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THE LEGALITY OF ISSUING A STATE ORDER IN THE DECISIONS OF THE FEDERAL SUPREME COURT IN IRAQ

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Abstract

In this legal study, we discussed the nature of the state order in terms of its legal definition, as the state order is a temporary administrative procedure issued by the competent judge in some instances according to the law on the petition submitted by one of the parties to the case, including facts and evidence and supported by documents in an urgent matter. Likewise, the state order does not enjoy the authority of the ruling order. Still, it enjoys the power of urgent legal enforcement. It suspends the implementation of all urgent procedures and decisions resulting from the issue issued against the state order until the issue of the case is resolved.

And that the Federal Supreme Court, as far as the matter relates to the constitutional dispute, has taken the issue of issuing the state order regarding these disputes, even though its law and internal system are devoid of a text on it, basing it on Civil Procedure Law No. 83 of 1969 as amended in force, and as far as the matter relates to the nature of the constitutional dispute. It also fortified the state decision issued by it from appeal, although the Iraqi Civil Proceedings Law permitted appeal against this decision by way of grievance. Therefore, we will discuss this issue from both legal and practical perspectives, as well as the role of the Federal Supreme Court in resolving constitutional disputes and issuing such decisions when considering constitutional disputes.

Keywords

Legal definition, Federal Supreme Court, constitutional dispute, constitutional courts.

INTRODUCTION

The primary function of the judiciary and courts of all kinds, including constitutional courts, is to decide on the cases brought before them by issuing rulings and decisions to return rights to their rightful owners, preserve legal positions, and protect them by the force of law. To do this, these courts must carry out a series of judicial and legal procedures that contribute to forming the court's conviction by issuing judicial rulings.

Among these judicial procedures are state decisions, which are procedures and orders that preserve the right in dispute and work to spread reassurance among those requesting them until the legal centers are stabilized and the case is decided. State orders are considered ineffective against adversaries. They

cannot be considered rulings because the ruling is decisive in the case in terms of the merits and, therefore, does not have the authority of the *res judicata*.

The Iraqi legislator adopted state orders, as he gave those who have the right to obtain an order from the court to request it to issue a state order in case of urgency, as amended by the provisions contained in the Civil Procedure Law No. 83 of 1969. However, the problem of research in this study is whether these provisions contained in the Iraqi Civil Procedure Code in force can be relied upon to decide the constitutional dispute presented before the Federal Supreme Court. Especially since the law and internal regulations of the Federal Supreme Court did not stipulate the issue of accepting or rejecting the state order about the constitutional dispute. Also, what is the position of the Federal Supreme Court from a practical standpoint on issuing state orders? Did it take the text contained in the Civil Procedure Code or restrict it in a way commensurate with the nature of the constitutional dispute?

In this research, we have relied on the inductive analytical approach to analyze legal texts by general constitutional principles and project them onto practical reality through the rulings and decisions of the Federal Supreme Court issued in this regard.

The research was divided into an introduction and two requirements. In the first requirement, we discussed the nature of the state order in terms of definition and authority. Then, in the second requirement, we discussed the legal basis for the authority of the Federal Supreme Court to issue state orders in two branches. First, we explain the constitutional dispute. As for the second section, we discussed the authority of the Federal Supreme Court. In issuing these orders, and finally, a conclusion that included the most important findings and recommendations.

Section One

What is the state matter?

The primary function of the judiciary and the various types of courts, including constitutional courts and administrative courts, is to decide and adjudicate the cases brought before them between opponents through issuing judicial rulings and decisions and returning rights to their rightful owners or preserving legal positions and protecting them by force of law, through judicial and legal procedures followed by the courts. It contributes to forming the court's conviction by issuing decisive rulings and decisions in these cases.

These judicial rulings and decisions are either original, so to speak, meaning they are issued in a judicial capacity and are binding and have the authority of a *res judicata* after they have acquired the degree of finality, or they are jurisdictional and limited to taking temporary preventive measures, which are purely administrative (1).

