

THE IMPACT OF DECISIONS OF THE FEDERAL SUPREME COURT ON THE IMPLEMENTATION OF REGIONAL ADMINISTRATIVE DECENTRALIZATION IN IRAQ

**Faris Abdulraheem Hatem
Noor Fariyah Binti Mohd Noor
College of Law, University Utara Malaysia (UUM)**

ABSTRACT

The Interim Constitution of 2004 and the 2005 Permanent Constitution of Iraq is distinguished from the previous Iraqi constitutions as it provided for the principle of democracy and the guarantees of the application of this principle. One demonstration of democracy in the constitutions of 2004 and 2005 is the principle of regional administrative decentralization. The Constitution provided details of this principle as well as provided for the establishment of the Federal Supreme Court, which is competent to interpret the provisions of the Constitution and to repeal the legal texts that violate the constitution. The stipulations on the details in the constitution means that these details are binding for the three authorities and everyone in the state. As a result of the ambiguity in some provisions of the 2005 Constitution related to regional administrative decentralization, the Supreme Federal Court interpreted these texts. However, the court's legal opinion was ambiguous and contradictory, which led to the continued ambiguity of the constitutional text and thus the continued wrong application of administrative decentralization by the governorates that issued laws, in contravention of the constitution which was not granted this authority to the governorate councils. The imbalance in the performance of the Federal Supreme Court led to a defect in the application of the Constitution because the Federal Supreme Court is the sentinel of the Constitution.

Keywords: Decentralization, administrative decentralization, regional administrative decentralization, Federal Supreme Court.

INTRODUCTION

can the definition of the regional administrative decentralization that is “distribution of the administrative function between the central government and local entities, and then it can make decisions concerning administrative activity that is subject to the supervision and control of the central authority.”(Allawi, 1996, P. 38) In another definition “The method of the administration methods which distribute the administrative competences between the central authorities that represent the ministries and local councils elected which represent the administrative units, and to proceed, these local councils practice its authority under the control of the central authorities.” (Ghidan, 2012, P.23) Finally there is definition mentioned granting legal personality to the part of the territory of the State “The recognition of the legal personality of part of the territory of the State with the consequence that granting the elected entities which represent it a degree of independence in the administration of its utilities under the control of the central authority.”(Al- Helo, 1987,P. 113)

Building on the above, regional administrative decentralization is a distribution of the administrative function between the central authority and the local entities (Called in Iraq, the governorates), so it is not a distribution of the legislative function. As a result, the local entities not having the authority to issue laws, but only to issue administrative decisions.

In 2003, the United States and its allies occupied Iraq and toppled Saddam Hussein’s government. Thus, the 1970 constitution was abolished, and the temporary constitution of 2004 called the “Law for the Administration of the State of Iraq for the Transitional Period” was issued, which continued until issued the permanent constitution of 2005 and the formation of the new government based on it. In fact, after ten months Formed of the new Iraqi government, according to the 2005 Iraqi constitution (Al-Fatawi, 2010, P.56; Al –Anbuga, 2010).

The constitutional legislator, adopted the principle of democracy as a philosophy of governance when it enacted the Iraqi Constitution of 2004. That the Article 4 of the said Constitution states that the “The system of government in Iraq shall be republican, federal, democratic, and pluralistic, and the powers shall be shared between the federal government and the regional governments, governorates, municipalities, and local administrations”. In this Article, the constitutional legislator provides for the philosophy of governance in Iraq, which is a democracy, pluralism, and federalism, and then directly states that the most important manifestations of the philosophy of governance are the distribution of authorities between the center and the regions, governorates, and other administrative units. It is true

that the democratic principle was stipulated in the previous Iraqi constitutions, but the 2004 constitution is different from all the previous Iraqi constitutions because it provides the details of the manifestations of democracy and the guarantees for the implementation of the constitution.

The fact that the constitution provided the details regarding administrative decentralization means that it is binding on the three authorities (legislative, executive, and judicial authorities) and it is not permissible to violate the provisions of the constitution because it is the supreme law of the state. Article 3 of the 2004 Constitution states that “this law is the supreme law of the country and shall be binding in all parts of Iraq without exception”

To guarantee the application of the provisions of the constitution and it is not violated by the public authorities, Article 44 of the Constitution of 2004 provides for the establishment of the Federal Supreme Court, which is competent to adjudicate the constitutionality of laws and administrative decisions, if it is challenged by a plaintiff or by a court to consider the constitutionality of a law or decision. The court is also competent to hear disputes between the central government and the regions, governorates, and municipalities on the basis of a lawsuit before it.

The Federal Supreme Court Law was passed and published in the Iraqi Gazette on March 17, 2005. The Federal Supreme Court consists of nine judges, one of whom is the head of the court and they are appointed for life by the President of the Republic after being nominated by the Supreme Judicial Council. (Federal Supreme Court Law, 2005, A. 3,6)

In accordance with the 2004 Constitution, the government issued a law to regulate the administrative decentralization of the governorates which was known as “Order 71: Local Governmental Powers” in 2004. This law stipulates that the governorate councils are to be elected (A. 2/4) and that the governor is selected by a majority of the members of the council. (A. 2/5) The governor is accountable to the governorate council. (A.3/1) The governorate councils exercise their competence according to the laws in force. (A. 4/1)

This paper will examine the regional administrative decentralization in Iraq and the decisions of the Federal Supreme Court in Iraq about the implementation of administrative decentralization.

