King's Law Journal

ISSN: 0961-5768 (Print) 1757-8442 (Online) Journal homepage: http://www.tandfonline.com/loi/rklj20

Judging Elections: The Constitutional Judiciary in Iraq's Emerging Democracy

Majida S Ismael

To cite this article: Majida S Ismael (2017) Judging Elections: The Constitutional Judiciary in Iraq's Emerging Democracy, King's Law Journal, 28:2, 309-323, DOI: 10.1080/09615768.2017.1362794

To link to this article: http://dx.doi.org/10.1080/09615768.2017.1362794

King's Law Journal, 2017
Vol. 28, No. 2, 309–323, https://doi.org/10.1080/09615768.2017.1362794

Judging Elections: The Constitutional Judiciary in Iraq's Emerging Democracy

Majida S Ismael*

I. INTRODUCTION

Over the last few decades, courts throughout the world have frequently been called upon to resolve, in Hirschl's words, 'core moral predicaments, public policy questions, and political controversies'.[1] In particular, courts are becoming central players in deciding on the rules and institutions that govern the democratic process, referred to by Issacharoff and others as 'the law of democracy'.[2] Courts 'become embroiled in partisan, political struggles, not over specific enactments, but over the very political framework through which the electorate exercises its political will'.[3] For instance, in 2000, the US Supreme Court in *Bush v Gore* effectively decided the outcome of the presidential election[4] and, more recently, in 2017 in *R (Miller) v Secretary of State for Exiting the European Union* the UK Supreme Court ruled how the government must start the Brexit process.[5]

There has long been debate on the role of judges in deciding politically sensitive matters. It is argued that judicialisation of politically high-profile cases is problematic for a representative democracy and 'may undermine the very essence of democratic politics as an enterprise involving a relatively open, at times controversial, but arguably informed and accountable deliberation by elected representatives'.[6] On the other hand, by implication or design, judicial rulings may modify the constitutional balance of power, expanding the powers of one or more institutions whilst limiting those of others. In emerging democracies where 'judges moved from a position of obscurity

* Assistant Lecturer in Law, University of Duhok. Email: m.s.ismael@live.ac.uk; majidasanaan@hotmail.co.uk. I would like to thank my PhD supervisors, Professor Michael Dougan and Dr Michael Gordon, for comments on earlier drafts of this work.

1 Ran Hirschl, 'The New Constitutionalism and the Judicialization of Pure Politics Worldwide' (2006) 75 *Fordham Law Review* 721, 721.

2 Samuel Issacharoff and others, *The Law of Democracy: Legal Structure of the Political Process* (Foundation Press 1998) cited in Russell A Miller, 'Lords of Democracy: The Judicialization of "Pure Politics" in the United States and Germany' (2004) 61 *Washington & Lee Law Review* 587, 597.

3 *Ibid*.

4 531 US 98 (2000).

5 [2017] UKSC 5, [2017] 2 WLR 583.

6 Hirschl (n 1) 752.

and marginality to becoming central actors in the resolution of a range of political and social conflicts',[7] courts may facilitate democratic progress, upholding constitutional principles on electoral and political process. However, there is also the added perceived danger of the judiciary becoming politicised, in situations where court intrusion into the political process could provoke political interference, undermine judicial independence, and lead to counter-measures that could infringe on its institutional autonomy; at worst, this may even result in the reconstruction or dissolution of the court itself.[8] These concerns have led some to argue that binding decisions of the constitutional judiciary, especially in emerging democracies, might trigger 'more constitutional harm than constitutional benefit, particularly when governmental non-compliance provokes a constitutional or political crisis that the fragile, and emergent constitutional order is not yet strong enough to weather'.[9]

The involvement of the Federal Supreme Court (FSC) in the political process in post-2003 Iraq is a good illustration of this problem and the issues it raises. The aim of this paper is to show that during the electoral process and in the course of electoral litigation the newly established Iraq FSC has found itself at the centre of politics, and its electoral jurisprudence could be described as diverse and of precedential value but inconsistent. As part of its constitutional function, the FSC contributed to enforcing and evaluating election rules in cases arising from electoral law, MPs' eligibility disputes and election results. This paper briefly analyses the role played by the FSC at various stages of the electoral process.

II. THE CONSTITUTION

Iraq's ancient legal system dates back to the days of King Hammurabi (c 1700 BC). Its modern legal system is rooted in French civil law system and *Sharia*.[10] In the aftermath of the 2003 US-led invasion, transition from a long-standing authoritarian regime to a constitutional democracy brought dramatic political and constitutional changes. The 2005 constitution, which was approved by referendum on 15 October 2005, replaced the interim constitution of 2004 (known as TAL), establishing a parliamentary democracy that is federal, republican and representative. Iraq's federal structure 'is made up of a decentralized capital, regions, and provinces, as well as local administrations' (Article 116), and recognises Kurdistan as a federal region (Article 117). The federal legislature

7 Pilar Domingo, 'Judicialization of Politics or Politicization of the Judiciary? Recent Trends in Latin America' (2004) 11(1) *Democratization* 104, 122.