To know the limits of the authority of the constitutional courts in applying state orders to constitutional disputes and what follows from that in terms of the fact that these disputes are particular and how to use legal and constitutional texts to this type of a decision, and its relationship to the jurisdictions of the Federal Supreme Court in Iraq and the strength of its decisions, we must In this requirement, we explain what state orders are in terms of definition in the first section, then we explain in the second section the validity of these orders.

First Branch

Definition of a guardianship order

When the courts decide disputes, they perform the essential function the law requires. However, this requires that these courts take temporary and urgent measures while considering the case, which must be taken to protect the essence of the disputed right. These procedures and matters are, by their nature, outside of the origin of the dispute, but they are within the jurisdiction of the courts. These orders are known as (state orders).

In language, a command is a request to separate-that is, to create something and its plural is commands (2).

As for the term "loyalty" in the language, it is derived from "wilayah," which is authority, and it is said that "guardian" means that he established it and ruled over his affairs to the exclusion of anyone else (picture).

As for the definition of legal jurisprudence, the state order prohibits the judiciary's decisions based on the opponent's request without hearing the other opponent's statements and assigning him to appear (3). Or they are decisions issued by the judge based on a person's request without pleading and without assigning the other party to attend in his absence; that is, they are issued without the path of judicial litigation (4). Jurisprudence has indicated that the jurisdictional order is not a comprehensive judicial ruling on the case, but rather it is one of the judicial actions that the court undertakes when examining the origin of the case from the point of view of the merits. These judicial orders are closer to the actions of the judicial administration of the case. The decisions taken in state orders are considered temporary. They are issued without an adversary in cases where it is permissible to issue the order without inviting the adversary and hearing it.

Therefore, the state order is not valid against the opponents and cannot be considered a ruling because the ruling is decisive in the case, as we will explain, not really, in terms of the subject matter. It is issued based on a request, an established dispute, and a pleading between the parties to the case according to the correct formation of a well-formed court. Accurate according to the law.

As for the legal definition of state orders, Article (151) of the amended Iraqi Civil Procedure Law No. 83 of 1969 stipulates: "Whoever has the right to obtain an order from the court to carry out a specific action in accordance with the law must request the competent court to issue this order in the event of urgency with a petition submitted by him." This petition shall be submitted in two copies to the competent judge, containing the facts and supports of the request, and supporting documents shall be attached.

The law and internal regulations of the Federal Supreme Court do not address the court's definition or authority to issue state orders. The court has confirmed in its decisions that it is subject to the provisions of Articles (151 and 152) of the Iraqi Civil Procedure Code in force to the extent that they do not conflict with the nature and specificity of the constitutional lawsuit. We will discuss this later.

From the above, state orders are procedures or orders that preserve the right in dispute and work to spread reassurance among those requesting them until the legal situation stabilizes and the case is decided. We mention the conditions here.

Second section

Validity of state orders

Judicial decisions taken in state orders are considered temporary and are issued without litigation in cases in which it is valid to issue a state order. Therefore, the state order is not valid against the adversaries

and cannot be considered a ruling since the ruling is decisive in the case from the point of view of the merits and is issued based on a request and a dispute. Verified and pleaded between the parties to the case by a competent court by the law (4).

Therefore, state orders do not have the authority of the *res judicata*. What is meant by the authority of the *res judicata* is that the judicial ruling, when issued, is considered by the law to be evidence of what was decided upon and an indication of the truth. It is not permissible for any party to the lawsuit to renew the dispute through a new lawsuit with the same opponents and the same subject matter (5).

The validity of a *res judicata* is only valid for the rulings, so the judge may not violate the order, and the opposing party may issue another order (6). The ruling issued by the grievance against the state order is also considered a temporary ruling and has the validity of its provisionality (7). It does not affect the origin of the right that is the subject of the dispute, but rather, what it aims to achieve is the temporary protection of this right, as it is far from delving into the heart of the matter.

