Abstract

Constitutional review usually focuses on the positive actions of lawmakers in relation to enacted legislation. However, can constitutional violations arise out of the negative actions of the lawmakers? This situation may be called "legislative omission" which happens when the lawmakers breach their duty to enact laws required by the constitution. If the negative actions of lawmakers can cause constitutional violations, how can this kind of violations be reviewed? The constitutional judiciary may adopt this mission in some countries as a kind of constitutional review, and some other countries regulate specifically the method of practising this monitoring. However, recognising and monitoring this kind of constitutional violation is still relatively new and even identifying this problem is still not clear enough. Thus, this thesis is an attempt to clarify this legal phenomenon deeply by studying several issues related to its definition, types, and identifying the reasons which cause it, on one side. Then it is an attempt to examine the role of the constitutional judiciary to remedy this problem, the kinds of decisions which may be issued by judges in this context and how can this kind of monitoring be justified, on another side.

Declaration 1

I confirm that this thesis "**The Monitoring of Legislative Omission by the Constitutional Judiciary a Comparative Study"** is my own work and the use of all material from other sources has been properly and fully acknowledged.

ABDULHALEEM MOHAMMED

Declaration 2

I confirm that I have used a third party for proof-reading and I declare that the proof-reading did not compromise my authorship of the work submitted and the substance of work remains my own work.

ABDULHALEEM MOHAMMED

Certificate

This is to certify that the thesis entitled "**The Monitoring of Legislative Omission by the Constitutional Judiciary a Comparative Study"** has been prepared under my supervision by Abdulhaleem Qasim Mohammed for the Degree of Doctor of Phelosophy in Constitutional Law and Legal Theory in the School of Law, the University of Reading.

Dr Stuart Lakin
Associate Professor in Law, Law School Careers Advisor
School of Law, University of Reading
Foxhill House, rm. 1.20, Whiteknights Road, Earley
Reading RG6 7BA, United Kingdom
Phone: +44 (0) 118 3784534
Fax: +44 (0) 118 378-4543
Email: S.J.Lakin@reading.ac.uk
Web: https://www.reading.ac.uk/law/about/staff/s-j-lakin.aspx
SSRN: http://ssrn.com/author=1460618

Acknowledgement

I would like to dedicate this thesis to my mother and my wife. These two women have the most positive influence on my whole life because of their unconditional love and support. I also would like to thank many people who supported me during my study at the University of Reading. First of all, I would like to provide a special thanks to my supervisors, Dr Stuart Lakin and Dr Dimitrios Kyritsis, for their guidance, valuable advice and all their useful comments. They supported and helped me throughout the research and writing this thesis which would never be in this academic form without their supervision throughout my study. I would also like to thank Professor Paul Almond and Professor Alina Tryfonidou for their valuable comments during the confirmation of registration and academic monitorings. I would like to extend my thank to Professor Thérèse Callus, Elizabeth Wyeth and Sarah Brown for their administrative support over the years. I also would like to thank Professor Aleardo Zanghellini and Dr Michael Gordon for all their helpful discussions and amendments during the viva. My study would never have been possible without the generous funding award that I received from the Ministry of High Education and Scientific Research in Iraq through their ambitious programme to improve the high education in Iraq; thus I would like to thank all workers in this Ministry for all their hard work. Moreover, I would like to thank the staff in the Iraqi Cultural Attaché office in London for their administrative support to minimise the difficulties Iraqi students have faced during their studies abroad. I would also like to thank my fellow PhD colleagues in the School of Law at the University of Reading for their support and for all the great times that we have shared. I am particularly thankful to Ana Cannilla, Shweta Band and Dr Stephen Samuel. My thank should extend to my cousin Abdulah Auad, my brother in law Mohammed Hummood and my younger brother Mohammed for all their kind support. Finally, I would like to mention the warm and natural environment of the University of Reading Campus which was a great way to release from feeling stressful because of the study.

Glossary of Acronyms

The Supreme Federal Court in Iraq…….. SFCI
The Iraqi Federal Council ……..… FC
The Coalition Provisional Authority in Iraq……..… CPA
The Iraqi Governing Council ……..…IGC
The Law of Administration for the State of Iraq for the Transitional Period…… TAL
The National Assembly in Iraq …… NA
The Iraqi Interim Government ……..... IIG
The Supreme Constitutional Court in Germany ……..... SCCG
The Supreme Federal Court in Brazil ……...…….. STF
The unconstitutional Suit due to Omission …….…..... ADIo
The Act of 2011 on the Constitutional Court of Hungary ……..…. CLI
The Act of National Referendum in Hungary …….…….…….. ANR
The Supreme Constitutional Court in Egypt ……..……. SCC
The European Convention of Human Rights …...…… ECHR
The European Court of Human Rights…….. ECtHR
The Supreme Court of Appeal in South Africa ……. SCA
The Constitutional Court of South Africa ……. CCT
The Supreme Court in India …….. SCI
The Human Rights Act in the UK 1998 ……..…HRA

Contents

Introduction

In most cases, especially in new democratic systems, the legislature is controlled by some political parties who, for the most part, have differing ideological standpoints. The question of the extent to which they can agree to enact laws on significant matters concerning the systems and structure of the government and the state institutions - or the regulation of a particular matter which the constitution stipulates should be referred to the legislature - is something that can be difficult and complex to determine. This can lead to failure or even refusal to legislate such laws and provisions. The reason for this is that there may not be enough support to pass the law that can be garnered in the legislature. Alternatively, the power to pass such laws is limited or restricted in some way because of disagreement of the parties which form the legislative authority. All of this leads to a situation called "legislative omission".

There is thus a pressing need to find an effective solution to deal with this issue. Since any failure or a poor attempt to regulate the legislature may detract from the legislature's purpose, then it may constitute a violation of the legislature's constitutional duty. This kind of violation would constitute a deviation from the objects and functions that are mentioned by the constitution. This deviation leads to a problem in relation to the legitimacy of the legislature's actions, especially in the countries that have legal systems in which the constitution is considered to be the top of the legal pyramid. In such systems, all laws, acts or provisions should be concordant with the constitution. Otherwise, they are considered to be unconstitutional and therefore illegitimate. The legislature has two duties in terms of the legislative function. The first one is a negative duty which means that the legislature should not violate the constitutional norms when enacting the laws and provisions. On another hand, there is a positive duty where the legislature should enact laws that should be legislated according to the constitution or that are related to protecting the people's freedoms and rights. Otherwise, the legislature will fall into a situation called "legislative omission". This study is mainly concerned with the latter type of duty.

Identifying the concept of the legislative omission is not easy because there are several situations when the legislature takes a negative position against enacting the legislation itself without falling necessarily into legislative omission. These situations may seem similar to legislative omission, thus there needs to be transparency regarding what legislative omission means precisely. This is as the legislative function is not always obligatory and the legislature

in many situations has the absolute power to make an intervention or not. At the same time, several countries have resorted to adopting a judicial review in situations where there is negative conduct of the legislature whether this judicial review is adopted by constitutional and legal texts or through decisions of the constitutional judiciary. A judicial review is predominantly carried out by the highest court in the judicial system or by a specialised constitutional court.

Nevertheless, the exercise by judges of this monitoring power is controversial because it gives judges the power to order or warn the legislators that they have to enact a specific law or provision. This may lead to the judges being allowed to intervene in legislative procedures. This, in turn, may give rise to several questions that need suitable answers. For example, this judicial intervention may lead to giving the judges more power in the legislative process, and this may harm the principle of the separation of powers. How can this kind of monitoring against the negative action of lawmakers be justified? How and who can sue a case against the lawmakers in the situation of legislative omission? Is there a specific procedure for this kind of case? If the judges have issued a decision that asks the lawmakers to do their job, then is this decision obligated to the lawmakers or not?

Thus, there is a need to identify the scope of what is seen to constitute “legislative omission” in a clear explanation. All of the issues which relate to remedying it should be discussed and all criticisms which may face the methods of potentially addressing this problem need to be examined. I think that discussing the models of monitoring of legislative omission may answer all these issues or any questions that may arise. Some legal systems already acknowledge this problem and they try to remedy it through a kind of constitutional review. In other legal systems, the constitutional judiciary has issued several decisions that can be considered as extending their review to the situation of legislative omission even when there are no constitutional or legal provisions allowing them to do so. Thus I am going to try to find suitable answers to these questions through analysing and comparing different models applied around the world to deal with this problem. These answers will be compatible with a need to know the problem itself by drawing a correct definition of it to identify the right way to remedy it and respond to any legal considerations which may criticise this kind of monitoring.

What encouraged me to choose this topic is the situation in my country, Iraq. In this country, we have a young democratic system in a complex and divided society. I explained this situation briefly in Chapter 1 of this thesis since I think that it would be a good introduction to studying this legal phenomenon. From studying the Iraqi situation, I found several issues related to the legislative omission that guided me to the most important matters that should be discussed in order to give useful advice and recommendations to Iraqi judges and legislators both. Then I discussed these matters widely in a comparative study of several legal systems around the world. Some of these legal systems acknowledge and regulate the review of legislative omission. The constitutional review of legislative omission can also be found in some other legal systems; even though there is no regulation of such a review. Thus, studying this legal phenomenon in light of some of the texts that regulate it or the judicial decisions that practise it would be useful for finding practical solutions to this problem.

I argue, in this study, that the constitutional judiciary may be given the power to direct or at least warn the legislature to regulate essential matters that should be regulated according to the constitution. I contend that this power can be justified as a kind of constitutional review of the legislature's negative actions by the constitutional judiciary. This is since any failure by the legislature to regulate a particular matter may detract from the purpose of this matter and may constitute a constitutional deviation by the legislature. This may require directing or warning the legislators to exercise their legislative duty properly because any dereliction would constitute a deviation from the legislative tasks and functions laid down in the constitution.

The constitutional review may lead to putting the judges in a supreme position when they can apply their perspective about what the constitutional norms mean so then they have the final word on controversial issues. Nevertheless, it may be an effective way to restrain the lawmakers and to solve an unconstitutional situation that may appear because of unconstitutional legislative actions. Moreover, alternative ways may not give the same effective solution.

In this context, monitoring legislative omission may seem to be another power that is given to the constitutional judiciary but in my opinion, it may lead to limiting the power of the judges to impose their interpretations of the constitutional norms. The judges may try to interpret constitutional norms according to their convictions when they do not find a law or provision to apply it. The monitoring of legislative omission suggests that the judges should

warn or direct the lawmakers to fulfil their duty and to remedy the omission that they caused. This may be better than allowing them to interpret constitutional norms according to their convictions in the perspective of the scholars who criticise the constitutional review.

In most countries, there is no legal rule governing the monitoring of this situation, especially in countries where the monitoring of the constitutionality of laws only takes place ex-post. This means that the monitoring of constitutionality always needs laws or provisions that have already been enacted. In this case, the constitutional judiciary cannot exercise their power of constitutional review in cases of legislative omission since there must be already an existent text to apply this constitutional monitoring.

Under some of the systems of judicial supervision, there must be an explicit call made for a ruling on the constitutionality of a provision. This means there cannot be any monitoring of something which is left unstated by the lawmakers. It could be said that it would grant the constitutional judiciary the status of lawmakers themselves if they had the power to evaluate the need or appropriateness of promulgating a particular piece of legislation contrary to the separation of powers. On the other hand, should the lawmakers refuse to regulate a particular matter concerning something that needs to be regulated as otherwise being contrary to the constitution, then this could perhaps justify an intervention by the constitutional judiciary. It is the body charged with protecting respect for the constitutional rules and for applying them in the manner stipulated for. Thus this study tries to focus on the ability of the constitutional judiciary to monitor the legislative omission as a kind of unconstitutional action.

The idea of a constitutional review was created in a country where the Common Law system was applied, which is the United States of America. Later, many countries around the world adopted this idea of monitoring the constitutionality of legislation by judicial authorities. Most of these countries have a different legal system which, for the most part, is a civil law system where judicial decisions have no precedential force over other judiciary decisions even of the same court. In other words, it is axiomatic in such systems that judges may not make laws. Judges are not bound by precedent as in Common Law systems. This situation led to creating an exclusive judicial authority in many countries called a constitutional judiciary. This judicial body has different competencies than standard judicial bodies. The most important competencies of the constitutional judiciary are constitutional review of laws and interpreting the constitutional rules. The decisions have the same

influence of the decisions in the Common Law system. This is as all authorities should obey the decisions that include all other courts.

In most countries, there is a constitutional judiciary that has the power to interpret the provisions of a written constitution. Scholars and judges differ about the nature of such interpretation and the extent to which judges bring their personal moral views into their task. Scholars who are originalists or textualists deny that the personal moral views of judges are relevant to interpretation. For these theorists, the role of the judges is to identify and apply the intentions of the constitutional drafters [(1)]. In contrast, some theorists argue that constitutional interpretation is inherently moral. For natural law or interpretivism theorists such as Ronald Dworkin, judges must make the best moral sense of the constitution [(2)]. Here, interpretation has a far more creative, law-making aspect.

However, both perspectives of judicial interpretation may not be enough to address some of the cases where there is a need for legislation to make constitutional rules effective. This is where this thesis tries to address a different type of judicial role which may seem, at first glance, to be similar to the role of interpreting the constitution. What I hope to prove is that it gives less power to judges than the interpretation of the constitutional text. This role involves judges assessing not the constitutionality of positive law but whether a legislative omission is unconstitutional. This is typically the situation where a legislature (or sometimes the executive) has, in the view of an applicant or the judiciary itself, failed to create an act or provision that is explicitly required by the constitution. My aim in this thesis is to examine the phenomenon of legislative omission and to ask whether, or to what extent, judges should have the power to correct such omissions.

The power that should be given to the judges in respect of legislative omission depends on the political and legal system and the topic of the required legislation. In young democratic systems with many political problems, there may a need for a clear, authoritative centre of constitutional power. This centre should intervene wherever there is a need to

---

1 B. Austin, AGAINST ORIGINALISM: GETTING OVER THE U. S. CONSTITUTION, Critical Review; *Astoria* Vol. 16, Iss. 4, (Fall 2004): 431-453. P: 433 -434.

2 See Ronald Dworkin, 'The Moral Reading of the Constitution' [1996] The New York Review of Book.

correct authorities' actions that violate the constitution, especially in relation to the constitutional rules that relate to the freedoms and rights of people. Otherwise, these authorities will be able to ride roughshod over the constitution, giving it any meaning that suits their interests, especially when the authorities consist of political parties that have extremely various ideologies, some of which may oppose constitutional rules themselves.

On the other hand, the situation may seem different in developed democratic systems. There might be a kind of stable system where almost all people, or at least most of them, agreed on the supreme social and political values. I cannot claim that there is no disagreement about these values in such countries but it is arguably a right kind of disagreement which will not lead to a high level of conflict such as a civil war. Thus there is no fear of changing some of the legal rules related to these values by a small majority of the legislature. Therefore, the power of judges can be reduced without fearing similar political problems. Moreover, it would be conceivable to send decisions back to the people in a referendum if there is a dispute between the court and other authorities. Such an option would not be viable in a young democratic system where the dominant political party would undoubtedly win.

The argument here is that the absolute corrective power that is appropriate to judges in young democracies is inappropriate in mature democracies. In mature democracies, the judges may exercise a limited relative role when faced with a situation of legislative omission. They may typically do no more than recommend broad solutions to an omission but they leave the details to the authority that has the power to legislate. This model of adjudication can be seen clearly in the regulating of monitoring of legislative omission in Portugal. This can also be noted in several decisions of the Constitutional Courts in Germany and Spain. The judges in young democratic systems may direct the legislature concerning what they should do to remedy the legislative omission. This might be shown by putting a particular interpretation about what the constitutional rules require forward or by issuing a direct order to the legislature to remedy the omission in a certain way.

I shall argue that if judges do all of the work in filling in the gaps in the law, then they not only improperly taking on the powers of the legislature but they may take on powers more significant than the legislators for the following reason. In many legal systems, the constitutional judiciary has the final word on constitutionality of acts and provisions, including the constitutionality of its own rectification of an omission. In practice then, the

legislature will adopt a view taken by the judges. Such is the position nearly applied in Iraq, which is a principal focus of this thesis. Iraq, as the paradigm of a young civil law democracy, may need this kind of monitoring to keep the democratic values safe from any radical changes. Some may argue that judges themselves may make these radical changes by putting in their perspective of what the constitutional norms mean.

The answer to that is the practical application of the constitutional judiciary as in Iraq, which proves that judges usually support democratic values that are the general aim of the Iraqi constitution. For example, the Federal Supreme Court in Iraq FSCI's judges supported the women's quota in local councils and they asked Parliament to include this quota in the Local Councils Election Act. The Judges relied on the constitutional rule that mentions the women quota in Parliament as a general principle of empowering women in political life. In contrast, the significant majority of religious conservative members in Parliament sought to limit this quota just to Parliament as the constitution literally mentions[3]. This can be confirmed by the current effort of the religious conservative parties to enforce a push for a number of religious scholars to become members of FSCI as an attempt to affect and change its decisions[4].

It seems that in a mature civil law democracy such as Germany and others that are arguably approaching democratic maturity, notably, Spain, Portugal and others, there is no need for such judicial interventions. It would be enough for judges to mention the omission and to let the legislature remedy it in what way they think is suitable. However, there are some decisions in these countries which may be close to the obligatory constitutional interpretation but these decisions usually seek to reinforce the rights and freedoms such as the decision of the Supreme Constitutional Court in Germany SCCG (*Protecting Unborn Human Life)*[5].

---

3 *Decision of FSCI 13/2007* (2007) 13.

4 See Zaid Salem, 'Jurists in the Iraqi Supreme Federal Court: Judiciary at the Mercy of Parties' (*Al-Arabi Al-Gadid*, 2019). Majida Sanaan-Guharzi, 'Is Putting Islamic Jurists with Veto Power on Iraq's Supreme Court a Constitutional Requirement or a Legislative Choice?' (*KURDISTAN 24*, 2019).

5 *Protecting Unborn Human Life* (1993) BvF 2/90.

Research Questions.

The problem of legislative omission is still nascent. Thus constitutional judges are more hesitant to issue strong orders against Executive and Legislative authorities in this context. This may suggest that one reason why some courts have no certainty about monitoring this situation is that even though some of their decisions may give good evidence that courts have the ability and willingness to deal with this problem. Moreover, there are some legal systems that have already given the power of monitoring the legislative omission to the constitutional judges. Therefore studying this legal phenomenon in light of some applications in different countries will help us to understand this problem in the best way. As there are several issues related to this phenomenon that can be discussed in this study, I shall mention these issues in the list of essential questions:

1. What is precisely the situation of legislative omission? How can it be identified?

2. Are there differences between the concepts of "legislative omission", "legal gaps" and "the negative incompetence of the legislator"? How can we clarify the difference between the situation of legislative omission and any other negative action of the lawmakers?

3. Is it possible for the constitutional judiciary to review laws to determine if the legislature has failed to provide for the legal regulation of any topic when the constitutional rules impose on the legislature a positive obligation to enact laws to protect the legal subjects? Alternatively, does the monitoring by the constitutional judiciary merely applies to those laws that have already been enacted?

4. Does reviewing the legislative omission lead to let judges intervening in the competence of the legislature? If so, how can the principle of separation of powers be respected with this kind of monitoring? There will always be a fear that any intervention by the constitutional judiciary in works of the legislature could be construed as interference and thus breach the principle of separation of powers.

5. If we agree that the constitutional judiciary should monitor legislative refusal or omission, what is the normative basis for this monitoring? How can constitutional judges carry that out? What are the legal means available for exercising such supervision?

6. How can a case against legislative omission be raised? Can a constitutional court issue directly that there is a situation of legislative omission without any claim from complainants?

7. If a constitutional judiciary decides that legislature should enact a specific statute or add some essential provisions that are omitted from any valid law, does this decision obligate the legislature or not?

8. What is the legal enforcement of the court's decision that relates to this kind of monitoring?

9. Can a constitutional court remedy a legislative omission by interpreting the constitutional norms? If so, why does it issue an order or a warning to the lawmakers to remedy this situation?

10. When the constitutional courts ask the lawmakers to remedy any legislative omission, does it ask for a specific provision, or does it only ask for the legislation without specifying its content?

All of these questions can be answered by studying and discussing several issues related to the situation of legislative omission. Therefore this situation should be studied broadly by discussing the meaning of legislative omission and differences between legislative omission and other negative actions of lawmakers. The types of legislative omission and the reasons behind this situation should be explained. Normative justification of this kind of monitoring should be clarified before the monitoring can be applied. Finally, the enforcement of the decision that is issued by the constitutional judiciary to remedy the legislative omission should be identified. Studying all of these topics would help to find right answers to these questions and to give the right advice to the constitutional judiciary. However, I focused on the Iraqi situation in the first chapter as I would like to give some advice to the Iraqi legislature and judges in FSCI as well. This chapter also discussed several other issues related to the Iraqi political and legal system in order to understand and learn how this kind of monitoring can work and help to remedy some of problems in such a system.

Terminology

The title of the thesis is **THE MONITORING OF LEGISLATIVE OMISSION BY THE CONSTITUTIONAL JUDICIARY (A COMPARATIVE STUDY)**. This study focuses on a discussion of the extent to which it is possible for the constitutional judiciary to issue a decision requiring the legislature to promulgate a particular piece of legislation. Alternatively, a decision requires a deficiency in the legislation that it has already enacted but where it does not comply with the constitutional provisions and achieves the purpose for it.

Some texts or articles talk about a "legislative lack" [6] or "a lack of a measure" [7] where what they mean is "legislative omission".

This study takes the view that "legislative omission" is the most appropriate term since supervision by the constitutional judiciary is concentrated on legislative omission engaged in by the legislature in a situation where it fails to pass particular laws. These laws must be enacted according to the constitution. A different situation is where the legislature passes a piece of legislation but it then neglects or omits to address some issues which results in it failing to achieve its purpose where the constitution requires such a law to be legislated. This study uses the term "legislative omission" since it is a more precise and better expression, and one that is widely recognised [8]. Not everything that the legislature omits to regulate can be considered to fall into the category of legislative omission. Thus, this study tries to focus on the situation of legislative omission and it draws a specific concept related to that.

Also, It is an attempt to examine the power of the constitutional judiciary to monitor this kind of violation. The constitutional judiciary means that a specific authority has constitutional judicial competence or it refers to any other judicial authority that practises these competencies. Thus, I will not examine the role of constitutional political councils and the role of the international judiciary to monitor this situation except in a narrow field when I feel that studying some specific situations may help with some of the arguments.

The gaps in the literature

The study of the phenomenon of legislative omission is still a relatively new subject in doctrinal legal research. Thus, the studies that are related to this topic are still few. The views that identify what legislative omission means are still not clear and obvious. For example, there is confusion in the definition of the concept of legislative omission and the concept of

---

6 Salim R. Al-Mousawi, 'The Role of Iraqi Constitutional Judiciary in Solving the Legislative Lack' (*Federal Supreme Court of Iraq*, 2013).

7 As it is mentioned by article 103 paragraph 2 of *The Constitution of Federative Republic of Brazil* (3rd ed, Brazilian Chamber of Deputies 2010).

8 ML Wigishoff Sc. R. Dürr, T. Gerwien, D. Jones, A. Gorey, 'General Report of the XIVth Congress of the Conference of European Constitutional Courts on Problems of Legislative Omission in Constitutional Jurisprudence' (2008).

legal gaps, as would be shown. Thus this study aims to clarify two issues. From one side, there is defining the concept of legislative omission and clarifying all other similar concepts. From the other side, there is explaining the solution to this problem which is the constitutional review of this problem by the constitutional judiciary and justifying this monitoring.

The first issue that is significant for studying this situation is the definition of legislative omission. Several studies have tried to clarify the concept of legislative omission [(9)]. The concept of legislative omission was explained in the past studies narrowly, which does not give a clear definition for a legislative omission. Some of these studies try to define the concept of "legislative omission" through clarifying the differences between it and the negative incompetence of legislature which means the legislators delegates their legislative competences to another authority, whether explicitly or implicitly, without constitutional authorisation which allows them to do that. This does not give the overall definition of it. Some others try to give a specific definition of legislative omission through clarifying the constitutional basis of the concept of legislative omission and explaining that this concept came from the theory of negative non-specialization of administration which is put by French jurist Edward Laferriere and means that the administrative authority delegates its competences to another authority unlawfully [(10)].

In other studies, the same meaning of the concept of legal gaps is given to the legislative omission or a new meaning is proposed by relying on the judgments that are issued by the constitutional judiciary because they believe that the constitutional judiciary is responsible for creating the concept of legislative omission. However, both views are not enough to define the concept of legislative omission. This is because the concept of legal gaps has an entirely different meaning. Hence it is broader and more comprehensive than legislative

---

9 See for examples: Abdel Hafiz Al-Shimi, *Censorship of Legislative Omission in Judicature the Supreme Constitutional Court* (Al Nahda Al Arabia for publishing 2003), Eed Ahmad Al-Gaflol, *The Theory of the Negative Incompetence of the Legislator* (Second Edi, Dar Alnhda Alarabia 2003), Kilali Zahrat Al Rahman, 'Legislative Omission and Constitutional Monitoring on It' (University of Abu Bakr Belkaid Algeria 2013), Gilmar Mendes, 'Constitutional Jurisdiction in Brazil: The Problem of Unconstitutional Legislative Omission' (*Federal Supreme Court of Brazil*, 2008).

10 Al-ghaflol (n 9). P: 3-4.

omission because the concept of legal gaps relates to the ability of the legislators to anticipate society needs while legislative omission relates to the omissions of legislators related to these needs. On the other hand, depending on the judgments of the constitutional judiciary to define legislative omission, these may be useless because the constitutional courts have different views. The solution to this problem heavily depends on the form of the legal and political system of each state[(11)].

Thus the first aim to this study is to clarify the concept of legislative omission and this will be done in several ways. First, It would be shown by explaining the meaning of this legal phenomenon by studying the constitutional and legal texts, judicial decisions, and the jurisprudence definition of the concept of legislative omission and trying to create a clear definition through explaining the elements of the situation of legislative omission. Then it would be shown by identifying the difference between the concept of legislative omission and any other similar concepts. Also, it would be useful to clarify the types of legislative omission and what the difference is between them in terms of monitoring. These issues would be discussed in Chapters 2, 3 and 4 of the study and they would be given a clear picture of this concept before discussing the monitoring of it.

Another issue that the previous studies of legislative omission have tried to address is the role of the constitutional judiciary to review the legislative omission. These studies have addressed the review of legislative omission in different ways. Some of them explain the opinions of jurisprudence that relate to the monitoring of legislative omission by the constitutional judiciary and the form of said monitoring in several European countries such as Spain, Germany, Portugal and France and other countries such as South Africa. They also discuss the legal basis for this monitoring and finally, they clarify the theme of monitoring legislative omission. They also try to justify the monitoring by the constitutional judiciary

---

11 See Marian Grzybowski, 'Legislative Omission in Practical Jurisprudence of the Polish Constitutional Tribunal' The XIVth Congress of the Conference of European Constitutional Courts Vilnius 1, Juan Louis Requejo Pagés, 'The Problems of Legislative Omission in Constitutional Jurisprudence (the Constitutional Court of Spain)' [2008] Conference paper for the XIV Conference of Constitutional Courts of Europe, Vilnius, Portuguese Constitutional Court, 'Problems of Legislative Omission in Constitutional Jurisprudence' (2008).

through the concept of "Supremacy of the Constitution." This is the same traditional theory of justifying the concept of "Constitutionalism" [12].

In other studies, there are attempts to explain a suitable way to remedy the problem of legislative omission by suggesting "Directed Judgments" to solve the problem. Directed Judgment means that the constitutional judges issue a judgment to direct the legislators to legislate laws or provisions that they have omitted. They suggest that this kind of judgment is because they do not differentiate between the legislative omission and the concept of negative specialisation in the legislature, which is a kind of unlawful authorisation. They are then looking at this problem as a kind of illegal delegation. This can be corrected by a direct order as the administrating courts do their best to remedy the situation of illegal delegation[13]. This solution cannot be acceptable in all legal systems and even in all situations that face the constitutional judges.

Other studies discuss the role of courts when it comes to reviewing the problem of legislative omission by mentioning the situation of legislative omission without giving any orders to the lawmakers to remedy it. The role of the court stops in the position of warning the lawmakers. These studies also try to clarify the role of judges as a positive and negative legislator respectively and the way that it is used in court to meet the problem of legislative omission. This is especially when the courts try to interpret the constitutional text in order to fill in the legal gap caused by legislative omission[14]. However, these studies do not discuss the situation of absolute legislative omission as this situation usually cannot be remedied by interpreting the constitutional text alone.

Other issues would be debated in this study which I think need more discussion such as trying to explain the reasons causing the situation of legislative omission. For example, there is an attempt to explain the reason for the problem of legislative omission in Iraq as it is due to the newness of the parliamentary system and the lack of experience that Iraqi legislators have[15]. This may be one of several reasons but it is not the real and only reason for this

---

12 Abdel Hafiz Al-Shimi (n 9).

13 Al-ghaflol (n 9).

14 See: Portuguese Constitutional Court (n 6). & Juan Louis Requejo Pagés (n 11).

15 Salim R. Al-Mousawi (n 6).

problem. Dealing with the problem is a kind of lack of legislation. It cannot justify why the Parliament could not legislate the Federal Council law that is mentioned obviously by the constitution. The parliaments should have enacted it before the end of the second session. The newness and inexperience of Parliament do not prevent the legislators from legislating this significant law, especially after four Parliamentary periods have alternated.

In my view, the previous studies do not give enough justification as to the idea of reviewing the legislative omission by the constitutional judiciary. Thus these issues should be discussed more in-depth because clarifying and identifying the problem is the first step to remedying it and presenting a suitable solution with its justification being next. I debated the monitoring of legislative omission by the constitutional judiciary in Chapters 5, 6 and 7 of this study. It is expected that this study would be helpful to legislators and constitutional judges because several cases of different legal systems have been shown and explained. Also, several juristic views have been discussed which may clarify several of the models used to deal with this problem. The legislators and judges may choose from these models and thus, the ideal position.

Research Methodology.

I shall use the comparative perspective method. This is going to be done by critically evaluating the opinions of the different schools of thought and jurisprudence and the precedents of the constitutional judiciary. An attempt is going to be made to identify the optimum opinion as adjudged by the researcher. My own opinions are going to be stated, and the arguments and evidence that have led to these opinions are going to be weighed up. However, how might the research questions be answered? A two-fold strategy has been used to address these questions. The first one is the applied part which will take up most of the chapters of this thesis. This will be clarified by studying and analysing some of the practical examples that can be found in some constitutional systems. The second one is the theoretical part, which involves examining the normative basis that can be relied upon to justify this kind of monitoring.

Jurisdictions are used as a comparative focus. This is a comparative study of some of the systems of such judicial control, concentrating on judicial supervision in Iraq and some other countries which face the same situations or that have similar constitutional judiciary systems. I am going to focus on some of the countries that acknowledge the monitoring of legislative

omission in their legal systems. These countries are Brazil, Hungary, Portugal and South Africa. The study is going to focus, for some topics, on the situation of legislative omission in other countries that have no provisions that give the power to the constitutional judiciary to monitor the legislative omission. Instead, their constitutional judiciary practises this kind of monitoring. These countries are Germany, Egypt, Spain, Poland, and India. The study mentions, as well, the situation in the UK to compare it with the countries that have a system of Parliamentary Sovereignty. I am going to start this study by examining the situation of legislative omission in Iraq since it is of importance to this piece of research. This is because it is designed to provide recommendations and solutions to benefit the Iraqi legislature and the Iraqi constitutional judiciary [(16)].

Several challenges may face this kind of comparative study. The countries, or models as called in this study, that I am going to focus on are widely different in terms of their political system. Some of them have a developed democratic system; others have a young, still a developing democratic system. Some may have only just started on a kind of democracy or they may still be struggling in an authoritarian system. Another difference between these models is that they have a different judicial system with some of them having a specific constitutional judiciary while others have a supreme court of final appeal that has the power of constitutional review.

These differences may affect the comparative approach that will be used as there are different styles used to deal with this problem and different views of what precisely legislative omission means. Thus these differences should be considered when discussing and comparing two or more different models. At the same time, I think that this study will benefit from these differences as it will show how each system can define this problem and the decisions that are made in terms of how much power the judges can use to remedy it in each system. This may give this study more value as it focuses on studying the situation of legislative omission in these countries as the models may be strong or weak depending on how each system deals with this problem. This may give the judges many options to choose

16 For more information about Comparative constitutional study, see: Edward J. Eberle, 'The Methodology of Comparative Law' (2011) 16 Roger Williams University Law Review 51. P. 56-57. Also, see: Mark Tushnet, 'The Possibilities of Comparative Constitutional Law' (1999) 108 The Yale Law Journal Company 1225. P: 1238.

from when they face a situation of legislative omission. Each option has its normative justification in light of the degree of reviewing that needs to be used in each case. For example, when the judges decide to take a strong position against a particular legislative omission which relates to a severe need for legislation, they can find there to be a normative justification for this position from one model. At the same time, they can find another normative justification from another model when they decide to take a weaker position.

Another challenge which may face this kind of comparative study that the comparative analysis needs to be heedful of each legal system's social and political context. I agree that this consideration may not be considered in this study as the problem of legislative omission is a kind of common problem which can be found in many legal systems. On the other hand that the nature of constitutional law in contemporary societies permits a degree of abstraction from individual social and political contexts as most of the constitutional principles and even some constitutional provisions became as general rules which can be found in most of constitutional documents around the world. That can be seen in the human rights' principles for example. Moreover, many countries which have been chosen have almost the same circumstances of creating a new democratic system after long struggling with a dictatorship, political disorders or apartheid regime as it is in Brazil, Portugal and South Africa. Thus, this study will focus on the experiments of how these countries and others dealt with the problem of legislative omission.

The legislation (constitutional, legal texts) and judicial decisions will be the data of this study. Thus, the comparative method would be related to the legislation that regulates the method of reviewing the legislative omission in order to discuss how each text explains the legislative omission and how it addresses it. These legislations are a part of particular systems which are Brazil, Portugal, South Africa and Hungary. It would also be related to the courts' decisions which are to try to remedy the situation of legislative omission without any anchoring in the constitutional text. These decisions of the courts in the countries above and in the courts in other countries practise reviewing the legislative omissions.

Outline of the Thesis

To address all of these issues, I am going to start this thesis by explaining the Iraqi legal and political system according to the new Constitution of 2005. Then I am going to explain the forming of the constitutional judiciary in Iraq and how the FSCI dealt with the problem of

legislative omission through discussing some decisions of the court which related to this problem. This starting chapter will help me to identify the essential issues that need to be discussed and clarified through this thesis.

In Chapter 2, I am going to clarify the definition of the concept of "legislative omission" as it is the most crucial issue that this thesis tries to present. This chapter will be divided into three sections. Each section is about the definition of "legislative omission" in one field. The first section will be relevant to the definition of legislative omission according to the constitutional and statutory texts. The second will be about the definition of legislative omission in judicial judgments. The last section will discuss the definition of legislative omission according to legal scholars.

The definition of the concept of legislative omission may not be enough to identify this legal phenomenon. Thus, the discussion of the relationship between the concept of legislative omission and other concepts that are similar to it might be helpful in order to clarify this problem in more detail. I am going to explain these relationships in Chapter 3, which will be divided into two sections. The first one will be about clarifying the difference between the legislative omission and legal gaps. Identifying the difference between legislative omission and "the concept of negative incompetence of the legislator" will be in the second section.

Understanding this problem may require clarifying the types of legislative omission and the reasons for them. Thus I am going to explain the classifications of this legal phenomenon and the important reasons behind it. In Chapter 4, I am going to discuss the aforementioned topics. Thus, Chapters 2, 3 and 4 are going to be used to explain the concept of legislative omission widely before discussing the reviewing of it by the constitutional judiciary.

After identifying the legal phenomenon of legislative omission, Chapters 5, 6 and 7 will be about the second part of this thesis, which is the constitutional review of the legislative omission. In Chapter 5, I am going to discuss the normative justification of this kind of monitoring, which contains two sections. One section includes the theory of moral reading of the constitution and how this theory can be a part of the normative justification of monitoring legislative omission. In the second section of this chapter, I am going to discuss some of the legal principles which may give another justification for this kind of constitutional review.

After justifying the monitoring of legislative omission by the constitutional judiciary, I am going to explain the mechanism of applying this monitoring in Chapter 6. This chapter

will be divided into two sections. The first will contain a study of the methods used to bring the cases of legislative omission to the constitutional courts in countries that have acknowledged this kind of monitoring in their constitutional systems. These countries are Brazil, Portugal, South Africa and Hungary. The second section includes studying how the cases of legislative omission are brought to the constitutional courts in other countries whose constitutional judiciary have monitored the situation of legislative omission. I am going to study some cases that can show the mechanism of suing the legislative omission.

The consequences of using this kind of monitoring will be identified in Chapter 7, which contains an explanation of the kinds of decisions that may be issued to remedy the legislative omission. This chapter is going to be divided into three sections. The first one shows the weak model of legislative omission where judges decide that they have no power to direct the legislature to enact the required legislation or where they only mention that there is a situation of legislative omission without asking for a remedy. In the second section of this chapter, I am going to explain the strong model of reviewing the legislative omission when the judges ask the legislature directly to remedy the legislative omission by enacting the required legislation. Then I am going to discuss, in the third section, the case where the judges try to fill the omissions by interpreting the constitutional rules and how can we deal with the judges as lawmakers. After that, I am going to write down, in the last chapter, all of the conclusions and recommendations that I found during the discussion of all of the chapters of this thesis.

Chapter One

Iraqi Political System & the Problem of Legislative Omission

Most countries around the world have faced the problem of legislative omission, which means the legislature fails to do its function. However, why does this situation or problem happen? Several reasons may cause it. The problem is complicated in some countries. Since some specific circumstances, such as the diversity of political ideologies or the sharp ethnic division, as it will be explained in this thesis later. Therefore, finding some effective solutions requires understanding the root of the problem through studying situations and circumstances which helped or caused it to occur. This study is trying to find suitable solutions which may help Iraqi constitutional judges to solve the problem of legislative omission. It would be useful to discuss several issues related to Iraqi history and the problem of legislative omission in its legal system. This chapter will relate to Iraqi political and legal situation. Then the problem of legislative omission in this system. It will be a good start to studying the phenomenon of legislative omission into broader ambit.

More and specific information about the ethnic and political structure of Iraqi society and how can the Iraqi situation be understood in light of this structure are necessary to understand the Iraqi political and legal situation before discussing the problem of legislative omission in Iraq. Therefore, this information may help in answering the most important and specific question which, is what the most important reasons that caused the problem of legislative omission in the Iraqi legal system? I shall mention some circumstances, which companioned establishing the new Iraqi political system after 2003. Some information about the history of the Independent State of Iraq may help to understand how deep the controversy between the Iraqi political elites. It may also show how far they can agree about some significant issue related to complete the political and legal system. I shall discuss the circumstances of creating current Federal Supreme Court FSCI which may help to understand the ability of this Court to direct Parliament's legislative omissions. Then the most important decisions of the FSCI which related to remedy some situations of legislative omission will be discussed. Thus, this chapter is going to be divided into two sections. The first one will relate to the Iraqi political history and circumstances of creating a new Iraqi state. The second one will relate to the problem of legislative omission in Iraq.

Section One

Iraqi Political History and Circumstances of Creating New Iraqi State.

In this section, Iraqi political history will be explained briefly to understand the root of the problem. That is essential to understand the Iraqi social structure because this part of the world witnessed many historical transitions which affected the ethnic and sectarian population structure. Thus, establishing a national state based on the principle of citizenship is very difficult. Explaining and understanding the ethnic and sectarian structure is a significant issue for this study. Since it is, in my opinion, the main reason which caused the problem of legislative omission as will be shown later. This section will be divided into two issues. The first one will be about Iraqi history. Briefly, the ancient and Islamic history of Iraq will be clarified before the history of the new Iraqi state from 1921 until American occupation in 2003 will be explained. The second issue will be about explaining the Iraqi situation according to the new constitutional system which started after a new Iraqi constitution of 2005 has been applied.

1. Iraq as a New Independent State.

Iraq[(1)] was a part of the Ottoman Empire at the beginning of the twentieth century. In the First World War, the Ottoman Empire decided to enter the war with Germany against Britain

---

1 Iraq is a name called to the lower part of Mesopotamia which is located between two rivers, the Euphrates and the Tigris. Mesopotamia has been known as the area of some oldest civilisations in the ancient world, especially in the Bronze Age and the Iron Age such as Sumerian, Akkadian, Babylonian and Assyrian. After that several empires alternately controlled this area such as the Persian and Macedonian empires before it fell under Sasanian influence. There are still some positions relate to those civilizations live in Iraq, such as the Assyrian people. Also, that shows how many ethnic in his area.

When Islam appeared in Arabia, most of Mesopotamia was controlled by the Sasanian Empire, but Islamic armies swept Mesopotamia, which was called (Iraq). In Arabia, in the era of the second Caliph Umar ibn Al-Khattāb and Iraq became a part of the Islamic state in the era of the Rashidun Caliphs and the Umayyad State. Under Umayyad State, Iraq has witnessed a massive event in Islamic history. Muawiyah bin Sufyan decided to transfer the power to his son Yazeed. That was against the theory of "Shurat" which means that the nation should elect the Caliph through taking the opinion of some leading figures who were most of them the Prophet Mohammed's companions. Hence Al-Husain, who

and France[2]. The British army landed in Basra south of Iraq in 1914 and continued the progress to the north of the country. Most of Iraq fell under British forces by 1918. Several Insurrections occurred in Iraq. One of them was the revolution of 1920 in south and centre of Iraq before Britain decided to establish an Arabic administration by named Faisal the first as

---

was the son of the prophet's daughter, refused this transformation. People in Iraq sent a message to Al-Husain to inform him that they would not accept the rule of Yazeed, and they would choose Al-Husain as a Caliph. Al-Husain travelled to Iraq from Almadina. Yazeed sent a big army to fight Al-Husain, and the people in Iraq did not help Al-Husain who killed in the centre of Iraq in the area which called Karbala. The people who were supporting Ali and his son Al-Husain became called “Shi'a" who still live in the south of Iraq around the shrines of Ali and his son Al-Husain. Thus, Iraq was the place where Islam has divided into two separated sects. Also, that made Iraq the holiest place to all Shia Muslims around the world that makes the influence of the Shia clergy very strong on the political and social life of people. Since Iraqis divided between Shia, who live in the centre and south and Sunni who live in the centre, west and north, thus, Arab political elites divided into Shia and Sunni as it will be shown later. After several years, Abbasid had controlled the Islamic state in 750 A.D. They made Iraq the centre of the Islamic world until Mongol invasion of Baghdad in 1258 A.D.

For more information, See Guillermo Algaze, *Ancient Mesopotamia at the Dawn of Civilization: The Evolution of an Urban Landscape* (University of Chicago Press 2009). P: 11-14. Karen Polinger Foster Benjamin R. Foster, *Civilizations of Ancient Iraq* (2nd ed, Princeton University Press 2011). P: 5, 7-14, 51, 87, 105, 147 &166. Also, Georges Roux, *Ancient Iraq* (George Allen & Unwin Ltd 1964). P: 43 -49, 163-167. & Ira M Lapidus, *A History of Islamic Societies* (Cambridge University Press 1989). P: 39-41, 69-70.

2. (Ottoman Empire ruled Iraq in 1534 A.D. In1831, Iraq was divided into three vilayets. Mosul Vilayet was in the North, Baghdad Vilayet was in the Centre, and Basra Vilayet was in the South. All these vilayets were under the rule of the Sublime Porte in Istanbul (the Sublime Porte is the name position of Prime Minister in the Ottoman Empire). Ottoman Empire was following the Sunni sect of Islam. That may explain the reasons of influence of Iraqi Sunni leaders on the political life in Iraq during the Ottoman Empire era and in earlier time of the national Iraqi State.

For more information, see Charles Tripp, *A History of Iraq* (2nd ed, Cambridge University Press 2002). P: 8 - 29. & William R Polk, *Understanding Iraq: A Whistle-Stop Tour from Ancient Babylon to Occupied Baghdad* (I B Tauris & Co Ltd 2006). P: 56-61.

a king of Iraqi kingdom in 1921[3]. The first constitution of the Iraqi Kingdom was approved in 1925, which was called The Basic Law. Arabs Shia and Kurds did not actively share in the political life when the new Iraqi state was established.

The reason for the Kurds was the fear of losing the national character. After the First World War, the land of Kurdish people was distributed between four countries Iraq, Iran, Turkey and Syria. All of these countries were established on a national basis. Kurds felt that they should have their own country. They had fears for their position in Arabic nationalistic country after Faisal I became king of Iraq. Since he was the son of Al-sharif Hossain, the leader of the Arabic revolution against the Ottoman government. They wanted to establish a national country for Kurdish people such as Arabic, Turkish and Persian people. Thus, most of Kurds were still opponents most of the time. Several military confrontations have happened between Kurds and central government during contemporary Iraqi history [4] which were strongly suppressed by the British army and later by Iraqi army several times [5]. The Kurds still have a dream of an independent country for all Kurdish ethnic. That makes them the third main part of the Iraqi political life as it will be explained later.

Arabs Shia were not enthusiastic about sharing power because most of them, especially religious people, were religiously introvert. The majority of them were working as farmers under feudal lords which most of them were Sunni. Therefore, most politicians were from Arabs Sunni because they were either feudal lords, merchants, officers in Ottoman army or government employees. On the other hand, the new King was an Arab Muslim Sunni, and he had Arabic nationalist ideology [6]. However, many Shia secular decided to share in political life. Most of them were either nationalists or communists, but they were still less than their popular percentage.

In 1930, the Anglo-Iraqi Treaty between Britain and Iraq was agreed to clear the way for Iraqi independence. Nevertheless, the Treaty gave two air bases for the British army in Iraq.

---

3 Polk (n 18). P: 67, 78-81.

4 ibid. P: 114.

5 Steven, 'A Timeline of Key Events in Iraqi History and Class Struggle in the 20th Century' (2006) accessed 10 December 2015. P: 3.

6 ibid. P: 2.

Moreover, it allowed Britain to influence Iraq's foreign policy until 1957. Thus in 1932, the League of Nations recognised the independence of Iraq, although Britain still had the most influence on Iraqi government [7]. In 1933 young Prince Ghazi became king of Iraq after his father King Faisal I had died. King Ghazi was killed in 1939 by crash car. Prince Faisal II was the heir to the throne. However, he was just a little child. Therefore, his uncle and brother-in-law of King Ghazi prince 'Abd al-Ilah became the protector of the throne until King Faisal II reached the age of puberty [8]. In 1940 a military coup happened against the politicians who were supported by Britain. The new government reconnected with the German government. In 1941, Britain sent a new force to Basra, and they reoccupied Iraq again after thirty days of the war. Britain hanged the leaders of the coup and sent thousands to prison. Politicians who were supported by Britain were returned to power [9].

Several circumstances such as growing of nationalism and leftist ideologies, the cold war, the increasing power of Iraqi communist party, Suez Canal war in Egypt, and other circumstances caused a bloody military coup on 14 July 1958. The group of army officers who were called Free Officers succeeded in controlling power. The leader of them was Abd alKarim Qasim, who became prime minister. The new government decided to change the political system from Monarchy to Republic [10]. Iraq entered a new bloody age which was full of coups and rebellions. Thus, five years later in 1963, after several failed coups, a new successful coup was affected by a group of nationalists and Baathists officers. In November of same year Nationalists removed Baathists from power by another coup [11].

Baathists and some military leaders captured the power by another military coup on 17th July 1968. They removed those military leaders on the 30th of July. Then they executed and imprisoned most nationalists and communists in 1970s. Sadam Hussin, who was the Vice President since 1968, controlled the country after he executed most Baath leaders in 1979 and isolated the president Ahmad Hasan Al- Baker [12]. Iraq entered the bloody dictatorial age,

---

7 Polk (n 18). P: 94.

8 Steven (n 21). P: 3.

9 Polk (n 18). P: 95-97.

10 ibid. P: 103-110.

11 ibid. P: 115.

12 ibid. P: 117-119.

which contained three devastating wars. The First Gulf War was between Iraq and Iran, which continued for eight years. Second Gulf War started when Iraq occupied Kuwait in 1990. Then it ended when the Iraqi army was forced out of Kuwait by the International Alliance led by the USA in 1991. However, economic and military sanctions were forced on Iraq by the UN. The economic sanctions led to the deaths of more than one million Iraqis civilian [13]. In 2003 Anglo-American occupied Iraq after Sadam's regime fell in the Third Gulf War.

This long history of Iraq can give a clear view of the political live in Iraq, and the structure of its society. Iraq was a land of the oldest civilisations in the world. Thus, many ethnic groups lived in Iraq, and some of them still live there now. Several religions have a long history in Iraq, and there are some very unique religious groups still live in Iraq. Islam as a religion has divided into two main sects in Iraq because of the conflict for power in the earlier history of Islam, which made Iraq the holy place for all Shia Muslim. Nationalism, Communism and Several other political ideologies have ruled the Iraqi political life since the new Iraqi State has been established and during the monarchy and republican systems. All that makes Iraq people a mosaic of religions, sects and ideologies and any democratic system in this country will lead to the same mosaic in the political class. That may make the agreement of enacting laws difficult, and that may be the main reason for the legislative omission situation in Iraq.

2. Iraq Situation after 2003.

2.1 The New Iraqi Political System

After Several totalitarian governments which rotated in ruling Iraq since the military coup in 1958, the USA and its allies decided to occupy Iraq in 2003 because of several issues, most of them were found to be false or exaggerated [14]. One of these issues was the foundation of a new democratic system in Iraq. Thus, they established the Coalition

13 Barbara Crossette, 'Iraq Sanctions Kill Children, U.N. Reports' (*The New York Times*, 1995).
14 For more information: Antic M, 'Iraq War (2003): Was It Morally Justified?' [2009] Politička Misao 88, 0032-3241, P. 88-113. & K Mumtaz, 'Post-Saddam Democratization in Iraq: An Assessment of March 2010 Elections. Strategic Studies' [2010] Institute of Strategic Studies Islamabad ISSI. P: 3-4.

Provisional Authority (CPA) to control Iraq during the transitional period. CPA created the Iraqi Governing Council (IGC) which contained twenty-five members. Those members were selected on a sectarian basis by U.S. Ambassador L. Paul Bremmer who was the president of (CPA) and civil administrator of Iraq [15]. IGC legislated Law of Administration for the State of Iraq for the Transitional Period (TAL) which was considered the constitutional law. This law drew a roadmap to transfer power to Iraqis [16].

However, there was no law in Iraq at that time without the agreement and signature of L. Paul Bremmer according to Security Council Resolution 1483. [17]. Hence, there were many influences of American administration on it, such as timings of elections, writing the new constitution and formation of the new Iraqi government [18]. The short time that was given to write the new constitution led to several problems in terms of completing the whole legal system. Since several issues have been left to be regulated by Acts which should be enacted by Parliament.

According to (TAL) the (CPA) would submit the power to an Iraqi government which would be appointed by (CPA) and (IGC) on the 30th of June 2004. This government would prepare the general election of the National Assembly which shall be no later than 31st of January 2005[19]. One of the essential missions of the National Assembly was drafting the permanent constitution [20] which, had to be done before 15th of August 2005. There is an exception when majority members of the National Assembly demanded extra time to complete it if that is necessary. However, extra time shall not be more than six months. Then, drafting of the Constitution shall be put to a referendum on 15th October 2005. The election

---

15 Mumtaz (n 30). P: 9.

16 Feisal Amin Al-Istrabadi, 'Constitution without Constitutionalism: Reflections on Iraq's Failed Constitutional Process' (2009) 87 Texas Law Review 1627. P: 1635.

