

The Role of the Iraqi constitution in the growing unconstitutional practices

دور الدستور العراقي في ظهور الممارسات غير الدستورية

حارث أديب إبراهيم

مدرس

كلية الحقوق – جامعة الموصل

ملخص البحث

في كثير من الأحيان تكون الدول أمام ممارسات يقوم بها أصحاب السلطة والحكم في البلاد لا تكون مستندة إلى أساس من نصوص الدستور المدون، بسبب عدم التزامهم الدقيق بمبادئه وأحكامه، قد يصل بهم الأمر إلى درجة الانحراف الكامل عن مبادئ وأسس الوثيقة الدستورية، الأمر الذي يؤدي إلى حدوث فجوة واسعة بين هذه الممارسات وبين الفكرة القانونية التي ارتضاها المجتمع.

يحاول البحث استقراء أبرز الممارسات والتطبيقات الخارجة عن إطار النصوص الدستورية في الواقع السياسي العراقي في ظل الدستور العراقي لعام 2005 النافذ، فضلاً عن محاولة استشراف ما يمكن حصوله في هذا البلد فيما لو استقرت هذه الممارسات على الوضع الذي هي عليه حالياً، إن هذه المحاولة الاستشرافية تقتضي ابتداء البحث عن العوامل التي تعزز قيام هذه الممارسات غير الدستورية سواء ما تعلق منها بالوثيقة الدستورية ذاتها، أو بالواقع المصاحب لها، وهل يمكن للظروف الحالية أن تساعد في قيام هذا النوع من الممارسات، ثم يأتي لاحقاً عرض لأبرز الأفعال أو الممارسات الخارجة عن نطاق نصوص الدستور، التي جاءت نتيجة لتلك العوامل.

Summary

Repeatedly we see that those in power engage in practices which are not based on provisions of written constitution because they are not strictly complain with its principles and provisions; it might take them to a full deviation from the principles and bases of constitutional document, which leads to a wide gap between practices and the legal thought which accepted by the community.

This research is an attempt to extrapolate the most prominent practices and applications which could be outside the framework of constitutional rule -in the Iraqi political experience under the Iraqi constitution of 2005. As well as, it is an attempt to foresee what can happen in this country if these practices are established on their current situation. This perspective attempt requires to begin to search for factors that the emergence of these unconstitutional practices, whether related to the constitutional document itself, or the reality accompanying it. In addition, can the current circumstances help to establishing this type of practices? Then, it comes later, showing the most common acts or practices that outside the framework of constitutional rule which came as a result of those factors.

Introduction:

One of the main goals of the legal science is to study, analyze and show the enforced controlling (applied) law which is called “The positive Law” “Le droit positif”. This calls the researcher working in the field of constitutional law to emphasize his/her efforts to examine the obligatory practices and behaviors in the constitutional subjects and to determine whether or not these practices and behaviors are represent the rules, constitutional standards, then he/she can determine how these practices and behaviors according to the constitution. On the basis of fore cited analysis and conclusion, the distinction between the written and unwritten constitutions can be done.

We often see that those in power engage in practices which are not based on provisions of written constitution because they are not strictly complain with its principles and provisions; it might take them to a full deviation from the principles and bases of constitutional document, which leads to a wide gap between these practices and the legal thought accepted by the community.

The distinction between the deviation from the application of constitutional rule and constitutional custom is that the constitutional convention starts from the willing of public authority based on common satisfaction, and the necessity

of specific elements and conditions which make it mandatory; while the deviation is a single willing expression emerges from a situation based on conflict among these willings and practices devoid to those elements and conditions. However, the practical application represented by the activities of constitutional institutions, sometime, makes it difficult to distinguish between what is considered as a constitutional convention and what is considered as a deviation the application of constitutions.

The instability which might often weakens the constitutional legislation, besides the noticed stability of constitutional rule have brought us to the question of the fate of the positive constitutional rule between the rule which has been left and the different reality of this rule? We can find ourselves in new method of performance of governmental institutions; the relations among public authorities are quietly different from what is written in the constitutional rules.

