

The scope of the Constitutional Court's authority to Overrule its judicial Precedents (Iraqi federal supreme court as a case study)

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Abstract

This research deals with the principle of overruling the judicial precedents, whereby, according to this principle, the Constitutional Courts issue a new judicial decision or ruling that includes an explicit and clear change to a legal principle that it had decided in a previous decision without amending the constitutional and legal rules that were the basis for issuing the decision. The constitutional court resorts to it as a judicial mechanism whenever necessary in order to adapt the decision to the prevailing circumstances and developments of society to achieve the highest interest, or the constitutional court resorts to it as the only way to correct its previous decisions that are tainted with defects. This research also deals with the concept, meaning and elements of this principle and the justifications for its application, and then explains its conflict with the principle of legal security and the stability of the legal positions of individuals. This research also deals with the judicial applications of the Federal Supreme Court in Iraq in this regard and explains the problems facing the Federal Court when applying this principle.

Keyword: overruling, Supreme Court, binding force, legal security, judicial precedents.

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1. Introduction

Research subject: It is known that the decisions and rulings of the constitutional courts in every country, including the Federal Supreme Court in Iraq, may not always be free from errors, because it is possible to make errors when issuing its decisions or rulings. At the same time, the Iraqi Constitution (2005) stipulates that: “The decisions of the Iraqi Federal Supreme Court shall be final and binding on all public authorities and shall not be subject to appeal in any way.” This prompted the Iraqi Federal Supreme Court to apply a new method to correct its wrong decisions and principles that it had previously decided, by resorting to work on the principle of overruling its previous decisions, as the principle of overruling the decisions of the constitutional courts is the voluntary replacement of a judicial ruling with another judicial ruling in the subject of the same case and its circumstances. Since it is conceivable that some decisions, whether constitutional or otherwise, are characterized by error and deficiency, and since life is in sustainable development, the only way to correct constitutional decisions and keep pace with development is application of overruling the decisions of the constitutional courts, but this subject cannot be taken into account absolutely, as it is not possible to conduct overruling without any restriction or condition. The principle of overruling has its special conditions and different restrictions when it is done, some of which are related to the judicial authority that is doing it, and others are related to changing circumstances and conditions or the occurrence of development in one or more aspects of life.

Research issue:

1- There is no explicit text, whether at the level of the constitution or the law of the Iraqi Federal Supreme Court, regarding the principle of overruling the decisions previously issued by the Iraqi Federal Supreme Court. This leads to the problem of the lack of a constitutional and legal basis for applying this principle.

2-the application of this principle may sometimes lead to a clash between the principle of legal security and judicial security, because there is no effective guarantee in the constitution or in the law of the Federal Court to achieve a balance between the two principles, i.e. (the principle of overruling and the principle of legal security). It means that there are some difficulties in making balance between the principle of the stability of constitutional court decisions and the possibility of applying the principle of overruling them.

3-the application of this principle may also lead to violate the authority and validity of the decisions of the Federal Court and their finality.

research objectives:

1-This research aims to benefit both jurists and the Iraqi Federal Supreme Court from these analyses and criticisms that will be presented in the core of this research so that the Iraqi Federal Supreme Court can apply the principle of overruling even in the absence of an explicit text regarding it.

2-This research also aims to guide the constitutional legislator and ordinary legislator to include explicit texts that explicitly stipulate this principle when amending the constitution and enacting laws related to the work of the Federal Court in the future.

3-This research also tries to make a balance between the principle of overruling and the principle of legal or judicial security, and tries to clarify the subject of the contradiction between the stability of the legal status of individuals and principle of overruling. It attempts to find an appropriate solution to these problems and propose solutions for them.

Research justification:

The importance of this research is that the subject of the principle of overruling the constitutional provisions has not received its full share of studies in Iraq, in addition to the fact that this subject is one of the subjects that occupies the forefront among the subjects that the

constitutional courts work on it, including the Iraqi Federal Supreme Court. Another importance of the subject lies in the fact that the subject of applying the principle of the Constitutional Court's overruling its previous decisions was and still is a hotly debated philosophical subject, as the opinions about this issue clash between legal philosophers and jurists over the extent of the constitutional court's competence to apply this principle.

This research will contribute to strengthening constitutional studies with a new study specializing in the principle of overruling from constitutional provisions as an exception to the general rules represented by the stability and constancy of constitutional judicial decisions, as these decisions represent a manifestation of the intention and will of the constitutional court regarding the constitutional lawsuits filed to it, as they are characterized by finality and cannot be appealed, as the court's jurisdiction ends in the lawsuits that it previously decided as a general rule. From here, we see the importance of the principle of overruling as an effective and influential tool or means in the hands of the constitutional court to protect the constitution and preserve the basic rights and freedoms of individuals stipulated in the constitution, and to embody the principle of the rule of law by strengthening the principles of overruling by correcting its previous decisions that include incorrect legal principles, and establishing new principles that differ from Previous principles in terms of the content or essence of the decision.

Research Methodology: The method followed in this research is an analytical method of the legal system of the Iraqi Federal Supreme Court, through interpretation of the texts of the Iraqi Constitution of (2005) in relation to the principle of overruling, and through analysing the texts of the Federal Supreme Court Law No. (30) of (2005), which was amended by Law No. (25) of (2021), and through analysing the decisions and rulings of the Federal Supreme Court that it issued regarding the principle of overruling, the research method also focus on analysing the traditional and modern trends of the Iraqi Federal supreme Court in this regard, and identifying the errors that occurred in the court's decisions when applying the principle of overruling its previous decisions, highlighting and criticizing them, and explaining ways to address these errors.

Research Outline: this research is divided into three main sections as follows:

- 1.The concept of the principle of overruling:
- 2.The impact of principle overruling on the other principles:

3. Judicial applications of the Federal Supreme Court in Iraq regarding the principle of overruling:

2. The concept of the principle of overruling:

to clarify the concept of overruling accurately, we must find the definition of overruling and determine all the elements that must be achieved in the principle of overruling. We must also look for the reasons that push constitutional courts towards following this principle and we must address the importance of the existence of the principle of overruling as follows:

2.1 Definition and elements of the principle of overruling:

Here, the researcher will discuss the definition of the principle of overruling and Elements of the overruling in order to reach an accurate concept of This principle as follows:

2.1.1 Definition of the principle of overruling:

There is no any legislative or judicial definition for the principle of overruling, so this issue has been left to constitutional comparative jurisprudence.

The Comparative jurists has tried to clarify the meanings of overruling in legal terminology. By referring to the jurisprudential definitions of the principle of overruling, we see that there is diversity and multiplicity of definitions regarding it according to the multiplicity of jurists who have addressed the issue of definition, as any constitutional jurist addresses it from a certain angle or specific aspect. For example, some French jurists define the overruling as "a ruling that imposes a new rule different from that followed in a previous case". some other jurists define it as "a clear and specific judicial rule or principle that replaces a previous judicial interpretation through a contradiction in reasons or justifications of the decision". (Salahuddin Fawzi, 1993, p. 3).

Another opinion of Jurists believe that the overruling is "a clear shift in judicial solutions characterized by being a voluntary shift not imposed on the court, and this shift is characterized by a complete or radical shift in the previous decision" (Hadeel Mohammed Hassan, 2015, p. 65). majority of jurists from Egyptian jurisprudence define it as a " overruling from a principle decided by the Supreme Constitutional Court in some of its previous decisions" (Salah El-Din Fawzy, 1993, p. 3). some Iraqi Jurists define it as "the shift and change in the judicial principle of the court's decision and the adoption of a new principle that contradicts the previous decision

and conflicts with it in the ruling, operative part, and legal bases and reasons"(Adel Taleb, 2001, p.3).

Among the previous definitions that we consider the most accurate for overruling is “the clear and certain voluntary substitution of a new ruling for another ruling on the subject of the same lawsuit and its previous circumstances.” (Hadeel Muhammad Hassan, 2015, p.65). Because This definition defines for us all the elements of overruling that we will discuss later.

It is worth noting that, through our review of the previous definitions, we think that constitutional Jurists did not fully address the elements, reasons and conditions of overruling in the core of their definitions. Except for one definition only that we mentioned now.

The researcher believe that the principle of overruling is: the issuance of a new ruling by the constitutional courts that contains an explicit and clear contradiction to a legal principle that the same court had decided in a previous ruling or decision on the subject of the same lawsuit and with the same circumstances and legal grounds and reasons surrounding the lawsuit, without amending the constitutional and legal rules that were the basis for issuing the ruling.