17 Feisal Amin Al-Istrabadi, 'Reviving Constitutionalism in Iraq: Key Provisions of the Transitional Administrative Law, International and Comparative Perspectives on Defamation, Free Speech, and Privacy: II' [2006] New York Law School Review. P: 270.

18 Al-Istrabadi (n 32). P: 1634.

19 Law of Administration for the State of Iraq for the Transitional Period 2012. (LASI) P: 7.

20 Articles 60 of The Law of Administration for the State of Iraq for the Transitional Period.

of the new parliament will be held on the 15th of December to form the first national government. [21].

At the same time, the Sunni-Arab regions were under military insurgency against the American army. Therefore, the Sunni-Arab political elites decided to boycott the election of the National Assembly because of several reasons. They felt injustice about their representation percentage in IGC. Some of them refused to hold an election under the American occupation. Some others claimed that the security situation in their regions was unsuitable to hold an election and they asked to delay election [22]. As a reason of that, most Arabs Sunni refused the Constitution later.

The election was held on 30th of January 2005 amid broad participation of Shia-Arabs and Kurds. However, almost all Sunni-Arabs boycott it. They committed the same mistake which Shia-Arabs committed when the newly independent Iraq state was established in 1921[23]. Thus, the National Assembly was formed by Shia-Arabs and Kurds. However, American intervened to name members from Sunni Arabs to involve in the Constitutional Drafting Committee. However, they quickly withdrew from the committee because of disagreement about several provisions [24]. After the National Assembly failed agreement of compatible draft, the draft constitution was written within six weeks. The Constitution draft was passed in the general referendum which was held on 15th of October 2005, although it was rejected widely by Sunni-Arabs [25].

This situation deepened the sectarian divide, which affected political life later. The circumstances accompanied establishing the new state in Iraq was the essential cause of legislative omission. Since the political elites faced many difficulties to reach an agreement for some of the essential Acts that are very necessary to any democratic political system.

---

21 Articles 61 A, E and F, of (The Law of Administration for the State of Iraq for the Transitional Period. See as well Mumtaz (n26) P: 10.

22 Mumtaz (n 30). P: 11. & Al-Istrabadi (n 32). P: 1637-1638.

23 Al-Istrabadi (n 32). P: 1637.

24 Jonathan Morrow, 'Deconstituting Mesopotamia, Cutting a Deal on the Regionalization of Iraq' (2005). P: 564.

25 For more details see: Al-Istrabadi (n28) P: 1640-1642.

However, it may show that even in such circumstances constitutional judges may be able to issue some decisions which warn lawmakers about their legislative omissions. Even judges may order them to remedy these omissions as it will be shown in SFCI's decisions. That may give a clue that the monitoring of legislative omission can be the solution to the problem of legislative omission, even in a very divided political system. There is no risk that the legislature will keep dodging difficult decisions because there is a court is always there to do their job. Since this court will not do the legislature job, it just asks the legislature to do that.

2.2 The Ethnic and Sectarian Structure of Iraqi Society.

Iraq people are considered one of the most diverse nations in the world because of the deep history of Iraq and alternation of historical eras. Thus, the demographics of Iraq people are much diversified. Even though most Iraqis are Muslims, there are Christians and even Jews. Iraq is the home of some unique religions such as Yazidi and Sabean Mandaean. Although the majority of Iraqis are Arabs, there is a significant minority of Kurds. Moreover, there are many other ethnic groups such as Chaldeans, Assyrians, Shabak and Turkmen (who come from Turkish people). Iraqis Muslims themselves are divided between Sunni Muslims and Shia Muslims[26]. Even though there are many ethnic and religious groups in Iraq, the three main groups have the most influence on political life since establishing the new Iraqi state. Those groups are Arab Muslims Shia, Arab Muslims Sunni and Kurds who most of them are Muslims Sunni. [27].

There is no official statistic for the proportion of each group from the whole population. However, the general election results in December 2005 might be useful to understand the Iraqi social structure. Hence, it could be adopted as a statistic of the Iraq ethnic population because turnout was very wide. Approximately eighty per cent of registered voters voted, and most of them gave their votes to the parties which were established based on ethnicity or sect. Except for Iraqi National List which contained fifteen parties most of them secular, but it got just 25 seats from total seats which were 275. That represented just nine per cent of total

---

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

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

seats. In total the representation of seats was as follows: Arabs Muslims Shia got 145 seats from three lists which mean 53 per cent. While Arabs Muslims Sunni got 68 seats in four lists that represent 24 per cent. Kurds got 58 seats from two lists which means 21 per cent of whole seats. [28]. The remaining seats were awarded to other minorities which represented just 3 per cent. However, it cannot be a reliable statistic of ethnic and sectarian proportion, but it gives an approximate percentage of Iraqi social structure.

That may give a view of the complicated ethnic and sect situation, which led to the system of sectarian quotas. Since any government has to get an agreement of two-third members of the Parliament according to the Constitution. That can not happen without an agreement between two ethnic sect groups at least. Thus, all governments, which have been formed after 2005, were a coalition government and most of them took a long time to be formed. Moreover, the heads of the central authorities have been distributed according to the ethnic basis. Although it was not mentioned in the constitution, there is custom has been established. This custom provides that the president of Iraq should be Kurdish. The prime minister should be Shi'ite. The speaker of parliament should be Sunni. All that makes the agreement of the essential Acts very difficult because, in most cases, these Acts need a special majority of the Parlament members to be enacted. That, in my opinion, is the main reason for the situation of legislative omission.

Some similar situations may face a legislature in some countries that have the same problem of a divided political and social system such as South Africa and Brazil. These countries witnessed a long history of political and ethnic dividing before transforming into the democratic system. That did not prevent regulating review of legislative omission and giving judges a power to direct the legislature to correct the omissions in these countries as it will be explained later.

---

28 For more details of the election's results: Dawisha A&Diamond L., 'Iraq's Year of Voting Dangerously', *Diamond L. & Plattner M., Electoral systems and democracy, Baltimore* (The Johns Hopkins University Press 2006). P: 234-235.

Section Two

The Problem of Legislative Omission in Iraq

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

1. Legislative Omission in Iraq

1.1 Legislative Omission as Legislature Problem

Judge and lecturer in Iraqi Judicial Institute Salem Roudhan Al-Mousawi argued that the main reason for legislative omission in Iraq is newness of the legislature. He clarified that legislators have not enough experiences yet [29]. It may be one of several reasons, but in my view, it is not the main one. Since the sharp sectarian and ideological division of the political elites is the salient trait of Iraqi political life after 2003. That is, in my opinion, the primary cause, especially for absolute legislative omissions. Thus, the first general election according to the new constitution of 2005 was held on December 2005, which witnessed broad participation from all sects and ethnic groups. At the same time, it widely witnessed sectarian and ethnic polarization as it has been shown above. Hence, political elites, which appeared as a result of this election and even other later elections, have entirely different ideologies. Even in the same sect, there are coalitions between parties have different ideologies. For example, a coalition of Iraqi list, which won 91 seats in the election of 2010 and represented Sunni Arabs, was formed by twenty parties. [30]. The ideologies of these parties were utterly different. They were religious, secularism, nationalism, liberalism, even leftism.

---

29 Salim R. Al-Mousawi (n 6).

30 See the web site of 'Independent High Electoral Commission in Iraq (IHEC).

At the same time, Constitution of 2005 mentioned several issues that require legislative intervention such as enacting following important laws: Federal Council Law, [31] which is the second chamber of the legislature, and the Federal Supreme Court law [32] which require the agreement of two-thirds of Council of Representatives' members. The fourth session of Parliament has been elected, and Federal Council law has not enacted yet, while Constitution 2005 requires that this law should be enacted in the second session. These laws have never been enacted because political parties in Council of Representatives could not achieve the agreements, especially with this kind of percentage of members which is required.

On the other hand, there are several Acts related to rights and freedoms which, are mentioned by a chapter of Rights [33] and chapter of Freedoms [34] in Constitution, have not been legislated yet, even though these Acts need just standard majority to pass.

Any political system has the same problem that may witness the same problem. Because of that, I think that the sectarian and ethnic division of the political elites may seem the most crucial reason for the absolute legislative omission as has been mentioned before. There is no clear majority that can achieve the two-thirds of Council of Representatives members which are required to form the government. [35]. Thus, all Iraqi government, which formed after the ratification Constitution of 2005, were formed and endorsed after a long time and lot of discussions. Pressure applied to Parliament by regional and international powers to form alliances from different sects and ethnic. Again, that may give the reason why Parliament has failed to enact the Acts which shall be passed by the same majority of forming the government.

---

31 Article (65) of Iraq's Constitution of 2005 2005 1.

32 Article (92) of ibid. Iraq's Constitution of 2005.

33 See articles: 18 /sixth, 21, 22 /Third, 23 /Second, 24, 27, 28/ Second, 30/ Second, and 34/ Fourth of ibid. Iraq's Constitution of 2005.

34 See articles: 38 third, 39 First, 41, and 43 first of ibid. Iraq's Constitution of 2005.

(35) For more information about formation Iraqi government after 2005 see Kenneth Katzman, 'Iraq: Elections, Government, and Constitution' (*CRS Report for Congress, published*). P: 4-5. John Leland &Jack Healy, 'After Months, Iraqi Lawmakers Approve a Government' (*The New York Times*, 2010). Kareem Fahim &Azam Ahmed, 'Lawmakers Approve Cabinet in Iraq, but 2 Posts Are Empty' (*the New York Times*, 2014). Also, Morrow, 2005.

1.2 Legislative omission as a problem of executive authority

The problem of legislative omission in Iraq does not just relate to the legislature, but it relates to executive authority as it will be explained in this section. The Constitution provides in the article No. 60:

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

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

Thus, Iraqi Council of Ministers (executive authority), in a case that arose against Parliament to FSCI, argued that the legislature has no power to enact laws unless these laws have been presented as a draft by President of Republic or Council of Ministries according to article no. 60 of Constitution. While Parliament argued that article No 60 of the Constitution gives the Council of Representatives a power to propose laws and the difference between presenting a draft law and proposing law is just an idiomatic. Also, Parliament clarified that there are more than sixty laws have been proposed and enacted by the Council of representatives. These laws have not been presented as draft laws by the executive and the President of Republic, who is a part of the executive authority, has approved them without any objection [(36)]. This issue was very complicated, and the Council of Ministers decided to resort to the FSCI to repeal two laws which were enacted without being presented as drafts from the executive authority. The FSCI issued two decisions which supported the executive authority view.

It clarified that the Constitution provides the principle of separation of the powers in the article No (47) which requires that every authority must not encroach on the power of other

---

36 Osman Mahdi, 'The Legitimacy of Laws Drafting Rises the Disagreements between the Iraqi Presidencies' (*The Elaph E-Daily*, 2012).

authorities and in this case the legislature has the power to enact laws but after they are presented as draft laws by the executive authority. It added that the Constitution gives the executive authority this power because it has the responsibility to execute financial, political, international and social commitments [37] and it should give its opinion through preparing the draft laws which may create new commitments. On another hand, Constitution gives the Council of Representatives the power to present proposed laws, but that does not mean that legislature can enact laws without being presented as draft laws by the executive authority because drafting laws are something completely different from proposing laws. Proposed laws are just ideas which should be sent to the executive authority to prepare them as drafts and send them back to the legislature [38].

The FSCI issued two other decisions which provided that the Council of Representatives has no power to modify the draft provisions which create financial commitments without the permission from the Council of Ministers. The FSCI Justified its decisions according to the article No (62) of the Constitution, which provides:

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

Also, article No (130) of the Rules of Procedure for the Council of Representatives provides that the assent of Council of Ministers shall be taken before the Council of Representatives can modify drafts if that change creates financial commitments. Hence, the FSCI decided that some provisions of the Retirement law are unconstitutional because they create financial commitments and there is no permission from the Council of Ministers for the changes which were made by the Council of Representatives in those provisions [39].

Faris Abdul Karim, an Iraqi legal scholar, argues that the first two decisions were reasonable because they conform with the Constitution according to article No (60). He

---

37 According to article No. (80) of Constitution of Republic of Iraq 2005.

38 *Decision of FSCI 43/2010* (2010) 43. & *Decision of FSCI 44/2010* (2010) 44.

39 *Decision of FSCI 36/2014* (2014) 36. & *Decision of FSCI 59/2015* (2015) 59.

explained that the executive has a technical function in the legislative process which is preparing and shaping laws, and the legislature has the power to enact the laws but only after they have been drafted, by the executive. On the other hand, the legislature has the role of discussing, adding, modifying or even redrafting any provisions which need that. Also, the legislature has the power to ignore enacting these laws. Thus, he demanded from the FSCI to reject the appeal of the provisions in the Unified Retirement Law because the Council of Representatives has the power to add new provisions to the draft laws as one of the most essential functions of legislation and nobody can rob them this function [(40)].

As was shown, FSCI justified these decisions using the principle of separation of powers that is mentioned in article No (47) of the Constitution. However, in my view, these decisions were entirely against this principle because FSCI robs the right of enacting laws from the Council of Representatives. It gives power to the executive authority to control the legislative process and to intervene in the core work of the legislature through drafting laws. As the Court tried to interpret this article that it gives each authority a part of the legislative process and that what the principle of separations of powers determined according to the perspective of the Court

Thus, the executive authority will neglect to draft any law which it does not want to be enacted.

Moreover, these decisions will create a new problematic question which is what will happen if the executive authority refrains or neglect to draft the laws that have been proposed by the Council of Representatives? Does the Council of Representatives have the power to draft and enact these laws or not? This problem may not appear with coalition governments which have alternated ruling Iraq since 2003. Nevertheless, it would be the biggest problem facing Parliament if there is a majority government in the future because the government can stop enacting any law. Thus, it can disrupt the legislative and monitoring role of parliament. Also, that makes the executive authority causes the situation of legislative omission in the first stage of the legislative process.

---

40 Faris Abdul Karim, 'Problematic of the Appeal of the Unified Retirement Law and the Legislative Role of the Council of Representatives' [2014] Al-Dustour Newspaper.

FSCI had to use the principle of separation of powers to make another decision which enhances the legislative function of the Council of Representatives and Prevents intervening of the executive authority in the parliament work. Article No. (60) First should be interpreted and understood in the context of all other Constitution's articles which provide that enacting federal laws is the first task of the Council of Representatives [41], and the federal authorities exercise their competencies and tasks according to the principle of separation of the powers [42]. Consequently, the Constitution gives the power of drafting laws to the executive authority, but it does not prevent Parliament from this function.

That can be supported by knowing that the Constitution does not discuss or mention the case of abstention of the executive authority to provide the draft laws which have been proposed by the parliament. At the same time, the literal interpretation of the FSCI leads to prevent the executive authority from proposing laws as well because article No (60) gives the power to propose laws to the Council of Representatives which means that the executive authority cannot draft laws unless they have been proposed by ten members of the Council of Representatives or by one of its specialized committees. Also, the SFCI has asked just Parliament to enact the required Acts which should be enacted according to the Constitution in its declaration, which will be discussed later. While SFCI had to mention the executive authority as well, as it has the power to draft these Acts.

Another evidence for Invalidity of these decisions that the FSCI itself issued another decision which overturns the Court's opinion. Hence, the FSCI issued in the last decision that the Council of Representatives should take the opinion of the executive authority before enacting laws which related to the government programmes or which create financial commitments. Also, the Council should discuss and take the opinion of the Judicial authority for enacting laws which relate to the power of the Judicial authority before enacting them. Otherwise, the Council of Representatives has all the rights to propose, draft and enact laws without them being presented as a draft by the executive authority [43].

---

41 Article No. (61) First of Constitution of Republic of Iraq 2005.

42 Article No. (47) of Iraq's Constitution of 2005.

43 *Decision of FSCI* (2015) 21, 29/2015.

The FSCI in this decision contradicts with other decisions because there is one way to enact Acts by presenting them as draft Acts by executive according to the early decisions, but it creates several ways to enact laws in the last decision. Thus, Acts related to the power of the Judiciary authority should be enacted after they have been discussed, by Legislature and Judiciary. Also, other Acts related to the government programmes or which create the financial commitments should be enacted after they have been presented as draft Acts by the executive or after the opinion of the executive has been taken. Except that the Council of Representatives can propose, draft and enact laws directly.

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

In any rate, it seems that the judgments of FSCI have finally stabilised on the status that the executive and legislative authorities have the power to draft Acts, especially in the last decision [(44)]. In this case, the executive authority is considered a partner to the legislature in the problem of legislative omission. It gets the most significant responsibility in term of an absolute legislative omission because it has to start the legislative process through drafting laws and submitting them to the legislature. This responsibility may expand if the Act related to government programmes or create financial commitments. This situation may be more complicated if there is a majority government because this kind of governments may use this power to disrupt the job of Parliament as it was explained above. Nevertheless, the FSCI did not mention the responsibility of the executive authority in the legislative omission in its decisions which will be discussed later in this chapter.

---

44 W. A. Latif, 'The Irregularities Five Contained in the Recent Decision of the Federal Supreme Court' (*Al-Nahrain Center for Strategic Studies*, 2015).

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

2. 1. The History of Iraqi Constitutional Judiciary.

There was no case of legislative omission in the history of Iraqi constitutional judiciary before the new Iraq state was established in 2003 because there was no real activating of monitoring constitutionality of laws. Even though, there was a supreme court in Iraq which, was established according to article No (81) of the Basic Law of Iraqi Kingdom. The Supreme Court consisted of nine members. Four of them were named from the members of the Senate. The other four are named from members of the Court of Cassation. The Court is headed, by the president of the Senate. As it is shown the Senate controlled this court; thus, the Supreme Court was subject to the will of King because the members of the Senate are appointed, by the King himself. There was just one case of constitutional review which happened when the Supreme Court vetoed the law of preventing harmful propaganda because it was unconstitutional [45]. Thus, there is no case of legislative omission can be noted in the decisions of this court.

The constitutions of the Republican era did not contain the concept of constitutional review except the Interim Constitution of 1968, which mentioned the formation of the Supreme Constitutional Court. One of its missions was monitoring constitutionality of Acts, but this court was never formed because a new constitution was provided in 1970 and it did not mention anything about the formation of the constitutional court or ways to apply for the constitutional review. However, some Jurists argued that the judges have the power to refrain from applying unconstitutional laws. They argued that when the judge finds that the provision which must be applied in any case infringe the constitution, she or he has to apply the constitutional text and neglects to apply the unconstitutional provision because the constitutional text has the supreme location in the pyramidal legal system. In other words, the judge has to apply the supreme provision according to the principle of the Constitution's Supremacy [46]. However, the judges could not do that because of the authorities' successive coups powerful which collect legislative and executive authorities through the so-called

---

45 Raad Naji Al-Jada, *Constitutional Order in Iraq* (Ministry of Higher Education and Scientific Research 1990). P: 321.

46 ibid. P: 401.

Revolutionary Command Councils. Thus, there was no what is called a constitutional judiciary in the republican era until 2003.

Nevertheless, there were two cases which may be called as a kind of constitutional review within the history of Iraqi judiciary in the republican era. The first one was when a judge refuses to apply the Agrarian Reform Law No. 30 the year 1958 because it was unconstitutional, and the judge explained that Constitution of 1958 provides justice for all Iraqis and prevents the confiscation of lands without Just compensation [47]. Another case was in 1990 when a Judge refrained from applying the order of the Revolutionary Command Council No. 581 of 1981, which provided that Capital Secretariat can confiscate agrarian lands in the borders of Baghdad without indemnifying its owners[48]. It contradicts with article 16th B. of the Constitution of 1970 which provides that "private ownership and individual economic freedom shall be guaranteed within a limit of Law and the basis of non-investing them in what contracting or harming to the general economic planning" [49].

In both cases, the judges issued a judgment for claimants which included refusing to apply the unconstitutional provisions after they clarified why these provisions are unconstitutional. That was almost the only cases which the Courts tried to repeal an unconstitutional provision by refraining from applying them. That may show that the courts tried to monitor the constitutionality of Acts according to the general principle of the constitution's supremacy. However, they could not ask for a remedy to any situation of legislative omission if it exists as such kind of monitoring can not be practised in direct order for legislative intervention. That may give the reason for FSCI hesitation to give clear decisions in the situations of legislative omission as it will be shown in the following discussions. The judges practised the constitutional review for the first time after 2003, and they may need more time and experience to manage the monitoring of legislative omission in a better way.

---

47 Kalid Essa Taha, 'We Hope That the American Legislation for Iraqi Courts Will Lead to the Stability' (*Al-Hewar Al-Mutemedn*, 2007).

48 Maki Naji, *The Federal Supreme Court in Iraq* (Dar Al-Dieaa 2007). P: 33.

49 Iraqi Interim Constitution 1971.

2.2. Iraqi Constitutional Judiciary after 2003 (Forming of Federal Supreme Court FSCI)

As it was shown above, Iraq has never known the specific constitutional judiciary. Thus, the forming of a new constitutional court was a massive evolution in Iraq judiciary system. However, establishing and forming FSCI has witnessed a complicated discussion and argument. I am going to explain the circumstances of establishing the FSC and the argument about its legitimacy as it may help to understand the uncertainty and hesitation of its decisions, especially in the cases of legislative omission.

The Federal Supreme Court in Iraq FSCI has been established according to (TAL), and Interim Iraqi Government (IIG) issued the Act of Federal Supreme Court No. (30) Of 2005. Article No (44) of (TAL) explained the numbers and the way of forming the (FSC). It provides that:

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

FSCI was formed in 2005, according to TAL. It is still in this formation until now, even though the Constitution of 2005 mentioned it with a different formation. The Constitution of 2005 provided that the FSCI shall be formed by judges, experts in Islamic jurisprudence, and legal scholars [(50)]. Nevertheless, it did not mention the numbers of those judges, experts and scholars, and what is the role each of them? There are huge discussions about these issues between legal scholars [(51)] which are particularly relevant to my thesis. The Constitution

---

50 Article (92) of Constitution of Republic of Iraq 2005.

51 For more information, see: B Pimentel, D., & Anderson, 'Judicial Independence in Post-Conflict Iraq: Establishing the Rule of Law in an Islamic Constitutional Democracy' (2013) 46 George

provides that all these significant issues to be organised by Act of FSCI which shall be passed by agreement of two-third Council of Representatives members. This law has never been legislated yet thus the FSCI is still formed according to TAL and Act No (30) of 2005. Therefore, some politicians argue that the current forming of FSCI has no right to interpret the constitution's texts when the political blocs have different views on them because it is not formed according to the Constitution [52]. This situation made FSCI very cautious when it considers such actions. Some legal scholars argued that the current FSCI in this form is unconstitutional, and it has no power to practise any of its competences [53].

In my opinion, it is clear that the current FSCI has an absolute power to practise all competencies which have been given to the Federal Supreme Court which mentioned by the Constitution of 2005 because of several reasons:

First: article 92/ second of the Constitution provides that:

> *"The Federal Supreme Court shall be made up of numbers of judges, experts in Islamic jurisprudence, and legal scholars, whose number, the method of their selection, and the work of the Court shall be determined by a law enacted by a two-thirds majority of the members of the Council of Representatives."*

The Constitution provides the competences of FSCI in article 93 as well. It does not mention that the current court is dissolved. Also, Article (130) of the Constitution provides that: "*Existing laws shall remain in force unless annulled or amended following the provisions of this Constitution*" That means the Act No (30) is still in force and the current Court is still constitutional and legal. The issue of dissolving the current court relates to

---

Washington International Law Review 29. P: 39-42. Salim R. Al-Mousawi, 'The Formation of the Federal Supreme Court in Iraq between the Constitution and the Law Analytical and Cash Reading' (*Journal of the legislation and the judiciary*, 2009). Salem (n 4). & Sanaan-Guharzi (n 4).

52 Salim R. Al-Mousawi (n 67).

53 See S. K. Abid, 'The Federal Supreme Court in Iraq, Its Formation and Competencies (Comparative Study)' (Al-Nahrain University 2011). P: 39-40.

enacting the new law of FSCI, which will provide a new forming of the Court according to the Constitution [54].

Second: saying that the current FSCI is unconstitutional would result to Institutional vacuity and damage the principle of constitutionalism which is mentioned in the Constitution because there is no institution has the power of monitoring the constitutionality of laws and other essential competences. In this case, the only parliament has the power to establish the FSCI according to the Constitution, and legislators naturally do not want to establish an institution which monitors their work. While the fact that FSCI is established by Constitution which gives powers and competences to the authorities, and Parliament has just a power to enact laws to organise and shape these institutions. On another hand, saying that the current FSCI is unconstitutional is just an opinion which cannot be applied realistically merely because it means there is no authority which has the power to apply FSCI's competences and that leads to many constitutional problems.

One of these problems, for example, is destroying all political and legal system which has been established since the second session of the Parliament because the Constitution provides that the FSCI should validate the results of the general election [55]. Therefore, if the FSCI was unconstitutional, its decisions are void because the decision of unconstitutionality of FSCI is discovered not created decision. That means the Council of Representatives in its 2010 and 2014 sessions and even in the current 2018 session is unconstitutional because there is no authorised body to approve the results of the election under the Constitution.

Third: there is a constitutional custom, that has been established in Iraq, makes all decisions of the current FSCI acceptable because all state's departments accepted and respected FSCI decisions during last fourteen years without any objection or doubting of the constitutionality of the Court. There is no constitutional rule that prevents the forming of any constitutional custom. Finally, keeping the current FSCI can be considered as a penalty to the legislators' failure for enacting the Act of FSCI as it may seem an example of an absolute legislative omission.

---

54 A. Al-Samuk, 'About the Supreme Federal Court (the Legal Basis)' (*Sot Al-iraq*, 2011). P: 40.

55 See Article 93/ Seven of Constitution of Republic of Iraq 2005.

Therefore, the current forming of FSCI is one of the state's bodies which should still exist even though there is no an Act regulates its job after the new Constitution became in force as any other body. For example, the Presidency of Republic which still existed even there was no legislation which regulates it according to the Constitution of 2005 [56]. For all these reasons, I support that the current FSCI has an absolute power to practise all competencies which have been given to the Federal Supreme Court, which mentioned by the Constitution of 2005. That will support its position of monitoring the lawmakers' actions, including the situation of legislative omission. The Court itself already practised this monitoring through several decisions which will be discussed in the next section.

2.3. The Decisions of FSCI which Related to Legislative Omission

In most of the countries, the constitutional judiciary has the power to interpret laws or even the constitution itself. Thus, in most of the cases, constitutional judges interpret laws or constitutional rules according to their understanding of the texts and this interpretation will get the same power of the law which is interpreted and in the case of legislative omission constitutional judges may use this power to create new provisions. In this case, constitutional judges indirectly become as another lawmaker, but constitutional judiciary may be more potent than the legislators themselves because the constitutional judiciary has the authority to consider the constitutionality of laws and the rulings which are issued by the constitutional judiciary are assumed that they are conforming of constitution more than legislators.

In Iraq, FSCI issued several decisions which contain new provisions to meet some of the legislative gaps [57] which I think would be great starting of this study. Displaying these decisions will help to identify the most important issues relating to the problem of legislative omission and will help to create some significant notes and issues which this study would deal with in the coming chapters. Therefore, I am going to display these decisions then I am going to find out the essential notes which may be found about the monitoring the legislative omission by FSCI:

---

56 See Decision of FSC, 37/2010).

57 Salim R. Al-Mousawi (n 67).

1. Decision No. 13 / 2007. Dated: 31/7/2007 [58]. FSCI provided an interpretative decision which confirmed the quota of women in the local councils that it should be one-quarter of the number of members of each local council. FSCI relied on article No. 49 / fourth of the Constitution which provided: "*The elections law shall aim to achieve a percentage of representation for women of not less than one-quarter of the members of the Council of Representatives*"[59] As is shown the article relates to the electoral law for the Council of Representatives, and it does not mention local councils. Nevertheless, FSCI used this article to confirm on the women's Quota in the local councils then the legislators included a provision related to that in article no. 13 / second of the election law of local councils [60].

Thus, FSCI has established a new provision which confirms a specific women's quota in the local council only according to the constitutional provision which related to the Council of Representatives. That shows not just the power of the Court's interpretation, but how the court can compel the legislature to contain a specific provision in the Act of the local councils' election. The Court used the article above as an example of the intention and will of constitutional drafters. This will and intention aim to empower the women by ensuring a specific proportion of them in all representative councils. Thus, the main aim of the constitutional article is to empower women, and this aim can not be effective without extending it to all representative councils. This view of the Court can also be understood through another decision of FSCI [61].

2. Decision No. 56 / 2010. Dated: 24/10/2010[62]. After the general election in Iraq in 2010, the political parties did not agree to name the speaker of parliament in the first session as such Constitution has provided in the article (55). Thus, they agreed to leave this parliament session indefinitely open until they agree about the name.

Nevertheless, a case was brought against parliament to FSCI which issued an injunction to quash the decision above and oblige Parliament to reconvene to name the speaker, although there is no provision in the Constitution or any other Acts that address this situation. That means that FSCI created a new provision which was necessary to ensure the standard

---

58 *Decision of FSCI 13/2007* (n 3).

59 Constitution of Republic of Iraq 2005. P: 15.

60 The Election Law of Governorates' Councils in Iraq 2008. P: 3.

61 *Decision of FSCI 42/2012* (2012) 42.

62 *Decision of FSCI 56/2010*.

progress of the political process, and Parliament respected and applied this provision. That means there is a high level of respect to FSCI's decision even in some issues which seem to have a political nature.

This decision may seem like an interpretation of the Constitution rules. However, in this case, FSCI added a provision obliges Parliament to elect its speaker in the first session without any extension for this session. This provision fills a legal gap which is whether Parliament can leave the first session indefinite open until an agreement about the naming of the Speaker or not. Thus, it is not just a standard interpretation of the constitutional text, but it is an answer to the legal question which is: what should Parliament do if there is no agreement of the Speaker in the first session.

3. Decision No. 27/ 2009. Dated: 11/8/2009[(63)]. FSCI clarifies the meaning of "absolute majority" in the text of article No (63) second (B) of the Constitution which, provided that:

> "*A Council of Representatives member may not be placed under arrest during the legislative term of the Council of Representatives, unless the member is accused of a felony and the Council of Representatives members consent by an absolute majority to lift his immunity or if he is caught in flagrante delicto in the commission of a felony*".

The text does not mention what does the "absolute majority" mean either it is the majority of all Council of Representatives members or the majority of members who are attendant?

FSCI interpreted that "absolute majority" in this text means the majority of members who are attendant because when an absolute majority of all the Council of Representatives members is required, the Constitution's texts provide it. This case may seem like a standard interpretation of the constitutional text, but FSCI created a new provision which is when the Constitution mentions just "absolute majority", that means the majority of members who are attendants. This provision may have the same supremacy of the constitutional rules because the legislators may not be able to enact a provision that gives a different interpretation. Again this decision fills a legal gap that is established because of the legal question. This question is what the absolute majority of the Council of Representatives means.

In another way, FSCI has other decisions which provide a directive decision to the legislator to address legal gaps in some statutes which are explained below:

---

63 *Decision of FSCI 27/2009*.

1. Decisions No. 6/2010 and decision No. 7/2010 both dated on 3/3/2010 [64]. The amendment of the general election Act No. 26 of 2009 provides that five seats of parliament are given to Christian minority that comprises all Christians in Iraq who live in five constituencies which are Baghdad, Nineveh, Kirkuk, Dohuk and Erbil. While it provides that one seat is given to Sabean Mandaean minority in Baghdad province which was considered as one constituency. Also, the general election Act gives the right to Christians voters in those provinces to vote for their candidates regardless of the constituencies, but Sabean voters who live outside Baghdad can not vote for their candidates in Baghdad. The FSCI directed the Parliament to legislate a new provision which gives the Sabean minority voters the right to vote for their candidates regardless of the constituencies such as Christians. Then the Council of Representatives enacted an Article which gives the Sabean voters the right to vote for their candidates regardless of the constituencies [65].

Again, this decision may seem as any constitutional interpretation of the principle of the equality of people, but the FSCI asked the Parliament to amend the Representatives Council's election Act to be compatible with the Constitution by adding another minority to be considered equally with the Christian minority. That may be considered as a clear intervention into legislative competence by asking the legislators to add a specific provision[66].

2. Decision No. 11/2010 dated on 14/6/2010 [67]. As the constitution provides that each parliament seat represents one hundred thousand people, the Parliament has issued an electoral law for the general election which provides that the seats of parliament should be as the constitution provided with considering the quota of minorities of Christean for five seats and one seat for each Sabean Mandaean, Yazidi, and Shabak. The Yazidi independent list brought a case against Parliament as the electoral Act gave them one seat and they claimed that Yazidi population are more than five hundred thousand which means five seats should be given to Yazidi minority.

---

64 *Decision of FSCI 6/2010* & *Decision of FSCI* 7/2010.

65 Article No. 11 third of Council of Representatives Elections Act in Iraq 2013.

66 See Majida Sanaan Ismael, 'The Judicialisation of Constitutional Disputes in Iraq: Exploring the Rule of Law in Transitional Democracies' (Liverpool 2016). P: 220.

67 *Decision of FSCI 11/2010*.

FSCI clarified that there is no official statistic for the Iraqi population since 1997 and IHEC depended on the statistic of the population which was prepared by Ministry of trading for providing food in a certain economic situation [(68)]. This statistic does not contain the religious, ethnical and sectarian information of the population. However, the Court mentioned that the statistic of 1997 indicated that the population of Yazidi who lives in fifteen governorates (except Kurdistan region) was (205,379) and when the population growth rate is being added, which is (8,2%), the number will be (273319). That means the quota which is given to Yazidi does not match with their population size. Thus, the Court issued that the Yazidi minority should be given seats according to the size of their population after new statistics will be executed [(69)].

This decision may seem like any standard constitutional review. However, but there is a direct order for legislative intervention to correct the unconstitutional situation, and that may give a piece of evidence that FSCI can issue a decision which demands the legislature to remedy the situation of legislative omission because it is a constitutional violation as this study tries to prove.

3. Decision No. 59/ 2011 dated 21/11/2011[(70)]. The constitution provides in the article (41) that "Iraqis are free in their commitment to their personal status according to their religions, sects, beliefs, or choices, and this shall be regulated by law". The current law of personal status has many problems because it has several provisions which infringe the Islamic law. Hence, FSCI directed that legislators shall consider all Islamic doctrinal schools when a new law of Iraqi personal status will be legislated. Thus, they shall try to provide provisions which fit for all Iraqis and respect their religions and sects. As it is shown above FSCI did not mention that the law of personal status shall be legislated according to the article (41) of Constitution and it did not demand from the legislature to enact it although the article (41) provides that. It may seem that FSCI has some decisions which may address some legislative gaps as partial legislative omission, but it does not have a decision which related to an absolute legislative omission, but other decisions show deferent as it will be shown. Thus, the court only asks for considering a specific issue in the Act of Personal States without asking the lawmakers directly to enact this law as the Constitution mentioned that.

---

68 Article No. 1/ third of First Amendment of General Elections Act in Iraq 2009.

69 Ismael (n 82). P: 220-221.

70 *Decision of FSCI 59/2015* (n 55).

4. FSCI did not rest content to direct the legislature but it recommended [71] the Committee of Constitutional Amendments, that is established according to the article (142) of the Constitution, to provide a new constitutional provision regulates a way of electing the speaker of Parliament and the two Vice-Speakers when these positions vacate for any reasons. Therefore FSCI tried here to correct the Constitution itself because this decision is directed the Committee of Constitutional Amendment. That means FSCI is not just a court applied the laws, but it participates in developing the whole legal system, and that is not out of its competences. In the end, the legislators are human, and they cannot anticipate all the situations which may appear, and the judicial authority can help the legislators to fill all the constitutional or legal gaps. At the same time, FSCI did not mention the specific way to fill this gap, but it just mentioned, and the Committee of Constitutional Amendments has the absolute power to choose the ideal way to regulate it. Thus, FSCI mentioned the gap and asked for a provision which is in need.

5. On 16th of January 2018, FSCI issued a declaration which demands from the parliament to complete the components of the legislative authority. The spokesperson of the Court said that the legislative authority contains two councils (the Representatives' Council and the Federal Council). According to the Constitution of 2005[72]. The declaration mentioned that there was an FSCI's decision which mentioned this issue by saying that the parliament should complete the components of the legislative authority, especially those which are mentioned in the Constitution.

This decision was issued in 2012 when the Parliament asked FSCI to give a constitutional interpretation of articles No 65 and No 137 of the Constitution. The article No. 65 mentions that there is another council of the legislative authority which is called the Federal Council. All matters regarding this council should be regulated by the law which should be enacted by agreement of two-thirds of members of the Representatives' Council. Article No. 137 mentions that all provisions which related to the Federal Council and mentioned in the Constitution should be delayed until a parliament's decision which should be enacted by two-thirds of the members of the Parliament in the first round of it that is

---

71*(Decision of FSCI 10/2009*

72 The Federal Supreme Court in Iraq FSCI, 'The Announcement of the Supreme Federal Court 16/1/2018' (*The Federal Supreme Court website*, 2018) <https://www.iraqfsc.iq/news.4012/> accessed 15 June 2018.

elected after the Constitution will be endorsed. In that time, the Parliament asked FSCI if there is a need to issue that decision or not.

The Court replied to the Parliament that they should issue this decision, and they should complete the components of the legislative authority. The Court said that the articles No (65) and (137) complement each other. Also, the Court mentioned that enacting the law of the Federal Court should be preceded by preparatory work. The Court confirmed that Parliament, Government, Judicial authority and all concerned bodies should join the discussion of the provisions of this law because it is so essential which will set the foundations of the second wing of the legislative authority. Finally, the Court invited the Parliament to issue the legislative decision or statement which includes calling both executive and judiciary authorities and all other concerned bodies to discuss and give their opinions about this law. After that, all suggestions should be sent to the Council of State Consultative to formulate legally and send it to the Parliament to discuss and enact it [(73)]. Thus, this announcement demands the Parliament to complete one of the legislation which should be enacted according to the Constitution. However, the most important questions that may be asked are what the legal value of this announcement? Also, why the Court issued this kind of announcement?

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

There are several points which can be noted from a discussion of these decisions about the position of FSCI of monitoring the situation of legislative omission.

1. In all these decisions, FSCI does not mention that there is a situation of legislative omission. The Court reviews these cases as a standard constitutional review or as cases of constitutional interpretation. It may show that the Court has no clear view of the situation of

---

73 *Decision of FSCI 72/2012*.

legislative omission. It considered these situations as any constitutional violation which needs to be reviewed, or unclear rule needs to be interpreted.

2. In some cases, FSCI calls Parliament to remedy the unconstitutional situation by adopting the Court's view whether it is an obligatory constitutional interpretation or a way to remedy an unconstitutional situation. It may show that FSCI has the ability and will to practise monitoring the situation of legislative omission even there are no legal provisions which regulate this kind of monitoring through other powers which it has them already.

3. All decisions were related to the kind of relative legislative omission, and when the situation was related to an absolute legislative omission, FSCI issued a declaration by its legal spokesperson which called the Parliament to provide all required legislation without any obligation. However, FSCI did not mention the executive authority in this declaration, as it has the role of drafting Acts, and it is a part of the legislative process according to previous FSCI's decisions. That may show that FSCI has retracted from its position to restrict drafting Acts exclusively for executive authority.

4. FSCI tried to warn the Parliament that there are some essential laws which should be enacted by its spokesperson's declaration. That may give a clue that FSCI wants a legislative intervention to fill the absolute legislative omissions, but it does not want to direct the parliament to do that as the Court may see that is a legislative competence which should be practised by the Parliament and the Court should not intervene

5. FSCI's decisions are different in terms of the impact. Some decisions mention the legislative omission and ask for a specific remedy. Some others only mention the omissions, while the Court tried to fill omissions by interpreting the constitutional rules in other decisions.

To be able to give some advice to FSCI in this context, I think I need to study the situation of legislative omission widely and to discuss several issues related to this problem which will be the topics of the next chapters of this study.

Chapter Two

The Definition and Scope of the Concept of Legislative Omission

The phenomenon of legislative omission exists in most legal systems around the world, especially in countries where a constitution document is considered to be the top of the legal pyramid. This means all laws and provisions must be compatible with the constitution and that all laws take their enforcement from it. At the same time, no matter how assiduous the competent legislative authorities, they may omit to enact some provisions, especially those that are very important in order to make the constitutional norms executable. The omission of enacting these provisions leads to the failure to execute or implement the constitutional norms which will stay on the constitutional documents without any influence or execution. This situation becomes dangerous when the provisions relating to the bills of freedoms and rights. This is because people may not be able to practise some of their freedoms and rights without the legal systems that regulate them. Some countries have recognised this situation and they have tried to find a suitable solution in their legal mechanisms. In other countries, legal provisions do not mention this case but the constitutional judiciary deals with it.

In this stage, the most critical issue is knowing what legislative omission means. Answering this question is the most critical issue that this study aims to clarify. Since there are several views about what legislative omission means, there are some situations that may seem like there is a situation of legislative omission but it is not. It is useful to examine these views and to try to find out the most common elements. This will help to draw up a clear definition of this legal phenomenon. Thus the definition of the concept of "Legislative Omission" is going to be identified in this chapter of the study, which will be divided into three parts. The first part will concern the definition of legislative omission in the constitutional and legislative texts. The second part will be about the definition of legislative omission according to case law. The third part will discuss the theoretical explanation of the legislative omission definition. At the end of this chapter, my perspective of the legislative omission definition will be clarified.

Section One

The Definition of Legislative Omission in the Legislative Provisions.

Many definitions have been developed for the concept of "Legislative Omission". Some constitutional and legal provisions clarify this concept, which acknowledges this problem. Several provisions provide clarification or definition of the concept of legislative omission. These provisions have been issued by the constitutions of Portugal, Brazil, South Africa and by the Act of 2011 of the Constitutional Court in Hungary. Every provision puts forward a different concept from others. However, the provisions agreed to give the same information such as "there is a lack of legislation" as will be shown. In this part, the concept of legislative omission according to the constitutional and legal provisions will be discussed.

1. Legislative Omission in Portugal and Brazil.

Some constitutions issue a brief definition of the problem of legislative omission. The Constitution of Portugal provides that "unconstitutionality by omission … the Constitutional Court shall review and verify any failure to comply with this Constitution by means of the omission of legislative measures needed to make constitutional rules executable" [(1)]. According to the Portuguese constitution text, legislative omission arises when the legislature fails to enact the laws which are necessary for executing the constitutional rules [(2)]. While the constitution of Brazil mentions legislative omission, it is called a "lack of a measure". The article provides that "*when unconstitutionality is declared on account of the lack of a measure to render a constitutional provision effective, the competent Power shall be notified for the adoption of the necessary actions and, in the case of an administrative body, to do so within thirty days*". [(3)]. Thus, the provision in the constitution of Brazil does not differ substantively from the provision in Portugal's Constitution.

---

1 The Constitution of Portugal 1976 Article (283) 1. The first version of the constitution gave the competence to review unconstitutionality by omission to the Council of the Revolution. Then, the revision of the constitution, which took effect in 1982, changed the authority responsible for this competence from the Council of Revolution to the Constitutional Court. Portuguese Constitutional Court (n 14). P: 20.

2 Portuguese Constitutional Court (n 14). P: 10.

3 Article 103 Paragraph 2 of *The Constitution of Federative Republic of Brazil* (n 7).

Even though the provisions are clearly different in terms of wording, they agree that there are constitutional norms that require legislative intervention to be executable. Whether this intervention is required from the legislature or executor, this authority has failed to achieve that requirement [(4)]. It may seem that there is a difference. This difference is where Brazil's constitution mentions that legislative omission may happen because of the executive authority, when it mentioned that: "… in the case of an administrative body, to do so within thirty days". However, this is not a real difference because the drafting of the provision in the Portuguese constitution does not prevent the expectation that legislative omission may arise from the executive authority too.

However, there is an essential question that may appear, which is "What is the difference between the legislature and executive authorities in terms of legislative omission?" Alternatively, in another way, can a legislative omission arise because of an omission by the executive authority?

Even though a legislative omission may be predominantly expected to arise through an item of the legislature because it is relevant to the legislation, an executive authority can be a cause of legislative omission according to the provisions above. It is a good idea to expect that legislative omission may arise through the executive authority for two reasons. First of all, the executive authority may have an essential part in the legislative process, especially in parliamentary systems. For example, the executive authority has the power to propose or draft laws and provisions. Hence the executive authority should be responsible for its part in the legislative process. Second, most political and legal systems give the executive authority the power to enact orders and instructions. Alternatively, the legislature may delegate to the executive power to enact laws in a specific matter. In both situations, the executive authority may omit to enact these orders, instructions or laws. In that case, the monitoring of the legislative omission should be directed against the executive authority.

In my opinion, there is no real difference between the legislature and executive in terms of a legislative omission, even though the Brazilian Constitution mentions that the omission should be corrected within thirty days if it has arisen because of an administrative agency

---

4 Mendes (n 9). P: 7-8. & 'Portuguese Report for the XIVth Congress of the Conference of European Constitutional Courts (n 83) P: 10.

omitting. [5]. The reason that I can think of for this is that the Brazilian Constitution may want to give open time to the legislature to correct the legislative omission because legislators may need more time to prepare the political consensus for enacting laws.

Meanwhile, the executive authority does not need that. Hence administrative agencies are capable of issuing orders and instructions immediately. Another note that can be deduced from the Brazilian constitutional text is that the authority that is given to the FTS may seem stronger in the case of the administrative body's omission. This is as there is the timing that the administrative body should use to remedy the omission within. There is no such timing for the legislative body. The reason for this may also relate to the fact that the administrative body may omit many measures as it has many responsibilities that may be more than the responsibilities of the legislative body.

There is another issue that can arise, which is "How can the constitutional non-executable norms be identified?" In other words, how can we identify the constitutional norms that need a legislative intervention to be executable and other constitutional norms that are executable in themselves? Answering this question is very important in order to identify if there is a situation of legislative omission or not. Some constitutional norms do not need any legislative intervention to be executable. This means that they cannot be the subject of legislative omissions, such as the rules that identify the number of parliament members, for example.

In Brazil, Mendes explains that legislative omission has arisen when a competent authority fails to fulfil the constitutional obligation of legislating. This affects the constitutional rights and freedoms. In other words, the constitutional non-executable rules are the rules related to rights and freedoms [6]. However, Mendes gave this explanation when he explained the injunctive writ. This is one of the ways that the Supreme Federal Court in Brazil STF uses to solve the legislative omission according to the Brazilian Constitution, which provides that:

---

5 Article 103 Paragraph 2 of *The Constitution of Federative Republic of Brazil* (n 7).

6 Mendes (n 9). P: 8.

"*A writ of injunction shall be granted whenever the absence of a regulatory provision disables the exercise of constitutional rights and liberties, as well as the prerogatives inherent to nationality, sovereignty and citizenship*" [(7)].

This means that the Brazilian Constitution distinguishes between the absence of a regulatory provision, which relates to rights and freedoms, and other provisions that relate to other constitutional norms. This differentiation provides the constitutional norms that relate to rights and freedom. This is the preference because the Brazilian Constitution gives judges the power to issue a writ of injunction to solve this omission. This is more potent than directing the legislature to solve the problem. This is because the provision gives judges the power to establish a solution to meet the omission [(8)].

For example, there is a decision of FTS that relates to the case of civil servants strike. The FTS issued to solve the legislative omission of a lack of rules which regulate the civil servant strike should apply Act 7, 783 of 1989. This regulates the right of the employees in the private sector to strike. The FTS thus extended the 1989 Act to include all civil servants up until enacting a separate Act that regulates their right to strike [(9)]. This is one way that shows how the Court can use a writ injunction to remedy the legislative omission. This gives it more power to direct the legislature and to solve the problem even temporarily. I shall explain the writ injunction widely in the next few chapters of this study.

In this context, there is a significant issue that may arise. This concerns how the constitutional judicial review of legislative omission can be justified in light of the principle of the separation of powers? Alternatively, another question is "How can judges, who are usually appointed, direct legislators, who are usually elected by the people, to enact laws or provisions?" Two points can answer these questions. First, there is the principle of "the reservation of the law" or "la réserve de la Loi" This principle will be discussed in more detail

---

7 Article 5, LXXI, of *The Constitution of Federative Republic of Brazil* (n 7).

8 See Keith S Rosenn, 'Procedural Protection of Constitutional Rights in Brazil' [2011] The American journal of comparative law 1009. P: 1027.

9 *Decision of STF en banc, Rep Mauricio Corria* (2007) 670-ES. *Decision of STF, Rep Gilmar Mendes* (2007) D.J.U. 708. *Decision of STF, Rep Eros Grau* (2007) D.J.U. 712. See Rosenn (n 97). P: 1029.

later on in this chapter. This means that the legislative competence is reserved for the legislature. There is no other authority that has this power without authorisation from the legislature. Hence when the legislature fails to practise this competence, it violates this principle and the constitution, which gives the legislature this power. Thus this violation should be monitored and the legislature should be directed to fulfil its duty. The second point, the principle of the separation of powers itself, gives justification to such a judicial review because the principle of the separation of powers is a political principle that seeks to divide and distribute the power between the different independent authorities. This distribution requires that every authority exercises a part of the power.

However, some may argue why this kind of monitoring should be given to the judges? As is well known, this principle has been shaped over the last two hundred years and now it has different approaches [(10)]. Nevertheless, it is wrong to leave it up to the authorities to exercise their power without any monitoring. Thus, every authority should be monitored to make sure that it does its job and that this does not interfere with any other authority's job. Therefore there are several ways of monitoring between the authorities that have been established. The constitutional judicial review is one of these ways. It seeks to guarantee that the legislature abides by the constitutional norms. This commitment comes in two types. The first one is a negative commitment, which means that the legislature should not violate the constitutional rules. Another is a positive commitment, which means that the legislature should enact the acts and provisions that should be enacted according to the constitution. Otherwise, it will fall into what is called legislative omission. Also, as the situation of legislative omission can be considered a constitutional violation, the constitutional judges can monitor it as they can any other constitutional violations. In Chapter 5 of this study, I shall devote my focus to the relationship between the legislative omission and the principle of the separation of powers widely [(11)].

In reference to the main issue, ‘How can non-executable constitutional norms be identified? - it is still not being addressed. Legislative omission may relate to constitutional norms other than rights and freedoms, especially when Mendes explained that the

---

10 Richard Benwell & Oonagh Gay, ‘The Separation of Powers’ (*House of Commons Library*). P:1.
11 ibid. P. 5. & Kilali Zahrat Al Rahman, ‘Legislative Omission and Constitutional Monitoring on It’ (University of Abu Bakr Belkaid Algeria 2013). P. 17.

"unconstitutional Suit due to Omission (ADIo)" is another way that can be used to solve legislative omission through the Supreme Federal Court. He clarified that ADIo is the judicial solution that can be the way to activate the constitutional norms and address the legislative omission [12]. Thus he did not identify whether the constitutional norms relate to freedoms and rights or not.