REGIONAL ADMINISTRATIVE DECENTRALIZATION UNDER THE CURRENT IRAQI CONSTITUTION IN 2005

Article 144 of the Iraqi Constitution of 2005 states that “This Constitution shall come into force after the approval of the people thereon in a general referendum, its publication in the Official Gazette, and the seating of the government that is formed pursuant to this Constitution.”

In accordance with Article 144, the Iraqi Constitution of 2005 came into force on May 20, 2006, after the referendum by the Iraqi people on October 15, 2005, which was then published in the Iraqi Gazette on December 28, 2005, and finally the formation of the Iraqi government under this constitution on May 20, 2006 (Al Fadl, 2010).

The constitutions usually apply federal or decentralized administrative systems in all the territories of the country. However, implementation of the federal system in an area of the country, but not in another area, and allows the other areas to choose between federalism or regional administrative decentralization, this method implemented by the Iraqi constitution and it is very different from the constitutions of other countries. Historical and political factors have led the Iraqi constitution to adopt this method.

The Kurds in northern Iraq were separated from the Iraqi central government in 1991, and was under the protection of the United States of America. Then the Kurdistan parliament announced unilaterally the implementation of the federal system in 1992. The Kurdistan region was created from three governorates in northern Iraq (Nendy, 2002).

The Iraqi constitution of 2005 adopted the federal system in order to accommodate the Kurdistan region, which was established in 1992. Article 117(First) stipulates that “This Constitution, upon coming into force, shall recognize the region of Kurdistan, along with its existing authorities, as a federal region.” But, because of disagreement of the Iraqi parties about the implementation of the federal system (Aladdin, 2012, P.229), the constitution left to the rest of the Iraqi governorates to choose either federalism or regional administrative decentralization. According to Article 119, “One or more governorates shall have the right to organize into a region based on a request to be voted on in a referendum submitted in one of the following two methods: First: A request by one-third of the council members of each governorate intending to form a region. Second: A request by one-tenth of the voters in each of the governorates intending to form a region.” Article 122(Second) states that “Governorates that are not incorporated in a region shall be granted broad administrative and financial authorities to

enable them to manage their affairs in accordance with the principle of decentralized administration, and this shall be regulated by law.” Since the issuance of this constitution in 2005, the federal system has not been applied by any governorates, except the three governorates which established the Kurdistan region therefore, 15 governorates have implemented of the regional administrative decentralization.

PHILOSOPHY OF THE CONSTITUTION OF 2005

Article 1 of the Iraqi Constitution of 2005 states that “The Republic of Iraq is a single federal, independent and fully sovereign state in which the system of government is republican, representative, parliamentary, and democratic, and this Constitution is a guarantor of the unity of Iraq.” This means that the constitutional legislator in 2005 adopted the same philosophy of governance as the constitution of 2004. Also, the constitution of 2005 adopted the same approach as the constitution of 2004 by having the details about the decentralized administrative system. In addition to that, the constitution of 2005 had increased the details to ensure the application of public authorities of the decentralized system. As well as, the constitution also provided for the establishment of the Federal Supreme Court to observe the constitutionality of laws and administrative decisions(A,92-94)in order to guarantee the implementation of the constitution by the public authorities.

From the details stipulated in the Constitution of 2005 that is the Article 122 (Fourth) which states d that "A law shall regulate the election of the Governorate Council, the governor, and their powers." Also, Article 122(Third) which states that “The governor, who is elected by the Governorate Council, is deemed the highest executive official in the governorate to practice his powers authorized by the Council.” According to this article, the governor is elected by the governorate council and is accountable to the council(Cravens,2011, P.2). This is the same approach as the temporary constitution of 2004.

THE DISTRIBUTION OF COMPETENCE BETWEEN THE CENTRAL GOVERNMENT AND THE GOVERNORATES

Article 110 of the Iraqi Constitution of 2005 states that the exclusive authorities of the central authority are in areas such as foreign policy, the development of a national security policy and its implementation, the drawing up of financial and customs policy, issuing currency, setting the draft budget, and the general census of the population. This sovereign competence, cannot be exercised it by other authorities in the country. On the other hand, Article 114 of the Constitution deals with the shared competence between the central authority with the regions and the governorates such as customs administration, the organization of electric power sources and distribution, environmental policy, health policy, and educational policy. Then Article 115 of the constitution states that “All powers not stipulated in the exclusive powers of the federal government belong to the authorities of the regions and governorates that are not organized in a region. With regards to other powers shared between the federal government and the regional government, priority shall be given to the law of the regions and governorates not organized in a region in case of dispute.”

Some authors, such as Ahmed (2015), criticized this constitutional approach and he said that the Iraqi constitution “Has worked to expand the competence of the governorates in an unprecedented manner in all the constitutional systems that adopted the decentralized administrative system.”(P.389)The author added “This Constitution, which determined the common competence between the federal authorities and the authorities of the regions, did not stop this determination at these two parties but also included the governorates that are not incorporated into a region in all the matters entrusted to the region.”(P.390) Another author stated that “It is not accurate to regulate a decentralized system for governorates that are not incorporated in a region by a constitutional text like the federal system, because federalism is a form of region, while administrative decentralization is a form of administration and regulated by law.”(Al Hassani, 2017)In the same context, Kazem(2011) said that the constitutional legislator is mixing the federal system, which runs the regions with the administrative decentralization system that governs the governorates that are not incorporated in a region.(P. 146)Also, Mahdi (2009) stated that “The inclusion of governorates that are not incorporated into a region in the same competence of the regions is mixing the federal and administrative decentralization systems”.