8 For example, political responses to intervention on the part of high courts that led to the reconstruction or dissolution of high courts in Russia (1993), Kazakhstan (1995), Zimbabwe (2001) and Ecuador (2004). See Hirschl (n 1) 747.

9 Michael William Dowdle, 'Of Parliaments, Pragmatism, and the Dynamics of Constitutional Development: The Curious Case of China' (2002) 35(1) *New York University Journal of International Law and Politics* 1, 28.

10 Madhat al-Mahmood, *The Judiciary in Iraq: The Path to an Independent Judiciary and Modern Court System* (iUniverse 2014).

consists of the Council of Representatives (CoR) and the Federal Council (FC) (Article 48). Since the FC has yet to be established, the CoR or the Parliament remains the only federal legislature in Iraq. The executive branch consists of the President of the Republic and the Council of Ministers (CoM) (Article 66). Until 2010, the Presidency Council, which was established during the transitional period, exercised the constitutional powers of the President. It was elected by a two-thirds majority of Parliament and had three members, each representing the major Iraqi communities (Shia, Sunni and Kurds) and each member had the power to veto legislation (Article 138).

The constitution enshrines some of the fundamental principles regarding the electoral and the political process. Some of these constitutional provisions featured prominently in the court's electoral jurisprudence, the most important being Article 13, which considers void any legal rule that contradicts the constitution. Article 49 states that general elections are held to elect members of Parliament 'at a ratio of one seat per 100,000 Iraqi persons representing the entire Iraqi people', and guarantees 'representation of women of not less than one-quarter' in Parliament. It also states that further rules about general elections, candidates and replacement of members of the Parliament are to be provided by statute. The process for forming a new government is mainly detailed in Article 76 of the constitution which provides that the President of the Republic within 15 days from the date of his election must charge the nominee of the largest parliamentary bloc with forming a new government. If the PM-designate fails to form a government within 30 days then the President must name another nominee.

Other constitutional provisions that have featured in the electoral jurisprudence of the FSC include Article 5 which guarantees sovereignty of the law, stating that 'The people are the source of authority and legitimacy, which they shall exercise in a direct, general, secret ballot and through their constitutional institutions'. According to the constitution, 'Iraqis are equal before the law without discrimination based on gender, race, ethnicity, nationality, origin, color, religion, sect, belief or opinion, or economic or social status' (Article 14). It explicitly provides for citizens' rights 'to vote, elect and run for office' (Article 20) and the freedom of expression (Article 38). The FSC has also dealt with another controversial issue that affected the political process, in particular Kirkuk provincial elections. This one originated in the constitutional provision regarding the disputed city of Kirkuk. Under Article 140, the federal executive authority is responsible to undertake the necessary steps to complete the implementation of the requirements of Article 58 of the TAL, 'provided that it accomplishes completely normalization and census and concludes with a referendum in Kirkuk and other disputed territories to determine the will of their citizens),..'.

III. ELECTIONS, ELECTION LAW AND THE JUDICIARY

The above constitutional framework led to the emergence of dozens of political parties competing for power in elections and to constant debates on election laws. Iraqi citizens

participate in elections, voting in the 2005 constitutional referendum and casting their votes in federal, regional and provincial elections every four years. Prior to each election, the Parliament amended the election legislation. The first elections for the Transitional National Assembly, which was principally tasked with preparing a draft constitution, were held under Election Law 96/2004, which had been issued by the US-led Coalition Provisional Administration (CPA) during its rule in Iraq between 2003 and 2004. These elections were held using a closed-list proportional representation system; Iraq was seen as a single national electoral constituency and parliamentary seats were distributed among competing lists using the largest remainder formula.[11]

The January and December 2005 elections were crucial in transferring power to an elected Iraqi government and drafting a 'permanent' constitution and were held under the Elections Law for the Council of Representatives (16) of 2005 (ELCoR 16/2005), which was amended in 2009 and 2013 (ELCoR 26/2009 and ELCoR 45/2013). The ELCoR 16/2005 adopted a closed-list system, a quota of 25 per cent for representation of women in Parliament and multi-electoral constituencies in which each province was allocated 'a number of seats proportional to the number of registered voters in the province'. The March 2010 elections were the first to be held under the terms of the 2005 constitution, testing the constitutional and legal principles of democratic elections and were held under ELCoR 26/2009. ELCoR 26/2009 introduced significant changes to the electoral system, including an open list system, eight reserved seats for minorities and 5 per cent of seats to be allocated as compensatory seats to winning lists. In addition, it was decided that the calculation of the Iraqi population, for the purposes of the distribution of parliamentary seats to each province, was to be based on the statistics produced by the Ministry of Trade in 2005 plus a 2.8 per cent growth rate.[12] The April 2014 elections were held after the US withdrawal and at the beginning of Iraq's period of conflict with so-called Islamic State. These elections were held under ELCoR 45/2013 which used a modified Sainte-Laguë method in allocating seats on the competing lists.

