

## The role of constitutional diligence in addressing legislative omissions (Comparative study)

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### *Abstract*

*The devotion of the legal security principle as the basis for the constitutional judge's work is a new tendency to address the constitutional response to the idea of legal security. The circle of this principle is completed to serve as the basis for the work of all the executive, legislative and judicial authorities. Since the legislative branch is required by the norms of legislation and the principle of legal security in its industry, constitutional norms are a source and reference for legal security. However, assurance of the constitutional norms of the legislature is not achieved unless it is clear and inconsistent. Legal security is achieved in those who address legislation clearly. Legislative texts must also be assured. Only the legislature is obliged to avoid the lack and ambiguity of its drafting of legislative texts so as to facilitate their application.*

*Keywords: Constitutional Diligence, Legislative Omissions, Legal Security, Constitutional Judge.*

### **1. Introduction**

The statement said that the principle of legal security is adopted as the basis for the work of the constitutional judge is one of the fundamental subjective restrictions on his authority, which explains the trend of most constitutional legislators towards dedicating the competence of constitutional oversight at its core; convinced of the vitality of this oversight to achieve legal security by ascertaining the extent of Parliament's fidelity to the Constitution, which does not exist and has no continuity, unless the community reassures him, otherwise constitutional oversight, especially in its judicial form, would not have become one of the main pillars in the arteries of the modern state of law, but the legislator has he neglects to exercise his legislative competence in the first place and overlooks the regulation of matters entrusted to him by the Constitution to regulate or seeks to regulate Is it possible for the constitutional judiciary to exercise its constitutional control in these cases, if it fails to choose the

appropriate legislative wording, and sometimes it organizes part of the issue and leaves the regulation of the other part of it? is it possible for the constitutional judiciary to exercise its constitutional control in these cases And if he can exercise it, what is the philosophical basis for that censorship The fact that the legislator has the discretionary power, which has led some to make everything issued by the legislator a legislative option, cannot be asked about the issues that he did not regulate, but the adoption of the legislative option of the legislator strips the constitutional texts of their content, so what is the use of constitutional texts directing the legislator to regulate a particular issue , As the Legislative omission, whether in whole or in part, is undoubtedly detrimental to legal security because it undermines the confidence of individuals in the constitutional provisions for fear of individuals not applying them, as well as their confidence in the legislative authority, which is supposed to be the source of security for individuals through the protection and regulation of their rights and all their positions through the laws it issues.

## **2. Role of Constitutional Jurisprudence in Addressing the Total Legislative Omission**

First of all, before delving into the treatment of legislative omission, whether in whole or in part, it is necessary to explain what is meant by this omission and to indicate what are the reasons that lead the legislator to that omission, and then to indicate the role of constitutional diligence in addressing the total omission, and this we will explain in the following purposes.

### **2.1. Definition of legislative omission.**

Legislative omission is defined as: “the legislator deliberately or negligently refused to regulate a matter within his competence, thereby violating the constitutional guarantee of the subject of regulation” It follows that legislative omission is a violation of the legislator's legal obligation, whether the regulation of this issue is within his absolute or relative authority, and one of the types of legislative omission is total legislative omission or legislative silence, which means the unwillingness of the legislator to issue a specific law regulating one of the rights or freedoms guaranteed by the Constitution, which is the case of the complete absence of legislation or the relevant legal norm with the presence of a constitutional order obliging the legislator to intervene in the legislation, and the control of total omission does not raise any legal or doctrinal problems in legal systems that have expressly agreed to control absolute legislative omissions, the legislative omission has several reasons, some of which are CF There are other reasons beyond the will of the legislator (Ali,

2022) , including the lack of clarity of the principle of separation of powers, as the legislative authority remains unaware of its competencies, which leads to its reluctance to exercise many of those competencies (Al-Shimi, 2008).