On the other hand, Dr. Ali (2017), head of the legal department at the University of Babel said in an interview with the researcher that the approach of the constitutional legislator in the distribution of competence granted very broad competence to the governorates. Also, Mr. Al – Mahnah (2017), a member of the Iraqi Parliament, said, in an interview with him, that the constitution gave the governorate councils very broad powers.

The researcher agrees that this constitutional approach is strange, and would like to highlight the following two points.

Firstly, the constitutions which regulate the competence of local units in the decentralized administrative system, normally state the general principles and leave the details to the law (Shlash, Al-Mahdawi, Lateef, Kazem, n.d.). For example, Article 134 of the Tunisian Constitution of 2014 states that “Local authorities possess their own powers, powers shared with the central authority, and powers delegated to them from the central government. The joint and delegated powers shall be distributed in accordance with the principle of subsidiarity. Local authorities shall enjoy regulatory powers in exercising their mandates. Regulatory decisions of the local authorities shall be published in an official gazette of local authorities.” Also, Article 180 of Egyptian Constitution of 2014 states that “Local councils shall be competent to follow up the implementation of the development plan, monitor the different activities, the exercise of oversight over the executive authorities using tools such as providing proposals, and submitting questions, briefing motions, interrogations and others, and to withdraw confidence from the heads of local units, as regulated by Law.” Finally, Article 72 of French Constitution states that “Territorial communities may take decisions in all matters arising under powers that can best be exercised at their level. In the conditions provided for by statute, these communities shall be self-governing through elected councils and shall have the power to make regulations for matters coming within the conditions of the law.” It is clear from the texts of these constitutions that they transferred the details of the competence of local councils to the law and that they were limited to the general principles.

Secondly, that the Iraqi constitution was unique in the method of mixing two different systems, which was criticized by some authors as mentioned above. In fact, the reason for this approach is due to the historical reasons that is related to the establishment of the Kurdistan region in 1992 during the rule of Saddam Hussein. That is, The Kurdistan region already existed when the Iraqi Constitution of 2005 was written, as mentioned earlier. On top of that, there are also political reasons which are related to the

different orientations of political parties on the system of government in Iraq, for there are those who wanted the federal system, while other parties wanted a decentralized administrative system, and more, there is a third group that did not want to give broad powers to the provinces. So, that is why the Iraqi Constitution came out this way (Isra Aladdin, 2012, P. 229). Professor Althabhwawi (2017) in his interview with the researcher pointed out that the multiple political trends were formulated this constitutional approach.

ANALYSIS OF ARTICLE 122 OF THE IRAQI CONSTITUTION OF 2005

Article 122 is about the organization of the decentralized administrative system in Iraq. The first paragraph of this article states that “The governorates shall be made up of a number of districts, sub-districts, and villages.” This article provides for the local units which are grouped together to form the governorate. Also, Article 122 provides for the election of the governorate council and the governor, as mentioned earlier. On the other hand, the second and fifth paragraph of Article 122, shall be analyzed below. These two paragraphs are important because they determine the general principles of the decentralized administrative system adopted by the Iraqi Constitution and they have given rise to many discussions as we shall see later in this paper.

ANALYSIS SECOND PARAGRAPH OF ARTICLE 122

The second paragraph of Article 122 states that the “Governorates that are not incorporated in a region shall be granted broad administrative and financial authorities to enable them to manage their affairs in accordance with the principle of decentralized administration, and this shall be regulated by law.”

According to the Article 122 of the Constitution, a new Law was passed and published in the Iraqi Gazette on 19/3/2008. The Law of Governorates Not Incorporated into a Region No. 21 of 2008 (hereinafter referred as LGNIR) espouses a decentralized administrative system. And this system is implemented in the governorates which do not belong to a federal region.

It is clear from the second paragraph of Article 122 that the governorates that are not incorporated in a region are outside the federal system. Therefore, the provisions of this article include governorates that do not implement the federal system. The constitution “granted broad administrative and financial authorities”. It is evident, that the constitution granted broad authorities for the governorates, but these authorities are merely “administrative”. The administrative authorities are an

administrative activity which issues from the executive authority (Abdul Rahman,2013).On the other hand, the broad financial authorities are consistent with the broad administrative authorities, as the authorities will not be able to function without financial powers. Therefore, if the governorates do not have wide financial authorities, they will be “handcuffed”.The report to the United Nations (ESCWA)states that the “granting broad powers through the law is useless as long as financial allocations are identified and attached with instructions and controls that forbid the good use of available resources.”(Shlash, Al-Mahdawi, Lateef, Kazem, n.d.)

In the second paragraph of Article 122, the constitutional legislator stated that the broad administrative and financial authorities of the governorates are under the principles of administrative decentralization. Thus, the principles of administrative decentralization are applied to the wide authorities of the governorates. The report for United Nations(ESCWA) states that “Expanding local administrative and financial powers do not contradict the administrative decentralization principle so long as such expansion does not cover the legislative areas.”(Shlash, Al-Mahdawi, Lateef, Kazem, n.d.).In the same context, Al-Hassani 92016) said,that “The expansion of administrative and financial powers do not interfere with administrative decentralization.”In short, in accordance with the principles of administrative decentralization, the administrative activities are being distributed between the central government and administrative units only, in other words, there is no such distribution for the legislative and judicial authority. That means the administrative units do not have the authority to issue laws, the most they can do is to issue administrative decisions. In the decentralized administrative system, there is only one legislative authority, that is,Parliament. Under administrative decentralization, the governorates can run their affairs by the decisions that are issued according to the laws enacted byParliament.