Accordingly, these orders are preventive measures, the effect of which will be removed by a decision of the same judge who issued them. The amended Iraqi Procedure Law No. 83 of 1969 confirmed that orders on petitions (state decisions) are purely administrative procedures and not procedures issued under the judicial function, according to what was stated in the reasons for the effective Civil Procedure Law, which said (the judge's judicial function requires him to He separates the opponents after assessing their rights and duties, even if it is an apparent assessment that detects the origin of the right. However, his guardianship function is limited to taking temporary preventive measures, which are severe administrative measures.

Therefore, state orders are not subject to the methods of appeal prescribed for judicial rulings. The reason for this is that the process of appeal aims to correct an error mentioned in the verdict, whether this error is related to the procedures or to the assessment of the judge who issued the ruling based on it, and the state action does not have a judicial ruling regarding it. Hence, there is no need to appeal the possibility of the judge amending the guardianship order, canceling it, or filing an original lawsuit to invalidate it (8). Appeals against guardianship orders shall be by way of grievance since the guardianship order issued in the absence of the adversary may not be issued in the interest of the person requesting the issuance of the guardianship order. Therefore, the effectively amended Iraqi Civil Procedure Law gave the right to the parties, whether the one against whom the order was issued or the one requesting the issuance of the guardianship order whose request was rejected and granted. The right to file a grievance against this state order, by what was stated in Article (153) of the Civil Facilities Law in force, which states: "For whomever the order is issued against, and the applicant, when his request is rejected, may file a grievance with the court that issued it within three days from the date of issuance of the order or the date of its notification, by assigning The opponents must appear before the court on an urgent basis.

What is worth noting is that the Iraqi legislator in this text did not call the objection to the decision issued by the state order "appeal," but instead called it a "grievance," and his intention was clear to distinguish it from the rest of the other objections, including appeals designated by the law, because when the legislator used specific words, it was only He uses it in its particular meaning, not in its ordinary meaning. It is necessary to understand the phrases of legislation in their entirety. Therefore, the legislator in the Code of Procedures found it essential to draw up a word and name it with a particular technical

meaning when he used the word (grievance) and not (appeal) because every word is included. In the legal text, it is necessary and may not be considered excessive (8). In addition, when the legislator used the word grievance, because the state order, as we have previously shown, is an administrative procedure and is within the state judiciary's function, every decision issued by the judiciary in its administrative capacity is subject to objection. On it by way of grievance. The state order has the force of urgent legal enforcement. It stops the implementation of all urgent procedures and decisions resulting from the matter against which the state order is issued until the case is resolved, and the relevant authorities must implement it immediately upon its issuance by the competent judiciary (9).

Also, the Iraqi legislator did not specify the court competent to issue these state orders. Still, the judicial custom in force in the Iraqi courts confirms that state jurisdiction belongs to the courts, which are determined by the type of disputes, issues, and lawsuits related to and within which they are competent.

Also, the person requesting the guardianship order must have the right to do so and submit his request in writing to the competent court in two copies containing evidence and facts and be supported by documents, in addition to the presence of an element of urgency. The judge must issue his order in writing, either accepting or rejecting the request within (24) hours and explain the legal text on which this order was based if he issued this order because the absence of a legal text means that the request will be rejected in form. In other words, it is not permissible to issue state orders in disputes whose merits are not affected by time, nor is there a legal text that allows the judge to do so the competent authority, since the state order is directly enforceable and by force of law. The guardianship order is not required to prejudice the case's original subject matter, and its issuance does not require informing the other party or confronting it with the opposing party. The primary purpose of the guardianship orders is to restore the balance between the parties to the case in terms of providing protection for public rights and freedoms and preserving the integrity of the original subject matter of the case, which is a principle of The principles of litigation guaranteed by the Constitution and the laws in force, including the Iraqi Constitution of 2005 in Article (19/Third), as well as the reasons for issuing the amended Civil Procedure Law in force.