2.1.2 Elements or conditions of the overruling:

The principle of overruling has a set of elements or conditions that must be achieved when the constitutional court applies the principle of overruling. These elements or conditions are as follows:

1- The overruling must be clear and certain: To achieve this element, there must be a clear contradiction between the constitutional principles or interpretations created by the two judicial decisions (the old decision and the new decision), despite the unity of the constitutional problem raised. This indicates that the clarity of the previous principle is a main condition or essential element for carrying out the overruling process by the constitutional court. If the previous principle is ambiguous or unclear, it will be very difficult to recognize that the overruling being achieved. In the event that the constitutional court has developed his subsequent decisions and rulings without affecting the previous principle and decision, this overruling is not considered overruling. For example, the constitutional court’s amendment in the reasons or justifications of the judicial ruling does not fall within the scope of applying the principle of overruling the ruling previously decided by the constitutional court. (Mahmoud Ahmed Zaki, 2005, p 4).

2- The overruling must be as the result of Court's will and not imposed upon him: This means that the overruling must be by the will of the court, it means that the overruling the previous or old principle must be due to the will of the court and not outside of his will or imposed on him. For example, if the overruling is due to amending the constitution texts or political pressure or binding force of the decisions of some international supreme courts, as follows:

A- In the event of amending the constitution: If the overruling is imposed on the court as a result of the amendment of the constitutional texts, it means that this overruling cannot be considered a voluntary overruling by the court, but it means the implementation of the will of the constitutional legislator, because the mission of the constitutional court is to apply the constitutional texts. Because In the event of amending the constitution, the court has no other choice rather than apply the overruling.

the previous principle to apply the new legal text in a similar case. The court's will must be free to apply the principle of overruling, but this will of court is not free from all restrictions, and conditions, as there are some restrictions on this will, the researcher will try to address them later within this research. (Hadeel Muhammad Hassan, 2015, p. 82).

B-In the event of political pressure or interference: If the overruling occurred as a result of political pressure or interference exercised by a party on the constitutional court to rule differently from what he had previously decided in a similar case, for example, (Roosevelt) introduced economic reforms law (New Deal), but the Supreme Court in the United States of America rejected the draft law, but then Roosevelt increased the number of members of the supreme court and included in its formation a number of members who supported him in the economic amendments.(Ahmed Kamal,1960, p. 317). This is not considered an overruling, because the overruling was intended to be made by Roosevelt under political pressure through the increasing some members of the supreme court and not because of the pure will of the US Supreme Court.

C-The binding force of the decisions of some international supreme courts: If the overruling is due to the subjection of the internal constitutional court to the principle of the binding force of decisions issued by other international supreme courts whose decisions are binding force on the internal constitutional courts, then this overruling is not considered the overruling. For example, the decisions of the European Courts of Human Rights may be binding on the Constitutional Council in France. In this case the French Constitutional Council is not in the

process of overruling even if it overrules its previous decisions, because the overruling is not conducted by the will of the court in this case, but rather is an application of the will of international supreme court, which is the European Court of Human Rights.(Abdul Hafeez Ali Al-Shimi, 2008, p. 2).

3- The overruling must be total or complete. it means that the change that occurs to the legal principle decided by the constitutional court is not limited to the change in the reasons for the ruling and its legal grounds, but must include all the elements on which the decision is based. If the overruling is conditional or partial, then this is not considered the overruling. That is, in order for the overruling to be complete, the constitutional court must abandon an old constitutional principle or interpretation in favour of a new constitutional principle or interpretation in a totally way. (Abdul Hafeez Al-Shimi, 2008, p. 3).

4-The overruling must be legitimate: In order the overruling to be legitimate it must:

It must keep pace with the changes and developments that occur in society and aim to achieve the supreme interests of the country that the real intention of the constitutional legislator aims for. The overruling must also increase individual rights and freedoms.

it must also be within an exceptional and limited scope, meaning that it must not be applied in a wide scope. The overruling must also not affect the stability of the legal status of individuals and may not affect the security of the law, otherwise it will be exposed to illegitimacy.

Majority of jurists in the world say that it must also not be on the overruling, meaning that the overruling may not be carried out more than once in one decision.

But a new trends of French jurists recognizes (overruling on overruling) is permissible if the previous overruling is based on an erroneous interpretation of the constitutional text by the Constitutional Court, provided that the second overruling or the new overruling contains the same principle as the first decision was containing which was the overruling conducted in it .(Haddel Mohammed Hassan, 2015, p24). The researcher supports this new idea, but it should be in a narrow scope. It must be conducted in the case of if the first overruling was based wrong interpretation of the constitution and in the case of (negative overruling) or if the first overruling decreased the rights and freedoms of individuals, provided that the second overruling is directed to return to the same principle in the first decision.

2.2 Types and legal basis of the principle of overruling:

There are some types of overruling we will try to explain them clearly by dividing into five different types. Likewise, overruling has its own legal or constitutional basis we will try to address them in detail, as follows:

2.2.1 the types of overruling:

There are five different types of overruling that are divided as follows:

1- Types of overruling according to the source: This type of overruling is divided into (Realistic overruling) and (legal overruling):

A- Realistic overruling: it is obvious that laws are enacted according to what society wants and according to its circumstances and conditions. judicial institutions are managed by society through cadres or employees, and therefore the courts are nothing but an institution that is considered part of society and is affected by it, therefore any court that is not in compatible with its society its legitimacy will be threatened and it will become illegitimate within this society, and therefore its decisions and rulings will be inappropriate for its society and traditions and customs and religion and beliefs, so this reason prompts the court to overrule its decisions and change and amend them in accordance with what society demands of it, but within the framework of the spirit of constitution and real intention of the constitutional legislator and within constitutional legitimacy. (Ihsan Muhammad al-Hasan, 2008, p. 94)

B- Legal overruling: This type of overruling does not occur due to the court's will, but rather due to the issuance and amendment of a law and the constitution in which the new law and new constitution adopts a specific solution to a specific subject that contradicts what the constitutional court applies, and the court has no choice but to apply the new legal rule. This type occurs either due to the court adopting a specific approach in its interpretation or in adopting a constitutional solution for a case. (Hadeel Muhammad Hussein, 2015,107).

The researcher believes that this division is not appropriate, because this overruling is done through a new law or an amendment to a law or a constitutional text, and this means that this overruling is an implementation of the will of the constitutional or ordinary legislator and not

an implementation of the pure will of the Constitutional Court. so the researcher does not support this type of overruling as a type of The overruling.

2- Types of overruling in terms of period of time: This type of overruling is divided into (sudden overruling) and (gradual overruling): as follows:

A- Sudden overruling: is the overruling a previous judicial principle without any indication or informing by the constitutional court that it has changed the previous ruling. This type is described as sudden, because there is no large time interval between the old and new decision, the court overrules its previous decision instantly not gradually. (Francis Delperee, 2002, p. 7).

B- Gradual overruling: this type of overruling can be seen by following the decisions of the Constitutional Court, because it does not happen suddenly or instantly, but it happens gradually. in this type the overruling the previous principle occurs in several stages until it reaches the stage of complete overruling, where the court begins to weaken the old principle until it reaches the point of completely abandoning these principles that its previous decision are based on. (Francis Delperee, 2002, p. 7). It is worth noting that gradual overruling is not only achieved because of the stages that the overruling goes through to abandon a specific principle, but it can also occur as a result of the development of the court action by the court, which this development occurs because of the development of the court' vision toward a specific issue, thus its overruling the old judicial principle is not sudden, but rather expected to happen, it means the element of surprise is absent here. (Hadeel Mohammed Hussein, 2015, p. 112).

3- Types of overruling in terms of the will of the constitutional court: This type of overruling is divided into (explicit overruling) and (implicit overruling):

A- Explicit overruling: This means that the constitutional court declares its intention to overrule explicitly, and Explicit overruling does not mean any ambiguity or confusion. This means that the intention of the constitutional supreme court is clear in adopting a new judicial solution and abandoning the old ruling without any vagueness. Explicit overruling can be read and extracted the court's decision easily when the constitutional court mentions the new principle and announces his abandonment of the old principle. (Cons. Const n73-80 L 2 8nov).

B- Implicit overruling: Implicit overruling occurs through the court's silence about mentioning the previous decision that is being overruled, whereby the constitutional court mentions the

new decision or ruling only without referring to the previous decision, and in this type of overruling the court amends the grounds or reasons that he used in his previous decisions and rulings or changes some of these reasons and legal grounds and in the decision without any declaration Explicit by the constitutional court .(Abdul Hafeez Ali Al-Shimi, 2005, p. 17).

