



Legislative Referral to the Executive Authority is A Necessity or a Waiver of the Legislative Role

Amer Zghair Mohaisen¹, Elaf Abdul Rasool Sabri²

^{1,2}College of Law, University of Misan.

¹amerzghair@uomisan.edu.iq, ²elaf_abdel_rasoul@uomisan.edu.iq.

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ABSTRACT

The practical and philosophical necessities have highlighted the necessity to increase the legislative role of the executive authority, so that the administration authority has the authority to issue the executive regulations necessary to activate and facilitate the implementation of laws on the ground. As this study was divided into two requirements: the first is the legislative referral and its legal basis, and the second is the legislative referral controls. We have recommended that the executive authority, when practicing legislative referral and issue executive regulations, respect the formalities stipulated in the constitution during the exercise of legislative referral, in addition to the obligation to adhere to the general constitutional principles and not deviate from the provisions and principles of the constitution and respect the goal and objectives that it seeks to achieve, otherwise it becomes Its behavior is illegal because it is unconstitutional, whether formally or objectively.

INTRODUCTION

The legislative function is one of the most important forms of people's sovereignty. It is also originally vested in the legislative authority of Parliament - the House of Representatives - as it is the authority that has been elected by the people. This authority is responsible for legislation than others. This is the general principle and according results of the separation of powers. In addition, the executive authority exercises the implementation process (Al-Sadiq, 2002). However, this relative separation between the powers has presented some overlaps between the powers. This allows the authority to perform some of the competencies that fall within the scope of another authority (ibid).

Likewise, the practical reality, the increase in the state activity in various aspects, and the complex technical issues that have resulted from technological advancements require great awareness of their existence and high technical expertise to organize them. They also need a high speed to resolve and accomplish them. All these matters seem expand the role of the executive authority in the legislative field (Ahmed, 2017).

The executive authority exercises the legislative process through various means, including the legislative referral. According to later, the executive authority has the right to issue some abstract general rules that resemble laws in their generality and abstraction and the obligation to adhere to them. These rules are called in Iraq 'systems' and named 'regulations', as in France and Egypt.

Study importance

The study is important because it deals with a significant and main competence of the executive authority, which is the practice of legislative referral and the issuance of executive regulations. Given that these regulations affect the rights and freedoms of individuals in one way or another, it is necessary to clarify the conditions and controls that the legislative authority seems obliged to observe when exercising legislative referral.

Problems of the study

The legislative authority is an inherent competence exercised by the legislative authority. However, the practical reality of implementing the laws issued the legislative authority requires the executive authority exercise legislative referral. It is important that this exercise should follow certain constitutional and legal criteria that ensure that the referral is not marred by a constitutional impasse or legislative omission and evasion. Accordingly, the study tries to answer the following questions:

The main question: What are the controls for practicing legislative referral to avoid legislative evasion?

The main research question is divided into two sub questions:

1. What is the definition and characteristics of legislative referral?
2. What are the conditions for legislative referral?

Aims of the study

This study aims to:

1. Define the meaning of legislative referral.
2. Publicize the constitutional and legislative basis for exercising the executive power in the legislative referral process.
3. Publicize the conditions that the legislative authority must observe.

METHODOLOGY

To answer the study's questions, more than one scientific research methodology is adopted. A "descriptive approach" is used through a precise description of the situation in the comparable legislations. Then, through the "analytical method," the constitutional and legislative texts will be analyzed to determine the legislator's attitude on the issue under investigation in terms of text and spirit. The study not only follows what is mentioned in those texts, it also highlights what is hidden in them, guided by the opinion of legal jurisprudence and judgments as possible.

Study plan

In order to understand all aspects of the topic and to solve the aforementioned problem and answer the questions resulting from it, this study is divided as follows:

1. The first requirement: the nature of the legislative referral and its legal basis.
2. The second requirement: legislative referral controls.

What is the legislative referral and its basis?

In principle, the legislative branch in the state prepares the necessary laws and legislation in the state because this is its main competence. Following its preparation and issuance, the law often includes a text referring to the executive authority to issue the necessary regulations to implement this law. The next section discusses the concept of legislative referral and its legal basis, through two sections: the concept of legislative referral and the legal basis for legislative referral.

Definitions of legislative referral

Radi (2004) states that the legislative referral is a general directive in the final provisions of the law for the executive authority in general or a particular executive party, such as the Council of Ministers or a specific minister, to issue legislation - regulations or bylaws - secondary executive.

This is because when the legislator establishes a specific rule, regardless of the extent of its scrutiny and examination, one cannot cover all the subtleties in the law. Thus, legislators refer to the executive authority to issue necessary regulations to implement law because this authority's contact with the public makes it know these details more (Al-Tamawi, 1957).