In general, the adoption of proportional representation was largely based on the assumption that 'some form of proportional representation is needed in the face of deep-rooted ethnic divisions, in order to give minorities adequate representation'.[13] Thus far, election results have been such that no political party has been able to gain the majority needed to form a government and the country has been governed by successive national unity governments formed after months of political deadlock. The whole process of democracy and free elections was new and post-election responses from politicians and the public were often unpredictable. Each election

11 CPA/ORD/2004/92. See also Law of Independent Electoral Commission (CPA/ORD/2004/96) and Political Parties and Entities Law (CPA/ORD/2004/96).

12 As part of the UN Oil for Food Programme, the Trade Ministry issues all Iraqis living inside the country with a food rations card.

13 Alina Rocha Menocal, 'Why Electoral Systems Matter: An Analysis of their Incentives and Effects on Key Areas of Governance' (Overseas Development Institute, Research Report and Studies, October 2011) 7 <www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/7367.pdf> accessed 22 December 2015.

represented a perilous moment in itself. Therefore, electoral law became central to the political battles reoccurring every election season, meaning that even slightly revised electoral law provisions could have critical implications for Iraq's political process and stability.[14]

IV. THE ROLE OF THE JUDICIARY

Electoral disputes and constitutional review were not entirely unfamiliar to Iraq, but a functioning constitutional judiciary and a rise in constitutional electoral litigation represented something new.[15] During the electoral process, the FSC was at the centre of politics due to its constitutional mandate to rule on the constitutionality of legislation and resolve constitutional disputes. The first post-2003 constitution, TAL 2004 established the current FSC (Article 44), and the FSC Law 30/2005 further regulates the powers and work of the court. In consultation with the regional judicial councils, the Higher Judicial Council (HJC) presented three nominees for every FSC vacancy to the Presidency Council, which selected and approved the nine judges of the FSC.

The composition and the powers of the FSC as established in the TAL were far less controversial than they proved to be during the drafting process of the 2005 constitution. Religious groups insisted on a constitutional council that reviewed legislation before it was enacted to ensure its conformity with *Sharia* law. This view was strongly opposed by both secular and Kurdish political parties who wanted a constitutional court in which Islamic jurists have only a consultative role at the very most.[16] They eventually reached a compromise, reflected in Article 92 of the constitution, which establishes that the FSC is to be independent financially and administratively and made up of 'a number of judges, experts in Islamic jurisprudence, and legal scholars'.

Thus far, Parliament has failed to pass the FSC Law to implement the 2005 constitution due to political disagreements over the court's remit and the ambiguity regarding non-judicial members, their powers and role within the court. Therefore, the FSC, operating with the composition agreed under pre-constitutional legislation (Law 30/2005), continues to make constitutional decisions until the legislature succeeds in passing the law to implement the restructured FSC that reflects the 2005 constitutional changes. In the absence of such legislation it is argued that the court operates in a position of legal uncertainty. Some have also argued that the court, which 'represents one of the

14 Meghan L O'Sullivan and Razzaq al-Saiedi, 'Choosing an Electoral System: Iraq's Three Electoral Experiments, Their Results, and Their Political Implications' (Harvard Kennedy School, Belfer Centre for Science and International Affairs, 29 April 2014) 9.

15 Iraq was one of the first countries in the region with a constitution that explicitly established constitutional judicial review during the monarchy era (1925–58), but this was entirely absent during the republican era (1958–2003).

16 Haider Ala Hamoudi, *Negotiating in Civil Conflict: Constitutional Construction and Imperfect Bargaining in Iraq* (University of Chicago Press 2013) 94.

most meaningful Rule of Law institutions in Iraq, […] is not operating consistently with its constitutional mandate'.[17]

In practice, there have been instances where because of its controversial rulings the court's legitimacy and at times its very existence were threatened, as the case of *Largest Parliamentary Bloc* (2010) will show. Only the enactment of the Law of the new FSC will be able to put an end to the controversy concerning the court's legitimacy. For now, the existing pre-constitutional court operates on the basis of Article 130 of the constitution, which confirms that 'Existing laws shall remain in force, unless annulled or amended in accordance with the provisions of this Constitution'.

A number of factors suggest that the founders of the FSC anticipated that the court might become involved in the politically high-profile issues, in particular electoral cases. They assigned the court powers over the constitutionality of legislation, including election laws, abstract interpretation of constitutional provisions, approval of the final result of general elections, and deciding on any appeals regarding decisions made by the Parliament concerning the eligibility of its members (Article 93). More recently the FSC has been given the powers to review judicial rulings regarding dissolution of the political parties.[18] Furthermore, the court is relatively open access: the constitution guarantees access to the court to lower courts and gives 'the right of direct appeal to the court to the Council of ministers, those concerned individuals, and others' (Article 93).

The President, Parliament and CoM can request abstract constitutional interpretation while the court itself explicitly excluded civil society organisations, political coalitions and parties from requesting an abstract interpretation.[19] The independence of the judiciary and in particular of the FSC is enshrined in the constitutional and statute text.[20] Rulings are made by consensus in most cases and dissents are not issued; rulings and interpretations are final and binding on all, including the government, and cannot be overridden. Furthermore, the constitution is an uncompleted, ambiguous text that left many unresolved issues to be implemented by legislation meaning that the FSC would eventually be called upon to resolve those disputes and controversies that politicians proved unable or unwilling to settle.