This means that the non-executable constitutional norms cannot be confined to freedoms and rights in isolation. For example, when there are constitutional rules that set up the main authorities, there will be a need for more details which are left to the legislature to regulate through the complementary laws. The constitutional rules usually cannot cover all of the essential information about setting up the authorities. Thus, when the legislature omits to enact these complementary laws or when it enacts them incompletely, this will lead to making the constitutional rules ineffective. This can be considered a situation of legislative omission, even though it is not related necessarily to freedoms and rights [13]. Legislative omission is a failure of the lawmakers to make the constitutional norms effective, whether these norms relate to rights and liberties or not. However, when it relates to rights and liberties, there may be a different way to deal with it as explained in the Brazilian case.

In Portugal, most Portuguese legal scholars differentiate between legislative omission and unconstitutional legislative omission [14]. They argue that the criterion of identifying the difference between legislative omission and unconstitutional legislative omission is the constitutional rules themselves that have been disobeyed, disrupted or processed negatively by the legislative authority. Hence, it cannot be that all of the negative actions of the legislature are considered an unconstitutional legislative omission. Thus legislative omission arises when the legislature does not enact laws that are necessary for executing the constitutional rules that cannot self-execute. In other words, constitutional judges should examine the constitutional text that has been disobeyed, disrupted or processed negatively. Hence if they find that this text needs a legislative intervention to be executable, then an unconstitutional legislative omission will arise. Otherwise, it may be considered a standard negative action of the legislature, which does not need a constitutional judiciary intervention.

---

12 Mendes (n 9). P: 3-4.

13 Ibid. P: 4.

14 Portuguese Constitutional Court (n 14). P:10.

However, Pereira da Silva criticises this classification because it relates to procedural issues. The definition cannot cover the meaning of legislative omission. He argues that the legislative omission can be found in other substantive constitutional rules and that the text of article 283 of Portugal's Constitution does not prevent other forms of legislative omission from appearing [(15)].

The criticism of Pereira da Silva may be correct, especially when it would be possible to expect that legislative omission may arise because a competent authority omitted to effect a direct constitutional obligation. This mentioned in the constitution. This includes the constitutional rules that order the legislature to create political parties through legislation or to enact election Acts. However, some may argue that this situation does not relate to making constitutional norms executable as Portugal's Constitution mentioned because they are related instead to regulating specific legal issues that may not necessarily relate to making constitutional rules executable. I may argue that when a competent authority does nothing to activate a direct constitutional obligation, it fails to make the constitutional norms executable as well. These constitutional rules aim to make the topics regulated. This regulation should be made by the Acts that are enacted by the lawmakers. Thus when the lawmakers omit to enact these Acts, they did not adhere to their direct constitutional obligations. This means that the constitutional rules that relate to these obligations become non-executable.

Nevertheless, there is, in my view, still a need to create a ranking of the constitutional rules. This can relate to the unconstitutional legislative omission when the legislature does not enact laws that are related to them. There is a traditional distinction between the two kinds of constitutional norms, which are the Programmatic and Prescriptive rules respectively. The Court of Cassation (Corte di Cassazione), which was considered the highest court in Italy, originally made this distinction. The Court clarified that programmatic norms identify the higher values of society and what goals want to be achieved. For example, justice and equality etc. These norms always need action from the parliament or government in order to produce the effect that is required. Prescriptive norms explain the practical rules that organise the political and legal system. For example, the number of parliamentary members,

15 Portuguese Report for the XIVth CCECC (n 83). P: 10-11.

the method of electing them and who has the right to vote etc. These norms are effective, and they only need the operating rules that are issued by parliament or the government [16].

Portugal's legal theorists, Gomes Canotilho, Vital Moreira, Vieira de Andrade and Manuel Afonso Vaz, considered that programmatic rules cannot be a part of unconstitutional legislative omission. This is because these norms relate to the highest values of society [17]. Thus they need a long time to be met, and a legislative authority has the right to decide when and how are they met [18]. Jorge Miranda dissents this view. He claims that both programmatic and prescriptive constitutional rules can lead to unconstitutional legislative omission. He explains that the unconstitutional legislative omission appears for the prescriptive rules when the legislature fails to enact laws that are required by the applicable constitutional rules. The unconstitutionality appears for the programmatic rules when the legislature fails to enact laws that are necessary to make the social and economic conditions suitable for the constitutional norms [19]. Thus when the constitution aims are focused on a specific economic ideology, the legislature fails to meet this ideology in specific economic legislation. This can be considered a legislative omission that has appeared because the legislature fails to meet the requirements of the programmatic constitutional rules. The legislative omission may appear as well when the legislature omits to enact an Act that is required by a certain constitutional article that is considered to be a prescriptive constitutional rule.

I agree with the perspective of Miranda because some of the programmatic constitutional norms are essential for interpreting constitutional rules. They direct the legislature to abide by the supreme aims adopted in the constitutional document [20]. Some of these rules may relate to the rights and liberties of the people. For example, this can include the decision of the

---

16 D. Sassoon, *Contemporary Italy: Politics, Economy and Society since 1945* (Routledge 2014). P: 219. F Parisi M. Livingston, P. Giuseppe Monateri, *The Italian Legal System* (2nd ed, Standford University Press 2015). P: 245.

17 Portuguese Constitutional Court (n 14). P: 12.

18 See: M Cartabia and A Simoncini V. Barsotti, P. G. Carozza, *Italian Constitutional Justice in Global Context* (Oxford University Press 2015). P: 31.

19 Portuguese Constitutional Court (n 14). P: 12-13.

20 V. Barsotti, P. G. Carozza (n 107). P: 31-32.

FSCI in Iraq, which has been shown before. This decision relates to the women quota, thus as was explained, the Court directs Parliament to contain a women's quota in the local council election Act according to the constitutional text that enforces a women's quota in Parliament. The FSCI considered this text to be a general programmatic rule which aims to empower women in their political life. The FSCI provided that the rule that should be followed for interpreting any provision of legislation requires studying all of the provisions of that legislation in order to understand the philosophy and aims of it. According to this, the Court has extended this text to include local councils [21].

Overall, it is clear that Portugal's Constitution and the Brazilian Constitution are nearly concordant in that legislative omission is the failure of a competent authority – whether it is legislature or executive authorities - to make the constitutional norms executable. It does not matter whether the constitutional norms are programmatic or prescriptive and whether they relate to freedom and rights or if they relate to other constitutional rules that required legislative intervention.

2. Legislative Omission in South Africa.

The situation seems to be different in South Africa. Even though the constitution does not mention legislative omission, it mentions the concept as one of the Constitutional Court jurisdictions. It stipulates that the Constitutional Court has the power to "decide that Parliament or the President has failed to fulfil a constitutional obligation" [22]. The constitutional issues, in the beginning, indicate that "*this Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled*" [23]. Therefore the legislative omission outwardly seems to have a different meaning in South Africa than the meaning in both Portugal and Brazil. This is because South Africa's Constitution mentions this situation as the failure to fulfil the obligation that is imposed by the constitution. The Constitutional texts in Brazil and Portugal provide that a

21 *Decision of FSCI* 13/ 2007 (n 14).

22 Article 167 point4 P: 97 of The Constitution of the Republic of South Africa 1996, Administration of Justice.

23 Article 2 P. 3 of The constitution of Republic of South Africa.

legislative omission is a lack of legislation that prevents the constitutional rules from being executable.

However, I suggest that according to the South African Constitution, it would be acceptable to expect that legislative omission may arise by omitting to enact the laws and provisions that are necessary to execute the constitutional norms. This is especially when executing and activating the constitutional norms is considered to be a constitutional obligation. This can be shown clearly in the case of (*My vote counts NPC vs Speaker of the National Assembly and other*) [(24)]. The claimant invited the Court to order Parliament to enact a law obliging the political parties to disclose the sources of their private funding. The claimant clarified that the voters need this information to make their constitutional right to vote effective in a multi-party democracy system. Thus the claimant's argument, in this case, is an article (19) / 3 of the Constitution that relates to the freedom to vote. This cannot be exercised effectively without enacting a law that allows the voters access to the sources of private funding of the political parties.

Even though the Constitutional Court dismissed the case, it is still a good example that shows that legislative omission in South Africa can arise from omitting the laws or provisions that make the constitutional norms executable. The Constitutional Court dismissed the application because there was already an Act which is known as the Promotion of Access to Information Act PAIA. The court clarified that "My vote counts NPC" had to have attacked the constitutionality of PAIA, which is enacted to have an effect on the constitutional right instead of claiming that the Parliament ought to enact a new Act according to the constitutional obligation. According to this, the Court dismissed the case not because there is no constitutional obligation to affect the right of the vote but because there is already an Act that can be used to meet the claimed requirement. This means that the legislative omission could arise if there was no such PAIA Act to execute the constitutional rules. Thus there is no significant difference between the concept of legislative omission in South Africa's Constitution and the concept in Brazil and Portugal's Constitutions, in my view.

---

24 *Decision of CCT 'My vote counts NPC vs Speaker of the National Assembly and other'* (2015) CCT 121/14. Para: 1.

As shown above, the constitutional text in South Africa provides that 'the legislative omission arises, when the competent authorities whether "Parliament" or "President" has to fulfil the constitutional obligations by doing a positive action which consists in enacting Acts and provisions or any other required action'.[25]. However, the constitutional text does not mention what the court should do if it finds out that the Parliament or the President has failed to fulfil their constitutional obligation. Some say that the Constitutional Court has several options. It can make a declaration stating that there is an unconstitutional legislative omission. It can also invite the competent authorities to address this omission, and it can even complete the omitted text to make it compatible with the constitution [26]. I may agree with the first and second options, but as I shall argue in the subsequent chapters, I differ with the third option because it leads to inserting the Constitutional Court into the legislative process. This gives a massive role to the judges. This may be greater than just monitoring legislative actions [27].

3. Legislative omission in Hungary.

Finally, there is no constitutional provision about the legislative omission in Hungary but Act CLI of 2011 on the Constitutional Court OF Hungary issues that*: "If the Constitutional Court, in its proceedings conducted in the exercise of its competences, declares an omission on the part of the lawmaker that results in violating the Fundamental Law[28], it shall call upon the organ that committed the omission to perform its task and set a time limit for that"*[29].

We can see then that the Hungarian Act defines legislative omission as a negative action made by the lawmaker, which infringes on the Fundamental Law. This means that the

---

25 I. D. Liba & T. Coetzee, Supremacy of the Constitution and the Rule of Law in the New South Africa, Journal of US-China Public Administration, ISSN 1548-6591 March 2013.P. 251. See also, Neil Parpworth, 'The South African Constitutional Court: Upholding the Rule of Law and the Separation of Powers' (2017) 61 Journal of African Law 273. P: 276-277.

26 Abdel Hafis Al-Shimi, *Censorship of Legislative Omission in Judicature the Supreme Constitutional Court* (Al Nahda Al Arabia for publishing 2003). P. 42.

27 See Chapter Seven of this study.

28 Hungarian Constitution is called "Fundamental Law".

29 Article 46 of Act CLI of 2011 of the Constitutional Court OF Hungary.

lawmaker should fulfil all obligations that are imposed by Fundamental Law, including making the Fundamental law norms executable. However, the act clarifies the kinds of legislative omission when it indicates that:

> *"The following shall be considered as an omission of the lawmakers' tasks: a) The lawmaker fails to perform a task deriving from an international treaty. b) A legal regulation was not adopted even though the lawmaker's task derives from explicit authorisation by legal regulation. c) The essential content of the legal regulation that can be derived from the Fundamental Law is incomplete"* [30].

Thus the act mentions three statuses that should be considered a legislative omission. These statutes relate to the failure of the lawmakers to fulfil the legislative obligations that are imposed whether by an international treaty or by the Fundamental law. Therefore the Hungarian act expands on the range of the legislative omission to include not just the failure to fulfil the constitutional obligation but also the obligations imposed by an international treaty. Even though the Hungarian text is very general, it contains some situations that help judges to identify legislative omission. At the same time, the text does not prevent the legislative omission that may arise because of another situation that is not mentioned. Hence it would be possible to expect other cases that can cause the legislative omission so long as the Fundamental Law is violated because the lawmakers do not fulfil their obligations. Moreover, the Constitutional Court in Hungary has several other statuses that may be considered legislative omission as well. These statuses will be shown in the next part of this section.

The provisions above give a general framework to the concept of legislative omission, even though they are general and they do not give a clear and specific definition of the concept. This framework is a failure to fulfil the legislative obligation which is related to the constitutional norms whether it is a direct constitutional obligation, a failure to make the constitutional norms executable or an omission that can cause an infringement of the constitution. Nevertheless, studying constitutional judicial decisions may help to clarify and identify the concept better, especially in the countries that do not have legal provisions and organisation methods that can treat this problem.

---

30 Article 46 of Act CLI of 2011 on the Constitutional Court OF Hungary.

Section Two

The definition of legislative omission according to judicial judgments.

As shown above, constitutional and legislative provisions from different jurisdictions can put forward several definitions related to the concept of legislative omission. They may give a general view of this concept but they are still not exhaustive decisive definitions. Therefore, it would be useful to discuss the definition of this legal phenomenon in relation to the decisions of the judiciary authorities that practise this kind of monitoring. In this chapter, I am going to consider whether there is a clear view of what the legislative omission means in the constitutional judiciary's decisions. Discussing these decisions may give a clearer definition of the legislative omission as the Courts deal directly with cases of omission. They can put forward an obvious clarification of what situation should be considered a legislative omission.

It can be argued that each jurisdiction may have a specific view about what legislative omission means. This may be right but I would like to put forward a specific definition related to the concept of legislative omission in order to help the judges who face this phenomenon. They have no constitutional or legal provision available that clarifies it. This may lead them to issue several different decisions in similar cases because they have no specific definition of this problem. Therefore, some constitutional judiciary judgments will be discussed in this part in order to try to identify this concept more accurately.

1. Legislative Omission According to the Federal Constitutional Court in Germany.

Germany is considered the first country that has recognised the situation of legislative omission through the judgments of the Federal Constitutional Court (FCCG). The most important decision [(31)] of the FCCG shows the perspective of the court regarding the concept of legislative omission as in 1981. It is about two claimants who indicate that the state authorities did not undergo the appropriate procedures in order to avoid the effects of airport noise. This noise affected them because they live near to the airport. They also argue that this negative action contradicts their right to physical integrity which is protected according to

31 *Decision of FCCG 'Aircraft noise'* (1981) BvR 612/72.

article 2 (2) of the Basic Law [32]. The application was dismissed for the procedural reason of having no significance in our discussion. [33].

Nevertheless, the court addressed the question of legislative omission in its reasoning. It explained that the legislature did not violate its constitutional duty to protect their physical integrity from airport noise because the knowledge of air noise pollution is still limited. On the other hand, the authorities had already issued regulatory provisions about this issue and enough time should be given to the legislature to improve these provisions.

The court commented that in the case of legislative omission, the court intervenes just when and where there is an evident breach of the legislative duties derived from constitutional norms. The court clarified that legislative omission also arises when there are laws or provisions issued in the past that have become inconsistent with the constitutional requirements. If the competent authorities do not intervene to amend these Acts and provisions or if they intervene in a way that does not fulfil the constitutional requirements. Then the court will intervene. However, the court did not give clear guidance on the following questions: 'What is the test of the evident breach?' and 'Who can identify it?'

Another decision of the FCCG may be the answer. In the case of what I call "protect unborn human life", the claimants were asked a question: 'Which "various criminal, social security, and organisational provisions on pregnancy termination satisfy the state's constitutional duty to protect unborn human life?"' The court clarified that the state authorities do not give enough protection to unborn children during the whole period of pregnancy in violation of articles 1 and 2 of the Basic Law. This gave the right to life to all humans, including unborn embryos [34]. The court added that the basic law gives the protection of human life and that it leaves the issue of organising that up to the legislature.

---

32 The constitutional law in Germany called "Basic Law of the Federal Republic of Germany".

33 The court dismissed the application because the claimants did not fulfil the condition of the one-year limitation period which is mentioned in article 93 (2) of the Basic Law and the condition of asylum to non-constitutional Courts before they submitted their application to the Federal Constitutional Court.

34 *Decision of FCCG 'Protecting Unborn Human Life'* (n 5).

However, the current provisions exist on the principle of counselling the pregnant woman to convince her to keep her pregnancy. The court clarified that the current provisions are not enough and the legislature thus has to provide effective and appropriate protection. The legislators have to protect all unborn children regardless of age. The Basic Law does not distinguish between the unborn according to age or the stage of pregnancy. The court demanded from the legislature that it identify the content of the counselling, including how the counselling is to be organised and who can give it.

Therefore, as it has been shown in the decision made above that the court itself can decide whether there is an evident breach of the constitutional norms because of negative legislature action. If there has been a breach depends on the Court's interpretation. This is because the court has the power to interpret the constitutional norms and examine the constitutional review. Thus when it exercises that power, it looks for any evident breach of constitutional norms when this breach happens because of the negative or positive legislative action. However, how can the court do this in terms of negative actions?

According to W. Zeidler, there are several examples that clarify the constitutional duties of the legislature. First of all, “the constitutionally required mandates” refer to the direct orders to legislate that are mentioned by the constitution. Thus when the legislature does not fulfil these required mandates, it falls into what is called “the genuine omission” [35]. Secondly, there are constitutional duties relating to the rights and obligations of a certain group of people who have to be regulated by law. In this case, the legislators may fall in what is called “discrimination”, even though they enact an Act. This Act does not contain all of the rights and obligations of this certain group. Finally, “the constitutional duties of the legislature should take into consideration changes in the actual conditions". This means that the legislature has to improve all laws and provisions to be sure that they are compatible with the constitution. If it fails to do this for a long time, then it falls into what is called a “lack of implementation” [36].

---

35 Wolfgang Zeidler, ‘Federal Constitutional Court of the Federal Republic of Germany Decisions on the Constitutionality of Legal Norms’ (1987) 62 Notre Dame Law Review 507. P. 507.
36 ibid. P: 507.

I have two notes related to this perspective. First, in term of rights and obligations, it would be possible for a legislature to enact an Act which regulates the rights and obligations. However, it fails to fulfil the constitutional requirements that should be achieved regardless of whether these rights and obligations are related to a certain group of people or not. Thus there is a clear condition of legislative omission that is not mentioned in Zidler's perspective. On the second note, the legislative omission may arise from another condition such as the failure of the legislature to make the constitutional norms executable as shown in the last part of this study. Generally, it can be summarised that legislative omission according to the judgments of the Federal Constitutional Court of Germany is as follows: it is any negative actions of the legislature or any other lawmaker that leads to an evident breach of the constitutional norms.

2. Legislative Omission According to the Constitutional Court of Hungary.

As shown above, the Act CLI of 2011 of the Constitutional Court of Hungary mentioned three situations that must be considered as a legislative omission. However, the Constitutional Court in Hungary has a long history with this issue. Before the Act of 2011, the Constitutional Court issued several decisions related to the legislative omission. The Constitutional Court relied on article 49 of the Act XXXII of 1989 on the Constitutional Court. This gives the Constitutional Court the power to establish the unconstitutional omission of legislative duty when the legislature fails to fulfil its legislative duty of enacting statutes. This causes an unconstitutional situation. According to this provision, the Constitutional Court has issued many decisions related to what is called an "unconstitutional omission of legislative duty". One of the essential decisions is number 27/2007[(37)]. This is because the Court has explained its perspective of the situation of legislative omission.

In the case of this decision, the claimant submitted to the Court several petitions, of which some of them related to establishing an unconstitutional omission of legislative duty against the Parliament. The allegations include that the legislature omitted to mention three issues in the Act of National Referendum (ANR). First, the ANR does not contain the period in which the Parliament should abide by a successful referendum decision. Second, the ANR does not contain the amount of time that must pass in order to call another referendum on the

37 *Decision of the Constitutional Court of Hungary 72/2007* (2007) 72/2007.

same question. Finally, the ANR does not regulate the issue of the period of time that the Parliament should take to abide by a law or provision that has been enacted according to a decision that was made by a successful referendum. All of these omissions violated the constitutional norms that are related to the national referendums that seek to ensure the perfect usage of this procedure.

The Constitutional Court explained that according to article 49 of the Act XXXII of 1989 on the Constitutional Court, the unconstitutional omission of legislative duty arises when two conditions happen. First of all, the legislature has omitted to enact a law or provision and secondly; an unconstitutional situation arises as a result of this omission. The Court added that the legislature has the responsibility to enact laws, even though there is no mandate to enact when the legislature's action is necessary to enforce the constitutional rights of the citizens. Under this point, the Court mentioned decision No. 22/1990 which relates to the failure of the Council of Ministries to enact the legislation that regulates and settle the issue of vouchers. This was given to the people who were detained by the United States of America as prisoners of war. This violated their rights, which should be protected. The Court has stated the following regarding this decision: *"The requirements of protecting both the constitutional order and the citizens' rights impose an obligation on the Council of Ministers to perform its legislative duty – if necessary – even without a specific authorisation"*.

This represents an explicit violation of the constitutional norms [38]. The court also mentioned that unconstitutional omission arises when the legislature omits its legislative duty to enforce fundamental rights. Under this point, the Court mentioned decision No. 37/1992, which relates to the omitting of the Parliament to enact an act of the supervision of public radio, television and public news agency. This should be enacted by two-thirds of the members of Parliament according to article 61 paragraph (4) of the Constitution [39]. The Court clarified that the unconstitutional omission does not only arise because of the violation of the explicit constitutional orders. It also arises when the legislature omits to enact laws that should be enacted according to the legislative duties that can be deduced from constitutional norms. Under this point, the Court mentioned decision No. 29/1997, related to the dereliction

38 L. Csink & P. Paczolay, 'Problems of Legislative Omission in Constitutional Jurisprudence' (2008). P. 11.

39 ibid. P: 10.

of the Parliament in order to include a provision in the Standing Orders of Parliament to give fifty members of Parliament the right to initiate a preliminary review of laws before they are enacted [(40)]. Finally, the Court mentioned that even when there is no explicit statutory authorisation to enact laws, a legislative omission can arise because there is a need for legal regulation. Under this point, the Court mentioned decision No. 4/1999 concerning the failure of Parliament to include several provisions in the Standing Orders of Parliament that are related to the basic procedural rules of the parliamentary sittings. However, three members of the Court dissented from the decision. They argued that the constitutional and parliamentary rules have enough legal guarantees to regulate the sittings of Parliament and that there are no constitutional requirements for the Standing Orders of Parliament. The matter of regulating the parliamentary sittings is a competence of Parliament. This argument is right because the court mentioned that any negative action of the legislature should cause an unconstitutional situation to be considered a legislative omission. In this case, there are no constitutional requirements related to the way in which the Parliament should regulate its Standing Orders. Therefore, it has the absolute power to regulate it [(41)].

Therefore, the Hungarian Court explained that legislative omission arises when two things have happened at the same time. First, the legislature does nothing towards its legislative duty and second, an unconstitutional situation has appeared because of this negative action. Then the Court tried to explain the legislative duties that may be identified as one of the following: legislative duties related to guaranteeing the enforcement of fundamental rights, legislative duties related to enforcing the constitutional rights of the citizens, even when there is no legal mandate to enact, legislative duties that can be deduced from constitutional norms and legislative duties that have appeared because there is "explicit statutory authorisation" or a necessary need for legal regulation. Even though the Court's review managed the components of legislative omission, there are several critical issues in its explanation of legislative duties.

First, in order to explain the duty to guarantee enforcement of fundamental rights, it could identify this duty as a violation of the constitutional orders of legislating but it is not the only duty. Since some of the legislative duties are not relevant to fundamental rights yet

40 See *Decision of the Constitutional Court of Hungary 29/1997* (1997) 29/1997.

41 See *Decision of the Constitutional Court of Hungary 4/1999* (1999) 4/1999.

they are still considered to be constitutional orders, this causes a legislative omission if they are not fulfilled. For example, the constitution may issue a constitutional order to enact a law which regulates the official emblem and flag of the state. This constitutional order is not relevant to fundamental rights but it is still a constitutional order. Thus, if it is not fulfilled, then legislative omission will arise.

Second, the Court mentioned that legislative omission arises when there is a necessary need for legal regulations. This may expand the concept of legislative omission to include situations which may not be relevant to the constitutional norms or even to the rights and freedoms. Therefore there is a need for legislative regulation in some case but the failure to meet that need may not necessarily lead to legislative omission when there is not an unconstitutional situation that has arisen because of this failure. For example, it may be a necessary need to regulate a Standing Order of the Council of Ministries but the failure to enact this order may not lead to legislative omission because there is no a constitutional requirement for such a legal regulation. This is exactly what happened when the Court issued decision number 4/1999, which has been clarified in note No. 35 above.

In conclusion, the Constitutional Court of Hungary tried to put the components of legislative omission based on article No. 49 of the Act XXXII of 1989 into the Constitutional Court. It failed to apply these components in some of its decisions which were not relevant to the legislative omission. The Court may try to expand the concept of legislative omission in order to force the legislature to enact significant acts and the ambiguity of legislative omission in Article No. 49 helps it to expand the concept. This may give this study importance when it comes to identifying the concept of legislative omission. It may help the legislature to identify the concept clearly in the constitutional or statutory text. This may help to restrain the constitutional judiciary from expanding its power. Nevertheless, it would be useful to know the two criteria that are put in place by the Court to identify a legislative omission. It can give a brief definition of the concept as it is a negative action issued by the legislature or any other lawmaker. This causes an unconstitutional situation.

There are several decisions undertaken in the constitutional courts in several countries[42] but in my view, they do not give another definition or perspective concerning the concept of

42 Some of these decisions are going to be mentioned in this study.

legislative omission that is different from what has been shown above. Thus the constitutional judiciaries almost agree that the legislative omission arises when the legislature or any other lawmaker adopts a negative action that leads to violating the constitutional norms. However, legal scholars may have a different perspective as is going to be discussed in the next part of this chapter.

Section Three

The definition of legislative omission in the legal jurisprudence.

The concept of legislative omission is considered to be a relatively new concept. The constitutional judiciaries almost formed this concept through their decisions as was shown before. However, each decision may only give a certain view of the legislative omission. Therefore, legal scholars have widely discussed this concept and they have diverse views about what legislative omission means. In this section, I am going to discuss the legal scholars' views on the meaning of legislative omission. Then I am going to give my view about this concept using the collected views and all of the previous discussions in this chapter.

1. Legal Scholars' Views of the Concept of Legislative Omission

Some legal scholars give a very general definition like M. Melchior [(43)]. They mention that legislative omission is a fundamental flaw that is created because the legislature does not obey the principle of constitutional legitimacy through violating the constitutional rules. [(44)]. This view is so general because he does not mention the way that the legislation violates the constitutional rules. This is as a fundamental flaw may happen because of the positive action of the legislature. Thus it would be possible to expect a violation of constitutional legitimacy by enacting the provisions that infringe on the constitution. In this case, a fundamental flaw happens because of a positive disposition, thus there is no legislative omission situation. This definition ignores the fact that legislative omission arises because of the negative disposition of the legislature.

Others give a definition that is related to the rights that are guaranteed by the constitution. This is D. T. Oliveira's view. She states that legislative omission arises when there is no legislation or a gap in the legislation that is already enacted, which prevents practising the rights that are guaranteed constitutionally properly. [(45)]. This definition restricts legislative omission in the case of a violation of the constitutional norms, which is related to

---

43 He was the president of the Constitutional Court of Belgium until August /2009.

44 Michel Melchior, 'L' Omission Legislative Dans La Jurisprudenc, Belgium's 2007' (2007). P. 5-6.

45 Denise Teixeira De Oliveira, 'Le Controle Juridictionnel Des Omission Legislatives Inconstitutionnelles Au Bresil', *French Congress of Constitutional Law - AFDC* (2014). P: 1.

rights. It may seem correct but in one situation of legislative omission, there are several situations that lead to failure in terms of this problem such as a violation of a direct constitutional obligation. It does not matter whether this obligation is related to rights or not. Thus it would be better if the definition mentioned that non-legislation or a gap in the legislation prevents applying the constitutional norms properly.

Mendes restricts the legislative omission in failure to activate constitutional norms. He says that it arises when the legislature does not obey an obvious constitutional obligation that is required to make the constitutional norms executable [(46)]. Mendes takes this definition from the text of article No. (103) of the Brazilian Constitution, as shown above, which restricts the legislative omission in one situation. Thus this definition is limited as well. This is because it would be possible to expect that the legislative omission may arise when there is a negative action of the legislature against its duty to harmonise between international and domestic rules. A legislative omission may also arise when there is a negative action of the legislature against a direct constitutional obligation. Ostensibly, there are no constitutional norms that need to be effective. Nonetheless, these situations are considered to be a legislative omission as well. Hence a constitutional judge may not consider these situations to be a legislative omission according to the definition above.

Another definition comes from J. L. Requejo. They argue that the legislative omission arises when there is no specific legal rule for a specific situation that needs a legal regulation according to constitutional obligation. [(47)]. M. Safjan almost agrees with him. This is because he defines legislative omission as a situation when the legislature performs a negative action for providing legal solutions, which is required by the constitution. [(48)]. Therefore both scholars agree that legislative omission arises when the legislature takes negative actions against a need for a legal solution or regulation that is required or imposed by the constitution. However, these definitions restrict the legislative omission in the case where the

---

46 Gilmar Mendes, 'New Challenges of Constitutional Adjudication in Brazil' (*Woodrow Wilson International Center of Scholars, Brazil Institute, special report*, 2008). P: 4-6.

47 Juan Luis Requejo Pagés, 'The Problems of Legislative Omission in Constitutional Jurisprudence' (2008). P: 4-6.

48 Marek Safjan, 'Dilemmes de La Passivité Legislative Apres Les Decisions Du Tribunal Constitutionnel' DE JUSTÍCIA CONSTITUCIONAL. P: 6.

legislature fails to fulfil the constitutional requirement for providing legal regulation or solution as well. This may be understood as the legislative omission arising just when there is a clear violation of constitutional requirements. Any other situation may not be considered a legislative omission. For example, when the legislature fails to make a constitutional right effective or executable, constitutional judges may not consider such a situation to be a legislative omission. According to the definition above, they may see that there is no legal regulation or solution that needs to be fulfilled in this case.

A. Al-Shimi has a different view of legislative omission. He sees that mere legislative omission arises when the legislature omits to adopt a legal regulation without authorising its legislative competence to the other authorities. He added that it does not matter whether this omitting happens intentionally or inadvertently, so long as it causes an upsetting of the constitutional safeguards, which should be regulated by the legislation [(49)]. Eed Ahmad Al-Gaflol mentions the definition above and other definitions in the same context. He sees that since it is so difficult to identify what legislative omission exactly means, the legal jurisprudence resorts to connecting the concept of legislative omission with the principle of "legislative reservation" or "La reserve de la Loi". This principle means that legislative authority has the exclusive jurisdiction of legislation. This principle is a product of the principle of the separation of powers which distributes the authoritarian competences between the state's authorities. As a result, the jurisdiction of enacting the legislation is granted to the legislature, the jurisdiction of executing the legislation is granted to the executive, and finally, the jurisdiction of conflict resolution is granted to the judiciary authority [(50)].

He explained this principle historically from its origin point, which is according to Frenchman scholar Raymond Carre de Malberg during the French Revolution when the jurisdictions of the verdicts were distributed between the legislative and executive authorities. The legislature has the jurisdiction of enacting the legislation especially when the laws became defined as an action that is issued by elected parliaments. Paul Laband expanded this principle when he defined that legislations are texts that are issued by parliament. They

---

49 Abdel Hafis Al-Shimi (n 26). P. 7.

50 Eid Ahmed Al-ghaflol, *The Idea of the Negative Incompetence of Legislature a Comparative Study* (Second edi, Dar Al-nahza Alarabia 2003). P: 37.

contain legal rules while the executive authority issues administrative regulations that contain only administrative rules. They are bare from having any legal character. This means that the legislature has the absolute power to enact legislation and at the same time, it does not prevent the legislature from delegating this jurisdiction to another authority [51].

This was the meaning of this principle until the twentieth century. After that, a new perspective appeared which restricted the principle of legislative reservation in the legislation that relates to the protection of freedoms and ownership. This means that elected parliaments have the absolute power to protect freedoms and ownership. The executive authority should not intervene in these legislations without the permission and approval of parliament. In other words, this principle was dedicated to protecting people's freedoms and rights [52]. This perspective resulted in what is called "Parliamentary Supremacy", especially in terms of legislation related to freedoms and rights.

He clarified that after the Second World War, the situation has changed. The role of executive authority in the legislative process has been acknowledged and it was granted the power to enact legal regulations on several topics. Thus a new perspective of the principle of legislative reservation has appeared which stands on the differentiation between the absolute reservation “La réserve absolute” and the relative reservation “La réserver relative”.

Absolute reservation means that the legislative authority should regulate some issues through direct legislative intervention. It is not allowed to authorise this duty to another authority. A clear example of these issues is related to freedoms and rights. Therefore the constitution gives the duty of regulating these issues to the legislative authority; it cannot omit this duty or authorise it. It would be possible to identify these issues through constitutional rules when they mention that this issue should be regulated by law. Relative reservation means that the legislative authority can regulate some of the issues by identifying the basic elements and leaving the details for the executive authority, which can be regulated by the administrative rules. These issues can be identified by constitutional rules as well when they mention that this issue should be regulated based on the law.

---

51 ibid. P: 56

52 Ahmad Fathi Soror, *The Constitutional Criminal Law* (Dar Al-Shuroq 2002). P: 40.

Portugal's Constitution is the only constitution that mentions this differentiation obviously when it issues: ((Exclusive legislative competence. The Assembly of the Republic has exclusive competence to legislate on the following matters…)) [53]. Then it issues: ((Partially exclusive legislative competence. 1. Unless it also authorises the Government to do so, the Assembly of the Republic has exclusive competence to legislate on the following matters…)) [54].

On the other hand, the new perspective of the principle of legislative reservation distinguishes between what is called the ordinary reservation "La réserve ordinary" and the strengthened reservation "La réserve reinforceand". The strengthened reservation means that there are standard constitutional rules which restrict the power of the legislature to enact laws such as identifying some of the issues that the legislature cannot limit or decrease. For example, most constitutions issue that all citizens have the absolute right to move around the country and the authorities should not limit this right unless there is a serious situation that threatens public health or security. Hence the legislature should patronise this rule when it regulates the right of the freedom of movement. The ordinary reservation means that there are no such standard constitutional rules and that the legislature has the absolute power to identify the way in which it would be possible to regulate matters. It is still ordered to enact legislation in order to regulate these matters.

Nevertheless, what can be understood from the above? Kilali sees that according to the constitution, the principle of legislative reservation restricts the legislative jurisdiction to the legislature, which has to practise this jurisdiction directly in some exclusive issues or it can authorise it to the executive authority. Thus this principle has a clear relationship with the legislative omission. The principle of legislative reservation imposes on the legislature fulfilment its legislative duty. When the legislature takes negative action against this duty whether, through non-legislation or non-authorisation, it falls in the legislative omission because it violates the constitution. At this point, the constitutional judiciary should intervene

53 Article No. 164 of The Coustitution of Portugal 1976 (constitute project).

54 Article No. 165 of The Constitution of Portugal.

to protect the constitution through ordering or enforcing the legislature in order to fulfil its legislative duty [55].

This perspective may be suitable to justify the constitutional judiciary intervention in terms of addressing this problem. However, it cannot give a clear definition of the concept of legislative omission because this perspective shows that the legislature is the only authority that can fall into the domain of legislative omission. It would be impossible to expect that the executive can cause legislative omission as well. The executive authority may be excluded because the omitting of the executive authority causes an administrative violation, which can be addressed by an administrative judiciary. However, the contrary may be correct for two reasons. First, there are some constitutional texts that impose executive authority to address some matters and when the executive authority fails to regulate these matters, it falls into a clear constitutional violation. This requires constitutional judiciary interference. Second, according to the new perspective of the principle of legislative reservation, the role of the executive authority in the legislative process has been expanded. It would not be logical and justice-based to give the executive authority legislative jurisdictions without subjecting its powers to constitutional judiciary monitoring.

2. My perspective of the legislative omission definition.

As shown above, there is no one definition of legislative omission. The definition found in the constitutional texts, judicial decisions and scholars' views are different because this concept is new. It was established first by the commentaries of the constitutional judiciaries. Thus through all of the information that has been discussed in this chapter, it would be possible to create the fundamental components of this concept which may lead to identifying a comprehensive definition of legislative omission. Therefore, there are two components of legislative omission.

The First Component: legislative omission is a negative action of the lawmakers.

In this component, two issues should be clarified. First, legislative omission has two forms. One form presents a complete omitting of the lawmakers from issuing a positive action. In this case, the lawmakers adopt a negative action against a constitutional obligation,

---

55 Rahman (n 100). P: 14-26.

which requires legislative intervention. Thus legislative omission arises because the lawmakers do not fulfil their legislative obligation. This form of omission is called “absolute legislative omission”. For example, the constitution mentions that the legislature shall enact a specific act such as a political parties act. None the less, the legislature remains in a negative action against this direct constitutional obligation.

However, there is another form of omission that arises when the lawmakers do enact legislation but where it does not provide the constitutional requirements of the legislation. In other words, there is a substantial lack of legislation, which leads to violating the constitutional norms that should be sponsored. This form of omission is called “partial legislative omission”. For example, the legislature enacts the act of election but this act contains several gaps which affect or violate rights like the secret ballot, which is guaranteed by the constitutional norms. Consequently, both forms, whether absolute or partial [(56)], are caused by a negative action of the lawmakers which leads to a fall in the legislative omission situation.

The second issue is that the legislative omission may happen because of the negative action of the legislature. Nevertheless, this does not prevent expecting that legislative omission may happen because of the negative actions of the executive authority as well. Inasmuch, the intervention of the executive authority is necessary to complete the legislative procedures. On the other hand, the executive authority has legislative competences related to issuing some legal regulations. Thus the executive authority may cause a situation of legislative omission when there is a violation of the Constitution because the executive authority violates its duty to issue a legal regulation or to take its part in the legislative process.

The Second Component: legislative omission is a negative action which leads to violating the constitutional norms.

The most critical issue is that the negative disposition of lawmakers should lead to violating the constitutional norms because not all negative dispositions of the lawmakers are considered to be a legislative omission. Therefore, lawmakers have the complete right to act or not. In addition, they have the right to decide when they should enact. Thus any negative

56 Mendes (n 9). P: 6.

disposition of the lawmakers should not be considered a legislative omission unless it causes a constitutional violation. However, how can this constitutional violation be identified?

As shown above, several situations can be considered a legislative omission such as A) the violation of a direct constitutional obligation. This situation happens when the lawmakers infringe on an obvious constitutional obligation to enact a specific law. B) The failure to make constitutional norms executable. There are several constitutional norms that cannot be executable without legislative intervention. Hence, in this case, the lawmakers should take their part to make the norms effective. Otherwise; they fall into the legislative omission situation. C) The failure to apply the freedoms and rights that are guaranteed by the constitutional norms. The legislative omission arises when the lawmakers fail to provide provisions that guarantee that the people can achieve and practise the freedoms and rights that are mentioned in the constitutional document. Most of the freedoms and rights need specific legislation which contains the details of exercising and protecting these freedoms and rights. Any lack in this information may lead to deactivating them. D) The failure to reconcile international rules with domestic rules. Such a failure is considered to be a legislative omission because one of the duties of the lawmakers is to ensure that the international rules that are accepted by the legislature should be reconciled with the domestic legislation. However, these situations are more familiar. This means that other situations may cause a legislative omission so long as the two components above are available.

Generally, it would be possible to define the legislative omission as a negative action, whether absolute or partial and whether it is issued intentionally or inadvertently by the lawmakers. This leads to violating constitutional norms. This definition may seem wide, but it still gives a brief clarification of the two components of legislative omission. Nevertheless, there is still a need to clarify the difference between the legislative omission and other negative actions of the lawmakers which may seem similar. This will be explained in the next chapter.

Chapter Three

The Difference between Legislative Omission and Other Concepts

In the last chapter, the definition of legislative omission has been clarified. As has been shown before, legislative omission has two components. The first one is that legislative omission is a negative action on the part of lawmakers. The second is that legislative omission leads to violating the constitutional norms. According to the former element, legislative omission is a negative action, whether absolute or partial, and whether or not it is issued intentionally or inadvertently by the lawmakers, which leads to violating the constitutional norms. This definition may seem enough to give a good view of legislative omission but other concepts may have the same components. The distinction between legislative omission and these concepts is significant because for two reasons. First, these similar concepts may require monitoring by the constitutional judiciary or they may not, as will be shown. Thus it has to be clarified in order to know when the intervention of constitutional judiciary is required and when it is not. Second, the distinction between these concepts helps to identify the limits of the authority of the law-makers in terms of choosing the right time to issue the legislation. The knowledge of the difference between these concepts helps to identify when the authority should be narrowing or widening.

Two concepts may seem to be very similar to legislative omission. Some jurists even consider these concepts as one and they deny a clear distinction between them. However, I do think that there are significant differences between them as will be shown. The first concept that will be discussed in this chapter is the concept of the negative incompetence of the legislator, which is also a negative action of the legislature. This concept involves the delegation of legislative competence to another authority. Thus, the negative incompetence of the legislator is the situation where the legislature delegates its legislative competence to another authority without having the power of legal authorisation. The definition of this concept and the similarities and differences between legislative omission will be identified in the first section of this chapter. Then the concept of “legislative gaps” will be discussed. This concept can be generally defined as a situation where there is a need for specific legislation in a specific situation but this legislative lack does not necessarily lead to violating the constitutional norms. The definition of “legislative gaps” and the similarity and difference between legislative omission will be explained in the second section of this chapter.

Section One

The Difference between Legislative Omission and the Negative Incompetence of The Legislator

The relationship between the concept of legislative omission and the concept of the negative incompetence of legislature is very complicated. Both concepts are caused by a negative action which leads to the unconstitutional situation of a legislative lack. Both of them may cause a constitutional violation. Because of this, some jurists consider legislative omission as a form of negative incompetence on part of the legislature. They argue that the negative incompetence of the legislature is a general situation that appears when the legislators take negative action against their duty to legislate the provisions because they thought that it is not under their power [(1)].

However, I cannot agree with this view because there are still many essential differences between these concepts in terms of the authority that issued them and the monitoring of the constitutional judiciary. Many other differences will be discussed in this section. Hence, the distinguishing between legislative omission and the negative incompetence of legislator will be discussed. It would be useful to know what the negative incompetence of the legislator means. What is the similarity between the two concepts? Then the differences between them will be clarified. Thus this section will divide into three parts.

First: The concept of the negative incompetence of legislature.

One of the essential functions of the constitutional norms is the definition and clarification of the competencies of the public authorities (judicial, executive and legislature). In some political systems, the constitution identifies the competence of the authorities and in other systems, the constitution clarifies the topics that should be regulated by the legislature. The constitution typically has the role of enacting the laws and provisions related to the legislature. The legislature itself should do this competence and it should not be delegated to any other authorities, especially in the topic that is reserved to laws such as concerning the issues that are related to freedoms and rights. When the legislature authorises this

1 Abdel Hafis Al-Shimi (n 26). P: 13

competence, whether explicitly or implicitly, to another authority without constitutional authorisation, it falls into what is called "the negative incompetence of legislature"[2].

This situation seems to be similar to the case of an unlawful delegation, which is known in administrative law [3]. The law sets the competences of the administration and the method that is used to apply these competencies. However, the administration cannot practise all of its competencies through its central authority. It sometimes delegates some of the works to be done to another authority in its affiliated bodies or another authority. Nevertheless, the administration cannot authorise its duty to another subordinate authority or another authority without permission given to it by the law itself. Thus if the administration delegates its duty without this permission, then its conduct will be unlawful because the law does not give it this permission or the administration overrides it [4].

This concept appeared first time in the decision of the Constitutional Council of the French Republic which was related to the judges [5]. In the bill which was related to nominating the young judges in the French Court of Cassation, the legislature omitted to identify the conditions of nominating these judges to the executive authority while that should have been identified in the bill itself. The Constitutional Council decided that the bill was unconstitutional because it omitted to mention these conditions. The Constitutional Council mentioned that the legislature should identify these conditions because it is its duty and the unconstitutional issue would appear because the legislature delegated its duty to the executive without any constitutional authorisation. After that, the Constitutional Council issued several decisions relating to the same issue. For example, there is the decision of the “Unique Judge” when the legislature gave the president of the court the power to choose the way to form the tribunal which has the power to review infractions, including whether this tribunal should contain one or three judges. The Constitutional Council considered this

---

2 ibid. P: 13-14.

3 Claire Weir, ‘The Principles of Unlawful Delegation’ (1998) 3 Judicial Review 211.

4 H Barnett, *Constitutional and Administrative Law* (Seven Edit, Routledge, Cavendish 2009). P:741. & H. W. R. Wade & C. F. Forsyth, *Administrative Law* (Tenth Edit, Oxford University Press 2009). P: 262-266.

5 *The decision of the French Constitutional Council CC N 67-31 DC* (1967). See L. Favoreu and L. Philip, *Les Grandes Decisions Du Conseil Constitutionnel* (Fifth edit, SIREY 1989). P: 194.

provision to be unconstitutional because identifying the conditions of this tribunal should be regulated in the fundamental law that should be enacted by the legislature. Thus the legislature does not have the authority to abandon this duty [6]. There are several other decisions of the French Constitutional Council that are related to the same situation.

The idea of the negative incompetence of the legislature comes from the application of the administrative judiciary in France. The French State Council "Conseil d'État" has made several decisions that have condemned the administrative authorities because the administration authorities abandoned their competence, arguing that they do not have the power or the authority to deal with them. One of these decisions was the case of "Société des mines de la Guyane Française". In this case, the State Council cancelled the decision of the Minister of the Navy and Colonies. He stated that he does not have the power to amend the decisions of the French colony Guyane's governor. The State Council considered that the governor denied the duty that he possesses according to law and this means that he breached the law negatively [7].

Hence, the French jurist "Edward Laferriere" concluded the definition of the idea of negative incompetence from these decisions [8]. He argued that the situation of negative incompetence happens when the administrative authorities refuse to apply their competences because they think wrongly that a specified competence is not one of their duties. Then he clarified that this situation should be considered a violation of the jurisdiction rules because it is clearly known that the administrative authorities cannot expand their competences. When they override these competencies, they fail in the defection of the jurisdiction rules, which leads to the illegality of the administrative decisions. [9]. At the same time, when the administrative authorities refrain from executing their duty according to their legal competence, they fail in the defect of the jurisdiction rules but in a negative way. This creates a negative incompetence situation.

---

6 *The decision of the French Constitutional Council CC N 75-58 DC* (1975)..

7 *Decision of the French Council of State 'CE, Société des mines de la Guyane Française'*. In Al-ghaflol (n 9). P: 2.

8 Al-ghaflol (n 139). P: 2.

9 Al-ghaflol (n 139). P: 2-4.

There are many French scholars who support this idea, such as Raphael Alibert and Francois Gazier. [(10)]. However, others criticised this idea, such as J. Kerninon. He argued that the administrative authorities do not breach the jurisdiction rules when they refuse to apply their competence but that they make a mistake in terms of the decision itself. In other words, the decision itself has violated the rules of competence. This is as the administrative authority made a mistake because it thought that they have no power to issue this decision. Hence, the illegality comes from this mistake and not from the negative action [(11)]. Several other French scholars have supported this criticism such as Jean de Soto, Jean-Marie Auby and Rolland Drago. According to these scholars, there is no negative incompetence situation when the administrative authority refuses to apply its duty but it is a failure to choose the ideal decision[(12)].

It seems that adopting the idea of negative incompetence is the right option in my view because the administrative authority does not just violate the rules of competence but it ignores to do its duty as well. This may happen because of the administrative authority's mistake or it may happen when the authority ignores that intentionally and claims that the action is not one of its competences. Thus, this attitude can lead to a situation of negative conflict concerning administrative competence between the authorities. Adopting the idea of the negative incompetence may let the court direct the administration authority without looking to such conflicts between the authorities. In any case, the French State Council adopted the idea of negative incompetence in its further decisions. The Constitutional Council of the French Republic then took this idea from the French State Council to apply it to the constitutional cases shown above.

---

10 R. Alibert, *Le Controle Juridictionnel de l'administration Par Le Moyen de l'exces de Pouvoir* (Payot 1926). P: 217. F. Gazier, *Essai de Presentation Nouvelle Des Ouvertures Du Recours Pour Exces de Pouvoir* (EDCE 1951). P: 31. Al-ghaflol (n 139). P: 3-5.

11 Jean Kerninon, 'L'obligation Pour l'autorité Administrative de Prendre Réellement Ses Décisions' (1981) 34e La Revue Administrative 479. P: 480.

12 Jean de Soto, 'Contribution a La Nullite Des Actes Administratifs Unilateraux' (1941). P: 129. Jean-Marie Auby, *Traite Du Contentieux Administrative* (second edi, 1975). P: 247-248. And Jean-Marie Auby, 'Note Sous l'arret Du Conseil d'etat Du 30 Juin 1950' [1951] Queralt. P: 87. Jean-Claude Venezia, 'Le Pouvoir Discretionnaire de l'administration' (LGDJ 1959). P: 144. And Al-ghaflol (n 139). P: 7-9.

In Egypt, the Supreme Constitutional Court (SCC) has the same decisions. For example, the decision related to the case of freedom of movement. The legislature issued the law to regulate this right. The legislature left the issue of identifying the conditions of giving passports to citizens to the executive according to the provisions issued by the president of Republic. In this case, the SCC ruled that this law is unconstitutional because there is no right for the legislature to authorise regulating the conditions of giving the passport to any other authority. The legislature itself should identify these conditions because it is an issue that should be regulated by fundamental law according to the constitution. The Court provided that when the constitution assigns that the legislature should regulate a certain right, the legislature cannot neglect that or authorise the whole thing to the executive without determining the fundamental standards. These standards should clarify the right and identify the role of the executive to apply this right which should be regulated according to these standards. Thus when the legislature authorises regulate these fundamental standards to another authority, it breaches article 86 of the constitution and it falls into unconstitutionality[13].

Overall, the negative incompetence of the legislature contains two main components. First, the legislature neglects to practise its competence and authorises this competence explicitly or implicitly to another authority. Second, this negligence or authorisation leads to violating the constitutional norms related to the jurisdiction rules. It is worth mentioning that there are two forms of negative incompetence related to the legislature. First, the negative incompetence of the legislature associates with a legislative authorisation which means that the legislature authorises explicitly another authority to regulate an issue that should be regulated by the legislature according to the constitution. Second is when the legislature authorises implicitly another authority to do its job [14].

As shown above, the negative incompetence of the legislature is a kind of unlawful delegation by the legislature and it leads to violating the constitutional competence rules. It seems to be very similar to the situation of legislative omission. Both of them is a negative action, and both of them lead to violating the constitution. Therefore, the discrimination between these two phenomena is of enormous importance as the monitoring of both may take

13 *Decision of SCC N0 432/21* 432/21.

14 Abdel Hafiz Al-Shimi (n 9). P: 13-16.

a different route. The monitoring of the negative incompetence of the legislature can be practised by constitutional judges directly as there is a direct violation to the constitutional competence rules and it may come with positive action from unlawful delegated authority. This cannot be done in the situation of legislative omission. Because of that, I think that it would be useful to discuss the similarities and differences between these two phenomena.

Second: The similarities between the concept of the negative incompetence of the legislature and legislative omission.

