSC powers of legal supervision and interpretation on the constitutionality of laws, the actions of other branches from the protection of the liberties of the citizen does not violate the S.O.P doctrine. The Interviewee responding to the question of how he views the legitimacy of allowing the FSC comprising of unelected representatives setting aside for instance a legislation duly passed by the parliament, Interviewee No. 9 stated that:-

> "There is nothing wrong in allowing the FSC to determine and where necessary to set aside an unconstitutional action of the parliament. The power to determine the constitutionality of laws and executive actions by the Federal Supreme Court is simply to protect the Iraqi citizens from the executive or legislative tyranny."[665]

Still in addressing the same issue, the response of Interviewee No. 14 in support of the powers of the FSC was also very instructive. Interviewee No. 14, opined that:-

> "To my mind, there is no harm in the FSC setting aside a legislative decision inconsistent with any constitutional provisions. I hold the same opinion on allowing the FSC to set aside an executive decision when same is found contrary to the set values such as fundamental rights as contained in the Constitution. It does not make sense to view SOP as a means to instutionalise lawlessness. The working of SOP requires checks on the legislature. The fact that they are elected does not mean they have all the right to go contrary to the provisions of the constitution. That is the place of the FSC in all democracies to interpret and determine the constitutionality of laws and actions. There is nothing wrong with that."[666]

Apart from those who were interviewed and against the countermajoritarian doctrine, it is equally important to point out that some of the respondents interviewed favoured the doctrine. For example, Interviewee No. 13 viewed the exercise of the powers of the FSC in the determination of the constitutionality of laws duly passed by the legislature as going against the counterrmajoritarian doctrine. According to Interviewee No.13:-

[665]Interviewed Hind Ali Mohammed with a professor of Constitutional Law No 4,Baghdad University, Baghdad, Iraq, on March 20th, 2016

[666]Interviewed Hind Ali Mohammed with a lawyer No 14 at the Federal Supreme Court, Baghdad, Iraq, on February 21th, 2016.

> "The parliament comprise the representative of the people of Iraq. The members of parliament are the voice of the Iraq people. They speak through legislation. Legislations are therefore the voice and the decision of the Iraqi people. The same hold true of the executive who are popularly elected through general elections. It is undisputed that the FSC judges are not subjected to the same electoral process. Therefore, the powers of the FSC to determine the constitutionality of laws and/or the actions of the other branches of government is in my opinion against the principle of majority rule sanctioned under the democratic rule."[667]

From the above, Interviewee No.13 seems to suggest that the exercise of the powers of the FSC in the determination of the constitutionality of laws is not in line with the true spirit of democracy since the judges of the FSC are not elected and yet given such powers to question the constitutionality of laws passed by parliament representing the voice of the Iraq people, by virtue of being elected to represent their constituencies in parliament. In other words, the Iraqi people speak through a legislative body, and that is, the Iraqi Parliament.

4. 8 Conclusion

Based on the discussion above, it would suffice to note that no one doubts the inclusion of the S.O.P under the Iraqi Constitution 2005. However, the principle is not strictly observed because of interference in the work of the judiciary. The FSC appears not to be truly independent as proclaimed under the Iraqi Constitution 2005. So much interference on the work of the FSC from the other branches exists. These interferences are against the spirit of S.O.P as postulated by philosophers and expanded by experts.

It needs to be stressed that like the arrangements in most countries across the globe, the Iraqi Constitution 2005, did establish the FSC as the highest court of the land.

[667] Interviewed Hind Ali Mohammed with a lawyer No 13 at the Federal Supreme Court, Baghdad, Iraq, on February 17th, 2016.

Although the Iraqi Constitution 2005, was not the first to establish a Federal Supreme Court, the establishment of the FSC, in Iraq after 2003 was a turning point in the judicial and constitutional history of the country. It must be stated that the court has contributed in promoting the rule of law in Iraq. This positive aspect of the court notwithstanding the political reality, the social setting and the sectarian issues and other related issues associated with the court undermined the role of the FSC in the democratisation process as a country. This chapter examined the constitutional provisions of two Iraq Constitutions i.e. the Basic Law of Iraq 1925 and the Iraqi Constitution 2005.

In the context of this study, perhaps it has to be pointed out caterogically that within the S.O.P principle is the recognition of the powers of the FSC as the highest court in terms of legal supervision and interpretation on the constitutionality of laws. In the exercise of this power, the court must not be found to be interpreting the provisions of the Constitution or deciding cases to suit political interest. Should that be the case, such a court violates its public trust reposed on it as the least dangerous of the other branches. Interference is one great evil identified with the working of the FSC. This has weakened the FSC, and by extension the judiciary in their work as the custodians of law and protectors of fundamental freedoms in Iraq. Under this chapter, the researcher answered third and fourth research question as well as achieved the third and fourth research objectives respective.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Overall Findings

The main theme of this research has been to critically analyse and examine the powers of the FSC in terms of legal supervision and constitutional interpretation on the constitutionality of laws under the Iraqi Constitution 2005. In addition, the research also rests on the conviction that it is the responsibility and duty of the FSC to unify the federal status of the Iraqi Constitution 2005 and maintains its supremacy over all other regional Constitutions. In the other words, being the highest court of the land the decisions of the FSC has to be final and binding on all authorities. Apart from that, the research also paid attention to other pertinent issues such as the composition of the FSC comprising of judges who are expert in Islamic Jurisprudence as well as the unelected nature of the membership being allowed to supervise and interpret on the constitutionality of laws. The following are thus the overall findings of the research:-

5.1.1 Finality and Binding Nature of the Decision of the Iraqi Federal Supreme Court, the research found five important findings as follows:-

First:- The plurality of the Iraqi society dictates it adopts a Federal Constitution. This is exactly what happened in 2005 under the Iraq Constitution. Under Article 92 of Iraq Constitution 2005, the FSC was established to discharge some

Responsibilities within the framework of the Iraqi Constitution. The Article stipulates that the Supreme Court is an independent entity that can take care of itself in terms of administration and finance. Such independence allows a speedy decision making and freedom from all sorts of interference from the government. It should be noted here that the FSC is not only the independent court in Iraq; this is applicable to all levels of courts. What distinguishes the FSC from other courts is that it is the appellate court of Iraq and therefore should be treated as such. The Iraqi Constitution 2005 thus makes provision in Articles 87 and 88 for the independence of the courts in all cases referred to it. In this way, the FSC should act according to the law of the land. Like most Constitutions, Article 87 of the Iraqi Constitution 2005 further stresses that in the interpretation and administration of justice, judges are completely independent and therefore should be free from government intervention. This position, thus makes the Iraqi Constitution 2005 more elaborate and inclusive. However, one needs to realise that there is a difference between constitutional declaration and practice. In most developing countries, including Iraq, the Constitution may say something and the people at the helms of affairs may do something else. This is exactly what happens in the case of Iraqi in the administration of its regions.

Second:- The research found that Article 93 emboldens the jurisdictional functions of the FSC under the guidance of Iraqi Constitution 2005. Such functions include the supervision of the Constitution, the settlement of a dispute among various parties, determining the budget and much more. Thus, the decision of the FSC should be binding on all matters in order to guide against the anarchy that may ensue in the course of litigation. Many interviewees, most especially interviewees No. 2 and 4, lamented their discontent that nearly all countries of the world with written

constitutions have a supreme court, which is the highest court in the dispensation of justice. Such also needs to be replicated in Iraqi. The FSC has to be the apex court and its decision should be binding and final. No other court or section should be allowed to overrule its decision.

