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CONSTITUTIONAL TEXTS IN THE FIELD OF FUNDAMENTAL RIGHTS

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ABSTRACT

Fundamental rights are the first nucleus that has pushed the constitutions of the world to strive for a kind of balance between power and freedom. This concept seeks to achieve a degree of peaceful coexistence between individuals who demand the need to respect their rights and freedom resulting from natural law and those in power.

Accordingly, the present study is based on showing the specificity of the constitutional texts in the field of fundamental human rights and the extent to which these texts are affected by the considerations that take into account the will of the people and the constitutional judiciary, which prompted the proponents of the theory of the sovereignty of Parliament to ensure respect for the constitutional texts intended to be applied by the constitutional judge.

The present study also indicates that the validity of the applicable fundamentalist rules to resolve the apparent conflict between the constitutional texts and other legal texts has not been proven due to the specificity of the constitutional texts in the field of fundamental rights.

Keywords: Fundamental rights, constitutional texts, authority, constitutional judiciary, popular will.

INTRODUCTION

The issue of fundamental human rights and how to protect them has always been one of the most discussed topics at both the local or international levels. This situation increased significantly after the Second World War after the establishment of the United Nations and the issuance of many international conventions in this context. The international community found itself in need of laying out clear foundations that explicitly define the fundamental rights and freedom of individuals and provide mechanisms to protect them against any action that infringes them. However, the guarantees present at the international level have not, of course, reached the desired result. Whatever international mechanisms and means exist aiming to achieve a kind of protection and find an international consensus in this field, in the end, the one

relied upon is the protection available at the internal level of each country and stipulated in constitutions and laws, which are supposed to be enforced through independent judicial bodies.

Today, most, if not all, constitutions contain texts that affirm rights and freedom and provide individuals with multiple means and mechanisms to protect them. Yet, the text itself is not sufficient to achieve this protection. Constitutions provide for these rights and provide guarantees for respecting them. But, the comparison reveals that the effectively applied level of respect for fundamental rights differs between the constitutions of the countries of the world.

First: The significance of the present study

The issue of preserving fundamental rights depends on multiple frameworks. Popular oversight is not sufficient to guarantee and protect it. This monitoring is described as being too weak to be effective because its scope is limited to the elections within the constitutional limits that regulate it.

Accordingly, the issue of preserving the constitutionally recognized rights of individuals means the group of active powers that practice the manifestations of sovereignty when setting up the executive legal rules related to constitutional texts, which include disclosure of natural rights or recognition of other rights. This means that true protection of fundamental rights cannot be of a degree of effectiveness and influence unless the party in which it is carried out is characterized by integrity and impartiality and is trusted by the owners of rights so that reaching these standards within the title of competition between the principle of freedom and constitutional judiciary suggests that this task is given to a Judicial power, whether it is within the state's judicial organization or within a special judicial body that establishes an investigation for this purpose. This body must decide on the issue of protecting fundamental rights as a result of the constitutional law's violation of the constitutional provisions that regulate it (Missaglia & Sanchez, 2020; Morantes Quintana et al., 2020; Kobayashi & Farrington, 2020; Ozcan & Vural, 2020; Kusel et al., 2020; Lawrence, 2020).

Second: The objectives of the present study

The issue of preserving the constitutionally recognized rights of individuals, especially in confronting the legislator as one of the poles of political power means those practicing the manifestations of sovereignty when developing the executive legal rules for constitutional texts, especially the constitutional texts that include disclosure of natural rights or recognition of other rights. Popular oversight may not be sufficient to guarantee and protect it. This monitoring is characterized by being too weak to be effective because it is not practiced except at the polls on the assumption that the elections are characterized by integrity and impartiality of the bodies that supervise them so that they adhere to the constitutional limits that regulate the electoral process. Therefore, true protection of fundamental rights cannot achieve a degree of effectiveness and impact unless the party in which it is undertaken is trusted by the right holders.

Third: The problem of the study

It seems that the issue of fundamental rights raises a problem of a high degree of importance, including the possibility of grasping the special nature of constitutional texts in the field of fundamental rights and the way to protect these rights in the context of the controversial relationship in application between the principle of freedom and constitutional judiciary.