If we tried to apply what is mentioned above on the reality of the Iraqi institution, we will face the misrepresentation of the current constitutional and political system in Iraq. The prevalence of extrajudicial practices in general. And the absence of legal and constitutional stability. Due to the different crises that Iraq has witnessed and is still witnessing in most fields of life such as security, economy, society and policy, all these weakened the capacity to create a legal environment suitable for study. Thus, it is not possible – at present - to monitor acts and practices related to the constitutional subjects in Iraq as precedents suitable to be examined in the constitutional studies labs to come with results refer to the legal reality of these acts and practices, in the sense that any talk about forming constitutional conventions in Iraq might be premature. Thus, they cannot be called for now only the unconstitutional practices.

Problem of the research:

This research is an attempt to extrapolate the most prominent practices and applications outside the framework of constitutional rule in the Iraqi political reality under the in force Iraqi constitution of 2005. As well as, it is an attempt to foresee what can happen in this country if these practices are established on their current situation. This perspective attempt requires to begin to search for factors that promote the emergence of these unconstitutional practices, whether related to the constitutional document itself, or the reality accompanying it. And can the current circumstances help in establishing of this type of practices. Then it comes later, a presentation of the most prominent acts or practices that outside the framework of constitutional rule which came as a result of those factors.

The structure of the research:

The study of this topic will be in two chapters:

The first chapter: The enablers of the emergence of unconstitutional practices in Iraq.

The first part: The form factor

The second part: Social and political factors

The second chapter: acts that are outside the Iraqi constitutional rules.

The first part: Acts relating to the idea of sectarian distribution of power

The second part: Acts relating to the relationship between the authorities

The first chapter

Factors contributing to the emergence of unconstitutional practices in Iraq

The constitutional law jurists have mentioned many factors that lead to the appearance of unconstitutional practices, which can be divided in terms of their nature into factors related to the formal aspect of the constitution, i.e. the nature of technical formulations of the constitutional rules, and others related to the surrounded circumstances:

The first part

The form factor

It is rare for the constitution to provide easily for everything; as constitutions are often done by a select group of theorists, who often do not keen to achieve the effectiveness of constitutions as they are far as their interest to produce and balance technical constitutional wording. This creates a gap between the political system established by the Constitution and what the reality of the

system has created, that is, those rule articles will be in one side and the circumstances of their application in the other side sooner or later¹.

The concept of the nature of the Constitution could also refer to its adaptability to modify between flexibility and stalemate, and it could also accommodate the provisions that the constitutional might contain, which referred to custom directly or indirectly. Thus that questions related to the nature of the constitutional provisions rule could be attributed to (Summarization, flexibility, and stalemate of the Constitution, and its provision rule refers to custom.)

The second part

Social and political factors

Social and political factors have been an important element in the emergence of many unconstitutional practices; among them the existence of diverse configurations in a single country, the diversity of party systems all over the world, political changes, and exceptional circumstances and crises.

Although this paper attempts to apply the factors that have been reviewed for the establishment of unconstitutional practices on the ground in Iraq; it will be limited to those factors that were related only to the constitutional document without going into what was related to the circumstances surrounding this document, whether social, economical or political. There are many factors related to the reality of the constitutional document in Iraq that can contribute to the rise these practices, the most prominent of which are:

1. The adopted method of the constitution approval:

The method that was adopted in approving the permanent constitution of 2005 was characterized by many mistakes, which contributed in one way or another to the confusion that occurred in the drafting and referendum of the constitution. These mistakes include:

- a. Failure to observe the provisions of the transitional administrative law - notorious – which are related to the extension of the period of working on the permanent constitution draft: the ruling authorities insisted at that time on that the constitution be conducted at the specified initial date, despite the fact that the transitional administrative law of the Iraqi state- which was the current constitutional document and determining for the permanent constitution mechanism and stages - had stipulated that the period for preparing he constitution draft could be extended and the referendum could

1 Ali Al-Hilaly, the difference between constitutional reality and political reality, Euphrates magazine, issue 3, article published on the website of Euphrates Center for Development and Strategic Studies: <http://www.fcdrs.com/mag/issue-3-5.html>

be delayed by another six months. This urgency caused many provisions of this constitution to be poorly produced.

- b. The lack of an accurate description of the majority required in the referendum: the fact, that the Transitional Administration Law of the Iraqi State was sufficient to require a simple majority in the referendum to approve the constitution, was considered by some to be insufficient to earn public trust. Therefore, they view that in order to accept such an important document, it was necessary to require a precise description of the majority as either two thirds or at least three fifths to approve it.
- c. The conditions required for conducting a proper referendum were not met: the referendum on the Iraqi constitution was held under security and social conditions of tense and regression, because of the continuation of armed operations in many areas of Iraq, and the inability of the government to secure all areas where the referendum was held. This prevented many citizens from voting, resulting in their negative attitude toward the result of the referendum.
- d. These and other matters gave a reason for many to describe the process through which the constitution come to life as distorted and unsuccessful, and for other to resort to unconstitutional practices to solve the problems which the constitutional failed to solve.