4- Types of overruling according to the constitutional court's methodology: This type of overruling is divided into (Specific overruling) and (unspecific overruling), as follows:

A- Specific overruling: This type of overruling does not contain general phrases and does not raise a dispute between the public authorities and the constitutional court regarding the overruling an old ruling and the adoption of a new ruling. This means that it does not raise any hesitation or confusion towards adopting a new legal principle that contradicts previous judicial principles. (Hadel Muhammad Hussein, 2015, p. 117). This type of overruling is to some extent similar to the explicit overruling.

B- Unspecified overruling: In this type of overruling the constitutional court changes a previous judicial principle and moves towards applying a new, unspecified judicial principle that has been issued by itself previously. For example, the court indicates that the text is unconstitutional because it contradicts to the constitution due to its lack of constitutional principles or controls for the contested text. This means that the constitutional court does not specify in the core of its new decision that the old decision and principle has been changed, but rather announces it in a general and unspecified manner. It is worth noting that this type of overruling makes its application difficult by the court itself or by the other public authorities. the existence and acceptance of this type of overruling will depend on its clarification through subsequent judicial applications of this principle by the constitutional supreme court.

5- Types of overruling in terms of their effects: This type of overruling is divided into (positive overruling) and (negative overruling) as follows:

A-Positive overruling: A overruling is considered positive if it supports the basic freedoms and rights of citizens. An example of this is the decisions of the French Constitutional Council in 1971 regarding giving constitutional value to the preamble to the 1958 Constitution and the resulting constitutionalize all the rights and freedoms contained in the Declaration of 1789 and contained in the preamble to the 1946 Constitution. This is in contrast to its previous decisions that refused to return to the preamble to the 1958 Constitution. (CONS.1999, p 44). This means

that the overruling that supports individual rights and freedoms and increases their protection is considered positive overruling. this type of overruling is the most legitimate overruling among the other types of overruling.

B- Negative overruling: The overruling is considered negative overruling if it has negative effects on the rights and freedoms of citizens. In other words, if the overruling decreased the rights and freedoms of individuals it is considered negative overruling. The Negative overruling can often be seen due to the intervention of the constitutional legislator, and is achieved often through amending the constitutional texts. (Hadeel Muhammad Hussein, 2015, p. 120). This type of overruling is considered the most dangerous and also the most illegal type among the types of overruling and is permitted within a specific and narrow framework and very exceptional condition.

2.2.2 The basis of the principle of overruling:

Constitutional courts in the countries of the world are different in adopting the principle of overruling according to their laws and constitution texts, in other words the constitutions in the countries did not adopt a unified approach regarding this principle, and this led to the emergence of different trends and jurisprudential opinions regarding it with regard to a unified constitutional and legal basis, and we will try to explain this controversial subject as follows:

In France: Constitutional jurists are divided into different opinions regarding the adoption of the principle of overruling that is implemented by the French Constitutional Council.

The first opinion Acknowledge the total rejection of the Constitutional Council's authority to exercise principle of overruling previous decisions and rulings that issued by the French Constitutional Council.

The second trend of French jurists acknowledge the Constitutional Council's right to apply the principle of overruling because it is consistent with the intent and will of change by French constitutional court.

third trend is called a middle trend between the two previous trends, as it embraces the idea of judicial transformation with a partial justification represented by not using the term overruling, but rather interprets it as a development in the trends of the French Constitutional Council.

briefly, although there is no explicit constitutional and legal basis in France regarding the principle of overruling, the Constitutional Council applies it, but under the name of the Constitutional Council developing its previous principles not under the name of overruling.

In Egypt: Constitutional jurists may be divided between denial and support for overruling previous decisions of the Supreme Constitutional Court:

the first trend mentions to the fact that the decisions and rulings issued by the court according to Article (49) of Law No. (48) of (1979) are binding and final for all authorities, including the Constitutional Court itself, and therefore it is not permissible to overrule those decisions and rulings again except in the case of amending the constitutional texts. (Saad Mamdouh Nayef, 2006, p. 129)

The second trend acknowledges the overruling previous decisions and rulings of the Supreme Constitutional Court, as the majority of jurists in Egypt recognized the authority of the court to amend or review some of its previous decisions, especially those decisions that have been issued for a long time and are no longer compatible with the developments and changes taking place in the society or those decisions issued in the past that could lead to the failure to achieve justice if they remain as they were or if their continuation leads to harm to individuals and their rights and freedoms. this indicates that a number of conditions are required for overruling the decisions including keeping pace with the political and social conditions in society and not violating the main tasks of the constitution which is the supreme constitutional interest that the constitutional texts aim for by the constitutional legislator, the most important of which is the protection of individual rights and freedoms.

In Iraq: The Iraqi permanent Constitution (2005) follows an absolutely silent approach toward the issue of a constitutional basis for the application of the principle of overruling the previous decisions by the Federal Supreme Court. On the contrary, we note that Article (94) of the Constitution stipulates that the decision issued by it is binding and final for all public authorities and individuals, including the Federal Supreme Court itself. The same applies to the Federal Supreme Court Law No. (30) of 2005, amended by Law No. (25) of 2021, as well as the previous Federal Supreme Court bylaw No. (1) of 2005, where Article 5/Second of the Federal Supreme Court Law states that: "The decisions and rulings issued by the Federal Supreme Court are final," while Article 19 of the Federal Supreme Court bylaw states that: "The decisions and rulings issued by the Federal Supreme Court are final." The court issues a final

decision that is not subject to any form of appeal.”). However, in the final amendment to the bylaw of the Federal Supreme Court, we find that the amendment recognizes the principle of overruling its previous decisions, in accordance with Article(45)of the Court’s bylaw No.(1)of (2022), where this article states that: “The court may ,when necessary, and whenever the public constitutional interest requires, overrule a previous principle it approved in one of its decisions, provided that this does not affect the stability of legal status stability and acquired and vested rights” .

In brief, there is no explicit constitutional or legal basis in Iraq regarding recognition of the principle of overruling previous decisions, except for Article 45 of the Court’s internal regulations (bylaw of the court), which granted the Court this right to itself.

Based on the above mentioned, constitutional jurists in Iraq are divided into two different opinions in this regard as follows:

The first opinion acknowledges that the reasons or justifications of the decision do not enjoy the authority or binding force, as the authority is determined for the ruling’s operative part only. They relied in this statement on many considerations, the most important of which is that the pronouncement of the ruling is a decision and a judgment, i.e. taking a decision in the event of a dispute, unlike the reasoning, which is qualified as justification, clarification and presentation of the approach followed by the constitutional court. The reasoning is a means of showing how the decisions were issued.

This means that the above opinion acknowledges that as long as the reasons and grounds of the decision have not binding force, the overruling is not considered the overruling even the federal supreme court conducted it in this regard only.

The second opinion acknowledge the enjoyment of the operative part and the reasons associated with it in a close and indivisible connection with the binding force of the matter ruled upon, considering that the constitutional legislator did not distinguish between the reasons and the operative part in enjoying binding force.(Abdul Aziz Muhammad Salman, 2000, p.19). This opinion acknowledges that since the authority of the Federal Court’s decisions includes all of the reasons, grounds, and the operative part of the decision, then the overruling must be bound by this authority, meaning that if the reasons and grounds are overruled, this is considered the Federal Court’s overruling the previous decisions.

the researcher supports the second opinion, since the Iraqi constitutional legislator did not distinguish between the authority of the ruling issued by the Federal Supreme Court and its reasons and decision grounds. Therefore, the reasons for the interpretative decision also have absolute authority because they are closely related to the text, as they are what led the Iraqi constitutional supreme court to reach the text of the interpretative ruling. It is the same whether the interpretation is related to an original request for interpretation submitted to the Federal Supreme Court or a secondary or subordinate interpretation related to the court's exercise of one of the powers assigned to it.

Although the common trend is that: there is no explicit text that allows the constitutional courts to overrule the previous decisions issued by it, but there are some countries that have departed from this general rule and common trend. For example, Article (13) of the Basic Law of the Spanish Constitutional Court No. 2 of 1979 that states "When a chamber of the court deems it necessary to overrule a previous constitutional judicial decision of the court, this must be done through a session that brings together all chambers of the court." (Article 13 of the Basic Law of the Spanish Constitutional Court No. 2 of 1979).