According to the Iraqi Advisory Council (2005), the Iraqi State Council follows the same path. It explains in one of its provisions the regulations that aim to highlight the necessary detailed parts for the enforcement of the provisions

contained in the law or to complete its provisions that are often confined to defining the holistic general principles of legislation.

According to the researcher, the legislative referral is process by which the legislative branch directs the executive authority to issue executive regulations to activate the laws that the legislative authority has issued. This is based on the existence of a constitutional text that gives the executive authority the power to issue those regulations"

The legal basis for the legislative authority

Constitutions and laws tend to stipulate the authority of the administration to practice legislative referral addressed in the two following items:

First: The constitutional basis of legislative referrals.

Constitutions seem to find a constitutional basis and support through which the executive authority exercises legislative referral. Thus, this text could be a sufficient support for the administration to exercise its authority in issuing executive regulations, whether in a written constitutional text or a customary constitutional rule (Sabry, 1996).

"The Iraqi constitutions have frequently stipulated the authority of the administration to practice legislative referral and issue executive regulations. Likewise, the Iraqi constitution in force for the year 2005 state: "The Council of Ministers shall exercise the following powers: Third. To issue rules, instructions, and decisions for the purpose of implementing the law" (Iraqi Const. art. 80, § 3.).

Accordingly, the constitution gives the right to the executive branch to exercise legislative referral and issue regulations. Thus, the executive authority has the right to exercise without needing an invitation from the legislative authority (Al-Tamawi, 1957).

Second: the legislative base for legislative referral

Although constitutions lay the foundations for the executive authority to practice the legislative referral process and issue executive regulations, it is argued that legislative text alongside the constitutional text is necessary (Abdel-Baqi and Khader, 1989).

In fact, executive authority does not need a legislative text to exercise legislative referral and issue executive regulations. Rather, the right of the executive authority to issue these executive regulations is directly derived from the constitution, and the legislative authority cannot grant or prevent the executive authority from it (Al-Tamawi, 1957).

A text is being written to be stipulated in the laws issued by the legislative authority. This text requests the executive authority exercise legislative referral and issue the executive regulations necessary to implement the law and activate it on the ground (Abdel-Baqi and Khader, 1989).

Despite the existence of this text, the exercise of legislative referral by the executive authority remains an inherent competence when the original legislative authority is present. The executive authority does not issue executive regulations based on a mandate from the legislative authority or in its absence, rather, this practice is a competence that is an inherent right of the executive authority.

The exercise of the legislative referral by the executive authority and its issuance of executive regulations is a fixed right for it according to the constitutional texts. Therefore, the executive authority does not need a legislative basis to exercise this right.

Legislative referral controls

In the referral of laws by the legislative authority to the executive authority in order to issue the executive regulations necessary to implement the laws, there will be some conditions on the legislative authority. The legislative authority is not allowed to neglect its legislative role, giving up some issues to be regulated by laws issued by the executive authority. This is a waiver by the legislative authority of the exercise of the authority that was granted to it by the constitution.

Therefore, legislative authority is required to avoid legislative omission and calling on the executive authority to issue executive regulations. In addition, the legislative authority must not deviate from the constitutional restrictions of referral, explained next in two requirements.

Following the constitutional restrictions to referrals

The legislative authority must not deviate from the constitutional restrictions on legislative referral. Thus, if the constitution stipulates a specific procedure when conducting the legislative referral, the legislative authority must carry out this procedure as an implementation of the constitution before the legislative referral.

In addition, the constitution shows a specific law that the constitutional legislator must regulate some issues through laws. Then the House of Representatives may not refer those issues to the executive authority to be regulated through regulations. It is imperative for the House of Representatives to adhere to this constitutional restriction and to legislate alone in this framework. The administration is not able to address these issues in its executive regulations, and legislative referrals to the executive authority in these matters are not allowed (Khalil, 1986).

The specific constitution regulated issues through the law forces the legislative authority to regulate these matters than referring them to the executive authority. Likewise, the constitution may restrict the legislative authority in different ways when making a legislative referral. This is because the constitution requires that the legislative referral be to the Prime Minister - the First Minister - or to the Council of Ministers or to a specific minister. So, it is also the responsibility of

the legislative authority to follow these constitutional restrictions. Thus, the referrals must be to the parties the constitution identified to issue the executive regulations necessary to enforce the law.

This is clear in Article (80) of the Iraqi constitution, where competence was held to issue executive regulations for the Council of Ministers, and it was stipulated that "The Council of Ministers shall exercise the following powers: Third. To issue rules, instructions, and decisions for the purpose of implementing the law" (Iraqi Const. art. 80, § 3.)

The legislative authority must abide by this constitutional restriction. In addition, the legislative referral must be to the Council of Ministers and not to a specific minister, even if this does not prevent the parliament from delegating a minister or some of the ministers to issue the executive order of the law.