Some scholars argue that the legislative omission is just one of the forms of the negative incompetence of the legislature. They explained that the legislature should enact laws when there is a need for them. The legislature should do that by itself. It should not authorise that to any other authorities, except in the cases which are mentioned by the constitution. Therefore a principle of "legislative reservation" has arisen, which means that the legislative function should be restricted for the legislature. Then the executive cannot intervene in the legislative process unless it is under the limits of the constitutional rules. The legislature should intervene to provide the necessary provisions when there is a need for them, and it cannot refrain. Hence, the legislature falls into an unconstitutional situation when it breaches this principle, whether it authorises another authority to enact these provisions or when it just takes an absolute negative position. According to this perspective, the negative incompetence of the legislature includes both actions of the authorisation which enables the legislative action to be done by another authority and the absolute negative position that is represented by the legislative omission [(15)].

I disagree with this perspective because the idea of the negative incompetence of legislature was extracted from the application of the administrative judiciary. In the administrative judiciary, there are some clear differences between the idea of negative incompetence and the negative administrative decision which is an absolute administrative negative action [(16)]. If there are differences between them in administrative law, it should be so in the constitutional law as well. On another hand, when the legislature takes a negative position against a law that should be enacted, this cannot be understood as authorisation to

15 Al-ghaflol (n 139). L. Favoreu and L. Philip (n 150). P: 68.

16 Al-ghaflol (n 139). P. 30-36.

another authority to enact it. The situation of the negative incompetence of the legislature supposes that the legislature authorises explicitly or implicitly its competence to another authority. Generally, there are many other differences that will be discussed in the next point.

Third: The differences between the concept of the negative incompetence of the legislature and legislative omission.

Al-Shimi argued that the concept of the negative incompetence of the legislature differs from the legislative omission in six matters. First is in terms of the violation itself. The legislature breaches the jurisdiction rules that are identified by the constitution in the negative incompetence of the legislature. The legislature omitted to provide the provisions which should be enacted according to the constitution in legislative omission. Second is in terms of intentionality. The negative incompetence of the legislature always happens because of the voluntary legislative actions that are issued by a legislature. Legislative omission usually happens because of involuntary legislative actions. Thus it generally happens because of the negative action of the legislature, which in most cases happens wrongly or unintentionally [(17)]. This is not a sharp difference in my opinion, as legislative omission may happen because of the intentional negative action of the legislature.

Third is in terms of the legal principle. The legal principle of the concept of the negative incompetence of the legislature is the idea of "legislative reservation". This means that there are some matters that should be regulated by a legislature according to the constitution. Then the legislature breaches this idea when it authorises the whole of its competence to another authority. In other words, the legislature breaches the constitutional jurisdiction role. The legal principle of legislative omission is the idea of the supremacy of the constitution. So legislature falls in legislative omission when it breaches the constitution by taking a negative position against its constitutional duty.

Fourth is where the negative incompetence of legislature considered as a nominal violation of the legislation. In other words, the violation is related to the ways of the authority that has enacted the legislation, not to the legislation itself. There is an objective violation of

17 Abdel Hafiz Al-Shimi (n 9). P: 24.

the constitution in the situation of legislative omission which represents the negative action of the legislature [18].

Fifth is in terms of the aim of monitoring. The aim of monitoring the negative incompetence of the legislature is the protection of the principle of "legislative reservation" and preventing other authorities from practising the legislative competence that is reserved for the legislature. The aim of monitoring the legislative omission is the protection of the constitution itself. In this situation, there is a constitutional violation that has arisen because of the negative action of the legislature.

Finally, there is how to address the violation. The constitutional judiciary usually issues the decision of there being unconstitutionality of the law or provision in the case of the negative incompetence of the legislature. In other words, the judges decide whether the legislation is unconstitutional or not. They do not demand the legislature to fulfil its constitutional duty or address the legislative lack as they do that in the case of the legislative omission [19].

I do support the perspective of Al-Shimi, and I can add other differences as well. As shown before, negative incompetence happens because of a legislature's action. Thus, it cannot happen because of an action of the executive authority. Legislative omission can happen because of the legislature or executive authority's actions. In my opinion, the most crucial difference is the reason for the legislative action itself. There is always an action from the legislature whether it is associated with an authorisation or not, in the case of the negative incompetence of legislature. There is an absolute negative action of the legislature against a constitutional legislative demand in the case of legislative omission.

---

18 ibid. P: 24- 27.

19 ibid. P: 27- 28.

Section Two

The Difference between Legal Gaps and Legislative Omission

After the difference between the negative incompetence of legislature and the legislative omission has been discussed, there is another concept that may seem similar to legislative omission which is legal gaps, as they may be considered a negative action on part of the legislature. At the same time, the situation of legislative omission is usually described as a legal gap that violates the constitution [(20)]. Does this mean that the legislative omission is a kind of legal gap? There is a kind of general and specific relationship between the two concepts. While we can say that all legislative omissions are considered legal gaps, it is not true that all legal gaps can be considered legislative omissions. Therefore, it would be useful to know the difference between these two concepts and the relationship between them in order to make the concept of legislative omission more clear and understandable.

I think that the concept of legal gaps should be clarified before anything else. Legal gaps are another negative action of the legislature but there are several apparent differences between the legal gaps and the legislative omission. The concept of legal gaps is very wide and there are several perspectives from which to try to identify it. Some give this concept a general definition as there is a lack of such in the legal system. Others try to narrow this down to an unexpected legislative lack in the legal system [(21)]. In this section, I am going to try to explain the concept of legal gaps and the similarities and differences between it and legislative omission.

First: the definition of the concept of legal gaps.

It is well known that whatever the legislators are careful to expect in all legal situations in all circumstances of life, there are many situations that still have no specific legal regulation. Since the legislators are human in the end, they cannot expect all possibilities that may happen in the context of human activities[22]. Hence, the legislature needs enough time to

---

20 See chapter two of this study.

21 Sc. R. Dürr, T. Gerwien, D. Jones, A. Gorey (n 8). P: 11.

22 Alan Rosenthal, 'Beyond the Intuition That Says "I Know One When I See One," How Do You Go about Measuring the Effectiveness of Any given Legislature?' (*NCSL State Legislatures magazine, The Good Legislature*).

follow all of the changes and new activities that have been created because of life development to cover them with suitable legal regulations. During that time, all new needs of legal regulations are called legal gaps. Legal gaps can be defined as a need for a law or provision which regulates a new situation or a new change in a situation that has not been regulated yet. In other words, there is a legislative gap in the legal system that is related to a specific legal situation [23].

This view of legal gaps may only relate to the consideration of the law as it is just the enacted laws and provisions. However, if we are looking into the general concept of the law, this may lead us to a different perspective of legal gaps. This is since the law in general view is not just the provisions and laws that are enacted by the legislature but it can be defined as all of the rules that regulate a specific activity that can be applied by the judges. In this view of the law, the legal gaps may be defined in a different way. The legal gaps may be defined as a lack of answers to the legal questions. This is what Joseph Raz explained when he said that "there is a gap in the law when a legal question has no complete answer. Understanding a question is knowing what counts as a correct answer. This does not mean knowing what the correct answer is. It means knowing which statements the possible answers are i.e. which statement would be, if true, the correct answer. A legal question is a question all the possible answers to which legal statements are. A legal gap exists if none of the possible complete answers to a legal question is true"[24].

According to the aforementioned, the legal gaps appear when there is no possible answer to the legal questions. In other words, when there is a legal question that is what the law provides for a specific situation and when there is no possible answer to this question such as the law provides nothing or the law is not settled on one clear answer, in this case, we have a legal gap. Searching for the answer to this question contains all sources of law such as enacted provisions, natural law and moral rules [25]. This definition of the legal gaps gives us

---

23 The general report of the XIVth CECC, P: 7.

24 Joseph Raz, 'Legal Reasons, Sources, and Gaps', *The authority of law: Essays on law and morality* (Oxford University Press 1979). P: 70. TIMOTHY AO ENDICOTT, 'Raz on Gaps—the Surprising Part', *Rights, Culture and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (Oxford University Press 2003). P: 109.

25 Raz (n 169). P: 71. ENDICOTT (n 148) P: 110.

the distinction between legal gaps and legislative omission, which is of significant importance as most of the studies of legislative omission do not clarify this difference between the two concepts.

For example, the Spanish report for the XIVth Conference of the European Constitutional Courts (CECC) argued that the problem of legal gaps in scientific doctrine research is a part of a bigger problem based on the relationship of mutual influence between the legislature and the Courts. According to the constitution, the legislators are obligated to enact legal regulations which give a legal description for human activities and relationships. In other words, legislators should fulfil their duty of enacting legal rules that make the constitutional norms effective. Hence, any omitting or deficient of execution and applying this obligation may lead to creating a legal gap. Nevertheless, these legal gaps may not lead to a situation of unconstitutionality. Precisely, the constitutional judiciary can only review the action of (insufficient) or omission (relative) as a case of unconstitutionality. The absolute silence of lawmakers would not be considered as a constitutional violation unless there are constitutional rules that are classified as a self-application [(26)].

As can be concluded from the Spanish report and from other reports, the legal gap generally is a legal regulation has not been enacted by a lawmaker as it should be [(27)]. Others have conceded legal gaps as a disadvantage in the legal system which hampers the Courts in managing and achieving justice. For example, the legal gap may appear when there is a law, that is enacted by lawmakers, does not contain any provision that allows or gives the court the ability to find right diction in the essence of the case. In this case, the court cannot find a suitable solution in the enacted law and it may depend on itself to find a diction according to its interpretation [(28)].

On the other hand, there is another perspective that denies the existence of legal gaps when "the positive legal system is all-regulating". This view is based on the fact that legal norms regulate all actions and relationships whether the legal norms are enacted or whether they are considered as principles only. According to this view, the absence of norms and

---

26 Juan Luis Requejo Pagés (n 136). P: 4.

27 Sc. R. Dürr, T. Gerwien, D. Jones, A. Gorey (n 8). P: 7. L. Csink & P. Paczolay (n 127). P: 9.

28 Sc. R. Dürr, T. Gerwien, D. Jones, A. Gorey (n 8). P: 7.

provisions does not necessarily mean that the actions and relationships are not regulated. They are regulated by implicit legal norms or principles such as the rule which state that without legal prohibition, everything is permissible. According to this method, the norms and provisions that are enacted by the law-makers are always adequate. When more details or provisions are required, any authority can provide them (including the Courts). This is since what is called the law is no more than rationing the legal principles which are originally existent [(29)].

There are two critical issues in this perspective. First, if that situation can be accepted in the scope of the private law, then it is difficult for it to be accepted in the scope of the public law, especially in criminal law, because of the principle of legitimacy and the rights and freedoms of the people. This may lead to establishing penal texts according to general principles, which may be interpreted wrongly by the Courts or any other state institution. The penal texts should be enacted clearly and specifically by a competent authority, keeping the public rights and freedoms free from any violation. This may include the rules of taxes that should be specific and clear as well as they are related to the financial rights of people.

Second, legal principles are such a broad concept and they are entirely different according to the place and time. There is still an important issue which is related to who can identify any norm that is considered to be an implicit legal norm or not. Even though there are many rules considered to be public legal norms, there are still many others that cannot get a consensus to be considered as well. Because of that, we can see that there are different views related to one principle which causes the instability of the interpretation of some of the principles such as freedom of expression, equality, freedom of belief etc. There are several perspectives about these principles which make the Courts unable to institute one decisive decision. It may seem to be no problem in developed countries where there is a long discussion about these principles. There may be a semi-agreement about what these principles should mean. It is not the same situation in some developing countries where there is still a dispute about whether these principles should be understood according to the Western view where they are established and developed, or if they should be according to the traditional local view in the country where they were adopted.

---

29 ibid. P: 7-8.

Generally, whatever law-makers try to anticipate all possible prospective actions or events, they are not going to cover all of them. Thus, there is still a need for new regulations for new actions or relationships that may be established in human activity. There is still a possibility that legal gaps may appear in any legal system because it is a reasonable outcome of developed human activities.

Second: The similarity between the concept of legal gaps and legislative omission.

As shown above, the concept of legal gaps is broad and it overlaps with the concept of legislative omission. Even some authors use legal gaps in a situation of legislative omission [(30)]. The most important similarity between the two concepts lies in the fact that a negative action of the law-makers causes both. In both situations, there is a need for suitable regulations for new or changed actions and/or relationships. All state institutions that are responsible for law-making can cause legal gaps and legislative omission situations. Thus, the negative action may be issued by the legislature or executive authority. However, there are still several substantial differences that will be discussed in the next paragraph.

Third: The differences between the concept of legal gaps and legislative omission.

Although it may be challenging to compare legal gaps and legislative omission because they approximately look the same, there are still several differences. The first is that even though a negative action of law-makers causes both situations, the negative action is different in the legal gaps because the neglect or improper expectations of the law-makers causes it. Legal gaps usually appear because of the inadvertent actions of the law-makers. Meanwhile, the negative action in the case of legislative omission may be deliberate or inadvertent. Second, is that legal gaps relate to the abilities of the legislators to expect and anticipate society needs and to try to regulate all expected actions and relationships. Thus, it would also be possible that lawmakers may fail to expect all of these needs. Because of this failure, legal gaps appear. Legislative omission is related to the omission of the legislators of these needs even though they are mentioned explicitly or implicitly by the constitution.

The third and most important one is the constitutional breach. In the situation of a legal gap, there is no constitutional breach even though the need for regulation is obvious as long

30 Portuguses Constitutional Court (n 11). P:2. Marian Grzybowski, 'Legislative Omission in Practical Jurisprudence of the Polish Constitutional Tribunal' (2008). P: 2.

as this need is not mentioned explicitly or implicitly by the constitution. In other words, there is no constitutional breach in the case of legal gaps because the law-makers have an absolute right to decide when and where they have to regulate a social relationship or action as long as there is no constitutional demand from the legislation. Meanwhile, there can be a constitutional demand whether it is explicit or implicit in the legislation but the law-makers ignore this demand deliberately or inadvertently. This causes a constitutional breach. The Constitutional Court of Lithuania mentioned that in one of its decisions [31].

Consequently, the monitoring of the constitutional judiciary cannot be considered acceptable in the situation of legal gaps. This is because there is no constitutional breach and the lawmakers have a right to choose the right time for legislative intervention. On the other hand, the monitoring of legislative omission is based on the constitutional violation. In my argument, a constitutional judiciary has the power to monitor legislative actions because it is a way to guarantee the supremacy of the constitution. When the legislature or any other law-makers refrain from enacting the critical legislation that is mentioned explicitly or implicitly by the constitution, they breach the constitution. Hence the monitoring focuses on this breach. In other words, there is a necessary legislative intervention that is demanded in both situations. However, it is demanded by the constitution in the case of legislative omission. When the law-maker fails to fulfil this constitutional demand, they fall into legislative omission. While there is no such constitutional demand in the situation of legal gaps, whatever they need for legislation is essential because there is no constitutional breach [32]. The legal gaps, as discussed before, had a lack of answers to the legal questions. This definition makes the legal gaps a broad concept. Remedying this legal problem needs not just the intervention of the legislators and judges, but it also needs to look into the general philosophy of the whole of society in order to find the right answer to the right legal question.

Overall, the legislative omission is a negative action that is issued by law-makers and that causes a constitutional violation. Legal gaps are a negative position against a need for legislation in order to answer a specific legal question. Thus, it would be possible to say that

---

31 *Decision of the Constitutional Court of Lithuania* (2006) LTU-2006-M. See Sc. R. Dürr, T. Gerwien, D. Jones, A. Gorey (n 8). P: 139-140.

32 *Decision of the Constitutional Court of Lithuania* (n 176). See Sc. R. Dürr, T. Gerwien, D. Jones, A. Gorey (n 8). P: 140.

all legislative omission is a kind of legal gap but it is not correct to say that all legal gaps are legislative omissions. Thus, there could be a general and specific relationship between both concepts. In other words, legislative omission is a specific kind of legal gap which contains or causes a constitutional violation. Exactly what it authorises in terms of power to the constitutional judiciary is the ability to monitor this kind of legal gaps.

It is clear what legislative omission means now. It is a legal phenomenon that can happen in any legal system. What makes this phenomenon special is a negative action that may not be noted. Wherefore it is discovered and noted by a constitutional judiciary, its definition is still developing. This study tries to shed a light on it and they seek to know a suitable form of identification that may help them to understand and learn of a suitable solution which will be provided by this study. However, several other things should be discussed concerning legislative omissions such as the types, the main reasons that cause it and this will be shown in the next chapter.

Chapter Four

The Types of Legislative Omission and the Reasons Behind It

As the meaning of legislative omission has been identified and the differences between it and other concepts have been clarified, it is time to know if there are different types of legislative omission. This is because these different types may affect the understanding of this phenomenon. The knowledge of these types may allow the constitutional judges to deal with all of the cases when the lawmakers try to escape from their responsibilities in order to fulfil their constitutional obligations. Since legislative omission appears not only when there is no law but also when there is a substantial shortage in an enacted law as well, it is challenging to realise in this case. As will be shown, there are several classifications of legislative omission but the most important one is the classification that divides legislative omission into two types; relative and absolute. The lawmakers either omit to enact a whole law or a specific provision of an enacted law as shown above. In both cases, there is a situation of legislative omission if there is a constitutional violation. What makes this classification very important is that it may affect the remedial method given by the judges. Judges can interpret the constitutional rules in order to remedy the omission or they can order the legislature to complete the legislation to address the constitutional requirements in the relative legislative omission. The situation is different in the case of absolute legislative omission as there is no enacted law and the judges may not be able to direct the legislature to enact the law as it is a legislative competence. The legislature has the power to decide when and how to enact laws as will be shown in this chapter.

Therefore, studying the different types helps to learn of the real applications of legislative omission and to identify in more detail the elements of this constitutional and legal problem. At the same time, it is useful to know the most important reasons that cause legislative omission as this research seeks to identify. This is since the knowledge of the reasons for any phenomenon is the first step to knowing the right solution for the problems that may be caused, especially in the situation of legislative omission. The decision, which may be made to address this situation, may be affected by knowing the reasons that push the lawmakers to omit to enact a law or any provisions, as will be shown. Thus, this chapter will be divided into two sections. The first section will be about explaining the different types of legislative omission. In the second section, the most important reasons that cause legislative omission will be identified.

Section One

The Types of Legislative Omission

As has been shown in the previous chapters, legislative omission has two main elements. The first is a negative action issued by the lawmakers against their legislative duty under the constitution. The second is where a constitutional violation has happened because of this negative action. Thus, legislative omission, in the end, is a kind of breach of the constitution but this breaching happens negatively. This is what makes the phenomenon of legislative omission a unique constitutional violation. However, does this breach happen because of any negative action of the lawmakers? Is a part of or the relative silence of enacting a specific provision in an enacted Act the only way that leads to legislative omission? In other words, may the absolute silence of lawmakers against a constitutional requirement of enacting a specific Act lead to legislative omission as well? What is the importance of distinguishing and identifying between the types of legislative omission?

To answer these essential equations, judicial decisions and the views of legal scholars should be discussed which mention that there are two different types of legislative omission. These types will be clarified in two separate paragraphs. Then the importance of this differentiation will be clarified in another paragraph.

First: Relative Legislative Omission.

Judge Wessel, a judge in the Federal Constitutional Court of Germany, was the first scholar who divided legislative omission into two types [(1)]. The first one is a relative legislative omission which means that there is something lacking in the enacted Act. For instance, the Act does not contain a specific regulation which should exist according to the constitution. Thus, the act, in this case, violates the constitution because it does not provide a completed regulation of the action, activity or relationship in accordance with the constitution [(2)]. For instance, the Federal Constitutional Court of Germany FCCG considered that the Act of identifying children's inheritance is unconstitutional because it does not identify the

---

1 F. Wessel, 'Die Rechtsprechung Des Bundesverfassungsgerichts Zur Verfassungsbeschwerde', *deutsches verwaltungsblatt* (1952). Abdel Hafiz Al-Shimi (n 9). P: 120.

2 Mendes (n 9). P: 6. Abdel Hafiz Al-Shimi (n 9). P: 121. Portuguses Constitutional Court (n 11). P: 17. Marian Grzybowski (n 175). P: 1.

inheritance of illegitimate children. The Court stated that the Basic Law (constitution of Germany) in point 5 article 6 mentions the equality of legitimate and illegitimate children in term of their material, moral and social rights. The legislature should regulate the inheritance of illegitimate children as well. [3]. The FCCG can monitor the legislative omission when the Court is looking into an Act or provision, which is not enough for the constitutional requirements. Then it can issue a judgment of unconstitutionality by omission in this case.

Second: Absolute Legislative Omission.

Absolute legislative omission applies when the legislation that is required according to the constitution does not exist. Such an omission usually concerns a constitutional obligation which requires a legislative intervention from a competent authority in order to regulate a specific legal issue [4]. For example, when there is a specific constitutional provision which provides the freedom of formation and affiliation to political parties, this provision creates a constitutional obligation that the competent authorities should regulate this freedom by enacting an Act of political parties. Thus in the case of absolute legislative omission, there is no act or provision that has been enacted [5]. How can the monitoring of this absolute silence be applied and justified? In addition, what gives this classification importance?

The Importance of the Distinction Between Relative and Absolute Legislative Omission

The importance of distinguishing between the two types of legislative omission mentioned above concerns the competence of the judges to monitor the legislative omission itself. As was explained above, the situation of relative legislative omission appears when an Act has been already enacted by the lawmakers but where the constitutional requirements that have to be achieved by this Act are not provided. In this case, the constitutional judiciary can monitor this omission through the regular monitoring of the constitutional review as there is

---

3 *Decision of FCCG 'Inheritance of Illegitimate Children'* (1969) BVerfGE 25. Abdel Hafiz Al-Shimi (n 9). P: 117-118.

4 Lech Jamróz, 'The Constitutional Tribunal in Poland in the Context of the Constitutional Judiciary' (Faculty of Law University of Białystok 2014). P: 97. The author called this kind of legislative omission "lack of regulation" or "legislative negligence."

5 Mendes (n 9). P: 6. Abdel Hafiz Al-Shimi (n 9). P: 120.

already an enacted Act. Moreover, the constitutional judges can announce that the Act is unconstitutional because of this omission or they can note that the lawmakers should solve this omission in another way to inform the competent authority that there is an omission that should be addressed. This situation can be noted in several constitutional judiciary decisions as has been mentioned before.

However, it may not always be that easy to monitor the relative legislative omission. Sometimes, the judges may not be able to remedy the omission through interpreting the rules or making a strong directional decision against the lawmakers as will be explained widely in this study. However, it is still easier than monitoring the absolute legislative omission as there is no exit Act to be monitored. Thus, the question is 'How can the Court contact in the case of an absolute legislative omission?'

In some constitutional systems, this situation has been regulated through giving the constitutional judiciary the authority to monitor omitting of lawmakers to enact Acts which should be enacted according to the constitution. This situation applies in several countries, as mentioned before. These countries are Portugal, Brazil, Hungary and South Africa. The Constitution of Portugal provides that: "... the Constitutional Court shall review and verify any failure to comply with this Constitution by means of the omission of legislative measures needed to make constitutional rules executable"[6]. The constitution of Brazil mentions that "when unconstitutionality is declared on account of lack of a measure to render a constitutional provision effective, the competent Power shall be notified for the adoption of the necessary actions … "[7]. These provisions may give the constitutional judiciary the power to monitor an absolute legislative omission when the lawmakers omit to enact a whole Act which should be enacted in order to make the constitutional norms or provisions effective and executable. There is a specific method that can be used to sue the situation of absolute legislative omission in Brazil called "a writ injunction" which will be discussed in Chapter 7 of this study.

---

6 Article (283) 1 of The Coustitution of Portugal.

7 Article 103 Paragraph 2 of The Constitutional of the Federative Republic of Brazil 1988.

The Constitution of South Africa issues that the Constitutional Court has the power to "decide that Parliament or the President has failed to fulfil a constitutional obligation" [8]. This provision gives a mission to the constitutional judiciary to monitor the actions of the lawmakers and to declare any failure to fulfil their constitutional obligations. There is no doubt that enacting laws that should be enacted according to the constitution is a constitutional obligation and that any failure to enact these laws leads to absolute legislative omission.

In Hungary, the Act of the Constitutional Court of Hungary issues that:

"If the Constitutional Court, in its proceedings conducted in the exercise of its competences, declares an omission on the part of the lawmaker that results in violating the Fundamental Law, it shall call upon the organ that committed the omission to perform its task and set a time limit for that". [9].

This provision gives the Constitutional Court in Hungary the power to direct or (as the provision issues) call upon the lawmakers to address the omission. This includes absolute omission as well. However, the text mentions that the Court "shall call upon the organ that committed the omission to perform its task..." This may make it seem like the Court's decision is not obligated to the lawmakers as it is just a call to fulfil their duty. In my opinion, as the text itself gives the Court the power to set a time limit for this omission to be remedied, this leads to the understanding that the Court's decision is binding on the authority that is committed the omission as it has a specific time to remedy the omission.

It seems that the constitutional judiciary in these countries can monitor the situation of absolute legislative omission but there is no certain way to deal with it. Except for the writ injunction cases in Brazil, most other cases of this kind of monitoring are related to the situation of relative legislative omission [10]. This shows that the constitutional judiciary usually tries to avoid directing the lawmakers to enact the whole constitutionally required Act. There are several reasons for this but in my view, the most important one is that the constitutional judges are usually hesitant to intervene in the legislative process. They may

---

8 Article 167 point 4 P. 97 The Constitution of the Republic of South Africa 1996.

9 Article 46 of Act CLI of 2011 of the Constitutional Court OF Hungary.

10 All these decisions are going to be discussed in Chapter Seven of this study.

think that the lawmakers have the absolute power to decide when they should enact the Acts. The judges may only warn them when they delay or omit to do that.

On the other hand, can the constitutional judiciary practise this power in the countries that do not recognise and regulate the situation of legislative omission in their constitutional or legal systems? This is especially when some argue that the constitutional judiciary may not have the power to monitor an absolute legislative omission. (11). This situation can be clearly seen in Poland where the constitution texts exclusively outline the competences of the Constitutional Tribunal. The Court may be allowed to monitor the relative legislative omission as with any constitutional violation. However, monitoring the situation of an absolute legislative omission cannot exist as it is considered to be an intervention in reference to the legislative competence of the legislature (12).

To answer these questions, it would be useful to distinguish between the two different situations. The first one, where there is a constitutional norm, clearly requires there to be a legislative intervention from a competent authority. In this case, there is a clear constitutional obligation which obliges the competent authority to enact a specific law. If the competent authority omits or neglects to enact this law, then it violates the constitution because this negative action leads to the disruption of the constitutional norm. This situation can be called monitoring because the most important competence of the constitutional judiciary is to guarantee the supremacy of the constitution and to make sure that all legislative actions harmonise with the constitutional norms (13). Therefore, the absolute silence of the lawmakers is the point that should be monitored by the constitutional judiciary. In other words, the negative actions of the lawmakers against their constitutional duty to regulate issues and relationships, as mentioned by the constitution, can violate the constitution as positive actions can also do.

The monitoring of legislative actions should include the negative actions of the lawmakers as well. For example, in Brazil, there is a direct constitutional demand for an Act

---

11 Sc. R. Dürr, T. Gerwien, D. Jones, A. Gorey (n 8). P: 25.

12 Marian Grzybowski (n 175). P:12.

13 See Chapter five of this study.

to regulate the retirement of civil servants [14]. The Congress omitted to enact this law which means that the Congress committed to a situation of absolute legislative omission. Then the FTS issued a decision to extend Article No. 57 of the General Social Security Act to include the retirement of civil servants until Congress passed a specific Act for the retirement of civil servants[15].

Another question now appears, which is 'When can it be considered that the lawmakers have omitted to enact such laws? In other words, who can decide that the lawmakers have committed absolute legislative omission? To answer this question, it may be possible to look to the constitutional norms. If the constitutional norms that create the constitutional obligation identify a specific time for the lawmakers to regulate the issue or relationship, then absolute legislative omission will appear when the lawmakers do not regulate the issue or relationship in that specific time. The lawmakers have the power to enact this issue or relationship within this specific time and they fall into the situation of an absolute legislative omission when the time has passed without enacting a suitable regulation for that issue or relationship.

For example, the Iraqi Constitution of 2005 mentioned that:

"The Council of Representatives shall enact, in a period not to exceed six months from the date of its first session, a law that defines the executive procedures to form regions, by a simple majority of the members present." [16].

Thus the constitution gives the Council of Representatives six months from the date of its first session to enact the law. The Council of Representatives enacted this law in 2008, which was after one and half years in which it should have been enacted because the political parties could not achieve an agreement until that time [17]. In this case, the Council of

---

14 Article No 40 of *The Constitution of the Federative Republic of Brazil* (n 10).

15 Decision No. 755, the decision of May 12, 2009, D.J.U. May 19, 2009 (STF, Rep. Eros Grau); decision No. 721, D.J.U. Nov. 30, 2007 (STF, Rep. Marco Aurdlio); decision No. 758, D.J.U. Sept. 26, 2008 (STF, Rep. Marco Aurdlio; and decision No. 795, Apr. 15, 2009, D.J.U. May 22, 2009, 210 R.T.J. 1070 (STF en banc, Rep. Carmen Lficia). Rosenn (n 97). P:1030.

16 Article (118) of Constitution of Republic of Iraq 2005.

17 This law has been enacted and published on 11/2/2008. See Law of Executive Procedures for

Representatives fails in the situation of absolute legislative omission, when the first six months after the date of its first session has passed without enacting the law as the constitution has mentioned.

Nevertheless, constitutional norms, which contain a specific time-frame to lawmakers to enact a law, are rare. Most constitutional norms, which require a legislative intervention from lawmakers, do not set a specific period for enacting the laws. The lawmakers usually have the absolute power to decide when and how issues and relationships should be regulated. Thus, when can we say that there is a situation of legislative omission in this case? In my view, this time should not be unlimited. The lawmakers should regulate these requirements as quickly as they can in light of the need for the regulations. Therefore when there is a clear need for regulations required by the constitution, and the lawmakers have omitted or neglected this need, then the situation of legislative omission will appear. In this case, the constitutional judiciary should decide whether there is a real need for regulation. Did the lawmakers have enough time to enact this regulation but they did not? If so, they committed to a situation of legislative omission.

However, how can this be justified in light of the absolute power of lawmakers to decide when they have to regulate the constitutional requirements? In my opinion, this power of constitutional judiciary can be justified by looking to the role that has to be played by the constitutional judges when they face the situation of legislative omission. They have to deal with this situation in one of two ways. First, they have to interpret the current constitutional and legal rules and derive the right decision from them, which fills in the gaps of the required regulation. They have to face the situation of legislative omission through warning the lawmakers that they have to fulfil their constitutional duty, which is mentioned by the constitution. I may support the second way because it prevents converting the constitutional judiciary into the lawmakers by the interpretation of the constitutional norms and creating a

---

new provision. This is usually very difficult, especially when the constitutional norm is so brief and it contains a direct order to the lawmakers to regulate a particular issue.

If we return to the main discussion, there is still one issue, which in some cases is the requirement of legislation that can be concluded from the contesting of the constitutional norms. Therefore, there is no clear and direct obligation for the lawmakers to regulate but the constitutional norms implicitly require this legislative intervention. For example, the constitutional norm cannot be executable without legislation which clarifies how the constitutional norm can be applied. When the rights and freedoms mentioned by the constitution cannot be applied without legislation to regulate them, or in general, there is a constitutional violation because of the legislative silence. In these cases, it would be challenging to decide when the lawmakers fall into the situation of legislative omission if they do not enact these laws. I suggest that the constitutional judiciary should decide on each case independently if there is a constitutional violation and if there is a need for a legislative intervention or not.

Thus, it would be better to give the constitutional judges the power to decide whether there is a need for legislation or not. They can also decide whether the lawmakers have to intervene to address this need or not and whether they had enough time to do so. Since the constitutional judges have the power to decide if there is a constitutional violation or not regardless, then this violation is caused by positive or negative action of the lawmakers. However, it would be challenging for the judges to contact in the case of an absolute legislative omission as there is no enacted Act that can be sued. This makes monitoring the absolute legislative omission more complicated than a relative one. The judges may face a specific situation when they try to direct the lawmakers about the absolute omission as there is another issue that should be considered. This is the power of the lawmakers to time their intervention. The judges, in relative omission, can monitor the enacted Act in order to examine if there is an omission that violates the constitution. First of all, they have to examine how far they can monitor the power of the lawmakers to choose the time of legislative intervention.

Another Classification of Legislative Omission.

Al-Shimi mentioned that there is another classification of legislative omission, which is the content of the legislative omission. As there is a legislative omission that violates the

principle of equality that is mentioned in the constitution, another type is the legislative omission that contains a legislative lack. The first type of legislative omission in this contest is the legislative omission. This violates the constitutional principle of equality. In this type of omission, the lawmakers omit to mention a specific group of people and they may not be able to benefit from some right that is regulated by law. The reason for this kind of omission is that the court can remedy this omission by extending the rules that regulate the rights of a specific group to include others whose rights are not regulated.

For example, the decision of the Federal Constitutional Court in Germany relates to the inheritance of illegitimate children which has been mentioned before [(18)]. These types may apply to the legislative omission in South Africa which is related to the rights of gays and lesbians to determine an immigration permit for their foreign partners [(19)]. The decision of SFCI, which is related to giving all minorities the right to vote for their candidates regardless of their constituencies, can be another example of this kind of legislative omission [(20)]. In all of these examples, the Courts demand to be included in the certain groups and for them to be in protected by the general rules that are already enacted.

The second type is a legislative omission, which contains a legislative lack in enacted legislation. In this type, there is a lack within the enacted legislation which leads to violating the constitution, especially the rights and freedoms therein. For example, the provisions related to criminals and punishments. These provisions should be clear and identified because any unclearness in these provisions may lead to violating the rights of the people [(21)].

In my opinion, this classification does not contain absolute legislative omission because both types are related to the relative legislative omission. In both types, there is an enacted law that does not contain specific provisions related to the principle of equality or related to freedoms and rights. It also does not contain other types of omissions that do not relate to

---

18 *Decision of FCCG 'Inheritance of Illegitimate Children'* (n 180). See Abdel Hafiz Al-Shimi (n 9). P: 117-118.

19 *Decision of CCT 'National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and Others'* (1999) CCT 10/99. This case will be discussed in the next section of this chapter.

20 *Decision of FSCI 6/2010* (n 80). See chapter one of this study.

21 Abdel Hafiz Al-Shimi (n 9). P: 118-119.

rights, freedom and equality. Therefore I think that the first classification of legislative omission which divided the legislative omission into two types - absolute and relative - is more useful in this study.

Section Two

The Reasons Behind Legislative Omission

The different types of legislative omission have been shown in the last section which will be useful for this section, as will be shown soon. Now is the time to discuss the most important reasons that cause the situation of legislative omission. Knowing the reasons that cause any phenomena may help us to find a suitable solution to address its effects. Thus the reasons for legislative omission may help the constitutional judges to deal with the problem in an ideal way. However, knowing these reasons is not an easy thing. The lawmakers may omit to enact a specific provision or a whole law for many reasons. Some of the reasons can be known but others may not be obvious enough to the constitutional judges because they are related to the lawmakers' actions that are not always identified and obvious.

There are dozens of reasons that may lead the lawmakers omitting to enact the laws or to enact it in an incomplete way that violates the Constitution. However, I will try to discuss the most important reasons. It would be better if the reasons were divided into two groups according to the type of legislative omission, so relative or absolute. In addition, there are another group of reasons that may cause both types of legislative omission. On the other hand, it would be possible that there is another group of reasons which may be divided into two groups as well. These reasons may be intentional or unintentional. Thus when the lawmakers intentionally omit to enact laws or when they omit some essential provisions, these reasons consider intentional reasons. They consider unintentional reasons when the lawmakers unintentionally omit to enact them.

In this section, I am going to discuss the reasons that cause legislative omission in two different groups. The first one will be about the intentional and unintentional reasons and the second one will be about the reasons that cause absolute legislative omission and relative legislative omission or both. I am going to try explaining these reasons according to the constitutional judiciary's judgments because a few studies have taken into account the motives of the legislature from omitting through to providing constitutional requirements. In my view, this is an important consideration as the reasons for a legislative omission may affect how the judges treat the omission.

Intentional and unintentional reasons.

There are different reasons that lead the lawmakers to omit to enact laws or to enact them in an incomplete way that may violate the constitution. These reasons may relate to economic, social or political motives [22]. The social motive may cause the lawmakers to omit to mention a certain group of people in an enacted law, which may relate to regulating a specific right for specific people. For example, the FSCI demanded parliament to include in the election law of the local councils' provision to ensure that there was a female quota in the local councils as has been explained in Chapter 1 of this study. The Court depended on the constitution which provided that: "the election law shall aim to achieve a percentage of representation for women of no less than one-quarter of the members of the Council of Representatives"[23]

The court used this article to enforce the female quota in the local councils [24]. The legislators included a provision related to that in the article no. 13 / second of the election law of local councils [25]. This is an example of the social reason for the legislative omission because many legislators tried to ignore mentioning the quota as it is not mentioned in the constitution. The legislators claimed that the women's quota might harm the constitutional principle of "Equal Opportunities" [26] and they ignored the idea of empowering the women which can be understood from the constitutional provision. In my view, the legislators, in the end, represent a masculine society and empowering women is the last thing that they may consider. This would be clear if one knows that the majority of Parliament's members represent religions political parties where the issue of the representation of women is still in debate [27].

---

22 Sc. R. Dürr, T. Gerwien, D. Jones, A. Gorey (n 8). P: 11.

23 Article No. 49 / fourth of Constitution of Republic of Iraq 2005.

24 *Decision of FSCI 13/2007* (n 3). P. 3.

25 Act of local councils election in Iraq 2008. P. 4.

26 Article No 14 of Constitution of Republic of Iraq 2005. See also *Decision of FSCI 13/2007* (n 3). P:1.

27 Noga Efrati, 'Women Representation and Democracy in Post-Saddam Iraq, 2003-2010' (2012) 48:3 Representation 253. P: 261-262. In this context, see Ousseina D Alidou, *Muslim Women in Postcolonial Kenya : Leadership, Representation, and Social Change* (University of Wisconsin Press

The lawmakers also may omit to enact laws for economic motives. As an example of that, the lawmakers may omit to contain some expenses in the public budget because they may not have enough money to cover these expenses. They may also have a new financial plan that is consistent with their economic ideology. [(28)]. The lawmaker may omit to enact laws for political reasons such as the political parties not enacting a law which forces them to show their parties' private funding as has been shown before [(29)]. However, the legislator may only omit to mention some information in all of the cases above unintentionally. If so, how can it be known whether the lawmakers omitted these laws or provisions intentionally or unintentionally? What is the significance of intention in this context?

In the case of relative legislative omission, it would be helpful to look at the legislative discussions, which were undertaken before enacting the Act such as the Bills. These discussions and drafts may show whether the lawmakers omitted to contain the re quirements intentionally or if they just omitted that unintentionally [(30)]. In the case of an absolute legislative omission, it would be a challenge to know if the omission was intentional by the lawmakers or not as there is no action that may put forward a clue. Nevertheless, there may be some pieces of evidence that can help us to know that. For instance, are there any discussions about fulfilling certain constitutional obligations?

However, why is the knowledge of the reason for the legislative omission important in this case? This is very important for the judges to know related to whether the lawmakers omit to enact laws and provisions intentionally or unintentionally because this may affect their decision. If the lawmakers omit intentionally to enact a law or provision which may

---

2013). P: 93-94. & Daniel Stockemer and Bilel Kchouk, '(Democratic) Regime Change and the Representation of Women in Parliament' (2017) 27:3 International Review of Sociology 491. P: 494.

28 See *Decision of Supreme Court of Estonia* (2004) EST-2004-1. P: 109.

29 *Decision of CCT 'My vote counts NPC vs Speaker of the National Assembly and other'* (n 113).

30 There is a kind of review which called legislative record review focuses on the legislative activities before enacting Acts. For more information, see William W. Buzbee and Robert A. Schapiro, 'Legislative Record Review' (2001) 54 Stanford Law Review.

cause a constitutional violation, this means that the lawmakers have violated the constitution intentionally which makes their actions illegitimate. In this case, the decision of the constitutional judges may be strong enough to announce that the lawmakers' action is unconstitutional. The judges may suffice to warn or remind the lawmakers of their omission if they find that the lawmakers omit this unintentionally [31].

I do not claim that intentional violations cause more constitutional damage than unintentional ones, but I mean that the judges may consider that the legislators do not note the constitutional obligation. Thus they omit to fulfil this obligation unintentionally so then the judges may only warn them about that specifically. When the legislators ignore fulfilling their duty intentionally, they may need a direct decision that requires a remedy as with any other constitutional violation.

This can be understood from some decisions of the constitutional judiciary. For example, the Federal Constitutional Court of Germany FCCG explained that the authorities should have enough time to improve the provisions related to protecting people from the noise of aircraft [32]. The Court indicated that there was no intentional omission because the legislature had already issued regulatory provisions about this issue but these provisions needed enough time to be improved. The direct order to the legislature to remedy the omission can be seen in the decision of the FSCI in Iraq when the Court mentioned that the Electoral Act provides that Christian voters can vote for their candidates regardless of their constituency, while the Act did not mention the Sabeans. This violates the constitutional principle of equality [33] because they mentioned Christian voters and they did not mention the Sabeans. Both of the minorities have voters who live in different governorates. Thus, the legislators should enact a provision that gives the same right to Sabean voters in the Electoral Act [34].

The reasons that cause relative or absolute legislative omission.

As has been shown before, legislative omission comes in two different types; relative legislative omission and absolute legislative omission. The reasons that cause each one of

---

31 Sc. R. Dürr, T. Gerwien, D. Jones, A. Gorey (n 8). P: 11.

32 *Decision of FCCG 'Aircraft noise'* (n 120).

33 Article 14 of Constitution of Republic of Iraq 2005.

34 *Decision of FSCI 6/2010* (n 87) & *Decision of FSCI 7/2010* (n 80).

them may be different from one another. Thus, several reasons may cause relative legislative omission, such as a lack of legislative experience on part of the lawmakers. In this case, the lawmakers may omit to contain some significant provisions just because they do not have enough experience in how the law should be enacted. They may violate constitutional norms, which requires legislation. For example, the legislature may omit to contain some provisions which relate to a transitional arrangement between the old and the new laws. This may mean violating individual rights for some people. The Federal Constitutional Court of the Republic of Germany has undertaken decisions that may express this situation [(35)].

In addition, there is another reason that may cause relative legislative omission, which is an excessive generalisation. This means that the lawmakers try to make the provisions more general in order to cover as many as individual cases as possible. Trying to do this may cause them to omit some essential details from the enacted laws. For example, the legislator in South Africa may intentionally omit to mention the foreigner who is in a stable homosexual relationship with a South African citizen in Article No. 25/5 of the Aliens Control Act 96 of 199. They may think that it already contains a general provision which gives any South African citizen the right to demand an immigration permit for their foreign spouses. In other words, the legislator may omit these special relationships because they think that the text in article 25/5 was general enough to contain homosexual relationships. The Court accepted that the legislature had to contain the specific case of citizens who are in a stable homosexual relationship. The Court rejected to consider the word "spouse" as a general concept which includes citizens who have a same-sex life partner and they demined that the section should contain a specific text related to "partners in a permanent same-sex life partnership"[(36)].

Finally, it may be political or social reasons that push the lawmakers to omit some of the provisions such as omitting to amend the laws to make them adaptive with the current economic and social situations. For instance, in Germany, the FCCG considered that the legislature omitted to amend the value of the allowance for necessary maintenance expenditure for thirteen years, thereby violating the principle of taxation according to the

---

35 *Decision of FCCG 'Der Öffentliche Dienst'* (1985) BvL 18/83. Sc. R. Dürr, T. Gerwien, D. Jones, A. Gorey (n 8). P: 124.

36 *Decision of CCT 'National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and Others'* (n 196).

purchasing power. The Court mentioned that the legislature should take into consideration the changes in purchasing power and that they should amend the value of taxes' allowances according to that [37].

On another hand, several reasons may cause absolute legislative omission. The certain majority required for some laws may be the most crucial reason preventing the lawmakers from enacting such laws. Thus, the lawmakers may not be able to achieve the numbers of votes that should be achieved to pass these laws, and instead of trying to achieve this majority, the lawmakers only omit to enact them. For example, the Iraqi parliament could not achieve the two-thirds of members of the representative's council to enact the Federal Supreme Court Act. Therefore, the parliament omitted to enact this Act up until now, even though the Constitution of 2005 mentions that the Act of the Federal Supreme Court should be enacted by the agreement of two-thirds of the members of the Representatives' Council [38]. The same situation may apply to the Act of Federal Council, which requires the same majority of members of the Representatives' Council as well [39].

Some may argue that it does not make sense to talk about a legislative omission situation when the legislature cannot reach a certain majority to pass the legislation because giving the judges the power to direct the legislature will not remedy this situation. This situation may show that the judges will try only to warn the legislature instead of directing them. As has been shown in the announcement, the FSCI called the legislature to complete the legal system structure by enacting the necessary required Acts [40].

In addition, there is another reason that may cause absolute legislative omission. The lawmakers may think that the time of enacting an Act, which has to be enacted according to the constitution, is open and that they can decide on that time without any monitoring or limitation. This may cause them to omit to enact these Acts even though there is a real need for them. Therefore, it may be useful to give the constitutional judiciary the power to monitor

---

37 *Decision of FCCG 'Höchstrichterliche Finanzrechtsprechung'* (1984) BvL 10/80. Sc. R. Dürr, T. Gerwien, D. Jones, A. Gorey (n 8). P: 122.

38 Article No. (92) of Constitution of Republic of Iraq 2005.

39 Article No. (65) of Iraq's Constitution of 2005.

40 The Federal Supreme Court in Iraq FSCI (n 88).

if the legislature should take on a positive position or if it needs more time to identify the most suitable time to enact these legislations, especially in terms of freedoms and rights.

For example, in the case of *"Lindiwe Mazibuko & Others v City of Johannesburg & Others"*, the CCT of South Africa clarified that achieving the right of the people to have water, as mentioned by the Constitution [(41)], needs reasonable legislative and other measures provided by the state progressively to achieving the right of access to sufficient water within the available resources [(42)]. The Court explained that this issue should be regulated by the state progressively because the available resources should be considered. The state cannot provide water as demanded within limited resources. Thus, the Court found that the state needs more time to achieve this right for all people [(43)].

Regardless of the controversial discussion of this decision [(44)], the Court mentioned a significant explanation of when the state would violate its duty to activate both social and economic rights. It issued that: *"... the positive obligations imposed upon government by the social and economic rights in our Constitution will be enforced by Courts in at least the following ways. If the government takes no steps to realise the rights... If government's adopted measures are unreasonable ... Finally, the obligation of progressive realisation imposes a duty upon government continually to review its policies to ensure that the achievement of the right is progressively realised"* [(45)]. The Court puts forward the ways that can be considered a constitutional violation of both social and economic rights. They are, in

---

41 Article 27 of the Constitution of the Republic of South Africa 1996.

42 *Decision of CCT 'Lindiwe Mazibuko & Others v City of Johannesburg & Others'* (2009) CCT 39/09. P:25. For more information about this case, see: Peter Danchin, 'A Human Right to Water? The South African Constitutional Court's Decision in the Mazibuko Case' (*Blog of the European Journal of International Law*, 2010). Lucy A Williams, 'The Justiciability of Water Rights Mazibuko V. City of Johannesburg' (2010) 18 Willamette Journal of International Law and Dispute Resolution 211. See also: Andrew L Magaziner, 'The Trickle-Down Effect: The Phiri Water Rights Application and Evaluating, Understanding, and Enforcing The South African Constitutional Right to Water' (2008) 33 North Carolina Journal of International Law and Commercial Regulation 509.

43 *Decision of CCT 'Lindiwe Mazibuko & Others v City of Johannesburg & Others'* (n 219). P: 87.

44 See Williams (n 219). P:219. & Danchin (n 219).

45 *Decision of CCT 'Lindiwe Mazibuko & Others v City of Johannesburg & Others'* (n 219). P: 33.

my view, very obvious and they can be a standard for all constitutional Courts in this context, especially when it mentions that the state takes on no steps to realising the rights involved.

We have seen that different factors may cause different types of legislative omission. Moreover, some reasons may cause both types of legislative omission. For instance, there are not enough details in the constitutional norms for protecting all groups and human denominations. The lawmakers may think that the current provisions, which protect the rights of these groups, are enough. Thus, they omit to identify or contain special provisions for these groups. For example, the FCCG in Germany considered that the legislature should contain more rules for the counselling concept, which was adapted to allow abortion for a pregnant woman. The court mentions that these rules should contain specific information about the counselling's procedures and how and who can be involved in this progress. Thus, the Court said:

> *"The legislature must take into account the prohibition of insufficient protection and make rules on how the counselling regulation is to be implemented and rules on how counselling is to be organised including the choice of people to be involved These rules must be effective and adequate to persuade a woman who is considering termination to carry the child to term. Only then is the legislature's conclusion that effective protection of life can be achieved through counselling justified"* [(46)].

In this case, the legislature may think that there are enough provisions in the Constitution and the current Acts to protect unborn human life even though they accept the counselling concept for pregnant women who would like to have an abortion. Therefore, the court decides that the legislature should identify more details that should be considered in the counselling progress because this may risk the general protection of human life which includes the protection of the unborn child. Thus even though the court found that the counselling concept may not contradict with the constitutional protection of human life, the court decides that the legislature should enact more rules to ensure the general protection of the unborn child.

---

46 See *Decision of FCCG 'Protecting Unborn Human Life'* (n 5). Sc. R. Dürr, T. Gerwien, D. Jones, A. Gorey (n 8). P: 126.

As has been explained, there are two main types of legislative omission, "absolute" and "relative". There are different reasons which may cause one or both types of omission and these reasons may be intentional or unintentional. All of this may affect the decisions of the constitutional judiciary that seek to remedy this situation in one way or another. However, the most critical question is how these judicial decisions can be justified in light of the principle of the separation of powers and constitutional review? This will be the aim of the next chapter of this study.

Chapter Five

Justification of the Monitoring of Legislative omission

As has been shown before, legislative omission is a legal problem that any constitutional and legal system may face. Many countries around the world face this serious problem which may violate the freedoms and rights of the people. It may also violate the constitution in general. In the previous chapters, the meaning of legislative omission, the differences between this legal phenomenon and other concepts and the types and reasons that may cause it, have been discussed. However, one of the most critical issues that need to be discussed is how this problem can be solved in terms of the appropriate constitutional distribution of powers between institutions. There are several ways to deal with the omission of the lawmakers. I do not claim that the monitoring of legislative omission by the constitutional judiciary is the only way to solve this problem. There is also developing the experience of the lawmakers, pressure from the opposition parties inside the legislative councils and even external pressuring from the media and the general opinion. All of these measures may contribute to solving the legislative omission and putting pressure on the lawmakers to do their duty. However, all of the previous ways are political instruments or measures. They may not be able to coerce the lawmakers to solve the legislative omission especially when there is no obligation upon the lawmakers to listen to them. Therefore, the monitoring of legislative omission by the constitutional judiciary is still, in my opinion, the best way to deal with this problem. First, this is because any monitoring requires direct decisions which in some case would be coercive legal remedies. It also needs an independent government branch. Finally, it needs an effective system of checks and balances.

In this chapter, I shall expand on these reasons and I shall consider several objections that have posited against the idea of monitoring the legislative omission by the constitutional judiciary. The most crucial issue is how can we justify this kind of monitoring in light of principles of the separation of powers and democracy? How can non-elected judges force elected lawmakers to enact the legislation and provisions? Are there objections to the constitutional review? For instance, it may lead to making the judges too powerful. This chapter is in two sections. In section one, I discuss Ronald Dworkin's moral reading of the constitution as a possible basis for the justification of the judges' monitoring. In section two, I explain how some of the specific constitutional principles (Legislative Reservation and Constitution's Supremacy) can justify this kind of monitoring.