Third:- The research also found the existence of the apex court in the Basic Law 1925 as compared to the Iraqi Constitution 2005. In making some comparative analysis, therefore, the research found that there was an existence of the apex court under the Basic Law of Iraq 1925. The Basic Law of Iraq 1925 made provision for the formation of the High Court, which was responsible for the adjudication of law referred to it by Iraqis. Such court represented the apex court of Iraq at the time and whatever decision reached by the court was deemed binding and final on all parties concerned. It also made provision for trial of ministers and other government functionaries who contravene the rule of law. Thus, a critical analysis of the Basic Law of Iraq 1925 revealed that its decision was binding and final with an exception which included reaching a final decision through two-third majority. It may thus be wrong of anybody to assert that there was no any history of appellate court in Iraq before the 2005 Constitution.

Fourth:- As found out in the research, there appears to be no independence in the operation and existence of the FSC in its real sense. This was found to be true by considering the views of some of the interviewees. There were some cases where the FSC supposed to exercise supremacy, but lacked the capacity to do so because of the provision in the Iraq Constitution 2005. According to the Iraqi Constitution 2005, the regional government can adopt its own laws over that of central government as discussed in Chapter Three of this thesis. In this case, the FSC cannot administer and interpret the law throughout Iraq and its decision could not be could not considered

binding and final in nature. Although some scholars have established the need to ensure that the decision of the FSC is binding on all Iraqis, but the provision in the Iraq Constitution 2005 dictates otherwise.

Fifth:- Through the examination and assessment of law, the FSC also acts as intermediary between the Iraqi people and the parliament. The FSC interprets the Constitution and determines the constitutionality of any decision taken by parliament. Although, the decision of the FSC may be influenced by the central government as stated by interviewee 4, but still serves as a moderator between what is constitutionally right and wrong in the context of the Iraqi society.

5.2.1 Conflict between Federal and Regional laws, the research found six important findings as follows:

First:- The research found that there was no unanimous agreement among Sunni, Shia and Kurds on how the Constitution should be operated within Iraq. The Kurds on their own part wanted the word federal to be reflected in the name of the state so that each federal unit would have to exercise a degree of autonomy over its domain. The Sunni Arab refused to agree with the name and therefore suggested the use of the word united instead. The Shia seemed to be in agreement with Kurds position knowing fully that their own interest can also be fully attained within the federal structure which will allow them to be recognised as an important entity in the state of Iraq. In this way, three most important partners in the state of Iraq found it difficult to agree on some issues during the constitutional drafting sessions. Such disunity may well explain the reason why it has been very difficult for the FSC to exercise its influence all over Iraq. Granted the fact that the Constitution is a source through which the courts derive its injunctions and jurisdictions, as long as the Constitution is

deemed bias or unrepresentative, the court, FSC, may be structurally and socially crippled to function effectively. Such is the case of FSC in Iraq.

Second:- The relationship between the central government and the component states were disputed among the partners. Given the nature of Kurds within the Iraqi state, they were of the conviction that more power should be given to regional governments by reducing the power of central government so as to allow the component units to have control over their own affairs. Such position was nullified by Sunnis who hold the view that Kurds can only be granted greater autonomy and not to empower the region over the central government. Both parties seemed to have been driven by personal interest and such discredited the functionality of the federal Constitution. For example, as it has been construed and suggested by the Kurds, if the regional governments were made more powerful than central government, what would be the position of the FSC? Definitely, if such position was agreed upon, it would have meant that the FSC would be powerless to exercise any control over the regions in Iraq. Therefore, if the FSC was powerless in the face of regional autonomy, then it was the region that would have been determining the constitutionality of laws and not the FSC. In this way, the disagreement of both Kurds and Sunnis over who should have greater control in the affairs of the country has dictated the power of the FSC within Iraq.

Third:- In the process of drafting the 2005 Constitution, the nature of Iraq identity was in dispute. The Sunni on their own part argued that the word "Arab state" should be included in the Constitution so as to recognise Iraq as an Arab state. This position was vehemently opposed by the Kurds saying that this is to divide the Kurds people over the geographical area of the Middle East. The Kurds thus argued that the word "Arab state" cannot be included in the Constitution as that may tantamount to

mortgaging the rights of other partners within Iraq. In contrast to the above view, the Shia also wanted the Iranian nationals to be included as the component of Iraq, which may ultimately linked them to the majority Shittes state of Iran. Such arrangement contravenes the sovereignty of Iraq by making Shia in Iran appear as a partner in the Constitution. This was clear absurdity. Such was the extent to which the various elements within Iraq disagreed over the identity of Iraq during the constitutional process of 2005.

Fourth:- According to the Iraq Constitution 2005, Kurds language is recognised by Iraq Constitution and they are allowed to exercise autonomy over the Kurdistan region. They also have their own representative in the two assemblies to determine their destiny. In case of any dispute between the federal government and components units, the Iraq Constitution 2005 has made explicit procedure in settling such dispute. In Kurdistan region, it has been found that the region's Constitution prevails over the central government on certain issues. This was a point of concern to the public as it is stipulated in the Constitution that the FSC is independent and it is the apex judicial body in the country whose rule nullifies others. If the Iraqi Constitution explicitly states that the central government's decision, under the auspices of the FSC is bound on all Iraqis, how does one explain the rationality behind Kurdistan regional control over some issues which should be decided by the central government? This position is buttressed by interviewee No. 10 who opined that the region has been empowered to modify its law against that of central government most especially on issues not listed under the exclusive power of the government. This was buttressed further by interviewee No. 7 who pointed out in Article 121 of Iraq Constitution 2005. Such Constitution is said to place regional government law over that of the central government. This was a clear case of contradiction and inconsistency.

Notwithstanding all these encumbrances in the Iraq Constitution 2005 and how it militates against the working of the FSC, under the Iraq Constitution 2005.

Fifth:- It needs to be stressed here that the hastiness with which the Constitution was drafted did not allow all parties concerned to examine the efficacy and workability of the Constitution. The constitutional drafting committees of 69 members was given ultimatum to submit the draft in August 2005. Such hastiness, it needs to be stressed, did not allow for proper appraisal and examination of the Constitution before it was adopted. In this manner, the Kurds claimed that the component regions should have authority over the wealth and remit some portion of it to the central government. The Sunnis went against the motion and stated that the practice in all federal states is that the central government determines the distribution of wealth across the country, not the regions as suggested by the Kurds. The research observed that each section was trying to impose its will on the Constitution. Nevertheless, the Constitution does not in any way accommodate the wishes of all sections of the Iraqi communities as it was drafted in haste. Such irregularity has partly affected the jurisdictional capacity of the FSC to exercise its power and autonomy in determining the course of justice in Iraq.

Sixth:- On the contradictions between the regional and federal laws, the research found that the regional law can modify the federal law in the region by virtue of Article 121(2). Such a constitutional provision has been regarded as a fundamental weakness of the Iraqi Constitution 2005. Some observers, scholars and interviewees were of the opinion that this was wrong and that the Federal Constitution should be supreme over the regional ones, no matter the case. In some federations like the US, it has been found out that whenever there is conflict of law between the state and federal government, the federal Constitution prevails. Such should also be applied to the Iraqi Constitution in order to avoid any form of duplication and contradiction in

the administration of justice. In doing this, it is imperative to recognise that the regions have to be involved in order to identify the point of discrepancies between the Regional Constitutions and the Federal Constitution.