Fourth: The plan of the study

Taking note of the foregoing, these questions necessitate showing the special nature of the constitutional texts in the field of fundamental rights, just as the reality of fundamental rights cannot be overlooked in the midst of the conflict in application between the principle of freedom and constitutional judiciary as an entity possessing the instrument of control and protection within its constitutional framework.

In addition, the analytical method is followed to find out all the ambiguities surrounding the details of the present study. Accordingly, the present study is divided into two sections. Section one tackles the special nature of the constitutional text in the field of fundamental rights. Section two discusses the constitutional text from the point of view of the principle of freedom and constitutional justice.

SECTION ONE

The special character of the constitutional text in the field of fundamental rights. There is no doubt that the most important authority of constitutional texts is that they work to protect fundamental rights through monitoring the constitutionality of laws issued by the legislative authority, provided that the effectiveness of these texts is only after the constitutional judiciary takes its role in terms of protecting the fundamental rights that every human being possesses. This is a constant principle among the drafters of the world's constitutions (Salih, 2009: 159).

Accordingly, defining the nature of constitutional texts and showing their role in the field of fundamental rights becomes clear only after talking about the most important features that characterize these texts. This leads to the fact that these texts are of a special nature, ambiguous, and lack constitutional limit, which results in the abundance of the expressions that make up the composition of the constitutional texts. In turn, this requires correct interpretation of the constitutional text. This feature leads towards another characteristic, which is stirring up controversy in the application of constitutional texts. Hence, this section will be divided into two subsections. The ambiguity of the constitutional text is discussed in the first subsection. The inconsistency in the application of the constitutional text is addressed in the second subsection.

First: Ambiguity of the constitutional texts

Among the characteristics of the constitutional texts in the field of fundamental rights is the lack of definition of the constitutional texts. This makes the text ambiguous. At the same time, these texts are characterized by the capacity and flexibility of the words used, which leads to the possibility of amending the constitutional text

whenever it becomes ambiguous. This characteristic manifests itself in two aspects: the first is verbal or semantic uncertainty, which means that the word leads to more than one meaning, and the second is methodological uncertainty, which means that the sentences bear more than one meaning, which leads to the interpretation and decipherment of this ambiguity (Hassanain, 2013: 210).

But, sometimes, the lack of definition is not limited to what has been mentioned above. There is a third aspect in this context, which is the ambiguity that leads to making the texts vague in terms of significance, which leads to the difficulty of defining the term. Then, some facts and actions are involved in The framework of the text and others are not governed by the constitutional text (Hart, 1999: 62). Therefore, some scholars argue that one of the most important features of the constitutional text, especially in the field of rights and freedom, is that it contains many controversial expressions. This is the case in the texts of laws For example, for the provisions of civil laws that stipulate the invalidity of contracts that contain conditions contrary to public order and public morals, it is noted that the constitutional legislator has resorted to this approach more than for the ordinary legislator. This situation requires the constitutional judge to issue an interpretative judgment that has the same characteristics as that of the interpreted constitutional text from the dialectic in determining its meaning and content (Comilla, 1997: 26).

Second: Contradiction of applying the constitutional text

The issue of conflict between the legal text and the constitutional text is one of the complex problems that penetrate organizing fundamental rights. Indeed, it constitutes one of the reasons for the lack of definition that characterizes the constitutional texts. So, the problem of this conflict is resolved through the application of the general principle, which requires that the private legal text prevails over the public. The subsequent legal text eliminates the previous one. The higher legal text prevails over the lower legal text according to the legal hierarchy. In light of this, the question that arises is how is the situation within the framework of the constitutional texts?