## 2.2. Relation between the legislative omission and the legislator's discretion.

The legislative power is the means of formulating the public policy of the State, regulating social ties and determining the relationship of governors with the governed, and most doctrinal studies go to recognize the release of the discretion of the legislator ", considering it the basis of its work and the limitation to be the exception, and from the definitions that came to indicate the discretion of the legislator made it" the freedom of the legislator to regulate or not to regulate a topic and his freedom to trade between alternatives and options for legislative regulation without imposing on him a course of action of its own that he must follow or provide specific guidance to be bound by ". Since it is the legislative power represented in Parliament that exercises the process of enacting laws on the basis of the so-called When regulation is limited exclusively to Parliament and the Constitution forbids Parliament from delegating this competence here, it is considered that: (absolute legislative unilateralism), either if the Constitution provides for the regulation of a matter in accordance with the law or on the basis of a law here called (relative legislative exclusivity), the Constitution allows the executive to regulate certain aspects of the matter (Mahdi, 2021).

## 2.3. Role of the constitutional in addressing total legislative omissions.

The philosophy of constitutional judiciary is based on constitutional oversight and not adequacy control as a general principle, and it is constitutional control not to discuss the adequacy, motivation or needs of legislation However, the absence of legislative policy means that the legislature loses the possibility of setting objectives because of the lack of capacity to recognize social, political and economic realities. Thus, the legislative product will be insufficient to recognize this reality and the relationship between the legislature and the social reality is disagreed with. Some argue that constitutional censorship violates the legislator's discretion and leads to the replacement of the legislator by the judge, stating that one of the objectives of the control of the legislative omission is to achieve the justification of the principle of separation of powers in terms of the benefits of the division of labor, good governance, the preservation of freedom, the prevention of authoritarianism and the achievement of the rule of law, Guaranteeing the principle of legality, and in our view this trend is unacceptable because this would lead to abuse of these powers by legislators as well

as their infringement of the same rights and freedoms ( Abd al-Rahman and Yassin, 2019).

A part of the jurisprudence also considers that there is no doubt that the scope of the Constitutional Court's action is broad and not unlimited. The Court can destroy the breach of the Constitution established by Parliament. But she certainly can't set up unless the parliament itself does. s total omission and justified the fact that the legislature could not ignore constitutional principles by invoking its discretion. Absolute silence on the part of the legislature was contrary to the Constitution and violated the principle of cooperation between the authorities, This undermines democracy itself and leads to the tyranny of a State organ over rights and freedoms. This affects the Constitution itself, because it is not merely deaf texts but needs actual activation or translation to achieve its intended purpose and directly undermines the legal security of the rights and freedoms guaranteed by the Constitutional legislature. The Supreme Constitutional Court, through which it monitored the lawmaker's silence on the intervention to regulate a matter that has become regulated by an international obligation under an international convention concluded by Egypt, and which it is incumbent upon the legislator to intervene to enforce its provisions, is the question of Egyptian nationality and the entitlement of minor children of a foreign mother who has acquired Egyptian nationality according to their mother and the force of law, Like the foreign father who acquires Egyptian nationality, the court affirmed that the legislator's failure to amend the text of article 6 of Act No. 26 of 1975 would violate the Constitution. Legal security was destroyed in the event of the legislature's lax implementation of the provisions of the Constitution (Al-Najjar,1997).

If we went back to the 2005 Iraqi Constitution, we would have found that it was full of referrals to the ordinary legislator to regulate various issues without specifying a certain time for that. And this is not entirely compatible with the requirements of legal security, because more time has elapsed since the legislation of the Constitution and the legislature still does not care about the importance of the legislation required by the legal structure of the State. In our view, the legislature has completely omitted many laws of paramount importance, including the law on the establishment of the Council of the Federation. The Constitution stipulates that a Legislative Council called B shall be established. (The Federation Council) includes representatives of the irregular provinces and governorates of a territory and regulates its composition, the conditions of membership, its competence and everything related to it by a law enacted by a two-thirds majority of the House of Representatives (Mahdi, 2021).

According to article 137 of the Constitution, the legislation of this Act has become necessary, "The provisions of the articles of the Council of the Federation shall be postponed wherever they may take place in this Constitution until a decision of the House of Representatives by a two-thirds majority after its first election session after the entry into force of this Constitution". The legislator has not also issued a law regulating the public freedoms contained in Article (38) of the Constitution on freedom of opinion and expression, freedom of the press, printing and advertising, Freedom of Assembly and peaceful demonstration, "although a period has passed" ( Abd al-Rahman and Yassin, 2019).

