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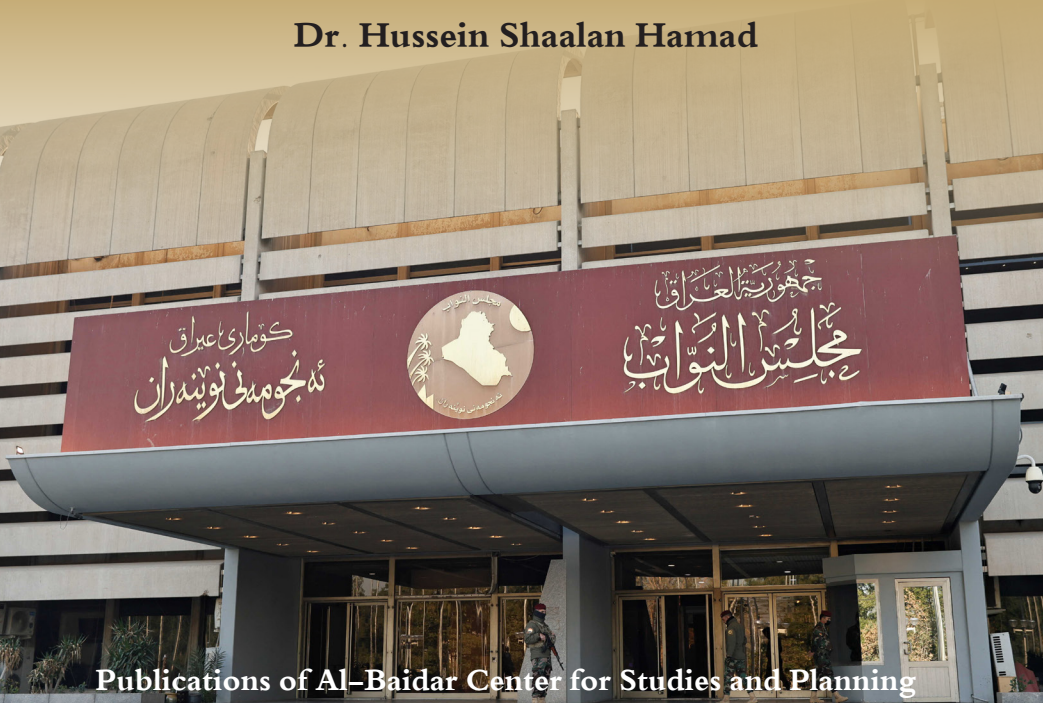
Al-Baidar Center For Studies And Planning



Research Paper

The Position of the Council of Representatives Regarding the Implementation of Some Decisions of the Supreme Federal Court

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Publications of Al-Baidar Center for Studies and Planning

Introduction

The decisions of the Supreme Federal Court possess the qualities of finality and binding force with respect to all authorities, pursuant to Article 94 of the Constitution of the Republic of Iraq for the year 2005. The term “finality” here means the decisions of the Court are conclusive and not subject to appeal before any other authority, including the Court itself. As for “binding force,” it is evident that this refers to the imperative of full compliance with the outcome of the Court’s decision, whether it concerns the constitutionality or unconstitutionality of a law. There may not be significant issues with adhering to rulings of constitutionality as much as with those ruling unconstitutionality, particularly regarding the boundaries, substance, timing, and both direct and indirect ramifications of such compliance.

Perhaps the foremost authority that should strictly comply with the decisions of the Supreme Federal Court is the Council of Representatives, as it is the body directly concerned both with constitutional oversight practiced over the laws it enacts, and with the absence of clear constitutional regulation concerning the fate of legal provisions ruled unconstitutional—whether they are abolished or their enforcement is merely suspended, which can create ambiguity requiring the intervention of the Council of Representatives. Despite the clarity and importance of these two attributes in implementing the Supreme Federal Court’s decisions and putting them into practice, the Council of Representatives is observed to be non-compliant with certain decisions of the Supreme Federal Court, which negatively affects the aforementioned qualities.