2.3 The importance of the principle of overruling:

The application of the principle of overruling results in many benefits, meaning that overruling has utmost importance in achieving justice and reaching the true intention of the constitutional legislator, which aims to achieve the supreme constitutional interests, as follows:

1- the principle of overruling is a guarantee for the basic rights and freedoms of individuals:

There is no doubt that all democratic constitutions in the world stipulate the protection of the basic rights and freedoms of citizens and prevent the public authorities from infringing them by issuing legislation, regulations or judicial decisions that deprive individuals of rights and freedoms without any justification. and the Constitutional Court represents an effective and important guarantee in the face of the arbitrariness of the public authorities, whether by the legislative authority in the event that it issues a law that infringes the rights and freedoms of individuals, or by the executive authority in normal or exceptional circumstances when it disturbs the desired balance between the rights and freedoms of citizens (Karim Youssef Kashash, 1987, pp. 300-301). It means that The Constitutional Court always tries to apply the

principle of overruling in decisions that increase the protection of individual rights and freedoms without any hesitation, because the Constitutional Courts use all means through which they preserve the basic rights and freedoms of citizens, so the principle of overruling is one of these means.

For example, the US Supreme Court decided that the rights of equality in the society include private rights only and does not extend to social class in the case of (*Plessy V. Ferguson*). The case was related to a constitutional challenge against a law enacted by the state of Arizona that stipulated the allocation of train carriage for whites and others for blacks. The federal supreme court decided in this case that this law was constitutional. Then, several years later, the same court overruled this decision by saying that the equality includes all rights, including social class not only private rights, the name of the case was (*Brown V. Board of Education*), which the court ruled: "Equality in the protection of legislation imposes a restriction on the authority of the states with regard to discrimination between individuals because of their belonging to certain categories, including discrimination on the basis of race or sex." (*Griswold*, 1968, p. 75). This ruling indicates that when the federal supreme Court overrules its previous decisions, it takes individual rights and freedoms into consideration as a first priority.

2-The principle of overruling as a means of developing constitutional texts:

The nature of constitutional law poses a challenge to the constitutional court to reach satisfactory results. The texts of the constitution bear multiple dimensions that constitute a wide range at the level of the constitutional base that keeps pace with the developments and changes that accompany it in circumstances and political life.

This importance is raised with the rigid constitutions, as rigidity makes the constitutional texts to be dead texts that do not keep pace with the developments and changes that occur in the society in various aspects of life. These changes push the Constitutional Court to keep pace with them in order to achieve stability in the state. The constitutional court's overruling a previous principle that he had approved under certain circumstances as a result of the developments and changes in those circumstances leads to the revival of the dead constitutional text, which makes it suitable for application later through the overruling judgment. (*Karl-Peter Sommermann*, 2001, p. 372).

This means that the principle of overruling is one of the means used by the Constitutional Court with the aim of reviving dead constitutional texts that are not applicable because they have not been amended.

3-its A means of avoiding denial of justice:

The idea of denying justice in the constitutional court has many forms. It is not limited, as it is in the ordinary courts, to refraining from ruling on a suit that is eligible for ruling. Rather, it includes restricting the constitutional court's jurisdiction without a legal basis, and thus his refusal to accept the constitutional suit without any legal basis.

If the constitutional court rejects a case on the base of lack of jurisdiction, it can later change its position and exercise its jurisdiction. This change represents a pillar for applying the spirit of the constitution, as it corrects the constitutional judicial ruling that denies justice. We find the application of this in the ruling of the French Constitutional Council to monitor the law previously issued to avoid the idea of denying justice completely, in which it changed its position by refusing to examine the constitutionality of a law after its issuance, and it did not accept any plea against unconstitutionality of a law that had not been presented to it before in the context of a dispute brought before the court. (Griswold. 1988, p. 75).

For example, The French Constitutional Council ruled to reject its oversight of a law that had been issued, considering that the French Constitutional Council cannot oversight laws after they have been issued, but the Council overruled this decision and ruling that justice requires that the Constitutional Council exercise oversight of this law even after it has been issued.(Ghameija, 2008, p. 7).

4-principle of overruling is a tool for correcting previous decisions or rulings of constitutional courts:

It is obvious that the decisions of the constitutional court are sometimes tainted with errors and shortcomings, whether intentionally or unintentionally, because they are the work of man and derive this characteristic from the nature of humans, whose work is exposed to errors and shortcomings. The constitutional courts are supposed to correct errors in its decisions and develop them in a way that keeps pace with the development taking place in social, economic and political circumstances. The importance of correcting errors in constitutional decisions appears from the fact that these decisions have the authority to make them a judicial precedent

or make them move the court to unify its decisions regarding a certain subject to achieve legal stability or legal security, even if the applicable system does not rely on judicial precedents because the constitutional ruling is directly linked to the constitutional texts in terms of its interpretation or application of legitimacy. (Hadeel Muhammad Hassan, 2015, p.93).

It is worth noting that most international constitutions explicitly stipulate that the decisions of the constitutional court enjoy absolute finality, binding force and are not subject to appeal or objection. This is a guarantee to maintain the stability of legal status and prevent conflict between the decisions of the constitutional court and maintain the prestige and supremacy of the constitutionality. But this enjoyment faces danger and disadvantages because the constitutional court is not immune from error and is not infallible from defects and shortcomings, like the rest of the other courts, it is exposed to falling into error. Hence, the constitutional court must seek to find a way to correct the errors it has fallen into and then correct them through a new constitutional ruling, by inventing a self-made method called the principle of overruling its previous decisions and automatically reviewing its decisions without resorting to an appeal for cancellation or announcing the cancellation of the previous ruling explicitly in all cases.

An example of this is the ruling of the Supreme Court of the United States of America in 1952 in the case of (*Rochin V. California*), where the court considered that breaking into the accused's house and attacking him in bed to seize a drug he kept next to him, then forcibly transporting him to the hospital and removing the drug from his body by inserting an emetic solution into his body, the court saw this as a blatant violation of the condition of proper legal means. As for the case of (*Irvine V. California*), the court rejected this (*Rochin*) precedent, despite the fact that the police had resorted to proving the accused's guilt by forging a forged key to his house, entering the house in his absence, installing a recording device in one of the rooms, and then by recording discussions, proving the accused's guilt." (Ahmed Kamal Abu al-Majd, 1960, p. 134).

3. The impact of principle overruling on the other principles

The principle of overruling the previous decisions often conflicts with some other principles, including the principle of legal or judicial security, the principle of stability of the legal status of individuals and acquired rights, and the principle of legitimate expectation. A serious

problem arises between principle of overruling and these other principles, and we will try to explain this problem and ways to address it here, as follows:

3.1 The impact of principle overruling on principle of legal security

The majority of French constitutional jurists define legal security:(any guarantee and any legal system of protection that aims to ensure, the proper implementation of obligations and to avoid or at least limit the lack of confidence in the application of the law, without any sudden surprise act). (Abdul Majid Ghamidija, 2008, p. 6).

The French State Council defines it in the context of a ruling as “it requires that citizens be able, without much difficulty, to determine what is permitted and what is prohibited, by the applicable law. To reach this result, the established rules must be clear and understandable, and not be subject to frequent and unexpected changes over time.” (Abdul Majid Ghameija, 2008, p. 7).

the researcher defines the principle of legal security as “the relative stability of legal relations, i.e. a minimum level of stability for the various legal status that the public authorities create and adhere to with the aim of establishing security and reassurance between the parties to the public and private legal relations, so that they can arrange their situations in accordance with the legal rules in place at the time they begin their work without being exposed to unexpected surprises issued by one of the authorities that would undermine the pillar of stability or destabilize the spirit of trust.”

It is worth noting that the principle of legal security is rely on four components and pillars, which are:

A- Non-retroactivity of laws: The principle of non-retroactivity of laws or legal rules means that their effects apply after they are enforced. Most international constitutions stipulate clauses about this principle. although the majority of international constitutions have recognized this rule or principle, it is not an absolute rule or principle, but there are some exceptions to it if the public interest requires otherwise, as the majority of constitutions stipulate the possibility of applying laws retroactively after they are approved by a certain majority within parliament in the event that the public interest requires it, and this does not include criminal and tax laws if the necessity of retroactivity exceeds the necessity of stability of transactions. There is no doubt that the application of the law to the past is a waste of confidence in the law, because it

makes what was a legitimate act at one time illegitimate in the future, and anxiety and fear are generated in the feelings and minds of people due to their lack of reassurance about the rights they have acquired. (Hadeel Muhammad Hassan Al-Mayahy, 2015, p. 180).

B- Respect for acquired rights: Acquired rights are the interests is protected by the law, i.e. the individual can demand them and defend them before the courts if someone else disputes them. Acquired rights are considered one of the principles of constitutional value, meaning that no authority is allowed to deprive individuals of rights that have been acquired, even if it is through one of the legitimate means in accordance with the applicable legislation, whenever they relate to the practice of the basic rights and freedoms guaranteed by the constitution, for example, the right to property, the right to enjoy social insurance, the right to nationality, etc. (Alaa Abdel-Muttaal, 2004, p. 9).

