

# The Federal Supreme Court’s Role in Iraq’s Eroding Democracy

by [Hemin Hawrami \(/experts/hemin-hawrami\)](#)

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## ABOUT THE AUTHORS



[Hemin Hawrami \(/experts/hemin-hawrami\)](#)

Hemen Hawrami is a member of the Kurdistan Democratic Party (KDP) Leadership Council and the head of its Foreign Relations Office.



Brief Analysis

**Iraq is in real danger of losing its checks and balances and failing as a constitutional democracy due to the rapid collapse of a separation of powers.**

The Constitutional Court is generally the highest judicial authority in every country, its decisions are final and un-appealable. The court is both a bulwark and a guarantor of the constitutional system’s efficiency, continuity and success, especially in federal states. If it does not overstep its role and task, the court underpins the success of the federal system. But when it is a political tool that involves itself in political disagreements, it becomes a dangerous instrument that undermines the entire process and is likely to eventually bring down the system.

While we see numerous examples of successfully functioning constitutional courts in federal states, the current situation in Iraq may be the clearest manifestation of the danger posed by the reverse case. Iraq’s highest court is itself unconstitutional in that it was not included in Constitution’s provisions, and the court has recently deviated from its previously defined authority by working as an instrument of politics that beats down what it sees as rivals in political disagreements.

### Background on the flawed establishment of the federal court

The first Constitutional Court in Iraq was established in Articles 81-87 of the 1925 Constitution. The court served as an independent institution in Iraq until 1979, when the Iraqi Judicial Council was merged with the Ministry of Justice during Saddam’s purge and the court lost its position and value. After 2003, the Coalition Provisional Authority (CPA) formed a senior committee to review the courts and judges, removed judges who were close to the former Ba’ath regime and thus created opportunities for new appointments. The Supreme Judicial Council regained its independence and was separated from the Ministry of Justice. CPA Order No. 35 in 2003 established the Supreme Judicial Council, headed by Chief Justice Madhat Mahmoud.

After the establishment of the Iraqi Governing Council, the enactment of the Transitional Administrative Law (TAL) and the confirmation of federalism, the provisions of Article 44 of the TAL established that a constitutional court would underpin the federal system. The Iraqi government—led by Ayad Allawi—issued Law No. 30 of 2005, which established the Federal Supreme Court (FSC) also headed by Chief Justice Madhat Mahmoud *explicitly* for the pre-constitutional period in Iraq.

When the court was established, discussions on drafting a permanent constitution had begun. Ten months after the court was formed, Iraq's permanent Constitution was put to a referendum and approved in October 2005. At this point, the FSC was intended to expire and required the passage of a law to form a permanent version of the FSC. Moreover, the court's only legal basis—Article 44 of the TAL—was annulled by Article 143 of the Constitution. Unlike the Iraqi High Criminal Court, which Article 134 of the newly-passed Constitution explicitly carried over from before, Article 92 explicitly required that the FSC be re-established by passing a new law through a two-thirds majority of parliamentary votes, a process that never occurred.

### **Rushed and unconstitutional amendment of the FSC through Law No. 25 of 2021**

After the political crisis of October 2019 and the fall of Adel Abdul Mahdi's cabinet, Justice Farooq Sami's retirement and the death of Justice Aboud Tamimi paralyzed the FSC. With the FSC still existing on the basis of Law No. 30, it requires the presence of all the judges to hear cases. The two vacant seats could not be filled because of controversies over the appointments mechanism.

Meanwhile, early elections protesters demanded could not be held due to the FSC's paralysis because of the constitutional requirement that final election results must be approved by the FSC. Attempts by the political parties to reach a compromise and pass a law on the FSC failed. To address this issue, Law No. 30 of 2005 was finally amended on March 18, 2021 by a simple majority of 204 MPs through the passage of Law No. 25 of 2021. This amendment had several fundamental flaws:

- **Lacked necessary super-majority:** The FSC itself issued Decision No. 107 of 2012, whereby it stresses that the passage or amendment of legislation on the FSC must take into account the provisions of the Constitution's Article 92, second paragraph, requiring the amendment to be passed by a two-thirds majority. Thus the margin—a simple majority—was insufficient to amend Order No. 30.
- **Bypassed the presidency:** Under the Constitution, the President of Iraq must issue decrees when laws or amendments are passed. However, in this case the decree was issued by the Parliament Speaker, who does not hold this authority.
- **Reduced representativeness of the post-2021 FSC:** In the flawed 2021 amendment, Article 3 of Law No. 30 of 2005 was amended to create new procedures for the appointment of the court's members, removing the Kurdistan Region's previously held right to appoint members of the FSC in coordination with the Kurdistan Region Judicial Council. This right is omitted in the amendment, which has disrupted the ethnic, communal, and religious balance in Iraq.

### **Exceeding the scope of lawsuits and claims post-2021**

An abiding principle of the judicial process and the work of the courts is the court's adherence to the scope of the lawsuit and the claim. However, the FSC in its current composition has violated this abiding principle of the Iraqi Civil Procedures Law, No. 83 of 1969. The court has apparently seen some claims as an opportunity to extend the scope of the plaintiff's complaint and use them to manipulate and implement political agendas.

For example, the PUK's recent complaint against the Kurdistan Parliament Election Law did not call for the removal of the seats reserved for Kurdistan Region's ethnic and religious components, but rather to distribute those seats across constituencies. Under established principle in law and justice, the claim is limited to the scope of the petition, and should not be judged beyond the plaintiff's claims. The FSC instead gave itself the role of law-maker and

amender. The latest instance of legal and constitutional violations is in the ruling on Lawsuit No. 83, units 131 and 185 of 2023 on the Kurdistan Parliament Election Law, in points 2, 3, 4 and 5 of the judgment. The ruling's unconstitutional points and constitutional violations were pointed out by the Kurdistan Region Shura Council.