It remains unclear how the new court will approach election rules but the current FSC's electoral jurisprudence, discussed below, provides an insight into where the judges stand in this process. In general, the court, faced with increasing demands for constitutional adjudication, has had a tendency towards self-preservation, an acceptance of centralisation in a federal system, and avoiding deciding on the substance of constitutional questions, instead using procedure and formal rule of law reasoning as a basis for non-intervention, except in the field of elections law.

17 David Pimentel and Brian Anderson, 'Judicial Independence in Post-Conflict Iraq: Establishing the Rule of Law in an Islamic Constitutional Democracy' (2013) 46(1) *George Washington International Law Review* 29, 43.

18 Law of the Political Parties and Organisations (36) 2015.

19 IRQFSC 34/2011 [5/5/2011].

20 Constitution of Iraq (2005), Arts 19, 87, 88, 92, 97, 98 and 100.

V. THE GOVERNMENT FORMATION CRISIS

The FSC has been involved in various stages of the electoral process, and as an aspect of its constitutional function it defines constitutional rules using its interpretive jurisdiction. This jurisdiction was never more crucial and controversial than in the 2010 parliamentary elections. The final result of these elections showed that the Iraqiya bloc, led by former PM, Allawi, had won the election, two parliamentary seats more than the State of Law bloc led by incumbent PM, Maliki. Although neither had the majority necessary to form a government on their own, Allawi's bloc had the largest number of parliamentary seats, and it was thought that it would only be a matter of time before he was tasked with forming a government. The constitution (Article 76) clearly defines the process of government formation: the President of the Republic, within 15 days of his election, tasks the candidate for 'the largest parliamentary bloc' with forming a government. However, this apparently clear process quickly proved problematic. Maliki, who had criticised the Independent High Electoral Commission (IHEC) and called for a manual recount of votes,[21] asked the FSC to define 'the largest parliamentary bloc', clarifying whether this means the largest pre- or post-election bloc. The court held that:

> the largest parliamentary bloc is: either the bloc which is formed after the election from an electoral list which participated in the election with a specific name and number, and then gained the largest number of seats, or it is a bloc which consists of two or more electoral lists which participated in the election under different names and numbers and then formed one bloc in the Parliament; the President empowers the candidate from the parliamentary bloc which *either won most seats or which has most seats in the first session of the Parliament*, whichever one of these has the larger number of seats.[22]

Therefore, the bloc with the highest number of seats in the first parliamentary session, whether this is a pre- or post-election bloc can form a government. Interestingly, on 10 June 2010, immediately before the first session of the Parliament on 14 June 2014, the State of Law (with 89 seats) and the National Coalition (with 70 seats) jointly formed the National Coalition bloc, and then announced in the first session of the Parliament that it had become the largest bloc in the Parliament at that time.

Essentially, the question was: why was the first session of Parliament considered important for the post-election bloc? It could be argued that the court found a textual argument in the process for government formation in Article 76, which implies that a post-election bloc cannot exist until Parliament holds its first session and elected members have taken the constitutional oath.[23] It is also possible that judges had taken

21 'Iraq PM Seeks Manual Vote Recount' (*Al Jazeera*, 22 March 2010) <http://www.aljazeera.com/focus/iraqelection2010/2010/03/20103228644280828.html>.

22 IRQFSC 25/2010 [25/3/2010] (emphasis added). This translation appears in Haider Ala Hamoudi, 'The Iraqi High Court's Rise to Legitimacy' (*Jurist Forum*, 23 April 2010) <http://jurist.org/forum/2010/04/iraqi-high-courts-understated-rise-to.php> accessed 7 June 2013.

23 Charles P Trumbull IV and Julie B Martin, 'Elections and Government Formation in Iraq: An Analysis of the Judiciary's Role' (2011) 44(2) *Vanderbilt Journal of Transnational Law* 331, 372.

into consideration the implication of not setting a time limit for announcing a post-election bloc, given the already fragile political and security situation in the country, or that the interpretation simply supported Maliki's bloc.[24] Maliki, who appeared to have lost the elections but was the leader and the nominee of the largest post-election bloc, was tasked with forming a new government. The decision was a blow to the election winner, Allawi, who argued that the current court did not have explicit interpretive jurisdiction under FSC law or under the TAL which established the FSC; instead, the true court of interpretive jurisdiction was still to be established under the terms of the 2005 constitution.[25] Clearly, turning to the law and the judiciary in this case might have defused 'a potentially violent debate',[26] but it exacerbated political disagreements, delayed government formation for over six months, and even threatened the institutional autonomy of the FSC.