Likewise, there is a constitutional restriction on the legislative authority during the referral process. It does not refer to the executive authority to set provisions restricting public freedoms or affect the rights and obligations of individuals. It should also avoid referrals to the executive authority by establishing financial provisions or penal sanctions that are not included in the law (Abdel-Baqi, 2004).

The legislative authority must follow all restrictions included in the constitutional texts when referring laws and legislation to the executive authority to issue the executive regulations necessary to activate these laws on the ground.

When the legislative authority violates those constitutional provisions related to legislative or other referrals, there will be defects in the law, the regulation, and a violation of the constitution. This is subject to oversight by the constitutional judiciary, which is responsible for ruling that it is unconstitutional and removes the violation from the violated text any legal features as if that text does not exist.

Does not the referral represent a legislative omission

Although the exercise of the power of legislation is a right of the House of Representatives, it is also an authority and jurisdiction that the House must exercise and should not sacrifice. The principle is that jurisdiction is not a right that can be waived (Ajami, 2016). Therefore, the first condition that the legislative authority must take into account when referring to the executive authority is to move away from intentional partial legislative omission.

Legislative omission is defined as the failure of the legislator to exercise the legislative competence stipulated in the constitution (Adel Al-Abd, 2016).

It can also be defined as the fact that the parliament regulates an incomplete certain issue or issues that could result in a legislative vacuum. This vacuum does not go in line with the parliament's commitment to the need to exercise its legislative competence in the manner specified in the constitution (Abu Al-

Enein, 2016). Legislative omission occurs because of a lack such as the omission of some issues that should have been addressed by law. It could also occur because of the ambiguity in legal texts due to disorder in the legislative formulation (Abdul Majeed, 2016).

In the legislative referral process, there should be no intentional partial legislative omission. Penal omission is achieved when the legislator deals with one of the topics that pertains to the organization. However, it comes - whether intentionally or negligently – incomplete. Thus, the law is an organization that cannot address all aspects of the subject to be regulated in a manner that leads to a breach of the constitutional guarantee of the subject matter (Abdel Karim, 2020).

The Iraqi constitution stipulates: “Expropriation is not permissible except for the purposes of public benefit in return for just compensation, and this shall be regulated by law” (Iraqi Const. art. 23, § 2.).

Those previous issues reported in the constitutions are not regulated except through the law, and it is not permissible to regulate them through the regulations issued by the executive authority. This forces the legislative authority to fully regulate these issues through laws.

Consequently, the House of Representatives may not neglect the regulation of some aspects of the issues, if they are regulated through legislative referral to the executive authority according to executive regulations. The regulation of rights and duties is through laws and not through executive regulations (Abdel-Baqi, 2004).

Accordingly, the House of Representatives could waive its jurisdiction and authority legislative if one of the following happens: (1) omission by the legislative authority, (2) its reliance on the legislative referral of the executive authority and (3) handling issues neglected by the legislative authority by the executive regulations. This is contrary to the constitution.

CONCLUSION

The executive authority's practice of the legislative referral process and its issuance of executive regulations enable it to implement the laws issued by the legislative authority. This is that the executive authority is more knows more about what the laws need in terms of regulations to implement them on the ground. This familiarization should show an important role for the executive authority in the field of subsidiary legislation in the cooperation and relative separation between the two authorities (executive and legislative).

This research has resulted in a set of findings and recommendations as follows.

RESULTS

The researcher has reached through this study the following results:

1. The executive authority is recommended to replace the legislative authority in carrying out the legislative process in delegation and the necessary legislation.

2. Legislative referral is when the legislative authority directs the executive authority to issue laws and executive regulations. This is to activate the issued laws based on a constitutional text that gives the executive authority the power to issue those regulations.
3. The power to exercise legislative referral and issue executive regulations is a constitutional authority established for the executive authority. Here, the legislative authority does not need to take any legal action.

RECOMMENDATIONS

The study recommends the following:

The executive authority is recommended to follow the formalities stipulated by the constitution during the exercise of the legislative referral and issuing executive regulations. In addition, the executive authority must adhere to the general constitutional principles. It should avoid the deviation of the provisions and principles of the constitution and to respect the goal and objectives. Otherwise, its actions become Abdel Karim, S., H., (2020). *Effects of Legislative Omission and Supervision of the Federal Supreme Court* (1st ed). Arab Center for Publishing and Distribution.

1. Illegitimate because of the lack of its constitutionality, whether formally or objectively.
2. The executive authority must review the regulations periodically and amend them in accordance with the changing practical necessities. This should be in a manner to ensure the achievement of the public interest and helps implement the law in a manner consistent with developments occurring within the state.

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