By surveying the practices of the Council of Representatives, among the cases of non-compliance with the Supreme Federal Court’s decisions for various reasons are: the Council’s insistence on adopting legal provisions similar or identical to those previously ruled unconstitutional by the Court; or the adoption of legal

solutions that entail more grave constitutional violations than previous iterations; as well as the Council's failure to repeal or amend legal texts that are equivalent to ones previously ruled unconstitutional; and finally, the Council's failure to act upon the content of Supreme Federal Court decisions which necessitate taking certain actions. The details and legislative applications of these practices will be outlined in three sections:

Section One: Enacting a Legal Provision Carrying the Same Constitutional Violations as the Previously Invalidated Provision

This scenario entails first the issuance of a Supreme Federal Court decision declaring a certain legal article unconstitutional, followed by the Council of Representatives enacting a new article that contains the same violations specified by the Court for unconstitutionality in the previous text. The ruling of unconstitutionality is not limited to abolishing the offending provision but also precludes it from being reconsidered among the Council's options for re-regulating the issue. The Supreme Federal Court has affirmed this point by stating: "The qualities of finality and binding force attached to the principles set forth in decisions and judgments of this Court prevent the Council of Representatives from enacting new laws or legal articles identical to ones previously ruled unconstitutional."¹

Nonetheless, the Council of Representatives may revert to adopting some of the previously invalidated legal solutions. The gravity of this increases as it neutralizes the authority of Supreme Federal Court decisions and strips the Council's new legislations of the presumption of constitutionality that underpins their application, in addition to the legal effects on state authorities and individuals obligated to apply these laws and the execution of the Supreme Federal Court's decisions. Furthermore, this situation requires the resubmission of the new legal text to the

1. Decision of the Supreme Federal Court No. 154/Federal/2021 issued on 30/11/2021

Court, involving efforts and resources to resolve an issue already adjudicated.

Moreover, this not only constitutes a simple error, but—if repeated after the constitutional defect has been clarified—becomes a deliberate violation. With reference to the Supreme Federal Court Decision No. 154/Federal/2021, if, for example, the Council of Representatives mistakenly enacted a provision contrary to the constitution, the second enactment amounts to deliberateness, as the constitutional parameters of jurisdiction had become clear, and thus it becomes impermissible to re-adopt the previously invalidated provision.

One application of this case is when the Council of Representatives enacted Article 10 of the Passport Law No. 32 of 2015, which deprived a citizen of obtaining a new passport for three months from the date of sentencing to a fine if he/she lost or damaged an effective passport more than once, despite a previous ruling by the Supreme Federal Court invalidating Article 10/ Fifth (j), Passport Law No. 32 of 1999 (repealed), which stipulated depriving a convicted person under Article 10(a) of obtaining a new passport for one year from judgment date, for violating the constitution.

The Court reasoned: “Deprivation here means preventing the Iraqi citizen from travel, which contradicts the freedom of movement guaranteed by Article 44/First of the Constitution, and may cause hardship for needs such as medical treatment or study, regardless of the absence of criminal intent.”²

Irrespective of the different deprivation periods, the reason for unconstitutionality identified by the Court also applies to the newer provision, as it results in depriving citizens of travel in direct contravention of Article 44/First of the Constitution.

2. Decision of the Supreme Federal Court No. 65/Media/Federal/2014 issued on 22/6/2014

Further evidence lies in the Supreme Federal Court's later decision to declare Article 10 of Passport Law No. 32 of 2015 unconstitutional.

Section Two: Failure of the Council of Representatives to Repeal or Amend Legal Provisions Equivalent to Texts Ruled Unconstitutional

This scenario arises when the Supreme Federal Court declares a specific legal provision unconstitutional, yet there remain in force other similar or equivalent legal provisions, with the Council of Representatives taking no action to repeal or amend them to remove similar constitutional violations.

