

The Problem of Legislative Omission in the Iraqi Political System after 2003

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Abstract

The problem of "legislative omission" can be found in many countries around the world regardless of the reasons. This situation happens when the lawmakers take a negative action against their duty to make the constitutional norms effective. In other words, the lawmakers fail, omit or ignore to enact Acts or provisions. This negative action leads to violating the constitution whether because the lawmakers do not obey the direct requirement of legislating by the constitution rules or they omit to enact an Act or provisions related to the protection the freedoms and rights of people which mention by the constitution. In Iraq, there are several important laws which still have not enacted such as the Supreme Federal Court Act, and Federal Council Act which have been mentioned that they should be enacted in the Constitution of 2005. Other Acts which are related to the freedoms and rights have never enacted yet as well. The Supreme Federal Court (SFC) has issued several decisions that related to this problem, but they are still limited. In this paper, there are discussions and analyses of some (SFC)'s decisions related to this problem. That will be discussed, after giving brief information about the Iraqi political system according to Constitution of 2005, then a clarification of what the legislative omission means, and discussing of this problem in the current Iraqi legal system and the decisions of the (SFC).

Key words// Legislative Omission, Iraqi legal Political System.

Introduction

It is well known that the new Iraqi political and legal system has been built in a very complex period of the Iraqi history. The circumstances which accompanied the reshape of the new state in Iraq after 2003 created several serious problems in the political and legal system. These problems have appeared after just a short period of adopting the new constitution of 2005. I cannot ignore that most of these problems are caused by the Iraqi complex political situation, but there are some other may appear in any other political and legal systems. One of these problems is "legislative omission". Many countries around the world have faced this problem in their legal systems regardless of the reasons. However, what does legislative omission mean? Indeed, the legislative omission is a negative action is issued by lawmakers against their duty to make the constitutional norms effective. In other words, the legislative omission is the situation when the lawmakers do not enact laws or provisions which are required by the constitution or related to the protected freedoms and rights. Therefore, it leads to violating the constitution.

In Iraq, there are several important Acts which still have not enacted such as the Supreme Federal Court (SFC) Act, and the Federal Council (FC) Act which have been mentioned that they should be enacted in the Constitution of 2005. Other laws which are related to the freedoms and rights have never enacted yet as well. Hence, how can this situation be remedied? Many countries tried to remedy this problem through giving the constitutional judiciary the power to order or direct the lawmakers to enact these laws and provisions. Constitutional judiciary intervened to remedy this problem spontaneously without a legal authorization in some other countries. However, these countries have different perspectives about how this order or direction can be issued, and its legal

value. In Iraq, the Supreme Federal Court (SFC) has issued several decisions which related to this problem, but they are still limited. In this paper, I am trying to focus on the discussion of the extent to which it is possible for the constitutional judiciary in Iraq to issue an order requiring the legislature to enact a piece of legislation, or to rectify a deficiency in legislation which it has already passed so that it complies with the provisions of the Constitution and achieves the purpose for which it was intended. I am doing that through discussing and analysing these decisions but before that, I am going to give brief information about Iraqi political system according to Constitution of 2005. Also, I am going to clarify what the legislative omission means and discuss the effects of this problem in the current Iraqi legal system.

1. Iraqi Political History and Circumstances of Creating New Iraqi State.

In some countries like Iraq, the problem of legislative omission is more complex because of some specific circumstances, such as: the diversity of political ideologies or the sharp ethnic division as it will be explained in this paper later. Finding some effective solutions requires understanding root of the problem through studying situations and circumstances which helped or caused occur. Thus, as an entrance to the topic, some very important issues should be discussed and a one of the most important issue is answering some specific questions which are: What are the most important reasons which caused the problem of legislative omission in Iraqi legal system? Therefore, the Iraqi situation will be discussed in the first part of this paper. It would be a historical issue, but it is very necessary to understand the Iraqi society structure. Hence, establishing a national state based on the principle of citizenship is very difficult in this kind of society. Explaining and understanding the ethnic and sectarian structure is very important issue for this study because it is the main reason which caused the problem of legislative omission in my opinion. Then, the circumstances of creating new Iraqi state after 2003 will be shown to understand the ethnic and political structure before the problem of legislative omission will be discussed in second part.

1.1. The Ethnic and Sectarian Structure of Iraqi Society.

Iraq people are considered one of the most diverse nations in the world because of the deep history of Iraq and alternation of historical eras. Therefore, the demographics of Iraq people are much diversified. Even though most of Iraqis are Muslims, there are Christians and even Jews. Actually, Iraq is the home of some unique religions such as Yazidi and Sabeian Mandaean. Although the majority of Iraqis are Arabs, there is a big minority of Kurd. Moreover, there are many other ethnic groups such as Turkmen (who come from Turkish people), Chaldeans, Assyrians, and Shabak. Iraqis Muslims themselves are divided between Sunni Muslims and Shia Muslims ⁽¹⁾. In fact, even though there are many ethnic and religious groups in Iraq, the three main groups have the most influence on the political life since the new Iraqi state has been established in the beginning of the twentieth century. Those groups are Arab Muslims Shia, Arab Muslims Sunni and Kurd who most of them are Muslims Sunni ⁽²⁾.

