

مركز البيدر للدراسات والتخطيط

Al-Baidar Center For Studies And Planning



Research Paper

# The Extent of the Commitment of the Supreme Federal Court in Iraq to the Protection of the Effective Constitution

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## **Abstract**

The aim of constitutional review is to protect constitutional provisions against legislation that contradicts these provisions, in accordance with the principle of constitutional supremacy. The succession of constitutional texts in Iraq raises the issue of the scope of the Supreme Federal Court's jurisdiction: is it limited to the provisions of the 2005 Constitution of the Republic of Iraq, or does it extend to the provisions of the repealed 1970 Constitution?

## **Introduction**

The concept of the legal state that guarantees rights and freedoms refers to a state in which the rule of law prevails over both rulers and the ruled. The effect of this supremacy does not lead to a negative restriction of rights and freedoms beyond the intended role of the constitution and legislation in organizing the exercise of these rights and freedoms in the face of challenges and violations.

The principle of the rule of law is based on crucial pillars, notably the implementation of the principle of constitutional supremacy over all ordinary and subordinate legislation and the maintenance of the hierarchy of these legislations to ensure the subordination of lower rules to higher ones. The preservation of this hierarchy does not occur automatically or voluntarily; the legal system must adopt mechanisms to guarantee this supremacy. These mechanisms are represented by assigning the task of constitutional review to a specialized body to determine the conformity of laws or their drafts with constitutional provisions, or to refrain from applying legislation that contradicts the constitution.

The 2005 Constitution of the Republic of Iraq assigned the jurisdiction of constitutional review to the Supreme Federal Court, as an extension of the provisions of the Law of Administration for the State of Iraq for the Transitional Period of 2004, to clarify its jurisdiction in detail. The issuance of the 2005

Constitution followed the repeal of the 1970 Constitution, a succession resulting from the events of 2003 and subsequent developments. This succession raises significant issues, particularly the absence of constitutional review under the 1970 Constitution, and the need to determine whether the Supreme Federal Court's role is limited to protecting the current constitution or if there are legal grounds for extending its review to the repealed constitution.

There is a fundamental difference between the 2005 Constitution and the 1970 Constitution in terms of the form of the state, the philosophy of the political and economic system, the organization of authority, and the rights and freedoms of individuals, which leads to the exclusion of the idea of continuity in constitutional provisions due to the contradictions in their rationale, objectives, and principles of constitutional review.

This study aims to trace the rulings of the Supreme Federal Court in Iraq to determine the extent of its commitment to protecting the current constitution.

Based on the above, this research is divided into two sections: the first examines the protection of the current constitutional provisions by the Supreme Federal Court, and the second addresses the extension of the Court's jurisdiction to repealed constitutional provisions.

### **Section One: Protection of the Current Constitutional Provisions by the Supreme Federal Court**

Constitutional review is one of the most important jurisdictions assigned to the Supreme Federal Court under the 2005 Constitution of the Republic of Iraq. This is a judicial review of the issuance and enforcement of laws, similar to judicial review systems in most constitutional systems.<sup>1</sup>

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1. For further details, see Dr. Ali Youssef Al-Shukri, *The Supreme Federal Court in Iraq Between Two Eras*, Al-Dhakira Publishing and Distribution, Baghdad, 2016, pp. 31–37.

The scope of the Supreme Federal Court's review extends to laws and regulations in force under the constitution, including all legislation before the issuance of the 2005 Constitution, unless repealed or amended as stipulated by Article 130 of the 2005 Constitution. The force of effect referred to in Article 130 does not immunize these legislations from the Court's review, as the review is established to guarantee the principle of constitutional supremacy.<sup>2</sup>

The Supreme Federal Court has consistently affirmed its role in protecting the provisions of the 2005 Constitution, issuing several rulings as examples of its constitutional review in cases challenging laws enacted before the 2005 Constitution:

- **Case No. 65/Federal/2014:** The Court ruled unconstitutional paragraph (c) of item (Fifth) of Article 10 of the Passport Law No. 32 of 1999 for violating Article 44/First of the 2005 Constitution.<sup>3</sup>
- **Case No. 60/Federal/2017:** The Court ruled unconstitutional item First, paragraphs 1-4 of Revolutionary Command Council Resolution No. 296 of 1990 for violating Articles 12/First and 37 of the 2005 Constitution.<sup>4</sup>
- **Case No. 108/Federal/2020:** The Court ruled unconstitutional Article 1/97 of the Municipal Administration Law No. 165 of 1964, as it relates to private property, for violating Article 23 of the 2005 Constitution.<sup>5</sup>

The Court has also rejected challenges to the constitutionality of some laws enacted before the 2005 Constitution, confirming their compliance, such as in

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2. See Article 93(2) of the 2005 Constitution of the Republic of Iraq.