Section One

The Moral Reading Justifies Monitoring of Legislative Omission

It is not enough to find solutions that may be applied to solve the problem of legislative omission in light of the balance of power. These solutions should have a reasonable normative justification to withstand against all criticisms that may face it. Therefore, I am going to discuss the matter of giving the constitutional judges the power to direct or at least warn the lawmakers about any legislative omission that they may fall into. In my opinion, Ronald Dworkin had good points that justify constitutional review, and I am trying to start my debate from these points because first of all, I would like to explain why the legal gap which violates the constitution should be reviewed, then why that should be through constitutional judges. Thus, I am going to show Dworkin's view of the moral reading of the constitution and then I am trying to show my debate in the light of this view by trying to apply it to the review of legislative omissions.

Dworkin's View (The Moral Reading of the Constitution).

Perhaps the most crucial question concerning the monitoring of the legislature or executive for the constitutionality of its enactments or decisions is: 'What is the moral justification for using such kind of monitoring?' In my view, the justification for the monitoring of negative action is the same as the justification for the ordinary judicial role in adjudicating on the constitutional review. The situation of legislative omission is a kind of constitutional violation, albeit one that is created because of the negative action of the lawmakers. In my view, the work of Ronald Dworkin can help us to justify the role of the judges in both types of action. Dworkin argues that the Constitution contains several abstract moral principles [(1)]. Legislatures should respect these principles when they legislate, and judges should draw on these principles when they interpret and apply the law.

However, these principles have to be interpreted according to the moral principles of constitutional practice. This method of interpretation may give the authority, which has the

---

1 He gave the First Amendment of the United States' Constitution as an example for these abstract clauses because it mentioned that no laws limiting "the Freedom of Speech" shall be enacted. This text should be understood as "a moral principle about political decency and justice". Ronald Dworkin, 'The Moral Reading of the Constitution' (n 2). P: 1.

last word of interpretation on the constitutional principles, the right to impose its moral convictions. Dworkin admitted that the judges have that power in the USA because the American legal system gives them that power [(2)]. He added that the moral reading of the constitution by the judges is not a bad thing because it is the right way of interpreting the constitution. Many countries around the world have benefited from the American's experiment. Ronald Dworkin calls this "the moral reading of constitution" [(3)].

He also criticises the alternatives which have been identified in two strategies. The first strategy was explored by some constitutional lawyers and scholars who believe that "the Bill of Rights, which are mentioned in the constitution, cannot be understood unless they are considered to be a set of moral principles" [(4)]. However, they argue that the judges should have less power by not giving them the last word on controversial issues. They claim that people exclusively have the power to interpret the constitutional principles [(5)]. Dworkin faults this strategy by saying that people have many conflicting views and the aim of moral reading is knowing what the constitution means. It is not an endeavour to explain the outweighing of a specific view over another. Then he clarified that the judges' decisions are more stable than people's views [(6)] when he mentioned what he called the shining Supreme Court's decisions related to the equal protection clause. These decisions set the bases of racial equality, religious independence, and several other personal freedoms [(7)].

The second alternative strategy, which is called "originalist" or "original intention", depends on the fundamental approach which means that the constitution should be understood and interpreted in light of its framers' [(8)] intent. In other words, the constitutional

---

2 ibid. P: 8-9.

3 See ibid. P: 1-10.

4 ibid. P: 10.

5 For more of this view see: Learned Hand, *The Bill of Rights* (Cambridge, Harvard University Press 1958). P: 73.

6 There is a good and useful discussion of Dworkin about that in Ronald Dworkin, 'The Moral Reading and the Majoritarian Premise' in Ronald C Slye (ed), *Deliberative Democracy and Human Rights* (Yale University Press 1999). P: 98-110.

7 Ronald Dworkin, 'The Moral Reading of the Constitution' (n 2). P: 10-11.

8 Dworkin explained that the word "framers" is called to indicate those people who drafted and

provisions should be interpreted by applying the expectations, assumptions and ideas of the framers themselves and not by assuming that the constitutional provisions are abstract moral principles as the moral reading has identified [(9)]. Dworkin criticised this strategy as well because the expectations, assumptions and ideas of the framers are not necessarily clear and correct. Thus the "originalist" strategy will lead to transferring the wrong thoughts and interpretations of the farmers onto the next generations [(10)].

I agree with Dworkin because if the judges have no power to legislate laws, then they have the power to apply them. When the judges find that there is law or provision which infringes the constitution, then they have to obey the constitutional provision because the legislature has the power to legislate laws but at the same time, these laws have to be consistent with general constitutional principles which are mostly considered moral principles. The public conscience is embedded in these moral principles.

This can help to deal with the situation of legislative omission as well. The moral reading of the constitutional rules can be used to supply the omissions in the legislature. For example, the FSCI in Iraq interpreted the constitutional rule that was related to female quota in Parliament as a constitutional principle. The Court directed the legislature to consider the women's quota to be included in all local councils depending on the moral reading of the constitutional rule as it aims to empower women [(11)]. The originalist reading may not lead to the same interpretation as it may emphasise on the linguistic meaning of the text, which may abridge the women quota to the Parliament only.

It should be emphasised that Dworkin said that moral reading is the way that the constitution should be interpreted, not who has the power to interpret. Thus, as has been

---

enacted constitutional provisions. Ibid. P: 7.

9 For more see: Antonin Scalia, 'Originalism: The Lesser Evil' (1989) 57 University of Cincinnati Law Review 849.

10 Ronald Dworkin, 'The Moral Reading of the Constitution' (n 2). P: 11.

11 *Decision of FSCI 13/2007* (n 3).

shown above, Dworkin did not justify the monitoring of the judges but he tried to justify the way in which the constitution should be interpreted. However, he tried to explain that judges in America have the power to interpret the constitution because of historical considerations and the nature of the American legal system [12]. Thus, other systems may give the constitutional review to a governmental body as it is in France, for example where there is a political council which has the power of constitutional review.

In my opinion, there is another consideration which may give the judges the advantage when it comes to being the interpreters of the constitution. This is the nature of the judges' role because the judges should respect the constitutional rules that should be read morally when they apply the ordinary laws and provisions. Therefore if there is any mismatch between these laws and provisions and the constitutional rules, the judges should respect and apply the constitution and repeal any violated laws and provisions. This can be seen in cases of legislative omission as well, as the constitution provides positive legislative duties. When the lawmakers omit to fulfil these duties, they may harm or restrict the constitutional principles, and the judges should direct or at least warn the legislature about these omissions as the judges need the legislation to make the constitutional principles effective [13].

However, some may say 'Why should this power be given to the judges? Or does the judicial review harm democracy?' To answer this, it would be useful to show Dworkin's view when he clarified that the most critical critic of the judicial review is the "majority premise". This is as democracy is the governing of the majority, and the judicial review restricts the power of this majority. However, Dworkin distinguished between two kinds of democracy. There is the statistical democracy reading which means that the votes or a specific majority of people make political decisions. Another reading of democracy is communal reading, which means that "a distinct entity" of people make political decisions. He claimed that freedom is the most important argument for "majority premise". The freedom may cause harm because the judicial review is the one that relates to the communal reading of democracy [14].

---

12 See Ronald Dworkin, 'The Moral Reading and the Majoritarian Premise' in Ronald C Slye (ed), *Deliberative Democracy and Human Rights* (Yale University Press 1999). P: 82, 86, 94.

13 Portuguese Constitutional Court (n 14).

14 Ronald Dworkin, 'The Moral Reading and the Majoritarian Premise' (n 229). P: 98-100.

Dworkin gave the reason for that as the freedom in the statistics reading as weak. This is because the individual rights of each citizen cannot limit the constitutional restraints. The freedom in communal reading is represented in the collective entity of individuals who deal with their government as a collection and this is the will of the majority. The "majority premise" may be restricted by the constitutional review. Then he explained that the communal reading of democracy needs a kind of majority based on moral members or what he called "moral membership". This means that the individuals cannot be a part of the collective entity without being a part of the collective responsibility. In other words, the individuals should be responsible for the group actions as the membership of the individuals in a political community engaging in self-governance. He claimed that true democracy should be based on moral membership [(15)].

Dworkin then explained that the idea of equality is another argument for "the majority premise". Equality supposes that all individuals are equal in their political rights. However, the "majority premise" cannot support other kinds of equality, such as economic equality. Political equality should lead to a kind of sharing of wealth. Political equality supposes that there is an equal impact for all individuals in the political decisions by their right of electing the legislature and other authorities. However, there is a misdistribution of wealth in many capitalist countries. Inequality in sharing wealth has led to inequality in impact, as the people who have more money have a massive influence on political decisions. Thus, the matter is about influence, not impact [(16)].

Therefore, Dworkin argued that individuals might have a better impact on the political decisions in the court than what they have in practising their right of electing the legislature. He said, "some citizens may have more influence over a judicial decision by their contribution to a public discussion of the issue than they would have over a legislative decision just through their solitary vote"[(17)]. Dworkin did not claim crucially that the discussion in a judicial decision is better than the impact of voting, but he offered that there is no specific information about which way is better. As Dworkin explained above, there are two ways to review the legislature's actions. The first one is what the individuals have in

---

15 ibid. P: 101-103.

16 ibid. P: 105-107.

17 ibid. P: 108.

terms of impact by voting for representatives. This way may be affected negatively by the influence of economic inequality. The second one is a judicial review which may restrict the will of the majority. If we accept the influence of economic inequality on the individuals' votes, why we do not accept the review by a professional legal body?

How Can Moral Reading Justify Monitoring the Legislative Omission?

If the moral reading gives a moral justification of the constitutional review by the constitutional judiciary, I think that it can give the same as a part of justifying the monitoring of the legislative omission. As is repeatedly claimed, in this study, a legislative omission is a kind of constitutional violation. Dworkin said that judges have a duty to interpret constitutional texts in light of the underlying, implicit values of the constitution according to a theory of understanding these values [(18)]. Some constitutional rules need enacted laws and provisions to be effective, and lawmakers should enact these laws and provisions. Otherwise, these constitutional rules will merely remain as ink on paper that is non-available to citizens. In my view, this is one kind of constitutional violation.

This situation may push the judges to interpret the constitutional rules according to their approach of interpretation to fill in the omissions. This can take on different forms according to the approach that is used. Originalists may stick to what the formers of the constitution exactly mean, and this may obstruct finding the right interpretation to fill in the omission. The moral reading supporters may interpret the constitutional rules widely, which gives the judges more power to intervene in the legislative process. I think that directing or warning the legislature about the legislative omission is a kind of balance between moral reading and originalism. Thus, when the judges warn or direct the lawmakers about their duty, they only give back the lawmakers their right to enact the provisions needed. This is better than giving the judges the absolute power to interpret the constitutional rules as they understand them as moral reading suggests or the restricted interpretation of originalism. In this case, the right balance between protecting essential individual rights and deferring to the popular will may be achieved, which Dworkin denied could be achieved [(19)].

---

18 Ronald Dworkin, 'The Moral Reading of the Constitution' (n 2). P: 2.

19 ibid. P: 12.

Thus, I may agree with Dworkin that it is very hard to achieve the balance between protecting essential individual rights and deferring to the popular in the standard constitutional violation (what I mean by the standard constitutional violation is a positive violation by enaction unconstitutional law or provision) However, this balance can be achieved when there is a negative constitutional violation through the constitutional review because the judges will not interpret the constitution in order to fill the omission but they just ask the lawmakers to do their job and that can help to protect individuals' rights and it is not anti-democracy at the same time.

However, some may argue that even though the lawmakers can enact provisions according to the constitutional rules, judges still have the last word if they see that there is an inconsistency between the remedial provision and the constitution. Thus, they can impose their convictions about the constitutional rules through the constitutional review [(20)]. In my opinion, there are two answers to this objection. First, the monitoring of legislative omission does not give the final word to the judges. On the contrary, it gives the issue back to the legislature to regulate it as they want according to the constitution. Then the judges review the remedial provisions or laws only when it violates the constitution. This is not a common situation. This is better than the situation of omission when there is no legislation to be applied.

Second, the judges may find that there is an inconsistency with the constitution in an enacted provision. They then quash that provision. In this case, there are two different convictions of what the constitutional principles mean. The conviction of the lawmakers is shown through the enacted provision. Another conviction of the judges is shown by their decision about the constitutionality of the provisions. Even though the judges have the last word in most legal systems, we can see the view of the lawmakers in this case.

For example, when there is no law or provisions to regulate abortion and the right to life of unborn children, the judges should deal with these issues through their understanding of the constitutional rules. This understanding will depend on their moral reading of these rules or any other way that the judges may use. The judges should decide in this case concerning

---

20 This objection is the same one which may point to the role of the judges in the constitutional review.

what is presented to them in the end. In this situation, the judges have two options. The first one is that they may direct the lawmakers to regulate these issues according to the constitutional principles, which is what the monitoring of legislative omission suggests. Another way is that they may interpret the constitutional principles according to their understanding. In this case, they will put their convictions forward about these issues. Any other alternative ways may result in constitutional rights and freedoms being harmed because there are no laws or provisions that make them effective and applicable.

Anyone who does not support the role of judges in the interpretation of the constitution will agree with the first option because the judges will not put their convictions forward. They will only ask lawmakers to regulate this issue. Nevertheless, one may say that in both cases, the final word is still with the judges if the enacted legislation would be reviewed by judges. The answer is: it does not happen usually that enacted provisions and laws will be reviewed constitutionally.Also, the lawmakers' convictions about the issue can be found through the enacted legislation, while the convictions will remain unknown in the case of the lawmakers' silence.

However, some may argue that in the end, the court's view becomes a part of the meaning of the constitution. I do not think that the court's view will be a part of the meaning of the constitution but it may become stronger than the legislature's view in terms of applying it to the cases. At least the lawmakers can come back to the people in different ways (referendums for example) [21]. In this case, the opinion of the public will be decisive in showing which perspective should be followed.

Someone may ask 'Do judges have the power to direct the lawmakers of any omission they made?' The ansower is that the judges have the power to direct lawmakers only when there is a constitutional violation. This prescription has been suggested and supported by the Federal Constitutional Court of Germany in one of its decisions which provided that "*Thus it is only possible for the Federal Constitutional Court to intervene in connection with a constitutional complaint of this type if the legislature has obviously violated its duty of*

21 See: Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 The Yale Law Journal 1346. P: 1361-1362.

protection" [(22)]. Thus, as I support, when the lawmakers ignore their duty to protect these freedoms and rights, the judges should direct them in that duty because it is one of the judges' tasks. Nevertheless, are there any legal principles can support this view? That is what will be discussed in the next section of this chapter.

22 *Decision of FCCG 'Aircraft noise'* (n 120). See Sc. R. Dürr, T. Gerwien, D. Jones, A. Gorey (n 8). P: 122.

Section Two

Legal Principles Justifies Monitoring the Legislative Omission

In section one of this chapter, the moral reading of the constitution and its effect on monitoring the legislative omission has been discussed. However, the question that may appear is whether there are legal principles that can justify this kind of monitoring? In other words, why should there be a monitoring of the legislative omission? Moreover, why should this monitoring be given to the judges? The answer to these questions can be discussed in different ways. It may be discussed through the constitutional text itself or according to the principle of separation of powers. This is even though the function of the lawmakers is, at the same time, their constitutional duty.

As discussed before, the lawmakers should activate the constitutional norms and that is their constitutional duty. At the same time, no other authorities can do that except for the legislature according to the principle of "Legislative Reservation", which has been explained in this study[23]. Nevertheless, the justification may stand on the principle of the "Constitution's Supremacy" because legislative omission is a negative action that leads to a constitutional violation. Thus, it can take the same justification as any other constitutional violation as the idea of constitutionalism assumes. Whichever way may be used to give the monitoring of the legislative omission a reasonable justification, it finally depends on the fact that there is a defect in the lawmakers' job.

Therefore, there is more than one idea which gives a normative justification for monitoring the legislative omission by the judiciary. However, each one of these ideas focuses on one side of this problem. In my opinion, these ideas are different because the definition that is given to this problem is varied. Some consider this problem to be an unlawful authorisation which should be monitored because of the principle of legislative reservation [24]. Others consider it to be a constitutional violation which violates the principle of constitutional supremacy [25].

---

23 See Chapter Two of this study.

24 Al-ghaflol (n 9). P: 51.

25 Abdel Hafis Al-Shimi (n 26). P: 74.

In this section, I am going to discuss some of the principles which may give justification for this kind of monitoring. First of all, I am going to discuss the principle of "Legislative Reservation" and how it can be a reasonable justification for this monitoring. I shall discuss this principle in light of the principle of the Separation of Powers. Then I am going to discuss the principle of the Constitution's Supremacy and how the monitoring of legislative omission be justified according to this principle as with any other constitutional violation. Finally, I am going to explain the possibility of monitoring legislative omission in light of the principle of Parliament's Sovereignty. In this last part, I am going to examine how far the situation of legislative omission can appear even in the legal system, which gives sovereignty to the parliament.

1. The Principle of Legislative Reservation

Simply put, the principle of legislative reservation means that the legislative function is the job of the legislative authority. No other authorities can practise this job except the case when there is a legitimate authorisation. In Chapter 2 of this study, the historical development of this principle has been shown. This historical development shaped the current perspective of it. As shown there, legislative reservation is created as a result of the principle of the separation of powers [(26)]. Thus, studying this principle as a basis to justify the monitoring the legislative omission will answer the generally critical question against the monitoring of this problem. The question is, 'How can we allow the judges to monitor the lawmaker's actions in light of the principle of the Separation of Powers?' Addressing these issues needs to discuss the relationship between the principle of Legislative Reservation and the principle of the Separation of the Powers, followed by legislative reservation as a justification of the monitoring of legislative omission being explained.

The Principle of Legislative Reservation and the Principle of the Separation of Powers.

The constitution, as a political document, is the base that clarifies all main competences of all authorities in the state. These authorities should practise their competences according to the principle of the Separation of Powers. Each authority (legislative, executive and judiciary) should practise its competences independently as Montesquieu and other scholars have

26 Al-ghaflol (n 9). P: 38.

assumed [27]. This separation takes two forms. The first one is topical, which means that each competence of the power should be practised independently as the power should be divided into several competences. For example, the legislating laws should be practised in isolation from the competence of dispute settlement [28]. Thus, each competence should be practised independently [29].

The second way is structural or functional, which means that each competence should be practised by a different authority independently. Therefore, each competence should be given to one authority which is entirely independent of the other authorities. Any authority should not intervene to exercise the competence of other authorities. Thus, each authority practises one part of the power and no one body or authority should practise more than its functions because that concentrates the power in one hand which leads to corruption. As Lord Acton said: "Power tends to corrupt, and absolute power corrupts absolutely" [30].

Therefore, the legislative authority practises the competence of enacting laws, the executive authority should execute these laws, and the judicial authority has the power to resolve the conflicts that may be created by applying these laws or the conflicts that may be created between individuals. Each authority should practise its competences independently and they should not intervene in other authorities' competences. However, each authority has to practise its competence because the competence that has been given to it is not a right but an obligation. The authority cannot just ignore this duty. This means when authority does not practise its competence, it violates the obligation that has been given to it by the constitution

---

27 Iain Stewart, 'Men of Class: Aristotle, Montesquieu and Dicey on Separations of Powers and the Rule of Law' (2004) 4 Macquarie Law Journal 187. P: 198-199. See also: Paul O Carrese, *The Cloaking of Power: Montesquieu, Blackstone, and the Rise of Judicial Activism* (University of Chicago Press 2003). P: 57.

28 Eoin Carolan, *The New Separation of Powers: A Theory for the Modern State* (Oxford University Press 2009). P: 19. & Stewart (n 250). P: 219.

29 For more information about the history of the principle of separation of powers, see: M. J. C.Vile, *Constitutionalism and the Separation of Powers* (2nd ed, Liberty Fund, Incorporated 1998). P: 1-22.

30 See John F. Manning, 'Separation of Powers as Ordinary Interpretation' 124 Harvard Law Review 1939. P: 1950. & Cătălin-Silviu Sararu, 'The State and the Separation of Powers' (2015) 5 Juridical Tribune 274. P: 278-279.

[31]. Judges, for example, should consider the disputes that have been displayed to them. Otherwise, they may fall into an illegal situation, which is called the "Denial of justice" [32].

It needs to be made sure that all authorities practice their competences in the right way, and that they do not override the rights and freedoms of individuals. The separation of powers makes sure that all authorities practise their competences. At the same time, each authority will prevent the other authorities from intervening into its competence. This is what is called "Check and Balance". This is what Montesquieu himself suggested [33]. Thus, there is a monitoring process between all authorities because there is a limitation of each state authority. This limitation is the competence of the other authorities. Therefore, any authority cannot intervene in another authority's competences and when it does so, it means that its job is illegal as has been shown above. The criterion which gives all authorities these competencies and limitations is the constitution. This is because it clarifies and distributes all competencies to the state authorities [34]. However, authorities should not just intervene in another authority's competencies but it should practice its competencies as well. Applying this issue to the legislative authority means that the legislature should practise its competence of enacting laws because that is its constitutional obligation. This is the essence of the idea of the principle of legislative reservation [35].

How can the Principle of Legislative Reservation Justify the Monitoring of Legislative Omission?

As has been shown above, each authority has an exclusive function to practice its competences and in terms of legislative authority, it creates a principle called Legislative Reservation. This means that the power of enacting laws is an exclusive function of the legislative authority. However, there is an essential question that may appear, which is ‘When

---

31 See John F. Manning (n 30).P: 1971.

32 P. Francois, ‘L’ Incompetence Negative Du Legislature’ (1994) 17 R.F.D.C. P: 74.

33 See: M. J. C.Vile (n 252). P: 142, John F. Manning (n 30). P: 1951-1952. & T. Sultana, ‘Montesquieu’s Doctrine of Separation of Powers: A Case Study of Pakistan’ 28 Journal of European Studies, Karachi. P: 55.

34 See Nathan S. Chapman and Michael W. McConnell, ‘Due Process as Separation of Powers’ (2012) 121 The Yale Law Journal 1672. P: 1677.

35 Al-ghaflol (n 9). P: 37-38.

can we say that there is a constitutional violation because of the authorisation action of a legislator?' In other words, should all of the negative actions of a legislature be considered as a constitutional violation? Generally, when the legislature takes a negative action against its duty to regulate any human and social activity that needs to be regulated, it may be considered as a legal violation of the principle of legislative reservation [(36)].

However, it is challenging to consider all negative actions of lawmakers as a constitutional violation because this may lead to observing all legal gaps which are, of course, created because of the negative action of a legislature. Legislators, in the end, are human. Forgetfulness, omission, mistakes or even a deliberate choice may happen. As well as taking into account the nature of humans and social activities that are both always developing, many legal gaps are created because the legislators cannot anticipate all future events. Because of that, the legislative authority has an absolute right to choose the right time to enact and amend laws.

Nevertheless, if the constitution itself demands specific laws to be enacted or there are laws related to the freedom and rights of people, in this case, any dereliction or omission in enacting these laws should be considered as a constitutional violation. The legislature supposedly knew and took enough time to recognise these constitutional requirements as they are mentioned in the constitutional document. Therefore, the criterion of legislative omission, as has shown before, is related to the constitutional violation. Thus not all violations of the principle of legislative reservation, which are created because of the negative action of a legislature, should be considered a legislative omission. It would be considered a legislative omission only when it relates to a constitutional violation [(37)].

Thus, the principle of legislative reservation gives a good justification for the idea of monitoring a legislative omission when there is a constitutional violation created because of violating this principle. However, why should this kind of monitoring be given to a judiciary?

I cannot claim that the monitoring by the judges is the only way to solve the problem of legislative omission but I can say that it is the ideal way to deal with this problem. Discussion this may need to refer back to the principle of the Separation of Powers itself. The principle of the Separation of Powers suggests a kind of mechanism to create a balance between the

---

36 ibid. P: 38-40.

37 ibid. P: 46.

authorities. This mechanism is called "Checks and Balances", which supposes that each authority limits others through preventing the other authorities from intervening in its competencies [38]. On the other hand, this mechanism results in a balance between the authorities by giving each authority exclusive competencies that should be practised by them. Therefore, each authority should practise its competencies. The judiciary, executive, and legislature must practise their competencies [39].

Thus, a legislature should enact laws and these laws must not oppose the constitutional norms [40]. When a legislature omits to enact the required laws, it violates the constitution, and there is a need for an institution that is not, of course, the same one that has the power to enact them directly. If a country has a constitutional monitoring system to monitor the constitutionality of the laws, then the institution that has been given this power can monitor this omission as with any other constitutional violation. Therefore, a constitutional judiciary can practise this kind of monitoring if it has the power to monitor the constitutionality of the laws or it may be given to the Supreme Courts which practise this monitoring practically, even though there is no an official assignment for that.

Nevertheless, why do judges have to do that? This, in my view, relates to the nature of the judges' job as they should issue a decision to solve any case that is brought to them. When there is no enacted law or where there is one but it does not contain enough detail to apply it, in a clear violation of the constitutional rules, the judges should take one of two options. Either they should interpret the constitutional rules to extend it and cover the omission or, alternatively, they should say that there is no legislation to apply it. It is the legislature's job to enact one. In both cases, the judges practise a kind of monitoring of the legislative omission through the interpretation of the constitution or by asking the legislature to do their job [41].

Here, political constitutionalism supporters may argue that the legislation is a political act and that it should be enacted after political discussions inside the parliament. No other

---

38 Carrese (n 250). P:197.

39 Al-ghaflol (n 9). P: 38.

40 Donna Batten (ed), 'Marbury V. Madison', *Gale Encyclopedia of American Law*, vol 6 (3rd ed, Gale, a Cengage Company 2011). P: 461. See also: Ronald Dworkin, *Taking Rights Seriously* (Bloomsbury Academic 2013). P: 164.

41 In the next chapters of this study, I am going to explain all these judges' options in detail.

bodies should intervene in this process [42]. To answer this, I can say that the judges' decisions in this context would be political as well. If the political constitutionalism supporters have agreed that the law is a political act, then the judges who apply this law would be practising a political act as well. This is what Griffith criticised when he said: "to require a supreme court to make certain kinds of political decisions does not make those decisions any less political". Thus, he demanded that politicians should issue political action (Law) [43]. In my view, the monitoring of legislative omission by the judges would be no more than asking the politicians to do their job. Otherwise, the judges will intervene to remedy the omission through interpreting the constitutional rules. In this case, the judges will apply the constitutional rules instead of the unenacted legislation.

On the other hand, political constitutionalism is based on the idea that democracy is the guarantee of embodying constitutional values [44]. Therefore, any defect in a democratic system may cause harm to the values, freedoms and rights of people. Thus, monitoring the legislative omission by the judges will be necessary, especially in young democracies where the democracy is not complete. In developed democracies as well, this monitoring would be a kind of alarm to the public which may help them to pursue any dereliction in the performance of the lawmakers [45].

2. The Principle of the Constitution's Supremacy.

The constitutional rules have a unique nature compared to other rules in the legal system. This specific nature comes from the issues that are regulated by them. The supreme political social and legal principles and the values of justice, liberty and democracy are all located in the constitutional document. The constitution regulates the relationship between the state's authorities and the competencies of each one as well. The freedoms and rights of individuals are identified there. Thus the constitution, in general, regulates the state's authorities and

---

42 See: Richard Bellamy, *Political Constitutionalism : A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007). P: 176.

43 John Aneurin Grey Griffith, 'The Political Constitution' (1979) 42 The Modern Law Review 1. P:16.

44 See: Michael Gordon, *Parliamentary Sovereignty in the UK Constitution Process, Politics and Democracy* (Hart Publishing Ltd 2015). P: 293-302.

45 I am going to explain that in Human Rights cases at the end of this chapter

there is a relationship between the state and its people. Because of that, most countries put the constitutional rules in the supreme position (top of the legal pyramid), which is called the "hierarchy of norms"[(46)]. This gives these rules supremacy above all other rules in the legal system as it gives stability to all topics and values [(47)]. This is what is called material supremacy, which means that the constitution has supremacy because of the topics that the constitutional norms regulate [(48)].

However, this is not the only reason that gives the constitution its supremacy. There is an in-depth discussion that relates to the idea of a Social Contract. At the end of the eighteenth century, especially after the French revolution and the independence of the United States of America, there were several written constitutions that tried to identify the most important principles related to the construction of the society and the state. These written constitutions concentrated on three elements to ensure the hierarchical supremacy of the constitution.

First was creating a particular body that will be responsible for writing a constitution. This body is usually elected by the people or their representatives. Second, there needs to be put in a specific way that has to be followed for any constitutional amendments. Finally, gathering all constitutional principles in one document can be called the Constitution [(49)]. These elements give the constitution a specific location in the legal system. This means all lower provisions should be harmonised with the constitutional norms. This is what is called the formal supremacy of the constitution because the process of amending the constitution

---

46 Sc. R. Dürr, T. Gerwien, D. Jones, A. Gorey (n 8). P: 19.

47 Emil Balan, 'Romanian Constitutional Court and Its Active Role in Assuring the Supremacy of the Constitution' (2015) 11 Acta Universitatis Danubius: Juridica 33. p: 33-35.

48 See: Marius Andreescu, 'Recepting the Principle of Supremacy of Constitution on the New Penal Code' (2016) 4 SEA: Practical Application of Science 359. P: 360-361. & Jaber Jad Nasaar, *Arbitrator in the Constitutional Law* (Comprehensive Library for Legal Sciences). P: 101-102.

49 Werner Heun, 'Supremacy of the Constitution, Separation of Powers, and Judicial Review in Nineteenth-Century German Constitutionalism' (2003) 16 Ratio Juris 195. P: 196. See Gordon S Wood, The Creation of the American Republic, 1776-1787 (University of North Carolina Press 1998. P: 306-343.

should be different from the process of amending the regular statutes. Thus there are two kinds of constitutional supremacy; Material and Formal [50].

The constitutional rules define and regulate how powers are exercised in the state. On the other hand, it defines and determines the philosophy and ideological basis on which the political, economic and social systems of the state are based. All bodies should follow the constitutional rules when they practice their jurisdictions because they are the basis of the object of the existence of these bodies and the legal basis of their jurisdiction. Therefore, they are considered to prejudice the essence of the constitution when they issue any action contradicts with the constitution. Theoretically, this situation is not limited to a Rigid constitution but also appears in a Flexible constitution [51]. Although the ordinary legislator has the right to amend the provisions of the flexible constitution with the same procedures of amending the ordinary law, they are always obliged to respect the theoretical basis of the constitution [52]. However, practically there is nothing preventing the legislature to amend even the theoretical basis of the flexible constitution as it is a part of the constitution and the legislature can amend the constitution itself.

The material supremacy of the constitution which means that there are a superemacy for the topic of the constitutional provisions themselves has several significant consequences. First, the constitutional rules are binding on all State bodies and any activity contrary to these

---

50 Judge Marshall said: "It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act ... . Between these alternatives, there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it ... . If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable". Donna Batten (n 263).

51 There are two kinds of constitutions in terms of amending: the rigid which has a specific prosses to amend it or it can not be amended total or partly. The second kind is the flexible constitution which can be amended like any other ordinary law. See Eoin O 'Mahony, 'The Pathology of Democracy with Particular Reference to Personal Liberty under Flexible and Rigid Constitutions' (1929) 11 Journal of Comparative Legislation and International Law 96. P: 96, 102.

52 Andreescu (n 48). P: 360.

rules has no legal effect because it violates the principle of legitimacy. This means the ordinary laws must respect and observe the constitutional norms because the constitution is the source of all public authorities in the State. The powers of (head of state, legislative councils, executive authorities, etc.) do not exercise a personal right to act as they wish but they exercise functions that are determined by the constitution and that is according to its conditions and scope. Moreover, these functions can only be delegated if the constitution allows for the authorisation [53].

However, the principle of the material supremacy of the constitution does not produce its legal effect unless there are modalities to ensure that there is respect for it. These modalities take on the form of oversight which is called a constitutional review. This cannot be applied unless there is the formal and material supremacy of the constitution. Because of that, there is a need for what is called the formal supremacy of the constitution. Formal supremacy means that set procedures are followed to amend the constitution and that they should differ from those of the amendments of ordinary law. Thus, such procedures should be more difficult and more complex than those of the ordinary law amendments. On this basis, formal supremacy is achieved for rigid constitutions only because the procedures for its amendment are more complicated than those of the amendment of ordinary laws [54].

The issue that is relevant to the question of legislative omission is that the constitutional rules should be contained in constitutional documents to have their supremacy because they cannot be amended as standard legal rules. This is what gives the constitutional document formal supremacy. All other rules outside of these documents should not be considered as constitutional rules even though they may regulate a constitutional matter. This means the formal constitutional norms include just the rules that are contained in the constitutional document, whether they regulate a constitutional matter or any other topic. This does not extend to ordinary legal rules, although these rules may have constitutional matters therein. The position of the rule is what gives it supremacy, rather than its content. As a result, the flexible constitution does not achieve formal supremacy, even though it has a material

---

53 ibid. P: 361. See also Jutta Limbach, 'The Concept of the Supremacy of the Constitution' (2001) 64 The Modern Law Review 1. P: 1.

54 K Malan, 'Deliberating the Rule of Law and Constitutional Supremacy from The Perspective of The Factual Dimension of Law' (2015) 18 Potchefstroom Electronic Law Journal 1206. P: 1220.

supremacy. This is because there is no difference between the flexible constitutional rules and the ordinary laws in terms of the formality when amending them [55].

Thus, when lawmakers have enacted a law that violates the flexible constitution, it will be considered, practically at least, as an amendment of the constitution because the lawmakers have the power to amend the constitution itself in the same way as amending the ordinary laws. The lawmakers cannot violate the rigid constitution because they cannot amend the rigid constitution without specific procedures that are different and more complicated than amending the ordinary laws. Because of that, the lawmakers should commit to the constitutional norms in all of their actions. Otherwise, their actions will be illegal or unconstitutional [56].

Thus, the constitution should be rigid when it comes to applying the monitoring of legislative omission because if the lawmakers can change the constitutional rules as they can any other ordinary legislation (Flexible Constitution), then there is no meaning behind the constitutional obligations. Any positive violation of the flexible constitutional rules would be an amendment of these rules. At the same time, omitting any constitutional obligation would take on the same status. The silence of lawmakers or their omission, in my view, would be considered a cancellation of those obligations. Therefore, the monitoring of legislative omission needs a rigid constitution which imposes constitutional obligations upon the legislature regardless of who will be responsible for this monitoring.

The formal supremacy of the constitution was the main reason why the judges used it to justify their constitutional review. This can be seen in the earliest decisions of the Supreme Court in the United States like *Hylton v. the United States* [57] and *Marbury v. Madison* [58]. The Court invalidated many Acts because they infringed on the Constitution, which is a supreme law that should be respected. As Judge Marshall said: "*The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it ...*

---

55 Nasaar (n 48). P: 103.

56 Limbach (n 276). P: 2-3.

57 James W. Ely Jr. and Kermit L. Hall (ed), *The Oxford Guide to United States Supreme Court Decisions* (2nd ed, Oxford University Press 2009).

58 Peter Cane and Joanne Conaghan, *The New Oxford Companion to Law* (Oxford University Press 2008). See also: Limbach (n 276). P: 3.

. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable" [59].

When most of the countries started to give this mission to the judiciary whether there was an ordinary judicial authority or a unique judiciary called a constitutional judiciary, they were adopting and imitating the American model [60]. This is one of the issues related to the principle of constitutional supremacy that demands that each authority should practice its competences according to the constitution. The most important competency of lawmakers is enacting laws, especially those that are demanded by the constitution or that are related to the freedoms and rights of individuals. Thus if the lawmakers omit to do their duty, then they should be interrogated on the same basis. Therefore, they should be monitored for both negative and positive actions. They will violate the constitution when they omit to enact these laws, as the constitution gives them the competency of enacting laws and this competency is not a right but a duty. Omitting to enact the required laws is considered to be a violation of their constitutional obligations [61].

3. The Principle of Parliament's Sovereignty.

If the constitution has supremacy above all other legal systems in some countries, then the situation is like that of the British system where there is the principle of the supremacy of parliament or "Parliamentary Sovereignty". This means as Dicey argued, that the parliament has the absolute power to enact or not to enact any law [62]. There is an expression that says: "*Parliament can do everything but make a woman a man, and a man a woman*" [63]. This situation has historical and philosophic roots related to the political and legal system in the

---

59 Donna Batten (n 263). P: 461.

60 Ronald Dworkin, 'The Moral Reading and the Majoritarian Premise' (n 229). P: 86.

61 Abdel Hafis Al-Shimi (n 26). See Also Hala Mohammed Turaih, *The Limits of the Power of Egyptian Legislator to Regulate the Rights, Freedoms and Guarantees to Be Exercised* (Dar al-Nahda al-Arabia 2011). P: 251.

62 Stuart James Lakin, 'Debunking the Idea of Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution' (2008) 28 Oxford Journal of Legal Studies 709. P: 711.

63 The Parliament may even make a man a woman if the bill of Sex Transformation has been passed. See Limbach (n 276). P: 1.

UK [64]. However, there is a big discussion between British legal scholars about this principle and how far the Parliament has this Sovereignty [65]. Regardless of the reasons behind adopting this principle and the debate about it, the question is 'In this kind of system, can the idea of monitoring the legislative omission be expected to be practised?' Of course, the direct answer would be 'No' because as has been shown above, the Parliament can enact or take a negative action and nobody can ask the Parliament to do its job.

However, in my opinion, there is still a possibility of finding a situation of legislative omission especially when the Parliament fails to fulfil its duty to protect the freedoms and rights of individuals as guaranteed by the European Convention of Human Rights (ECHR). Discussing this possibility in the United Kingdom may help us to examine the existence of legislative omission in such a system. It may also clarify the role of the judges to remedy it.

Where there is no written constitution and there is no constitutional review practised, it would not be possible to expect the situation of legislative omission to exist in the UK. Nevertheless, there are several legal scholars who support that there are unwritten principles which justify giving judges a kind of judicial review upon the legislature actions. Some of these discussions depend on the role of the judges in the whole legal system [66]. Other discussions depend on criticising the extreme idea of Parliamentary Sovereignty and the judges, whenever they are careful to apply what the Parliament wants in terms of legislations, they will put their understanding forward of what the texts mean and not what the legislators may propose. This is as knowing the intentions of the legislature is challenging. When the judges interpret the legislation itself, they may apply their understanding according to their moral reading of the legislation [67].

---

64 Stuart James Lakin (n 285). P: 711.

65 See: Stuart James Lakin, 'The Moral Reading of The British Constitution' (College: University College London 2009). P: 23-50.

66 See: Dimitrios Kyritsis, *Where Our Protection Lies: Separation of Powers and Constitutional Review* (Oxford Scholarship Online 2017). P: 143-145.

67 See: Stuart James Lakin (n 288). P: 93-95.

The most famous and clear case in this context is Ghaidan case[68]. The case was related to of the Rent Act 1977 which provides that: "For the purposes of this paragraph, a person who was living with the original tenant as his or her wife or husband shall be treated as the spouse of the original tenant" [69]. There was a question for the court which is whether this Article can be also applied to unmarried same-sex couples. The answer was from the House of Lords which accepted that section 3 of the HRA 1998 can be read into Rent Act to achieve the effect of extending that provision to same-sex couples. This reading may seem different than what Article 2 of the Rent Act 1977 literally means[70].

In terms of case law, there are some cases in the Supreme Court that may be considered as a kind of omission. One of them is the case of (*Miller vs Secretary of State*) as there is the will of people to leave the EU and if this will can be above Parliament Sovereignty. In other words, people's will, in this case, might be considered as a constitutional restriction to the Parliament's will because it should be followed [71]. However, the most instructive cases in

---

68 *Ghaidan v Godin-Mendoza* (2004) UKHL 30.

69 Paragraph 2 (2) of Schedule 1 of Rent Act 1977.

70 See Stuart James Lakin (n 288). P: 144.

71 After the referendum on 23 June 2016 in which majority of voters had voted for withdrawing the UK from the EU, the Government started the process of it is called “Brexit” according to the article (50) of the Treaty on European Union. Several applicants sued the Government arguing that the Government had no right to start the progress of withdrawing the UK from the European Union as the result of the referendum has shown. The Supreme Court decided, by a majority of eight to three, that the Government has no right to start the progress of withdrawing the UK from the EU without an Act is issued by the Parliament. Thus, my question of this case is: can the situation of legislative omission arise if the parliament does not enact the act to authorise the giving of notice to the progress of “Brexit”? The first answer may be straightforward that there is no situation of legislative omission in this case because the court did not demand from the Parliament to enact this act to give the notice. The Court only clarify that the notice of withdrawing the UK from the EU need to be issued by the parliament, not by the Government and the Court did not ask the Parliament to do that. The decision was compatible with the nature of the UK legal system, which gives the Parliament the supremacy against all other state departments. This supremacy gives the Parliament an absolute power to enact or do not enact any acts. Thus the Supreme Court cannot demand from parliament to enact this Act. However, the Supreme Court’s decision identifies that there is a fundamental procedure that should be

this context are those that relate to the ECHR. Thus, it should be examined if there can be a situation of legislative omission in the UK according to the decisions of the European Court of Human Rights ECtHR and in light of the ECHR. I am trying to determine from these cases that even in a system where there is the principle of Parliament Sovereignty, the situation of legislative omission can still be expected to appear.

The Legislative Omission in Cases of Human Rights.

As I do not want to discuss the situation of legislative omission at the International level, I am going to mention some of the decisions of the European Court of Human Rights ECtHR just to examine if there is any kind of legislative omission that can be found in ECtHR decisions. This situation of legislative omission may be related to the Convention for the Protection of Human Rights and Fundamental Freedoms or the European Convention of Human Rights ECHR. The UK, as a member of the EU and having signed the Convention, became bound by it and the state's departments should respect the Convention and make all changes that are necessary for the domestic laws to be compatible with it. Thus when the state departments, including the British Parliament, ignore that and do not do what is necessary to affect the Convention, they may fall into a situation of legislative omission. This

---

taken to implement the decision of the majority of British people. Parliament should issue this procedure because only it has the power to do that. That means indirectly that if the Parliament omit to enact this Act or could not enact a guaranteed way to exit from the EU as it happens now, it may infringe the will of the majority of people. Nevertheless, the Parliament still has the supremacy to omit this will, and there is still no legislative omission situation. In another way, if we say that the parliament has to respect the people's will and enact an act gives the notice of starting the Brexit progress. In this case, a situation of legislative omission may appear when the parliament omits this obligation. However, this obligation does not exist because the Parliament can call for another referendum. This means implicitly that Parliament can ignore the people's will in the first referendum. At the same time, the Court cannot issue a direct order to the Parliament to do that. Instead, the Court can show that this job has to be done by Parliament. Thus, there is not a situation of legislative omission in the (Miller Vs Secretary of State) case as this study suggests. *Miller Vs Secretary of State, The Supreme Court in the UK* (2017) [2017] UKS.

can be noticed in some of the decisions of the ECtHR. However, this may be objected to by knowing that the UK did not sign as a signatory to adopt Article One, which is related to "the right of individual petition" [(72)] and the jurisdiction of the European Court [(73)]. The answer would be that the states still have to respect the Convention in their domestic legislation and that this is what this discussion tries to prove [(74)].

Most of the provisions in the ECHR put a negative obligation upon the state's departments if the members do not do them. However, there are some positive obligations as well. These positive obligations impose the state to respect them and they make the domestic legislation and procedures compatible with the Convention [(75)]. Some cases have sued against the government of the UK because of the neglect of authorities to protect the citizens' life

---

72 In the UK individuals can appeal any law or provisions in the domestic higher courts in the UK (such as the High Court, Court of Appeal or Supreme Court) according to sections 4 of the Human Rights Act 1998 (HRA) which clarifies the ability of the judicial authorities to issue a declaration of incompatibility between interpretation of rights using section 3 of HRA in which are compatible with the articles of the ECHR and primary or subordinate legislation. However, this declaration does not affect the validity or enforcement of the primary or subordinate legislation. Thus it is depended on Parliament to amend this legislation or not as its wish. It is very hard to expect a case of legislative omission through applying section 4 of HRA because this section mentions that a court determines whether a provision of primary legislation is compatible with a Convention right. Thus there should be an enacted legislation which incompatible with ECHR and it is very difficult to expect this incompatibility comes from a negative action of Parliament in my opinion. See: The National Council for Civil Liberties, *A Parliamentarian's Guide to the Human Rights Act* (LIBERTY Protecting Civil Liberties Promoting Human Rights 2010) P: 11. Colm O'Cinneide, *Human Rights and the UK Constitution* (The British Academy 2012) P: 39.

73 Jane Gordon and Philip Leach Alice Donald, 'The UK and the European Court of Human Rights' (2012). P: 9.

74 ibid. P: 87.

75 ibid. P: 18, 63. & Jean-François and Akandji-Kombe, *Positive Obligations under the European Convention on Human Rights, A Guide to the Implementation of the European Convention on Human Rights* (Council of Europe 2007). P: 7, 17-18.

according to Article (2) of the ECHR [76]. However, can the situation of legislative omission arise if any member state does not respect this obligation within their legislation or not?

This can be seen clearly in the case of Kawogo v the UK, in which the applicant claimed that the domestic law in the UK does not provide enough protection from forced labour or servitude. She also claimed that the failure of protection violates Article 4 of the ECHR, which can be which read either alone or together with Article 13. The Government of the UK acknowledged that the domestic criminal law, which was in force when the applicant submitted her complaint, was not enough to fulfil the effective protection against forced labour or servitude and that it was incompatible with Article 4 of the Convention. However, the Government clarified that the legislation has been redressed by lawmakers through enacting section 71 of the Coroners and Justice Act 2009 which came into force in April 2010. This section provides enough protection from forced labour or servitude [77].

Thus, according to this case, there may seem that there is a kind of legislative omission because the Government accept that there was a legal gap related to protection from forced labour or servitude and that this affected the human right protected by Article 4 of the Convention. However, one may argue that this omission violates ECHR not the domestic constitution and this study suggest that the legislative omission should violate the constitution. That might be right but if protection from forced labour or servitude is considered as a principle of the UK constitution, that means we face a clear case of legislative omission.

Also, the case of Christine Goodwin v. The United Kingdom, when the ECtHR issued that there was a violation of Article 8 and 12 of the ECHR in the domestic legislation as there is no acknowledgement of the right of people who have gender transitioned to marry a person of the same sex [78]. Even though ECtHR did not mention any directing for the authorities in

---

76 *Decision of ECtHR 'Osman v the United Kingdom'* (1998) 87/1997/87. See Alice Donald (n 296). P: 18, 45. & Jean-François and Akandji-Kombe (n 298). P: 21.

77 Elisabeth Kawogo v the United Kingdom (2010) 56921/09. See Alice Donald (n 296). P: 63.

78 *Decision of ECtHR 'Christine Goodwin v The United Kingdom'* (2002) 28957/95. See also Sharon Cowan, That Woman is a Woman" The Case of Bellinger V. Bellinger and the Mysterious (Dis) Appearance of Sex, Case note, Feminist Legal Studies Vol. 12, Iss. 1, P:81, 83.

the UK to remedy such violation, it is imposed that the legislature in the UK should make a change in the domestic legislation to be compatible with the Convention. The House of Lords issued that the law on marriage in the U.K. violates Articles 8 and 12 of ECHR and Matrimonial Causes Act 1973 and the Parliament should issue changes to this Act, not the Courts. The Parliament of the United Kingdom enacted a legislation called "the Gender Recognition Act" in 2004 which allowed the changing of their birth certificates for transgender people and it gave them the right to recognise their new gender for the purpose of marriage.

It may seem so difficult to compare these cases with other legislative omission cases in other countries because there is an international component. I discussed these cases just to prove that even in a unique system such as the legal system in the UK, with a unique principle of parliamentary sovereignty, one can expect a kind of legislative omission related to an international convention[(79)]. However, there is still no court in the UK can ask the British Parliament to enact a law or provision. Even the ECtHR cannot force the Parliament to do so. The only compulsion upon the Parliament to respect the European Conventions is the agreement of the Parliament to accept the Convention and the promise that is related making all domestic legislation compatible with the European Conventions.

Many authors emphasise that the British Parliament should respect the ECHR depending on the traditions stretching back to the origins of the British common law such as the Magna Carta, the Bill of Rights of 1689, and Habeas Corpus. Thus, the ECHR was framed by the significant contribution of British jurists, and the traditional legal documents which form British common law [(80)]. All of that, in my view, may help people to recognise and correct the situation of legislative omission in this context using the democratic processes as political constitutionalism supporters suggest. This may not be possible without the warning of the European Court as the public may not be able to note the legislative violations by themselves.

---

79 This kind of legislative omission with an international element can be expected in all other countries as well, but that is not the aim of this study as it is trying to examine the role of the constitutional judiciary to remedy the situation of legislative omission. Thus, I will only mention briefly the role of ECtHR to remedy this situation in chapter seven of this study.

80 Jesse Norman and Peter Oborne, *Churchill's Legacy: The Conservative Case for the Human Rights Act* (Liberty, The National Council for Civil Liberties 2009). P: 7.

Chapter Six

The Mechanism of Applying the Monitoring of Legislative Omission

During the previous chapters of this study, several issues related to legislative omission have been clarified. The definition of legislative omission, the difference between it and other concepts which may seem similar, the main reasons for it, and the justification for monitoring this legal problem have all been discussed. Now it is necessary to know how this kind of monitoring can be practised. In other words, what is the mechanism for monitoring and what is the correct response to the absolute negative action of the lawmakers by the judiciary? In the typical constitutional review, there is an Act or provision to be sued while there is no such Act or provision in the case of legislative omission. Thus, knowing this mechanism is essential because the monitoring of legislative omission focuses on the negative action of the lawmakers. The way that is used to practise this may be different from other constitutional violations caused by positive actions.

Also, studying the mechanism of applying this kind of monitoring may be important because it can show if this monitoring is for the protection of the freedoms and rights of the people or if it is a political procedure that aims to give certain authorities the power to sue the situation of legislative omission without any obligation to the legislature or to follow the judges' decision. This can be shown from the ability of people to bring the case of legislative omission to the Courts. In my view, if there is a chance for individuals to bring the case of legislative omission to the Courts, then this means that monitoring legislative omission is a kind of constitutional review of the negative actions of the legislature. It would be a political procedure if individuals are prevented to sue the legislative omission and this is what will be explained in this chapter.

As this study suggests, the right body to carry out this constitutional monitoring is the judiciary, whether it is in a constitutional court or related to the judges in supreme Courts. Of course, cases of legislative omission can reach the Court in different ways. In other words, there are various ways to sue the situation of legislative omission, which depends on several criteria. The special constitutional judges that practise constitutional review are likely to be different than those who exercise the same by ordinary judges. The monitoring practised in the countries that acknowledge the monitoring of the legislative omission in their legal system is different from those which do not have this kind of monitoring. To cover all of

these factors, I am going to discuss and explain the mechanism of monitoring the legislative omission in the countries which acknowledge this kind of monitoring in their constitutional or legal system. These countries are Brazil, Portugal, South Africa and Hungary. I am then going to explain the situation in some of the countries which have a constitutional judiciary and where this kind of monitoring has been practised without acknowledging it in their constitutional or legal system, such as Germany, Spain, Italy, Iraq and Egypt. This chapter will be divided into two sections. The first one will contain the cases in countries that have this kind of monitoring in their constitutional systems. The second section will include the cases in countries whose constitutional judiciary has the power of constitutional review, but where reviewing the legislative omission is not mentioned in their constitutional or legal systems.