The second Branch

The legal basis for the authority of the Federal Supreme Court in Iraq to issue state orders

After we have explained in the first requirement what the state order is in terms of definition and the authority that these orders enjoy, which are among the administrative acts of the judiciary, and to drop these orders on constitutional disputes, the fact that these disputes are unique in terms of the parties and the subject matter, so issuing these orders for them Its distinctive nature in such disputes. To explain this, we will divide this requirement into two sections. First, we address the nature of the constitutional dispute. In the second section, we describe the authority of the Federal Supreme Court in Iraq to issue state orders in constitutional disputes by the Constitution of the Republic of Iraq for 2005 and the court law. Federal Supreme Court No. 30 of 2005 amended, and the internal regulations of the Federal Supreme Court No. (1) of 2022.

First Branch

The nature of the constitutional dispute

The judiciary's function is to settle disputes by revealing the right, assigning it to its owner, and providing protection for him by imposing a legal penalty on whoever is proven to have assaulted him or committed

this act to have violated a legal rule (11).

The judge's performance of this function assumes a dispute between two people about the right one of them claims for himself. If this dispute is brought before the judiciary, a dispute takes place between the parties. Then, it is the judge's turn to resolve this dispute by the law, which leads to ending it in a way that gives it authority.

This action or ruling is judicial and concerns the constitutional dispute, as the Iraqi Constitution of 2005 stipulates that Iraq is a federal state and that disputes may arise between the federal government and local governments. According to the effective Iraqi Constitution, the dispute in which one party is the federal government (the region's Governorates, municipalities, and regional administrations) falls within the jurisdiction of the Federal Supreme Court as the authority to hear these disputes.

The term "dispute" is very similar to other terms characterized by a lack of clarity. It can be said that the term "dispute" has two meanings: the first is narrow, and the second is broad. Conflict in the narrow sense means that one party makes an extraordinary claim based on a violation of the law while the other party rejects this claim. The broad meaning of conflict implies a lack of agreement or disagreement between the conflicting parties, and this term is usually used in international law (12).

A lawsuit is defined as ((a legal authority enjoyed by individuals under which they can resort to the judiciary to protect their violated rights))(13).

As for the constitutional lawsuit, it has been defined through research into constitutional oversight as ((a lawsuit filed by some bodies in the state or by individuals based on a text in the law, system, or regulation that is believed to contradict or violate the Constitution))(14).

Referring to the powers of the constitutional judiciary, it becomes clear that the constitutional lawsuit has a definition that applies to everything that the constitutional judiciary considers, whether related to monitoring the constitutionality of laws or other jurisdictions. A constitutional lawsuit is "a legal authority enjoyed by some public state bodies and individuals. Sometimes, they can resort to the judiciary to defend their rights stipulated in the Constitutional Document (15).

So, the constitutional lawsuit is a legal authority or mechanism that gives the right to some public state institutions and individuals, in certain cases, to resort to competent judicial authority by the Constitution or the basic laws to defend their rights guaranteed by the Constitution when they are violated through a law, system, or regulation that contradicts the text of the Constitution.

Hence, the constitutional lawsuit relates to the violation of the provisions of the Constitution that command respect, prestige, and supremacy over the rest of the legal rules based on the superiority of the constitutional authority in the pyramid of legal regulations in the state.

From this standpoint, the constitutional lawsuit is objective, as lawsuits are generally divided into personal lawsuits and real lawsuits. The purpose of filing personal lawsuits is to establish a personal right related to a personal relationship between the two parties. As for real lawsuits, the purpose of filing them is to establish a real right or a specific legal situation (16).

Accordingly, the dispute is considered a lawsuit, and it does not differ from a constitutional lawsuit, neither in terms of nature nor in terms of procedures. Likewise, the ruling issued by the Federal Supreme Court, whether in a dispute, oversight of the constitutionality of laws, or any other decision issued in the other jurisdictions of the Federal Supreme Court, shall be final and binding on all authorities.