2. The nature of Iraqi constitution of 2005

There are many features of Iraq's 2005 constitution that lead to practices outside its provisions which are:

- a. Its complex amendment procedures: the greater of rigidity of the Constitution, the more necessary it is to support the practicing outside the constitutional provision. The Iraqi Constitution of 2005 was one of the rigid constitutions; as it required complex procedures to be amended: in the manner of both proposing and approving the amendment. It also imposed a temporary ban on the amendment of some of its provisions related to certain important topics¹. As well as, it included an exceptional case of the specific procedures of the amendment that the Constitution provided for the formation of a parliamentary committee to consider the amendments that can be made to the Constitution only once without being included in the ban; however, according to new approval procedures in which the idea of mutual veto was imposed in the case of three governorates' rejections².
- b. The ambiguity of some constitution's provisions: the ambiguity that accompanies the constitutional often comes from the poor drafting of the

1 See article 126 of the Constitution

2 This exception was referred to in article 142 of the Constitution.

Constitution, which makes those rules-articles far from the environment of their enforcement, at that time or later¹.

It has been noticed that in the Iraqi Constitution, there was a serious legislative ambiguous due to the combination of several factors. Perhaps the most prominent of which is the exceptional circumstances that have overtaken the political and the general situation of Iraq in the aftermath of Iraq's occupation, and the attraction and agreement among the main political blocs to satisfy this bloc or other, to guarantee its participation in the political process after it was refused for special reasons². In the body of the constitutional document, many articles have been misunderstood by the decision-makers in the State, which has led to differences among themselves. The fact that these ambiguous articles were incalculable does not prevent the mention of some of them for example and clarification, among them:

1. The constitution required in article 55 the absolute majority of the Council of Representatives Iraqi Parliament' members when choosing the Speaker of the Parliament. However it did not regulate the issue of not obtaining this majority in the first session because more than one candidate competed for this position. This allows the practicality outside the rule articles to remove this ambiguity.
2. The Iraqi constitution was not regulated deal with the impossibility of electing a new parliament, due to the circumstances of war or internal conflict, especially the constitution was organized and approved in such circumstances, i.e. the constitution-makers should have taken into consideration this issue. Would does the outgoing Council continue to do its duties as an exception? How long can it be sustained under these circumstances? These questions gave the chance to unconstitutional practice to answer them.

1 The formulation can be defined as a set of technical tools and means to bring political, social and economic ideas and values out of theoretical space into practice, or to transform intellectual wealth into sequential rules that are practically viable. One of the most prominent drafting requirements are: 1. Clarity: is to make the ideas of the Constitutional legislature understood by the public, which means that the rules are free from ambiguity and complexity, which makes individuals misunderstand what the constitutional legislature meant. 2. The precise wording of the rules: It represents a stage of constitutional drafting to which the Constitutional legislator reaches when he makes the rules a true reflection of what he really wants, i.e. the formulation is a true reflection of what he wanted to convey to individuals. 3. Realism: that the provisions and values come from the environment in which the Constitution will be applied, there are no strange and contradictory concepts with the environment of application, doctrine, religion, customs and traditions. Ali Al Hilali, former source

2 Ali al-Shukri, Constitution amendment within necessity, personality and political approvals, Al-Jamaa al-Islamiya al-Najaf al-Ashraf, No.2, 2007, P71 – 72.

3. The problems related to article (60/first) of the Constitution, which gives the President of the Republic and the Council of Ministers the right to submit drafts of laws. However, many legal writers believe that this right should be confined to the Council of Ministers because this is a requirement of the parliamentary system.
4. The lack of specifying a scientific qualification for the candidate for the position of Republic President in article sixty-eighth. Also the situation of the President's inability to exercise his duties permanently, as was the case before the parliamentary elections of 2014, has not been regulated.
5. The term of the President was defined in article 72/ first by four years, renewable only once, but it did not address a very important issue which was if the President completing the term of his predecessor, who had failed to exercise his functions for any reason such as death, is this mandate so complete that this President has only one more mandate? Or does he retain his right to stand for two full terms in addition to his "missing" initial mandate?
6. The Constitution required in article 77/second that for the Minister the same conditions that of the parliament member must be met in the Council of Representatives, while it had not been specified the conditions that must be met in the latter except that he must be a fully qualified Iraqi.