5.3.1 Composition of the Muslim Clerics in the Iraqi Federal Supreme Court, the research found four important findings as follows:

First:- According to Article 92 of the Iraqi Constitution 2005, the FSC is deemed to be an independent body charged with the responsibility of overseeing the Constitution of Iraq and the membership shall comprise those well versed in Islamic law. Iraq, from the social point of view, is a complex society which includes people of different background. Christians, Yazidiz, Muslims and Kurds are the key partners. Given the composition of the FSC, it is arguable whether it is inclusive and representative in nature. Constitution, as it is construed by philosophers, should be drafted to reflect the composition of the society. If the membership of FSC comprises Muslims clerics and scholars, why can such be extended to other parties in order to make the Constitution acceptable to all parties concerned. Such constitutional exclusiveness has been found to impede the course of adjudication in Iraq. This composition may well explain the rationale behind the demand for greater autonomy by the Kurds. This becomes imperative in order to ensure that such FSC rules and regulations are not applicable to the Kurdistan region. In addition, that may also explain why the Kurdistan region exercises control over some issues as opposed to the FSC rulings. It has also been argued by some people that the interference of the FSC in the affairs of parliament contradicts the principle of SOP. This is noted in the manner with which the decision made by the parliament is vetted by the FSC.

Second:- In fact, the Kurds went ahead to oppose the inclusion of Islam as a state religion while the Shia argued that the Constitution should state in clear terms that

Islam is the state religion in Iraq. Such became a matter of hot debate during the process of drafting the Constitution in 2005. The issue of great concern seems to revolve around the delicate question which is if some partners in Iraq do not want the word Islam to be reflected in the Constitution as the state religion, then how would the FSC operates within its jurisdiction to oversees constitution and to exercise a measure of control? Given the fact that some of the members of the FSC include the Islamic clerics and those having religious authority, it may be difficult for some of the component state to come to term or agree with the decision of the court. This is the dilemma in the Iraq Constitution. And it may be argued further that since Iraq is a multicultural society, the Constitution should be geared towards that and not otherwise. The constituents within the Iraq federation supposed to be the major determinant in drafting the constitution for the state. Therefore, if Islam become a cause of disagreement in the Iraq Constitution, it may be difficult for the FSC to extend its jurisdiction over non-Muslims within the state of Iraq. Such stand may threaten the acceptance of the Constitution by the general populace in Iraq.

Third:- The research also found that to qualify and be considered for the membership of the FSC, one has to be well versed and grounded in the Islamic law. Such provision, it needs to be stressed, allienates those who are not Muslims from becoming members of the FSC. This is understable given the fact that the Constitution explicitly states that Islam is the state religion. Thus, if it is stated in the Constitution, then it may be right to think that Islamic scholars and expert are to be included in the FSC. This position was given credence by Interviewee No. 4 who was of the opinion that the provision for Islamic expert is made in order to ensure that the proper remedy is provided in the case of issues pertaining to Islam is raised in the court of law. This excuse may be acceptable to other Iraqis who are not

Muslims given the fact that the majority of Iraqis are Muslims. Although, some people opposed this arrangement, claiming that the members of the FSC are only charged with the responsibility of interpreting the Constitution and therefore requires expertise and knowledge. This may be found in the way Interviewee No. 2 responded to the researcher's question. He opined that the FSC should comprise of professional judges, university professors and lawyers. Considering that the FSC is the final court without any room for appeal, it is imperative that the members are those who hold expertise in the law profession. This was in view of the fact that if there is maladministration of justice at that level, no other court can upturn the course of justice being dispensed. In such a case, there is a need to ensure that those who hold the position are knowledgeable and impeccable in character.

Fourth:- In connection to the issue of appointing Islamic scholars in the interpretation of the Iraqi Constitution 2005, the research found out that through knowledge of the Constitution and the working of civil law are precondition for anyone to be appointed as a member of the FSC which is charged with the responsibility of interpreting and determining the Iraqi Constitution 2005.

5.4.1 Non-Elected Judges Supervising and Interpreting on the Constitutionality of Laws, the research found four important findings as follows:

First:- Under the Iraq Constitution 2005, the research found that there were basic elements of SOP despite some salient contradictions. It needs to be stated here that there are basic differences between the Basic Law of 1925 and the Iraqi Constitution 2005. Under the Iraqi Constitution 2005, the president does not appoint the members of the legislature. It is the responsibility of the members of the Representative Council to appoint the member of Federal Council based on 2/3

majority. This is healthy for the Iraqi society. It also needs to be reiterated that the Members of Representative Council are also elected by the people and not selected as it used to be under the Basic Law 1925. Such arrangement provides for each organ of government to checkmate the excess of one another.

Second:- The research found that the appointment of justices, which constitute the membership of the FSC, is regulated by of Iraq Constitution 2005. Such appointment is vested in the power of the Higher Judicial Council of Iraq, which came into being under Article 90 of Iraqi Constitution 2005. The Article stresses that it is the sole responsibility of the judicial body to appoint the members of the FSC which will be constitutionally binded to perform some specific functions related to the adjudication and administration of justice in Iraq. The members of the FSC are responsible, according to the Federal Constitution, for management and supervision of all issues related to the judiciary. It is also charged with the responsibility of nominating the Chief Justice and others as assigned to it. The member also intimate itself with the national bugetary allocation that can cater for the welfare of the entire populace. Such responsibility allows the FSC to monitor the national expenditure in order to guide against any forms of misappropriation and inflation of budgetary allocation.

Third:- The research found that the selection of the supreme court members may be influenced by political and sectarian consideration. This was found to be peculiar to all countries of the world. This position, thus negates the principle of accountability and justice. If politics could determine the appointment of members of the supreme court, it suggests that the dispensation of justices at the apex level may be influenced by politicians and government. In such a case, the course of justice has been compromised. This has been found to be true in Iraq. Thus, Interviewee No. 3 concluded that the Islamic experts have nothing to do with administration of justice

at the apex level since the course of justice has nothing to do with Islamic issues. Based on some of the respondents interviewed, the researcher came to the conclusion that they believed that government can use those so-called Islamic experts to truncate the course of justice in Iraq. Whatever the argument, what this research has found out is that there was mutual suspicion among various groups concerning the composition of the FSC.

Fourth:- The research found that there is a clear similarity in the way the principle of S.O.P was upheld in the Basic Law of Iraq 1925 and Iraq Constitution 2005. The legislative powers, according to the Basic Law of Iraq 1925 was performed by two chambers of legislature, i.e. the Senate and the Chambers of Deputies alongside the King. It needs to be stated that the senate members were not directly elected by the people but by the King. The selection was based on the popularity and character of the people and as such it was left to be determined by the King. These senators were twenty in number and were to serve for a period of 8 years. Looking at the procedure by which such members were elected, one wonders how did they measure the popularity and character of the candidates involved in order to equality for selection as a member of the senate? Such arrangement is not favorable to democratic tenets. The members have to be elected and not selected.

5.5.1 Separation of Powers, the research found eight important findings as follows:

First: Based on the concept of S.O.P, the research showed that S.O.P could be seen as one of the basic elements that govern the activities of the legislature, executive and judiciary. It has also been found to be the most important feature of democratic governance which abhors the concentration of power in the hand of an arm of government. Thus, through historical exploration, the research has found a

connection between the modern day concept of S.O.P and the views of philosophers like Montesquieu. Thus, the most important element governing the implementation of the concept of separation of powers rests on the checks and balances. It needs to be stated here that when philosophers in the medieval Europe propounded the theory of separation of powers, the most important concern was how to checkmate the excessiveness in the display of power by the church. Therefore, in today's parlance, the rationale behind the adoption of the principle is to ensure that no arm of government is too powerful to obstruct the course of justice within a society. That can easily be inferred by the way the FSC checkmate and regulate the activities of parliament in order ensure their activities are in tandem with the constitutional provision of Iraq 2005.