There is no official statistic for the proportion of each group from the whole population, but the general election results in December 2005 might be useful to understand the Iraqi society structure. Therefore, it could be adopted as a statistic of the Iraq ethnic population because turnout was very wide. Approximately eighty percent of registered voters voted. Most of them gave their votes to the parties which were established on the basis of ethnicity or sect. Except the Iraqi National List, which was led by former, Prime Minister in (the Iraqi Interim Government) (IIG) Iyad Allawi because it contained fifteen parties most of them are secular, but it got just 25 seats from total seats which were 275. That represented just nine percent of total seats. In total the representation of seats were as follow: Arabs Muslims Shia got 145 seats from three lists which means 53 percent.

(1) Sherko Kirmanj, Identity and Nation in Iraq, Lynne Rienner Publishers, Portland, (2013), P:5.

(2) For more details about Iraqi sectarian and ethnic communities: Harith Hasan Al-Qarawee, Iraq's Sectarian Crisis A Legacy of Exclusion, Carnegie Endowment for International Peace, Washington, D.C. (2014), P: 3-4.

While Arabs Muslims Sunni got 68 seats from four lists which means 24 percent. Kurds got 58 seats from two lists which means 21 percent of whole seats ⁽¹⁾. The remaining seats were awarded to other minorities which represented just 3 percent. However, it cannot be reliable statistic of ethnic and sectarian proportion, but it gives approximate percentage of Iraqi society structure.

Arabs Shia and Kurds did not strongly share in the political life when Iraqi state was established first time in 1921. The reason for the Kurds was the fear of losing the national character. After the First World War the land of Kurdish people was distributed between four countries Iraq, Iran, Turkey and Syria. All of these countries were established on a national basis. Kurds felt that they should have their own country. Arabs Shia were not enthusiastic to share the power because most of them, especially religious people, were religiously introvert and the majority of them were working as farmers under feudal lords which most of them were Sunni. Thus, most of politicians were from Arabs Sunni because they were either feudal lords, merchants, officers in Ottoman army or government employees. On the other hand, the new King was Arab Muslim Sunni and he had Arabic nationalist ideology ⁽²⁾. However, many secular Shia decided to share in the political life most of them were either nationalists or communists, but they were still less than their popular percentage. Nevertheless, most of Kurds were still opponents most of the time. Several military confrontations have happened between Kurds and central government during Iraqi contemporary history ⁽³⁾.

1.2. The New Iraqi Political System

After Several totalitarian governments which rotated in ruling Iraq since the military coup in 1958, the USA and its allies decided to occupy Iraq in 2003 because of several issues, most of them were found to be false or exaggerated ⁽⁴⁾. One of these issues was the foundation of a new democratic system in Iraq. Therefore, they established (the Coalition Provisional Authority) (CPA) to control Iraq during the transitional period. (CPA) created the (Iraqi Governing Council) (IGC) which contained twenty-five members who were selected on a sectarian basis by U.S. ambassador L. Paul Bremer who was the president of (CPA) and civil administrator of Iraq ⁽⁵⁾. (IGC) legislated (the Law of Administration for the State of Iraq for the Transitional Period) (TAL) which was considered as a constitutional law and it drew the Roadmap to transfer power to the Iraqis ⁽⁶⁾. However, there was no law in Iraq at that time without the agreement and signature of L. Paul Bremer according to Security Council Resolution 1483 ⁽⁷⁾. Thus, there were many influences of American administration on it especially the timings of some issues such as elections, writing the new constitution and the formation of the new Iraqi government ⁽⁸⁾.

According to (TAL) the (CPA) would submit the power to an Iraqi government which would

(1) For more details of the election's results: Dawisha A. & Diamond L., Iraq's year of voting dangerously. In Diamond L. & Plattner M., Electoral systems and democracy, Baltimore, The Johns Hopkins University press, (2006), P: 234-235.

(2) Steven, 2006, A timeline of key events in Iraqi history and class struggle in the 20th century, libcom.org <https://libcom.org/history/1900-2000-iraq-timeline> P: 2.

(3) Polk, William R. 2006, Understanding Iraq: a whistle-stop tour from ancient Babylon to occupied Baghdad, I. B. Tauris & Co Ltd, P: 114.

(4) For more information: Antic M., Iraq War (2003): Was It Morally Justified?, in Journal: Politička misao, ISSN: 0032-3241 (2009) P: 88-113. And Mumtaz, K., Post-saddam democratization in Iraq: An assessment of March 2010 elections. Strategic Studies, (2010). Retrieved from <http://search.proquest.com.idpproxy.reading.ac.uk/docview/971667701?accountid=13460>, 15/2/2016, P: 3-4.

(5) Mumtaz, K., (2010), P: 9.

(6) Al-Istrabadi, Feisal Amin, Constitution without Constitutionalism: Reflections on Iraq's Failed Constitutional Process, in Texas Law Review, Vol. 87, Issue 7 (June 2009), P: 1635.