In 2014, history appeared to repeat itself. The final result of the parliamentary elections showed that Maliki's State of Law list had won the largest number of votes. Maliki, who could not have the full support of the largest post-electoral bloc within which he had the majority of seats, insisted on his right to form a government. As disagreements intensified, the President asked the FSC to clarify the meaning of the largest parliamentary bloc which would also determine who would form the government. This time, the court avoided the question, arguing that the 2010 interpretation of the largest bloc was valid and binding for all authorities, including the FSC itself.[27] As political conflict continued, Iraq became a violent battleground, losing major cities to Islamic State; the national and international community urged Iraqi leaders to form a national coalition government. In a controversial move, the President tasked Abadi from the State of Law with forming a government, despite the fact that Maliki had won the elections.[28] Maliki threatened to challenge the constitutionality of the President's nomination, but eventually accepted the vice presidency.[29]

While the FSC's interpretation of the 'largest parliamentary bloc' in 2010 made worldwide headlines, many other decisive electoral cases, as will be discussed here, went largely unnoticed.

24 Reidar Visser, 'PM Nomination Trouble in Iraq' (*Iraq and Gulf Analysis*, 29 July 2014) <https://gulfanalysis.wordpress.com/2014/07/> accessed 13 June 2015; see also Hamoudi (n 22); Trumbull and Martin (n 23).

25 Ayad al-Allawi, 'The Risk of Losing Iraq' *The Washington Post* (10 June 2010) P. A19.

26 Hamoudi (n 22).

27 IRQFSC 45/2014 [11/8/2014].

28 In June 2014, ISIS took control of Mosul, Iraq's second largest city, and started advancing toward the capital, Baghdad and also the region of Kurdistan in the North, and large parts of the country. Kenneth Katzman, 'Iraq: Politics, Security, and U.S. Policy' (Congressional Research Service, 26 May 2015); BBC News, ' Islamic State: Can Its Savagery be Explained?' (BBC News, 9 September 2014) <http://www.bbc.co.uk/news/world-middle-east-29123528>.

29 'Iraq's Maliki: I Will Never Give up My Candidacy for a Third Term' (*Al-Alam*, 4 July 2014) <http://en.alalam.ir/news/1608269> accessed 2 December 2015.

VI. CHALLENGING THE CONSTITUTIONALITY OF THE ELECTIONS LAW

Securing the integrity of elections is not an easy undertaking for an emerging constitutional democracy and it has proved to be one of the most challenging tasks in Iraq's extraordinary democratic transition. Therefore, evaluating and enforcing election rules is central to the political struggles in which the FSC has played a role at various stages of the electoral process. In 2006, election rules allocating parliamentary seats to winning candidates or parties were one of the first issues to become an ongoing political battle. Thus, *Distribution of Parliamentary Seats* (15/2006) was one of the first cases brought before the court by Iraq's vice president, one of the three members of Presidency Council. The court found ELCoR 2005 (Article 15), which allocated parliamentary seats on the basis of numbers of 'registered voters' per province rather than the total population, unconstitutional. The FSC supported the petitioner's argument that the distribution of seats contradicted the constitution (Article 49) which guarantees a ratio of one seat per 100,000 persons. The court insisted that Parliament should prepare a new elections law in accordance with the constitution. However, the decision implicitly upheld the legitimacy of the existing Parliament, arguing that the existing Parliament, elected under this (unconstitutional) legal provision, was not affected.[30]

In preparation for the 2010 elections, Article 1 of ELCoR 26/2009 used 'statistics from the Trade Ministry' for allocating parliamentary seats. This time, in a letter to Parliament, the vice president argued that these statistics excluded Iraqis forced to live in exile because of the war. This meant that the new amendment was in conflict with Article 49 of the constitution (1:100,000 deputy/voter ratio per province). Therefore, Parliament asked the judges for their opinion on the constitutionality of the reasons cited in the letter and on the timing of the potential vetoing of the vice president. In *Iraqi Voters in Exile* (72/2009), the FSC found that the constitution (Article 49) 'did not differentiate between the Iraqi living inside Iraq or outside it', it only sets up constitutional requirements guaranteeing that all segments of the Iraqi population are represented in Parliament, female representation is no less than 25 per cent in the Parliament, and the importance of the IHEC in the electoral process.[31] The vice president's letter had to be taken seriously because, as one of the three members of the Presidency Council, the vice president was able to veto the legislation and any threat of this, just days away from elections, would have had critical implications for the political process. Therefore, the legislators confirmed that Iraqis in exile were able to vote for candidates in their own provinces, receiving the same treatment as their fellow Iraqis inside the country. Moreover, the numbers of registered voters were to be based on Trade Ministry statistics for 2005 plus 2.8 per cent growth rate per year.[32]

30 IRQFSC 15/2006 [26/8/2006].
31 IRQFSC 72/2009 [19/11/2009].
32 ELCoR 26/2009, Art 1.

Something similar occurred regarding surplus seats. The ELCoR 2005 (Article 16) allocated seats left over after initial allocation among all competing parties 'by the method of the largest remainders'. The ELCoR 2009 allocated surplus seats to 'winning lists, which acquired a number of seats based on the proportion of the votes they acquired' (Article 3). In either case, the bigger parties literally gained more seats and voters' votes transferred to candidates and parties were not the voters' choice. For example, voters in Karbala supported an independent candidate 'whose surplus votes in the end benefitted multi-person lists in ways that were beyond the influence of his own voters'.[33] In *Surplus Seats* (12/2010), judges found that

> allocating surplus seats before and after the 2009 election law amendment meant that votes were transferred to individuals that voters had not personally voted for. Therefore, this transfer contradicted citizens' constitutional rights to 'participate in public affairs and to enjoy political rights including the right to vote, elect, and run for office' (Article 20) and 'Freedom of expression using all means' (Article 38) […] *the decision (however) would not affect the distribution of the parliamentary seats* for the 2010 elections.[34]

In cases concerning allocation of parliamentary seats, the court adopted a consistent approach: upholding the legitimacy of the existing Parliament so that unconstitutionality of the law would not affect the election results.