Second: Through close observation, this research discovered that S.O.P under the Iraq Constitution of 2005 is upheld but threatened. This has been found to be consistent with the Basic Law of Iraq 1925 and the Iraqi Constitution 2005. The in-depth examination of Iraqi Constitution 2005 showed that Iraq constitutional development can be traced to 1908 when the Royal Covenant was passed**.** It was from this source that the Basic Law of Iraq 1925 was garnered. Since 1925, Iraq as a geographical entity has been governed under successive five Constitutions. i.e. that 1925 represented a watershed in the development of Constitution in Iraq. This was because the 1925 Basic Law clearly guaranteed fundamental freedoms and human rights in Iraq. That is, the Iraqi people, for the first time could claim some rights under the administration of British authority during the colonial period. The Constitution was not just given to the Iraqi people by the British; it was a product of long and lasting deliberation, consultation and negotiation between British government and Iraqi people. In this way, the law was acceptable to the Iraqi people

and represented the first legal document under which Iraq could be governed. It can thus be safely said that the Basic Law of Iraq 1925 met the basic requirements for its adoption. One of the requirements is consultation. The research has found that the people of Iraqi was duly consulted before the final adoption of the constitution through referendum. This implies that the Iraqi people knew fully well the contents of the constitution before it was finally approved. The research also showed that the Basic Law of Iraq 1925 was acceptable to King Faisal, who governed the country based on the democratic ethics and principles. In order to strengthened the Constitution based on the Basic Law of Iraq 1925, he constituted a constitutional committee among both Iraqis and Britons to make some assessment and examination of the Constitution in order to uphold the fundamental human rights within Iraqi society. This move may nullify earlier assumption by some scholars that democracy and S.O.P are alien to Arab countries. Under the Basic Law, the Supreme Court was established with the duty to interpret the basic law and determination of the constitutionality. Therefore, the Basic Law established the constitutional development of Iraq and it was acceptable to all. It needs to be reiterated here that the introduction of the provisional Constitution of 1958 truncated the smooth process of constitutional development in Iraq for the Constitution was replete with all sorts of legal anomalies. One of such anomalies was the idea that Iraq was part of Arab nation and was backed by the provisional Constitution. Iraq, by all qualifications, is not a homogenous country. Such provision can only be asserted in countries like Saudi Arabia. Egypt, and Yemen, where over 90 percent of people regard themselves as Arabs. But in case of Iraq, this is not so. In Iraq, 74 percent are Arabs while others belong to Kurds, Turkmer, etc. In this way, the Constitution has technically

downplayed the rights of other ethnic nationalities. Such law did not take into cognizance the Iraqi national composition.

Third: The conception that Iraq was an Arab nation was also found to be entrenched in 1964 Constitution, which generally advertised for the alignment of Iraqi Arabs with other Arabs in Syria and Egypt. Such constitutional provision alienated other partners and represented a clear infringement on the rights of others. Another deficient inherent in the Constitution was the lack of participation from the people. Government did not consult the people and Iraq was governed under nondemocratic regimes until another constitutional committee came up with another Constitution in 1970. It also needs to be stressed that, according to the findings of this research, Saddam Hussein tried to amend the 1970 Constitution in order to favour its regime, but was denounced and the Constitution persisted until the US invasion in 2003. The US invasion of Iraq in 2003 opened the Iraqi society to external forces which dictated to a certain extent the direction of the Constitution. The fallout of the US occupation was the introduction of the TAL, which came into being as a result of negotiations that existed among the members of governing council of Iraq. But one needs to recognise the fact that the Administrative Law was ratified by an American named Paul Brenner. Such was the extent of the US's intervention in the internal affairs of Iraq. The Constitution, it needs to be stated, was meant for the Iraqi people. How then the Constitution got ratified by a foreigner? Such Constitution from the point of view of legal provision lacks legitimacy. The Constitution needs to represent the position and views of the Iraqi people. This was ~~is~~ a clear travesty of justice. Despite this legal lopsidedness, the TAL defined the roles of each arms of government in Iraq and uphold the principle of S.O.P as it was found in the Basic Law of Iraq 1925. Thus, the Administrative Law was later metamorphosed to the

Iraqi Constitution, which was said to be devoid of any ethnic and sectarian bias. Although this may represent a progressive move towards inclusiveness in Iraqi society, the fact that the constitutional drafting committees was instigated and supervised by foreigners call into question the credibility and representativeness of such legal document.

Fourth: The research found that there was a clear contradiction in the exercise of S.O.P under the Basic Law of Iraq 1925. The Basic Law of Iraq 1925 provided disagreement ensued between the Chambers of Deputies and Senators, it was the Senate President that would preside over the meeting to settle the case with the approval of the King. There was complicity in this scenario. How would the decision of the legislature be subjected to the approval of the King of which he has selected some parties therein? Furthermore, it has been identified by the researcher that in the Basic Law of Iraq 1925, the judges of the High Court were appointed by the Senate. Again, this appears not to be healthy for the principle of separation of powers. Since some of the members of parliament are selected by the King, one may question altogether the independence of the members of the bench or judges of the High Court.

Fifth: The research found that the doctrine of S.O.P and checks and balances are present under the Iraq Constitution 2005. Such checks and balances are found to exist, most especially between the FSC and parliament. Some interviewees have described this as an infringement on the rights of Parliament to make a decision. However, this is not so apart from what is practised in most societies in order to prevent absolute power. The historical analysis of S.O.P in Iraq therefore testifies that Iraq is no exception to the principle. As practised in civilised societies, Iraq Constitution 2005 also guarantees the application of S.O.P among legislature,

executive and the judiciary. Iraq FSC that exists today operates under the Iraqi Constitution of 2005. In this case, it is imperative to admit that its capacity to oversee the administration of justice and order within Iraq may be affected with the manner with which the Constitution was drafted in the first instance. If one needs to critically examine the FSC power over the constitutionality of laws in Iraq, such must be done through the lens of how the Iraq Constitution was drafted. The Iraq Constitution 2005, under which the FSC operates, has been criticised on various grounds. One such criticism is the gross violation of the rights of the Iraqis in the drafting of the Constitution. The occupation of Iraq in 2003 by the US gave ample chance to foreign elements to dictate the tune of the Iraq Constitution, which tended to dictate the power and powerlessness of the FSC on Iraqi Constitution. How would the FSC operates optimally when the Constitution, it ought to govern is flawed with irregularities? According to the research, the Iraqi Constitution 2005 was drafted by foreigners, mainly the US officials in connivance with some Iraqis who have never lived in Iraq. If this submission is right, how can the FSC operates within the ambit of law that does not reflect the wishes of the Iraqi people? Although, the US and other concerned parties are said to have conducted referendum to determine the acceptability of the Constitution, the result of the election was said to be manipulated by the authority in favour of the adoption of the Constitution.

