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The Obligations of the Iraqi Federal Supreme Court in Safeguarding the Constitution in Force

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Abstract

Observing statutes constitutionality aims primarily at safeguarding the constitutional texts. This helps to confront the legislations that involve conflicting with these texts in compliance with the principles of the supremacy of the constitution. The alteration of constitutional texts in Iraq brings up the issue of the scope of the jurisdiction of the Iraqi Federal Supreme Court (henceforth the IFSC, for short) in terms of its confined duty to the texts of the Iraqi Constitution that was enacted in 2005. The scope of observation of the constitutionality of laws may be extended to the texts of the abrogated Constitution of 1970.

Keywords: Obligations, Iraq, Federal Supreme Court in, Constitution

Las obligaciones de la Corte Suprema Federal iraquí de salvaguardar la Constitución vigente

Resumen

La observancia de los estatutos de constitucionalidad tiene como objetivo principal salvaguardar los textos constitucionales. Esto ayuda

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a confrontar las legislaciones que involucran conflictos con estos textos en cumplimiento de los principios de la supremacía de la constitución. La alteración de los textos constitucionales en Iraq plantea la cuestión del alcance de la jurisdicción de la Corte Suprema Federal iraquí (en adelante, la IFSC, para abreviar) en términos de su deber limitado a los textos de la Constitución iraquí que se promulgó en 2005. El alcance de la observación de la constitucionalidad de las leyes puede extenderse a los textos de la Constitución derogada de 1970.

Palabras clave: Obligaciones, Iraq, Tribunal Supremo Federal, Constitución

1. INTRODUCTION

The concept of the legitimate state, in charge of safeguarding rights and freedoms, involves the state in which the rule of law is equally applied to the rulers and people at large. The effect of the prevalence of the rule of law should not include negative aspects leading to restrict the rights and freedoms, which might lead to exceed the role played by the constitutions and legislations that regulate and organize practicing these rights and freedoms in facing challenges and also any encroachments of them. (Ali, 2007)

The principle of the supremacy of law is based on very important foundations. First of all, the constitutions should be superior over all common and sub legislations. Also, the hierarchy of these legislations should be safeguarded in a way that secures the submission of lowly population to the upper authority. In fact, maintaining such a hierarchy would not be attained spontaneously or

voluntarily as the legal system of the state should adopt certain means and mechanisms that guarantee such supremacy. These means and mechanisms should commission a specialized authority to observe the constitutionality of the laws to ascertain the conformity of laws or draft laws with the texts of the constitution, or the abstention from applying the legislations that conflict with the constitution. (Hanna, 2011) The Iraqi Constitution of 2005 commissioned the IFSC to observe the constitutionality of laws. Such an authority represents an extension of the texts of the law of administrating the Iraqi state for the provisional period of 2004. Decree No. 30 of 2005 was issued to make clear the competence of the Court in detail. (Al-Shukry, 2016) The Iraqi Constitution of 2005 came as a result of abrogating the Constitution of 1970. It was also an inevitable consequence of the events of 2003 and the years following them. The issuing of two constitutions and the absence of oversight on the constitutionality of laws during the validity of Constitution of 1970, both brings forth matters worthy of research and discussion. One important factor is to define the role played by the IFSC in safeguarding the Constitution in force, or rather extending the Court's oversight, for legal reasons, to the abrogated constitution. There is no doubt that there are radical changes between the Iraqi Constitutions of 2005 and 1970. (Awad, 2003) This includes the shape of the state, philosophy of the political and economic systems, organization of the authority and its specialties, and also the rights and freedoms of the individuals. The idea of linkage between the two constitutions in constitutional rules should be ruled out due to their

contradictory causes and objectives and the foundations of oversight on the constitution. (Mahmoud, 2005)

This research paper seeks to follow up the judgments and rules of the IFSC to ensure its protection of the Constitution in force. The paper will be divided into two parts, the first will tackle the IFSC's commitment towards the constitution; the second will be about the extension of the IFSC's jurisdiction to the abrogated constitutional texts. Observing the constitutionality of laws represents one of the most important specializations entrusted with the IFSC according to the rules of the Iraqi Constitutions of 2005. In this context, it is a judicial observation following the issuing of the law and its validity. This is similar to the judicial observation systems over the constitutionality of laws in most constitutional systems. (Al-Sha'er, 2005). The scope of the IFSC's oversight of the constitutionality of laws extends to include the laws and regulations in force under the Constitution. This scope encompasses all legislations in force prior to the Constitution of 2005 unless they are abrogated or amended according to Article No (130) of the Constitution of 2005.