(7) Al-Istrabadi, Feisal Amin, Reviving Constitutionalism in Iraq: Key Provisions of the Transitional Administrative Law, International and Comparative Perspectives on Defamation, Free Speech, and Privacy: II, New York Law School Law, Review 50 N. Y. L. Sch. L. Rev. (2006) P: 270.

(8) Al-Istrabadi, (2009), P: 1634.

be appointed by (CPA) and (IGC) on 30th June 2004. This government would prepare the general election of the National Assembly (NA), which shall be no later than 31st of January 2005⁽¹⁾. One of the most important missions of the (NA) was drafting the permanent constitution⁽²⁾ which had to be done before 15th of August 2005 except when majority members of (NA) demanded an extra time to complete it if that is necessarily. However, the extra time shall not be more than six months. After, that the draft of constitution shall be put to referendum on 15th October 2005. The election of the new parliament would be held in 15th of December to form the first national government⁽³⁾. At the same time, the Sunni-Arab regions was under military insurgency against the American army. Therefore, the Sunni-Arab political elite decided to boycott the election of the (NA) for several reasons. Some of them were feeling injustice about their representation percentage in the (IGC), some others refused to hold an election under the American occupation and, while some claimed that the security situation in their regions was unsuitable to hold election and they asked to delay election⁽⁴⁾.

The election was held on 30th of January 2005 amid wide participation of Shia-Arabs and Kurds however almost all Sunni-Arabs boycott it, and they committed the same mistake which Shia-Arabs committed when the new independent Iraq state was established in 1921⁽⁵⁾. Therefore, the (NA) was formed by Shia-Arabs and Kurds. However, American intervened to name members from the Sunni Arabs to involve in the Constitutional Drafting Committee, but they quickly withdrew from the committee because of disagreement of several provisions. After the (NA) failed agreement of compatible draft, the drafted constitution was written within six weeks. Then this Constitution was passed in the general referendum which was held on 15th of October 2005, although it was rejected widely by Sunni-Arabs⁽⁶⁾. This situation deepened the sectarian divide which affected political life thus it was the most important cause of legislative omission because the political elites faced many difficulties to reach an agreement of some of most important laws which are very necessary to any political democratic system as it will be shown in the next section.

2. The Problem of Legislative Omission in Iraq after 2003.

As it was shown in the last section the circumstances which accompanied the establishment of the legal and political system in Iraq after 2003 were affected by the ethnic and sectarian divide of Iraqi society. Therefore, that affected the performance the executive and legislative authority as it will be shown. The causes which cause legislative omission in Iraq will be explained in this point then the structure and circumstances of establishing a new constitutional judiciary will be discussed. Finally, the decisions of the (FSC) which are related to the problem of legislative omission will be explained as well.

2.1. Legislative Omission as Legislature Problem

Judge Salem Roudhan Al-Mousawi⁽⁷⁾ has argued that the reason of legislative omission in Iraq is the newness of the legislature and the legislators have not enough experiences⁽⁸⁾. It may be one of several reasons, but it is not the main because the sharp sectarian and ideological division of the political elites was the salient trait of Iraqi political life after 2003, and that is primary cause.

(1) Article 2. B. of the Law of Administration for the State of Iraq for the Transitional Period (TAL), Published in the ref world organization web: <http://www.refworld.org/docid/45263d612.html>. 15/2/2016. And see as well: Mumtaz, K., (2010), P: 7.

(2) Articles 60 of (TAL).

(3) Articles 61 A, E and F, of (TAL). And see as well Mumtaz, K., (2010), P: 10.

(4) Mumtaz, K. (2010), P: 11. And Al-Istrabadi, (2009), P: 1637-1638.

(5) Al-Istrabadi, (2009), P: 1637.

(6) For more details see: Al-Istrabadi, (2009), P: 1640-1642.

(7) He is a judge and lecturer in the Iraqi Judicial Institute.

(8) Al-Mousawi S. R., (2013), The role of the Iraqi constitutional judiciary in dealing with legislative defects, Article is published on Federal Supreme Court Web: <http://www.iraqja.iq/view.1871/>, 15/2/2016.

Therefore, the first general election according to new Constitution was held in December 2005 which witnessed wide participation from all sects and ethnic groups. At the same time, it widely witnessed sectarian and ethnic polarization as it has been shown above. Therefore, the political elites, which appeared because of this election and even other later elections, have completely different ideologies. Even in the same sect there are coalitions between parties have different ideologies. For example, the coalition of Iraqi list, which won of 91 seats in the election of 2010 and represented Sunni Arabs, was formed by twenty parties ⁽¹⁾. The ideologies of these parties were completely different. Therefore, they were religious, secularism, nationalism, liberalism, even leftism.

At the same time, the Constitution of 2005 itself mentioned several issues which require the legislature to enact specific statutes such as legislating follow important laws: Federal Council Law ⁽²⁾ which is the second part of legislature, and the Federal Supreme Court law ⁽³⁾ which require the agreement of two-third of Council of Representatives members. These two laws have never been enacted until now ⁽⁴⁾ because the political parties in Council of Representatives could not achieve the agreements especially with this kind of percentage of members which is required. On the other hand, there are several laws related to rights and freedoms which are mentioned by chapter of Rights ⁽⁵⁾ and chapter of Freedoms ⁽⁶⁾ in Constitution never legislate yet also, even though these laws need just normal majority to pass.