The meaning of ambiguity that characterized the constitution was not limited to the articles that were misunderstood by the decision makers, but even the existence of constitutional rule drawing an unusual way for building parliamentary systems has contributed to the weakness and ambiguity of the existing constitutional structure. Some of these articles may be mentioned, for example:

1. Article 76/ first provides that: The President of the Republic shall nominate the candidate of the largest parliamentary bloc, to shape the Council of Ministers within fifteen days of the election of the President of the Republic. This ambiguity lead to a difficulty in specifying what was meant by the largest parliamentary bloc. This was what did happen in the 2009 elections after the Iraqia list won the largest number of parliament seats, yet this advance did not help preventing the judiciary from interpreting the term of the largest parliamentary bloc which had been an unusual interpretation in democratic systems¹.
2. Article 81 provides that the President of the Republic shall act as the Prime Minister when the office is vacant for any reason. This provision is contrary to the contexts of the parliamentary systems.

1 For more details about the Federal Supreme Court Interpretation *See* decisions No. 25/ Federal/ 2010 on 3/25/2010 and No. 170/ Federal/ 2019 on 12/22/2019

3. The spirit of consensus in the constitutional document

The prevalence of consensus spirit in the State and its political system is the reason behind the rise of practices outside the framework of the constitutional that, gradually, becomes mandatory because they are compatible with this spirit. It is not secret that the regime established by the 2005 Iraqi Constitution is a system of a consensual nature, which can be drawn from the Constitution through several manifestations¹, the most prominent of which may be:

1. The establishment of the legislative authority by the system of the two Councils
2. The idea of a federal system
3. The idea of the Presidency
4. The requirement for a two-thirds percentage in the selection of the President of the Republic

The second chapter

Acts outside the Iraqi constitution provisions

Despite the short period of the current political regime in Iraq under the new Iraqi constitution of 2005, and in addition to the reported disorders in Iraq in political, security, social, economic and other aspects, this have not prevented some acts and practices relating to the affairs of authority, system of government and the functioning of State institutions, from performing outside the constitutional provisions, which led to the rise of the factors mentioned in the first part. In conducting an extrapolation of these acts and practices, it may be noted that they are two categories:

First Category: acts based on the notion conforms in governance. Which were designed to take account of the sectarian distribution on which the form of power in the country is based. In such a way that keep the drafters of the Constitution far from the circle of accusation of breaking modern democratic concepts if they will legalize such acts in constitutional provisions. Thus, they foresaw to leave it to the will of the country's political actors by establishing it in practice, and this has led those in power to seek out a conventional formulations of that takes into account this formative privacy outside the framework of constitutional provisions.

1 For more details about the relationship between these features and the consensual system, See: A. Lijphart, Consociation and Federation: Conceptual and Empirical Links, Canadian Journal of Political Science / Revue canadienne de science politique, Vol. 12, No. 3 (Sep., 1979), pp. 499-515

Second category: Acts regulating some aspect of the relationship between the three authorities of state, which were required by the interim circumstances or practical reality.

Based on this categorization this chapter will be divided into the following two requirements:

First part: Acts relating to the idea of the sectarian distribution of power.

Second part: Acts relating to the relationship between the authorities.

The first part

Acts relating to the idea of sectarian distribution of power

The review of the most common acts and practices relating to the subject of the sectarian distribution of power in Iraq could lead to the following applications:

First: the practice of electing the Presidency in one list. This political practice - whether under the Transitional Administration Law or under the current Constitution - has been based on engaging the three main components of Iraq in the presidency without any interruption, while the Iraqi Constitution does not explicitly or implicitly mention in article (138/ second/a) or other any rule that refers to take in the account this method. On the other hand, not all the political components of Iraq agree on the idea of a single-pack election of these positions through a single voting process. The prevalence of mutual mistrust among the political blocs representing the main components of the country, and the adoption of the mode of dealing in most decisions and actions by the components of the Authority, have led to the adoption of this method of voting on the selection of the members of the Presidency.