It is worth mentioning that the validity power, referred to in Article No. (130) does not mean immunizing these legislations against the IFSC's oversight. Some Egyptian juristic points of view have been examined. Such views support the right of the constitutional judicature to oversee the constitutionality of former legislations, for such oversight seeks to protect the Constitution in force as these rules enjoy a commanding quality. (Kamel, 2017)

On the grounds of what has been said, the IFSC's judgments have recurred with the aim of stressing its role in safeguarding the texts of the Iraqi Constitution of 2005. The following are some of these judgments that represent samples of the Court's judgments issued in accordance with its observational specialty regarding the lawsuits for which appeals have been lodged against some laws issued before the Constitution of 2005 has become valid, and as follows:

A. the IFSC's judgment of lawsuit No. 65/Federal/2014:

The IFSC took a decision on the non-constitutionality of Clause (c) of Item (5) of Article No. (10) Of the Passports Law No. (3) Of 1999, which conflicts with the laws of Article No. (44/First) of the Iraqi Constitution of 2005. (Al-Ghazali, 2017)

B. the IFSC's judgment of lawsuit No. 60/Federal/2017.

The IFSC decided that Paragraph No. First, (Clauses 1-4), of the abrogated Revolutionary Command Council, No. (296) of 1990 is non-constitutional. These clauses conflict with the laws of Articles (37/First/1) and (12/ First) of the Iraqi Constitution of 2005. (Mohamed, 2019)

C. the IFSC judgment of lawsuit No. 108/Federal/2020.

This judgment is one of the relatively recent judgments in comparison with those already undertaken. In this respect, the IFSC decided that Article No. (97/1) of the Municipalities Administration Law No. (65) of 1964 is non-constitutional as far as it is concerned with the private property of real estates, for it conflicts with the laws of Article No. (23) of the Iraqi Constitution of 2005. It is worth mentioning that the IFSC has dismissed appeals related to the non-

constitutionality of some of the laws issued prior to the 2005 Constitution. It further has stressed that these laws do not conflict with the Constitution. An example of this is the IFSC's decision about lawsuit No. 67/Federal/2014, based on the constitutionality of Article (2/1) of the abrogated Revolutionary Command Council, No. (42) of 1995 as it does not conflict with the laws of Articles (19/Third) and (47) of the Iraqi Constitution of 2005. (Akel, 2018)

Such laws make it clear that the IFSC has expanded the scope of its oversight on constitutionality when it passed a judgment on the non-constitutionality of certain legal texts issued before the Constitution of 2005 has become valid, emphasizing that the constitutional texts in force rule over previous, but abrogated rules, and enjoy supremacy. Besides, the Constitution in force incarnates principles and sources that differ, both naturally and basically, from the abrogated constitutional texts. A question may be raised here on the IFSC's competence to look into the abrogated laws. This question is dictated by the assumption of the promulgation of the law during previous constitutions, and then its abrogation according to the Constitution of 2005. The answer for such question is found in Article No. (93/First) of the Constitution which defines the IFSC's competence in observing laws and regulations in effect. Therefore, there is no justification to extend the IFSC's jurisdiction to include the abrogated legal texts. (Al-Ghazali, 2017)

1. Some of the judgments undertaken by the IFSC

It has already been pointed out that the IFSC has resorted to the texts of the Constitution of 2005 in passing judgments related to

the oversight on the constitutionality of laws passed prior to the Constitution of 2005. The IFSC, however, has then adopted, in some of its judgments, a new approach that contradicts altogether with the principles already indicated. The following are some of the judgments undertaken by the IFSC:

A. The IFSC's judgment of lawsuit NO. (21/Federal/2009).

The IFSC judged, in this particular lawsuit, of the constitutionality of the abrogated Revolutionary Command Council's judgment No. (775), dated 6/12/1989 on the confiscation of real estates owned as a private property by a certain person. The IFSC turned down the case judging that the abrogated Revolutionary Command Council's judgment does not contradict with the texts of 1970 Constitution, and also 2005 Constitution, especially Article (23). (Mohamed, 2019) This decision bears the IFSC's candid reference to the Constitution of 1970. In fact, it has sought to connect the two constitutions when it exercised its jurisdiction over laws and regulations in effect before the promulgation of the Constitution of 2005. It has so equaled between the two constitutions under its oversight over the constitutionality of a case related to the right of private property specifically Article No. (23). It is worth noting that the plaintiff, in the fore-mentioned lawsuit, has, in his pleading, rebutted the judgment of the abrogated Revolutionary Command Council No. (775), dated 6/12/1989 of the Constitution of 1970. (Akel, 2018)

B. The IFSC's judgment of lawsuit No. (10/Federal/2009).

The IFSC judged on this lawsuit on the non-constitutionality of the verdict of the former President of the Republic of Iraq No. (67), dated 31/7/2001 which included the partitioning of part of an owned plot of land, distributing it to the coparcenary and then registering it by the name of the defendant without the permission of the other partners. In this respect, the IFSC judged that "this partitioning is a way of confiscating the right of ownership of a property....It contradicts the texts of the Temporary Iraqi Constitution of 1970 under whose validity the appealed verdict was promulgated, and also the texts of 2005 Constitution in effect. As the republican verdict is still in force, and due to its contradiction with the rules of Article (16) of the Temporary Constitution of 1970, and Article (23) of the Iraqi Constitution of 2005, it therefore conflicts with the constitutional legitimacy that must be found in all legislations. The IFSC has therefore decided to abrogate the verdict No. (67), dated 31/7/2001" (Mohamed, 2019)

The IFSC has therefore counted on the abrogated Constitution of 1970, besides the Constitution of 2005, as a basis for its rules. Also, it has been clear for us that this judgment is connected with the judgments already undertaken as to their linkage with the right of ownership and other rights branching from it. One may question the criteria and principles that the IFSC has adopted in formulating these judgments in a way that led to shake the stability of dealings and affected the legal positions of persons, which were settled for many decades. (Al-Ghazali, 2017)

It is worth pointing here to the criteria, principles, and justifications that prompted the IFSC to promulgate such judgments as follows:

1. Giving priority to the principles of fairness, equity, and sacrifice over other principles. The IFSC seeks also to protect the right of ownership and related rights in facing non-constitutional decisions undertaken under the Constitution of 1970.

2. The constitutional texts, primarily, do not have a retroactive effect where cases were settled down before the Constitution of 2005 came in force. (Mohamed, 2019)

3. Contradicting the constitution was part of the substantive aspects of legislation and not its formal aspects. The IFSC has instituted its judgments, in this respect, on contradicting the laws stated in the constitution without basing them on the formalities, to enact and promulgate legislations as, for example, the provisions for the convention of the parliament sessions or the majority required to vote for the draft laws. (Akel, 2018)

Researchers in Iraq, however, do not show interest to discuss and analyze this matter, although the IFSC has based its judgments on it in an attempt to arrive at legally successful solutions of the alternate constitutions, represented later by the issuance of the Constitution of 2005. (Awad, 2003) Conversely, the researchers in Egypt paid due attention to such a matter. Many of them, in fact, stressed that the constitutional judicature should recall historical facts and established values in the society in order to cope with the pleas of non-constitutionality. Besides that, the laws and regulations issued under

the old constitution, and continued to be valid under the new Constitution, are subject, in terms of their legitimacy, to the two constitutions. The constitutional judicature therefore is probing the contraventions that may show up from both constitutions. (Al-Mur, 2003)

Such a point of view is based on a solid basis as it goes in line with the values of justice and sound legal logic. The congruity of legislations to the texts of the constitution is an unquestionable matter. Also, stipulating such a congruity is required and postulated under the constitution where the legislation is issued. Moreover, it should continue in case the constitution is abrogated or amended.