What is worth noting is that there is a difference between a judicial decision and a judicial ruling, even though there is a close relationship between the ruling and the decision, as the ruling is originally a judicial decision. Hence, the connection between it is between the specific and the general, as the judicial decision is everything that the court issues during the consideration of the case and until the ruling is issued in it (17). As for the ruling is only used to refer to the court's decision to decide the case, and the ruling is the final decision in the case (18). The decision is a general word that includes the ruling and other things.

Second Section

The authority of the Federal Supreme Court in Iraq to issue state orders

Judicial procedures represent an important area in legal thought and judicial work in particular because these procedures clarify how the judiciary communicates disputes through litigation. Therefore, it is how the judiciary can investigate the return of the right to its owner and then approve it in a binding manner through the rulings and judicial decisions it issues. The Federal Supreme Court, as a judicial body, is distinguished by the presence of unique procedures to regulate the progress of the lawsuit that is brought before it, in terms of how the ruling is issued in it and terms of the differences between those procedures: procedures and their diversity in terms of their nature, content, and persons.

As for Iraq, the effective Constitution of 2005 gave the Federal Supreme Court the authority to adjudicate disputes and cases brought before it (19), and for the Federal Supreme Court to carry out its work to adjudicate these disputes, it must have procedures to regulate the progress of the case leading to issuing its final ruling on it, and among these are Procedures for issuing (state orders). These orders issued by the courts are considered to be within the jurisdiction of the courts, as we have previously stated.

Therefore, the judge's authority is not limited to ending the disputes that led to him issuing a judicial ruling that ends the dispute and determines the rights of one of the parties only. Instead, the judge's and the court's jurisdiction also includes the authority to issue orders to the disputants to maintain a certain status until the existing dispute or the one about which it will arise is considered before the court.

It is worth noting that, as a general rule, the judge enjoys broad discretionary power when issuing judicial acts, which is much greater than the authority granted to him when issuing judicial acts. In judicial work, he determines prior rights by applying the rule of law to the facts, while jurisdictional work is not assumed. The existence of a legal bond upon which the rule of law applies, but instead decides a matter for the future that helps the person requesting the order to achieve his will from the issuance of the order, but this does not mean that the judge has absolute discretionary power because this is not consistent with the basis on which the idea of the judicial authority of the judge, in general, is based, which he enjoys. In addition to his judicial authority, whatever the case may be, the judge, in issuing judicial work, enjoys a discretionary authority that differs from the authority he enjoys when issuing judicial work (20).

State orders are generally not subject to the methods of appeal prescribed for space rulings. This is because the appeal process aims to correct an error mentioned in the verdict, whether this error relates to the procedures or to the judge's assessment of which the verdict was issued. The state action is as previously mentioned. It is not considered a judicial matter; therefore, there is no judicial ruling regarding it in the true sense.

Therefore, the challenge to the guardianship order is by way of grievance, and this is what the Iraqi

legislator took in the Iraqi Procedures Law No. 83 of 1969, as amended in Articles (151, 152), as it gave those who have the right to obtain an order from the court to request the court to issue a guardianship order in case of urgency. It also gave the judge the authority to accept or reject the issuance of a guardianship order by procedures stipulated in the abovementioned articles.

The Iraqi legislator also gave the person against whom a guardianship order is issued to file a grievance before the court that issued it within three days from the date of issuance of the order or the date of notification of it and that the court decides on the grievance in a manner of urgency, either by confirming, canceling, or amending it. Its decision is subject to cassation (21).