Section One

The Monitoring of Legislative Omission in the Countries that acknowledge it in their Legal System

Some countries around the world have noted the problem of legislative omission and they have attempted to regulate it, typically through a constitutional judicial review. Most of these countries acknowledge this problem. The oldest state that regulates this kind of monitoring is Portugal in its Constitution of 1976 [(1)]. Therefore, most of the constitutional or legal provisions that regulate this kind of monitoring are new. For example, Act CLI of 2011 on the Constitutional Court of Hungary acknowledges the problem of legislative omission [(2)] while the Hungarian Constitutional Law does not mention it. South Africa has witnessed a significant change in its constitutional system after a long time of having a racial discrimination system [(3),] and they rewrote a new constitution in 1993 and endorsed it in 1996. This adopted constitutional review in a country that traditionally supported the principle of parliamentary supremacy [(4)]. Furthermore, the constitution mentions that the Constitutional Court has the power to remedy the situation which may be considered as a problem of legislative omission [(5)]. Even though these countries, in some way, acknowledge this problem, they have different mechanisms to deal with it as it will be shown in this chapter.

The ways that are used by these countries to remedy legislative omission have common factors such as all of these countries have a specialised constitutional judiciary. Except for Hungary, all of these countries have mentioned the monitoring of legislative omission in their constitution. However, each country has a unique mechanism to practise this kind of monitoring. As has been shown in Chapter 2 of this study, these countries do not agree on the

---

1See: The Constitution of Portugal. Article 283/ 1.

2 Article No. 46 of Act CLI of 2011 of the Constitutional Court OF Hungary.

3 A. Sachs, 'The Creation of South Africa's Constitution' (1996) 41 New York Law School Law Review 669. P: 669 - 683.

4 Michael F. Mohallem, 'Immutable Clauses and Judicial Review in India, Brazil and South Africa: Expanding Constitutional Courts' Authority' (2011) 15 The International Journal of Human Rights 765. P: 776.

5 See article No. 167 point 4 of The Constitution of the Republic of South Africa 1996.

definition of what legislative omission means and, as it will be shown in the next chapter, they do not agree on the value of the judges' decision. The mechanism of practising this monitoring is also different. Generally, there are some similarities between these countries in terms of how the constitutional court receives the cases of legislative omission. Therefore, I am going to explain the mechanism of practising this monitoring in the chosen countries, which are South Africa, Brazil, Portugal and Hungary in this section.

1. The Mechanism of Monitoring Legislative Omission in South Africa.

As has been shown in Chapter 1 of this study, the Constitution of South Africa mentions that the Constitutional Court has the power to "decide that Parliament or the President has failed to fulfil a constitutional obligation". Thus, this provision gives the Constitutional Court the absolute power to decide if there is any failure related to fulfilling the constitutional obligations and whether the Parliament or the President have known of this failure. As shown, the constitutional provision gives full power to the Constitutional Court to take on a case of legislative omission in any way, whether the judges discover the failure of fulfilling the constitutional obligation by themselves when they are practising their job or where there is the request from claimants that is brought to the Court about that [(6)]. The court then decides if there is a failure or not [(7)].

However, an important question may arise, which is 'Can the individuals or any state's institution sues a case against any failure of the Parliament or the President?' The mechanism of litigating constitutional cases should be explained. The constitution mentions that "*National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court a. to bring a matter directly to the Constitutional Court; or b. to appeal directly to the Constitutional Court from any other court*" [(8)]. Thus, the constitution generally gives any person who has an interest of justice the ability to prepare a case to the Court whether going directly to any ordinary court or appealing directly to the Constitutional Court CCT from any other court. This means

---

6 See for example *Decision of CCT 'My vote counts NPC vs Speaker of the National Assembly and other'* (n 113). Para: 2.

7 Abdel Hafiz Al-Shimi (n 9). P: 41.

8 Article No 167/ 6 of The Constitution of the Republic of South Africa 1996.

theoretically that individuals can sue a case against any law which may seem to violate the Constitution.

However, CCT's decisions may show something different. The CCT mentioned in one of its judgments that it is a rare thing that the CCT can accept the appeal directly. It needs to be sent by the Supreme Court of Appeal SCA[9]. The Court explains its perspective in that there are usually different kinds of issues in the cases. Some of them are related to constitutional matters and others are not. Thus, the appeal should be presented to the SCA, and this Court can send constitutional issues to the Constitutional Court [10]. Nevertheless, the Constitutional Court mentioned that when there is just a constitutional issue, the situation is different as it provided that:

"But where the only issues on appeal are constitutional issues the position is different. Relevant factors to be considered in such cases will, on one hand, be the importance of the constitutional issues, the saving in time and costs that might result if a direct appeal is allowed, the urgency, if any, in having a final determination of the matters in issue and the prospects of success…" [11].

This is the situation of any constitutional case and this may apply to the case of legislative omission as well because the constitutional provision, which has provided the competence for deciding if the Parliament or the President has failed to fulfil a constitutional obligation, does not indicate a specific way to practise this competence.

This means that the CCT can practise this competence as it would any other constitutional case. Therefore, the legislative omission or failure to fulfil the constitutional obligation can be brought to the CCT in several ways. A - a direct case to be sued the CCT by

---

9 *Decision of CCT 'Member of the Executive Council for Development Planning and Local Government Gauteng v Democratic Party and Others'* (1998) CCT33/97. Para: 32.
10 See Eric C. Christiansen, 'Transformative Constitutionalism in South Africa: Creative Uses of Constitutional Court Authority to Advance Substantive Justice' (2010) 13 The Journal of Gender, Race, and Justice 575. P: 584. *Decision of CCT 'Member of the Executive Council for Development Planning and Local Government Gauteng v Democratic Party and Others'* (n 312). Para: 32.
11*Decision of CCT 'Member of the Executive Council for Development Planning and Local Government Gauteng v Democratic Party and Others'* (n 312). Para: 32, 33.

the individuals [12], B - sending the case from the High Court of Appeal and C - sending the case from any Court. Finally, the Constitutional Court can also decide if there is any failure to fulfil the constitutional obligation when it is practising its competences related to any other issue. This can be concluded from the constitutional provision and the practice of the Constitutional Court [13].

There is no evident procedural difference between suing the situation of legislative omission and suing any other constitutional violations. In my view, this can provide another piece of evidence that the situation of legislative omission is a kind of constitutional violation. This can be understood from the constitutional text as explained above. In addition, this can be shown in the CCT's decision as well when it allows the constitutional requests to be brought to the Court directly [14].

As a result of this, I think that any constitutional court that has the power to review the constitutionality of the laws can practise the monitoring of legislative omission, even when there is no legal text which allows for such as it is a constitutional violation that should be reviewed. If individuals are allowed to bring the case of the constitutional review directly to the constitutional court, then they may be able to bring the case of legislative omission forward as well. Thus, individuals in Iraq, for example, can bring the case of legislative omission forward as they can any other constitutional violation as they can sue under the conditions that are in place for the constitutional review cases. I am going to support this through more evidence in the following discussions.

2. The Mechanism of Monitoring Legislative Omission in Brazil.

The constitution of Brazil indicates the problem of legislative omission but it calls it a "lack of measure". The Constitution provides that "*when unconstitutionality is declared on account of lack of a measure to render a constitutional provision effective, the competent Power shall be notified for the adoption of the necessary actions and, in the case of an*

12 Eric C. Christiansen (n 313). P: 585.

13 Abdel Hafiz Al-Shimi (n 9). P: 41.

14 See: *Decision of CCT 'My vote counts NPC vs Speaker of the National Assembly and other'* (n 113). Para: 2. & *Decision of CCT 'Member of the Executive Council for Development Planning and Local Government Gauteng v Democratic Party and Others'* (n 312). Para: 6-10, 32.

administrative body, to do so within thirty days"[15]. The most crucial issue that can be noticed from this constitutional provision is that the legislative omission can be issued because of a legislative or executive action where there is a lack of measure which leads to rendering the constitutional rules ineffective. Thus, the legislative omission can be issued by both executive and legislative authorities. A lack of measure is considered to be an unconstitutionality situation because it has been mentioned in the same article of the measure of suing the constitutional review by the Brazilian Supreme Federal Court FTS. Therefore, a case which sues the lack of measure takes on the same procedures of suing as in any other unconstitutional situations.

The Constitution mentions that the following departments can sue for actions of unconstitutionality and declaratory actions of constitutionality: "*1 – The president of the republic, 2 – The directing board of the federal senate, 3 – The directing board of the Chamber of Deputies, 4 – The directing board of a state legislative assembly or of the federal district legislative Chamber, 5 – A state Governor or the federal district Governor, 6 – The Attorney-General of the republic, 7 – The Federal Council of the Brazilian bar association, 8 – A political party represented in the National Congress, 9 – A confederation of labour unions or a professional association of a nationwide nature*" [16]. Paragraph 1 of the same article adds that "*the Attorney-General of the Republic shall be previously heard in actions of unconstitutionality and all suits under the power of the Supreme Federal Court*" [17]. As has been shown, there are two conditions for a constitutional case to be acceptable. First, it should be provided by the specific departments of the state that are mentioned above. Second, the case should be brought forward by the Attorney-General of the republic. Thus, the case cannot be sued by individuals [18].

---

15 Article 103 Paragraph 2 of The Constitutional of the Federative Republic of Brazil.

16 Article 103 of The Constitution of the Federal Republic of Brazil.

17 Article 103, Paragraph 1 of The Constitution of the Federal Republic of Brazil.

18 " If there is exceptional urgency and relevance, an absolute majority of the full Tribunal can issue provisional measures, which may consist of the suspension of the law in a case of partial omission. The provisional measure may also consist of a suspension of judicial or administrative proceedings, or any other measure that the STF decides to impose". Rosenn (n 97). P: 1047.

In the case of legislative omission, there is another condition that is added by the FTS. This condition is that the legislative process of the omitted issue should not be started by the competent authority [19]. This condition gives lawmakers the time to remedy the omission. However, this condition should be limited to a reasonable period. Therefore, the Court itself has accepted what is called "Direct Unconstitutional Suit due to Omission" against a deliberate slowing of the laws or provisions under consideration by the lawmakers [20]. Thus, the case against legislative omission should be sued after a reasonable period has been given to the lawmakers to enact or prepare the procedures of legislation, and after the Court estimates all of these conditions.

The constitution mentions that: "… *in the case of an administrative body, to do so within thirty days*". This part of the provision invites the question on the value of the Federal Supreme Court's decision which will be answered in the next chapter. Nevertheless, the most critical issue that should be noted here is that the Court's decision in the case of legislative omission is obligatory on any administrative body, and the situation should be remedied within thirty days.

The Brazilian Constitution mentions another way to sue in a situation of legislative omission. This way is mentioned in the provision which issues that "*a writ of injunction shall be granted whenever the absence of a regulatory provision disables the exercise of constitutional rights and liberties, as well as the prerogatives inherent to nationality, sovereignty and citizenship*" [21]. In this provision, there is an explicit authorisation to the Court to issue a writ of injunction to solve the situation of legislative omission which is related to constitutional rights and freedoms [22]. This authorisation should be practised in the same way, which has been mentioned in article 103 above. However, the question that may arise here is can the individuals demand a writ of injunction from the Court directly?

The constitution does not mention so, but the STF mentioned that the constitutional text which provides the writs of the injunction could be executed without any executive Act or

---

19 Mendes (n 9). P: 5.

20 *Decision of STF, Min ILMAR GALVÃO* (2002) ADI 2495. See Mendes (n 9). P:6.

21 Article 5 LXXI of The Constitutional of the Federative Republic of Brazil.

22 See Mendes (n 9). P: 7-12.

provision. The STF clarified that until the new Act is enacted to regulate the procedures of the writ of injunction, the processes of the writ of mandamus should be applied by analogy [23]. This is what the Congress approved later [24]. According to the Constitution, the case of the writ of mandamus can be brought by "*a) a political party represented in the National Congress. b) a union, a professional association or an association legally constituted and in operation for at least one year, to defend the interests of its members or associates*" [25] Thus, the writ of injunction can be filed by the same bodies above [26].

As has been shown above, an individual cannot bring the case of legislative omission directly to the STF. Even in the method of the writs of injunction that is allocated to correct any omission that goes against the rights and liberties of the people, individuals are not allowed to bring the case to the Court as well. However, individuals can sue the case of legislative omission indirectly through appeals from other Courts or by political parties and the other institutions mentioned above.

The Brazilian regulation of remedying the situation of legislative omission is one of the most developed in my view. This is as there is more than one method to sue this situation. Moreover, the writ of injunction is the most crucial method to remedy an absolute legislative omission. Although the Constitution provided the writ of injunction to remedy the legislative omission which related to the rights and liberties of the people, the STF did not have the same interpretation of what decision should be undertaken to remedy these omissions. Thus, this method witnessed big developments in the view of STF as I am going to explain in the next chapter [27].

---

23 *Decision MI 107 QO* (1989).

24 Act No. 8.038 1990. Article 24.

25 The Constitutional of the Federative Republic of Brazil. Article LXX.

26 Rosenn (n 97). P: 1028.

27 See: Keith S Rosenn, 'A Comparison of the Protection of Individual Rights in the New Constitutions of Colombia and Brazil' (1992) 23 The University of Miami Inter-American Law Review 659. P:688.

3. The Mechanism of Monitoring Legislative Omission in Portugal.

The Constitution of Portugal provides that: "*At the request of the President of the Republic, the Ombudsman, or, on the grounds of the breach of one or more rights of the autonomous regions, presidents of Legislative Assemblies of the autonomous regions, the Constitutional Court shall review and verify any failure to comply with this Constitution by means of the omission of legislative measures needed to make constitutional rules executable*" Also, the constitution added "*Whenever the Constitutional Court determines that unconstitutionality by omission exists, it shall notify competent legislative body thereof*" [(28)]. Thus, legislative omission, according to the Portuguese constitution, arises when the legislature fails to enact the laws that are necessary for executing the constitutional rules.

Legal scholars try to identify what this failure looks like. Some of them such as Gomes Canotilho and Vital Moreira explained three situations which may be considered as involved in a failure to comply with the Constitution. The first one is Situations of Absence, which means that there are some constitutional provisions that are not accurate enough and that need more of a specific explanation and clarification to be executable. For example, the constitutional norms which mention the special crimes that may be committed by political officeholders [(29)]. These crimes need to be defined, then they can be clear and executable. The second one is Situations of inadequacy. This means that the lawmakers fail to fulfil their duty to "improve, update, perfect or correct existing rules". In other words, it is a failure of an adaptation or improvement of the laws that are already in force with the current constitutional rules. Finally, there are the Situations of Insufficiency or Deficiency, which mean that the general constitutional rules need continuous legislative development to be executable. Thus, ordinary legislation tries to make the constitutional rules executable and without this legislation, these rules will be confined to the constitutional document [(30)].

The most critical issue which may be noted from the constitutional provision is that legislative omission can be raised from different types of state departments. It locates these departments as the President of Republic, the Ombudsman, and the presidents of the

---

28 Article (283) of The Coustitution of Portugal.

29 See Article (117) 3 of The Constitution of the Portugal.

30 Portuguese Constitutional Court (n 11). P: 13-15.

Legislative Assemblies of the autonomous regions "*on the grounds of the breach of one or more rights of the autonomous regions*"[31]. This means the individuals cannot sue in the case of legislative omission. There is no indirect way for individuals to sue such an omission as there is no option where the ordinary Court can send the case of legislative omission to the Constitutional Court. The Constitutional Court itself can not consider automatically any case of legislative omission as the constitutional text provides that this case should be brought at the request of the specific state departments.

Does that make legislative omission a political case to solve a political problem in Portugal? It seems that the Portuguese Constitution is meant to make the case of unconstitutionality by omission a political procedure. This can be understood from the constitutional text which provides that "*whenever the Constitutional Court determines that unconstitutionality by omission exists, it shall notify competent legislative body thereof*". Thus, it seems that the Court's decision is not binding on the legislature [32]. It is a procedure used by the state departments to discover the legislature's omissions and to show the public that there is a failure to fulfil the constitutional obligations by the legislature [33].

4. The Mechanism of Monitoring Legislative Omission in Hungary.

There is no constitutional provision about the legislative omission in Hungary, but Act CLI of 2011 on the Constitutional Court OF Hungary issues that:

"*If the Constitutional Court, in its proceedings conducted in the exercise of its competences, declares an omission on the part of the lawmaker that results in violating the Fundamental Law, it shall call upon the organ that committed the omission to perform its task and set a time limit for that*"[34].

---

31 Luisa Neto, 'Portuguese National Report on the National and International Codification of Human Rights' in Wen-You Wang (ed), *Codification in International Perspective* (Selected Papers from the 2nd IACL, Thematic Congress of the Internationa Academy of Comparative Law 2014). P: 344. & Mark Tushnet, 'Dialogue and Constitutional Duty' in Anat Scolnicov Tsvi Kahana (ed), *Boundaries of State, Boundaries of Rights Human Rights, Private Actors, and Positive Obligations* (Cambridge University Press 2016). P: 96-97.

32 I am going to discuss that more comprehensively in Chapter Seven.

33 Portuguese Constitutional Court (n 11). P: 23-24.

34 Chapter II, Section 46 of Act CLI of 2011 of the Constitutional Court OF Hungary.

Subsequently, the Hungarian Act defined legislative omission as a negative action made by the lawmaker, which infringes on the Fundamental Law. This means the lawmaker should fulfil all obligations that are imposed by Fundamental Law, including making the Fundamental law norms executable. The Court should consider this negative action as legislative omission, and it should ask the lawmakers to remedy this omission in a limited period of time. The provision locates that the Court has to discover the legislative omission through exercising its competence and that this may give rise to a specific question: 'Can the petitioner ask the Court to consider the legislative omission or it is something reserved to the Court?' The answer is yes, the petitioner can ask the Court to decide whether the lawmakers have violated the Fundamental Law by omitting their duty of enacting or not.

There are two reasons for this answer. First, the provision above gives the Constitutional Court the power to consider any omission of lawmakers as a legislative omission when it results in a constitutional violation. The mention of "in the exercise of its competences" does not prevent any petitioner from suing in the case of legislative omission. This case can be considered as a remand to the Court related to any legislative omission. Second, there are several Constitutional Court decisions in which the Court has been asked to consider the case of legislative omission by petitioners. Practically, several petitioners have sued in the case of legislative omission [(35)]. Thus, the legislative omission case is considered to be as any other constitutional case. The constitutional case mechanism should be clarified.

There are two kinds of constitutional review; the Ex-ante Review of Conformity with the Fundamental Law (Preliminary Norm Control) and the Ex-Post Review (Posterior Norm Control) according to the Law [(36)]. In both cases, the Court can be asked to deal with legislative omission and the petitioner can ask the Court to do so as well. However, who can sue in a constitutional case and who can ask the Court to consider any case of legislative omission? First of all, the Constitutional Court in Hungary can declare that there is an omission by the lawmakers when it is exercising its competence, whether there was a demand from the petitioners or not and whether the constitutional review is a Preliminary or Posterior norm control according to the provision above.

---

35 *Decision of the Constitutional Court of Hungary 23/ 1998* (1998) 23/ 1998. See also *Decision of the Constitutional Court of Hungary 50/ 2003* (2003) 50/ 2003.

36 Chapter II, Section 23, 24, of Act CLI of 2011 of the Constitutional Court OF Hungary.

There are some persons, and state departments can sue in the constitutional case in general. They can ask the Court to consider the issue of legislative omission. Some can sue the Ex-ante Review (Preliminary Norm Control). The National Assembly (NA) by the Government or by the Speaker of the (NA) can send any act, before enacting it, to the Constitutional Court for an examination of its conformity with the Fundamental Law. The President of the Republic can do that [37]. Other entities can sue the constitutional Ex-Post Review (Posterior Norm Control). Any person, organisation affected by a concrete case, and the Prosecutor General sue a constitutional case that is against a given law or provision which they think contradicts with the Fundamental Law [38]. No reason prevents them from asking the Court to consider any case of legislative omission.

Act CLI of 2011 tries to clarify the situations that should be considered a case of legislative omission to help the judges and to give them a clear idea. Thus, it issued the following:

"The following shall be considered an omission of the lawmaker's tasks:

a) The lawmaker fails to perform a task deriving from an international treaty.

b) A legal regulation was not adopted even though the lawmaker's task derives from explicit authorisation by legal regulation.

c) The essential content of the legal regulation can be derived from the Fundamental Law is incomplete" [39].

As has been explained before in this study, the Hungarian text is very general and it contains some situations that can help the judges to identify legislative omission. However, the text does not prevent any legislative omission that may arise because of another situation that is not mentioned. Thus, it would be possible to expect other cases that can cause legislative omission so long as the Fundamental Law is violated because of the lawmakers'

37 Article (6) 2, and 4 of The Fundamental Law of Hungary 2011.

38 See Chapter II, Section 26, 27, of Act CLI of 2011 of the Constitutional Court OF Hungary.

39 Article 46 of Act CLI of 2011 of the Constitutional Court OF Hungary.

omission. This would be supported by knowing that the Constitutional Court in Hungary has several other statuses considered to be legislative omission [(40)].

What can be noted from all of these legal systems is that there is no specific method to use to sue in the case of legislative omission. Therefore, all of the legal systems that have been mentioned above deal with the problem of legislative omission as they do any other constitutional violations. This supports the definition of legislative omission that I adopted in Chapter 1 of this study in that legislative omission is a constitutional violation in a negative way. What can also be noted is that there are different methods to deal with the problem of legislative omission in each legal system. Some differences relate to the methods of who can prosecute in the case of legislative omission. Others are related to how legislative omission can be identified. However, there are still some similarities, such as all systems, except Portugal, give the constitutional court the power to consider automatically any case of legislative omission. Sometimes the provision gives this power explicitly, which can be understood from the text, or it is in the exercises of the constitutional Courts.

In my view, several benefits can be taken from these models for monitoring legislative omission. One of the most important is the writs of injunction in Brazil. This procedure allowed the STF to remedy several omissions that are related to the liberties and rights of the people as I am going to explain widely in Chapter 7. Also, these models, except for Portugal, support giving individuals the right to bring the case of legislative omission to the constitutional Courts directly or indirectly. This is one of the right ways to ensure and protect their liberties and rights. The Hungarian model provides situations in which they should be considered legislative omissions. This method is suitable, but they should be mentioned as examples of legislative omission to help the judges to consider them easily. They should not be exclusive cases as there may be other situations that can be considered as legislative omissions. Thus, I support that the constitutional and legal text which regulates the monitoring of legislative omission should focus on explaining the conditions and elements of the legislative omission instead of mentioning examples. This can help the judges to adopt normative elements to help determine if a case should be considered legislative omission or not.

---

40 See Chapter Two of this study.

All of this can be noted from the countries which acknowledge the problem of legislative omission in their constitutional or legal systems. What can be noted from the other countries whose constitutional judiciary practises the monitoring of this problem? That is the topic of the next section.

Section Two

The Monitoring of Legislative Omission in the Countries whose Constitutional Judiciary deals with the Problem of Legislative Omission

In the last chapter, the mechanism of monitoring legislative omission in the countries that acknowledge this kind of monitoring has been explained. It has been shown that each country has a different method of who can sue in the case of legislative omission and how can it be managed. However, it has been clarified that in these countries, legislative omission was considered as a kind of constitutional violation. Generally, there may be special procedures to deal with the case of legislative omission. Thus some specific provisions regulate the monitoring of this legal problem and clarify the mechanism of it.

Nevertheless, this legal problem may appear in any legal system even where there is no explicit acknowledgement of it. The monitoring of this problem has been performed practically before there was an acknowledgement of it in any constitutional or legal system. Thus, there are countries that do not have a specific provision that identifies this problem, but where the constitutional judiciary practises a kind of monitoring against it as a constitutional violation. The procedures that have been followed to deal with this problem in these countries do not look any different than those of other constitutional review cases. Nevertheless, are there special procedures that have been used to allow the constitutional judiciary to decide on a legislative omission situation?

In this section, I am going to discuss the procedures that are used to deal with the case of legislative omission and the role of the constitutional judiciary in different countries which practise the monitoring of the problem of legislative omission. It would be useful to discuss these procedures in different ways. Studying these cases in the countries that have no specific provisions to deal with legislative omission is helpful to know how the constitutional judiciary can/should remedy this problem. Also, what various departments of state may sue in the limit of their power is useful as the constitutional judiciary may deal with this problem in different ways, related to the case on the problem or to individuals.

The most popular way that the constitutional judiciary used here to assess the case of legislative omission and the way that they try to decide about it will be discussed in several points. These procedures have been adopted in different constitutional Courts and through various decisions. This section will be divided into four parts. First, there will be the

decisions of legislative omission that have been made by the constitutional court spontaneously of its own motion. Second, there will be the decisions of legislative exclusion that have been made according to petitioners' applications. This point will be divided into two parts, whether the requirement was made by a specific state department or by individuals. Third, there are the decisions of legislative omission that has been made according to a direct constitutional case that have received from another Court. Finally, I will discuss the methods that the constitutional Courts have used to deal with these requirements.

1. The constitutional court makes decisions of legislative omission spontaneously.

The idea of a constitutional review was created by practising of judicial authority. Then, the constitutional review became the most crucial competence of this specific constitutional judiciary. The idea of monitoring legislative omission is a judicial innovation as well. Therefore, the existence of constitutional judiciary is the main reason for creating this kind of monitoring. It would be expected that the constitutional court makes the decisions related to remedying the legislative omission of its own motion when it considers this omission by the lawmakers as a constitutional violation. This can be noted in several judicial decisions in different countries.

Sometimes, the constitutional court decides that there is a legislative omission when it examines the constitutionality of a specific law or provision [(41)]. In another case, the constitutional court discovers the legislative omission when it tries to interpret the constitutional or legal provision [(42)]. Thus, the decision that acknowledges the situation of legislative omission may take on the form of an unconstitutional law or provision, or it may take on the form of the interpretation of the constitutional rules. This may affect the enforcement of the decision. In the case of unconstitutionality, the decision would require a legislative intervention from the lawmakers to make it effective, while it may apply by itself in the case of an interpretation of the constitutional rules. In both cases, there is no

41 This is the most common way that the court may use to discover the situation of legislative omission. See *Decision of FCCG 'Der Öffentliche Dienst'* (n 212). *Decision of Court of Arbitration in Belgium 'Parliamentary Assembly'* (1996) 31/96. See Sc. R. Dürr, T. Gerwien, D. Jones, A. Gorey (n 8). P: 80 and 124.

42 See *Decision of FSCI 13/2007* (n 3).

requirement that has been presented to the court to examine if there is a case of legislative omission or not. However, the court spontaneously discovers that and announces it.

There is another way that the court may use to decide against the legislative omission, which is when the constitutional court concludes that there is a case of legislative omission and the lawmakers should remedy this situation without any case having to be sued. As has been shown before in this study, the FSCI in Iraq issued an announcement which demanded the Parliament to complete the components of the legislative authority. The spokesperson of the court said that the legislative authority contains two councils (the Representatives' Council and the Federal Council) according to the constitution of 2005[(43)]. The announcement mentioned that there was an SFCI's decision which mentioned this issue by saying that the parliament should complete the components of the legislative authority, especially those mentioned in the constitution[(44)].

Regardless of the legal value of this announcement [(45)], it can be considered a new method that the constitutional court can use to remedy the situation of legislative omission. It is a unique way to deal with this problem because FSCI issued this announcement without hearing a case or receiving a request from a petitioner to issue a decision or to announce its position on the problem of legislative omission. This may show the importance and the seriousness of legislative omission in the legal system. In general, this announcement, in my opinion, is still not a way to sue in the situation of legislative omission. It may just give the impression that FSCI tried to warn the legislators that there are several laws that should be enacted by them. However, this warning is informal. In any case, this announcement may be considered as an important step in terms of monitoring the legislative omission in Iraq because the Court noted this problem and tried to warn the Parliament about it and acknowledge the existence of a problem is the first step to put a suitable remedy for it.

2. The direct case against the situation of legislative omission.

As has been shown in the last section, a direct constitutional case may sue in the situation of legislative omission in the countries that acknowledge the problem of legislative

---

43 The Federal Supreme Court in Iraq FSCI (n 88).

44 ibid.

45 I have discussed the legal value of this announcement in Chapter One of this study.

omission. However, what is the case in the countries that do not recognise this problem? In my opinion, legislative omission can be a reason for a direct case of constitutional review because it is a kind of constitutional violation as has been explained before. Thus, there is no reason preventing any petitioner from asking the constitutional court to consider this situation and asking the court to order the lawmakers to remedy it.

There are several cases that were applied directly to the court in countries that do not acknowledge legislative omission. The state's departments have sued in these cases. For example, the Free State of Bavaria asked the SCCG to examine if there are enough protective provisions on pregnancy termination which fulfil the constitutional duty to protect unborn life [(46)]. Individuals can sue in a direct case of legislative omission as well. For example, a petition asked the Federal Constitutional Court in Germany directly to remedy the omission of the state authorities to adopt effective protective measures against airport noise [(47)].

Thus, there is a direct requirement to consider the situation of legislative omission in both cases. This means that even in the countries that do not acknowledge legislative omission, it can be a constitutional violation issued by the petitioners. The method of practising this monitoring is the same method used to sue the constitutionality of any law or provision. However, the legal value of the decision which is related to remedying the legislative omission may seem different because there is a direction that is issued by the court to the lawmaker to remedy a legal gap. This may be different from the judges considering that a provision is unconstitutional. In any case, this is what will be discussed in the next chapter.

3. The ordinary court refers to the case of legislative omission to the constitutional court.

Another way to sue in the situation of legislative omission is when an ordinary court in the exercise of its duty finds a situation of legislative omission by itself or according to a requirement of the claimant. Then the court would send this requirement considering the

---

46 See *Decision of FCCG 'Protecting Unborn Human Life'* (n 5).

47 See *Decision of FCCG 'Aircraft noise'* (n 120). Sc. R. Dürr, T. Gerwien, D. Jones, A. Gorey (n 8). P: 120.

legislative omission to the constitutional court to decide about it [48]. In this case, the constitutional court is asked to consider the situation of legislative omission. The ordinary court may see that there is a legal gap which may violate the constitutional rule, but it cannot ask the lawmakers to remedy this gap. This is the competence of the constitutional court. Thus, it sends the case to the constitutional court to decide whether there is a need to direct the lawmakers to enact this provision or not. This situation is considered to be a constitutional matter because it relates to a constitutional violation and the ordinary court cannot review such a violation as that should be the competence of the constitutional court.

How do the constitutional Courts deal with the requirements of remedying the situation of legislative omission? As has been explained in the last section of this chapter, the constitutional Courts in countries that acknowledge the problem of legislative omission have to decide if there is a situation of legislative omission according to the constitutional or legal rules and they need to then notify the lawmakers of that. However, what is the situation in the countries that do not acknowledge the problem of legislative omission? There are two ways that the constitutional Courts have taken to deal with this situation. First, the constitutional Courts may issue a decision about the legislative omission and that takes on two forms. They either decide that there is a legislative omission that should be remedied [49] or that there is not one. The lawmakers have an absolute right to regulate the issue or not [50].

The second is where the constitutional Courts may interpret the constitutional rule to fill in the gap. In this case, the constitutional Courts try to find legal solutions to apply to the cases which displayed. This seems very clear when a court puts its opinion and issue forward on a judgment to solve the case [51]. However, someone may say that the constitutional Courts give their opinion about the case when they rule that there is a legislative omission case and

---

48 The same situation may apply to the *Decision of Court of Arbitration in Belgium 'Failure to act or to pass legislation'* (1997) 54/97. Sc. R. Dürr, T. Gerwien, D. Jones, A. Gorey (n 8). P: 82.

49 See *Decision of the Constitutional Court in Spain 'Rights in respect of the audiovisual media and other means of mass communication'* (1994) 31/1994. Sc. R. Dürr, T. Gerwien, D. Jones, A. Gorey (n 8). P: 186.

50 See *Decision of FCCG 'Aircraft noise'* (n 120). Sc. R. Dürr, T. Gerwien, D. Jones, A. Gorey (n 8). P: 122.

51 See *Decision of FSCI 56/2010* (n 78).

the lawmakers should remedy it in a specific way. For example, the FSCI in Iraq ruled that the quota of women in the local councils should be one-quarter of the number of members of each local council. The FSCI demanded from Parliament to mention that in article no. 13/second of the act of the local councils' election [(52)]. Thus, the FSCI did not just mention that there is a case of legislative omission in the act of election, but it also enforced a specific provision that should be added to the act. This means that the FSCI enforced its opinion of how the omission should be remedied.

I agree that the Court put its opinion forward as an obligation upon the Parliament but it sent the issue to Parliament to solve it, even after putting a certain way forward for that. The Court did not put its view as an act in force. This means that the final word is still in the hands of the lawmakers who can enact the provision as they have the power to legislate it according to the Constitution. The Court will act as a legislature if it issued its decision as a judgment in force without any parliamentary intervention. In other words, when the judges interpret constitutional provisions, they enforce their interpretation which will be followed by that of the different Courts and institutions. In the case of directing the lawmakers, they send the case back to the lawmakers to enact the law or provision and the court's decision cannot be applied by itself because it needs a legislative intervention to be enforced. Thus, the lawmakers have to enact the legislation by themselves as it is their job. This issue is going to be explained and evaluated in more detail in the next chapter.

On another hand, the constitutional Courts cannot remedy all omissions by interpreting the constitutional rules. There are some omissions that cannot be remedied without legislative intervention. This situation can be seen clearly in the case of an absolute legislative omission as judges cannot create a whole law[53]. In special cases, they may be able to apply some rules which regulate a similar situation to current cases until the required legislation is enacted as we are going to see in the cases of "the Brazilian writs of injunction". However, this does not work for all omission as well.

As has been shown, the Courts in the countries that do not acknowledge the monitoring of legislative omission deal with the situation of legislative omission through constitutional review or by the interpretation of the constitutional rules. In both methods, the constitutional

---

52 See *Decision of FSCI 13/2007* (n 3).

53 See the discussion of the principle of separation of powers in chapter 5.

Courts consider the legislative omission as a constitutional violation which needs a legislative remedy by the lawmakers, even when the Courts give their solutions for that. That may help the Iraqi constitutional judges to know that they can practise this kind of monitoring through exercising their competences or according to the appellant's requirements. However, the critical question here is how the judges can identify the ideal decision for each situation of legislative omission. I am going to try to answer this question in the next chapter.

Chapter Seven

The Consequences of Monitoring Legislative Omission

Almost all issues related to the problem of legislative omission have been discussed in the previous chapters. There is still one significant issue related to the decision that may be provided to remedy this problem. It has been shown that there are several methods to deal with this problem. Judges may interpret the constitutional rules to create a new provision that may fill in the legal gap. Sometimes, the judges cannot do that and so they ask the lawmakers to deal with the omission. They paint for them a specific way to do so. In other cases, they warn the lawmaker about the omission without any suggestion of how it can be remedied. The judges may decide that it is not their job to direct the lawmakers to enact laws and provisions. Even when the judges issue a decision that is related to remedying the legislative omission, there is still a critical issue which is what the legal value of the decision is. Are lawmakers obligated to obey this decision or not? If so, is there a limited amount of time for the lawmakers to do so or can they enact a required act or provision at any time that they think is suitable? It will be shown whether the legal value of decisions which remedy the legislative omission is different in the countries that acknowledge this monitoring and in other countries that do not.

The position of the constitutional judges in respect of legislative omissions is different. Decisions that have been made to deal with this problem take on a different shape as shown before. These non-stable positions of the judges have been taken usually because judges typical think that they should not intervene in the lawmakers' jobs, especially when they see that there is no constitutional violation arising because of the lawmakers' silence [(1)]. On the other hand, they sometimes feel that the lawmakers should be given more time to regulate the issue, which is required by the constitution [(2)]. Nevertheless, when the judges decide that the lawmakers should intervene, their decision excites another issue which is 'What is the legal

---

1 See the case of: *Decision of CCT 'Doctors for Life International v The Speaker of the National Assembly and Others'* (2006) CCT 12/05. & Kate O'Regan, 'Text Matters: Some Reflections on the Forging of a New Constitutional Jurisprudence in South Africa' (2012) 75 The Modern Law Review 1. P: 16-19.

2 See the case of *Decision of FCCG 'Aircraft noise'* (n 120).

enforcement of this decision?' and 'Is it obligatory to the lawmakers or not?' When should the lawmakers obey the decision and enact the required legislation?

Thus, we can see that there are a variety of different judicial approaches to deal with the situation of legislative omission around the world. In this chapter, I shall rationalise these approaches by constructing normative models of judicial review of legislative omission. I shall call the first model a 'weak' model where the Courts take some actions short of directing, e.g. recommending. I shall call the second model a 'strong' model, where the Courts order the legislature to rectify an omission. There is a third option where the judges decide to remedy the omission by themselves through interpreting the constitutional and legal texts, which I shall call "judges as lawmakers". There are compelling moral justifications for each model. I shall also outline some of the considerations that the Courts should consider when deciding on which course of action to take in a given case, e.g. whether the legislature can/is likely to obey the decision and whether the omission is justifiable. Therefore, this chapter will be divided into three sections. The first section will discuss the weak model of monitoring legislative omission. The second will be about the strong model of this monitoring. Finally, the situation of judges as lawmakers will be explained in the third section.

Section One

The Weak Model of Monitoring Legislative Omission.

As has been shown in the previous chapters of this study, the problem of legislative omission is a relatively new issue for constitutional judiciaries. Different solutions may be undertaken to deal with it. Even though there is no agreement on what legislative failure means as shown in Chapter 2, there are some conditions that should be present in any situation to be considered a legislative omission. Thus, the judges, in some cases, try to be silent against some of the lawmakers' omissions. Sometimes they decide that the lawmakers have the absolute power to delay or even ignore enacting any legislation according to the fact that they can decide when and how laws and provisions should be regulated. In another case, they may take the view that they have no power to direct the lawmakers and the lawmakers can take on any position in order to fill the omission. Even when they decide that there is a situation of legislative omission, they may only mention that and inform the competent authority without asking for any remedy.

The judges may take the view that directing the lawmakers is something that they should not do. This position can be called the weak model of monitoring legislative omission. The judges may use this model in all cases of legislative omission or they may take on this position in specific topics. This weak position of the judges against legislative omission may seem similar to the constitutional review in the states of the commonwealth where there is a specific theory that emerges in this context. Some legal scholars call this theory "Institutional Dialogue Theory"[(3)]. This theory tries to explain judicial review in light of "Parliament's Superiority". It focuses on the relationship between courts and the legislature. The judges can review the legislators' actions which violate the statutes of a specific topic such as human rights and other legislation and repeal them. The legislature, in return, can override the judicial decision by amending the statutes of human rights themselves, or even without such amendment[(4)].

---

3 See: Luc B Tremblay, 'The Legitimacy of Judicial Review: The Limits of Dialogue between Courts and Legislatures' (2005) 3 International Journal of Constitutional Law 617. P: 217-218.

4 Ming-Sung Kuo, 'In the Shadow of Judicial Supremacy: Putting the Idea of Judicial Dialogue in Its Place' (2016) 29 Ratio Juris 83. P: 85-86.

The judges in the weak model of monitoring legislative omission take on a similar position when they mention the case of legislative omission. They claim that the lawmakers need more time and freedom to fill in the omission or they mention the omission without asking for any remedy as it will be shown. The lawmakers, in this case, can follow the judicial decision and enact the required legislation or they can simply ignore this decision. However, the lawmakers may be faced with the general opinion of the people if they choose to ignore the judges' decisions. Thus, dialogue theory may give us a justification for such a position of the judges against the legislative omission.

However, is the court taking this weak position all times when dealing with legislative omission or this just in specific situations? To answer this question, I am going to explain this weak model in light of the groups of similar decisions in order to find out what options are that the judges can take when they deal with legislative omission according to this model. Through these judicial decisions, we are going to see that the judges take this position for different reasons and in specific situations.

First: Judges decide that there is no constitutional violation because of the lawmakers' omission.

As has been shown, the omission of the lawmakers does not always cause a constitutional violation. It may seem to be just a normal legal gap that cannot be avoided as lawmakers, in the end, are human and they usually cannot anticipate all situations that need to be regulated. These situations do not necessarily violate constitutional rules. Thus judges should examine if there is a constitutional violation because of the lawmakers' omission. If they find that there is no such violation, then this means that there is no legislative omission and the lawmakers have the absolute power to choose to fill in the gap or not as they have an absolute power to practise their legislative competence.

Several decisions of the constitutional judiciary can show this position of judges toward the lawmakers' silence. There is a clear example of this kind of decision from the Constitutional Court in Hungary where the Court considers that there are enough provisions in the Hungarian legal system that prevent discrimination as the Constitution provides. Thus the Court ruled that there was no legislative omission situation simply because there is no specific anti-discrimination law. The Court took this position even though the Constitution of Republic of Hungary itself provides that: "*(1) The Republic of Hungary shall respect the*

human rights and civil rights of all persons in the country without discrimination on the basis of race, colour, gender, language, religion, political …. (2) The law shall provide for strict punishment of discrimination on the basis of Paragraph (1)"[5]. The Court explained that there are several provisions in the Hungarian legal system that provide enough protection against discrimination. The Court clarified that the Civil Code and the Criminal Code provide this protection and that there is no need for specific anti-discrimination laws unless the petitioner proves that there is such a need for this law to protect all aspects of discrimination[6].

In this case, the Court shows that the lawmakers can regulate issues as they wish so long as they make the constitutional norms effective. The petitioners who try to sue the lawmakers, depending on the legislative omission situation, should prove that there is a real need for legislation that should be regulated to provide a constitutional requirement. Otherwise, there is no situation of legislative omission.

However, the constitutional judiciary is going to decide if there is a need for legislation or not in the end. This means on one hand, the petitioners must prove that there is a need for legislation that fulfils what the constitution requires. On the other hand, the lawmakers will try to defend themselves by claiming that the enacted legislation is enough to fulfil their constitutional duty. The constitutional court is then going to decide if there is a real need for legislation as the petitioners claim or if the lawmakers have done their job.

This can be seen clearly in the decision of the Constitutional Court of South Africa (*Doctors for Life International v The Speaker of the National Assembly and Others*) [7] as the Court found that Parliament's failure to consult before enacting some Acts related to health did not constitute a legislative omission. The claimant argued that the Parliament should permit the public's involvement in the legislative process according to the Constitution [8]. The Court found that there was no constitutional requirement to ask the public before enacting each an Act. Thus, there was no legislative omission in this case [9].

---

5 Article 70 A of The Constitution of the Republic of Hungary 1949.

6 See Decision of the Constitutional Court of Hungary 45/2000 (2000) 45/2000.

7 *Decision of CCT 'Doctors for Life International v The Speaker of the National Assembly and Others'* (n 357).

8 Section 72 of The Constitution of the Republic of South Africa 1996.

9 See O'Regan (n 357). P: 16-19.

Therefore, we can conclude that the judges should make sure that there is a real need for legislation before they decide if there is a legislative omission or not. It is not enough to know that there is no specific law that regulates a specific constitutional requirement because there may be another legislation that can be applied to fill in the legislative omissions. The aim of monitoring legislative omission is to find the most suitable legislation for constitutional requirements. Thus, legislative omission arises just when there is no such legislation. This decision may not show us clearly a weak model of monitoring but it may clarify that judges take serious care before they issue a decision which asks lawmakers for legislative intervention. They are looking for any suitable legislation which can fulfil constitutional requirements before they call for new legislation.

Second: Judges find that they have no power to direct the lawmakers.

Even though the constitutional judiciary has the advantage of creating the monitoring of legislative omission, judicial decisions do not always support this monitoring. The non-agreed definition of legislative omission or uncertainty as to whether the judges have the power to direct lawmakers may be the reasons why the judges decide that they have no power to direct the lawmakers. The judges, especially constitutional judges, may think carefully before they decide to correct the lawmakers' actions. They may think that constitutional review works only when the lawmakers violate the constitution directly and positively. The violation of the constitution by the negative action of lawmakers is not what the judges usually expect to monitor when they consider constitutional issues. Even so, they think usually that they have no power to say what the lawmakers should do instead of what they should not do. The judges themselves may not agree about how the lawmakers can violate the constitution by their negative actions.

There are several decisions from the constitutional Courts in which judges have held that they have no power to direct the lawmakers to enact or amend laws. For example, there is the decision of the Supreme Constitutional Court in Egypt SCC related to the First Amendment of article No 2 of the Constitution of 1971 [(10)] which provides that the principles of the

---

10 See The first amendment of the Constitution of the Arab Republic of Egypt 1980. & Michael Meyer, *Egypt in Depth Analysis of the Main Elements of the New Constitution* (Directorate-General for External Policies of the EU, Policy Department, European Parliament 2014) P: 13.

Islamic Law are the main source of legislation. This means that all enacted laws should be compatible with these principles. There was a case brought to the court against article No 226 of the Civil Law of 1948 on the grounds that it is incompatible with article 2 of the Constitution. Article 226 provides that all debts may create an interest which means that the interest of any debt is lawful according to the Civil Law of 1948. Interest is considered usury which is forbidden in Islamic Law. The appellant claimed that the legislators should make all laws under the rule of the Islamic Law principles, and that they should amend all laws to be compatible with them.

Even though the SCC invited the lawmakers to make all necessary changes to the enacted laws to be compatible with Islamic Law's principles, the Court dismissed the case and decided that the position of the lawmakers should not be considered a constitutional violation that could be sued. On the contrary, it should be considered a political issue which should be left up to the voters' opinions and orientation [(11)]. Thus the SCC refused to consider this omission of the lawmakers as the reason for monitoring the constitutionality of the legislative omission. The SCC tried not to direct the lawmakers. Instead, it invited them to consider this issue because it is a political issue as the Court justified its decision.

Nevertheless, the question that may appear is ‘Should this issue be considered a political one as the Court tried to explain?’ Some legal scholars reject this position of the Court. They emphasise that the Constitutional Court should monitor this kind of legislative omission and that it should issue decisions which oblige the lawmakers to reconcile all legislation with the principles of the Islamic law as Article 2 of the Constitution has provided[(12)].

In my opinion, this is a very difficult case because most of the constitutional rules can be considered political issues. The Constitution paints the general principles of society and what the majority of people have agreed on. Any violation of the constitutional rules may lead to violating that agreement in one way or another. Of course, people can monitor the lawmakers' performance through their right to vote according to whom they think can respect and apply the constitutional principles that they agreed on. They can even change the understanding of the constitutional principles by enforcing a new reading of these principles as has been done

11 *Decision of SCC No 20* (1985) 20.

12 Al-ghaflol (n 9). P: 171.

in the civil rights era of the 1960s in the USA[13]. However, the issue of considering the Islamic principles as the main source for legislation has both political and legal sides. The lawmakers should respect these principles as legal bases when they enact and amend the laws and provisions. At the same time, there is a political side to these principles as they are considered ideological rules which were put into the constitution to clarify the supreme values of the state [14].

Therefore, there should be a kind of constitutional review of any omission against these rules as they have a legal nature. At the same time, the lawmakers should be given absolute power to decide when and how these rules should be activated as they relate to the supreme values which are considered to be a reflection of the people's agreement in the constitution and that cannot be changed without a new agreement of the people. Therefore, I think that the SCC's decision was proper for this case. It considered this issue as political which should be regulated by the lawmakers under the monitoring of the public. At the same time, this decision mentioned indirectly that there is a kind of review in a weak form as the Court invited the legislators to consider Article No 2 when they enact and amend legislation.

This is what I may call a "political model of the weak monitoring of legislative omission" The judges can take this position when they face the same situation of political issues which usually relate to the supreme values in the constitution or what are called by Portuguese scholars as "the programmatic rules" as I have explained in detail in Chapter 2 of this study. I supported that these rules can be the subject of the legislative omission but I am supporting the weak monitoring of the omissions relating to them here.

I can claim that the programmatic rules have more of a political nature because they usually relate to complex general ideology such as the principles of Islamic Law that are not clearly identified even in the Islamic jurisprudence. There are several views about what exactly the principles of Islamic Law are. For example, there were long debates about how these principles should be interpreted in the constitutional assembly which drafted the

---

13 Sean Beienburg and Paul Frymer, 'The People Against Themselves: Rethinking Popular Constitutionalism' (2016) 41 Law & Social Inquiry, American Bar Foundation 242. P: 244.
14 Article 2 located in chapter one of the constitution under the title of: "the state". See Chapter One of The Constitution of the Arab Republic of Egypt of 1971. P: 2.

Egyptian Constitution of 2012 between three approaches: Traditional, Modern and Salafis[15]. Because of that, this topic and other similar issues may have more of a political nature which should not be confined in the judge's view. However, the judges' decisions would be helpful to warn the legislature and people about omissions.

I can not claim that identifying political issues is an easy thing. On the contrary, it is a very difficult issue and it depends on the nature of the society and political system as some issues may be considered as political in one country while it is not in another. Thus, it should be restricted in a few issues, such as the supreme value of society. Some may argue that principles such as Equality, Freedom of Speech, and Justice and so on are considered as supreme values in most modern constitutions and at the same time they relate to freedoms and right of people. Thus it should be protected strongly from legislative omissions. In my opinion, identifying how these principles should be protected is a very critical issue and in most the countries, these principles were left to be identified and protected by long social interactions where judges were a part of these interactions. Therefore a kind of weak monitoring by judges on omissions of these principles may be the right way to deal with them.

Is Monitoring the Legislative Omission in Portugal a Political Issue?

In the countries that give the power to the constitutional judiciary to monitor the legislative omission, they also give special enforcement to the constitutional judges' decisions which is related to that. Nevertheless, there is a drafting text that may show something different. The Constitution of Portugal provides a text which may seem that it does not give the same enforcement to the decisions that are related to the situation of legislative omission. The constitutional issues are that "*Whenever the Constitutional Court determines that unconstitutionality by omission exists, it shall notify competent legislative body thereof*" [16].

According to the Portuguese constitutional text, the Constitutional Court should notify the lawmakers of any unconstitutionality by omission when it discovers it. However, the text does not mention whether this notification means that the lawmakers should remedy the

15 For more information about these debates, see: Clark B. Lombardi and Nathan J. Brown, 'Islam in Egypt's New Constitution'. P: 2-4.

16 Article (283) two of The Coustitution of Portugal.

omission or not. The text itself gives no evidence that the lawmakers should remedy the situation of legislative omission because the text does not give the power to the Constitutional Court to direct or order the lawmakers to do so. The Constitutional Court has the power solely to review and verify the omission, and when it finds it, it only has to announce that there is such omission to the competent legislative institution [17]. This is what the Constitutional Court itself supports because the Court issued, in one of its decisions, that the issue of enacting the required legislative procedures belongs only to the authority of the lawmakers and that the Court should not intervene [18]. The Portuguese Constitutional Jurisprudence supports this view because many Portuguese scholars argue that the lawmakers are not obliged by the Constitutional Court's decisions that are related to the situation of unconstitutionality by omission [19].

Nevertheless, other Portuguese legal scholars support that the obligation of the constitutional Court's decision comes from the Constitution itself as the Court just clarifies that there is such obligation. In other words, the role of the Court is simply to detect that there is a constitutional obligation to legislate a law or provision on a certain topic. Thus the Court does not create this obligation. This means that the constitutional obligation already exists in the constitutional text and the legislature should remedy the unconstitutional omission according to the Constitution, not according to the Constitutional Court's decision[20].