C-The idea of legitimate anticipation: It means that the state is committed to not surprising individuals with legislation it issues that contradicts their legitimate expectations. This principle is based on objective foundations derived from existing systems adopted by public authorities, embraced by the state, and implemented by its institutions.” (Yusra Muhammad Al-Attar, 2004, p. 9).

D- Restricting the retroactive effect of the ruling of unconstitutionality of laws: “The retroactive effect of the ruling of unconstitutionality of laws means that the law ruled unconstitutional is considered to be devoid of legal value from the date of issuance of the ruling of unconstitutionality of the law, i.e. its effect extends to all legal status that arose under it. This matter requires the establishment of controls and rules that limit the application of the ruling of unconstitutionality of the law to the previous one in a way that ensures that the rights and freedoms of citizens and their legal status are not affected, because the ruling of unconstitutionality leads to the law ruled unconstitutional as if it did not exist, and this leads to the rights that arose from its application being threatened during the time in which it was in force, and also leads to the rights of individuals being exposed to infringement and violation, and as a result this leads to a breach of the principle of legal security and judicial security as well.” (Ahmed Ibrahim Hassan, 2000, p. 24).

Regarding the decisions of the Federal Supreme Court on the effect of the unconstitutionality of laws, we see that there is no constitutional and legal basis or text regarding restricting the

retroactive effect of the ruling on the unconstitutionality of laws, but we only find in the bylaw of the Iraqi Federal Supreme Court that Article 37 has addressed this problem, as it states:

The First: The effect of the rulings and decisions issued by the court in non-criminal texts shall apply from the date of its issuance, unless the ruling stipulates otherwise.

The Second: The rulings and decisions issued on the unconstitutionality of criminal texts shall apply from the date of entry into force of the provisions of the text subject to the ruling.

Article (38) has also addressed that as follows:

The effects of the interpretative decision shall apply from the date of entry into force of the provisions of the text subject to interpretation, unless the decision provides otherwise.

This means that, in criminal texts, the ruling be effective on the day of enforcement of the constitution text that decided upon and the court has no authority to change its effect, but in non-criminal texts, the principle is that the ruling is effective on the day of its issuance, unless the ruling itself stipulates that it is effective to the past, i.e. the court's authority here is discretionary power.

As for interpretative decision, the courts rule is applied from the date of entry into force of the provisions of the text subject to interpretation, but the court can change the effectiveness to other date, so the power of court is discretionary here too.

This may constitute a problem if the constitutional court decides that the ruling is effective on an earlier date, because it disrupts legal security and violates the established legal status of individuals if the court rules that the ruling is effective from an earlier date. Therefore, we call on the Federal Court in Iraq to adopt the approach of immediate effect and to work with the restriction of retroactive effect, and we ask the court to allow retroactive effect except within very narrow limits and under specific conditions, it means that the retroactive effect of the ruling must not affect the rights and freedoms of individuals and the stability of their legal status and acquired rights during the period of validity of the abolished law.

It is worth noting that judicial overruling may become a threat to legal security in many cases if the constitutional court does not pay attention to it when applying the overruling his previous decisions, because there is no harmony or great compatibility between legal security and principle of judicial overruling, as the contradictions between the two ideas of the principle of legal security and the principle of overruling are that the latter may reduce or weaken the status

of the constitutional court and expose its sanctity and prestige to danger, which prompts the established constituent authority to amend the constitution to reduce the role of the constitutional court in this regard, and the gap between judicial overruling and the idea of legal security increases as judicial overruling increases and becomes excessive, which does not make the constitutional court a sacred and respected body, so a large part of constitutional jurists believe that the court's adherence to its previous ruling on the constitutionality of the law is better than overruling a ruling that decided its unconstitutionality, and it overturns what it had of authority, which is an important element of the continuity and stability of the law and takes its value from the philosophical need for reassurance about the future, because overruling will cause a great and dangerous shock. Warning of a threat to legal security and the stability of legal situations and status, and squandering the court's respect, prestige and reputation.

the researcher does not support this trend, because the mission of the constitutional court is to protect the constitution from violation and monitor the constitutionality of laws. The constitutional court should have the authority to overrule its previous decisions if it sees that it has made a mistake at some stage of its work, whether intentionally or unintentionally, in order to give priority to the public interest in accordance with the changes that occur in society so that its decisions keep pace with these developments with the aim of achieving the principle of justice and the principle of constitutional supremacy. Therefore, logic and justice require that these decisions or rulings do not bind the court that issued them at all times, but rather it must have the right to rule in a way that contradicts, especially in a system in which judicial precedents are not applied. Just as constitutional courts cannot be bound by these decisions under the pretext that they undermine the security of the law and the stability of legal status related to these decisions, because the courts can avoid this by determining and restricting the effect of its new ruling to the future only. (é A. J. D. A2005 199 P).

To mitigate and restricting the contradiction between the principle of overruling and the principle of legal or judicial security, the following conditions must be met when overruling is applied by the constitutional court:

A- The overruling must be limited and exceptional: The constitutional courts must acknowledge that the general rule is not to apply judicial overruling and the exception is to apply principle of overruling, because the exceptionality and limitation of judicial overruling will contribute to confirming the credibility and supremacy of the constitutional court in

relation with other constitutional bodies, especially in relation with the ordinary and administrative court, which may see - in the many constitutional overruling - a justification for separating from the constitutional court, which will negatively affect the authority of the latter. The constitutional court must make its decisions become a contribution to achieving legal stability and constancy and confirming legal status, not threatening them. If it is limited in its overruling, it will contribute to establishing the idea of legal security in its aspect related to legitimate expectations on the part of individuals. (Abdul Hafeez Ali Al-Shimi, 2008, p. 8).

In brief: The frequent and absolute overruling by the constitutional court leads to the constitutional supreme court being stripped of its sacred character, and its authority is exposed to some kind of loss of prestige and supremacy. Therefore, the supreme constitutional courts in every country must apply the principle of overruling in the narrowest scope and with take all the conditions and restrictions that the legal jurists and comparative court has put for creating the balance between the two principles.

B- The overruling the constitutional court decisions must be acceptable and legitimate: the researcher has previously explained that the idea of overruling the constitutional court decisions may conflict with the principle of legal security, so there must be something that justifies the overruling in a way that makes it acceptable and legitimate. For the overruling to be justified, it must be due to a change in the factual and legal circumstances, meaning confirming the existence of reasons that prompted the constitutional court to issue a new ruling.

The element of legitimacy in judicial overruling is linked to the basic freedoms of individuals. If the overruling affects these freedoms and rights and is likely to reduce or threaten them, it will not be acceptable or legitimate. However, if the overruling increases or enhances the protection of basic freedoms, this overruling is considered acceptable and legitimate. This criterion contributes effectively to enhancing the quality of constitutional judicial decisions, and thus achieving legal security. In this criterion, we mention the decision of the US Supreme Court in the Adkins case, which ended with a ruling that a federal law was unconstitutional, including setting a minimum wage, on the basis that it violated the freedom of contract protected by the rights guarantee clause called the Due Process Clause stipulated in the Fourteenth and Fifteenth amendment to the US Constitution, which represents a constitutional guarantee to protect American citizens from any unjustified reduction or deprivation of their

right to life, liberty, or property, whether by the state or the states. (Daniel J. Solove,1999. P.941)

C- Reducing conflict or contradiction in constitutional court decisions: This condition requires studying constitutional judicial decisions and rulings, studying the detection of conflict and contradiction between them, studying the differences and avoiding them, or how to remove these contradictions and differences between these decisions, because studying these decisions contribute to mitigating the impact of overruling on the principle of legal security. Since unifying constitutional judicial decisions and their interpretations, publishing and announcing them enables everyone to access and know them, which enables opponents in constitutional lawsuits to know them and adapt their behaviours according to the requirements of these decisions or rulings. The constitutional court must perform the mission of communicating its efforts in regard to overruling to the elite of those working in the law, such as jurists, researchers and ordinary citizens alike. (Abdul Majeed Ghameija, 2009, p. 28).

D-Studying the effects and dimensions of overruling the constitutional court decisions: Every time the constitutional court wants to overrule its previous rulings and decisions, it must study the effects and dimensions of this overruling and the impact it will have on the principle of legal security. Doing this may be difficult for the constitutional court, but it can form a committee or a specialized team to do this. All of this is done through research and studies to obtain clear and specific answers to the questions raised about the ruling to be overruled (Mazen Lilo Radi, 2001, p. 61).