Second: The distribution of the three presidencies (the head of State, the head of government and the presidency of parliament) on the basis of three main components, has been repeated in a sequential manner to the Governments that have been formed in Iraq since 2004 to the present time¹.

¹Some have suggested that there are implicit references in the Constitution that reinforce the practice, as stated in article 126 of the Constitution, which stipulates that "the President and the Council of Ministers shall collectively, or the fifth-1/5 members of the Council of Representatives, shall propose the amendment of the Constitution". It has been noted that this rule made the President of the Republic a partner of the Council of Ministers in proposing the amendment of the Constitution, thus equating his opinion with that of the Council of Ministers as a whole in this field, which does not establish the constitutional status of the President in the parliamentary system explicitly adopted by the Constitution, This also raises the judgment of the state of disagreement between the President of the Republic and the Council of Ministers on the proposal for amendment, who would be the final word? This led to the question why the two executive heads had to co-sponsor the amendment proposal,

Third: ensuring the formation of coalition governments, the formation of ministerial formations through the actual practice of wide coalition - just as with the Presidency - is done through the formation of the Council of Ministers through the involvement of the main parliamentary blocs, which claim to represent the main components of the Iraqi people. As a result of the political agreements among these blocs, which allows to say that the Council of Ministers has become a wide coalition through the collective participation in it and according to the electoral size of the blocs. The repetition of this practice during successive Governments has led to firm a conviction among the political components - especially in the light of the crises that the country is experiencing which all the components must face together - that this coalition formation should be taken into account by any future government. Even authorizing a majority government is not applied only when there is a political crisis between the parties. In this sense, for those in power and their partners, the majority government is an undesirable option. The acts referred to are the most prominent part of a wider range of practices based on the notion of conformism and the sectarian distribution of "quota" power, which some participants in the judgment consider to be realistically and constitutionally acceptable. Because social reality, which cannot be ignored in any way, refuses that these senior positions are confined to one or two components without the rest, which means depriving the rest of the components of effective participation in power, and constitutional reality does not reject the notion of quota or compromise in government¹.

On the other hand, there are those who believe that despite the presence and work of the quota, these applications cannot be considered as acceptable constitutional recognition to the State institutions and the public opinion, as the quota is a result of the election outcomes, which is imposed by the reality of parties' representation within the Parliament. However, this view continues by offering a possibility that leads to the statement that the quota would become constitutional convention if the current parties continued their approach and through steady practices that would take a period of time in forming a

which concluded that it was due to the state of conformity on which the Constitution was based, It was believed that the presidency of the State would always be for one category and the presidency of the Ministry for another, which required their agreement on the proposal for constitutional amendment. For further details, the competent authority is to propose the amendment of Iraq's constitution for 2005Journal of the political and Legal Sciences, Journal of the political and Legal Sciences, volumes 3, No. 1, Babel, University of Babylon, p. 201. Hussein Daghab Al-Sakini, controversial topics in the Iraqi constitution amending and reviewing the constitution, Al-Ghadir for printing, Basra, 2008, p. 12. Aziz Asaad, a critical Study of the Constitution of the Republic of Iraq, Dar Al-Bustan Press, Baghdad, 2005, p. 80. 1for more detail looking at: Tarek Harb, is the holding of sovereign positions of two national and two gold constitutionally defined? Al-Sabah Iraqi newspaper, No. 930, Baghdad, 2006

government that includes the main blocs that reflect national and sectarian diversity¹.

The mere fact that these authorities are used to, in the field of mutual relations, does not confer on it the constitutional custom, unless it has the approval and belief of individuals in accordance with the decision of studies specialized in constitutional custom. Although the constitutional jurisprudence suggests that the customary rule of constitutional law is binding without a slow development and repeated application, and sometimes even a single application is required, the customary rule must reflect the total public will of the people. The general will of the people cannot in any way be demonstrated in the form of a full national compromise, but can be represented - to the minimum - by accepting such practices as customary constitutional norms which are as binding as those of the written constitutional norms. This is not true of the Iraqi situation toward this experience.