Sixth: The research found that the powers of the FSC in legal supervision and constitutional interpretation on the constitutionality of laws are considerable. Given the fact that there may be ambiguity and contradictions in the Constitution, it is the responsibility of the appellate court, the FSC, to clear the air on the legal controversy in order to prevent any form of conflict. This was found to be buttressed by Interviewee No. 6 who opined that the FSC should be responsible for interpreting the

law and determine the constitutionality of any laws. If there is any form of legal contradiction, it is within the jurisdiction of the FSC to make clarification. In case of determining the constitutionality of the law, some scholars, including legal experts are being found to criticise the FSC for determining the constitutionality of laws passed by parliament. This has been termed as contravening the democratic ethics. The Members of Parliament are elected and so whatever they come up to represent the interest of the Iraqis. The FSC's intervention in the course of parliamentary procedure represents a clear affront to justice and thereby undermining the principle of S.O.P. It is said that most of the members of the FSC are not elected but chosen by government. So, if they are not elected members, the FSC is not accountable to anyone. Such position is acceded to by Interviewee No. 9 who was of the opinion that "the role of the Iraqi FSC in legal supervision and interpretation on the constitutionality of laws is viewed as a threat to the concept of separation of powers and democracy or representative government".

Seventh: Another issue being observed in the research is that Islam as a religion does not abhor S.O.P the governance of society. This is reflected in the way the earliest four caliphs governed over all Muslim territories during and after the time of the Holy Prophet. Such observation thus nullifies the insinuation and erroneous view that Islam is "allergic" to the principle of S.O.P.

Eighth The research found that the doctrine of S.O.P was based on the need to expend justice to all sections of society. This was also observed in the Iraqi Constitution 2005. Unlike the Basic Law of Iraq 1925, the King does not have the power to select any members of the Representative Council; all are elected through popular vote. Such development speaks well for the proper dispense of justice under the Iraqi Constitution 2005. In this way, the King in Iraq does not have the power to

truncate the decision of parliament, and both acts as checks and balances under the Constitution. Thus there is a slight difference between the Iraqi Constitution 2005 and the Basic Law of Iraq 1925. The researcher also observed that the Iraqi Constitution 2005 has been entirely reactive in nature. Since 1925, most of the Constitutions drafted to govern Iraqi have been products of the prevailing situation and as such determined the nature of Constitution that has to be drafted. This is exemplified in the way Iraqi Constitution 2005 was drafted. Granted the fact that it was drafted in connection with foreigners, the Constitution was drafted in reaction to past atrocities being perpetrated by Saddam Hussein against Shia and Kurds in Iraq. Thus, the rights and duties of each partner within the Iraqi statehood were taken into consideration in the Constitution of 2005.

5.6.1 Others Findings, the research found three important findings as follows:

First:- The perceived alienation in the drafting of the Constitution by the US. When the Constitution was about to be drafted nearly all people from Ba'ath party were excluded from the whole process and this was mostly the Sunnis who were influential in the administration of Iraq during the Saddam Hussein regime. The explanation for such policy of exclusion was not tendered by the US authority that front the constitutional drafting process. In this way, the Sunnis complained that their exclusion was against the tenets of democracy which give every sections of the society to determine their destiny within a state. Although, the Ba'ath party, which was Sunni majority, was influential during the reign of Saddam Hussein, the members of the party were reduced to the state of disrepute in the process of drafting the Constitution. Such a step made the Sunnis alleged that the Constitution was made to ensure that the Kurds and Shia are given upper hands in the administration of the country over the Sunnis. Taking the allegation from the point of view of

constitutional drafting, each party constituting a state should be allowed to partake in the process in order to address the importance of legitimacy of the Constitution. If a section in a state feels cheated in the process of drafting a Constitution that will govern their existence, such a Constitution may be unacceptable because it does not reflect their wishes. This in fact was a contradiction in the drafting of the Iraq Constitution in 2005. The Constitution was marred with many discrepancies from various sections i.e. Sunnis, Kurds and Shia. The point here therefore is that in such an atmosphere of distrust and suspicion, how can the FSC exercise its power over the constitutionality of laws? A section may believe that it may not receive fair treatment under certain provision in the Constitution, the position of which may affect the credibility of the FSC in Iraq.

In addition to the above, despite this discrepancy, there is existence of checks and balances in the Iraqi Constitution 2005. This can be noted in the manner with which the bill is passed into law. The bill that is being passed by two assemblies does not automatically become law until the King gives its own approval called assent. The bill becomes law after the assent has been given. Like all other systems, the power of the King is also checkmated by the power of parliament to veto the decision rejected by the King. Under the Iraqi Constitution 2005, the FSC is empowered to confirm the credibility of the members in the council of representative and to regularly review their action if it is in conformity with the Constitution.

Second:- It needs to be stressed here that based on what is practied in other countries of the world, most especially in the US, the appellate court has been in charge of interpreting the law and determining the constitutionality of such law. In embarking on such interpretation, the Iraq government under the FSC has employed the use of textualism to arrive at legal conclusion. Hence, if Iraqis are complaining about

subversion of the principle of S.O.P by the FSC, they should know that this has indeed been ~~is~~ a healthy practice as opposed to being construed as a negative one. In other words, this is a form of a check and balance to prevent abuse of power. Such lamentation shows that most Iraqis are not happy with the composition of the FSC. In addition, some also complain about the subversion and erosion of the legal right of parliament to determine the constitutionality of the law. This is what this research found to be known as subversion of the principle of S.O.P. Overall, this research has highlighted the basic findings concerning the operation of the FSC in relation to the Iraq Constitution 2005.

In a normal circumstance, the Constitution of any state is supposed to be proactive rather that reactive in nature. The result of such reactionary constitution may not be favorable to society. This condition explains why many Iraqis are unhappy with the hastiness with which the Iraqi Constitution 2005 was drafted. It was drafted in haste because it was basically in reaction to the prevailing political and social debacle that pervaded the Iraqi society after the demise of Saddam Hussein. Lastly, the researcher also observed that the membership of the FSC, which is responsible for the interpretation of the Iraqi Constitution have been criticised by many people. They criticised the composition based on the conception that there is no need for the inclusion of Islamic clerics and scholars in the membership. Such argument is two-fold. First, the Constitution's inclusion of Islamic scholars in the FSC might be to avert the difficulty that may occur in the process of interpretation by non-Islamic scholars. Second, since Iraqi society is basically over 90 percent Muslims, it is desirable that those who are versed in the knowledge of religion be included in order to assist in proper interpretation of the Constitution, possibly from Islamic point of view.

Third: The FSC in 1925 was the first constitutional experiment in the history of Iraq, because the Iraqi judiciary at that time was headed by the Supreme Judicial Council. The head of the Supreme Judicial Council was the chairman of the Cassation Court to run the professional issues of the judges (e.g. promotion, transference and discipline) and to protect them from the interference of the executive authority (Ministry of Justice).Although the Iraqi judiciary is linked to Ministry of Justice, judges used to enjoy a great extent of self- independence; as a result, the Iraqi judiciary at that period achieved a qualitative progress in developing the legal system with reference to the control over the constitutionality of laws and their interpretation. Also, the Iraqi judiciary is distinguished by courage in taking the decisions that mark the judge's independence and his contribution in developing the legal system.