3.2 The retroactivity of judicial overruling and its impact on the principle of legal status and acquired rights:

The retroactivity of the overruling in the constitutional court means that the new constitutional rule or the new constitutional judicial ruling that concerns the overruling will be applied to all lawsuits filed before the constitutional court regardless of the date of the incident. The prevailing theory in jurisprudence and court states that the ruling of the unconstitutionality of a legislative text does not invalidate or cancel the law or create a new legal status, but rather reveals the reality of the legislative act if the latter contradicts the constitution, then it was not a law according to the legal meaning of this term. The acts of the legislative authority to acquire the status of law must be issued within the limits set for them by the constitution in terms of form and substance. The result of this concept is the statement of the absolute retroactive effect

of the ruling of unconstitutionality, so the law is considered null and void from the date of its issuance, and thus all legal relationships that arose pursuant to it are null and void, and the rights and duties that were decided under it are null and void.(Ezz El-Din El-Danasouri, pp. 117-118).

The principle of retroactivity contradicts the principle of non-retroactivity of the legal rule, which threatens legal security, because the court leaves a clear legal principle and applies a new legal principle, meaning that he invents a new legal rule. One of the criticisms directed at the principle of retroactivity of constitutional judicial decisions is that it will retroactively affect millions of legal cases, even though these cases or rights are respected or not affected. The court is a reserve source of law and legislation and an official source of law, so how can the principle be bound by non-retroactivity while the court is not bound by it?

There are several solutions that have been put in place to mitigate the retroactivity effects of the principle of overruling when it be applied by the Constitutional Court. (Abdul Hafeez Ali Al-Shaimi 2008, p. 91). as follows:

A-The effect of the overruling is immediate and not retroactive :The future effect of overruling means that the application of the new principles or rules contained in the ruling ordering the overruling has a direct effect on any similar disputes that may arise in the future, without their application to the dispute in which this ruling was issued or other similar disputes pending before the constitutional court on a date prior to the issuance of this ruling.

B. Adopting a temporary law policy to limit the retroactivity of judicial decisions. This condition is based on informing or notifying the parties to the lawsuit that it will apply the old principle for the last time in the case before it, and then it will apply the new principles that are established in the overruling, which means that this ruling has taken an informative or media effect, but the effects of these principles do not apply retroactively but will be only future, i.e. the effects of the new ruling only extend to cases subsequent to this last ruling. It is assumed that the rules and principles included in the ruling ordering the overruling apply to the dispute in which the ruling was issued and any similar disputes that may be raised in the future; but without applying these principles and rules to similar disputes brought before the constitutional court before the issuance of this ruling.

The constitutional court is more knowledgeable than others in determining the effect of overruling its previous decisions and the extent of the validity of those effects. It balances between the previously established principles and what it will decide in his new ruling and the extent of his protection and expansion of the rights and freedoms of individuals. If the overruling is likely to expand the rights and freedoms of individuals or provide more protection than previous decisions, the court may acknowledge its effect on the past because this makes individuals feel reassured and just in the decisions of the constitutional court. However, if the new ruling reduces those rights and freedoms, in this case the court must not apply the ruling retroactively.

It is concluded from the above that the stability of legal status and acquired rights is one of the self-restrictions that the court must restrict itself with, while practicing its oversight and interpretative process, as it is included in its bylaw. Therefore, after restricting its authority to overruling, the Federal Supreme Court must practice its supervisory role in accordance with its own methods, and use its right to overruling, provided that this does not lead to influencing or harming the legal status of individuals, since the latter is a form of legal security, and harming the element of stability leads to undermining the confidence of individuals in judicial security.

4. Judicial applications of the Federal Supreme Court in Iraq regarding the principle of overruling:

the researcher will address the judicial applications or decisions issued by the Federal Supreme Court in Iraq regarding this principle, and the researcher will try to explain, and analyse, and criticize these decisions and resolve them. To clarify the subject of Judicial applications in Iraq in this regard, there are two different trends, as follows:

4.1 The traditional trend of the Iraqi Federal Supreme Court:

This trend began after the issuance of the Iraqi constitution 2005 until the Federal Court Law No. (30) of 2005 was amended by Law No. (25) of 2021. We can classify the decisions or rulings of the Federal Court in Iraq according to this trend in terms of the effect resulting the ruling into (positive overruling) and (negative overruling). The researcher will enrich this trend with some judicial applications, as follows:

A-Positive overruling:

The Iraqi Federal Supreme Court issued decision No. (82 Federal/2012) dated (12/18/2012) which interpreted the deferred dowry in the marriage contract as follows: "The Federal

Supreme Court believes that the deferred dowry is considered a debt owed by the husband from the day it was created and that its true value is determined according to time and place in accordance with the laws in force.” However, the court changed its interpretation above and was incorrect in determining the legal nature of the deferred dowry by describing it as one of the forms of compensation for the harm suffered by the divorced woman. Its ruling stated: “Paying the deferred dowry in the event of divorce, in addition to being a debt owed, constitutes a form of compensation for the harm suffered by the divorced woman as a result of the divorce, and since compensation is redress for the harm that is estimated according to place and time.” (Decision of the Federal Supreme Court, No. 45/Federal/2012 dated 9/19/2012).

Based on the above decision, we find that the decision is characterized by three features: the first is that it is a positive overruling, because it represents the court’s return to the right path from which it overruled in its previous decision. The second feature is that it is an implicit overruling because the court did not explicitly state the overruling when interpreting it. The third is that it is an incomplete overruling, because it was limited to amending the reasons for the decision and its justifications without affecting the origin of the request and the basic principle of the previous decision.

Another example of this type of overruling is that The Federal Supreme Court issued its decision No. (43-44/Federal/2010) on (12/7/2010), in which the decision states: “The draft laws are submitted by the executive authority and must be submitted by competent bodies in the executive authority due to their connection to financial, political, international and social obligations, and the one who fulfils these obligations is the executive authority, according to Article(80)of the Permanent Iraqi Constitution of 2005 and not the legislative authority, as Article(60)of the Constitution specified only two bodies exclusively within the executive authority to submit draft laws, which are the President of the Republic and the Council of Ministers, and if The draft laws are submitted by others, this is considered a constitutional violation of the text of Article (60/First), and the second paragraph of Article(60)allowed the Speaker of the Council of Representatives to submit draft laws through(10)members of Parliament and through one of its specialized committees, and the proposal does not mean draft laws, because the proposal is an idea, and the idea is not considered a law project and draft law, because it must pass through the specified executive body referred to above to prepare the draft law,... and on Accordingly, the draft law did not complete its stages before being submitted by the executive authority, and since this law was approved by the House of

Representatives and the Presidential Council and published in the Official Gazette without the executive authority expressing its opinion on it within its domestic and international political obligations, this is contrary to the prescribed path for issuing laws from a constitutional perspective so the court decided that it was unconstitutional.

As a result of the many criticisms, the court amended its previous decision and issued Decision No. (21/Federal Media/2015), and its unified decision (29/Federal/Media/2015) regarding the Law on Replacing Members of the House of Representatives No. (6) of 2006, which stipulated that: "The legislative authority exercises its duties and powers stipulated in Articles(60-62-63-64/First) of the Constitution, foremost among which are the tasks of legislating federal laws that are required by the public interest in accordance with constitutional contexts, and the exercise of these powers must be in compliance with the principle of separation of powers, and among the laws that the House of Representatives directly legislates must be those that affect this principle. Among those laws that affect this principle are the laws that impose financial obligations on the executive authority that were not referred to in its plans or in its financial budget without consulting with it and obtaining approval for that, as well as the laws that conflict with the ministerial approaches that the ministry gained the confidence of the House of Representatives on. Its basis. Except for the aforementioned laws, the legislative authority exercises its original powers in legislating federal laws in which it finds that they achieve the public interest and within the framework of the constitution.

Based on this decision, we note the following:

- 1- This overruling is considered a positive overruling, as it has taken the court's decisions from the scope of error to the scope of correctness, which supports the constitutional principles guaranteeing rights and freedoms, such as the principle of separation of powers.
- 2- This overruling is considered a partial overruling, as this decision did not give the Iraqi House of Representatives full authority to exercise its original constitutional jurisdiction to propose laws, and it maintained two serious restrictions that did not exist in contemporary constitutional systems. The first restriction is represented in the inadmissibility of proposing any law that would affect the court without consulting it, explaining that by the necessity of respecting the principle of judicial independence, and this is unacceptable, because it places the legislative authority under the court, and this restriction may be misused in a way that prevents the process of legal reform of judicial affairs. As for the second restriction, it relates to the inadmissibility of proposing laws that impose financial obligations on the executive

authority unless they are included in its plans or in its financial budget without consulting it and obtaining its approval in this regard. Here we note that the wording of the decision is very weak, and its quality is non-existent in terms of objectivity, because it was possible to allow the proposal of financial laws, but they are not issued until after they are presented to the executive authority.