In fact, the sectarian and ethnic division of the political elites is the most important reason of the problem of legislative omission. Therefore, it is known that all Iraqi government, which formed after ratification the Constitution of 2005, were formed and endorsed after long time and a lot of discussions pressure applied to the parliament by regional and international powers to form alliances from different sects and ethnic. Since there is no majority can achieve the two-third of Council of Representatives members which is required to form the government ⁽⁷⁾. This gives the reason why parliament has failed to enact the laws which shall be passed by the same majority of forming the government because there is no pressure to pass them.

2.2. Legislative Omission as a Problem of Executive Authority

The problem of legislative omission in Iraq does not just relate to legislators but it relates to executive authority as well because the Constitution provides in article No. 60 that:

(1) See the web site (Independent High Electoral Commission in Iraq (IHEC), n.d.)

(2) Iraqi Constitution 2005. It published in English on World Intellectual Property Organization website: http://www.wipo.int/wipolex/en/text.jsp?file_id=230000 , Article (65).

(3) Article (92) of Constitution 2005.

(4) In fact, third session of parliament has been elected, and the Iraqi parliament had still not passed a Federal Council law which is required to be legislated in the second session according to Constitution 2005.

(5) See articles: 18 sixth, 21, 22 Third, 23 Second, 24, 27, 28 Second, 30 Second, and 34 Fourth of Constitution 2005.

(6) See articles: 38 third, 39 First, 41, and 43 first of Constitution 2005.

(7) For more information about formation Iraqi government after 2005 see: Kenneth Katzman, Iraq: Elections, Government, and Constitution, CRS Report for Congress, published on internet in web:<http://fpc.state.gov/documents/organization/76838.pdf>

P: 4-5. , John Leland and Jack Healy , After Months, Iraqi Lawmakers Approve a Government, The New York Times, DEC. 21, 2010, On web:

http://www.nytimes.com/2010/12/22/world/middleeast/22iraq.html?_r=0, and Kareem Fahim and Azam Ahmed, Lawmakers Approve Cabinet in Iraq, but 2 Posts Are Empty, the New York Times SEPT. 8, 2014. On web: <http://www.nytimes.com/2014/09/09/world/middleeast/iraq.html>,

"First: Draft laws shall be presented by the President of the Republic and the Council of Ministers. Second; Proposed laws shall be presented by ten members of the Council of Representatives or by one of its specialized committees"

This article made a widespread controversial and different between the legislative and executive authority. Therefore, the very important question has appeared which is whether can legislative authority enact laws which are not presented as a draft by the executive authority or not? In other words, can legislature propose draft laws than enact them without returning to the executive authority or not?

Therefore, the executive argued that the legislature has no power to enact laws unless these laws have been presented as draft laws by the President of Republic or the Council of Ministries according to the article No 60 of the Constitution. While, the legislature argued that the article No 60 of the Constitution gives the Council of Representatives a power to propose laws and the different between presenting a draft law and proposing law is just an idiomatic contrast. Also, the legislature clarified that there are more than sixty laws have been proposed and enacted by the Council of representatives. These laws have not been presented as draft laws by the executive and the President of Republic, who is a part of the executive authority, has approved them without any objection ⁽¹⁾. This issue was very complex, and Council of Ministers decided to resort to the (FSC) to repeal two laws which were enacted without being presented as drafts from the executive authority. The (FSC) issued two decisions which supported the executive authority view. It clarified that the Constitution provides the principle of separation of the powers in article No (47) which requires that every authority must not encroach on the power of other authorities and in this case the legislature has the power to enact laws but after they are presented as draft laws by the executive authority. The court added that Constitution gives the executive authority this power because it has the responsibility to execute financial, political, international and social commitments ⁽²⁾ and it should give its opinion through preparing the draft laws which may create new commitments. On another hand, Constitution gives the Council of Representatives the power to present proposed laws, but that does not mean that legislature can enact laws without being presented as draft laws by the executive authority because drafting laws are something completely different from proposing laws. Proposed laws are just ideas which should be sent to the executive authority to prepare them as drafts and send them back to the legislature ⁽³⁾.

Moreover, the (FSC) issued other two decisions which provided that the Council of Representatives has no power to modify the draft provisions which create financial commitments unless the permission from Council of Ministers is got. The (FSC) Justified its decisions according to the article No (62) of the Constitution which provides:

"First: The Council of Ministers shall submit the draft general budget bill and the closing account to the Council of Representatives for approval. Second: The Council of Representatives may conduct transfers between the sections and chapters of the general budget and reduce the total of its sums, and it may suggest to the Council of Ministers that they increase the total expenses, when necessary"

Also, the article No. (130) of the Rules of Procedure Council of Representatives provides that the assent of Council of Ministers shall be taken before the Council of Representatives can

(1) Osama Mahdi, The legitimacy of laws drafting rises the disagreements between the Iraqi presidencies, An article published on 15/11/2012, the Elaph E-Daily, <http://elaph.com/Web/news/2012/11/773977.html>.