ANALYSIS FIFTH PRAGRAPH OF ARTICLE 122

Fifth Paragraph of Article 122states that “The Governorate Council shall not be subject to the control or supervision of any ministry or any institution not linked to a ministry. TheGovernorate Council shall have independent finances.”This article is a reaction to the strict control exercised by the central authority over the governorates before 2004 Constitution in Iraq.(Shlash, Al-Mahdawi, Lateef, Kazem, n.d.)Therefore, sharp phrases can be noticed for this article. Fatawi’s opinion(2010) about the observe of the central government before 2004 was that “The control exercised by the central authority over the

local entities is to ensure the legitimacy of its decisions, but in Iraq, we find that the legislator deepened so much in that.” (P.67)

Some authors criticized prevent the control of ministries on governorate councils, such as Ghidan (2012), who says “the observation is the safety valve for the country's unity” (P. 38). The researcher agrees with the author. Also, Mahdi (2009) stated that granting broad competence to the governorate councils with the prevention of administrative control by ministries and institution not linked to a ministry, with the lack of experience for governorate councils and corruption it leads to the fragmentation of the country and its division. The researcher thinks that Ghazi's opinion is correct. But, the author went further than that and considered administrative control by the ministries to be an element of the decentralized administrative system. Therefore, dropping this element will lead to the fall of the administrative decentralization, and accordingly, we cannot talk about the existence of administrative decentralization (Mahdi, 2009). The researcher does not agree with the author because there are countries that have adopted the decentralized administrative system and prevented the administrative control of the governorates and replaced it with the control by the judiciary such as Article 181 of the Egyptian Constitution which provides for “Local council decisions that are issued within the council’s mandate are final. They are not subject to interference from the executive authority, except to prevent the council from overstepping these limits, or causing damage to the public interest or the interests of other local councils.” In France, the Local Units Law of 1982, provides for the control of the local units activity by the judiciary (Fudel & Delphoeve, 2001, P.323). Also, in Iraq the governorates can be controlled by the judiciary (Ghidan, 2012, P.20). In addition, the fifth paragraph of Article 122 does not prevent independent commissions such as the Board of Supreme Audit and Commission on Public Integrity to observe the government councils. Article 47 of the LGNIR, states that “The governorate offices and councils shall together be subject to monitoring by the Board of Supreme Audit and branches of the independent commissions formed in accordance with the constitutional provisions.” But, this control is not administrative control. Also, the Second paragraph of Article 2 of the LGNIR stipulates that “The governorate council and the local councils are subject to monitoring by the Council of Representatives.” The administrative control by the ministries is different from the control by Parliament, the former is professional in nature while the latter’s control is political (Mohamed & Zaher, 2012, P.187).

In conclusion, it is clear that Article 122 regulates the regional administrative decentralization, and although the governorates are granted wide competence, the ministries are prevented from

observing the governorates councils. However, the Council of Ministries has the right to monitor the governorates councils. and this is because Article 122 specifically forbids the ministries, but not the Council of Ministries.

Cravens (2011) stated that, the Second paragraph of Article 122 qualifies the kind of decentralization in Iraq as 'administrative.'" (P.6). Also, Al-Hassani (2013) said that "the principle of Article 122 establishes the administrative decentralization of governorates not incorporated in a region." Finally, Mahdi (2009) states that "The constitution adopted the administrative decentralization system for the governorates that were not incorporated in a province."

ANALYSIS OF ARTICLE 115 OF THE IRAQI CONSTITUTION OF 2005

Article 155 of the Iraqi Constitution states that "All powers not stipulated in the exclusive powers of the federal government belong to the authorities of the regions and governorates that are not organized in a region. With regards to other powers shared between the federal government and the regional government, priority shall be given to the law of the regions and governorates not organized in a region in case of dispute."

The phrase "priority shall be given to the law of the regions and governorates not organized in a region in case of dispute." in Article 115 is ambiguous. The ambiguities of this phrase have caused problems in the implementation of administrative decentralization by the governorates. Some governorates have relied upon Articles 115 and 122 of the constitution and the LGNIR to issue laws. For example, the Night Guards Law, No. 2 of 2011 issued by the Babil Governorate Council (Official Gazette of the Babel Governorate Council, 2011, No. 6). and the law regulating the appointment of senior positions, No. 4 of 2014 issued by the Muthanna Governorate Council (Muthanna Governorate Council's letter, 2014, No. 2/14/4927).

The head of the legal committee in the Muthanna Governorate Council, in an interview with the researcher, said that the Muthanna Governorate Council issues laws based on the constitution and of course, it is based on the LGNIR as well (El Marzouk, 2017). On the other hand, in another interview with the head of the Muthanna Governorate Council, the respondent said that the constitution and the Federal Supreme Court grant the right to the governorates to legislate laws (Al- Yasiri, 2017). In addition to the above, a member of DhiQar Governorate Council, Mr. Ahmed (2017), said that the governorate council rely upon Articles 115 and 122 for the issuance of laws. And, the Federal Supreme Court has issued decisions in favor of the governorates in this regard.