The debate over allocating surplus seats was an ongoing one. ELCoR 2013 used a modified Sainte-Laguë method, which meant that it became more difficult for smaller parties to win seats than under the systems previously used in elections.[35] This time, the very prospect of challenging the constitutionality of this newly specified method would have serious consequences because the FSC had already established a judicial precedent in *Proposal and Draft Law* (43/2010),[36] in which it held that the CoM and the President have the exclusive right to present legislative drafts or projects to the Parliament and the latter cannot legislate without government approval. The FSC thus ruled any contested legislation that was proposed by the Parliament unconstitutional.[37] For better or for worse, this time the political battle over electoral law remained outside the court which would not have hesitated to overturn electoral legislation proposed and passed by the Parliament.[38] Furthermore, politicians fought over the allocation of parliamentary seats, including those reserved for minorities, both in and out of the court.

33 Reidar Visser, 'Proportional Representation Dispute in Iraq: Parliament Adjourns without Adopting an Election Law for 2010' (historiae.org, 28 July 2009) <www.historiae.org/proportional.asp> accessed 2 May 2017.

34 RQFSC 12/2010 [14/6/2010] (emphases added).

35 Mustafa Habib, 'New Iraqi Election Law Has So Many Holes, It's Likely to Delay 2014 Elections' (nigash,14 November 2013) <http://www.niqash.org/en/articles/politics/3327/>.

36 IRQFSC 43/2010 [12/7/2010].

37 This issue was of real concern given that at the time the court had not issued the ruling in *Second Proposal and Draft Law* (21/2015) [14/4/2015] which recognised Parliament's right to initiate legislation independently from government in limited areas. The ruling recognised that the MPs' replacement rules are within Parliament's legislative jurisdiction and it might have been the case with regard to the elections rules.

38 ELCoR 45/2013.

The constitution (Article 3) defines Iraq as 'a country of multiple nationalities, religions and sects', and in a crucial amendment ELCoR 26/2009 provided for eight reserved seats for specified minorities. It designated Iraq as a single electoral constituency for five Christian seats per Baghdad, Nineveh, Kirkuk, Dohuk and Erbil provinces; Yezidis and Shabak in Nineveh and Sabian Mandaeans in Baghdad had one seat per their provinces.[39] It was clear that the legislation did not take into consideration the fact that because of the war and unrest these populations had spread throughout virtually the whole country. Therefore, voters from these groups outside their specific electoral constituency would be prevented from exercising their political rights and participating in elections.

In several cases, the FSC ruled the ELCoR 26/2009 unconstitutional for a failure to guarantee that reserved seats were proportional to minority populations. The court upheld the political rights of minority groups, finding the one constituency arrangement unconstitutional and calling on the legislature to observe the constitutional principle of equality when enacting any electoral law, thus ensuring that parliamentary seats reserved for minorities represented their populations. It insisted that the decision would not affect the election results.[40] Therefore, while the FSC's decision upheld minorities' rights to vote, it prevented them from exercising this right in the 2010 elections, allowing unconstitutional law to be applied until the next election or until a national census can be conducted in Iraq to increase Yezidis' reserved seats.[41] It is possible, as in previous cases, that when the legitimacy of the existing Parliament was in question, judges had considered the broader implications of invalidating Parliament or requiring the holding of new elections. Indeed, holding a long-overdue election in Kirkuk would highlight the complexities of ensuring that elections function as the main channel of democracy in multi-ethnic, multi-faith Iraq.

Kirkuk in northern Iraq, home to Kurds, Arabs, Turkmens, Christians and other minorities, is one of the several cities in Iraq constitutionally recognised as 'disputed territories', which went through so-called 'Arabisation' by Iraqi governments that significantly changed the demography.[42] However, since 2003 successive governments have failed to implement the constitutional provisions that place the responsibility upon the federal government to normalise the situation in disputed territories including Kirkuk, to hold census and eventually referendum that determine the will of their people.[43] Therefore, as elections approach, the debate over whether to hold long-overdue elections in Kirkuk is dominating electoral politics. In fact, since the first

39 ELCoR 26/2009, Art 1.

40 The Special Representative of the UN Secretary-General to Iraq (UNAMI) welcomed the FSC's approach to minority rights in IRQFSC 7/2010 [3/3/2010] – Sabian Mandaeans (7/2010); IRQFSC 11/2010 [14/6/2010] – Yezidis Quota (11/2010). UNAMI Human Rights Office/OHCHR, Baghdad, '2010 Report on Human Rights in Iraq' (January 2011) 40.