(2) According to article No. (80) Of the Constitution.

(3) Decisions of the Federal Supreme Court which published on the Federal Supreme Court, website: No. 43/ 2010: http://www.iraqja.iq/krarat/1/2010/43_fed_2010.pdf. & No. 44/ 2010: http://www.iraqja.iq/krarat/1/2010/44_fed_2010.pdf.

modify drafts if that change creates financial commitments. Therefore, the (FSC) decided that some provisions of the Retirement law are unconstitutional because they create financial commitments and there is no permission from the Council of Ministers for the changes which were made by the Council of Representatives in those provisions ⁽¹⁾.

Faris Abdul Karim who is Iraqi legal scholar argues that the first two Court's decisions were reasonable because they conform with the Constitution according to article No (60). He explained that the executive has a technical function in the legislative process which is preparing and shaping laws, and the legislature has the power to enact the laws but after they have been drafted by the executive. On the other hand, the legislature has all right to discussing, addition, modifying or even redrafting any provisions which need that. Also, the legislature has the power to ignore enacting these laws. Therefore, he demanded from the (FSC) to reject the appeal of the provisions in the Unified Retirement Law because the Council of Representatives has the power to add new provisions to the draft laws as a one of the most important functions of legislation and nobody can rob them this function⁽²⁾.

As it was shown the (FSC) justified its decisions by the principle of separation of the powers which is mentioned in the article No (47) of the Constitution. However, its decisions were completely against this principle because the (FSC) rob the right of enacting laws from Council of Representatives. Therefore, it gives power to the executive authority to control the legislative process and to intervene in the core work of legislature through drafting laws. Thus, the executive authority will neglect to draft any law which it does not want to be enacted. Moreover, these decisions will create a new problematic question which is what will happen if the executive authority refrains or neglect to draft the laws that have been proposed by the Council of Representatives? Does the Council of Representatives have the power to draft and enact these laws or not? This problematic may not appear with coalition governments which have alternated ruling Iraq since 2003. Nevertheless, it would be the biggest problem faces the parliament if there is any majority government in the future because the government can stop enacting any law. Thus, it can disrupt the legislative and monitoring role of the parliament.

The (FSC) had to use the principle of separation of the powers to make another decision which enhances the legislative function of the Council of Representatives and Prevents intervening of the executive authority in the parliament work. The article No. (60). First should be interpreted and understood in the context of all other Constitution's articles which provide that enacting federal laws is the first task of the Council of Representatives ⁽³⁾. The federal authorities exercise their competencies and tasks according to the principle of separation of the powers ⁽⁴⁾. Consequently, the Constitution gives the power of drafting laws to the executive authority, but it does not prevent the parliament from this function. The evidence is that the constitution does not discuss or mention the case of abstention the executive authority to provide the draft laws which have been proposed by the parliament. At the same time, the verbatim interpretation of the (FSC) leads to prevent the executive authority from proposing laws as well. Since, the article No (60) gives the power to propose laws to the Council of Representatives which means that the executive authority cannot draft laws unless they have been proposed by ten members of the Council of Representatives or by one of its specialized committees.

(1) Decisions of the Federal Supreme Court which published on the Federal Supreme Court, website: No. 36/2014:

http://www.iraqja.iq/krarat/1/2014/36_fed_2014.pdf & No. 59/2015:

http://www.iraqja.iq/krarat/1/2015/59_fed_2015.pdf .

(2) Faris Abdul Karim, Problematic of the appeal of the Unified Retirement law and the legislative role of the Council of Representatives, Article published on 11/3/2014 , Al-Dustour Newspaper website:

<http://www.daraddustour.com/index.php/over-view/12963-2014-03-11-16-12-19> .

(3) Article No. (61) First of the Constitution.

(4) Article No. (47) of the Constitution.

Another evidence for Invalidity of these decisions that the (FSC) itself issued another decision, which contains the change of the Court's opinion. Therefore, the (FSC) issued in the last decision that the Council of Representatives should take the opinion of the executive authority before enacting laws which related to the government programmes or which create the financial commitments. Also, the Council should discuss and take the opinion of the Judiciary authority for enacting laws which related to the power of the Judiciary authority before enacting them. Otherwise the Council of Representatives has all the rights to propose, draft and enact laws without they are presented as draft laws by the executive authority ⁽¹⁾. The (FSC) in this decision clearly contradicts with other decisions because there is one way to enact laws through presenting them as draft laws by executive according to the early decisions, but it creates several ways to enact laws in the last decision. Therefore, there are laws which related to the power of the Judiciary authority should be enacted after they have been discussed by Legislature and Judiciary. In addition, there are other laws which related to the government programmes or which create the financial commitments should be enacted after they have been presented as draft laws by the executive or after the opinion of the executive has been taken. Except that the Council of Representatives can propose, draft and enact laws directly.

Further, the provisions of the Unified Retirement Law did not infringe the Constitution because the article No (62) of Constitution related only to the general budget bill and there is no reason to apply it to other laws. Moreover, these provisions may infringe the Rules of Procedure Council of Representatives but that does not justify the judgment of unconstitutionality because the provisions infringe the Rules of Procedure Council of Representatives which was issued by the Council itself and simply any Infraction is considered as an amendment to the earlier law.