I may support this view based on the principle of Constitutional Supremacy but there is a political responsibility upon the legislature to respect the constitution. The Constitution, as the supreme legislation, should be respected by all authorities. The Constitutional Court has the power, according to the Constitution, to review a situation of unconstitutionality by omission and it has to inform the competent authority about this omission. Thus, the Court has to discover this omission and clarify the constitutional obligation. For the lawmakers, they are supposed to obey the constitutional obligation and fulfil their duty according to the Constitution as well. However, even if this view is not suitable for the case of legislative

---

17 Al-ghaflol (n 139). P: 137. & Abdel Hafiz Al-Shimi (n 9). P:138.

18 *Decision of the Constitutional Court of Hungary 154/ 86* (1986) 154/86.

19 Portuguses Constitutional Court (n 11). P: 23.

20 Portuguese Constitutional Court (n 11). P: 23-24.

omission in Portugal, there is still a political responsibility upon the lawmakers to consider this omission and to try to solve it.

Thus, this makes the monitoring of legislative omission as a political issue which aims to remedy a political problem in Portugal. This can be concluded from the constitutional text above. This can also be understood from the text which gives specific state departments the right to bring up the case of legislative omission [(21)] to the Court as has been explained in the last chapter where I supported that the Court's decision is not binding on the legislature but instead where it is a procedure used by state departments to discover the legislature's omissions. It is also used showing the public that there is a failure to fulfil the constitutional obligations by the legislature [(22)]. Many Portuguese legal scholars support the idea of "a negative legislator match" in the Constitutional Court's decisions which means, as has explained above, that the Court's decision is not binding on the legislature [(23)]. This again supports the idea that the monitoring of legislative omission is a political case.

This may be the right way of looking at the Portuguese constitutional text or what the framers of the Constitution meant by putting forward this kind of monitoring. However, it is not the right way of monitoring the legislative omission in my view, especially when the omission violates the freedoms and rights of the people. The legislative omission does not always relate to political issues. There is sometimes a violation of the constitution which may need strong monitoring to remedy it, which will be explained in the next section.

Third: The Court simply mentions that there is a situation of legislative omission without asking for a remedy.

Many constitutional Courts try to identify the situation of legislative omission without asking for a remedy. These Courts may have no power to direct the lawmakers or they think that any directing of the lawmakers may be considered as an intervention in the legislative process. Nevertheless, they mention the situation of legislative omission as a problem that

---

21 See: Article (283)/ 1 of The Constitution of Portugal.

22 This position of monitoring the legislative omission is different than what it has been explained at point two because all situations of legislative omission in Portugal considered as a political issue whether it is related to Programmatic or Prescriptive rules. While the situation, which has been explained at point two, relate just to Programmatic rules. See point two of this chapter.

23 Portuguese Constitutional Court (n 11). P:22.

should be solved. In these cases, the lawmakers may not obey these decisions as they think that they are not obligated by them and the judges did not ask them to remedy the situation directly. The lawmakers may think that they have absolute power to follow these decisions or not. The judges also may think that they do not have this kind of power or they do not want to dispute with the lawmakers about their job. The lawmakers may also not follow the judges' decision because they are not able to do so. This is as the law may need a special majority or they cannot provide what the law or provision requires to be enacted.

The Constitutional Court in Spain has made several decisions that can be considered as identifying legislative omission without asking the lawmakers directly to solve the situation. In one of its decisions, the Court issued that:

> *"... it must also be pointed out that at the time of the facts there was a gap in the law with regard to the circumstances of such filming and the procedures to be observed, particularly as regards the keeping of recordings made in such circumstances, their availability for inspection by the Courts, rights of access to them, and their destruction"* [(24)].

The Court identified clearly that there was a gap in the law and it mentioned that this gap might affect the right to trade union freedom. This is protected by Article 28.1 of the Constitution. However, the Court did not ask for any remedy to this gap by the lawmakers. The Court just mentioned the gap and this might be considered a warning. In another decision, the Constitutional Court in Spain was more direct, when it said that:

> *"... The legislator had still not drawn up the rules governing the indirect management of cable television. Such an omission in the legal rules results in a de facto prohibition of this activity and therefore violates the freedom of communication guaranteed by Articles 201.a and 201.d of the Constitution"* [(25)].

Therefore, the Court warned directly that this omission would lead to violating the Constitution but again, the Court did not ask the lawmakers to correct this situation. The Court may consider this clarification of the constitutional violation as an indirect order to the

---

24 *Decision of the Constitutional Court in Spain 'Right to strike'* (1998) 37/ 98.

25 *Decision of the Constitutional Court in Spain 'Rights in respect of the audiovisual media and other means of mass communication'* (n 352).

lawmakers to solve it or the Court may think that its job is just disclosing the constitutional violations and that the procedures for solving them are something else. Even though these decisions may seem that they do not put a constitutional responsibility on the lawmakers to solve the situations of legislative omission, they should put a kind of political responsibility on the lawmakers to prompt them to do their job and to remedy the omission.

Generally, constitutional Courts issue their decisions related to the problem of legislative omission as possible solutions to constitutional violations. Therefore, the Courts issue their decisions as they have the power to review the lawmakers' actions. The Courts try to clarify that the best remedy to this problem is a legislative intervention which should be issued by the lawmakers. Thus lawmakers have a responsibility to correct an unconstitutional violation.

Fourth: Lawmakers should be given more time to regulate the constitution requirements.

The judges may see that there is an omission of lawmakers but they also show that the lawmakers cannot be asked to solve this omission before giving them a suitable period in which to do so. It seems that the judges do not agree that there is a situation of legislative omission in this case because they agree that the lawmakers need enough time to solve it. This means that there is no constitutional violation at the time when they hear a case. However, the judges can show that there is a legal gap that should be filled. Thus they asked the lawmakers indirectly to solve the situation but they give them all of the authority to decide when a suitable time to do that was.

This can be seen clearly in the German case of "Aircraft Noise" which was mentioned before when the Federal Constitutional Court raised FCCG issues:

"In the area of aircraft noise abatement, the fact that reliable scientific knowledge regarding the limits of reasonable aircraft noise pollution is not yet available and the fact that the material involved is complex and the legislature has to be given reasonable latitude for gaining experience and making adjustments in order to regulate it cannot be ignored. The measures which have been adopted to implement already existing and newly created regulatory provisions since the beginning of the 1970s contradict such a conclusion "[(26)].

---

26 See *Decision of FCCG 'Aircraft noise'* (n 120).

Thus the FCCG has shown that even when there is a need to develop the law that addresses the situation of aircraft noise, the lawmakers should be given "reasonable latitude" to do so. The Court explained that the authorities have the power to choose how they can fulfil their duty of protecting people's rights. The authorities can only decide what measures should be taken for that aim and the Court cannot intervene in these matters. The Court also mentioned that the lawmakers should be given an opportunity to get experience to make the required developments in the laws to address this issue [(27)]. Therefore, the FCCG aimed to give the lawmakers reasonable latitude to get the experience to regulate the issue of aircraft noise, which may need more time. The Court shows that the lawmakers cannot be asked to remedy the legislative omission without giving them enough freedom and time to deal with it. In this point, the question that may appear is when and who can decide if there is a legislative omission or if the lawmakers should be given more time to regulate the legislation?

In my opinion, the most suitable answer to this question is that the lawmakers should be given a reasonable time to regulate the required legislation. That time should be estimated by the monitoring authority. However, how can reasonable time be identified? This issue should depend on two criteria. The first is the real need for legislation and the second is the time that has been given to the lawmakers to fulfil this need. Therefore, the judges should monitor first if there is a real need for the legislation that can be identified by examining if the current legislation is enough to fulfil the lawmakers' duty to regulate the constitutional issue which is where it is claimed that it needs legislation that is effective or not. Then what should be monitored is if the answer is not enough, which means that there is a real need for legislation. After that, the judge should consider if the lawmakers have been given enough time to regulate the required legislation or not. If the answer is yes, this means that there is a clear case of legislative omission. Of course, all of this should be after making sure that there is a constitutional violation because of the lawmakers' omission as has been explained in the last point.

As has been shown in this section, this position of weak monitoring may be undertaken for all kinds of legislative omission or just in specific situations. I think that legal scholars, who are worried or who refuse this kind of monitoring and its effect on the democracy and

---

27 See Sc. R. Dürr, T. Gerwien, D. Jones, A. Gorey (n 8). P: 122.

separation of the powers, support this weak model as the legislature would still hold the final word. This means the legislature can follow the judges' decisions and enact the required legislation or they can just ignore the decisions. In my view, this kind of weak model would be useful in specific cases when the judges feel that the issue is political or where the legislature should be given more time and power to decide when and how the required legislation should be enacted. However, I do not support this kind of weak monitoring concerning important issues, especially those related to the freedom and rights of the people or when the judges take the view that the legislature can pass the required legislation but does not want to do so arbitrarily. In these last cases, I support a different kind of monitoring which can be called "the strong model of monitoring legislative omission". This is what I am going to explain in the next section.

Section Two

The Strong Model of Monitoring Legislative Omission

As has been shown, judges sometimes decide to take on a weak position against legislative omission. In other cases, the judges take on another position when they find that there is a serious problem caused by legislative omission. They try to remedy the situation directly or by warning the lawmakers that there is a serious need for the legislative intervention. There is no one opinion about how the Courts should deal with this problem. As a result of that, the decisions that are made to remedy this problem are different according to the constitutional system and the power of the lawmakers.

Judges, in many cases, find there to be an obvious situation of legislative omission and they try to remedy this situation by asking the lawmakers to fulfil their duty. In this case, we can see that there is an absolute decision related to remedying the situation of legislative omission. However, constitutional judiciaries around the world have different perspectives of what the legislative omission means as has been explained in the previous chapters. Even though they may agree about some of the conditions of the situation of legislative omission, they still have different methods in terms of what the legislative omission means and what the lawmakers should do.

As has been shown earlier in this study, the legislative omission situation has two components. The first one is the negative action of the lawmakers against their duty of enacting the legislation and the second one is that this negative action violates the constitution rules. These components may give a clear definition of what legislative omission means [28]. However, there is still another issue which is what happens when the judges issue a decision related to legislative omission? Also, what is the range of enforcement on these decisions that can be put on the lawmakers? There may be different styles within the judges' decision depending on the power that has been given to the judges to monitor such a constitutional violation. Lawmakers may obey the judges' decision or they may ignore it, or they may even argue that the judges have no power to direct them.

---

28 See Chapter Two of this study.

As has been explained in Chapter 5 of this study, the moral reading, and the principles of the Constitution's Supremacy and Legislative Reservation may provide reasonable normative justifications, thus giving the judges the power to direct the lawmakers to fulfil their duty. Constitutional Courts can be the right institutions that practise this kind of monitoring because legislative omission is a kind of constitutional violation that should be monitored by the competent authority. Constitutional Courts are the competent authority in this case. However, there are many objections against giving this power to the judges as it would harm democracy and the separation of the powers [29]. These objections may have some reasonable justification and I have explained in the last section, "the weak model of monitoring legislative omission", which may be supported by objectors as harmonious with their objections.

However, the weak model may not be enough to remedy all kinds of legislative omission. Some situations need prompt legislative intervention to be solved, otherwise real harm may infect the legal system or the freedoms and rights of the people. Thus, the criterion of a real need for legislation may relate to the constitutional violation itself as there may be a clear violation of freedoms and rights caused by the omission of the legislature. Because of that, the judges may take a stronger position against legislative omission that could lead to a direct decision that asks the lawmakers to remedy the legislative omission or even asking them to include certain texts. In this section, I am going to discuss the scenarios that may appear when the judges issue such decisions.

What Kind of Decisions can Judges Issue?

The most important aim of monitoring the lawmakers' actions is to show them how to avoid constitutional violations that can occur because of their actions [30]. In the legislative omission situation, lawmakers violate the constitution through a negative action and avoiding or remedying this situation requires a legislative intervention from the lawmakers. Thus, the judges first detect that there is a legislative omission. Then they may ask the lawmakers to

---

29 See Al-ghaflol (n 9). P: 117-120.

30 See: Larry A. Alexander, 'Constitutionalism' in Martin P Golding and and William A Edmundson (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (John Wiley & Sons, Incorporated 2004). P: 255.

remedy this situation. Sometimes the judges try to fill the omission by applying alternative legislation and at the same time, they ask the lawmakers to fill this omission with the necessary legislation as will be shown in the case of "writ injunction"[31]. This may seem like a judicial remedy that is created by the Courts. However, judges cannot do that all of the time, especially when there is a real need for a legislative intervention as there is a clear gap in the law that cannot be filled by applying another legislation.

Therefore the judges may ask the lawmakers directly to enact the required legislation. Then a very important question will appear: 'What kind of decision can the judges issue in this situation? Conversely, are the lawmakers obligated to obey this decision or not?' There are different models depending on the legal system in place. Sometimes the judges only mention that there is a situation of legislative omission as has been explained in the weak model. They ask the lawmakers directly to intervene and remedy the situation or they even ask for a specific remedy. On the other hand, lawmakers may follow this decision and enact the required legislation to solve the problem, but sometimes they just ignore this decision because they think that it is not obligatory for them to do so, or they simply cannot do it [32].

In any case, each country deals with the issue of legislative omission differently and to discuss this would be useful. I have divided this section into two parts. In the first one, I am going to discuss the kind of decisions related to remedying the situation of legislative omission and I am going to discuss these kinds of decisions in light of some practical examples, especially in the countries that have this kind of monitoring in their legal system. In the second part, I am going to explain the specific ways used by the judicial authorities to deal with some of the situations of legislative omission.

Constitutional Judiciary Decisions Direct the Lawmakers.

When constitutional judges issue a decision that relates to remedying a situation of legislative omission, they usually issue the decision as a kind of monitoring of the lawmakers' actions. Thus, they consider legislative omission as a constitutional violation and they try to fix this situation by using their power of constitutional review over the lawmakers'

31 Rosenn (n 97). 1027-1030.

32 Al-ghaflol (n 9). P: 69.

actions [33]. Therefore, this decision should be obligated to the lawmakers and they should do what judges ask them to do. Judges sometimes do show a strong position against legislative omission. They may mention that there is a defect in the legislation and that the lawmakers should consider some points to make legislation compatible with the constitution. The judges may clarify these points and ask the lawmakers to enact the legislation in light of this clarification [34]. It would be useful to discuss these types of decisions in relation to two points. The first one is the judicial decision which asks the lawmakers directly to remedy the legislative omission. In the second point, I am going to explain the decision when the judges ask the lawmakers to enact the legislation in a certain way. I am going to discuss these points using specific judicial decisions.

First: The Court Asks Lawmakers Directly to Remedy the Legislative Omission.

The court may ask the lawmakers directly to solve the legislative omission by asking them to enact the laws or provisions which are required. This obvious position of the Courts can be seen in several decisions. The Courts try to put clear phrases in their decisions which require the legislative intervention. For example, the FCCG in Germany stated, in one of its decisions, relating to the case of extradition of criminals between European countries: "*Moreover, amendments were necessary as regards the drafting of the decision on the grant of extradition and concerning the decision's relation to admissibility*" [35]. This is how the Court directs the lawmakers to remedy the situation of legislative omission by mentioning that there is a necessary need for amendments in the procedure of extradition. Of course, these amendments should be issued by the lawmakers.

Another decision of Germany's Court relating to the protection of unborn babies mentions this in a more obvious way when the Court provided that: "*Thus, the legal system must provide the same degree of protection in the early phase of pregnancy as it does later on*" [36]. The Court used strong words such as "Must Provide" to show that the lawmakers have to follow this decision. This shows the direct order to the lawmakers to provide the required protection. The Court makes it clear that the lawmakers should follow its decision

33 Sc. R. Dürr, T. Gerwien, D. Jones, A. Gorey (n 8). P: 17.

34 ibid. P: 22-23.

35 *Decision of FCCG 'the Rights of the Defence and Fair Trial'* (2005) BvR 2236/0.

36 *Decision of FCCG 'Protecting Unborn Human Life'* (n 5).

by enacting a specific provision to cover this protection. Thus, the lawmakers supposedly have to obey these decisions to solve the problem. Otherwise, their negative action will still be considered a constitutional violation by omitting their duty.

The situation of remedying legislative omission is different from any other constitutional violations because there is no legislation that can be considered unconstitutional. In the situation of legislative omission, the court directs that the negative action of lawmakers is unconstitutional and that they should provide legislation to remedy this situation. In other constitutional violations, the Court decides to detect unconstitutional legislation without asking the lawmakers to do anything because the court directs its decision related to the unconstitutional legislation and not to the lawmakers' action [(37)]. Nevertheless, in some judicial decisions that relate to unconstitutional legislation, the court may ask the lawmakers implicitly to change the legislation to be compatible with the constitution [(38)].

To understand the judges' position in this context, it would be helpful to discuss some of the legal texts that clarify the ways of dealing with this problem as they may seem different in terms of whether the decisions are obligated to the lawmakers or not. Hence, the legal texts and judicial decisions related to the legislative omission in the countries of Brazil, South Africa and Hungary will be discussed in the following part.

1. Judicial decisions relate to legislative omission in Brazil.

The situation in Brazil may seem to be different in term of decision enforcement. This can be noted in the constitutional provision, which mentions the situation of legislative omission. The constitutional issues are that "*when unconstitutionality is declared on account of lack of a measure to render a constitutional provision effective, the competent Power shall be notified for the adoption of the necessary actions and, in the case of an administrative body, to do so within thirty days*" [(39)]. The text used the words "should be notified". This might seem like it is not obligating the lawmakers to adopt the necessary actions to solve the

37 Al-ghaflol (n 9). P: 118.

38 The FSCI in Iraq has a decision which clarified that there are several unconstitutional provisions in the Act of the Council of Representatives. The judges mentioned implicitly that these provisions need to be amended. See *Decision of FSCI 140/2018* (2018).

39 Article 103 Paragraph 2 of The Constitutional of the Federative Republic of Brazil.

legislative omission. However, the next sentence clarifies that the administrative body should adopt an action within thirty days. This means that the decision of the FTS is obligatory for lawmakers, especially the administrative body. There is just one difference between the legislative omission issued by an administrative body and that which is issued by the legislative body. This difference is that the legislative body can remedy the situation of legislative omission within an unlimited timeframe. Thus, they can choose any suitable time to do so while in the case that an administrative body causes the legislative omission, they should remedy the situation within thirty days.

Nevertheless, some might argue that the text gives the legislative body unlimited time to solve the situation of legislative omission. This means that the decision of the constitutional judges is not really binding on to the legislator because the legislator has the power to decide when they solve the omission and of course, they have the power to ignore that. To answer this argument, a text in the Constitution itself provides that "*Final decisions on merits, pronounced by the FTS, indirect actions of unconstitutionality and declaratory actions of constitutionality shall have force against all …*" [(40)]. This means that even though the lawmakers have the power to decide when they will fulfil their duty and solve the omission, they still have to follow the Court's decision. In other words, they will still be in an unconstitutional situation unless they obey the Court's decision and enact the required legislation [(41)]. However, this is not the only thing that the FST can do. In Brazil, the Court has a way of remedying the situation of legislative omission by itself. This way is called the writ of injunction (the Mandate of Injunction) I am going to explain this separately later on in this chapter.

2. Judicial decisions relate to legislative omission in South Africa.

In South Africa, the issue of enforcing the decision of the constitutional judiciary when related to the situation of legislative omission may excite more discussion. The Constitution of South Africa issues that the Constitutional Court has the power to "*decide that Parliament*

---

40 Article 102 Paragraph 2 of the Constitution of Federative Republic of Brazil. See also, Marco Antonio Garcialopes Lorencini and Augusto Zimmermann Gilberto Marcos Antonio Rodrigues, 'The Supreme Federal Court of Brazil: Protecting Democracy and Centralised Power' in and John Kincaid Nicholas Aronet (ed), *Courts in Federal Countries* (University of Toronto Press 2017). P: 125.

41 ibid. P: 125.

or the President has failed to fulfil a constitutional obligation" [(42)]. Thus the Constitution gives the power to the Constitutional Court to decide whether the Parliament or the President has fulfilled their obligations according to the Constitution or not. However, the Constitution does not mention what happens if the Court has found that there is a failure to fulfil the constitutional obligations.

Because of that, some jurists have the opinion that the Court has several ways of dealing with this situation. The first is that the Court has the power to discover a situation of legislative omission and to declare that there is an unconstitutional legislative omission case. The second way shows that the Court has the power to direct the lawmakers who should follow the Court's decisions. This is as legislative omission is a constitutional violation that has to be remedied. The last way is that the Court has the power to remedy the omission by interpreting the constitutional norms and making the situation concordant with the Constitution [(43)].

I support the second way which is that the lawmakers should follow the Court's decision because the Constitution itself mentions this in the second article. "*This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled*" [(44)]. Therefore, there are several obligations in the Constitution that should be fulfilled and when the Court decides that there is a situation of failure to fulfil one of these obligations, the lawmakers should follow this decision and remedy the situation. The Court itself takes this route because it has issued decisions that the lawmakers should enact a specific provision to remedy one of the situations of legislative omission [(45)]. Thus the Court asks the lawmakers to fulfil their duty and to enact the provision, which makes the law concordant with the Constitution.

---

42 Article 167-point 4 P. 97 The Constitution of the Republic of South Africa 1996.

43 Abdel Hafiz Al-Shimi (n 9). P: 42.

44 Article 2 P. 3 of The Constitution of the Republic of South Africa 1996.

45 *Decision of CCT 'National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and Others'* (n 196). This case has been explained in chapter 4 of this study.

Some may argue that this decision shows the Court as a lawmaker through enforcing its opinion upon the legislators [46]. The answer is that the Court does not act as a lawmaker because it has only asked the legislators to add a provision to the law which includes all other people like homosexuals in order to make the law concordant with the Constitution. This means that the final decision still with the legislators themselves.

3. Judicial decisions relate to legislative omission in Hungary.

In Hungary, the situation is more obvious because Act CLI of 2011 on the Constitutional Court of Hungary issues mentions how the situation of legislative omission should be solved. *"... It shall call upon the organ that committed the omission to perform its task and set a time limit for that"* [47]. Thus, the lawmakers should follow the Constitutional Court's decisions that are related to legislative omission because the Court, as a part of its job, should call upon the authority to remedy its omission and the Court should also set a time-limit for this duty to be done. Before the Act CLI of 2011 was enacted, the Constitutional Court in Hungary demanded in several of its decisions, where there was an unconstitutional omission, that the lawmakers should enact the legal requirements that have been asked of them through successful constitutional complaints [48]. The Court simply mentioned the situation of legislative omission in other decisions [49]. However, the Court did not set a limit-time for the legal requirements to be enacted as this power has been given to the Court in Act CLI of 2011.

However, the question that may appear is 'What will happen if the lawmakers ignore the Court's decision?' Legally, the Court's decision should be respected and the lawmakers should follow it and enact the legislative requirements. Realistically, the lawmakers, for many reasons, may not follow the Court's decision even though this will lead to violating the constitution. Therefore, the question that will appear again is 'How can the Court enforce the lawmakers to do their job through the Constitutional Court's decision?' The Court's decision sets not just a legal responsibility but it also sets a political responsibility upon the lawmakers because the Court's decision will show that the lawmakers do not follow the Constitution.

---

46 See Abdel Hafiz Al-Shimi (n 9). P: 42.

47 Article 46 of Act CLI of 2011 of the Constitutional Court OF Hungary.

48 See *Decision of the Constitutional Court of Hungary 23/ 1998* (n 338).

49 See *Decision of the Constitutional Court of Hungary 45/2000* (n 362).

This will be considered a legislative failure which will affect the reputation of the lawmakers towards their voters. Thus the voters will know that the lawmakers are not reliable when it comes to protecting their freedoms and rights and they may not vote for them again. In this situation, there is a question may appear which is why do judicial interventions matter at all? The answer is that the role of the judges in this situation is a warning role as the judges have the ability to clarify the need for legislation and identify the situation of legislative omission more than any other institute as their job is related to applying legislation and they can find the situation of legislative omission during practising their competences more than others.

Second: The Court Asks a Lawmaker to Remedy Legislative Omission in a Certain Way.

Sometimes the Court does not just ask the lawmakers to remedy the situation of legislative omission. It may direct the lawmakers to do so in a specific way. The Court tries to show the lawmakers that the constitution requires that the legal gap should be filled in a specific way. There are several decisions that show that lawmakers should enact the legislation in a certain way for it to be accepted. For example, the Federal Constitutional Court in Germany said in one of its decision that: "As a result of the weighing of interests, the legislature should have created a transitional provision for those civil servants who reached the age of sixty-five in the first half of the school year 1979/1980" [(50)]. Thus the Court asked the legislature to enact a specific provision to remedy this situation of omission. The Court did not just show that there was a legislative omission that should be remedied, but it put forward certain details of how the omission should be filled.

This situation is found not only in Germany but also in Iraq, where the Federal Supreme Court FSCI on one occasion mentions specific details in its decision which relates to solving a legislative omission. This includes when the Court directed Parliament to legislate a new provision which gives all minorities the right to vote for their candidates regardless of their constituency such as Christianity [(51)]. Thus, the Court asked the Parliament to enact a certain provision that contained specific details to remedy this omission. Such decisions may lead to a very important question: 'How can judges give their opinion on how the legislation should

50 *Decision of FCCG 'Der Öffentliche Dienst'* (n 212).

51 *Decision of FSCI 6/2010* (n 80). This case has been explained broadly in chapter 1 of this study.

be enacted?' In other words, does that mean that the judges undertake an intervention related to the lawmakers' jobs?

When the judges mention what the lawmakers should do to remedy the omission, they are clarifying their perspective of the ideal way to fill in the gap. This situation is similar to the situation of interpreting the constitutional and legal rules because when the judges interpret these rules, they put forward their perspective of what these rules mean. In most cases, this perspective will be binding on lawmakers and others. Therefore, the solutions that are issued by the constitutional court to solve the situation of legislative omission should be obligated to the lawmakers as well. This should not be considered as an intervention in the legislative process for two reasons.

First, constitutional Courts usually have the power to review the constitutionality of the laws. This means that when the lawmakers enact the required legislation to solve the omission, this legislation may go back to the constitutional Courts to review its constitutionality if this legislation has been sued. In this case, the constitutional judges will put their perspective about how the situation should be solved appropriately with the constitution. This is the core of constitutional courts' job which is not considered to be an intervention in the legislative process.

Second, there is usually one way to solve the omission when the Courts mention what the lawmakers should do. Thus, there is just one vision that can be the solution to legislative omission and the judges just show this vision. This may be supported by knowing that the Courts sometimes ask the lawmakers to consider the legislative requirements without a direct order to remedy this situation. Therefore, the Courts mention that there is a legal gap and this gap should be considered and remedied in a certain way, such as through legislation that clarifies certain procedures. However, the Courts do not ask the lawmakers directly to do that. They just mention the problem and its solution.

This situation can be seen in the decision of the Court of Arbitration in Belgium when it issued that:

> *"... The real discrimination does not arise from Article 14 but from a loophole in the law, namely the fact that there is no right of appeal against the administrative decisions of legislative assemblies or their bodies. The Court held*

that this situation could only be remedied by the introduction of relevant legislation, at which point consideration could be given to providing specific safeguards taking into account the independence that must be guaranteed to legislative assemblies" [52].

The Court did not ask the lawmakers to remedy the gap directly. The decision only mentions the opinion of the Court about the gap and how this gap can be filled.

Special Methods to Deal with Legislative Omission.

There are other methods that may be used to deal with the problem of legislative omission. This may relate to the method that is used to remedy the problem or the authority that is supposed to deal with it. I consider these methods to be special because they are either unique or the authority that deals with it is an international one. Thus, I am going to explain the two different methods used to deal with the problem of legislative omission in two separate points.

First: The Writs of Injunction

In Brazil, the Constitution gives the FTS the power to issue a decision which remedies any omission related to rights and liberties. It also deals with all issues related to the prerogatives inherent to nationality, sovereignty and citizenship [53] until the legislature fills in that omission. However, what can the Court issue according to this power to remedy this kind of legislative omission? There is a decision of FTS which shows how far the Court can go to remedy the situation of legislative omission using a writ of injunction. The decision is related to the strike by the civil servants as there is no legislation regulating their right to strike. The Constitution mentioned in article No 9 that "the right to strike is guaranteed, it being the competence of the workers to the advisability of exercising it and on the interests to be defended thereby". Paragraph 1 issued that "The law shall define the essential services or activities and shall provide concerning the satisfaction of the community's undelayable needs". Article 37 (VII) added that "the right to strike shall be exercised in the manner and

52 *Decision of Court of Arbitration in Belgium 'Parliamentary Assembly'* (n 344).

53 See article 5, LXXI of *The Constitution of Federative Republic of Brazil* (n 7). Rosenn (n 97). P:1027.

within limits defined by a specific law". In 1989, the Congress of Brazil enacted an Act which relates to the right to strike of employees who work in the private sector. However, Congress did not enact an Act which regulates the striking of civil servants. In 2007, the FTS finally issued a writ injunction which extended the General Strike Act 1989 to include all civil servants until the Congress enacted an Act for the striking of civil servants [(54)].

In this case, the FTS tried to balance between the rights of the civil servants to strike and the right of continuously providing public services. The FTS found that there should be a remedy for the legislative omission by applying the Act of 1989 which related to the striking of employees in the private sector [(55)]. This is a unique way to remedy the legislative omission, especially because it is a kind of absolute legislative omission. However, the FTS issued this decision as it is the only way to solve the problem. The Court itself had refused the case of writ injunction on the same topic of the strikes of the civil servants two times before it issued this decision [(56)].

In the beginning, the FTS did not have a certain view about what one should do to remedy legislative omission using a writs injunction. The decision above came after the development of the FTS's decisions in this context. Thus, earlier on in the 1990s, the FTS issued a decision which shows that the principle of the separation of powers does not allow the Court to provide legislation to regulate certain subjects. This is as another authority should provide them according to their competences. The only procedure that the Court can provide is to warn the legislature that it violates its duty to execute the constitutional rules [(57)].

Nevertheless, the FTS issued another decision which was much stronger when it asked Congress to enact an Act of reparations for citizens who were prevented from professional civil activities because of the military ordinances. Since the Act of reparations for citizens should have been enacted within one year of applying the new Constitution according to the

---

54 *Decision of STF en banc, Rep. Mauricio Corria* (n 98). *Decision of STF, Rep. Gilmar Mendes* (n 98). *Decision of STF, Rep. Eros Grau* (n 98). Rosenn (n 97). P: 1029.

55 Gilmar Mendes, 'New Challenges of Constitutional Adjudication in Brazil' (Woodrow Wilson International Center of Scholars, Brazil Institute, special report, 2008). P: 6.

56 *Decision of STF, Rep Celso de Mello* (1996) D.J.U. 20. *Decision of STF, Rep Mauricio Corria* (2002) D.J.U. 485. *Decision of STF, Rep Ilmar Galvio* (2002) D.J.U. 585. Rosenn (n 97). P: 1029.

57 *Decision of STF, Rep Moreira Alves* (1990) D.J.U. 107. Rosenn (n 97). P: 1028.

Transitional Constitutional Provisions Act 1988 [58]. When Congress failed to enact this Act, the people who were affected by these military ordinances brought their case to the FTS. In 1991, the FTS asked Congress to enact the required Act within sixty days (forty-five days for enacting the Act and other fifteen days for the presidential signature) [59]. However, Congress did not enact this Act within this period of time. Thus the Court allowed the affected citizens to seek their indemnification through ordinary reparation damage procedures [60].

Another decision of FTS shows almost the same position of the Court when it issued that Article No. 57 of the General Social Security Act should be applied to fill in the omission of enacting the legislation in order to regulate the retirement of civil servants which should be enacted according to the Constitution [61]. Moreover, Congress omitted it [62]. As has been shown in most of these decisions, the FTS tried to remedy the situations of absolute legislative omission by extending the application of the enacted Acts to include other topics that are not regulated by using a kind of analogy between the topics [63]. It can be noted that the writ injunction used to remedy the legislative omissions relates to executing the constitutional rules ensuring the rights and liberties of people. It is usually used to remedy the absolute legislative omission at least in most of the above decisions.

The question is 'Can the FSCI in Iraq or any other constitutional Court issue such decisions to remedy situations of absolute legislative omission?' In my view, constitutional Courts may be able to issue such a decision to remedy legislative omission. The judges can apply any alternative legislation and warn the lawmakers that they apply this legislation because the required law is not enacted, which is the lawmakers' fault. There may be a special method to push lawmakers to enact the required legislation. However, it would be very difficult for the judges to apply a certain law to another issue as explained in the previous

58 The Constitution of the Federative Republic of Brazil. Article 8 / 3.

59 *Decision of STF, Rep Sepfilveda Pertence* (1991) D.J.U. 283. Rosenn (n 97). P: 1028.

60 See *Decision of STF, Rep Celso de Mello* (1994) R.D.A.355. Rosenn (n 97). P: 1029.

61 Article 40 § 4 *The Constitution of Federative Republic of Brazil* (n 7).

62 *Decision of STF, Rep Eros Grau* (2009) D.J.U. 755. *Decision of STF, Rep Marco Aurdlio* (2007) D.J.U. 721. *Decision of STF, Rep Marco Aurdlio* (2008) D.J.U. 758. *Decision of STF en banc, Rep Carmen Lficia* (2009) D.J.U. 795. Rosenn (n 97). P: 1030.

63 Rosenn (n 97). P: 1030.

cases because they are rare situations. Thus, the writ injunction cannot remedy all legislative omission scenarios.

Second: The Role of the International Judicial Authorities to Remedy Legislative Omission.

As this study focuses on the role of the constitutional judiciary for monitoring legislative omission, talking about the role of the international judicial authorities when monitoring legislative omission is beyond this study's limitations. However, I would like to discuss this because I have explained in Chapter 5 the situation of legislative omission as related to the ECHR and the role of the ECtHR when dealing with omissions of the British Parliament. I think that it would be useful to discuss the role of the ECtHR to solve the problem of legislative omission as a brief example of the role of the international judiciary in this context.

The situation may seem different in the human rights cases that come before the ECtHR because there is a possibility that any case relating to the omission of the Parliament against its positive obligations, according to the European Convention on Human Rights (ECHR), can be sued to the ECtHR. Therefore in the case of Kawogo v. the UK as shown above, the applicant claimed that there is not enough protection in the domestic law to give her the right of equal protection from forced labour or servitude and that a direct demand may not be possible in the case before the domestic court because of the principle of Parliamentary Sovereignty. Regardless of the legal value of the decision of the ECtHR against this omission by the lawmakers in the UK, it is still a clear example of a situation of legislative omission that can be shown in the UK legal system.

I am going to mention some of the decisions of the ECtHR as examples of how the Court deals with the legislative requirements that need to be satisfied by the domestic authorities in the member states to remedy the violation of the ECHR. There are several ways for the ECtHR to deal with the requirements of legislative changes in the legal systems of the member states in order to remedy the violations of these systems related to the ECHR. From the decisions of the Court, we can see that there are different requirements that range from a call of legislative intervention with a specific description of this intervention to a simple mention that there is a violation of the convention but no need to make any changes in the

domestic legislation [64]. The remedy sometimes contains filling in the legal gaps as there is a legislative omission in the legal systems of the member states [65].

In some decisions, the ECtHR demands a legislative intervention from the member state to remedy the violation and it sets a certain time limit for the legislative requirement to be enacted within [66]. Meanwhile in another decision, the ECtHR simply mentions the violation and it mentions that there is an option for remedying it as a possible or preferable choice [67]. In another decision, it mentions the violation only without giving a specific option to remedy it [68]. The ECtHR sometimes does not ask for a specific remedy. It instead mentions several options that can be adopted to remedy the violation [69]. There are other decisions which show the different ways that the ECtHR takes on to deal with the Convention's violations [70]. All of these decisions show that the European Court has no one style when directing the domestic legislature and this position of the Court comes from each case that it deals with.

The question here is how do the member states respond to these decisions? In this specific case, what is the response of the UK Parliament to the ECtHR's decisions? The ECHR, as an international convention, should be obligatory to all member states when the legislature of these states accept it. This should include all of the obligations which should set in the domestic legislation to be compatible with the Convention. Moreover, the decisions of the ECtHR should be obligatory for member states as well. This leads to establishing obligations which are created by the ECtHR according to its understanding of the

---

64 Nino Tsereteli, 'The Role of the European Court of Human Rights in Facilitating Legislative Change in Cases of Long-Term Delays in Implementation', The International Human Rights Judiciary and National Parliaments (Cambridge University Press 2017). P: 229-234.

65 See L v Lithuania (2007) 27527/03.

66 ibid. Also, see Greens and M.T. v. The United Kingdom (2010) 60041/08 a.

67 See Burdov v Russia (2002) 250 7.5.20. László Magyar v. Hungary (2014) 73593/10. Tsereteli (n254). P: 230.

68 See *Decision of ECtHR 'Hirst v The United Kingdom'* (2005) 74025/01.

69 See Gerasimov and Others v Russia (2014) 194/ 2014.

70 See Tsereteli (n 420). P: 232-235.

Convention's text. This situation may lead to a wide debate about whether the Court has overridden its authority or not [(71)].

The enforcement of any decision of the ECtHR needs cooperation and appropriate consent from the domestic authority of the member states. Without this cooperation, the decision of the ECtHR cannot be applied. This can be seen clearly in Hirst v. the United Kingdom case when the UK Parliament rejected the ECtHR judgment, which mentioned that there was a violation in the UK legal system related to Article 3 Protocol 1 of the ECHR. The violation was related to the right of prisoners to vote in the election [(72)]. This means the member states can reject the judgment of the ECtHR based on the principle of Parliamentary Sovereignty in the case of the UK [(73)]. Thus, the UK legislature can simply reject any legislative intervention required by the ECtHR. This, in my opinion, makes the decisions of the ECtHR not strong enough to be the right solution to the problem of legislative omission. However, it helps, of course, to recognise the existence of the problem and to warn the domestic legislature about it.

Thus, the legislative omission cases can be expected in the human rights issues according to the ECHR. The applicants can claim that directly to the ECtHR and it may be expected in domestic cases but domestic courts cannot accept a direct demand from the applicants which requires a legislative intervention to remedy an omission. In any case, I do not discuss the situation of legislative omission at the international level any further as this study focuses on the role of the constitutional judiciary to monitor legislative omission. The international judiciary may have a role in monitoring the situation, but it is limited in two ways.

---

71 Ed Bates, 'Democratic Override (or Rejection) and the Authority of the Strasbourg Court: The UK Parliament and Prisoner Voting', The International Human Rights Judiciary and National Parliaments (Cambridge University Press 2017). P: 279.

72 *Decision of ECtHR 'Hirst v. The United Kingdom'* (n 424). Also, see Animal Defender International v. The United Kingdom (2013), 48876/08. Law Making by Law Breaking? A Theory Parliamentary Civil Disobedience against International Human Rights Courts, The International Human Rights Judiciary and National Parliaments, (Cambridge University Press 2017) P: 348-350.

73 Bates (n 427). P: 297.

First of all, the international judiciary monitors the violation against the international treaties, which is caused by the negative action of the domestic lawmakers in one of the member states. The constitutional judiciary reviews the legislative omission that violates the constitutional rules. Second, the international judiciary monitors the situation of legislative omission on a specific topic such as human rights, while the constitutional judiciary monitors the legislative omission against the constitutional rules regardless of the rules' topic. Thus, the monitoring of the international judiciary has a limited range compared with that of the constitutional judiciary. However, that does not prevent the international judiciary from having a role in remedying the situation of legislative omission but it is not the range of this study. Therefore I support any future studies that focus on the role of the international judiciary to monitor legislative omission.

As has been shown in this section, there is a strong model used for monitoring legislative omission, which takes on the method of directing the lawmakers to fulfil their duty. Some objectors may argue that there is a problematic issue in this method as it may interpolate the judges into lawmakers with no competence. In my view, it is the right way to solve the problem of legislative omission when it comes to specific topics such as the freedoms and rights of people. On the other hand, preventing the judges from directing the lawmakers may push them to interpret the constitutional rules in a way that creates new provisions and interpolates the judges much more in the lawmakers' job.

Section Three

Interpreting the Law to Remedy Legislative Omission

Judges in all legal systems play a major role in terms of creating laws and provisions. This role is obvious in the countries that follow the common law style. Case law, which is created by the judges, is the main trait of these countries. Thus, the judges can put their perspective into force by issuing their decisions in a case that they are investigating[74]. In civil law countries, the situation is not very different. The judges can create laws as well by issuing judgments that contain what they think the provisions mean[75]. Sometimes the judges may try to fill the omission through interpreting the constitutional rule and they put their understanding of these rules in force. This is what I am going to discuss in this section.

Judges Interpret the Constitutional Rules to Remedy the Omission.

Sometimes the judges just try to interpret the constitutional rules in order to clarify the right way to regulate the case of legislative omission and to avoid telling the lawmakers what they should do. In this case, the judges may create a new provision which fills in the gap of the lawmakers' omission. This provision, of course, is related to the judges' perspective and their understanding of the constitutional rules. Thus, the judges try to fill an omission by applying the constitutional rules themselves as they understand them and as they think that they should be implemented. In my opinion, this position of the judges is more serious and it seems to make the judges into lawmakers. The judges can create new provisions and give these provisions enforcement just like any other laws. This situation makes the judges practise like lawmakers whereas if they only order the lawmakers to remedy their omission, then they do not step into the same position. Therefore when they only ask the lawmakers to remedy the omission, they only send the case to the lawmakers to decide as they want. Thus, the judges try to clarify that there is an obligation to enact legislation and they also try to push the legislature to enact that legislation but they do not enforce their understanding of how the legislature should fill this omission. Also, the judges, in most cases, can not enforce the legislature to enact the legislation. While, in the case of interpreting the constitutional text,

---

74 See: Seon Bong Yu, 'The Role of the Judge in the Common Law and Civil Law Systems: The Cases of the United States and European Countries' (1999) 2 International Area Review 35. P: 37.
75 ibid. P: 42-43.

the judges themselves remedy the omission as they understand the text in what is referred to as the judges being negative legislators [(76)].

This situation can be shown in several cases such as the decision of the FSCI in Iraq when it explained what the "absolute majority" in the text of article No (63) second (B) of the constitution means. The Court interpreted that the "absolute majority" in this text means the majority of the members who are in attendance because when an absolute majority of all the Council of Representative members is required, the constitutional texts provide it explicitly[(77)]. This case may seem like a normal interpretation of constitutional text because the Court practised its competence in terms of interpreting the Constitution. However, the Court created a new provision which can be a fit for all constitutional texts which mentions that an "absolute majority" means the majority of members who are attendants. The constitutional text itself does not mention that and the Court, as it has the power to interpret the constitutional text, fills this gap.

Other decisions may seem to be more obvious in this context. After the general election in Iraq in 2010, the political parties did not agree to name the speaker of parliament in the first session as the constitution has been provided in the article (55). Thus they agreed to leave this parliament session indefinitely open until they agree about the name. However, a case was brought against parliament. The FSCI issued an injunction to quash the decision above and to oblige parliament to reconvene in order to name the speaker, although there is no provision in the constitution for this, or in any other laws that address this situation [(78)]. This means that the Court created a new provision by interpreting the constitutional text, which always seeks to ensure the legitimacy of the legal and political process.

The lawmakers may include the provisions created by the Court in the legal system by enacting them as happened when the FSCI stated that the number of women in the local council should be no less than one-quarter of the members of each council, even though there

---

76 Sc. R. Dürr, T. Gerwien, D. Jones, A. Gorey (n 8). P: 18. See also: Marieta Safta, 'Developments in the Constitutional Review. Constitutional Court Between the Status of Negative Legislator and the Status of Positive Co-Legislator' (2012) 1 Perspectives of Business Law Journal 1. P: 11-13.

77 See: *Decision of FSCI 27/2009* (n 79).

78 See *Decision of FSCI 56/2010* (n 78).

were no constitutional or legal provisions that provided that. The Court relied on the Constitution of 2005 which provided that: "*The elections law shall aim to achieve a percentage of representation for women of not less than one-quarter of the members of the Council of Representatives*" [(79)]. As was shown, the article does not mention the local councils. Nevertheless, the Court used this article to enforce the women's quota in the local councils. This included a provision in article no. 13 / second election law of the local councils.

It is clearly shown that the Court has the perspective that the Constitution in article 49 seeks to enable women by giving them a specific quota within the Council of Representatives and that it should include all other elected councils. The Court itself mentioned that in its decision, the interpretation of any text should consider all other texts in the same document and the purpose that this document seeks to achieve. It is clear that the Constitution in article 49 seeks to enable the women and that this should include all other elected councils because they all have the same aims and legislative competences but in their local area [(80)].

Someone may argue that these cases are just normal interpretations of the Constitution. The answer is that it would be like that if there is no added provision created by the Court's interpretations. However, in these cases, especially the case of the women's quota, the Court did not just interpret the Constitution but it established a new provision. This was that the women's quota should be mentioned in the law of the local councils' elections. Thus the main difference between these cases and any other constitutional interpretation is that there is an additional provision created by the Court that is not mentioned by the Constitution or laws. In other words, there is a kind of direction in the legislature to fix the gap in a certain way. In the situation of constitutional interpretation, the Court does not direct the legislature but it adds its interpretation as a legal principle that should be considered by all other Courts when they apply the law. In this case, the court's interpretation seems like a legal provision that does not need legislation while in the cases above, there is still a need for a legislative intervention to add these interpretations to the enacted laws.

---

79 Article No. 49 / fourth of Constitution of Republic of Iraq 2005. See also: *Decision of FSCI 13/2007* (n 3).

80 *Decision of FSCI 13/2007* (n 3).

Judges as Lawmakers

The role of the judges is to apply the laws enacted by the lawmakers. However, the judges are not like a machine that does what it is designed to do. They have a huge effect on the laws that they are applied to. The most important effect is that judges put forward their understanding of the law when applying it. They may even develop it [81]. Therefore, no matter how much the lawmakers would like to make the legislation simple and clear, some ambiguity will always be left which needs to be clarified. The judges themselves perform this task as they must in order to apply the legislation. Thus the judges in different legal systems have their effect on the legislative process by explaining any ambiguity. They, of course, use their own perspective when they do that. The judges have a huge role in creating legal principles by interpreting the constitutional rules. This can be shown in the Anglo-American system and even in some civil law countries such as France [82].

In the situation of legislative omission, the judges find themselves in legal gaps that should be filled to avoid a constitutional violation. Therefore they try to fill in this gap by interpreting the constitutional rules and any other legislation [83]. In this case, they are applying the constitutional rules or enacting a law. Sometime this interpretation may lead to creating a new provision as has been shown in one of the decisions of the FSCI in Iraq above [84]. However, if there is a need for a whole Act or if some provisions cannot be created by the judges' interpretation, then there should be another way to remedy this situation. Thus the judges need to direct or warn the lawmakers to remedy this gap according to the fact that their negative action will be unconstitutional. Therefore even when the judges have the power to interpret the constitutional or legal rules to fill in the gaps, they may not be able to remedy the gaps in cases that need legislative intervention. This situation can be seen in absolute legislative omission as the court cannot enact a whole law. Thus, the Court may apply

---

81 See: Douglas E Edlin, *Judges and Unjust Laws, Common Law Constitutionalism and the Foundations of Judicial Review* (University of Michigan Press 2008). P: 53-54, 79.

82 See: R. C. Van Caeneg, 'Judge and Lawgiver in Anglo-American History' (2003) 11 European Review 325. & Ronan Keane, 'Judges as Lawmakers: The Irish Experience' (2004) 18 Judicial Studies Institute Journal.

83 Sc. R. Dürr, T. Gerwien, D. Jones, A. Gorey (n 8). P: 18. Marieta Safta (n 432). P: 12.

84 *Decision of FSCI 13/2007* (n 3).

alternative legislation as has been shown in the cases of writs and injunctions in Brazil [85]. It can also issue a statement or warning to the legislature to enact the specific law as has been shown in the statement issued by the FSCI in Iraq [86].

However, there are some situations where the constitutional Courts try to issue stronger decisions that contain a direct order to the lawmakers to enact the required acts. This can be seen clearly in the special decision of the Supreme Court in India SCI related to the case of an absolute legislative omission. The case was about the hawkers, squatters and vendors who were prevented from working on the streets by the municipality of Delhi and New Delhi. The workers sued the municipality. They claimed that the decision to prevent them from working on the streets interfered with their fundamental right to work under Articles 19(1) (g) and 21 of the Constitution of India [87]. In this case, the SCI issued a direct order to the executive authority to enact an Act that regulates the right to work on the streets. Moreover, the SCI set a certain day, which was the 30th June 2011, for the government to enact this Act [88]. This Act was called the Model Street Vendors, and it was issued as a draft Bill. Thus the Court directed the government and not the legislature in this case. The Court clarified that because there was already a draft Bill for that Act, the process of enacting the Act just needed to be completed [89].

The Indian Court, in this case, was asked the government directly to enact an Act that regulates the right to work on the streets. This shows how the judges can issue such a decision to protect the rights of the people, especially when there is a conflict between two different rights. This is as the Court has clarified that there is a right for hawkers and squatters or vendors to carry out hawking under Article 19(1) (g). At the same time, there is the right of the commuters to move freely and to use the roads without any impediment under Article 19(1) (d) of the Constitution. These conflicting rights should be resolved by harmonising and regulating. These can be resolved by enacting an Act that subjects the right

85 Rosenn (n 97). P: 1027.

86 The Federal Supreme Court in Iraq FSCI (n 88).

87 *Decision of SCI 'Gainda Ram and Ors Vs MCD and Ors'*. Par. 4.

88 ibid. Par. 76.

89 ibid. Par. 78.

of working on the streets to reasonable restrictions that are compatible with the right of others to move freely and to use the roads without any impediment.

Some may argue that this decision cannot be an example of a remedy for absolute legislative omission as the Court asked the government to enact the Act, not the legislative authority. This may show that the Court cannot ask the legislature to enact an Act as that is not one of its competences. The answer is that the SCI directed the government to enact this Act as there is already a draft Bill for it. The legislative process just needs to be completed as the Court has clarified above. The SCI would not hesitate to direct the legislature if it is necessary to remedy the situation as it is in the case of protecting the fundamental constitutional right of the people. The SCI itself explained that these rights should be regulated under law and that it should not be "left to be decided by schemes that are monitored by this Court from time to time" [(90)].

In my view, the judges play a huge role in the legislative process nowadays, whether we accept that or deny it. This role has developed and the Courts have started playing a political role, especially in the constitutional field. As has been explained in this chapter, there are several levels of monitoring legislative omission by the judges. The weak model tries to reduce the power of the judges to the minimum effect as they may only warn of the legislative omission without asking for direct legislative intervention. The strong model emphasises directing the lawmakers to remedy the legislative omission and in some cases, the judges ask for a specific solution. The legal scholars who do not support the role of the judges in terms of monitoring the constitution may accept the weak model, while the strong model may be supported by scholars who accept the real role of the judges in the legislative process. It would be possible that there are some scholars who may not accept both models. In this case, they have to accept the intervention of the judges by interpreting the constitutional rules which, in my view, nobody can prevent.