There is no problem with the regions because it can issue laws, according to the constitution, but the term “law” in this text is ambiguous in relations to the governorates. Does it mean the laws issued by the governorates? Does it mean that it is the same meaning as the law issued by parliament? Or is it a term for another legal activity that differs from the law issued by parliament? It was the term for “administrative decisions” which are issued by the governorates councils? but the constitution was not successful in naming this legal activity. Anyway, there are ambiguities in this article. Some authors have opined that the constitutional legislator’s intention in Article 115 was to allow the governorate councils to issue laws explicitly(Ahmed,2015, P. 390).Other authors went on to say that Article 115 implicitly grants the governorate councils legislative authority (Ghidan,2012, P41).While a third group opined that the governorate councils exercises administrative activity similar to the practice of government ministries to deliver services(Cravens,2011, P.4).

The main reason for the practical problems caused by Article 115 of the Iraqi Constitution is the Federal Supreme Court. This will be explained below.

INTERPRETATION OF THE FEDERAL COURT

Article 93 of the Iraqi Constitution states that “The Federal Supreme Court shall have jurisdiction over the following: Second: Interpreting the provisions of the Constitution.” Also, Article 94 provides for “Decisions of the Federal Supreme Court are final and binding for all authorities.”

The Federal Supreme Court of Iraq is supposed to interpret Article 115 and all the other articles of the Iraqi constitution so that it can be applied properly by the public authorities. But, the advisory opinions of the Federal Supreme Court have been ambiguous and contradictory.

THE FIRST ADVISORY OPINION (Federal Supreme Court, 2007)

During the drafting of the bill for the governorates not incorporated into a region, by Parliament on June 26, 2007, Parliament sought the legal opinion of the Federal Supreme Court on the issue of whether “does the governorate councils have legislative authority to enact local laws in accordance with Article 115 or any other articles of the Constitution”.

The Federal Supreme Court replied “that the court finds that this subject is governed by Articles 61 paragraph 1, 110, 111, 115 and 122 paragraph 2 of the Constitution.” The court added “the extrapolation of the contents of these articles refers to the authority of the governorate council to enact local legislation to regulate administrative and financial affairs so as to enable it to manage its affairs in

accordance with the principle of administrative decentralization, which Article 115 of the Constitution has granted priority in the implementation”. The court also states “that Parliament is exclusively specialized with the enactment of federal laws and does not have to issue local legislation for the governorate, based on the provisions of Article 61 paragraph 1 of the Constitution.”

It is clear that the parliament had ambiguity about the authorities of the governorate councils because of the ambiguity of Article 115 of the constitution in addition to the broad powers granted by the constitution to the governorate councils and the way of distributing competence between the central government and governorate councils. So, Parliament adopted the opinion of the Federal Supreme Court before the completion of the draft bill of the governorates.

Parliament has explicitly asked whether the governorate councils have the authority to issue local laws based on Article 115 and other articles of the constitution. So, the Federal Supreme Court replied that Article 115 and the other articles of the constitution, which is Article 122 paragraph 2 concerning the regional decentralized administrative system in Iraq and Articles 110, 111 and 115 concerning the distribution of competence. “These articles refer to the authority of the governorate council to enact local legislation to regulate administrative and financial affairs so as to enable it to manage its affairs in accordance with the principle of administrative decentralization”. That means the local legislation is administrative decisions and not laws because according to the principle of administrative decentralization, the governorate councils cannot issue laws, as discussed earlier. The court has explicitly stated that what is issued by Parliament are laws, not local legislation. It means that the court distinguishes between the term “law” and the term “legislation”.

Taleb (2015) said “We believe that this decision is right and in accordance with the provisions of the Constitution. These governorates operate according to the principle of administrative decentralization, which distributes executive competence between them and the authority of the Center, and not the legislative competence.” (P.214)

The opinion of the Federal Supreme Court seems to have been sufficient to convince Parliament that the governorate councils do not issue local laws. As evidence on that, the LGNIR which was issued after that did not provide the governorate councils with the competence to issue local laws.

In interviews conducted by the researcher with two members of the Council of Representatives, both members of Parliament said that based on the LGNIR, the governorate councils do not have the

authority to issue laws. However, the authority of the governorate councils is the issuance of administrative decisions (Abadi, 2017; Al Mahna, 2017).

THE SECOND ADVISORY OPINION (Federal Supreme Court, 2008)

The first consultative opinion of the Federal Supreme Court was not clear enough for the governorate councils. In addition, the LGNIR was issued on March 19, 2008, and it stipulates that the governorate council has legislative authority and that it can issue local legislation, which it caused confusion in some of the governorate councils. So, the Najaf Governorate Council requested the legal opinion of the Federal Supreme Court on the following issue. "Does the governorate councils not organized into a region have the authority to enact laws with regards to the imposition, collection, and disbursement of taxes in accordance with Article 115 and Article 122 paragraph 2 of the Constitution or any other articles or in accordance with any current Iraqi laws."

The Supreme Federal Court replied on April 21, 2008. In the beginning, the Court mentioned the text of Article 122 paragraph 2 which is "Governorates that are not incorporated in a region shall be granted broad administrative and financial authorities to enable them to manage their affairs in accordance with the principle of decentralized administration, and this shall be regulated by law." Then, the court stated the text of Article 7 paragraph 3 of the LGNIR, which is "Issue local legislations, instructions, bylaws, and regulations to organize the administrative and financial affairs so that it can conduct its affairs based on the principle of administrative decentralization in a manner that does not contradict the provisions of the Constitution and federal laws."

