

Republic of Iraq
Federal Supreme Court
Ref. 144 / federal /2021



Kurdish text

The Federal Supreme Court (F S C) has been convened on 14/11/2021 headed by Judge Jassim Mohammed Abood and membership of Judges Sameer Abbas Mohammed, Ghaleb Amir Shunain, Hayder Jabir Abid, Hayder Ali Noori, Khalef Ahmed Rajab, Ayoob Abbas Salah, Abdul-Rahman Suleiman Ali, and Dyar Mohammed Ali who are authorized in the name of the people to judge and they made the following decision:

The Plaintiff: Jaleel Adnan Khalaf/ President of the commissioners' Board in the Independent Higher Electoral Commission/ being in this capacity – his agent the counselor Ahmed Hasan Abid.

The Defendant: the Speaker of the ICR/ being in this capacity – his agents the legal counselor Haytham Majid Salim and the official jurist Saman Muhsin Ibrahim.

The Claim

The plaintiff claimed through his agent that the Iraqi Parliament passed the Iraqi Parliament Elections Law No. (9) for 2020 and stated article (46) which stipulates (the winning candidate in the parliamentary elections is obliged to take the constitutional oath within a month of the date of the first session, otherwise the alternative will be the highest votes of the losing candidates from his list in his constituency, and in the event of not being sworn in from the individual candidate winner the alternative is the highest loser in his constituency) Since the text of this article is in express violation of the Constitution, he, therefore, appealed it for the following reasons: 1. The principle of equal opportunities is a right guaranteed to all Iraqis, as stipulated in article (16) of the Constitution, and the defendant's legislation of the text of the article above has violated this constitutional principle, since failure to

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be sworn in by the winning candidate will give another candidate from the same list less votes than other candidates who received more votes than the alternative candidate, which means that the defendant ignored and neglected the votes of voters whose will and votes were directed at other candidates who were close to their votes. Or less than winning. 2. Article 14 of the Constitution stipulates that (Iraqis are equal before the law without discrimination on the basis of sex, race, nationality, origin, color, religion, doctrine, belief, opinion, economic or social status) and that the defendant has violated this constitutional provision and has not taken into account equality among Iraqis because he preferred the candidate of the list who has fewer votes than another candidate who is the highest in terms of votes. 3. Article 20 of the Constitution stipulates that "citizens, men, and women, have the right to participate in public affairs and enjoy political rights, including the right to vote, elect and be nominated), so the defendant has blocked this constitutional provision and deprived voters of participation in public affairs or enjoyed his political rights by participating as a voter by giving his vote to a candidate he finds eligible to represent in the Council of Representatives and to give the seat to a candidate who has not been sworn in by another candidate who belongs to his list without regard to the proximity of that alternative candidate to his or her constituents and the extent of his electoral weight among citizens, the electoral weight of the candidate is measured by the number of votes he receives and not by belonging to a particular electoral list. 4. Article (38/ 1st) of the Iraqi Constitution stipulates that the state guarantees freedom of expression by all means, and that respect for the freedom of expression of citizens is by allowing their candidate with the highest votes to be a true representative of voters in the Council of Representatives, which is closer to the spirit of the constitution and is in line with the freedom of

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the voter to choose his candidates for the membership of the Council of Representatives and to replace them when the seat is vacant for those who have the highest votes. 5. The defendant violated the electoral system provided for in the Electoral Law No. (9) of 2020, which adopted the majority system and the first winner's system, as stipulated in article (15) of the Electoral Law, whereas item (2nd) of the same article stipulated (the candidates of the constituency should be re-arranged according to the number of votes which each one of them obtained, and who gained the highest votes shall be considered winner based on the first winner system. This principle moves to the other candidates). It is known that the system of the first winner depends on his philosophy and mechanisms, that the candidate with the highest votes gets the seat and the defendant has taken it in the article (15/5th) of the law, which stipulates (if any seat in the Council of Representatives remained vacant shall be replaced by the candidate with the highest votes in the electoral district) if the defendant has adopted the highest votes in the vacant seat without referring to the electoral list, it is At the same time, it must apply the same standard in article 46, which is challenged for unconstitutionality. 6. The rationale for the electoral law stated that (to hold free and fair elections conducted with high transparency and to genuinely represent the will of the voter, allowing for legitimate competition, equal opportunities, and upgrading the democratic process, this Law has been enacted). The defendant violated the reasons for legislating article 46 of the Law. 7. The text of article 46 of the Electoral Law in the section on whether the alternative to a candidate who did not take the constitutional oath of office has violated previous decisions of the Federal Supreme Court that dealt with such topics, including the numbered decision (109/federal/2014). For the above reasons and the reasons considered