B- negative overruling:

The researcher previously discussed the meaning of negative overruling in the topic of types of overruling, where constitutional courts overrule a previous correct ruling that strengthened and supported citizens' rights and freedoms and also supported justice and replace it with a new ruling that is contrary to justice that affects the rights and freedoms of individuals.

The most prominent example of this type of overruling is the interpretative decision No. (9/Federal/2007) dated (7/16/2007) issued regarding the lack of jurisdiction of (provincial councils not organized in a region) to enact legislation, and the content of this decision stated the following:

By examining the provisions of Article (115) and other articles of the Constitution (2005), it became clear that the provincial council does not enjoy any legislative authority to enact local laws, but the council exercises its broad administrative and financial powers based on the provisions of the second paragraph and not the third paragraph of constitution as stated in Article(122)of the Constitution. This decision is consistent with what the majority of Iraqi constitutional jurists have accepted it in this regard, Because the (provinces not organized in a region) are not administered according to the political decentralization system like the(provinces are not organized in a region), but, they are administered according to the administrative decentralization system . (Dharif Boutros, 1997, p. 11).

But the Iraqi Federal Supreme Court changed its previous position in its ruling No. (13/Federal/2007) dated (7/31/2007), where it ruled:

The subject of the provincial council's enjoyment of legislative authority (enacting local laws) is governed by Articles (61/First),(110),(111),(114),(115),and(122/Second)of the Constitution, and the true content and purposes of these articles indicate the provincial council's authority to enact local legislation to regulate administrative and financial affairs in a way that enables it to manage its affairs in accordance with the principle of administrative decentralization, which Article(115)of the Constitution grants priority in application, and that the House of Representatives is exclusively competent to legislate federal laws and does not have the

authority to issue local legislation for the province, based on the provisions of Article(61/First) of the Constitution.

It is worth noting that the previous decision is considered a negative overruling, and the researcher believes that this decision is considered a serious retreat by the Federal Supreme Court, because this overruling causes distortion of the stable legal principles that established globally at the jurisprudential and judicial levels, and perhaps the reason for this overruling is due to the absence of constitutional law jurists in the Federal Court at that time, and therefore the Federal Supreme Court must overrule its previous overruled decision again in the principles that it has overruled in the second time to correct its second decision and cancel the second decision and return to the first decision through another overruling that requires a return to the same first principle, the researcher here rely on the new opinion of the majority of French jurists who the say : It is permissible to conduct(overrule on overrul) if the overruling based on the wrong interpretation of the constitution, here we noted that the above overruling decision is based on the wrong interpretation of the constitution by the Iraqi federal supreme court, so return to the correct interpretation is achieved only through the another overruling again, provided that returning to the same principle that the first above mentioned decision adopted based on the correct interpretation of the constitution by the federal supreme court in Iraq.

Another way for solving the above mentioned problem, the researcher recommend that the Iraqi legislator must amend the Law of Non-Regional Governorates No(21)of 2008, and cancel Article(2),thereof, which gives the power to issue legislation by the Provincial Council, in order to avoid this ambiguity and contradiction between the above provisions, because in this case the previous overruling will be nulled due the amendment of the law

4.2 The Modern Trend of the Iraqi Federal Supreme Court in applying overruling:

This trend begins after the restructuring of the Iraqi Federal Supreme Court in accordance with the amendment of the Federal Court Law No. (30) of (2005) by Law No. (25)of(2021), by citing the text of Article(45)of the bylaw of the Federal Supreme Court No.(1)of(2022), which states that:(The court may, when necessary and whenever the constitutional and public interest requires, amend a previous principle it approved in one of its decisions, provided that this does not affect the stability of legal positions and acquired rights), and according to this trend, the Federal Supreme Court in Iraq follows an approach that differs from what was followed in the traditional trend that we discussed previously. The Federal supreme Court applies, through this

trend, two types of overruling in two ways, namely: (double and explicit overruling as a method), and (affirmative overruling and implicit guidance) as another method, as follows:

A-Double, explicit, complete overruling: The Federal Supreme Court, in its ruling No. (90/Federal/2019) of the year (4/28/2021), exercised a double, explicit and complete overruling that it had not taken before. This ruling is considered the overruling two previous principles in one decision, as it decided that:

The Federal Supreme Court decided in its decision No. 90/Federal/2019 on 4/28/2021 to overrule its previous decisions regarding obtaining the approval of the House of Representatives in all crimes of which members of the House of Representatives are accused of, whether felonies or misdemeanours or violations. The court decided to limit obtaining the approval of the House of Representatives to only one case, which is the issuance of an arrest warrant for a crime of the type of felonies not witnessed. Otherwise, there is no immunity for members of the House of Representatives and legal measures can be taken against them directly in the event that any of them is accused of a felony or misdemeanour or violation. The court also decided to overrule the court's previous decision regarding the interpretation of the concept of absolute majority, as the court decided to consider that the concept of absolute majority wherever it appears in the constitution is intended to mean more than half the actual number of members of the House of Representatives. As for the simple majority, it means more than half the number of members of the House of Representatives present after achieving the quorum for the meeting. Through our study for the above decision, we reached a set of Notes, which are:

1-The Federal Supreme Court has created a new approach in this ruling, which is called double overruling, meaning that the court followed double overruling in this decision, and the court conducted overruling its two previous interpretative principle that it had issued separately in brief, the court decided to overrule the two previous decisions in one new decision. the first ruling related to the interpretation of the concept of majority that overruled the Previous Federal supreme Court Decision No. (23/Federal/2007) issued on (10/21/2007). But the second overruling is related to parliamentary immunity that the court overruled in its Previous Federal Court Decision and overruled the principle of concept of interpretation of majority concept.

2-In this decision, the Iraqi Federal Court follows a new approach, as it moves from implicit overruling to explicit overruling. Explicit overruling means that the court announces its explicit will to overruling, and explicit overruling does not contain any ambiguity or confusion. The

will of the constitutional court here is clear and evident by adopting a new judicial principle and interpretation.

3-It is clear according to this decision that the Federal Supreme Court in Iraq exercised positive and complete overruling. According to this decision, the court did not maintain any of the previous principles. This overruling is a complete overruling that removed or cancelled all interpretations and principles related to the subject of this ruling or decision.

4- The court decided that the concept of an absolute majority, wherever mentioned in the Permanent Iraqi Constitution of 2005, means more than half of the total number of members of Parliament, but what is meant by a simple majority is more than half of the number of members of Parliament who attend after the quorum is complete, and this omission is consistent or consistent with General, stable and well-established legal principles.

B- Confirmatory overruling and implicit guidance in the decisions of the Iraqi Federal Court:
As we have previously indicated, confirmatory overruling means that the constitutional court issues a new ruling confirming the principle that it adopted and approved in the ruling of the first overruling, which has become a judicial precedent that the court adopts and follows, and establishes the new principle and confirms its importance, and the court's insistence on following it and the necessity of applying it. As for implicit guidance, it means that the constitutional court includes indirect guiding principles in its ruling, and the legislative and executive authorities must respect the constitutional principles related to the subject of the decision or ruling that they issued.

For example, the Federal Supreme Court issued its decision No. (7/Federal/ on 6/8/2021), when considering the appeal of the unconstitutionality of Article (25/Fourth) and Article (27) of the Independent High Electoral Commission Law for violating some articles of the Constitution, where the court rejected the lawsuit and decided that the articles did not violate the constitutional texts that were challenged, where it ruled: (And the articles challenged as unconstitutional from the aforementioned law, including Article (25/Fourth) and Article (27), came in the general context of the purpose for which the law was enacted, and therefore they cannot be separated from the law as a whole, and the House of Representatives is competent to legislate laws based on what the country's supreme interest requires in accordance with the constitutional framework drawn up for it under the Constitution, therefore the aforementioned articles do not contradict the provisions of Articles (60, 61, 80) of the Constitution, accordingly,

and for all of the above, the Federal Supreme Court decided to rule to dismiss the plaintiff's lawsuit).