In any case, it seems that the judgments of (FSC) have stabilized on the status that the executive authority has the exclusive power to draft laws and any law was enacted without knowing and drafting of the executive authority is unconstitutionality law ⁽²⁾. In this case, the executive authority is considered a partner to the legislature in the problem of legislative omission, but it has the biggest responsibility because it must start the legislative process through drafting laws and submitting them to the legislature. This responsibility may expand if there is a majority government because this kind of governments may use this power to disrupt the job of the parliament as it was explained above.

3. The Role of the Federal Supreme Court to Solve Legislative Omission

The (FSC) has several important decisions which related to the problem of legislative omission. These decisions show that the Court try to remedy the problem in different ways. Some time the Court decide to warn the legislature about their omissions, while in some time the Court try to interpret the constitutional rules to fill the omission without any direction to the legislator as it will be shown when these decisions will be discussed. However, it would better to know how the (SFC) has been established before discussing its decisions.

3.1. Iraqi Constitutional Judiciary after 2003 (FSC).

Indeed, Iraq has never known the specific constitutional judiciary. The forming of a new constitutional court was a huge evolution in Iraq judiciary system. The (FSC) has been established according to (TAL) and (the Iraqi Interim Government) (IIG) issued the law of (FSC) No. (30) in 2005. Article No (44) of (TAL) explained the numbers and the way of forming the (FSC). It provides that:

(1) Decisions of the Federal Supreme Court No. 21, 29/ 2015 which published on the Federal Supreme Court, website: http://www.iraqja.iq/krarat/1/2015/21_fed_2015.pdf. P. 3, 4 / 6/2016.

(2) Judge Wael Abdul Latif, The irregularities five contained in the recent decision of the Federal Supreme Court, An article published on the Website of Al-Nahrain Center for Strategic Studies on 11/ 5/ 2015. <http://www.alnahrain.iq/?p=2052> .

“The Federal Supreme Court shall consist of nine members. The Higher Juridical Council shall, in consultation with the regional judicial councils, initially nominate no less than eighteen and up to twenty-seven individuals to fill the initial vacancies in the Court. It will follow the same procedure, thereafter, nominating three members for each subsequent vacancy that occurs by reason of death, resignation, or removal. The Presidency Council shall appoint the members of this Court and name one of them as its Presiding Judge. In the event an appointment is rejected, the Higher Juridical Council shall nominate a new group of three candidates”.

Indeed, the (FSC) has been formed in 2005 according to (TAL) and still in that formation until now even though the Constitution of 2005 mentioned that the Federal Supreme Court should be established. Therefore, the Constitution of 2005 provided that the (FSC) shall be formed by judges, experts in Islamic jurisprudence, and legal scholars⁽¹⁾. Nevertheless, it did not mention the numbers of those judges, experts and scholars and what is the role each of them. There is a huge discussion about these issues between legal scholars⁽²⁾. Actually, the Constitution provides that all these very important issues to be organized by law of (FSC) which shall be passed by agreement of two-third Council of Representatives members. This law has never been legislated yet. Thus, the (FSC) still formed according to (TAL) and Law No (30) of 2005. Therefore, some politicians argue that the (FSC) has no right to interpret the constitution's texts when the political blocs have different views on them because it is not formed according to the Constitution⁽³⁾. This situation made the (FSC) to be very cautious when it considers on such actions.

In my opinion, it is clear that the current (FSC) has absolute power to practice all jurisdictions which have been given by Constitution of 2005 because the Constitution of 2005 provides that. Then, the Constitution provides the jurisdictions of the (FSC) in article 93 as well. Therefore, it does not mention that the current court is dissolved. That means the issue of dissolving the current court relates to enacting the new law of (FSC) which will provide forming a new court according to Constitution. Otherwise saying that the current (FSC) is unconstitutional would result to Institutional vacuity and damage the principle of constitutionalism which is mentioned in constitution because there is no institution has the power of monitoring the constitutionality of laws. In this case, only parliament has the power to establish the (FSC) according to Constitution and legislators naturally do not want to establish an institution which monitoring their work. While the fact that the (FSC) is established by Constitution which gives powers and jurisdictions to the authorities, and parliament has just a power to enact laws to organize and shape these institutions. On the other hand, keeping the current (FSC) is considered as penalty to the legislators' failure for enacting the (FSC)'s Law.

3.2. The Decisions of (FSC) which Related to Legislative Omission

In most of countries, the constitutional judiciary has the power to interpret laws or even the constitution itself. Therefore, most of cases constitutional judges interpret laws or constitution according to their understanding of the texts and this interpretation will get the same power of the law which is interpreted and in the case of legislative omission constitutional judges may use this power to create new provisions. In this case, the constitutional judges indirectly became as another

(1) Article (92) of Constitution 2005.