As for the Iraqi Supreme Court's situation on constitutional oversight of legislative omissions, we believe that it has renounced its fundamental role in controlling the legislative refrain from constitutional duties. In many of the provisions, it is stated that the law is a legislative option or that it is irrelevant for Parliament to compel total legislative abstention in some of its decisions to establish that the abstention of the legislature is not subject to constitutional scrutiny.

Another contribution to the disruption of the provisions of the Constitution itself is the judgment of the Federal Supreme Court in case No. (105/Federal/2019) When the First Amendment Act to the Provincial and District Council Elections Act No. 1 was challenged (12) For 2018, which terminated the work of provincial and district councils, instead of requiring Parliament to enact a law dealing with the situation of disruption of the article (122) of the Constitution on Provincial Councils as an application of local democracy and as an imperative for the supervision of the Governor and the provision of local services to citizens has been justified in order to justify its position that it has no competence to control the electoral law contrary to the law of the governorates (Mahdi, 2021)..

### **3. Role of Constitutional Jurisprudence in Dealing with Partial Omissions.**

The legislator may endeavor to regulate matters which are authorized by the Constitution to be regulated in an inadequate manner, thereby rendering such regulation unfulfilled for its purposes. Consequently, the matter remains by virtue of the unregulated nature of the matter. The role of the constitutional judiciary in addressing such deficiencies is reflected in the principle of legal security by laws passed by the legislature.

### 3.1. Concept of legislative deficiency.

Legislative deficiencies are due to a shortage of aspects of the topic in question, thereby limiting its effectiveness, defined as "A gap in law prevents the proper exercise of the constitutionally guaranteed right", or that "The legislative gap resulting from the legislature's non-compliance with the explicit constitutional obligation to intervene to make constitutional norms effective" and was defined as "legislation insufficient to deal with issues well in terms of regulation". The legislative deficiencies have several reasons, including (Hamad, 2020):

A. The legislative text regulates a developed and limited society and the limitations cannot be complete in the face of infinite confrontation. Thus, the legislation is unable to keep pace with and keep pace with the continuous development in the life of the society in which it is applied.

B. The legislative text is a human condition. Humanitarian acts are inadequate. No effort can be made by the legislature to conceive and absorb all future situations that may occur later after the enactment of legislation. Human legislation must be inadequate and incomplete (Al-Nweji, 2008).

### 3.2. Philosophical basis for monitoring the constitutional elimination of legislative deficiencies.

The positions of jurisprudence on the deficiencies of legislation and the perfection of legislation varied between supporters and opponents, so the trend went to the idea of the perfection of legislation, which means that the legislation is complete and there is no shortage of it, as it absorbs everything that is required of it and includes solutions to all the issues that are put to the judge and finds what he wants, the idea of the perfection of legislation was based on two theories, namely the theory of legal free space and the theory of the general rule of prevention, the theory of legal free space goes to the permissibility of dividing the activity of individuals into two parts, one of which is governed by legal rules and is called the full section (Al-Zarif, 1953), As for the second section, the activity of individuals in it is free and is called the empty section, when an individual conducts behavior belonging to the full section was of importance, and if he belongs to the empty section, it does not have legal significance, as it is not governed by legal rules, and therefore, according to this theory, there can be no shortcomings in legislation, the philosophical basis it surrounds all its aspects in a way that leads to a violation of the constitutional guarantee of the right in question of regulation, and if one of the rights or freedom of This violation must be addressed through judicial supervision because the legislator's interference in the regulation of a particular right must be integrated with all aspects of