The second part

Acts relating to the relationship between the authorities

The actions that are outside the constitution's provisions were not limited to sectarian quota only, but other acts and practices appeared in the current Iraqi constitutional reality, which are also outside constitutional rules and cannot be classified within the framework of sectarian quota . Some of these practices are not, in fact, of a conventional nature, but the occasion to speak of constitutional reality in Iraq justifies some examples of such acts and practices, which have not emerged from the relationship between the authorities of the State. Examples of those acts include:

First: The Council of Representatives hosts government officials:

The current Iraqi constitution did not provide for the style of hosting, but the practical reality indicates that this practice has been repeated since the first electoral cycle that followed the approval of the last constitution in 2006; as many hosts to the prime minister, ministers and heads of independent bodies. This raises a question about the constitutional basis for this act.

Second: The reluctance no-confidence against the government:

The Iraqi Constitution gives the legislature the power to withdraw confidence from the government. Despite many events that called for government responsibility, many calls and voices - both inside and outside the

¹For more detail, consider Haidar al-Taei, a quota in the light of the theory of constitutional custom, a paper published in the Al-Moltaqa Magazine, Afaq Institute for Iraqi Studies and Research, 2007: <http://www.yuniv.net> P14.

parliament - vote for a no-confidence against the government. However, the tracker of the legislative authority in Iraq notices that its reluctance to exercise this right, and the most prominent reason for this reluctance is the nature of the formation of parliamentary blocs and its deviation from the actual role that the member of the Council of Representatives should play, as it has become inclined to the role of the government's protector and guard only. If it is from the bloc that formed the government, or it tends toward the role of the critic and the troll for pitfalls and slips in case it is one of the blocs opposing the government. The partisanship, lack of confidence - or at best its fewness - among the political, and the unwillingness of a large number of its members to take the parliament into its real place blocs are reasons behind that the Iraqi parliament has no authority. However, being fair, it can be said that parliament should be the one that wanted to be kept out of sight, and only approved the huge allocations, salaries and protection for its members.

Third: The constitutional judiciary applies the theory of legislative omission

Some jurists have argued that legislative omission means that the legislator ignores an aspect of the subject matter in question, thereby reducing its effectiveness, and failing to activate or devote the constitutional provision from other aspect¹. That is, legislative omission is achieved in the case where the legislator violates the obligations imposed by the Constitution or because s/he has not fully, clearly and explicitly regulated them as stated in the provisions of the Constitution. The fact that the legislature does not exercise its constitutional powers is also considered by constitutional jurisprudence and judicial authorities to be a kind of violation that stigmatizes the legislature's work and characterizing it by unconstitutionality, since the legislative omission is considered a state of the legislator's failure to comply with his/her obligation to legislate on the basis of the constitutional obligation it is bound by the constitutional provisions of the imperative form².

Legal thought, a long time ago, has reached that there can be no integrated legislation, any legislation that must be tainted by deficiency and some aspects of which are deficient, which is a natural consequence of the inherent deficiency of the legislator as a human being and this deficiency is a part of the human nature³.

1 Abdul Hafiz Al-Shimi, Monitoring Legislative Omission in the Supreme Constitutional Court: a Comparative Study, Dar Al-Nahda Al-Arabiya, Cairo, 2003, p. 5.

2 Khaled Beljilali, The Legislator's passive Jurisdiction and Constitutional Oversight over it, a Comparative Study, The journal of the research professor (Al- Ostath Al-Bahith) for Legal and Political Studies, Issue 6, Year 2017, p 76.

3 Sura Harith Abdul Karim and Haidar Talib Al-Imara, Controls of Legislative Omission, a Comparative Study, Journal of the Faculty of Law / Nahrain University, Volume 21, Issue 4, Year 2019, p. 49. And Abdul-Alaziz Mohammad Salman, Judicial Oversight on Deficiencies

As for the Constitutional Court has stated in many of its provisions that the deficient legislative organization constitutes a constitutional violation whether this deficient organization has represented what the contested legislative provision did not contain or what it contained in the provision of a deficient rule¹.

As for the constitutional judiciary in Iraq, despite its recent existence after the formation of the Supreme Federal Court by order No. 35 of 2005 is recent, based on the principle of separation of powers the legislature has passed numerous laws that do not take into account the techniques of legislative drafting. Some of these laws have gap and ambiguity because the legislature lack of experience in the law-making and the fact that this power has not reached full maturity, with the surrounding circumstances, although some of these laws are important and articular in State-building. This has led the Constitutional Court to play a major role in addressing these gaps of legislation by completing them with judicial decisions issued by the Federal Supreme Court through the application of the theory of legislative omission, which was not mentioned in the provisions of the Iraqi Constitution when mentioning the function of the judiciary², The Court Act No. 30 of 2005 also did not state to this jurisdiction. By adopting the general principles established by the Court according to its traditional origins, however, the Court exercised its right to oversight the refrain of the legislator to exercise his/her jurisdiction in legislation in several forms:

Form 1: The constitutional judge's role is limited to revealing the existence of a situation of legislative abstention, and notifying the parliament without judging the unconstitutionality of this abstention, and among the decisions issued by the court in this regard is the decision of the Federal Court of Iraq (No. 42) of 2008 on 24/11/2008, which states in its merits: "... Since the Council of Representatives has not enacted the law referred to in article 61, paragraph (IV), of the Constitution, the Council of Representatives can approve international conventions and treaties in accordance with the provisions of the Treaty Act before the enactment of the law referred to in article 61, paragraph (IV), of the Constitution"³.

in Legislative Organization, Journal of the Supreme Constitutional Court, Issue 34, year 2019, website address: <http://www.sccourt.gov.eg>

1 Samir Dawood Salman, Legislative Omission and the Possibility to Impose Judicial Oversight in Iraq, Journal of the Faculty of Law / Nahrain University, Volume 21, Issue 4, 2019, P.91

2 Salim Almosawi, the role of Iraqi constitutional jurisdiction in addressing the legislative lack, Alhewar Almutamaden website, 6/4/2013: <http://www.m.alhewar.org>

3 Haidar Mohammed Hassan Abdullah, addressing the abstention of the Parliament to exercise its Legislative competence, The magazine of Hillah investigator (Al-Muhaqiq Al-Hili) issue 4, vol. 7, 2015, p. 591

Form 2: That called "Directive control", since the role of the constitutional judge in this picture is not limited to mere disclosure of a legislative omission but addresses and appeals the legislator to fill this deficit or omission. This speech has many techniques and forms, including direct request, recommendation or advice that may include reprimand as well. The constitutional judge can resort to an order by directing what is like order, but in the end the legislative authority is not obliged to respond to this order or even call or instruction. The Federal Supreme Court of Iraq has had a clear effect on the application this aspect of theory in many of its decisions and provisions:

1. The Federal Court's decision on 26/5/2009 that instructed the Constitutional amendments Committee to remedy a provision that was ignored by the constitution drafter, includes how to elect the Speaker of the Parliament or one of his deputies to fill a vacancy.
2. The Federal Court's decision on 3/3/2010 which included a decision to instruct the Council of Representatives to pass legislation regulating the quota of minorities of the components of Iraqi people.
3. The Federal Court's decision on 21/11/2011 instructs the legislature to adopt the jurisprudence of all Islamic doctrines when enacting legislation governing personal status¹.

Form 3: If the Constitutional Judge concludes that abstinence from intervene in the legislature is in fact a breach of the Constitution, which obliges the party concerned to legislatively intervene by organizing a particular matter/s, he/she does not merely establish the state of legislative abstention or make a judgment to Parliament on the need for legislative intervention; he/she goes even further in filling the gaps caused by this legislative omission. Examples of this form are:

1. The Federal Court's decision of 31/7/2007 determined that the percentage of female quotas in the provincial court when they did not provide for the laws governing the elections of the provincial courts, which touched the constitution spirit and the purpose of constitutional provisions toward women, found a provision that would complement the laws in force relating to elections.
2. The Federal Court's decision on 21 April 2008 obliging the authorities to adopt the Syrian and Turkmen languages in areas where the population density of Turkmen and Syriac components for which there was no law to regulate, and the decision was a remedy to that legislative deficiency.
3. The Federal Court's decision on 5/2/2009 which included a rule regulating the work of the Council of Representatives when the President's office was vacant during the session, as no provision addressing this situation was included in the Council of Representatives' rules of procedure.

¹ Federal Supreme Court, Op. cit.

4. The Federal Court's decision of 11/8/2009 defining the concept of the parliamentary majority required to vote on the decision to waive immunity, when no one found a rule dealing with that situation.

5. The Federal Court's decision of 24 October 2010 which canceled the open session of the Council of Representatives, included an organizational procedure on how the Council of Representatives session would end, in case there was no consensus, as there was no provision in the legislation in force, the decision was like establishing a legislative rule, in an attempt to remedy the shortage by the Federal Supreme Court, in accordance with the objective of the constitutional drafter¹.