41 IRQFSC 8/2014 [13/7/2014].

42 See Liam Anderson and Gareth Stansfield, *Crisis in Kirkuk: The Ethnopolitics of Conflict and Compromise* (University of Pennsylvania Press 2009).

43 Constitution of Iraq (2005), Art 140.

provincial elections in 2005, Iraqis have elected three provincial councils, and Kirkuk has been excluded from provincial elections and the democratic process. Politicians tried to establish specific arrangements for holding elections in Kirkuk.

In 2009, however, the court overturned a proposal placed before the Parliament to subdivide 'the electoral constituency of Kirkuk into three ethnic districts (Arab, Turkmen, and Kurds)' on the grounds that it contradicted 'one seat per 100,000 Iraqis on a geographical basis (Article 49), and the prohibition of any kind of discrimination including that based on ethnicity (Article 14)'.[44] Eventually a similar arrangement was incorporated in Article 23 of Elections Law for the Provincial Councils (36) of 2008 (ELPC 36/2008) which stipulated that elections in Kirkuk could be held provided that 'administrative and security powers and public posts' were divided 'in equal percentage among the main components'; and that Parliament formed a special committee representing the 'main three components' of the city to establish special electoral measures for elections there. When this issue was placed before the FSC, in a major ruling the court found Article 23 unconstitutional for preventing equal opportunities for all Iraqis, including state employees, because the law excluded those who were not from the main components of Kirkuk's population. The court concluded that restrictions and measures of this kind contradict the constitutional principles that guarantee equality before the law (Article 14) and 'equal opportunities' for all Iraqis (Article 16). Furthermore, it held that in the absence of a general census for Kirkuk, determining the size of these communities would be impossible.[45]

VII. THE ELIGIBILITY DISPUTES OVER MEMBERSHIP OF PARLIAMENT

To this point, the judiciary's involvement in the electoral process was part of its constitutional mandate to review the constitutionality of legislation. The court also has special jurisdiction for settling eligibility disputes concerning membership of Parliament. Thus, the decision by a two-thirds majority of Parliament settling any objection to an elected MP's validity or his/her replacement 'on resignation, dismissal or death'[46] can be reviewed by the FSC.[47] The MPs' Replacement Law (MPsRL) 2006 sets two criteria for MPs' replacement: the replacement must be selected from candidates from the same province and from the same electoral list, coalition, entity or bloc.

The FSC has played a major role in settling MPs' replacement disputes and, over time, its approach has significantly shifted from denying jurisdiction to evolving key legal principles. In January 2011, when Parliament requested an interpretation of a specific provision of the MPsRL, the court denied it had jurisdiction to interpret

44 IRQFSC 45/2009 [20/7/2009].
45 IRQFSC 24/2013 [26/8/2013].
46 Constitution of Iraq (2005), Art 49.
47 *Ibid*, Art 52.

ordinary legislation,[48] thus avoiding any decision on the issue. Nevertheless, a series of new replacement cases arose following the 2011 downsizing of the CoM. Several ministers who had won parliamentary seats in the 2010 elections and then given these up to new MPs after being promoted to ministerial posts, tried to reclaim their seats after losing their ministerial posts. However, there was no legal basis for claims of this kind and MPsRL (Article 1) explicitly states that 'parliamentary membership ends upon promotion to any ministerial or official post'. In response to a request from Parliament for clarification, the State Shura Council argued that 'an MP who is promoted to a ministerial post and then dismissed due to ministerial downsizing can *return to his vacant seat*',[49] ie, provided replacement had not taken place or was illegal.

This opinion produced several replacement cases of this kind. With regard to already allocated seats, one possible way to reclaim a parliamentary seat was to prove that the replacement had been illegal. While the reference in the legislation to 'the same province' was clear, the other criterion, ie 'the same electoral list, coalition, entity or bloc' proved more ambiguous, providing a strong basis for most of the subsequent attempts by discharged ministers to reclaim reallocated seats. Oddly, although the FSC had previously dismissed most cases challenging parliamentary approval of the original replacement, with these newer cases it did review the original replacement.

In several cases, the FSC settled the eligibility dispute involving a dismissed minister by first reviewing Parliament's original decision concerning the initial replacement. In *Batikh* (73/2011), the central argument was that the replaced candidate was initially part of the same pre-electoral bloc as the petitioner but his bloc later parted from the petitioner's bloc and formed a new post-election entity. The court found Parliament's decision on the replacement invalid on the grounds it had approved allocation of the petitioner's seat to a candidate who no longer belonged to the same election bloc at the time of the original replacement, therefore, the disputed seat remained vacant. The court called on Parliament to instruct the petitioner's electoral bloc to nominate another candidate.[50] Furthermore, in *Polani* (15/2012), the court upheld Parliament's decision regarding return of the petitioner (a dismissed minister) to his original seat on the grounds that the initial replacement was illegal; thus, the seat remained vacant and 'there is no law that prevents dismissed ministers from returning to a vacant seat'.[51]

Thus far, both Parliament and the court had overlooked the importance of the number of personal votes received by candidates; consequently, the leader of the electoral list, coalition, entity or bloc had exclusive mandate over the replacement process with no regard to numbers of votes cast or voters' rights. As a result, electoral candidates

48 IRQFSC 13/2011 [18/1/2011].

49 State Shura Council Decision 85/2011 [18/8/2011] (emphasis added). The constitution (Art 101) provides that 'A State Council may be established, specialized in functions of the administrative judiciary, issuing opinions, drafting, and representing the State and various public commissions before the courts except those exempted by law'.