The royal system culminated a legal and judicial system characterised by its ability to develop and to reform because the political process was built on sound bases (standard of citizenship). However, the American occupation had taken place without a legitimate cover of UN (Security Council) and a violation of the UN Charter; and dismantled the infrastructure of the Iraqi state, especially the vital institutions such as the army, police and security. This was done according to the civil American governor's orders (Bremer) of the occupation. Hence, the American-British invasion brought destruction, chaos, corruption and organised crime to control Iraq. Due to the appointment of Ambassador Paul Bremer director of coalition forces in Iraq and his being the head of all authorities (legislative, executive and judicial) under Regulation No. (1) for the year 2003, he passed many regulations and verdicts violating international law and the provisions of the Geneva Conventions concerning countries under occupation. Such conventions and laws prohibit the occupier to make changes

to States' structures and legislations, which gave an extreme example of the nature of dictatorship and tyranny of the occupation forces in Iraq. Since Paul Bremer holds the judicial authority, the Iraqi judiciary was tied to the decisions of the occupation. Accordingly, he issued order No. XVII in 2003 which granted immunity from prosecution to US forces and their allies, staff from security agencies, contractors and others. This had encouraged the troops to commit the most outrageous international crimes against the unarmed Iraqis, and the outcome was to create a wide atmosphere of complaint among people; giving the impression that the troops came to destroy the country and people with the help of expatriate forces and sectarian militias.

The permanent present Constitution in its preamble used sectarian and ethnic concepts which at will fuel the spirit of division and hatred among the components of society and that will continue over the next generations. As planned by the occupation, the permanent Constitution of 2005 did not specify the identity of the Iraqi state of which Arabs constitute 80% and the Constitution was quoted from the Law of Iraqi state administration; that would break up the Iraqi State. To achieve these interests, the Constitution laid down some purposes to implement by making the executive authority more powerful than the legislative authority where the opposite should hold true as followed in all democratic states.

5.7 Conclusion

This thesis is thus divided into five chapters with each linked together to provide answers to the research questions. In answering these research questions as well as achieving the research objectives, therefore, Chapter One delved into introduction to the thesis which included background of the study, a statement of the problem,

research questions, research objectives, significance of the study, researcher methodology, limitation of the study, literature review and outline of the chapters:-

Chapter Two explored the historical background of S.O.P from western point of views. Such historical background has provided basic knowledge about the popularity of the concept in the international system and most importantly in Iraq. The critical evaluation of the origin of separation of powers thus revealed that it was essentially reinvented in the West, most especially in the US and France to uphold the tenet of justice in the society. Such usefulness has also been extended to Iraq by the British to ensure that modicum of justice is exercised within the Iraqi society. The lopsided problem of separation of powers inherent in the Iraq society is borne out of the conflict of laws between the Shariah and civil laws. Both seem to contradict each other in a sense which make it difficult for Iraq to evolve a unified system of justice to govern the society.

Besides, Chapter Three assessed the place of S.O.P under the Iraqi constitutional system. As would be expected, the Iraqi Constitution 2005 and the Basic Law of Iraq 1925 have some inherent elements of S.O.P, which clearly stipulated the role of each arms of government in the dispensation of justice in Iraq judicial system. Despite the US, British and other external powers' intervention in Iraq decades ago, the concept of S.O.P is still much respected within the Iraq judicial system. The only dark side is the internal rivalries between the principal partners in the state of Iraq and it is believed such rivalry can be ameliorated if mutual distrust is effaced.

The main chapter ended with Chapter Four which focused on the role of Iraq supreme court in legal supervision and interpretation on the constitutionality of laws. Iraq also has its own appellate court that sees to the day-to-day administration and

moderation of the judicial system. Despite some conflicting primordial issues that exist among the various partners, the Iraq judicial system has achieved some successes. The internal problem in the judicial system in Iraq should be exaggerated as it happens in other developing countries of the world, most especially where the state is heterogeneous in nature.

Finally, Chapter Five of the thesis focused on the overall findings as well as conclusion and recommendations. In discussing the overall findings of the thesis, some important issues were raised which formed the rationale for the thesis. Such rationale was embedded in the research objectives that were stated in Chapter One the thesis being extracted from the research questions. Under this chapter, the overall findings were tailored to the research questions and research objectives of the thesis.

the Iraqi Constitution 2005, is said to have been acceptable to the overwhelming majority (nearly 75 percent) of Iraqis, but the ten-day delay of the result greatly discredit the result. Iraqi people were of the view that if the result was genuine it should have been released as early as possible. Such credibility issue has been identified as the major demerit of the 2005 Constitution. If such Constitution is marred with irregularities, how can the FSC operates within such a Constitution? Thus, the research found out that the Iraq Constitution itself does not reflect the wishes of all partners constituting Iraq.

5.8 Recommendations

Based on the aforementioned findings, the thesis recommends the following in order to forestall the conflict of interests that may arise thereof:-

Firstly, for healthy Constitution, there is a need for democratic transformation. It needs to be said here that for any Constitution to be effective the societal structure needs to be tailored toward democratic ethics. It is the democracy that will further enhance the periodic debate on constitutional development. The drafting of the Constitution is not supposed to be an exclusive responsibility and right of any section of the society. Iraq as a state needs to promote democratic norm in order to reap the fruit of its Constitution. The Constitution can only thrive in an atmosphere where democracy is the norm. In other words, there is a need to amend some of the provisions of the Iraqi Constitution 2005 in order to enable the FSC to perform its function of legal supervision and interpretation on the constitutionality of laws without any hindrance.

Secondly:- the Iraq Constitution 2005 has been criticised by some scholars as being dictated by the US. If this is found to be true, the Iraqi of all groups should convene a national constitutional conference and try to spot out the irregularities in the Constitution. If such is found, then, it is the responsibility of the constitutional conference to address any discrepancy in the Constitution. After all, this Constitution is meant to govern the Iraqi people and not the British or Americans. Therefore, the allegation of foreign element being occasionally levelled against the Constitution can be addressed through such conference. The conference can also be used to address other national issues that are not adequately contained in the Constitution, most especially on the issue of the members of the FSC.

Thirdly, in a related development, in order to ensure that the course of justice is not influenced there is a need to moderate the appointment and tenure of the members of the FSC. In democracy, the appointment of judges should not be based on any political and sectarian consideration so as to guarantee the independence of the

judiciary. The appointment should not be based on political consideration and the Constitution should be clear on issues such as the appointment and promotion of judges, especially those from the superior courts. In this manner, the powers at various levels need to be appropriately defined by the Constitution based on three levels of responsibilities. These are exclusive, concurrent and residual responsibilities. In terms of exclusive rights, the Constitution needs to state clearly the regional boundary in terms of responsibilities to be performed. Normally, the exclusive power belongs to central government and there should be no any region competing with central government on this matter. Those issues on the exclusive list are currency, national army, foreign affairs, defense, immigration and law. In all these issues the will of the central government, in most cases should be predominant. These are all sensitive issues that need proper assessment and examination before it is executed. Most of these responsibilities are found to be conducted in relation with other states. Since the regions are not states, defined in terms of sovereignty, they should be constrained by the Federal Constitution to compete with central government in some of these issues. In addition, the concurrent lists are issues that are to be shared between the central government and the component states. In this case, the Constitution has to explicitly define the role of both governments in this regard. Some issues that normally fall under concurrent lists are custom, trade, investment, security et. cetera. It needs to be stated here that most of the issues listed under concurrent list may be termed as shared responsibilities between the regional and central government, but in some cases the Constitution should define the boundary of a regional entity in this regard. This is the lapse that is found in the FSC responsibilities. If the FSC cannot confidently adjudicate and determine the

constitutionality of some issues, then the Constitution needs to be amended in that regard.