It seems that the solution is not as easy as within the framework of legal texts. This means that the above principles cannot be relied upon except with regard to the primacy of the private text over the general in application because the constitutional texts have the same rank and they are issued at the same time except for what It is related to amendments to constitutional rules, where the old legal text is canceled and replaced by the new text. In any case, it can be said that the problem of the conflicting constitutional texts regulating fundamental rights cannot be sacrificed in the protection of one of the rights at the expense of the other protected rights, but the interpretation of the text must be in proportion to the guarantee of protection for other rights. This requires interpreting the constitutional text as part of an integrated system. Therefore, some fundamentalist rules can be confiscated to solve the problem of contradiction between constitutional texts. For example, there is a conflict between constitutional texts that require non-discrimination between citizens and constitutional texts that deal with inheriting the throne for males and not females in the royal family (Article 25 of the Jordanian Constitution of 1925, amended in 2011). That is why inconsistency between the constitutional texts is referred to in the present study. This conflict cannot be resolved based on the rule that the higher text is applied to the lower nor does the application of the saying that the following rule cancels the

previous one because both texts were applied within one date. Therefore, the contradiction between the constitutional texts occurs when the legislator organizes the subject of a general rule and puts specific exceptions to that rule, then other constitutional texts place restrictions on the general rule with other exceptions that are not related to the exceptions contained in the constitutional text that set the general rule. For example, the regulation of the legislator of the constitutional right to the inviolability of homes, it establishes a general rule that prohibits the violation of the sanctity of housing, but this rule restricts it with exceptions as it is permitted to enter it with the permission of its owner or with a judicial permission for inspection (Articles 30, 34 of the Iraqi Constitution in effect of 2005).

Accordingly, it can be said that the solution to the problem of contradiction or conflict between the protected rights and interests is possible through a comparison between them on the basis of the priority of the more important interest. But, assuming that it is difficult to make a comparison between rights, how can conflict be made?

Fig 0 (Nagel, 1997: 128) states that there are five basic criteria for solving this problem: Distinction between specific obligations to specific persons to fulfill the fundamental rights system or institutions in their own right, general duties towards all, public benefit and goals Perfectionism and the covenants that must be adhered to in order to fulfill the system of fundamental rights and to undertake various projects in all aspects of life.

The main focus in defining the main problem in the differentiation lies in the development of abstract differential criteria, which can be resorted to in the event of a conflict due to the nature of the constitutional value, which is characterized by the constitutional values that are not measurable or differentiated. Thus, the lawmakers of the constitutional text are concerned with referring to these values, in general, leaving the details to the ordinary legislator. For example, if the constitutional legislator elaborates all the details related to the right of education or the freedom to practice religious rituals, it will lead to divisions within the composition. This leads to the failure of the constitutional text to perform its function. Therefore, the constitutional legislator does not interfere in the details of the law. Finally, it must be said that the constitutional texts are not paper texts but rather practical tools that find application in practice, which leads to another problematic discussion, which is the relationship between the principle of freedom on the one hand and the practice of the constitutional judiciary of its function on the other hand.

SECTION TWO

The constitutional text between the principle of freedom and the constitutional judiciary

The relationship between the principle of freedom and the constitutional judiciary appears in terms of the interpretation of the constitutional texts related to the legal text to be interpreted. If the interpretation process is among the competencies granted to the constitutional judiciary, this raises a problem in the relationship between the constitutional judiciary as a competent body with legal interpretation and the democratic principle as an emerging practice Within the limits of the legal texts laid down by the legislative authority stemming from the general will of the nation.

Therefore, what is the way to address this problem? To answer this question, this section is divided into two subsections. The manifestations of the conflict between the principle of freedom and constitutional judiciary are addressed in the first subsection. The ways to address the conflict between the principle of freedom and constitutional judiciary are presented in the second subsection.

First: Manifestations of conflict between the principle of freedom and constitutional judiciary

The relationship between the principle of freedom and constitutional judiciary is problematic. It has become a conversation of constitutional jurisprudence in light of the spread of the theory of the supremacy of parliament in constitutional systems in general. This theory was moving towards eliminating the role of the constitutional judiciary in front of the so-called principle of freedom, considering the latter a representation of the democracy of people. This arguments is based on that the constitutional judiciary does not possess popular legitimacy. As long as the popular will has authorized Parliament to practice the manifestations of its sovereignty in legislation, the parliament can no longer be subject to any oversight other than popular oversight. This is in addition to the indirect popular mandate of Parliament to enact the law that leads To the transfer of the practice of the manifestations of sovereignty to Parliament throughout its term (Al-Najjar, 2017: 132).