the constitutional guarantees of this right because if he fails, this would reduce the constitutional protection of this right in violation of the Constitution, in addition ( Salman, 2019), when the constitutional judge monitors the positive activity of the legislator and contrary to the Constitution, it is a first step that he can monitor the legislative shortcomings. The philosophy of control over the constitutionality of laws is based on the element of stability of legal norms and legal centers and the expected stability is not absolute stability, but relative stability over a reasonable period of time, because the absolute stability of legal norms is contrary to changing political, social, economic, technological conditions; etc.. Because of this development, because deficiencies will lead to repeated treatment of it and thus affect legal security, the Egyptian Constitutional Court initially hesitated on the issue of monitoring legislative deficiencies, as it considered the failure of the legislator to regulate one of the topics such as expedients that the legislator is independent in its discretion, but it changed its direction and changed its policy in the face of legislative deficiencies and began its full control over what the legislator failed to regulate, considering that minor regulation in itself constitutes a constitutional violation ( Azawi, 2010). The Egyptian constitutional judiciary, starting from the Supreme Court through the Supreme Constitutional Court, has settled on the unconstitutionality of legal texts that overlooked the principle of non-retroactivity of laws on the past because it is a principle stipulated in the core of the Constitution, as it stated in the grounds of one of its decisions that (the principle of non-retroactivity of laws on the past)... The acts in which the defendants were convicted occurred within a year 1971 before the issuance of the law no. (33) For a year 1978 on the protection of the home front and social peace, which was effective from the date of its publication on 30/6/1978. therefore, the criminal punishment contained in Article V of the law referred to in item (a) thereof was imposed on an act prior to the entry into force of the law that decided it in violation of the two articles in the Constitution, which must be ruled unconstitutionality...) (al-Shimi, 2008).

The Iraqi legislature has seen the extent of legislative turmoil in many laws, including the Amnesty Law No. (27) For the year 2016, which was contingent on political attractions between the Government's desire to exclude certain serious crimes from amnesty such as terrorism, kidnapping, administrative and financial corruption, among others, and the support of some members of Parliament, as well as the rejection by parliamentary blocs that insisted that such crimes be covered by amnesty, the provisions of the Act were not strictly clear because it did not specify the exact description and the mechanism of the enforcement of the amnesty. However, it implicitly recognized the necessity of amending the law under the Amnesty Amendment Bill and

this is an implicit reference to a lack of regulation that the legislator should pay attention to and avoid.

#### **4. Images of the Treatment of Legislative Omissions.**

The constitutional judiciary's treatment of the legislative omissions in its whole and partial types is highlighted by the first two means of bilateral treatment through cooperation between the constitutional judge and the legislature and the other unilaterally by the constitutional judiciary. This will be explained in succession.

##### **4.1. Bilateral treatment of legislative omissions.**

The bilateral treatment of legislative omissions is in several ways.

A. Revealing Rulings: The role of the constitutional judge here is to detect the omission and the legislative power addresses it. This means, although it perceives the constitutional judge as a passive legislator, who cannot replace the legislature but must play a creative role by using legal technical means to limit his power to avoid clashing with the legislature. Here, the constitutional judge's role is limited to disclosing the existence of a case of legislative omission, which is one of the weakest forms of censorship.

B. Public Censorship: Here the constitutional judge declares the unconstitutionality of the legislative omission. This is what the German Supreme Court has adopted. That is, the judge's role is only to declare unconstitutional and does not include a directive to address the omission (Abd al-Rahman and Yassin, 2019).

##### **4.2. Individual treatment of omissions and legislative deficiencies.**

The Constitutional Court adopts other forms of addressing the legislative omission, namely, individual treatment. but also addresses the legislative omission by either ruling the implicit legal text unconstitutional, or prolongs and extends the explicit legislative text on silent cases, i.e. replaces the legislature that refrains from addressing omissions and makes a supplementary judgment, as in the case of the host judicial interpretation, the first two facets of which are the invalidity of the unqualified and unconstitutional legislative text. And the other is the reconstruction or formation of this abolitionist text by adding the anonymous rule so that the censorship text is in conformity with the Constitution and thus protects legal security ( Amran, 2012).



## 5. Conclusion

The study demonstrated the existence of a legislative omission, whether in whole or in part, directly affects legal security. Legal security is the first social value in each healthy society. This requires that the legal rule has an external form or appearance so that the legislative structure ensures the protection of individuals and the immunity of them in order to obtain their rights.

In light of these results, we propose some recommendations that are directed to researchers interested in the field of constitution, the constitutional judge must exercise his role in dealing with legislative omissions, whether in whole or in part, since the judge does not play his role in protecting legality if the legislator fails to regulate legal rights and centers and his role is broader than to alert the legislator to avoid omissions.

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Journal of Namibian Studies, 33S1(2023): 1181–1190 ISSN:2197-5523 (online)

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