The question to be raised here is concerned with the possible availability of judicial judgments, both previous and subsequent, to what the IFSC has passed under other constitutional systems. Answering such a question motivates us to explore the judgments of the constitutional judicature in Egypt, as it is one of the oldest constitutional systems in the region. (Awad, 2003)

The Supreme Constitutional Court in Egypt judged in lawsuit No. (48) of (1932/Judicial), dated 5/5/2018 by dismissing the lawsuit related to the non-constitutionality of the text of Article (1) of law No. (56) of 1954, as there is no contradiction with the texts of the Constitution of 1971 and the Constitution of 2012. The Court's decision states that " ... whereas monitoring the constitutionality of laws as to their congruity with the substantive rules included in the Constitution, and the common procedures of this Court's judicature, is subject to the Constitution in force and to any other body, such

monitoring aims at safeguarding the Constitution and protecting it from violating its judgments, this Constitution would not have a retroactive effect. It is therefore a prerequisite to apply the judgments of the previous constitution under whose judgments the appealed law has been promulgated...."(Mohamed, 2019)

The Court stressed that it turned to the rules of the abrogated Constitution of 1971 regarding the same judgment. It indicated that " ... whereas the Constitution of 1971 has identified, in Articles (38) and (119), corresponding to Article (26) of the Constitution of 2012, the regulating and governing rules of imposing the tax Therefore, it does not contradict the texts of Articles (38) and (119) of the Constitution of 1971, corresponding to Article (26) of the Constitution of 2012." (Akel, 2018)

The Egyptian Supreme Constitutional Court has also passed a judgment regarding lawsuit No. (70) of (1935/Judicial), dated 25/7/2014, of the non-constitutionality of Article (123) of the income tax law enacted according to Law No. (91) of 2005. The Court's decision states that ... whereas it has been decided that oversight of the constitutionality of laws and bills as to their congruity of the substantive rules included in the Constitution aims at safeguarding the Constitution in force and protecting it from any violations of the judgments it has undertaken, and that the texts of this Constitution always represent the rules and sources that constitute the foundation of the public order, and they are at the forefront among the rules of the public order that should be complied with and adhered to, and ignore any legislations that conflict with them, being the highest commanding

rules. As a result, the Court will start its observation of the appealed text based on the laws of the Constitution issued on 18/1/2014 as the constitutional documents that govern the current dispute. (Al-Ghazali, 2017)

On the grounds of what has been said, it is observed that the Supreme Constitutional Court has adopted two diverse tendencies. On the one hand, it brought together the Constitution of 1971 and the Constitutions that were adopted after it, basing its judgments on the valid Constitution, on the other. (Mohamed, 2019)

It is now clear that there is an approximation in the judgments of constitutional judicature in Egypt and Iraq in terms of protecting the effective constitutional texts or resorting to the abrogated constitutional texts according to the nature of the dispute. Also, it has already been pointed out that the Supreme Constitutional Court in Egypt has engendered its judgments in a way that contributed in bringing out the pretexts of the Court in turning to the abrogated constitutional texts in case the dispute is concerned with the substantive aspects and not the formal aspects whereas engendering was absent in the judgments of the Supreme Federal Court. (Ali, 2007)

2. CONCLUSION

1. The IFSC has expanded the scope of its oversight over the constitutionality of the laws and regulations in effect and issued before the Iraqi Constitution of 2005 came into effect.

2. The IFSC worked hard, in its examination of the scope of constitutionality, to bring together the abrogated Constitution of 1970 and the Constitution of 2005. This tendency was represented in the appealed lawsuits on the right of ownership and the rights branching from it, as the constitutional organization of the right of ownership is congruous in both Constitutions. Such judgments contributed in implementing justice, fairness, and restoring rights to the people concerned. The Court, moreover, was not confined to safeguard the texts of the constitution in effect alone.

3. The abrogated laws and regulations enacted before the Constitution of 2005 should not oversee the constitutionality of laws.

4. The IFSC has instituted its oversight over the constitutionality of laws and effective regulations issued prior to the Constitution of 2005 on examining the substantive aspects of legislations under observation and not the formal aspects of these legislations.

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