- 1- The Iraqi Federal Supreme Court, in accordance with the above decision, has authorized the Parliament to exercise the power to propose laws, which confirms the content of its previous ruling No. (21/Federal Media/2015) and its unified ruling(29/Federal/Media/2015), in which it ruled to overrule an erroneous ruling it had previously taken, in which it overruled from the truth and thereby deprived the Parliament of its most important powers, which is to propose laws. (Decision of the Iraqi Federal Supreme Court No. (43-44 Federal -2010 on 12/7/2010). This means that the court has applied the principle of confirmatory overruling, which is a modern trend practiced by the constitutional court in Iraq, as its aforementioned ruling is considered a overruling of its corrective ruling and a repeated overruling of its erroneous ruling, meaning that its ruling may include a new overruling and differs from its previous approach regarding the enactment of laws, as it did not make the proposals of the Council of Representatives related to amending texts regulating the public service in the state among the matters that require the unconstitutionality of the text, on Although it had previously ruled that such proposals were unconstitutional, it decided not to present them to the executive authority.
- 2- We note that the Iraqi Federal Court has adopted a new approach in terms of judicial formulation in basing its decision of rejection in a manner that suggests that it is sending messages indirectly to the executive and legislative authorities containing guiding rules requiring the necessity of submitting to the principle of peaceful transfer of power and achieving equal opportunities between the competing parties. This is what we learn from the court's statement: "The people are the source of powers and their legitimacy is exercised through their constitutional institutions. Holding free and fair elections is considered the basic pillar for achieving the principle of peaceful transfer of power in accordance with Article (6) of the Constitution. It is not permissible to violate the two aforementioned texts, as it is not permissible to replace the means of transferring power with another means other than national elections. It also achieves the principle of equal opportunities in accordance with what is stated in Article (16) of the Constitution.
- 3-The wording of this decision was absolute, and this is what we embody in the phrase: (The House of Representatives is competent to legislate laws). Since the absolute is applied in its absoluteness unless there is something that restricts it, and this results in the House of Representatives being given a free hand to propose whatever laws it wants, which means that

it gets rid of the restrictions imposed by Decision No. (43-44/Federal 2010) issued on(12/7/2010), which were detailed above, and thus the change is a complete and effective overruling and is considered complementary to its partial overruling that is included in this decision.

5. Conclusion and Recommendation

At the end of this research, the researcher reached a set of conclusions and recommendations, as follows:

5.1 conclusions:

1- There is no specific definition of overruling at the legislative, jurisprudential and judicial levels. Rather, there is a great deal of controversy regarding a comprehensive and exclusive definition. However, the most accurate definition by jurists is: a clear and complete voluntary replacement of an old ruling with a new ruling in the subject of the same lawsuit and its previous circumstances whenever necessary, which is the consistency of the court's decisions with the developments occurring in society and keeping pace with them.

2-Through our review of the Iraqi supreme court applications regarding the principle of overruling, it becomes clear to us that its decisions and rulings did not follow a single method, and this is what prompted us to divide the trends of the Iraqi supreme court into two independent trends. The first is called the traditional trend, through which the Federal Court practiced implicit overruling that was not at a high level of judicial proficiency. As for the second, it is called the modern trend, which is characterized by a high degree of quality in correcting its decisions, as the Federal Supreme Court followed the principle of explicit and complete positive overruling. In addition, it followed a modern method, which is double overruling, meaning overruling two previous decisions in one new decision.

3-The overruling is not an end in itself, but rather a means to which the constitutional court resorts in order to perform the legal task assigned to him by providing an interpretation capable of finding a solution to the issue presented to him without the need to replace the text of the constitution on the one hand and on the other hand to make it keep pace with the constant development in life.

4-This research has shown us that the application of the principle of overruling faces several risks if it is misused, because some jurists fear that its application may lead to negative

overruling that diminishes the basic rights and freedoms of individuals. Overruling in this case is a means of breaching, violating, wasting and reducing these rights and individual freedoms. It is also criticized for being a violation of the principle of the authority of judicial decisions and a breach of the principle of legal or judicial security or respect for acquired rights. However, constitutional jurists and comparative constitutional courts have adopted several conditions to reduce the intensity of tension between the principle of legal or judicial security and the principle of overruling from previous decisions. These conditions are as follows: the overruling must be limited, legitimate and exceptional, and it must not be negative overruling. With regard to mitigating the tension between the application of the principle of overruling and the principle of stability of legal status, several conditions have been set, namely: overruling shall not be applied retroactively, the adoption of a temporary law policy, limiting the conflict between the decisions by the constitutional court itself, studying the effects and dimensions of overruling in the decisions of the constitutional court with precision, and studying all the circumstances and repercussions that these decisions leave behind.

5- There must be several elements and conditions for overruling principle the previous decisions, namely: it must be clear and not imposed on the court, and it must be total and it must be legitimate.

6- The purpose of applying overruling is as follows: is a guarantee of and support for the fundamental rights and freedoms of individuals, and is a means of developing constitutional texts, and is a tool for correcting previous decisions of constitutional courts, and is a means of avoiding the denial of justice, a means of keeping pace with constitutional amendment.

7 -Through this research, it becomes clear to us that the texts of the current Iraqi constitution and the Federal Supreme Court Law in Iraq No. (30) of (2005) with Law No. (25) of (2021) are devoid of any explicit text on the principle of overruling, except for the internal regulations(bylaw) of the Federal Court, which stipulates in Article (45) of the internal regulations of the Federal Supreme Court No. (1) of (2022). This means that the only legal base in Iraq for applying the overruling is Article (45) of the internal regulations of the Federal Supreme Court.

5.2 Recommendations:

1- the researcher recommends the Iraqi constitutional legislator to amend the constitution of Iraq(2005) and add another text to the text of Article (93) or amend the Federal Supreme Court Law in Iraq No. 25 of 2021, so that it grants the authority to apply the principle of overruling

the previous decisions when necessary in a manner that is consistent with or compatible with developments occurring in society in all fields. the researcher also recommends that the amended constitutional and the legal text should be as follows: The Federal Supreme Court may, when necessary, resort to the principle of overruling its previous decisions or rulings or amending a previous interpretation of constitutional texts in a manner that keeps pace with new developments and circumstances or recent developments in society.

2- the researcher recommends the Constitutional Amendments Committee or the Iraqi constitutional legislator to amend Article (94) of the Constitution by including another text that determine the effect of the ruling issued by the Federal Court, whether in the case of the ruling being related to unconstitutionality or related to a overruling a principle previously decided, so that it clearly determined for us the scope of the ruling's application, whether it is immediate or retroactive. However, in all cases, the text proposed to be amended should include respect for acquired rights and legal and judicial authority, and that text will be as follows:

A- The decisions and rulings of the Iraqi Federal Court shall be effective immediately and not retroactively.

B- The decisions and rulings of the Federal Court shall be effective retroactively, and in this case the affected parties shall have the right to compensation for unconstitutional laws issued by the State, as well as the right to compensation for erroneous decisions and rulings issued by the Court that were overruled by new decisions and rulings, and the State shall be responsible for the actions of its public authorities after the cancellation of the contested law, or after the overruling of the erroneous decisions and rulings of the Federal Supreme Court.

3- the researcher recommends the Iraqi Federal Supreme Court not to expand the application of the principle of overruling as an exception to a general principle, which is the stability and constancy of the court's decisions, because this principle is a fundamental principle in the work of the Federal Supreme Court. Therefore, we also recommend that the Federal Supreme Court refrain from applying the principle of overruling except within narrow limits or after being completely certain of the existence of an error in its previous decisions. In other words, the court should resort to applying the principle of overruling except in cases where certain conditions and controls are met that require it to depart from its previous principles.

4- the researcher recommends the constitutional and ordinary legislator in Iraq to find an effective mechanism to create a balance between the principle of overruling and legal security, for example adding a constitutional text requiring the publication of its provisions in the official

gazette and issuing a periodic bulletin in which a set of decisions, provisions or principles that are intended to be overruled in the future are published. The researcher also recommends to avoid the method of sudden or negative overruling or avoiding the overruling the principles that diminish individual rights and freedoms.

5- the researcher recommends the Iraqi constitutional legislator to include an explicit constitutional text, and we also suggest to the Iraqi ordinary legislator to include an explicit legal text in some way that creates a balance between the principle of overruling and other principles that conflict with it, for example the principle of legal security and acquired rights, by including these conditions that we have indicated within this research.

6- the researcher recommends the Iraqi Federal Supreme Court to conduct a complete and comprehensive review of all its previously issued decisions and rulings, especially those decisions or rulings related to public affairs and the supreme interests of the Iraqi state, and correct all these errors that the court previously made by applying the principle of overruling and updating the interpretations that it previously made in line with the changes that occur in society in all areas, and this is done with the help of constitutional law jurists and consulting with them without any embarrassment or shyness, because this principle is the only way to get out of the wrong constitutional decisions considering them final, binding and definitive.

7- the researcher recommends the relevant authorities in the Kurdistan Region to resort to push the Iraqi Federal Court in Iraq towards applying the principle of overruling as the only way to correct these decisions issued against the Region.

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