(2) For more information, See: Pimentel, D., & Anderson, B. (2013). Judicial Independence in Post-conflict Iraq: Establishing the Rule of Law in An Islamic Constitutional Democracy, *The George Washington International Law Review*, 46(1), P.P. 29-54. Retrieved from

<http://search.proquest.com.idproxy.reading.ac.uk/docview/1515694474?accountid=13460>, P: 39-42. And Al-Mousawi S. R., (2009), The formation of the Federal Supreme Court in Iraq between the Constitution and the law analytical and cash reading, Article is published on Journal of the legislation and the judiciary Web: http://tqmag.net/body.asp?field=news_arabic&id=1191&page_namper=p3, 15/2/2016.

(3) Al-Mousawi S. R., (2009).

lawmakers, but constitutional judiciary may be more powerful than the legislators themselves because constitutional judiciary has the authority to consider the constitutionality of laws and the rulings which are issued by constitutional judiciary are assumed that they are conforming of constitution more than legislators' Acts. In Iraq, the (FSC) issued several judgments which contain new provisions to meet some legislative gaps ⁽¹⁾ which are explained in the following below:

Decision No. 13 / 2007. Dated: 31/7/2007 ⁽²⁾. The Federal Supreme Court (FSC) provide on the Quota of women in the local councils that it should be one-quarter of the number of members of each local council. The (FSC) depended on article No. 49 / fourth of Constitution which provided: "The elections law shall aim to achieve a percentage of representation for women of not less than one-quarter of the members of the Council of Representatives"⁽³⁾. As it is shown, the article does not mention the local councils. Nevertheless the (FSC) used this article to enforce the women's quota in the local councils. Then, the legislators included a provision related to that in the article no. 13 / second of the election law of local councils⁽⁴⁾.

Decision No. 56 / 2010. Dated: 24/10/2010⁽⁵⁾. After general election in Iraq in 2010 the political parties did not agree to name the Speaker of Parliament in the first session as such constitution has provided in article (55). Therefore, they agreed to leave this parliament session indefinite open until they agree about the name. Nevertheless, a case was sued against parliament to the (FSC) which issued an injunction to quash the decision above and oblige parliament reconvene to name the speaker, although there is no provision in constitution or any other Acts that addresses this situation. That means the (FSC) created new provision which was very necessary to ensure the safety of political process, and parliament respected and applied this provision.

Decision No. 27/ 2009. Dated: 11/8/2009⁽⁶⁾. The (FSC) clarifies what does mean "absolute majority" in the text of article No (63) second (B) of the constitution which provided that. "A Council of Representatives member may not be placed under arrest during the legislative term of the Council of Representatives, unless the member is accused of a felony and the Council of Representatives members consent by an absolute majority to lift his immunity or if he is caught in flagrante delicto in the commission of a felony". The text does not mention what the "absolute majority" means either it is the majority of all Council of Representatives members or the majority of members who are attendants. The (FSC) interpreted that the "absolute majority" in this text means the majority of members who are attendants because when an absolute majority of all the Council of Representatives members is required, the constitution's texts obviously provide it. In fact, this case may seem as a normal interpretation of constitutional text but the (FSC) create a new provision which is when constitution mention just "absolute majority", that means the majority of members who are attendant.

In another hand, the (FSC) has other decisions which provide direction to the Parliament to address legal gaps in some statutes which are explained below:

Decision No. 6/2010 dated 3/3/2010⁽⁷⁾. The amendment of the general election law No. 26 of 2009 provided that five seats of parliament are given to Christian minority which comprise all

(1) Al-Mousawi S. R, (2013).

(2) Decision published on the Federal Supreme Court, website: http://www.iraqja.iq/krarat/2/2007/13_fed_2007.pdf , P. 3.

(3) Iraqi Constitution 2005, P: 15.

(4) The election law of local councils No 36 year 2008 which published on Iraqi council of representative website: <http://ar.parliament.iq/CP/Websites/Laws/Documents/36-0888.pdf> , P. 4 23/1/2016.

(5) Decision published on the Federal Supreme Court, website: http://www.iraqja.iq/krarat/1/2010/56_fed_2010.pdf, P. 2-3. 25 /1/2016.

(6) Decision published on the Federal Supreme Court, website: http://www.iraqja.iq/krarat/1/2009/27_fed_2009.pdf, P. 6, 25 /1/2016.

(7) Decision published on the Federal Supreme Court, website: http://www.iraqja.iq/krarat/1/2010/6_fed_2010.pdf , P. 6-7, 26/1/2016.

Christians in Iraq regardless of their constituencies (provinces). While it provided that one seat is given to each Yazidi and Shabak minorities in Nineveh province, which is considered as a one constituency, and one seat is given to Sabeen Mandaean minority in Baghdad province and just voters in those provinces have a right to vote to their candidates. The (FSC) directed legislator to legislate new provision gives all minorities right to vote to their candidates regardless of the constituencies (provinces) such as Christians.

Decision No. 59/ 2011 dated 21/11/2011⁽¹⁾. The constitution provides in article (41) that "Iraqis are free in their commitment to their personal status according to their religions, sects, beliefs, or choices, and this shall be regulated by law". The current law of personal status has many problems because it has several provisions which infringe the Islamic law. Thus, the (FSC) directed that legislators shall consider all Islamic doctrinal schools, when a new law of Iraqi personal status will be legislated. Therefore, they shall try to provide provisions which fit for all Iraqis and respect their religions and sects. As it is shown above the (FSC) did not mention that the law of personal status shall be legislated according to article (41) of Constitution and it did not demand from legislature to enact it, although the article (41) provides that.