Then the court added:

"Based on the above, because the imposition, collection, spending, taxation, and the imposition of fees, and fines were financial matters referred to in Article 122 paragraph 2 of the Constitution of the Republic of Iraq. Therefore, the governorate councils which are not incorporated into a region, have the right to enact laws on the imposition and collection and spending of fees and fines so as to enable them to manage their affairs in accordance with the principle of administrative decentralization which it grants the Article (115) of the Constitution the priority in the application."

Here, the Federal Supreme Court, based on Articles 115 and 122 of the Constitution and Article 7 of the LGNIR, said that the governorate councils according to its competence, have the authority to issue local laws in accordance with the principle of administrative decentralization!!This is strange. How can a local authority issue a law based on a decentralized administrative system?

The author Ghidan (2012), commenting on the decision of the Federal Supreme Court said, “We find the extent of the contradiction of the Court. That the constitution grants to the governorates that are not incorporated into a region, broad administrative and financial authorities, and did not provide for legislative authority for a simple reason that is, they operate according to the principle of administrative decentralization.” (P.32). Another author stated that “The court's decision is baseless in the constitution”(Taleb,2015, P.215).The same author also said that the court's first decision is contradicted by its second decision(P.215).The researcher thinks that is true, In the court's first decision, it said that the governorate councils issue local legislation and the term “legislations” under administrative decentralization, can be interpreted as administrative decisions. But, in the second decision, the court mentioned that the governorate councils can issue laws. But, both decisions were issued based on the Iraqi Constitution of 2005, and the only change in the period between the first and second decision is the issuance of the LGNIR. In the second decision the Court took into account Article 7 of the LGNIR as well as Article 122 of the constitution. However, the Federal Supreme Court is competent in constitutional texts, not laws(Iraqi Constitution,2005, A.93).The court, in a decision, has said that “The Federal Supreme Court found that its competence was set forth in Article 93 of the 2005 Constitution of the Republic of Iraq and Article 4 of the Federal Supreme Court Law, No. 30 of 2005. None of these competence is the interpretation of laws. This is within the competence of the State Shura Council, according to Article 6 of the State Shura Council Law, No. 65 of 1979.”(Federal Supreme Court, 2009). The court repeated this text many times(Federal Supreme Court ,2009). On the other hand, changing the constitutional interpretation by issuing a law, means that this law amended the constitution. This is contrary to the principle of supremacy of the Constitution(Al Hassani,2013).

THE THIRD ADVISORY OPINION(Federal Supreme Court,2008)

The Basra Provincial Council on May 13, 2008, requested the Federal Supreme Court to clarify its competence in the imposition of local taxes and fees, which qualifies it to increase its revenues independently, according to Order No. 71, Local Governmental Powers of 2004 (this law was abrogated by the LGNIR).

The Federal Supreme Court replied on June 23, 2008, two months after the issuance of the second advisory opinion of the court.

The court stated that:

“The competences of the governorate council in the enactment of local laws are governed by Articles 61 paragraph 1, 110, 111, 114, 115 and 122 paragraph 2 of the Constitution. The extrapolation of the contents of these articles indicates to the authority of the provincial council to enact local legislations and regulate administrative and financial affairs so that it can manage its affairs in accordance with the principle of administrative decentralization, which Article 115 of the Constitution gives priority in the implementation. That the Council of Representatives is exclusively competent (in the legislation of federal laws and has no competence to issue local legislation for the governorate, based on the provisions of Article 61 paragraph 1 of the Constitution).”

The Federal Supreme Court added:

“As related to the competence of the governorate council in the imposition of local taxes and fees is based on Order No. 71. That the Federal Supreme Court found that Article 93 of the Constitution of the Republic of Iraq of 2005 and Article 4 of the Federal Supreme Court Law No. 30 of 2005 determined the competence of the Federal Supreme Court and not among them is the interpretation of laws and orders and the views or opinion about it. Its competence is to interpret the provisions of the Constitution according to Article 93. Therefore, the request of the Basra Governorate Council in this regard is outside the competence of the Court.”

In this opinion, the court mentioned the term “local laws” and then stated that base on Articles 110, 111, 122 paragraph 2 and 115 of the Iraqi Constitution, the governorates that are not incorporated into a region, can issue local legislation to manage their local affairs under the principle of administrative decentralization. The court also said that Parliament issues federal laws and does not issue local legislation.

Here the court, except using the term “local laws” in the beginning of the opinion, has returned to its first opinion. But, what does the court mean? Did it mean that the term “local laws” means local legislation? In fact, the court's opinion here is ambiguous, and needs clarification! On the other hand, the court based its opinion on the constitutional texts only and refused to interpret the legal text on the basis that its competence is to interpret the constitutional texts only. So, its opinion came close to the first opinion, which was only based on the constitution. But, what about the second opinion that was based on the LGNIR in addition to the constitution?!

Ahmed (2015), said that “The Federal Supreme Court did not answer the Basra Governorate Council's request to impose taxes and fees on the basis of Order No. 71 of 2004, under the pretext that its competence is determined by Article 93 paragraph 2 of the Constitution to interpret the articles of the Constitution without laws, orders, and its opinions about it” (P.401).