The effects of a decision of unconstitutionality expand to impose a positive obligation on the Council of Representatives to purge the legal system of unconstitutional texts. These can be identified through the reasoning within the unconstitutionality decision, which clarifies the constitutional defect, and through the similarity of legal provisions between the ruled text and other operative provisions, obliging the Council to amend or repeal the equivalent texts to eliminate the constitutional violation, even if those texts were not explicitly included in the court's ruling.

Despite this obligation, in practice the Council of Representatives often ignores the need to amend or repeal similar legal provisions previously ruled unconstitutional. This results in the equivalent texts remaining in the legal system and being applied in practice, which constitutes a breach of constitutional supremacy and can cause harm to individuals that cannot be remedied, except rarely ³. Failure by the Council to act in this respect potentially strains the relationship between the Council and the Court by not fully engaging with or

3. Article (37) of the Internal Regulations of the Federal Supreme Court No. (1) of 2022 states:

"First: A ruling issued by the Court, in matters other than penal provisions, shall take effect from the date of its issuance, unless otherwise specified. Second: A ruling declaring the unconstitutionality of penal provisions shall take effect from the date the provisions subject to the ruling came into force."

enforcing the Court's decisions.

A prime example of this is the Council's failure to repeal legal provisions granting executive branch employee's judicial powers such as arrest and detention. The Supreme Federal Court, in its decision of 22/2/2011, ruled Article 237/Second of the Iraqi Customs Law No. 23 of 1984 unconstitutional as it granted the General Director of the General Customs Authority or his delegate the authority to detain suspects in certain customs crimes. The Court reasoned that the Director General is not a judge, thus rendering the provision in conflict with Article 37/First (b) of the 2005 Constitution ⁴.

If the abovementioned decision ruled the unconstitutionality of the referred article, the Court clarified this effect with respect to all legislative texts in laws or instructions—whether those texts were part of the pending constitutional case or not. This was established in its decision issued on 26/9/2012, in which the Court stated:

“Administrative unit heads are not judges affiliated with the judicial authority. The authority to investigate, arrest, or try individuals is exclusively entrusted to the courts; no other body is permitted to exercise these powers. Therefore, any text in a law, order, or instruction contrary to this is considered void pursuant to Article 13 of the Constitution and Article 87 thereof... Accordingly, based on Articles 13, 37/First-B, 47, 87 of the Iraqi Constitution of 2005, it is not permissible for anyone other than judges to exercise judicial functions, as these duties—after the Constitution came into force—belong exclusively to judges of the judicial authority. Anything to the contrary is considered void.” ⁵

4. Supreme Federal Court Decision No. 15/Federal/2011 issued on 22/2/2011

5. Decision of the Federal Supreme Court No. (66/Federal/2012) dated 26/9/2012

Despite the Court's clear stance on legal provisions granting judicial powers to executive employees, the Council of Representatives has failed to undertake actions to amend or repeal such provisions, despite their prevalence as a result of pre-2003 circumstances when the judiciary lacked true independence and court numbers were limited, which led numerous laws to grant executive employees judicial powers.

Evidence of the continuing validity of many equivalent legal provisions—contrary to the constitutional defect—lies in the issuance of nine decisions invalidating certain provisions that grant executive employees judicial powers such as arrest, detention, and adjudication: 2012/Federal/30, 2013/Federal/8, 2013/Federal/10, 2013/Federal/14, 2013/Media/81, 2013/Media/63, 2014/Federal/4, 2016/Media/12, 2016/Media/60, 2017/Federal/60.

Section Three: Failure of the Council of Representatives to Carry Out the Requirement of the Supreme Federal Court Decision

This case materializes when the Supreme Federal Court issues a decision of unconstitutionality against a provision due to legislative deficiency, and the Council then fails to rectify the legislative gap identified by the Court.

An example is the failure of the Council of Representatives to implement the Supreme Federal Court's decision regarding the number of seats allocated to the Yazidi component in the Council. The Court ruled that granting only one seat to the Yazidi component was unconstitutional as it was disproportionate to their population based on the 1997 census, considering the population growth rate by the time of the Court's decision in 2010.