This trend is also based on the fact that the constitutional judiciary's lack of democratic legitimacy is based on the fact that this body is not directly elected by the people who represent the source of authority by universal suffrage. Therefore, it is a priority that this body does not practice control over the nation's representative. Stagnation in some constitutions restricts the constitutional judge towards freedom from complexity in the procedures that he must abide by in order to make constitutional amendments through which he can reduce control over his actions (Al-Khateeb, 2008: 509). Moreover, the existence of constitutional concepts that are subject to interpretation is affected by the circumstances and facts in which the interpretation takes place, which threatens the work of Parliament in the event that it conflicts with the interpretation given to the constitutional text, which will negatively affect the stability of the legal system. These data reflect the fact that the issue of conflict between the principle of freedom and constitutional judiciary is not at one level, but it varies according to the proponents of the theory of the supremacy of parliament from one case to another. In some cases, the democratic legitimacy of the constitutional judiciary disappears while the legitimacy becomes relative in other cases (Brichieri-colombi, 2020; Grajetzki, 2020; Goo et al., 2020; Goo, 2020; Maria et al., 2020; Martin-moya et al., 2020; Bakytbekovich & Seisenbekovich, 2020; Chepa et al., 2020). For example, The constitutional judiciary in the United States of America possesses less democratic legitimacy than the constitutional judiciary in countries where the term is limited. Hence, a judge in the Federal Supreme Court assumes his duties for life. Whereas, in other countries, such as France, for example, a member of the Constitutional Council is appointed for a period of nine years (ibid: 511).

As for the rigidity of the constitution, the difficulty becomes in granting the constitutional judge the last word in determining the will of the constitutional legislator. Thus, he is granted the authority to judge the extent to which the law is

compatible with the will of the constitutional legislator, which he reaches and believes is the true will. This would give the constitutional judge the final say in deciding on the constitutionality of the law. As for the different constitutional concepts and the consequent ability of constitutional texts to be interpreted, it can be said that the more controversial the constitutional text is in identifying its meaning, the more there is a possibility for a conflict between the principle of freedom and constitutional judiciary. The latter has the final word for constitutional definition. Then, there will be a wider possibility to influence Parliament, but if the constitutional text is meaningful, the authority of the constitutional judiciary will be narrower in influencing Parliament (Hazboun, 2009: 65).

Accordingly, the interconnectedness and composition of the aforementioned justifications represents the basis for defining the constitutional judge's behavior towards the law by defining the will of the constitutional legislator and the ordinary legislator to determine the extent of reconciliation between them through the work of the principle of functional safety for the work of the legislator that is associated with the constitutional presumption as a general principle Which is characterized by regularity and fluidity as a requirement for respecting the principle of freedom (Masimanga & Sekhampu, 2020; Sabela, 2020; Tsunga et al., 2020; Van Der Westhuizen & Ntshingila, 2020; Govender & Govender, 2020; Hotar, 2020).

Second: Integration between the principle of freedom and the constitutional judiciary

The conflict is between the principle of freedom and constitutional judiciary. So, achieving consensus between them is a necessity called for by the specificity of constitutional texts. This necessity cannot be confiscated in light of the constitutional systems that take central control over the constitutionality of laws (ibid: 9).

The reasons for seeking to achieve reconciliation between the principle of freedom and constitutional judiciary can be attributed to several justifications, including that the constitutional document is the constitutional basis for the idea of constitutional judiciary and relying on it to legitimize this type of specialized judiciary. It also provides for the introduction of the constitutional judiciary to protect the fundamental rights of individuals (Shiha, 2008: 174). The judiciary is formed according to the will of the constitutional legislator in an identical manner to the constitutional document (Hassanain, previous reference: 13).

The need to achieve integration between the principle of freedom and the constitutional judiciary emerges in terms of providing protection for fundamental rights. Therefore, the value of the judiciary appears through its ability to achieve this goal. Fundamental rights constitute the ultimate goal of constitutions, especially written constitutions. Thus, the principle of protecting fundamental rights is effective whenever there is an individual right and freedom in practice. Hence, the principle of freedom is nothing but a process through which rights and freedom are enshrined by individuals in general, and political rights in particular, whether this practice is direct or indirect (Habermas, 1996: 264).