3. Supreme Federal Court Ruling No. 65/Federal/2014. See the official website of the Court, accessed 21 February 2020.

4. Supreme Federal Court Ruling No. 60/Federal/2017. See the official website of the Court, accessed 21 February 2020.

5. Supreme Federal Court Ruling No. 108/Federal/2020. See the official website of the Court, accessed 15 March 2020.

**Case No. 67/Federal/2014**, where it upheld the constitutionality of Article 19/Third of Revolutionary Command Council Resolution No. 42 of 1995, finding no conflict with Articles 47 and 19 of the 2005 Constitution.<sup>6</sup>

These rulings demonstrate that the Supreme Federal Court has expanded the scope of its constitutional review to include laws enacted before the 2005 Constitution, confirming that the current constitutional provisions prevail over previous repealed provisions and enjoy supremacy, reflecting the distinct nature and principles of the current constitution.

A question arises regarding the Court's jurisdiction over repealed laws, specifically, if a law was enacted under a previous constitution and then repealed under the current constitution. Article 93/First of the constitution specifies the Court's jurisdiction over laws and regulations in force, leaving no ground for extending its jurisdiction to repealed legal provisions.<sup>2</sup>

## **Section Two: Extension of the Supreme Federal Court's Jurisdiction to Repealed Constitutional Provisions**

After establishing that the Supreme Federal Court relies on the 2005 Constitution in its constitutional review of laws enacted prior to its issuance, it is noteworthy that the Court has, in some rulings, adopted a different approach, referring to repealed constitutional provisions. The following are examples:

- **Case No. 21/Federal/2009:** The Court upheld the constitutionality of Revolutionary Command Council Resolution No. 775 of 1989, which involved the confiscation of private property, referencing both the 1970 and 2005 Constitutions, particularly Article 23, and dismissed the case.<sup>7</sup>

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6. Supreme Federal Court Ruling No. 67/Federal/2014. See the official website of the Court, accessed 15 March 2020.

7. Supreme Federal Court Ruling No. 21/Federal/2009. See the official website of the Court, accessed 15 March 2020.

- **Case No. 10/Federal/2009:** The Court ruled unconstitutional Presidential Decree No. 67 of 2001, which involved the division and registration of jointly owned land without the consent of all partners, citing violations of both the 1970 interim constitution and the 2005 Constitution, specifically Article 23.<sup>8</sup>

The Court's reasoning in these cases was based on:

1. Prioritizing principles of justice, equity, and the protection of property rights in the face of unconstitutional decisions issued under the 1970 Constitution.
2. Recognizing that constitutional provisions do not have retroactive effect, especially as the cases involved periods preceding the 2005 Constitution.
3. Focusing on substantive rather than formal aspects of the legislation, basing its rulings on substantive violations of constitutional provisions rather than procedural defects in the legislative process.

Iraqi researchers have not extensively analyzed this issue, despite the Court's reliance on it to reach effective judicial solutions, whereas Egyptian researchers have paid significant attention to the succession of constitutions and the necessity for constitutional courts to consider historical facts and entrenched societal values when adjudicating constitutional challenges. Laws and regulations promulgated under a previous constitution and remaining in force under a new one are subject to both constitutions in terms of their legitimacy, and constitutional courts must ensure their compliance with both.<sup>9</sup>

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8. Supreme Federal Court Ruling No. 10/Federal/2009. See the official website of the Court, accessed 15 March 2020.

9. See Dr. Awad Al-Mar, *Judicial Review of the Constitutionality of Laws in Its Main Features*, René-Jean Dewey Center for Law and Development, 2003, pp. 168–169.

### **Comparative Perspective: Egyptian Constitutional Judiciary**

The Supreme Constitutional Court of Egypt has issued several rulings addressing the relationship between successive constitutions:

- **Case No. 32/Judicial/48 (2018):** The Court dismissed a challenge to the constitutionality of Article 1 of Law No. 54 of 1954, finding no conflict with the 1971 and 2012 Constitutions. The Court stated that constitutional review focuses on the substantive rules of the current constitution, but since the current constitution is not retroactive, the provisions of the previous constitution under which the law was enacted must also be considered.<sup>10</sup>
- **Case No. 35/Judicial/70 (2014):** The Court ruled unconstitutional Article 123 of the Income Tax Law No. 91 of 2005, emphasizing the supremacy of the current constitution and the necessity of adherence to its provisions.<sup>11</sup>

Thus, the Egyptian Supreme Constitutional Court has sometimes combined the application of both the previous and current constitutions, and at other times based its rulings solely on the current constitution.