“The Court ruled that the Yazidi component must be allocated parliamentary seats proportional to its population according to upcoming parliamentary elections, based on future national census results.”⁶ Despite the clarity of the decision and the need to increase Yazidi seats, the Council failed to comply in subsequent legislative interventions regarding election laws. Two election laws were enacted, three amendments passed, and three consecutive parliamentary elections conducted, yet no increase in Yazidi seats was enacted.

The negative impact of this failure is significant; it not only reflects a neglect of the Council’s duty to organize rights and freedoms based on the principle of equality but also shows failure to act on the requirement of Supreme Federal Court decisions regarding reorganization on specific grounds. The seriousness is aggravated by the lack of legal mechanisms enabling beneficiaries of the Court’s decision to compel the Council to rectify legislative deficiencies, especially after the matter falls outside the scope of the Court’s jurisdiction following a final decision.

Evidence of this is the fourth cycle Yazidi parliamentary bloc leader’s petition to the Supreme Federal Court seeking implementation of its previous decision (No. 11/ Federal/2010, issued 14/6/2010) in the 2022 elections, citing lack of implementation of the provision requiring Yazidi seat increases. The Court’s response was limited to reiterating its previous ruling and the binding effect of its decisions upon all authorities. (Supreme Federal Court Decision No. 78/ Federal/2019 issued on 28/7/2019)

6. Supreme Federal Court Decision No. 11/ Federal/2010 issued on 14/6/2010

Conclusion

It has been established that decisions of the Supreme Federal Court are final and not subject to appeal before any authority and are binding on all—be it the legislative, executive, or judicial authority. Despite the constitutional legislator's imposition of Supreme Federal Court decisions upon the Council of Representatives, as previously explained, the Council has been found to disregard certain judgments, and the instances of non-compliance vary depending on the direct or indirect obligations created by each decision. Three main patterns of non-compliance by the Council have been identified: the insistence on enacting legal provisions similar or equivalent to ones previously ruled unconstitutional; failure to repeal or amend equivalent legal provisions; and failure to enact the requirements prescribed by certain Supreme Federal Court decisions mandating specific action.

Given the Supreme Federal Court's critical role in the constitutional system and the necessity of full compliance with its decisions, it is essential that the Council of Representatives and its members have a thorough understanding and analysis of the Court's decisions, ascertain the resultant direct or indirect obligations, and track any changes in the Court's approach regarding previous principles—to ensure full compliance and proper implementation.

This situation highlights the need for designated bodies within the Council of Representatives dedicated to monitoring Supreme Federal Court decisions as they are issued, tracking the obligations and outcomes these decisions entail, and carrying out the legislative activities required in response.

Research Identity

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Note: The opinions expressed in this research do not necessarily reflect the views of the center, but only the opinions of its author.

About center

Al-Baydar Center for Studies and Planning is a non-governmental and non-profit organization established in 2015 and registered with the NGO directorate in the general secretariat of the council of ministers in Baghdad.

The center seeks to contribute to developing the state and its institutions, by proposing ideas and practical solutions to the main problems and challenges facing the state, including improving public sector management, policies, and strategic planning, using reliable data and best practices. The center engages the relevant authorities in the state with regular meetings to support this objective and utilizes the support of international organizations dedicated to assisting Iraq's development. The center also seeks to support economic reforms, and sustainable development and provide technical assistance to the public and private sectors. The center also seeks to support the development of the private sector to provide job opportunities for citizens through training and upskilling, in a way that reduces dependence on government institutions and contributes to supporting and diversifying the country's economy.

The center aims to utilize the vast amount of potential in Iraq's human resources by organizing programs to prepare and develop promising young people, including leaders capable of proposing, adopting and implementing visions and future plans that advance society and preserve its value-system based on the commitment to a high moral standard and rejection of all types of corruption.

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