The (FSC) did not rest content to direct the legislature but it recommended in the decision No. 10/2009 dated 26/5/2009⁽²⁾ the Committee of Constitutional Amendments, which is established according to article (142) of Constitution, that they shall provide a new provision in constitution which organize the way of electing the Speaker of parliament or both of two Vice-Speakers when these positions vacate for any reasons.

On 16th of January 2018, the (SFC) has issued an announcement which demands from the parliament to complete the components of the legislative authority. The speaker man of the court said that the legislative authority contains two councils (the Representatives' Council and the Federal Council). According to the constitution of 2005⁽³⁾. The announcement mention that there was a (SFC)'s decision which mentioned this issue by saying that the parliament should complete the components of the legislative authority especially those which are mentioned in the constitution.

This decision has been issued in 2012 when the parliament asked the (SFC) to give a constitutional interpretation of articles No 65 and No 137 of the constitution. The article No. 65 mentions that there is another council of the legislative authority which is called the Federal Council. All the issue of this council should be regulated by the law which should be enacted by agreement of two-thirds of members of the representatives' council. Article No. 137 mentions that all provisions which related to the Federal Council and mentioned in the constitution should be delayed until a parliament's decision which should be enacted by two-thirds of the members of the parliament in the first round of it that is elected after the constitution will be endorsed. In that time, the parliament asked the (SFC) if there is a need to issue that decision or not.

The court answered the parliament that they should issue this decision and they should complete the components of the legislative authority. The court said that the articles No (65) and (137) complement each other. Also, the court mention that enacting the law of the Federal Court should be preceded by preparatory work. The court confirmed that Parliament, Government, Judiciary authority and all concerned bodies should join the discussion of the provisions of this law because it is so important law which will set the foundations of the second wing of the legislative authority. Finally, the court invited the parliament to issue the legislative decision or statement which includes calling both executive and judiciary authorities and all other concerned bodies to

(1) Decision published on the Federal Supreme Court, website: http://www.iraqja.iq/krarat/1/2011/59_fed_2011.pdf, P. 3, 28/1/2016.

(2) Decision published on the Federal Supreme Court, website: http://www.iraqja.iq/krarat/1/2009/10_fed_2009.pdf, P. 4, 28/1/2016.

(3) (The announcement of the Supreme Federal Court, 2018).

discuss and give their opinions about this law. After that, all suggestions should be sent to the Council of State Consultative to formulate legally and send it to the parliament to discuss and enact it ⁽¹⁾. Thus, this announcement demands the parliament to complete one of the legislations which should be enacted according to the constitution. However, the most important questions may be asked are what the legal value of this announcement? And why the court issued this kind of announcement?

In my opinion, there is no legal value to this announcement, because the Court issued an announcement by its speaker man and just decisions which are issued by the majority of the Court members have the legal value according to the law. On the other hand, this announcement may give the impression that the (SFC) knows there are several laws which should be enacted by legislators and it decides to warn the legislators. However, this warning takes an unofficial way. This behave of the (SFC) may be interpreted in two ways. It may try to warn the legislators to this issue indirectly or it is not sure enough if the Court has the power of this kind of monitoring. In any case, this announcement should be considered as a good step in terms of monitoring the legislative omission.

Conclusion

Indeed, the constitutional judiciary in Iraq is still nascent. As well as the problem of formation the (FSC) which is explained previously has made the court to be more hesitant to issue strong orders against executive and legislative authorities. That gives the reason why the (FSC) has no certainty about monitoring the legislative omission. Even though, the decisions which are shown above may give good evidences that the (SFC) has the ability and willingness to deal with the problem of legislative omission, there are several issues which related to this kind of monitoring are not clear enough yet. For example, does the (SFC) have the power to monitor the legislative omission? Also, how can a case be arising against the negative legislative actions? And, what is the legal value (Enforcement) of the decision which related to this kind of cases? In my opinion, the (SFC) has the absolute power to deal with this problem as any other constitutional violation. Also, the (SFC) can arise the case of legislative omission from any case which is sued to it. Finally, the decision which is issued to remedy the legislative omission should be obligatory for all authority as any other decision of the (SFC). All that can be justified by knowing that the legislative omission is a kind of constitutional violation and the (SFC) is tasked to monitor and make sure that all constitutional provisions are respected. Therefore, I recommend that the Supreme Federal Court Act, which should be enacting by the parliament, should contain detailed provisions which related to regulate the monitoring of the legislative omission.

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Glossary of Acronyms

(The Supreme Federal Court)	(SFC)
(The Federal Council)	(FC)
(The Coalition Provisional Authority)	(CPA)
(The Iraqi Governing Council)	(IGC)
(The Law of Administration for the State of Iraq for the Transitional Period)..	(TAL)
(The National Assembly)	(NA)
(The Iraqi Interim Government)	(IIG)