These are some samples of the applications of the theory of legislative omission and the control role of the Iraqi constitutional judiciary.

Conclusion:

The practices reviewed outside the constitutional rule have concluded that the Iraqi Constitution has created an environment that helps to produce practices within the scope of constitutional subjects, which are not based on its provisions, but which nevertheless proved to be acceptable by the governing parties. However, the realization of the acceptance of these practices is linked to the culture of the ruling political components, whether it is related to the idea of coexistence between these components and the requirements of achieving this coexistence, such as the sectarian quota in the state- administration, or what concerns the nature of the constitutional document, and what should be included in the provisions rules.

The legislative omission is also represented by the infringement of the rules of legislation by the legislature, which makes an implicit rule that constitutional provisions are not respected. This rule is a flagrant contravention of the provisions of the Constitution and must be accompanied by a verification of the constitutionality of laws.

This and other cases also open a broad section for other practices opens up a broad section for other practices, which requires that the provisions of this Constitution be reviewed, in the manner in which they are formulated, from the nature and orientation of the parties involved, to the way in which they are formulated and take into account the most governance and relationship between the authorities.

¹supreme federal court, court judgements and decisions, federal decisions, court website:
<http://www.iraqja.iq>

Sources

1. Ali Al Hilaly, the difference between constitutional and political reality, Euphrates magazine, issue 3, article published on the website of Euphrates Center for Development and Strategic Studies: <http://www.fcds.com/mag/issue-3-5.html>
2. Ali al-Shukri, Constitution amendment within necessity, personality and political approvals, Al-Jamaa al-Islamiya al-Najaf al-Ashraf, No.2, 2007.
3. Haidar al-Taey, Quota in the light of the theory of constitutional convention, a paper published in the Al-Multaqa magazine, Afaq Institution for Iraqi Studies and Research, 2007: <http://www.yuniv.net>.
4. A. Lijphart, Consociation and Federation: Conceptual and Empirical Links, Canadian Journal of Political Science / Revue canadienne de science politique, Vol. 12, No. 3 (Sep., 1979)
5. Ali Saad Omran, "competent authority to propose amending Iraq's constitution 2005," Journal of the political and Legal Sciences, vol.3, No.1, Babel, Babel University.
6. Hussein Daghbab Al-Sukini, controversial topics in Iraqi constitution amending and reviewing constitution, Al-Ghadir for printing, Basra, 2008.
7. Faiz Aziz Asaad, critical Study of the Constitution of the Republic of Iraq, Dar Al-Bustan Press, Baghdad; 2005.
8. Tareq Harb, is the occupation of sovereign positions of two national and two sects constitutional convention? Al-Sabah Iraqi newspaper, No. 930, Baghdad, 2006.
9. Salem Al Mousawi, the role of the Iraqi Constitutional Court in addressing the legislative gap, Al-hiwar Almutamadin website, 6/4/2013: <http://www.m.ahewar.org>
10. Federal Supreme Court, Court judgments and decisions, Federal Decisions Court Website: <http://www.iraqja.iq>
11. Abdul Hafiz Al-Shimi, Monitoring Legislative Omission in the Supreme Constitutional Court: a Comparative Study, Dar Al-Nahda Al-Arabiya, Cairo, 2003
12. Khaled Beljilali, The Legislator's passive Jurisdiction and Constitutional Oversight over it, a Comparative Study, The journal of the research professor (Al- Ostath Al-Bahith) for Legal and Political Studies, Issue 6, Year 2017.
13. Sura Harith Abdul Karim and Haidar Talib Al-Imara, Controls of Legislative Omission, a Comparative Study, Journal of the Faculty of Law / Nahrain University, Volume 21, Issue 4, Year 2019.
14. Abdul-Alaziz Mohammad Salman, Judicial Oversight on Deficiencies in Legislative Organization, Journal of the Supreme Constitutional Court, Issue 34, year 2019, website address: <http://www.sccourt.gov.eg>

- 15.Samir Dawood Salman, Legislative Omission and the Possibility to Impose Judicial Oversight in Iraq, Journal of the Faculty of Law / Nahrain University, Volume 21, Issue 4, 2019.
- 16.Haidar Mohammed Hassan Abdullah, addressing the abstention of the Parliament to exercise its Legislative competence, The magazine of Hillah investigator (Al-Muhaqiq Al-Hili) issue 4, vol. 7, 2015