Concerning the authority of the Federal Supreme Court in Iraq to issue state orders, the Federal Supreme Court Law No. 30 of 2005 as amended and its Bylaws No. (1) of 2022 are devoid of the issue of accepting or rejecting state orders, and therefore, the Federal Supreme Court gave itself the authority to issue orders. State based on the provisions of Articles (151 and 152) of the Iraqi Civil Procedure Code in force and to the extent necessary. It has also excluded itself from being subject to the provisions of Article (153) of the Civil Procedure Code in force based on Article (94) of the Constitution of the Republic of Iraq for the year 2005, as the court's decisions are binding based on the Constitution. They contradict the nature and specificity of the constitutional lawsuit, as it was stated in a decision of the Federal Supreme Court that stated: "The Federal Supreme Court law and its internal regulations did not address the authority and powers of the Federal Supreme Court to issue or reject state orders, and thus It is subject to the provisions of Articles (152 and 151) of the Civil Procedure Code only to the extent that does not conflict with the nature and privacy of the constitutional lawsuit (22).

Reading the direction of the Federal Supreme Court regarding its issuance of state orders as final, binding, and final decisions intersects with the essence of the legal provisions and the general principles that govern those provisions since these orders, as we have previously shown, are distinguished by their temporary nature and that this decision ends when the court resolves the subject of the dispute in the case. Then, it becomes ineffective and has no binding argument.

Accordingly, it is impossible to invoke the text of Article (94) of the Constitution of the Republic of Iraq for 2005 to give it a degree of finality. Therefore, it is permissible to appeal against it, and the court may consider it and then consider its decision, which is final and binding because there is no higher appeal body than the Federal Supreme Court. This is on the one hand and the other hand. Another, based on Article (100) of the Constitution, it is not permissible for the Federal Court to immunize its state decisions from grievance on the pretext that its decisions are final and binding because the state decision is not judicial but rather a temporary precautionary administrative postponement, as we previously stated, and Article (94) From the Constitution is not evidence on such issues. Instead, all you can say is that the content of Article (94) of the Constitution is a deduction the court can use to protect its federal-state decisions from grievance. Still, it does not rise to the level of clear, clear, and conclusive evidence.

CONCLUSIONS

After we finished studying the research (the legality of issuing a state order in the decisions of the Federal Supreme Court in Iraq) and arriving at essential results and recommendations that contribute to the development of the legislative system related to that, we found it appropriate to highlight the most critical

results extracted from the aspects of the research, in addition to that, presenting the most essential Recommendations related to addressing the defect that may occur in some texts.

RESULTS

- 1- State orders are urgent, temporary, precautionary administrative measures to protect the origin of the disputed right, and they are closer to the actions of the judicial administration of the case.
- 2- The state order is not valid against the opponents and cannot be considered a ruling; therefore, it does not justify a *res judicata*.
- 3-State orders are not subject to the methods of appeal prescribed for judicial rulings since appeals against rulings aim to correct an error contained in the ruling, and there is no judicial ruling regarding state action.
- 4- Appealing to state orders shall be by way of grievance, which the Iraqi legislator adopted in Civil Procedure Law No. 83 of 1969, as amended by Article (153).
- 5- The Federal Supreme Court Law No. (30) of 2005 and its Bylaws No. (1) of 2022 did not address the issue of accepting or rejecting state orders.
- 6- The Federal Supreme Court gave itself the authority to issue state orders based on the provisions of Articles (151 and 152) of the applicable Civil Procedure Code to the extent that does not conflict with the nature and privacy of the constitutional lawsuit.

Recommendations:

- 1- We recommend that the legislator stipulate the jurisdiction of the Federal Supreme Court in Iraq to issue state orders in a manner consistent with the nature of the constitutional lawsuit.
- 2- We recommend that the Iraqi legislator grant the Federal Supreme Court discretionary authority to issue state orders, provided that this authority is regulated and restricted to the extent that preserves the origin of the right to constitutional dispute since this type of dispute is exceptional in terms of the subject matter and the parties, and that the expansion of issuing such The orders may confuse the work of the state.
- 3- We recommend that the grievance against state orders be subject to objection by the parties in the event of their rejection, as these decisions are not subject to the provisions of Article (94) of the Constitution of the Republic of Iraq for the year 2005, but rather the provisions of Article (100) of the Iraqi Constitution, which stipulates that there is no immunity Any decision on appeal.

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