I would support the strong model in the serious cases of legislative omission such as those that relate to the freedoms and rights of people. I may support the weak model in cases where there is a need to give the lawmakers more time and freedom to fulfil their duty. All of these situations can be estimated by the judges themselves as they can decide when they

---

90 ibid. Par. 77.

might direct the lawmakers, warn them or when they just want to mention the situation of legislative omission. I would not be happy if the judges interpret the constitution in order to fill the legislative omissions but it might be a suitable solution in some specific situations such as when there is already constitutional or legal provision but it is not clear enough and needs for judicial interpretation in order to be applicable.

Chapter Eight

Conclusions and Recommendations

In this thesis, several issues related to the problem of legislative omission have been discussed. The definition of this legal phenomenon has been clarified by providing a specific explanation of the components of this problem before clarifying the difference between legislative omission and other legal phenomena that may seem to be similar. After that, the types of legislative omission have been explained and the most important reasons for this problem have been shown. To justify monitoring this kind of problem, there was a need to discuss the normative justification that may be given in order to understand why this problem should be monitored and remedied by the constitutional judiciary. The ways that can be used to monitor this problem have been clarified as well through discussing the mechanism of solving it. Finally, the consequences of any decisions that may be issued to remedy this problem have been explained.

Throughout the chapters of this thesis, there are several judicial decisions, and constitutional and legal texts that have been mentioned and analysed in order to find out how some of the constitutional and legal systems around the world deal with this problem. Countries like South Africa, Portugal, Brazil and Hungary have dealt with this problem directly by acknowledging the problem and putting in place a suitable method to solve it. Other countries like Germany, Spain, Egypt and Iraq have not acknowledged this problem, but the constitutional judiciary has made several decisions related to trying to solve this problem. In this last chapter, I am going to mention the most important conclusions that I have found them during this study. I am then going to put forward some recommendations for any constitutional systems that may need them to develop their system to deal with the problem. Therefore this chapter will be divided into two sections; the first one will be the conclusions and the second one will be the recommendations.

Section One

The Most Important Conclusions

Throughout the chapters of this study, there are several issues related to the problems of legislative omission that have been discussed. From these discussions, there are several conclusions that I can make. These conclusions are different. Some of them are related to the problem itself and others are related to the other issues that have been discussed in this study. Thus, it would be better if these conclusions are divided into two points. In the first point, I am going to mention all of the conclusions related to the problems of legislative omission. The second will be to bring forward the other conclusions that are not necessarily related to this problem.

First: Conclusions related to the problems of legislative omission.

As has been shown, there are not many studies that are related to the problems of legislative omission. Many countries still do not acknowledge this problem. However, it is still a universal problem that can be noted in any constitutional and legal system. I have discussed several issues within this problem and I can thus mention some of the conclusions that may help to understand this problem and provide a suitable solution. I am going to list these conclusions in the following points:

1. The problem of legislative omission can be noted in any constitutional system where the constitution is considered to be the top of the legal system. The lawmakers fail to enact some of the very important laws that are related to the rights and freedoms. Alternatively, they are mentioned in the constitution that they should be enacted.
2. There are many definitions of the problem of legislative omission which can be found in some of the constitutional norms or Acts, even in some judiciary judgements. The multiple definitions of this legal phenomena are set according to how the system is looked at. However, there are some common elements of this phenomenon that can be helpful to identifying the right definition. The first element is that the legislative omission is a negative action issued by the lawmakers against their duty to enact laws and provisions that are according to the constitution. The second element related to this negative action should lead to violating the constitution. This is since not all of the negative actions of the lawmakers can be considered a legislative omission. Thus the right definition of this problem, in my opinion,

is a legislative omission that is a negative action issued by the lawmakers which leads to violating the constitution.

3. There are several legal phenomena that may seem to be similar to a legislative omission such as a legal gap. Both happen because of the negative action of the lawmakers. However, there is still an obvious difference between them, which is the legal gap that may not lead to violating the constitution as it is the main condition in the case of legislative omission.

4. There are several classifications of legislative omission but the most important is the one that divides legislative omission into two types. The first one is a relative form of legislative omission which means that the lawmakers have already enacted the law but they have omitted containing in this law the provision that is required according to the constitution. The second kind is an absolute legislative omission which means that the lawmakers are omitted from enacting where the law is required by the constitution.

5. There are many reasons that can cause legislative omissions. Some of them are political and others are legal. Thus the lawmakers may not enact some laws deliberately if they do not want to pass them for political or legal reasons. They may not be able to enact them because they cannot reach the required majority; then the reason would be unintentional.

6. The normative justification of this kind of monitoring can be shown on the idea that lawmakers violate the constitution when they fail to do their legislative duty. As the constitution is considered to be a document that contains several legal principles, these principles need to be effective through both the laws and provisions. Any failure to legislate these laws and provisions should be considered a constitutional violation that needs to be solved by directing or warning the lawmakers about them. The best institution that can monitor and warn the lawmakers is the constitutional judges. This is as they have the power to review the lawmakers' job. They will direct or warn the lawmakers as to when they should interpret the constitutional text if they have no power to direct the lawmakers.

7. There are also two legal principles that may justify the monitoring of legislative omission. The first one is the principle of legislative reservation which means that the legislative competence is reserved for the legislative authority. Only this authority should practise according to the constitution. This leads to making the legislative competence, not just the right of the legislature, but it is a duty upon them. Thus, any omission to fulfil this duty will lead to a constitutional violation. On the other hand, the constitution is the

document that clarifies all of the competence as being the right authority to practise their duties. It gives the duty of legislation to the legislature. Legislature should respect this duty as it is mentioned in the constitution, which is considered to be the top of the legal pyramid according to the principle of the supremacy of the constitution. Therefore, this principle is considered to be another legal justification for monitoring the legislative omission as this negative violation harms the principle of the supremacy of the constitution.

8. In the countries where there is a principle of parliament superiority instead of constitution supremacy, the monitoring of the legislative omission cannot be applied. The parliament has the power to enact or not. There is no other authority and no legal document can force the parliament to do its job.

9. There is no specific mechanism to sue in the case of legislative omission. Therefore most of the legal systems deal with the problem of legislative omission as they do any other constitutional violation. There are different methods to deal with the problem of legislative omission in each legal system. Some differences relate to the methods of who can prosecution the case of legislative omission. Others are related to how legislative omission can be identified. However, there are still some similarities. This is as most systems give the constitutional court the power to consider automatically any case of legislative omission. This is whether the provision gives this power explicitly or if it can be understood from the text or the exercises of the constitutional Courts.

10. There are several levels of monitoring the legislative omission by the judges. The first one is the weak model of monitoring the legislative omission which gives the power to the judges just to warn the legislature about the legislative omission without asking for any legislative intervention. The second level is the strong model of monitoring when the judges try to direct the lawmakers to solve the legislative omission in a certain way or they just ask them directly to solve the omission without giving a certain solution. Finally, the judges may remedy the legislative omission by interpreting the constitutional rules.

11. The weak model can be a good option for some of the kinds of monitoring used related to the legislative omission where there is a need to give the lawmakers more time and freedom to fulfil their duty. On the other hand, a strong model may be supported where there is a real need for legislative intervention in serious cases of legislative omissions, such as those that are related to the freedoms and rights of people. It is possible that both models may not be accepted. In this case, it would be expected that the judges may fill in a legislative omission by interpreting the constitutional rules.

Second: Other Conclusions which do not relate to the legislative omission.

There are several conclusions in this study that are not necessarily related to the problem of legislative omission. Some of these conclusions are related to the situation of the constitutional judiciary in Iraq. These conclusions have arisen where there is a discussion about the Iraqi constitutional judiciary, one of which is related to the different kinds of constitutional rules in terms of monitoring the situation of legislative omission. For this point, I am going to mention all of the conclusions that are related to the issues in the FSCI in Iraq, its formation and its competences.

1. It seems that the judgments of the FSCI in Iraq have stabilised on the status that the executive authority has the exclusive power to draft laws. Any law that has been enacted without knowing and drafting the executive authority is unconstitutional. The Council of Representatives in Iraq has the absolute power to propose, draft, and enact laws unless the laws are related to the financial commitments of the government or to the judiciary authority. This is because in this case, these laws should be discussed with the executive and judiciary authorities. Thus the decisions of the FSCI in Iraq that mention that all laws should be drafted by the executive are incorrect. If the FSCI insists on this decision, then it should not only direct the legislature to enact the required legislation in the situation of legislative omission but the executive authority also has to be directed to draft these legislations as that is one of its competences.
2. The current FSCI in Iraq has the absolute power to practice all competencies that have been given to the Federal Supreme Court as mentioned by the Constitution of 2005, even though there is no FSCI Act that should be enacted by the parliament. This power includes the monitoring of the situation of legislative omission.
3. There is a traditional distinction between the two kinds of constitutional norms, which are Programmatic and Prescriptive rules. Programmatic norms identify the higher values of society and what goals they want to achieve. For example, justice and equality etc. These norms always need action from the parliament or government to produce the effect that is required. Prescriptive norms explain the practical rules that organise the political and legal system. For example, the number of parliament members, the method of electing them, who has the right to vote etc. These norms are effective and they just need operating rules that are issued by the parliament or government.

Section Two

Recommendations

During this study, several issues have been discussed. Most of these issues are related to the problem of legislative omission in the different legal systems around the world. One of the main aims of this study was to find out some of the recommendations aimed at scholars and authorities in Iraq and other general recommendations. These recommendations seek to give advice to the legislators, judges and legal scholars collectively. Some of the useful pieces of advice that can be given from this study may help to develop the constitutional judiciary functions. In this section, there are two kinds of advice. The first group is designated to the Iraqi authorities and scholars. They may be useful in other similar legal systems as well. The second group is more general, which may be helpful for different legal systems.

The Advice to Iraqi Authorities and Scholars.

Here is some advice for the authorities and legal scholars in Iraq which may help to develop the constitutional judiciary and the method of monitoring the situation of legislative omission.

1. The first advice is for Iraqi Federal Supreme Court FSCI is that it should not hesitate to monitor the situation of legislative omission even though there is no an Act of the Court yet. The court should also monitor the legislative omission even if the Act of Court does not give it the power to do that when it is enacted.

2. The Iraqi legislature should enact the Act of Federal Supreme Court as soon as possible. This Act should contain a provision that gives the court the power to monitor the legislative omission situation. This provision should clarify the clear definition of the situation of legislative omission and all of its conditions. The provision should also locate the legal enforcement of the court's decision that is related to this situation.

3. The FSCI should mention any situation of legislative omission that may be found when it is practising its competences. The court should issue a clear decision that requires a legislative intervention or any other requirement to remedy this situation.

4. In my opinion, the judges in the SFCI can push the legislature to enact required legislation through applying alternative legislation and warn the lawmakers that they apply this legislation because the required law is not enacted, which is the lawmakers' fault. This kind of decision is like the writs injunction which is used by FST in Brazil. This decision may

be a special method to remedy the situation of legislative omission. However, it would be very difficult for the judges to apply a certain law to another issue as explained in the cases of writs injunction because they are rare situations. Thus, the writ injunction cannot remedy all legislative omission scenarios as it has been explained in chapter seven of this study. Also issuing this kind of decision should be after warning legislature about the legislative omission and ask them to remedy it.

5. The court should ask the legislature to enact the Act of Federal Supreme Court as soon as possible to reform the court according to the Constitution of 2005. This is in addition to making sure that the court has the absolute power to practise its competences. This will finish any pretension that the court was formed unconstitutionally.

6. The numbers of the judges and Islamic scholars in the FSCI should be located in the Act of the Court. The role of Islamic scholars should be defined clearly. This issue is the most important in the reform of the FSCI and it should be determined carefully because the constitution mentions that the court should contain a number of Islamic scholars but it did not detail what the role of those scholars is.

7. More studies related to the constitutional judiciary should be encouraged in all Iraqi universities. A new curriculum of the constitutional judiciary should be designed by schools of law for undergraduate students. This curriculum should contain all of the issues related to constitutionalism, forming a constitutional judiciary, interpreting the constitution and any other topics related to the constitutional judiciary.

General Advice

Here is some advice related to the situation of legislative omission. This advice generally can be helpful for all legal systems that seek to monitor legislative omission.

1. If there is any mention of the legislative omission in the constitution or any other acts, then it should clarify the definition of legislative omission to make it obvious what this legal phenomenon means.

2. The legislative omission is a constitutional violation by a negative action of the lawmakers. Therefore the constitutional court should monitor this situation as with any other constitutional violation regardless if the constitution and other laws give this power to the court or not.

3. Legislative omissions may appear in some of the provisions in an enacted law. Thus the judge may note the omission when they practise their competencies. They can mention

the situation of legislative omission in their decision. However, the situation may be more complex when the omission relates to the whole law. In this case, the court can mention this omission when the law that is not enacted is related to the case matter. The judge also can exploit some of the cases or situations that mention this omission.

4. The judges should differentiate between a situation of legislative omission and any other situation that may seem similar, such as a general legal gap. What helps the judges to recognise that legislative omission is the situation is to always link it with a constitutional violation. Thus if there is no constitutional violation because of the omission, then there is no legislative omission.

5. The judges should clarify, in their decision, what exactly a situation of legislative omission is. What should the lawmakers exactly do to remedy this situation? However, it does not mean that the judges direct the lawmakers on how to enact provisions because this relates to the competence of the legislature. The judge should direct, or in some cases, only warn the lawmakers where exactly the omission is and why it violates the constitution.

6. If there is a constitution or legal provision that regulates the monitoring of the situation of legislative omission, then it would be better if these provisions locate the mechanism of bringing a case against the legislative omission.

7. I think that there is a need for studies that focus on the role of the international judiciary in order to monitor the legislative omission. The International Courts have many decisions to undertake to remedy the situation of legislative omission against international conventions, especially the European Court of Human Rights (ECtHR).

8. The monitoring of legislative omission may not be able to remedy the situation of legislative omission in some cases. However, the monitoring of the legislative omission is still the right way to warn the lawmakers and people that there is a serious situation that needs to be fixed.

Bibliography

Academic Resources

A. Sachs, 'The Creation of South Africa's Constitution' (1996) 41 New York Law School Law Review 669

Abdel Hafiz Al-Shimi, *Censorship of Legislative Omission in Judicature the Supreme Constitutional Court* (Al Nahda Al Arabia for publishing 2003)

Abid SK, 'The Federal Supreme Court in Iraq, Its Formation and Competencies (Comparative Study)' (Al-Nahrain University 2011) <http://nahrainuniv.edu.iq/ar/node/4978>

Ahmad Fathi Soror, *The Constitutional Criminal Law* (Dar Al-Shuroq 2002)

Ahmed KF& A, 'Lawmakers Approve Cabinet in Iraq, but 2 Posts Are Empty' (*the New York Times*, 2014) <http://www.nytimes.com/2014/09/09/world/middleeast/iraq.html>

Al-ghaflol EA, *The Idea of the Negative Incompetence of Legislature a Comparative Study* (Second edi, Dar Al-nahza Alarabia 2003)

——, *The Theory of the Negative Incompetence of the Legislator* (Second Edi, Dar Alnhda Alarabia 2003)

Al-Istrabadi FA, 'Reviving Constitutionalism in Iraq: Key Provisions of the Transitional Administrative Law, International and Comparative Perspectives on Defamation, Free Speech, and Privacy: II' [2006] New York Law School Review 270

——, 'Constitution without Constitutionalism: Reflections on Iraq's Failed Constitutional Process' (2009) 87 Texas Law Review 1627

Al-Jada RN, *Constitutional Order in Iraq* (Ministry of Higher Education and Scientific Research 1990)

Al-Qarawee HH, 'Iraq's Sectarian Crisis A Legacy of Exclusion, Carnegie Endowment for International Peace' (*Carnegie Endowment For International Peace, Washington, D.C*, 2014) <https://carnegieendowment.org/files/iraq_sectarian_crisis.pdf>

Al-Samuk A, 'About the Supreme Federal Court (the Legal Basis)' (*Sot Al-iraq*, 2011) <https://www.sotaliraq.com/2017/05/28>

Alan Rosenthal, 'Beyond the Intuition That Says "I Know One When I See One," How Do You Go about Measuring the Effectiveness of Any given Legislature?' (*NCSL State Legislatures magazine, The Good Legislature*) <http://www.ncsl.org/research/about-state-legislatures/the-good-legislature.aspx>

Algaze G, *Ancient Mesopotamia at the Dawn of Civilization: The Evolution of an Urban Landscape* (University of Chicago Press 2009)

Alice Donald JG and PL, 'The UK and the European Court of Human Rights' (2012) <https://www.equalityhumanrights.com/sites/default/files/83._european_court_of_human_rights.pdf>

Alidou OD, *Muslim Women in Postcolonial Kenya : Leadership, Representation, and Social Change* (University of Wisconsin Press 2013) <https://ebookcentral.proquest.com/lib/reading/detail.action?docID=3445367>

Andreescu M, 'Recepting the Principle of Supremacy of Constitution on the New Penal Code' (2016) 4 SEA: Practical Application of Science 359 <https://doaj.org/article/5d8c943b7f614c1c8e2fc4966374daef>

Antonin Scalia, 'Originalism: The Lesser Evil' (1989) 57 University of Cincinnati Law Review 849

Balan E, 'Romanian Constitutional Court and Its Active Role in Assuring the Supremacy of the Constitution' (2015) 11 Acta Universitatis Danubius: Juridica 33 <file:///C:/Users/abu20/Downloads/3114-10861-3-PB.pdf>

Barnett H, *Constitutional and Administrative Law* (Seven Edit, Routledge, Cavendish 2009)

Bates E, 'Democratic Override (or Rejection) and the Authority of the Strasbourg Court: The UK Parliament and Prisoner Voting', *The International Human Rights Judiciary and National Parliaments* (Cambridge University Press 2017)

Benjamin R. Foster KPF, *Civilizations of Ancient Iraq* (2nd edn, Princeton University Press 2011)

Caeneg RC Van, 'Judge and Lawgiver in Anglo-American History' (2003) 11 European Review 325

Carolan E, *The New Separation of Powers: A Theory for the Modern State* (Oxford University Press 2009) <http://zp2yn2et6f.search.serialssolutions.com/?ctx_ver=Z39.88-2004&ctx_enc=info%3Aofi%2Fenc%3AUTF-8&rfr_id=info%3Asid%2Fsummon.serialssolutions.com&rft_val_fmt=info%3Aofi%2Ffmt%3Akev%3Amtx%3Abook&rft.genre=book&rft.title=The+New+Separation+of+Powers%3A+A+>

Carrese PO, *The Cloaking of Power: Montesquieu, Blackstone, and the Rise of Judicial Activism* (University of Chicago Press 2003)

Clark B. Lombardi and Nathan J. Brown, 'Islam in Egypt's New Constitution' <https://ssrn.com/abstract=2258252>

Colm O'Cinneide, *Human Rights and the UK Constitution* (The British Academy 2012) <file:///C:/Users/abu20/Downloads/Human rights and the UK constitution WEB.pdf>

Conaghan PC and J, *The New Oxford Companion to Law* (Oxford University Press 2008) <http://zp2yn2et6f.search.serialssolutions.com/?ctx_ver=Z39.88-2004&ctx_enc=info%3Aofi%2Fenc%3AUTF-8&rfr_id=info%3Asid%2Fsummon.serialssolutions.com&rft_val_fmt=info%3Aofi%2Ffmt%3Akev%3Amtx%3Abook&rft.genre=bookitem&rft.title=The+Oxford+Guide+to+United+Sta>

Crossette B, 'Iraq Sanctions Kill Children, U.N. Reports' (*The New York Times*, 1995) <https://www.nytimes.com/1995/12/01/world/iraq-sanctions-kill-children-un-reports.html>

D. Sassoon, *Contemporary Italy: Politics, Economy and Society since 1945* (Routledge 2014)

Danchin P, 'A Human Right to Water? The South African Constitutional Court's Decision in the Mazibuko Case' (*Blog of the European Journal of International Law*, 2010) <https://www.ejiltalk.org/a-human-right-to-water-the-south-african-constitutional-court's-decision-in-the-mazibuko-case/>

Denise Teixeira De Oliveira, 'Le Controle Juridictionnel Des Omission Legislatives Inconstitutionnelles Au Bresil', *French Congress of Constitutional Law - AFDC* (2014) <http://www.droitconstitutionnel.org/congresLyon/CommLE/E-teixeira_T3.pdf >

Donna Batten (ed), 'Marbury V. Madison', *Gale Encyclopedia of American Law*, vol 6 (3rd edn, Gale, a Cengage Company 2011)

Edlin DE, *Judges and Unjust Laws, Common Law Constitutionalism and the Foundations of Judicial Review* (University of Michigan Press 2008) <https://ebookcentral.proquest.com/lib/reading/detail.action?docID=3414899>

Edward J. Eberle, 'The Methodology of Comparative Law' (2011) 16 Roger Williams University Law Review 51

ENDICOTT TAO, 'Raz on Gaps—the Surprising Part', *Rights, Culture and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (Oxford University Press 2003) <https://www-oxfordscholarship-com.idpproxy.reading.ac.uk/view/10.1093/acprof:oso/9780199248254.001.0001/acprof-9780199248254-chapter-6.>

Eoin O 'Mahony, 'The Pathology of Democracy with Particular Reference to Personal Liberty under Flexible and Rigid Constitutions' (1929) 11 Journal of Comparative Legislation and International Law 96 <https://www.jstor.org/stable/pdf/754120.pdf?refreqid=excelsior%3Adb3e6d8a9545b378e4c01591bd010559>

Eric C. Christiansen, 'Transformative Constitutionalism in South Africa: Creative Uses of Constitutional Court Authority to Advance Substantive Justice' (2010) 13 The Journal of Gender, Race, and Justice 575 <https://search-proquest-com.idpproxy.reading.ac.uk/docview/870360578/fulltextPDF/EC3229B43131474BPQ/1?accountid=13460>

F. Gazier, *Essai de Presentation Nouvelle Des Ouvertures Du Recours Pour Exces de Pouvoir* (EDCE 1951)

F. Wessel, 'Die Rechtsprechung Des Bundesverfassungsgerichts Zur Verfassungsbeschwerde', *deutsches verwaltungsblatt* (1952)

Faris Abdul Karim, 'Problematic of the Appeal of the Unified Retirement Law and the Legislative Role of the Council of Representatives' [2014] Al-Dustour Newspaper <http://www.daraddustour.com/index.php/over-view/12963-2014-03-11-16-12-19>

Gilberto Marcos Antonio Rodrigues MAGL and AZ, 'The Supreme Federal Court of Brazil: Protecting Democracy and Centralized Power' in and John Kincaid Nicholas Aronet (ed), *Courts in Federal Countries* (University of Toronto Press 2017) <https://www.jstor.org/stable/10.3138/j.ctt1whm97c.8>

Gordon M, *Parliamentary Sovereignty in the UK Constitution Process, Politics and Democracy* (Hart Publishing Ltd 2015)

Griffith JAG, 'The Political Constitution' (1979) 42 The Modern Law Review 1 <https://www.jstor.org/stable/pdf/1095629.pdf?refreqid=excelsior%3A3b4b25f669859ab3a1ca7f9eeaa5711d>

Grzybowski M, 'Legislative Omission in Practical Jurisprudence of the Polish Constitutional Tribunal' The XIVth Congress of the Conference of European Constitutional Courts Vilnius 1

H. W. R. Wade & C. F. Forsyth, *Administrative Law* (Tenth Edit, Oxford University Press 2009)

Healy JL& J, 'After Months, Iraqi Lawmakers Approve a Government' (*The New York Times*, 2010)

Heun W, ‘Supremacy of the Constitution, Separation of Powers, and Judicial Review in Nineteenth-Century German Constitutionalism’ (2003) 16 Ratio Juris 195 <http://zp2yn2et6f.search.serialssolutions.com/?ctx_ver=Z39.88-2004&ctx_enc=info%3Aofi%2Fenc%3AUTF-8&rfr_id=info%3Asid%2Fsummon.serialssolutions.com&rft_val_fmt=info%3Aofi%2Ffmt%3Akev%3Amtx%3Ajournal&rft.genre=article&rft.atitle=Supremacy+of+the+Constituti>

‘Independent High Electoral Commission in Iraq (IHEC)’ <http://www.ihec.iq/ar/index.php/political.html>

Ismael MS, ‘The Judicialisation of Constitutional Disputes in Iraq: Exploring the Rule of Law in Transitional Democracies’ (Liverpool 2016)

Iuisa Neto, ‘Portuguese National Report on the National and International Codification of Human Rights’ in Wen-Yeu Wang (ed), *Codification in International Perspective* (Selected Papers from the 2nd IACL, Thematic Gongress of the Internationa Academy of Comparative Law 2014) <https://www.springer.com/gb/book/9783319034546?utm_campaign=3_pier05_buy_print&utm_content=en_08082017&utm_medium=referral&utm_source=google_books#otherversion=9783319034553>

James W. Ely Jr. and Kermit L. Hall (ed), *The Oxford Guide to United States Supreme Court Decisions* (2nd edn, Oxford University Press 2009) <http://zp2yn2et6f.search.serialssolutions.com/?ctx_ver=Z39.88-2004&ctx_enc=info%3Aofi%2Fenc%3AUTF-8&rfr_id=info%3Asid%2Fsummon.serialssolutions.com&rft_val_fmt=info%3Aofi%2Ffmt%3Akev%3Amtx%3Abook&rft.genre=bookitem&rft.title=The+Oxford+Guide+to+United+Sta>

Jean-Claude Venezia, ‘Le Pouvoir Discretionnaire de l’administration’ (LGDJ 1959)

Jean-François and Akandji-Kombe, *Positive Obligations under the European Convention on Human Rights, A Guide to the Implementation of the European Convention on Human Rights* (Council of Europe 2007) <https://rm.coe.int/168007ff4d>

Jean-Marie Auby, ‘Note Sous l’arret Du Conseil d’etat Du 30 Juin 1950’ [1951] Queralt

——, *Traite Du Contentieux Administrative* (second edi, 1975)

Jean de Soto, ‘Contribution a La Nullite Des Actes Administratifs Unilateraux’ (1941)

Jean Kerninon, ‘L’obligation Pour l’autorité Administrative de Prendre Réellement Ses Décisions’ (1981) 34e La Revue Administrative 479

<https://www.jstor.org/stable/40773268?seq=1#page_scan_tab_contents>

Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 The Yale Law Journal 1346

Jesse Norman and Peter Oborne, *Churchill's Legacy: The Conservative Case for the Human Rights Act* (Liberty, The National Council for Civil Liberties 2009) <https://www.libertyhumanrights.org.uk/sites/default/files/churchill-s-legacy-the-conservative-case-for-the-hra-october-2009.pdf>

John F. Manning, 'Sepration of Powers as Ordinary Interpretation' 124 Harvard Law Review 1939 <https://www.jstor.org/stable/41306771?pq-origsite=summon&seq=1#page_scan_tab_contents>

Juan Louis Requejo Pagés, 'The Problems of Legislative Omission in Constitutional Jurisprudence (the Constitutional Court of Spain)' [2008] Conference paper for the XIV Conference of Constitutional Courts of Europe, Vilnius

Juan Luis Requejo Pagés, 'The Problems of Legislative Omission in Constitutional Jurisprudence' (2008)

Katzman K, 'Iraq: Elections, Government, and Constitution' (*CRS Report for Congress, published*) <http://fpc.state.gov/documents/organization/76838.pdf>

Kchouk DS and B, '(Democratic) Regime Change and the Representation of Women in Parliament' (2017) 27:3 International Review of Sociology 491 <https://www-tandfonline-com.idpproxy.reading.ac.uk/doi/pdf/10.1080/03906701.2017.1338929?needAccess=true>

Keane R, 'Judges as Lawmakers: The Irish Experience' (2004) 18 Judicial Studies Institute Journal

Kirmanj S, *Identity and Nation in Iraq* (Lynne Rienner Publishers, Portland 2013)

Kuo M-S, 'In the Shadow of Judicial Supremacy: Putting the Idea of Judicial Dialogue in Its Place' (2016) 29 Ratio Juris 83

Kyritsis D, *Where Our Protection Lies: Separation of Powers and Constitutional Review* (Oxford Scholarship Online 2017) <http://zp2yn2et6f.search.serialssolutions.com/?ctx_ver=Z39.88-2004&ctx_enc=info%3Aofi%2Fenc%3AUTF-8&rfr_id=info%3Asid%2Fsummon.serialssolutions.com&rft_val_fmt=info%3Aofi%2Ffmt%3Akev%3Amtx%3Abook&rft.genre=book&rft.title=Where+Our+Protection+Lies+%3A+Sepa>

L. Csink & P. Paczolay, 'Problems of Legislative Omission in Constitutional

Jurisprudence' (2008)

L. DA& D, 'Iraq's Year of Voting Dangerously', *Diamond L. & Plattner M., Electoral systems and democracy, Baltimore* (The Johns Hopkins University press 2006)

L. Favoreu and L. Philip, *Les Grandes Decisions Du Conseil Constitutionnel* (Fifth edit, SIREY 1989)

Lapidus IM, *A History of Islamic Societies* (Cambridge University Press 1989)

Larry A. Alexander, 'Constitutionalism' in Martin P Golding and and William A Edmundson (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (John Wiley & Sons, Incorporated 2004)
<https://ebookcentral.proquest.com/lib/reading/detail.action?docID=351520>

Latif WA, 'The Irregularities Five Contained in the Recent Decision of the Federal Supreme Court' (*Al-Nahrain Center for Strategic Studies*, 2015)
<http://www.alnahrain.iq/?p=2052>

Learned Hand, *The Bill of Rights* (Cambridge, Harvard University Press 1958)

Lech Jamróz, 'The Constitutional Tribunal in Poland in the Context of the Constitutional Judiciary' (Faculty of Law University of Białystok 2014)

Limbach J, 'The Concept of the Supremacy of the Constitution' (2001) 64 The Modern Law Review 1
<https://www.jstor.org/stable/pdf/1097135.pdf?refreqid=excelsior%3Aea5363012ff7cd98b8d4abdb5198ec8c>

M. J. C.Vile, *Constitutionalism and the Separation of Powers* (2nd edn, Liberty Fund, Incorporated 1998)
<https://ebookcentral.proquest.com/lib/reading/detail.action?docID=3327330>

M. Livingston, P. Giuseppe Monateri FP, *The Italian Legal System* (2nd edn, Standford University Press 2015)

M A, 'Iraq War (2003): Was It Morally Justified?' [2009] Politička misao 88

Magaziner AL, 'The Trickle-Down Effect: The Phiri Water Rights Application and Evaluating, Understanding, and Enforcing The South African Constitutional Right to Water' (2008) 33 North Carolina Journal of International Law and Commercial Regulation 509
<file:///C:/Users/abu20/Downloads/33NCJIntlLComReg509.pdf>

Mahdi O, 'The Legitimacy of Laws Drafting Rises the Disagreements between the Iraqi Presidencies' (*The Elaph E-Daily*, 2012)
<http://elaph.com/Web/news/2012/11/773977.html>

Malan K, ‘Deliberating the Rule of Law and Constitutional Supremacy from The Perspective of The Factual Dimension of Law’ (2015) 18 Potchefstroom Electronic Law Journal 1206 <file:///C:/Users/abu20/Downloads/18PotchefstroomElecLJ.pdf>

Marek Safjan, ‘Dilemmes de La Passivité Legislative Apres Les Decisions Du Tribunal Constitutionnel’ DE JUSTÍCIA CONSTITUCIONAL <http://docplayer.fr/10830556-Dilemmes-de-la-passivite-legislative-apres-les-decisions-du-tribunal-constitutionnel.html>

Marian Grzybowski, ‘Legislative Omission in Practical Jurisprudence of the Polish Constitutional Tribunal’ (2008) <https://www.confeuconstco.org/reports/rep-xiv/report_Poland_en.pdf>

Marieta Safta, ‘Developments in the Constitutional Review. Constitutional Court Between the Status of Negative Legislator and the Status of Positive Co-Legislator’ (2012) 1 Perspectives of Business Law Journal 1 <file:///C:/Users/abu20/Downloads/DEVELOPMENTS IN THE CONSTITUTIONAL REVIEW. CONSTITUTIONAL COURT BETWEEN THE STATUS OF NEGATIVE LEGISLATOR.pdf>

Mark Tushnet, ‘The Possibilities of Comparative Constitutional Law’ (1999) 108 The Yale Law Journal Company 1225

——, ‘Dialogue and Constitutional Duty’ in Anat Scolnicov Tsvi Kahana (ed), *Boundaries of State, Boundaries of Rights Human Rights, Private Actors, and Positive Obligations* (Cambridge University Press 2016) <https://www.cambridge.org/gb/academic/subjects/law/human-rights/boundaries-state-boundaries-rights-human-rights-private-actors-and-positive-obligations?format=HB&isbn=9781107066502>

Mendes G, ‘Constitutional Jurisdiction in Brazil: The Problem of Unconstitutional Legislative Omission’ (*Federal Supreme Court of Brazil*, 2008) <http://www.stf.jus.br/repositorio/cms/portalStfInternacional/portalStfAgenda_pt_br/anexo/Jurisdicao_Constitucional_no_Brasil_Omissao_Legislativa_incostitucional1.pdf>

——, ‘New Challenges of Constitutional Adjudication in Brazil’ (*Woodrow Wilson International Center of Scholars, Brazil Institute, special report*, 2008) <https://www.wilsoncenter.org/sites/default/files/brazil.gilmarmendes.constitution.pdf>

Michael F. Mohallem, ‘Immutable Clauses and Judicial Review in India, Brazil and South Africa: Expanding Constitutional Courts’ Authority’ (2011) 15 The International Journal of Human Rights 765

<https://www.tandfonline.com/doi/abs/10.1080/13642987.2011.572703>

Michael Meyer, *Egypt in Depth Analysis of the Main Elements of the New Constitution* (Directorate-General for External Policies of the EU, Policy Department, European Parliament 2014) <http://www.europarl.europa.eu/RegData/etudes/note/join/2014/433846/EXPO-AFET_NT(2014)433846_EN.pdf>

Michel Melchior, 'L' Omission Legislative Dans La Jurisprudenc, Belgium's 2007' (2007) <http://www.confeuconstco.org/reports/rep-xiv/report_Belgium_fr.pdf>

Morrow J, 'Deconstituting Mesopotamia, Cuting a Deal on the Regionalization of Iraq' (2005) <https://www.usip.org/sites/default/files/Framing the State/Chapter21_Framing.pdf>

Mumtaz K, 'Post-Saddam Democratization in Iraq: An Assessment of March 2010 Elections. Strategic Studies' [2010] Institute of Strategic Studies Islamabad ISSI <http://issi.org.pk/wp-content/uploads/2014/06/1298971881_85787540.pdf>

Naji M, *The Federal Supreme Court in Iraq* (Dar Al-Dieaa 2007)

Nasaar JJ, *Arbitrator in the Constitutional Law* (Comprehensive Library for Legal Sciences) <https://loiarabe.blogspot.com/2018/10/blog-post_47.html>

Nathan S. Chapman and Michael W. Mccnnell, 'Due Process as Separation of Powers' (2012) 121 The Yale Law Journal 1672 <https://www.jstor.org/stable/pdf/41510457.pdf?refreqid=excelsior%3Ad14d47192bf5317e963d567363ad2240>

Noga Efrati, 'Women Representation and Democracy in Post-Saddam Iraq, 2003-2010' (2012) 48:3 Representation 253 <https://www-tandfonline-com.idpproxy.reading.ac.uk/doi/pdf/10.1080/00344893.2012.706977?needAccess=true>

O'Regan K, 'Text Matters: Some Reflections on the Forging of a New Constitutional Jurisprudence in South Africa' (2012) 75 The Modern Law Review 1 <https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1468-2230.2012.00886.x>

P. Francois, 'L' Incompetence Negative Du Legislature' (1994) 17 R.F.D.C.

Parpworth N, 'The South African Constitutional Court: Upholding the Rule of Law and the Separation of Powers' (2017) 61 Journal of African Law 273 <https://www-cambridge-org.idpproxy.reading.ac.uk/core/services/aop-cambridge-core/content/view/3745843DACB6021AE25296F765B3D462/S0021855317000158a.pdf/south_african_constitutional_court_upholding_the_rule_of_law_and_the_separation_of_powers.pdf>

Pimentel, D., & Anderson B, 'Judicial Independence in Post-Conflict Iraq: Establishing the Rule of Law in an Islamic Constitutional Democracy' (2013) 46 George Washington International Law Review 29 <http://search.proquest.com.idpproxy.reading.ac.uk/docview/1515694474?accountid=13460, >

Polk WR, *Understanding Iraq: A Whistle-Stop Tour from Ancient Babylon to Occupied Baghdad* (I B Tauris & Co Ltd 2006)

Portuguses Constitutional Court, 'Problems of Legislative Omission in Constitutional Jurisprudence' (2008) <http://www.confeuconstco.org/reports/rep-xiv/report_Portuguese _en.pdf>

R. Alibert, *Le Controle Juridictionnel de l'administration Par Le Moyen de l'exces de Pouvoir* (Payot 1926)

Rahman KZ Al, 'Legislative Omission and Constitutional Monitoring on It' (University of Abu Bakr Belkaid Algeria 2013)

Raz J, 'Legal Reasons, Sources, and Gaps', *The authority of law: Essays on law and morality* (Oxford University Press 1979) <https://www-oxfordscholarship-com.idpproxy.reading.ac.uk/view/10.1093/acprof:oso/9780198253457.001.0001/acprof-9780198253457-chapter-4.>

Richard Bellamy, *Political Constitutionalism : A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007) <https://ebookcentral.proquest.com/lib/reading/reader.action?docID=321448&ppg=13>

Richard Benwell & Oonagh Gay, 'The Separation of Powers' (*House of Commons Library*) <file:///C:/Users/nc851432/Downloads/SN06053.pdf>

Ronald Dworkin, 'The Moral Reading of the Constitution' [1996] The New York Review of Book

——, 'The Moral Reading and the Majoritarian Premise' in Ronald C Slye (ed), *Deliberative Democracy and Human Rights* (Yale University Press 1999) <file:///C:/Users/abu20/Downloads/Deliberative_Democracy_and_Human_Rights_---- _(Part_Three_Nation-Building,_Constitutionalism,_and_Democracy).pdf>

——, *Taking Rights Seriously* (Bloomsbury Academic 2013) <http://zp2yn2et6f.search.serialssolutions.com/?ctx_ver=Z39.88-2004&ctx_enc=info%3Aofi%2Fenc%3AUTF-8&rfr_id=info%3Asid%2Fsummon.serialssolutions.com&rft_val_fmt=info%3Aofi%2Ffmt%

3Akev%3Amtx%3Abook&rft.genre=book&rft.title=Taking+Rights+Seriously&rft.au=Dwo>

Rosenn KS, 'A Comparison of the Protection of Individual Rights in the New Constitutions of Colombia and Brazil' (1992) 23 The University of Miami Inter-American Law Review 659 <https://www.jstor.org/stable/pdf/40176293.pdf?refreqid=excelsior%3Af08d25f461d0e787db5f68c56dab7f0a>

——, 'Procedural Protection of Constitutional Rights in Brazil' [2011] The American journal of comparative law 1009 <file:///C:/Users/abu20/Downloads/Procedural Protection of Constitutional Rights in Brazil.pdf>

Roux G, *Ancient Iraq* (George Allen & Unwin Ltd 1964)

Salem Z, 'Jurists in the Iraqi Supreme Federal Court: Judiciary at the Mercy of Parties' (*Al-Arabi Al-Gadid*, 2019) <https://www.alaraby.co.uk/politics/2019/7/20/فقهاء-في-المحكمة-الاتحادية-العراقية-القضاء-تحت-رحمة-الأحزاب>

Salim R. Al-Mousawi, 'The Formation of the Federal Supreme Court in Iraq between the Constitution and the Law Analytical and Cash Reading' (*Journal of the legislation and the judiciary*, 2009) <http://tqmag.net/body.asp?field=news_arabic&id=1191&page_namper=p3,>

——, 'The Role of Iraqi Constitutional Judiciary in Solving the Legislative Lack' (*Federal Supreme Court of Iraq*, 2013) <http://www.iraqja.iq/view.1871/>

Sanaan-Guharzi M, 'Is Putting Islamic Jurists with Veto Power on Iraq's Supreme Court a Constitutional Requirement or a Legislative Choice?' (*KURDISTAN 24*, 2019) <https://www.kurdistan24.net/en/opinion/4b8f3bfa-ba15-4719-8857-b42486d7ff68>

Sararu C-S, 'The State and the Separation of Powers' (2015) 5 Juridical Tribune 274 <http://tribunajuridica.eu/arhiva/An5v2/19 Sararu.pdf>

Sc. R. Dürr, T. Gerwien, D. Jones, A. Gorey and M-LW, 'General Report of the XIVth Congress of the Conference of European Constitutional Courts on Problems of Legislative Omission in Constitutional Jurisprudence' (2008) <http://www.venice.coe.int/files/Bulletin/SpecBull-legislative-omission-e.pdf>

Sean Beienburg and Paul Frymer, 'The People Against Themselves: Rethinking Popular Constitutionalism' (2016) 41 Law & Social Inquiry, American Bar Foundation 242 <https://onlinelibrary.wiley.com/doi/pdf/10.1111/lsi.12177>

Seon Bong Yu, 'The Role of the Judge in the Common Law and Civil Law Systems: The Cases of the United States and European Countries' (1999) 2 International Area Review 35

<https://journals.sagepub.com/doi/abs/10.1177/223386599900200203>

Steven, 'A Timeline of Key Events in Iraqi History and Class Struggle in the 20th Century' (2006) <www.libcom.org> accessed 10 December 2015

Stewart I, 'Men of Class: Aristotle, Montesquieu and Dicey on Separations of Powers and the Rule of Law' (2004) 4 Macquarie Law Journal 187 <file:///C:/Users/abu20/Downloads/4MacquarieLJ187.pdf>

Stuart James Lakin, 'Debunking the Idea of Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution' (2008) 28 Oxford Journal of Legal Studies 709 <https://www.jstor.org/stable/pdf/20185394.pdf?refreqid=excelsior%3Ac054ff21717ba482a00cdc92d20e4ce4>

——, 'The Moral Reading of The British Constitution' (College: University College London 2009)

T. Sultana, 'Montesquieu's Doctrine of Separation of Powers: A Case Study of Pakistan' 28 Journal of European Studies, Karach

Taha KE, 'We Hope That the American Legislation for Iraqi Courts Will Lead to the Stability' (*Al-Hewar Al-Mutemedn*, 2007) <http://www.ahewar.org/debat/show.art.asp?aid=114656>

The Constitution of Federative Republic of Brazil (3rd edn, Brazilian Chamber of Deputies 2010) <http://english.tse.jus.br/arquivos/federal-constitution>

The Federal Supreme Court in Iraq FSCI, 'The Announcement of the Supreme Federal Court 16/1/2018' (*The Federal Supreme Court website*, 2018) <https://www.iraqfsc.iq/news.4012/> accessed 15 June 2018

The National Council for Civil Liberties, *A Parliamentarian's Guide to the Human Rights Act* (LIBERTY Protecting Civil Liberties Promoting Human Rights 2010) <https://www.refworld.org/pdfid/4ed640552.pdf>

Tremblay LB, 'The Legitimacy of Judicial Review: The Limits of Dialogue between Courts and Legislatures' (2005) 3 International Journal of Constitutional Law 617

Tripp C, *A History of Iraq* (2nd edn, Cambridge University Press 2002)

Tsereteli N, 'The Role of the European Court of Human Rights in Facilitating Legislative Change in Cases of Long-Term Delays in Implementation', *The International Human Rights Judiciary and National Parliaments* (Cambridge University Press 2017) <https://www.cambridge.org/core/books/international-human-rights-judiciary-and-national-parliaments/B966B42C8F277F125FDC5DFE52EF18D5>

Turaih HM, *The Limits of the Power of Egyptian Legislator to Regulate the Rights, Freedoms and Guarantees to Be Exercised* (Dar al-Nahda al-Arabia 2011)

V. Barsotti, P. G. Carozza MC and AS, *Italian Constitutional Justice in Global Context* (Oxford University Press 2015)

Weir C, 'The Principles of Unlawful Delegation' (1998) 3 Judicial Review 211 <file:///C:/Users/abu20/Downloads/3JudRev211 (1).pdf>

William W. Buzbee and Robert A. Schapiro, 'Legislative Record Review' (2001) 54 Stanford Law Review <https://go.galegroup.com/ps/i.do?p=AONE&u=rdg&id=GALE%7CA80506785&v=2.1&it=r&sid=summon>

Williams LA, 'The Justiciability of Water Rights Mazibuko V. City of Johannesburg' (2010) 18 Willamette Journal of International Law and Dispute Resolution 211 <file:///C:/Users/abu20/Downloads/18WillametteJIntlLDisRes2.pdf>

Wolfgang Zeidler, 'Federal Constitutional Court of the Federal Republic of Germany Decisions on the Constitutionality of Legal Norms' (1987) 62 Notre Dame Law Review 507 <http://scholarship.law.nd.edu/ndlr/vol62/iss4/2>

Wood GS, *The Creation of the American Republic, 1776-1787* (University of North Carolina Press 1998) <https://ebookcentral.proquest.com/lib/reading/reader.action?docID=4322022&ppg=492>

Cases and Judicial Decisions

Decision of CCT 'Doctors for Life International v The Speaker of the National Assembly and Others' (2006) CCT 12/05

Decision of CCT 'Lindiwe Mazibuko & Others v City of Johannesburg & Others' (2009) CCT 39/09

Decision of CCT 'Member of the Executive Council for Development Planning and Local Government Gauteng v Democratic Party and Others' (1998) CCT33/97

Decision of CCT 'My vote counts NPC vs Speaker of the National Assembly and other' (2015) CCT 121/14

Decision of CCT 'National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and Others' (1999) CCT 10/99

Decision of Court of Arbitration in Belgium 'Failure to act or to pass legislation' (1997)

Decision of Court of Arbitration in Belgium 'Parliamentary Assembly' (1996) 31/96

Decision of ECtHR 'BURDOV v RUSSIA' (2002) 250 7.5.20

Decision of ECtHR 'Christine Goodwin v The United Kingdom' (2002) 28957/95

Decision of ECtHR 'Elizabeth Kawogo v the United Kingdom' (2010) 56921/09

Decision of ECtHR 'Gerasimov and Others v Russia' (2014) 194 /2014

Decision of ECtHR 'GREENS and MT v THE UNITED KINGDOM' (2010) 60041/08 a

Decision of ECtHR 'Hirst v The United Kingdom' (2005) 74025/01

Decision of ECtHR 'L v Lithuania' (2007) 27527/03,

Decision of ECtHR 'László Magyar v Hungary' (2014) 73593/10

Decision of ECtHR 'Osman v the United Kingdom' (1998) 87/1997/87

Decision of FCCG 'Aircraft noise' (1981) BvR 612/72

Decision of FCCG 'Der Öffentliche Dienst' (1985) BvL 18/83

Decision of FCCG 'Höchstrichterliche Finanzrechtsprechung' (1984) BvL 10/80

Decision of FCCG 'Inheritance of Illegitimate Children' (1969) BVerfGE 25

Decision of FCCG 'Protecting Unborn Human Life' (1993) BvF 2/90

Decision of FCCG 'the Rights of the Defence and Fair Trial' (2005) BvR 2236/0

Decision of FSCI 10/2009 (2009) 10

Decision of FSCI 11/2010 (2010) 11

Decision of FSCI 13/2007 (2007) 13

Decision of FSCI 140/2018 (2018) 140/2018

Decision of FSCI 21, 29/2015 (2015) 21, 29

Decision of FSCI 27/2009 (2009) 27

Decision of FSCI 36/2014 (2014) 36

Decision of FSCI 42/2012 (2012) 42

Decision of FSCI 43/2010 (2010) 43

Decision of FSCI 44/2010 (2010) 44

Decision of FSCI 56/2010 (2010) 56

Decision of FSCI 59/2015 (2015) 59

Decision of FSCI 6/2010 (2010) 6

Decision of FSCI 7/2010 (2010) 7

Decision of FSCI 72/2012 (2012) 72/2012

Decision of SCC N0 432/21 432/21

Decision of SCC No 20 (1985) 20

Decision of SCI 'Gainda Ram and Ors Vs MCD and Ors'

Decision of STF, Min ILMAR GALVÃO (2002) ADI 2495

Decision of STF, Rep Celso de Mello (1994) R.D.A.355

Decision of STF, Rep Celso de Mello (1996) D.J.U. 20

Decision of STF, Rep Eros Grau (2007) D.J.U. 712

Decision of STF, Rep Eros Grau (2009) D.J.U. 755

Decision of STF, Rep Gilmar Mendes (2007) D.J.U. 708

Decision of STF, Rep Ilmar Galvio (2002) D.J.U. 585

Decision of STF, Rep Marco Aurdlio (2007) D.J.U. 721

Decision of STF, Rep Marco Aurdlio (2008) D.J.U. 758

Decision of STF, Rep Mauricio Corria (2002) D.J.U. 485

Decision of STF, Rep Moreira Alves (1990) D.J.U. 107

Decision of STF, Rep Sepfilveda Pertence (1991) D.J.U. 283

Decision of STF en banc, Rep Carmen Lficia (2009) D.J.U. 795

Decision of STF en banc, Rep Mauricio Corria (2007) 670-ES

Decision of STF MI 107 QO (1989) MI 107 QO

Decision of Supreme Court of Estonia (2004) EST-2004-1

Decision of the Constitutional Court in Spain 'Right to strike' (1998) 37/ 98

Decision of the Constitutional Court in Spain 'Rights in respect of the audiovisual media and other means of mass communication' (1994) 31/1994

Decision of the Constitutional Court of Hungary 154/ 86 (1986) 154/86

Decision of the Constitutional Court of Hungary 23/ 1998 (1998) 23/ 1998

Decision of the Constitutional Court of Hungary 29/1997 (1997) 29/1997

Decision of the Constitutional Court of Hungary 4/1999 (1999) 4/1999

Decision of the Constitutional Court of Hungary 45/2000 (2000) 45/2000

Decision of the Constitutional Court of Hungary 50/ 2003 (2003) 50/ 2003

Decision of the Constitutional Court of Hungary 72/2007 (2007) 72/2007

Decision of the Constitutional Court of Lithuania (2006) LTU-2006-M

Decision of the French Council of State 'CE, Société des mines de la Guyane Française'

Ghaidan v Godin-Mendoza (2004) UKHL 30

Miller Vs Secretary of State, The Supreme Court in the UK (2017) [2017] UKS

The decision of the French Constitutional Council CC N 67-31 DC (1967) CC. N. 67-

The decision of the French Constitutional Council CC N 75-58 DC (1975) CC. N. 75-

Statutes and Legislation

Act CLI of 2011 of the Constitutional Court OF Hungary

Act No. 8.038 1990

Act of local councils election in Iraq 2008

Constitution of Republic of Iraq 2005 2005 1

Council of Representatives Elections Act in Iraq 2013

First Amendment of General Elections Act in Iraq 2009

Iraqi Interim Constitution 1971

Law of Administration for the State of Iraq For the Transitional Period 2012

Law of Executive Procedures for Formation of Regions in Iraq 2008

Rent Act 1977

The Constitution of Portugal 1976

The Constitution of the Arab Republic of Egypt 1971

The Constitution of the Republic of Hungary 1949

The Constitution of the Republic of South Africa 1996 (Administration of Justice http://www.justice.gov.za/)

The Constitutional of the Federative Republic of Brazil 1988

The Coustitution of Portugal 1976 (constitute project)

The Election Law of Governorates' Councils in Iraq 2008

The first amendment of the Constitution of the Arab Republic of Egypt 1980

The Fundamental Law of Hungary 2011