The last constitutional responsibility is the residual list. This, according to the Iraqi Constitution 2005, should be within the directives of component regions within Iraq. In this case, the regional government has exclusive rights to determine the execution and implementation of policies with regard to residual responsibility. And the interpretation of the Iraqi Constitution 2005 where Article 121 states that "in case of contradiction between regional and national legislation in respect to a matter outside the exclusive authorities of the federal government, the regional power shall have the right to amend the application of the national legislation within the region." This does not suggest that there is contradiction in the Federal Constitution. What the Constitution is trying to pinpoint is that any responsibility that fall outside the exclusive responsibility of the central government, the regional government shall apply its own law. One needs to be careful in interpreting Article 121 of the Iraqi Constitution 2005. It does not say the regional Constitution should prevail over that of central government. The main issue here is that where there are concurrent and residual responsibilities, the regional law shall be considered. It needs to be said that the FSC as an important body in determining the constitutionality of the Iraq Constitution needs to be inclusive and such inclusiveness means considering the complexity of the society. Although, the composition may be defective, but such can be improved by inclusiveness which may in turn accelerate the process of S.O.P in the Iraqi Constitution. As it occurs in most developing heterogeneous states, the government of Iraq needs to be meticulous on the way it arrogate some responsibilities to the regions as this may prompt and accelerate secessionist tendency from the regions. This is exactly why in most developing countries, the

center is always powerful so as to guide against the secession. And to be fair to Iraq, government needs some measures of judicial control to prevent secessionist agenda from constituting regions as Iraq undergoes a process of state building. As stated in Article 121(2) of the Iraqi Constitution 2005, the Region is entitled to modify the application of the federal law in the region in case of a contradiction or conflict between the federal law and the law of the province on the issue that does not fall within the exclusive powers of the federal authorities, and the phrase modifying the application of federal law could mean a partial cancellation or in full, is no secret that the practice of cancelling is an authority entrusted to the FSC exclusively as it is responsible for settling issues that arise from the application of federal laws, as provided in Article 93(3). This law is based on "the principle of the gradation of legislation included in constitutional law"

In addition, it is important to reconsider the second clause of Article 121 of the Iraqi Constitution 2005 for two reasons, the first reason to strengthen the federal government's authority, while the second is to not exceed the competences of the FSC.

As to the fourthly recommendation, a new law of the FSC should be passed, other than No. 30 of 2005. The new law should explicitly clarify conditions for the formation of the Court, its membership conditions. Perhaps this new law would help to address issues such as the requirements needed in terms of qualifications before a judge is appointed to be a member of the FSC. The current method of appointment appears to be clouded with a lot of uncertainities casting doubts altogether on the notion of independence of the judiciary. If that’s case, it would be difficult for the FSC to be seen as a performing its function of legal supervision and interpretation on the constitutionality of laws in a perfect manner.

Regarding the fifthly recommendation, Article 61(6) of the Iraqi Constitution 2005 needs to be repealed because it conflicts with the text of Article 94 of the Constitution itself. Article 94 stipulates that the decision of the FSC shall be final and binding on all authorities, but Article 61(6) contradicts this text because it exempts the decision of the FSC from being final and binding in a case involving the President of the Republic who has been found guilty and convicted by the FSC in the following cases: perjury of the constitutional oath, violating the Constitution and high treason. This exemption from the finality clause can be done by way of an absolute majority of the Council of Representatives. Hence, the operation of this exemption clause appears to put the President of the Republic above the law. By looking at Article 61(6), one would argue that the application of the rule of law seems to be questionable altogether.

5.9 Suggestion for Future Research

In terms of future research agenda, the researcher suggests the need to explore more about the efficacy of the FSC in relation to the Iraqi Constitution 2005. Such research can explore specific areas where there is need for adjustment and overhauling in the Constitution. One such area of future research would be to look into the structural flaws and political implications of the Iraqi Constitution 2005. For example, the future research has to address specific issues such as the political implications towards the road-map to the constitutional development of the Iraqi Constitution 2005. Take for instance the main points of difference witnessed during the drafting and approval of the permanent Constitution were the nature of the state and the extent of the federal system, the role of Islam, the relationship between the federal (decentralised entities) and the central government, the identity of the Iraqi state, the

issue of Kirkuk and the so-called disputed areas, the De-Ba'thification law and sharing the wealth of the country. All these issues require an in-depth study/research to be conducted in studying the Iraqi Constitution 2005. In other words, the Iraqi Constitution 2005 could not be understood in isolation without addressing the issues highlighted above. Hence, the future research would likely help in addressing some pertinent political problems that the country is currently experiencing or going through.

As to the research methodology adopted in this current study, the researcher adopted both doctrinal and qualitative methodologies. Hence, for future research it is suggested that a quantitative methodology may be adopted in studying the structural flaws and political implications of the Iraqi Constitution 2005.

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APPENDIX 1

The Constitutions

1. Constitution of the United States (1789).
2. Basic Law of Ottman 1876.
3. Basic Law of Iraq 1925.
4. Constitution of Iraq 1958.
5. Constitution of Iraq 1963.
6. Constitution of Iraq 1964.
7. Constitution of Iraq 1968.
8. Constitution of Iraq 1970.
9. Constitution of Iraq 1990.
10. Constitution of Iraq 2005.

APPENDIX II

IN- DEPTH INTERVIEW QUESTIONAIRE: Interview Questions – English

Dear Participant,

My name is HIND ALI MOHAMMAD. I am a PhD student at University Utara Malaysia. I am conducting research to examine the powers of the Federal Supreme Court in Iraq on legal supervision and interpretation on the constitutionality of laws under the Iraqi Constitution 2005. Your participation will help me in this study to gather important and relevant information related to the powers of the Federal Supreme Court in Iraq. All the responses will be treated in the strictest confidence and the data collected will be stored in anonymous form. The findings of this research will only be used for academic purpose only. All answers will be used only for scientific purposes and dealt with strictly confidential. I appreciate your tight schedules and thank you in advance for taking your time.

Time to look at and respond to this questionnaire.

This questionnaire consists of three sections:

Section A: Demographic Information.

Section B: Relates to the Composition and the extent of the powers of the Federal Supreme Court under the 2005 Iraqi Constitution

Section C: Relates to the Working of Separation of Powers under the Iraqi Constitutional Law and issues of Judicial Independence

Please, take your time to complete all questions as completely as possible. Your participation will be greatly appreciated.

Sincerely,

HIND ALI MOHAMMAD

PhD student

College of Law, (COLGIS)

Universiti Utara Malaysia

Supervisors:-

DR. AHMAD MASUM

DR. ROHANA BINTI ABDUL RAHMAN

Universiti Utara Malaysia

QUESTIONS

Section A:Demographic Data of the Interviewees (Judges of the FSC , Lawyers, University professors of constitutional law)

(Please tick (√) in an appropriate box)

1. Profession: () Judge, () Lawyer, () professors of constitutional law.

1. Gender: ( ) Male ( ) Female.

2. Age: ( ) 20-30 ( ) 31-40 ( ) 41-50 ( ) 51-60 ( ) Above 60.

3. Educational level: Bachelor's degree ( ) Master's Degree ( ) Doctoral Degree, ( )

4. Marital Status: ( ) Single, ( ) Married, ( ) Divorced, ( ) Widow.

5. Rank.

(a) Professor.

(b) Senior Lecturer.

(c) Other.

6.How long have you been in this Profession?

( ) Less than 1 year.

( ) 1-5 years.

( ) 6-10 years.

( ) 10-20 years.

( ) More than 20 years.