THE FOURTH ADVISORY OPINION (Federal Supreme Court, 2009)

On January 18, 2009, the Babil Governorate Council requested for a legal opinion about Article 115. This means that the previous legal opinions of the Federal Supreme Court were ambiguous, and as such Article 115 remains ambiguous. The Babil Governorate Council said that “the inquiry is about what is meant in Article 115, in the event there is a disagreement between federal law and the law of the regions and governorates not incorporated into a region. Is the law enacted by the governorate council or the regional council supposed to be amended or does it nullify the federal laws that violate it?”

The Federal Supreme Court replied on February 4, 2009 that “from the extrapolation of the text of Article 115 of the Constitution, the court finds that the priority in the application shall be to the law of the regions and governorates not organized in a region in case of conflict between them (Federal law on the one hand and the law of regions and governorates not incorporated into a region on the other).” The court added “Unless it is the law of the region and the governorate not organized into a region that is contrary to the Constitution regarding the common competence between the federal government and the regions or governorates that are not organized in a region.” The Court concluded its opinion by stating that it “The law will enact by the provincial council is not considered to be amended or nullified the federal law.”

The Federal Supreme Court in this legal opinion stated that the law issued by the governorate council cannot amend or repeal the federal law, i.e. laws passed by Parliament. This means that the local law is inferior to the law passed by Parliament and that it is subject to it (Al Hassani, 2013, P.16).

This means that a local law which is issued by a governorate council is lower than Parliamentary law. According to the principle of the legal rules gradation, the legal rules that are inferior to the Parliamentary law are administrative decisions (Al Hassani, 2013, P.7).

The result of the interpretation of the legal opinion of the Federal Supreme Court is that what is issued by the governorate council is an administrative decision. Even if it is called “local law”, but its nature is administrative (Al-Zubaidi, 2010, P.27).

THE FIFTH ADVISORY OPINION (Federal Supreme Court, 2014)

On May 20, 2014, the Wasit Governorate Council requested the Federal Supreme Court to interpret the following articles:

1. Article 122 paragraph 5 of the constitution, which states that “The Governorate Council shall not be subject to the control or supervision of any ministry or any institution not linked to a ministry. The Governorate Council shall have independent finances.”
2. Article 2 paragraph 1 of the Second Amendment Law to the LGNIR, No. 19 of 2013, which says that “The governorate council is legislative and oversight authority it has the right to issue local legislation to enable it to manage its affairs in accordance with the principle of administrative decentralization, in a manner that would not contradict with the Constitution and federal laws, which Falls within the exclusive competence of the federal authorities”.
3. Statement of competence of the governorate councils in the imposition and collection and spending of taxes and fees.

The Federal Supreme Court replied that:

“When checking, deliberating and examining the request which includes the interpretation of Article 122 paragraph 5 of the Constitution, it was found that the Second Amendment Law of the LGNIR has confirmed that The governorate council is legislative and oversight authority in the governorate and it has the right to issue local legislation to enable it to manage its affairs in accordance with the principle of administrative decentralization, in a manner that would not contradict with the Constitution and federal laws that fall within the exclusive competence of the federal authorities. Which means the independence of the governorate councils to manage the affairs of the governorate in related of the competence granted to them under the

Constitution and federal laws in its local affairs. Except for the exclusive competence of the federal authorities.”

The Federal Supreme Court added, “with regards to items 2 and 3 of the request by the Wasit Governorate Council regarding the interpretation of Article 2 paragraph 1 of the amended LGNIR, as well as the statement of the powers of the governorate councils, the answer is that it is beyond the competence of the Court to interpret the constitutional texts, without any other.”

The researcher has several comments related to the advisory opinion of the Federal Supreme Court, and they are as follows:

1- The Wasit Governorate Council requested for an interpretation of an article in the Constitution and another article in the LGNIR and also sought to clarify the competences of the governorate council to impose, collect and spend taxes and fees.

The Federal Supreme Court refused to answer the second and third question because it would have required it to interpret the text of the LGNIR, which it is not competent to do. The court has mentioned in many of its decisions since 2009 that only the State Shura Council has the competence to interpret the text of the law.

2- With regards to the interpretation of Article 122 paragraph 5 the Constitution, which is about the governorate council not being subject to the control or supervision of any ministry or any institution not linked to a ministry, the court responded by referring to the text of Article 2 paragraph 1 of the LGNIR. The aforesaid paragraph has a description of the governorate council and its authorities. That means the court agreed with what was stated in the paragraph.

According to Article 2 paragraph 1 of the LGNIR, which the court pointed out, the governorate council is legislative and control authority within the borders of the governorate and has the right to issue local legislation to manage the affairs of the province in accordance with the principle of administrative decentralization. The researcher has mentioned earlier that the local legislation within the principle of administrative decentralization means that the governorate council issues administrative decisions, not laws.

The court added that the governorate councils manage the affairs of the governorate in related to the competence granted to them under the Constitution and federal laws. That means the governorate councils are subject to federal laws. It also means that whatever is issued by the

governorate council is an administrative decision that is subject to federal laws. It has been noticed that the court has abandoned its former opinion that the local laws issued by the governorate councils have priority over federal laws according to Article 115 of the Iraqi Constitution. In this advisory opinion, the Court also did not mention the term “local law” and the third point (mentioned below) supports this opinion.