Based on that, there is no contradiction between the principle of freedom and constitutional judiciary as long as this latter institution is based on its legitimacy for

the extent of effectiveness in putting into practice the principle of protecting individual rights and freedom. Thus, respecting rights and freedom is only possible in democratic systems. Therefore, there is an inevitable correlation between the democracy of the constitutional system and its institutions, the effectiveness of rights, and the achievement of their protection. Protecting rights is only achieved through oversight of the public authorities related to those rights. Through oversight, a balance is achieved between rights, freedom, and public authorities at the practical level. The practical guarantee of balance with the theoretical guarantees represented in the content of the constitutional document are combined. In this way, there is integration between theoretical and practical constitutional guarantees to achieve a balance between power and freedom. It can also be said that the principle of freedom is not limited to the opinion of the majority, but it goes beyond that to embody the need for a party that is capable of achieving effective protection of fundamental rights and freedom. This is the justification on which the constitutional judge relies on the authority to monitor the constitutionality of laws in order to ensure that fundamental rights and individual freedom are not restricted (Lorene, 1999: 577).

CONCLUSIONS

The special nature of constitutional texts in the field of fundamental rights and individual freedom is obvious to the extent that it is related to finding solutions to the problem of conflict between the principle of freedom and the practice of constitutional judiciary and its powers as follows:

The results

1. The ambiguity in the constitutional texts in the field of fundamental rights aims to impart protection and maintain these texts because this situation allows creating legal interpretations that are consistent with the new circumstances.
2. Protecting fundamental rights does not depend only on the extent of the interference of the popular will in its formation, but it depends on the granting of legitimacy to the will of the constitutional legislator.
3. What confirms the authority of the constitutional judge is that he is subject to a set of controls and restrictions, including the necessity of a request to intervene to protect rights with the necessity that the decision be issued in a reasoned manner and that it be issued by the constitutionally determined majority to give these rulings the mandatory character.
4. The constitutional texts related to fundamental rights depend on the fulfillment of a standard among several criteria, including the distinction between specific obligations to specific persons or institutions themselves, public duties towards all, the public benefit, and the luxury goals that must be adhered to in order to fulfill the system of fundamental rights and to undertake various projects in all aspects of life.
5. The constitutional judiciary represents the democratic legitimacy and the supreme reference for protecting fundamental rights.

The recommendations

1. To solve the problem of ambiguity in constitutional texts, the constitutional legislator should develop legislations that are capable of accommodating facts that the legislator may not anticipate when developing legislations.
2. Selecting accurate and non-loose terms and expressions in order to understand the significance of the constitutional text and the explicit or implicit will in an easy and easy way.

3. Adopting the will of the constitutional judge when there is a conflict with the ordinary judge because this is the essence of the judge's work when applying the law.