50 IRQFSC 73/2011 [26/12/2011].

51 IRQFSC 15/2012 [2/5/2012].

with as few as 500 votes were becoming MPs. In 2014, the court determined that the number of votes cast for a candidate was of key importance in replacement cases, stating that,

> since the MPsRL 6/2006 does not include any provisions regarding personal votes, ELCoR 45/2013 which was enacted under the open list formula, complies better with the essence of the constitution and Article 38 which obligates the state to *ensure freedom of expression using all means that conform with the freedom of voters to elect their parliamentary representatives to the parliament and those who replace them in case of a vacant seat to those with the largest number of votes.* Thus, ELCoR 45/2013 states that 'seats shall be divided by re-arranging the candidates order based on the number of votes acquired by each candidate. The winner shall be the candidate who gets the highest number of votes. The same applies to other candidates … '.[52]

The fact that judges relied on the Elections Law and went beyond the litigation context by upholding voters' rights in relation to replacement of MPs and the importance of the number of votes cast for candidates was innovative in itself and of precedential value.

Since then, new criteria have eliminated leaders' discretionary powers in the replacement process causing some politicians to call for the MPsRL to be amended and for reintroduction of leaders' exclusive mandate to choose the new MP from their electoral list or bloc regardless of the number of votes the candidate received.[53] In another move, the constitutionality of the MPsRL was challenged on the grounds it was a parliamentary proposed law and had not been approved by the government: a constitutional requirement established in *Proposal and Draft Law* (43/2010). While the FSC had previously overturned all proposal laws on these grounds, it unexpectedly found MPsRL constitutional as it had been passed within the jurisdiction of the Parliament. Therefore, the case triggered significant change, overturning its own precedent, setting a new judicial precedent by recognising Parliament's direct, original legislative power as long as the proposal law does not affect the government's financial obligations, its general policy or judicial authority.[54]

Overall, replacement cases can have varied implications. Any decision to support or dismiss eligibility for membership of Parliament not only ends one MP's membership and endorses the membership of his/her replacement or the return of a former MP, it also affects the balance between provinces, the constitutional principle of 'one seat per 100,000 persons' and voters' rights. This may explain why the court found the parliamentary decision unconstitutional, introducing a 30-day time limit on challenges to its decisions concerning MPs' eligibility.[55]

52 IRQFSC 133/2014 [17/2/2014].

53 Mustafa Goran, 'Attempts to Amend the Law of the Replacement of Members of Parliament' (*Rudaw*, 25 April 2015) <Rudaw.net> accessed 29 April 2017.

54 IRQFSC 21/2015 [14/4/2015].

55 See IRQFSC 51, 52, 53, 54, 55, 56 and 57/2015 [22/6/2015].

VIII. CONCLUSION

Scholars are deeply divided on the position and role of courts in a constitutional democracy. They criticise judges for intruding into politics and deciding on matters of 'the law of democracy', considering this to be problematic for a representative democracy. In an emerging democracy, as part of its constitutional function, the court might contribute to enforcing and evaluating constitutional rules; however, its involvement in the political process might also pose a threat to its institutional autonomy and the democratisation process. The electoral jurisprudence of the FSC shows that the court, faced with increasing demands from politicians for judicial rulings and with little or no experience in constitutional adjudication, particularly electoral disputes, found itself at the centre of the political process.

On the positive side, it can be argued that the constitutional adjudication has contributed for the most part to guide political actors on the political process and on matters concerning the structure of the state institutions and power. Some of the FSC's decisions have had a positive effect on electoral law, mostly by enforcing electoral rules and at times evaluating them, broadening representation in democratic institutions from all segments of the population, including Iraqis in exile and minority groups. Other rulings, such as *Largest Parliamentary Bloc* (2010), had mixed results. Although the decision probably prevented a political battle from escalating into violence, it was seen as undesirable in that it undermined the FSC's institutional autonomy, public trust in the judiciary, and the broader process of establishing the rule of law and democratic institutions.

It can also be argued that judges who were previously in a position of obscurity and powerlessness under an authoritarian rule suddenly found themselves operating with greater institutional independence and powers. However, it soon became apparent that the context within which they operate is characterised by growing violence, endless political conflicts and instability, and above all a non-functioning rule of law system. The FSC's electoral jurisprudence illustrates the inconsistent role judges have played in Iraq's electoral system such as in settling replacement disputes or overturning its own precedents. There has also, however, been evidence supporting the court's pragmatic and reflective approach such as in avoiding necessary yet perilous decisions concerning the legitimacy of an existing Parliament under an unconstitutional law. It is quite possible that the FSC has been subjected to political interference and pressure as part of the post-2003 power struggles.