3- In 2013, the Second Amendment Law for the LGNIR, Law No. 19 of 2013 was issued. The law stipulates in Article 2 paragraph 6 that “Administer the shared competence provided for in Articles 112, 113 and 114 of the Constitution by coordinating between the federal government and local governments and priority shall be to the law of the governorates not incorporated into a region, in a case of disagreement between them in accordance with the provisions of Article 115 of the Constitution.” It seems that the is aforementioned article has interpreted Article 115 of the Constitution, because at the end of the article the legislator stipulates that “priority shall be to the law of the governorates not incorporated into a region, in a case of disagreement between them in accordance with the provisions of Article 115 of the Constitution.” That means the word “law” .at the end of Article 115 of the Constitution is not intended to be laws issued by the governorate councils. But, it is intended for the Law of Governorates Not Incorporated into a Region, No. 21 of 2008. Therefore, the Federal Supreme Court after the issuance of the second amendment to the LGNIR did not mention the term “local laws”, which is clear from its recent decision in 2014.

4- The deputy head of the State Shura Council said in an interview with the researcher that “the recent advisory decision of the Federal Supreme Court is an indirect retreat of its previous opinion that the governorate councils issue laws.”(Nayef,2017).

Article 115 of the Constitution is not about the organization of regional administrative decentralization, but it came in the context of the distribution of competence between the central authority on the one hand and the regions and the governorates on the other. However, the ambiguity of this article has led to practical problems. The Federal Supreme Court was supposed to interpret Article 115 in order to clear its ambiguity in accordance with the Iraqi Constitution. But, the vagueness of the decisions of the Federal Supreme Court and its contradictions have led to the continuation of the problem. therefore, the governorate councils issued many laws. For example, the Law on Local Revenues in 2010 (Babel local Gazette, 2010) and The Babel Governorate Council issued The Guards of Night Law in 2011 (Babel local Gazette, 2011). The Karbala Governorate Council issued The Service Fee Law in 2010 (Karbala local

Gazette, 2010) and The Basra Governorate council issued Local Public Holidays Law in 2014 (Alsumaria news,2015).

EVALUATION OF THE ADVISORY OPINIONS OF THE FEDERAL SUPREME COURT

The decisions of the Federal Supreme Court on Article 115 of the constitution should have been clear and decisive. But, the court's decisions also needed explanations too. Although the court in its last decision in 2014 has indirectly stated that the governorate councils issue local legislation under the decentralized administrative system after issued an amendment to the LGNIR, which interpreted Article 115. However, the ambiguity of the recent decision of the Court and the previous decisions of it, led to the continued wrong implementation of administrative decentralization by the governorate councils.

CONCLUSION

The Constitution of 2004 and 2005 adopted the application of the principle of democracy. These two constitutions differed from the previous Iraqi constitutions by stipulating the guarantees of applying this principle. That after stating the details of the decentralized administrative system in the text of the Constitution, the Constitution stated established of the Federal Supreme Court to interpret the provisions of the Constitution and the abolition of legal texts contrary to it. One manifestation of democracy is that the governorates that do not want apply the federal system, can run its own affairs by applying the principle of regional administrative decentralization.

According to regional administrative decentralization, the administrative function is divided between the central authority and the governorates. And the governorates may issue administrative decisions but cannot issue laws, because, under administrative decentralization, there is one legislative authority, that is the central authority. Therefore, the issuance of laws by the governorate is a violation of the Constitution.

The text of Article 115 of the 2005 Constitution was ambiguous, which led to the belief of governorate councils that they have the authority to issue laws, which helped this belief is that Article 122 of the Constitution provides for broad administrative and financial competence for the governorates. It also prevented ministries and non-affiliated bodies from the control of governorate councils.

In this case, the Federal Supreme Court should explain the ambiguity in the provisions of the Constitution with regard to administrative decentralization, especially when the governorates resorted

to it to clarify ambiguity in the provisions of the Constitution. But the decisions of the Federal Supreme Court were vague and needed to be interpreted as well. Also, these decisions are contradictory, for the court initially said that the governorate councils issue local legislation under administrative decentralization, then it said that the governorate councils issue local laws under administrative decentralization, then it said that local laws should not violate the constitution and federal laws, and after that it went back to what it has said before, that is, the governorate councils issue local legislation.

The ambiguity of the advisory opinion of the Federal Supreme Court has led to the continued problem of wrong application of the principle of administrative decentralization by governorate councils. Which continued to issue laws, which is contrary to the provisions of the Iraqi constitution, which does not grant governorate councils the power to issue laws, as mentioned earlier.

Some authors such as Ghidan (2012), said the constitution should be amended to solve the ambiguity problem in some of its texts (P.41). But this is not an easy practical solution. Because the procedures for amending the constitution are usually more difficult than issue law procedures, on the one hand. On the other hand, there is no defect in the provisions of the Constitution, but there is some ambiguity, and this is normal in the constitutions, and there is a competent authority to interpret the Constitution, which is the Federal Supreme Court in Iraq. So the problem is not in drafting the constitution but in the performance of the Federal Supreme Court.

To solve the problems of implementing administrative decentralization in Iraq, the performance of the Federal Supreme Court must be improved. Because the Constitution deals many details related to regional administrative decentralization in Iraq, so the Constitution must be applied and not to violate its provisions to ensure the proper implementation of administrative decentralization. The institution that guarantees the application of the Constitution is the Federal Supreme Court. Therefore, any imbalance in the performance of the court leads to a defect in implementation administrative decentralization.

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