### **Conclusion**

- The Supreme Federal Court in Iraq has expanded its constitutional review to include laws and regulations enacted before the entry into force of the 2005 Constitution.
- The Court has sometimes combined the application of both the repealed 1970 Constitution and the 2005 Constitution, especially in cases involving

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10. Supreme Constitutional Court of Egypt, Ruling No. 32/Judicial/48 (2018), Official Gazette, Issue 19(bis), 13 May 2018.

11. Supreme Constitutional Court of Egypt, Ruling No. 35/Judicial/70 (2014), Official Gazette, Issue 31(bis c), 2 August 2018.

property rights, where the constitutional regulation of property was similar in both constitutions, thereby achieving justice and equity and restoring rights to their owners, without limiting itself solely to the protection of the current constitution.

- Laws and regulations repealed before the entry into force of the 2005 Constitution are not subject to constitutional review.
- The Court's review has focused on the substantive aspects of legislation, rather than the formal aspects.



## **References**

### **First: Academic Books**

1. Dr. Ramzi Al-Shaer, *The General Theory of Constitutional Law*, 5th Edition, Dar Al-Nahda Al-Arabiya, Cairo, 2005.
2. Dr. Taimiyah Al-Jarf, *Constitutional Judiciary – A Comparative Study in Constitutional Review*, 1st Edition, Dar Al-Nahda Al-Arabiya, Cairo, 1993.
3. Dr. Ali Youssef Al-Shukri, *The Supreme Federal Court in Iraq Between Two Eras*, Al-Dhakira Publishing and Distribution, Baghdad, 2016.
4. Dr. Awad Al-Mar, *Judicial Review of the Constitutionality of Laws in Its Main Features*, René-Jean Dewey Center for Law and Development, 2003.
5. Mohamed Nasr El-Din Kamel, *Jurisdiction of the Supreme Constitutional Court*, Alam Al-Kutub, Cairo, 1989.

### **Second: Constitutions**

1. Constitution of the Republic of Iraq, 2005.
2. Constitution of the Republic of Iraq, 1970.
3. Constitutions of the Arab Republic of Egypt, 1970, 2012, 2014.

### **Third: Rulings of the Supreme Federal Court of Iraq**

1. Supreme Federal Court Ruling No. 23/Federal/2006.
2. Supreme Federal Court Ruling No. 30/Federal/2008.
3. Supreme Federal Court Ruling No. 31/Federal/2008.

4. Supreme Federal Court Ruling No. 10/Federal/2009.
5. Supreme Federal Court Ruling No. 21/Federal/2009.
6. Supreme Federal Court Ruling No. 21/Federal/2009.
7. Supreme Federal Court Ruling No. 65/Federal/2014.
8. Supreme Federal Court Ruling No. 60/Federal/2017.
9. Supreme Federal Court Ruling No. 108/Federal/2020.

#### **Fourth: Rulings of the Supreme Constitutional Court of Egypt**

1. Supreme Constitutional Court Ruling No. 29/Judicial/24.
2. Supreme Constitutional Court Ruling No. 32/Judicial/48.
3. Supreme Constitutional Court Ruling No. 35/Judicial/70.

#### **Footnotes**

1. For further details, see Dr. Ali Youssef Al-Shukri, *The Supreme Federal Court in Iraq Between Two Eras*, Al-Dhakira Publishing and Distribution, Baghdad, 2016, pp. 31–37.

2. See Article 93(2) of the 2005 Constitution of the Republic of Iraq.

3. Supreme Federal Court Ruling No. 65/Federal/2014. See the official website of the Court, accessed 21 February 2020.

4. Supreme Federal Court Ruling No. 60/Federal/2017. See the official website of the Court, accessed 21 February 2020.

5. Supreme Federal Court Ruling No. 108/Federal/2020. See the official website of the Court, accessed 15 March 2020.

6. Supreme Federal Court Ruling No. 67/Federal/2014. See the official website of the Court, accessed 15 March 2020.

7. Supreme Federal Court Ruling No. 21/Federal/2009. See the official website of the Court, accessed 15 March 2020.

8. Supreme Federal Court Ruling No. 10/Federal/2009. See the official website of the Court, accessed 15 March 2020.

9. See Dr. Awad Al-Mar, *Judicial Review of the Constitutionality of Laws in Its Main Features*, René-Jean Dewey Center for Law and Development, 2003, pp. 168–169.

10. Supreme Constitutional Court of Egypt, Ruling No. 32/Judicial/48 (2018), Official Gazette, Issue 19(bis), 13 May 2018.

11. Supreme Constitutional Court of Egypt, Ruling No. 35/Judicial/70 (2014), Official Gazette, Issue 31(bis c), 2 August 2018.

## **Research Identity**

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Al-Baydar Center for Studies and Planning is a non-governmental and non-profit organization established in 2015 and registered with the NGO directorate in the general secretariat of the council of ministers in Baghdad.

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