### **Inconsistent and expansionist powers set by the FSC itself**

In the meantime, the FSC has adopted its own rules of procedure, which have and will continue to have major legal and political repercussions. These internal rules violate the Constitution and even the law itself, as well as the Iraqi Civil Procedure Law. The court has given itself two rights in its rules: the right to confront (التصدي) and the right to withdraw (العدول), both of which are unfounded legal concepts and which allow the FSC to be much more active and invasive than the Constitutional framers intended.

One of the powers of the Court under Article 93 of the Constitution is to monitor the constitutionality of laws. The court has jumped on this power and given itself the right to decide on preliminary bills that have not even become laws. Yet this is not applied consistently: in some cases, the court has pushed to cancel legislative projects before they have even been passed (when this suits the dominant Shia political factions), while stating that other legal projects (supported by the Shia factions) cannot be challenged until after their passage.

To give an example: in the fifth term of the Kurdistan Parliament, a bill was introduced to establish a special court to try the leaders of ISIS. While the bill was only at the drafting stage in the parliamentary committees, the FSC ruled that the bill was unconstitutional. In reverse, when the State Financial Management Law was passed in the Iraqi Parliament in 2019, it contained several unconstitutional articles. The law had been passed and the presidential decree issued, but the court did not file a lawsuit against its unconstitutionality on the grounds that the law should not be challenged until it has been implemented. These conflicting examples highlight the ambiguity and double standards employed by the court.

### **FSC encroachment into constitutional amendment**

The FSC has now also given itself the role of amending the Constitution. While strict restrictions have been imposed on amendments to the Iraqi Constitution by Articles 126 and 142 to protect rights and powers, the current composition of the FSC has given itself the authority to amend the texts of the Constitution.

For example, Article 110 of the Iraqi Constitution does not make the management of natural resources, including oil and gas, an *exclusive* power of the federal government. Article 112 (1) states that the management of oil and gas is the *joint* power of the federal government and the regions, which are jointly responsible for the management of pre-existing oil fields. Nevertheless, on February 15, 2022, the FSC issued a decision and declared the entire Kurdistan Oil and Gas Law No. 22 of 2007 unconstitutional, on the grounds that oil and gas is an exclusive power of the federal government. The decision was rejected by all four authorities of the Kurdistan Region – the parliament, government, the presidency, and the judicial council.

### **The effective weaponization of the FSC in Iraq's current political disagreements**

The FSC has a significant impact on the implementation of the federal system, and if its authority is not carefully determined and regulated, it leads to the emergence of a dangerous 'judicial dictatorship', as described by William Quirk and Randall Bridwell (<https://www.routledge.com/Judicial-Dictatorship/Quirk-Bridwell/p/book/9781560009269>). To state the obvious: of the nine judges, five are Shia, two are Sunni, and two are Kurds. Under their own law, the court's decisions are made by a simple majority, which has already resulted in a series of brutal misuses of the FSC in favor of the Shia political faction and often against the Kurdistan Region specifically.

In the past three years, the court has made several pivotal rulings on the Iraqi political process, including but not

limited to:

**Amending the constitutional mechanisms for presidential elections**, to exclude a candidate not supported by the dominant Shia factions, despite custom allowing the presidential candidate to be decided among the Kurds;

**Re-inventing the government formation mechanism** to decide the winning bloc in elections, effectively changing the result in 2021 and achieving what Iraqi media called this ‘rule by the losers’, whereby the election winner is ousted and their losing rivals are put in power.

**Consistently diminishing the Kurdistan Region’s constitutional powers** to advantage the federal government’s supremacy, in contravention to the principle of administrative decentralization that underpinned the entire constitutional project and which is enshrined in the written Iraqi Constitution.

One of the two Kurdish judges on the FSC has now resigned. In his resignation letter, Judge Abdulrahman Zebari explicitly stated that the FSC has overstepped its constitutional role and is an instrument of political agendas. It has been used to prevent electoral winners from forming a government; to starve a large segment of the country (Kurdistan’s more than five million inhabitants) of income; to remove the Sunni speaker of the Iraqi Parliament Mohammed Halbousi; and to strip MPs like Mash'an Al-Juburi of his membership if he does not comply with a certain agenda.

These are prominent examples but only a tiny subset of the problems that the FSC has caused. Looking forward, Iraq is in real danger of losing its checks and balances and failing as a constitutional democracy due to the rapid collapse of a separation of powers. This separation of powers is enshrined in Article 47 of the Iraqi Constitution, and is moreover an international principle and the essence of the global democratic system of governance. The FSC must be reformed and its previous actions must be comprehensively reviewed in light of its lack of legal and constitutional establishment since October 2005. As explained by the Kurdistan Democratic Party (KDP) Political Bureau’s statement of March 18, 2024, it is a national responsibility to prevent this politicized judicial institution. Maintaining a functional separation of powers is also an international, and particularly an American responsibility, as the United States and the international community convinced Kurdistan to remain part of Iraq post-2003 on the condition of ensuring Iraq’s federalism in the new Constitution. ❖

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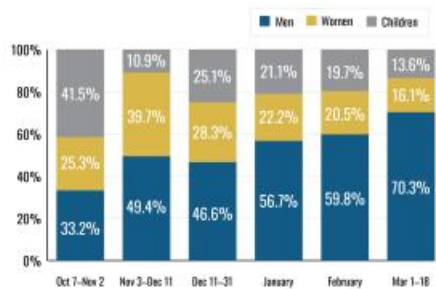
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