Section B: The decisions of the Federal Supreme Court in terms of exercising its powers of supremacy and constitutional interpretation on the constitutionality of laws are final and conclusive thus binding on all authorities? And Are the Iraqi Federal Supreme Court modify the application of the federal law in the regions if there is a conflict between the Federal law and the regional law on issues

outside the exclusive jurisdiction of the Federal authorities appointment,

Composition, Powers and Independence of the Iraq FSC:-

1. From your experience, what is your opinion about the decisions of the Iraqi Federal Supreme Court, are the decisions final and binding on all authorities and persons? How strong and independent do you see the Iraqi Federal Supreme Court in taking her decisions? (Probes are there interferences from the other arms of government? If there is executive interference in the decisions of the FSC how has the FSC handled such situations?
2. How are powers shared between the federal and regional governments in Iraq?
3. In your opinion, how appropriate is the provision allowing the application of regional law over federal law in case of conflict between regional law and federal law? (Does this amount to regional paramountcy? Does this not amount to creating dual judicial authority in Iraq?

   Section c: 3. Should the Iraqi Federal Supreme Court comprising of experts in the area of Islamic Jurisprudence conferred with the power to the supervise the constitutionality of laws in supremacy and constitutional interpretation? And Should the Iraqi Federal Supreme Court comprising of not-elected judges conferred with the power to the supervise the constitutionality of laws in supremacy and constitutional interpretation?

1. What are the criteria adopted in the appointment of judges of the FSC under the 2005 Iraqi Constitution? What are the considerations in the appointment? How different is the process under the 1925 Basic Law of Iraq?

2. In your opinion, why are members of parliament elected by the people of Iraq, while the judges of the FSC are not elected? And do you consider the fact that the judges of the Iraqi FSC being unelected, should not be allowed to determine the constitutionality of laws passed by the Iraqi Parliament?

3. What is your opinion on the composition of judges of the FSC of Iraq in terms of its inclusion of Islamic experts? What are the main reasons for the inclusion of Islamic experts among the judges? And how do you rate the expertise of the Islamic Judges in the appreciation of the rules of interpretation? (Are their decisions carrying equal weight with the decisions of other judges?

4. What is your opinion on the powers of the FSC asserting its "constitutional control" in the interpretation of the constitution? How has the FSC used its powers in determining the constitutionality of the actions of the other branches?

5. In your opinion to what extent do you think the powers of the FSC of legal supervision and interpretation assisted democracy and the protection of the Iraqi people? (Has the FSC checked the domination of one level of government or community from the other?)

6. How do you see the working of separation of powers under the Iraqi 2005 Constitution? (Probes: How has separation of powers shaped the working of the 2005 Iraqi Constitution? And do you consider the powers of the FSC in the determination of the constitutionality of laws as a violation of the concept of separation of powers?

7. Do you consider the powers of the FSC in the determination of the constitutionality of laws as a violation of the concept of separation of powers?

8. Finally, is there anything you would like to add or comments you wish to make on

any of the issues raised please do in the space provided below.

APPENDIX III

Interview Questions – Arabic

الاسئلة

القسم ا/

(البيانات الديموغرافية لمقابلة (القضاة والمحامين وأساتذة القانون)

(يرجى وضع علامة (√) في المربع المناسب)

المهنة: () قاضي، () محامي، () أساتذة القانون

الجنس: () ذكر () أنثى .

العمر: () 20-30 () 31-40 () 41-50 () 51-60 () فوق 60 .

()المستوى التعليمي: بكالوريوس () درجةالماجستير () درجةالدكتوراه، .

الحالة الزوجية: اعزب، () متزوج، () مطلق، ().

منذ متى وانت تعمل في هذه المهنة؟

اقل من سنة ( ).

15 سنة ( ).

6- 10 سنوات ( ).

10- 20 سنة ( ).

أكثرمن 20 عاما () .

القسم ب/ تعيين وتاليف السلطات واستقلال المحكمة الاتحادية العليا في العراق.

1. هل تعتبر قرارات المحكمة الاتحادية العليا في العراق نهائية وملزمه لجميع الاشخاص والسلطات في الدولة؟ هل في رايكم المحكمة الاتحادية قوية ومستقلة في اتخاذ قراراتها؟ هل هناك تدخلات من قبل السلطة التشريعية والتنفيذية والاحزاب في عمل المحكمة الاتحادية العليا وفي اتخاذ قراراتها؟ ارجو اعطاء مثال او قضية معينه دالة على تدخل السلطات في عمل المحكمة الاتحادية العليا؟

2. ما هي المعايير المتخذة في تعيين قضاة المحكمة الاتحادية العليا, برايك هل لدى قضاة المحكمة الاتحادية القدرة على تفسير احكام الدستور العراقي 2005؟ هل الانقسام الطائفي له تاثير على تعيين القضاة؟ كيف تختلف عملية تعيين القضاة في دستور 2005, عن القانون الاساسي العراقي لعام 1925؟

3. برايك لماذا اعضاء البرلمان منتخبين من قبل الشعب العراقي بينما قضاة المحكمة الاتحادية غير منتخبين من قبل الشعب العراقي ويسمح لهم القانون بتحديد دستورية القوانين التي تصدر من البرلمان العراقي هل هذا جائز برايك؟

4. برايك تاليف المحكمة الاتحادية من (غير القضاة) وهم
خبراءفيالفقهالاسلامي،وفقهاءالقانون, ما هي الاسباب التي ادت الى وجودهم؟ برايك هل يستطيع هولاء تفسير الدستور؟ وهل تعتبر هذه القرارات التي يصدرها الخبراء والفقهاء مساوية الى قرارات قضاة المحكمة الاتحادية العليا؟

5. ما هو رايك حول صلاحية المحكمة الاتحادية العليا في الرقابة والتفسير القانوني للقوانين ؟ وكيف تستخدم المحكمة صلاحياتها ضد السلطات الاخرى في الدولة اذا كان هناك تجاوز من السلطات؟

6. برايك هل تعتقد ان صلاحية المحكمة الاتحادية في الرقابة وتفسير القوانين تساعد في ارساء الديمقراطية وتحمي حقوق الشعب العراقي؟ هل تكون المحكمة مهيمنة في بعض الاحيان في عملها ضد السلطات او الحكومه؟

الفرع ب/ العمل في الفصل بين السلطات بموجب الدستور العراقي .2005

7. كيف ترى العمل في الفصل بين السلطات بموجب الدستور العراقي 2005؟ كيف يتم تقاسم الفصل بين السلطات في الدستور؟

8. هل تعتبر سلطات المحكمة الاتحادية العليا في الرقابة والتفسير مخالفة لمبدا الفصل بين السلطات في العراق؟ ما هي العيوب التي تراها في مبدا الفصل بين السلطات في العراق؟

9. كيف يتم التقاسم في السلطات بين الحكومة الفيدرالية وحكومة الاقليم في العراق؟ هل تعتبر سلطات حكومة الاقليم اوسع من سلطات الحكومة المركزية بموجب الدستور العراقي 2005؟

10. في رايك هل هو مناسب في الحكم الذي يسمح بتطبيق القانون الاقليمي على القانون الاتحادي اذا حدث صراع بين القانون الاتحادي والقانون الاقليمي فان قانون الاقليم هو الذي يطبق؟ كما هو الحال في المادة(121/ 2) من الدستور؟ هل هذا يؤدي الى انشاء سلطة قضائية مزدوجة في العراق؟

واخيرا اذا كان لديك اي اضافة او تعليق او تقديم اي قضية يرجى القيام به.