REFERENCES

- Ichepa, P., Universiti, J., & Razak, L. T. (2020). Why Do University Students Perpetrate Internet Plagiarism? A Multiple Linear. 11(12), 947–955.
- Al-Khateeb, N. (2008). "Mediator in Political Systems and Constitutional Law", House of Culture for Publishing and Distribution, Jordan.
- Al-Najjar, M. (2017). "The Idea of a Mistake in the Constitutional Judiciary", Dar Al-Nahda Al-Arabiya, Cairo.
- Bakytbekovich, O. N., & Seisenbekovich, K. R. (2020). Recurrent Ventral Hernia's Prevention And Treatment After Hernioplasty. 11(12), 1025–1028.
- Brichieri-Colombi, S. (2020). A Spurred Spiral Ramp For The Great Pyramid. 17(3), 1–20.
- Comilla, V. (1997). "Justicia constitucional y democracia Centro De Estudios Constitucionales", Madrid.
- Goo, L., Liu, Z., Wu, Y., & Feng, W. (2020). Evaluation of recreational satisfaction of courtyard fishpond landscape based on environmental psychology. *Revista Argentina de Clinica Psicologica*, 29(1), 489–498. <https://doi.org/10.24205/03276716.2020.66>
- Goo, S. (2020). Inspiration mechanism of dance creation based on brain subconsciousness theory. *Revista Argentina de Clinica Psicologica*, 29(1), 453–460. <https://doi.org/10.24205/03276716.2020.61>
- Govender, R. G., & Govender, D. W. (2019). Learning Geometry Online: A Creative Individual Learning Experience. *International Journal of eBusiness and eGovernment Studies*, 12(2), 151-165.
- Grajetzki, W. (2020). The Coffin Of Nywty □ Nuti □ , Saqqara. 1–29.
- Habermas, J. (1996). "Between Facts and Norms", Cambridge Mass, The Mit Press London.
- Hart, H. (1999). "Positivism and Separation of law and Morals, Oxford, Clarendon Press.
- Hassanain, I. (2013). "Judicial Oversight on the Constitutionality of Laws", Dar Al-Nahda Al-Arabiya, Cairo.
- Hazboun, G. (2009). Introduction to the Science of Law, House of Culture for Publishing and Distribution, Jordan.
- Hotar, N. (2020) Herd Behavior In Terms Of Social Psychology: The Example Of Crypto Asset Markets. *International Journal Of Ebusiness And Egovernment Studies*, 12(1), 79-90.
- Kobayashi, E., & Farrington, D. P. (2020). Why do japanese bully more than americans? Influence of external locus of control and student attitudes toward bullying. *Educational Sciences: Theory and Practice*, 20(1), 5–19. <https://doi.org/10.12738/jestp.2020.1.002>
- Küsel, R., Schultz, C., & Rankhumise, E. (2020). Perceptions Of Women Entrepreneurs About Sense Of Coherence.
- Lawrence, K. O. K. (2020). Relationship Between Skills Development, Employee Motivation And Organisational Performance In South African Organisation. *International Journal Of Business And Management Studies*, 12(1), 177-190.
- Lorene, F. (1999). "Seistesis sobre la jurisdiccions constitucional en Europa Cento De Estudios Constitucionales", Madrid.
- Maria, E., Coelho, C., Paula, M., Celina, S., Fonseca, F., Pinto, A., & Isabel, M. (2020). Exercise with Music : An Innovative Approach to Increase Cognition

- and Reduce Depression in Institutionalized Elderly. 29, 49–56.
- Martín-moya, R., Ruiz-montero, P. J., García, E. R., & Leeson, G. (2020). Psychological and Environmental Factors for Older Adults to Exercise: A Systematic Review. 29, 93–104.
- Missaglia, M., & Sanchez, P. (2020). Liquidity preference in a world of endogenous money: A short-note. *Cuadernos de Economía*, 39(81), 595-612.
- Morantes Quintana, G., Rincón Polo, G., & Perez Santodomingo, N. (2020). Willingness to pay for better air quality in the face of industrial emissions pollution in Venezuela. *Cuadernos de Economía*, 39(79), 191-217.
- Msimanga, T. H., & Sekhampu, T. J. (2020). Perceived Barriers To Employment: A Case Of Female Household Heads In A South African Township. *The International Journal Of Social Sciences And Humanity Studies*, 12(1), 192-206.
- Nagel, T. (1997). "The Fragmentation of Value". Cambridge University Press.
- Özcan, N. A., & Vural, Ö. (2020). The mediator role of thriving in the relationship between self-efficacy and mindfulness in middle-adolescence sample. *Educational Sciences: Theory and Practice*, 20(3), 56–66. <https://doi.org/10.12738/jestp.2020.3.005>
- Sabela, P. T. (2020). Trends And Realities: Provision Of Low-Cost Housing At King Cetshwayo District Municipality, Kwazulu-Natal Province, South Africa. *The International Journal Of Social Sciences And Humanity Studies*, 12(1), 130-145.
- Salih, O. (2009). "Judicial Oversight before the Constitutional Courts in Kuwait", 1st edition, *Kuwaiti Law Journal*, No. 4, Year 28.
- Shiha, I. (2008). "General Constitutional Principles", 4th edition, University House, Lebanon.
- Tsunga, K. R., Moores-Pitt, P., & McCullough, K. (2020). A Non-Linear Analysis Of South African Exports And Selected Macroeconomic Variables. *International Journal Of Economics And Finance*, 12(2).
- Van Der Westhuizen, J., & Ntshingila, L. (2020). The Effect Of Supplier Selection, Supplier Development And Information Sharing On Sme's Business Performance In Sedibeng. *International Journal Of Economics And Finance*, 12(2), 290-304.