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by the distinguished court, the plaintiff asked the Federal Supreme Court to rule that article (46) of the Electoral Law is unconstitutional in the part of the Constitution that the alternative to the candidate who did not take the constitutional oath shall be the candidate with the highest votes from the same list for violating the provisions of articles (14, 16, 20, 38/1st) of the Constitution. The case was registered with this court in number (144/Federal/2021) and the legal fee was met and the defendant was notified with its petition and documents in accordance with the provisions of articles (1/3rd) and (2/1st) of the Bylaw of the Federal Supreme Court No. (1) of 2005, and his agents replied with the answering drafts of 8/11/2021, which included the following: 1. The plaintiff did not indicate the immediate and influential interest in his legal, financial or social status or provided evidence that a realistic, direct and independent damage to its elements had been caused by the challenged legislation and could be removed if the legislation to be repealed was ruled unconstitutional or that the text to be repealed had already been applied or intended to be applied to it, and based on the text of the article (6/1st, 2nd, 3rd, 4th and 6th) of the Bylaw of the honorable court, he requested to reject the case in form. 2. The law in question was enacted under article (49) of the Constitution to regulate the provisions of the elections to the Council of Representatives, and the provision requesting the plaintiff to rule unconstitutional was a legislative option to regulate the mechanism for choosing an alternative to the winner who refrained from taking the oath of office and did not violate any of the constitutional texts as depicted/ being in this capacity. 3. The claim that the challenged article is unconstitutional is contrary to the article (15) of the same law and the imposition of the validity of the offense requires legislative intervention, not unconstitutionality, and its trying is outside the jurisdiction of the Federal Court under article (93)

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of the Constitution. 4. The allegation that the challenged article is unconstitutional with the rationales for its legislation is that the conflict in law between the reasons for its legislation and one of its articles is also outside the jurisdiction of the Federal Supreme Court. 5. Federal Court Decision No. (109/Federal/2014) was passed when Election Law No. 45 of 2013 was in force and was repealed by Council Elections Law No. 9 of 2020. For these reasons and reasons that the Court may see, they requested to reject the case of the plaintiff and to burden him with all the judicial fees, expenses, and advocacy fees. After completing the required procedures in accordance with the provisions of the Bylaw of the Federal Supreme Court mentioned above, a date was set for the argument and the parties were notified based on the provisions of article (2/2nd) of the aforementioned Bylaw, and on the appointed day the court was formed, for the plaintiff/ being in this capacity the legal counselor Haytham Majid Salim and official jurist Saman Muhsin Ibrahim attended as agents of him. The public in presence proceeded, the agent of the plaintiff repeated the petition of the case and requested to judge according to it. The agents of the defendant answered that they request to reject the case for the reasons listed in their answering draft dated 8/11/2021. Each parties' agents repeated their sayings and previous requests. Whereas nothing was left to be said, the Court has decided to make the end of the argument clear and issued the following decision publicly.

The decision:

Upon scrutiny and deliberation by the Federal Supreme Court, it was found that the plaintiff, the President of the Board of Commissioners of the Independent High Electoral Commission/ being in this capacity,

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claimed that the defendant, the Speaker of the Council of Representatives/ being in this capacity had enacted the Iraqi Council of Representatives Elections Law No. 9 of 2020, and article 46 stipulated that (the winning candidate of the parliamentary elections would be sworn in within a maximum of one month of the date of the first session, otherwise the alternative to the highest votes would be from the losing candidates from his list in his constituency, and if the individual candidate is not sworn in, the alternative is the highest loser in his constituency) and he requested to call upon the defendant to plead and to judge that the term (otherwise the alternative to the highest votes from the losing candidates from his constituency) is removed from the above-mentioned article for violating the provisions of articles (14, 16, 20, and 38/1st) of the Constitution of the Republic of Iraq 2005. By scrutinizing the plaintiff's case/ being in this capacity and requests and the agents of the defendant/ being in this capacity defend, the court reached the following conclusions: 1. The electoral process is defined by the procedures, multiple legal actions, and the stages the legislative power is formed of, by the will of the people as they considered the owners of power and sovereignty and there is no one electoral method that may fit all the nations and peoples. Moreover, the State and according to the Constitution has the right to choose the methods of developing their political, social, economical, and cultural systems according to the will of its people. According to its laws, it can determine all the procedures of the electoral process, the missions, and responsibilities of the electoral administration, and we will find there is big care specifically in the grown-up democracies about the necessity of setting a complete legal frame to ensure the integrity and independence of the electoral process. In addition to encouraging voters and political parties to participate consciously in the electoral process, constitutions

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include basic electoral provisions, and including this in the constitutional document enhances confidence in the electoral process because these provisions are more stable than normal legislation, as their amendment requires more complex procedures, so that these provisions have constitutional immunity. 2. The constituency is defined as a stand-alone electoral unit whose members who are bound by electoral lists elect their representatives within the Parliament and may be defined as that stand-alone geographical unit where individuals on its electoral schedules elect one or more representatives to parliamentary or local parliaments in accordance with the rules and procedures in force in the electoral law and how electoral districts will be determined to remain the result of the choice of state. It is a translation of the will of the people to choose a parliamentary government, which may itself constitute a single electoral district that requires that there be a number of representatives who are elected by individuals. In this case, a state is an indivisible unit and the one-circle method is a rare method that is no longer applicable except in some small-sized countries. for one circle relatively. 3. Legal equality is the fundamental base on which all aspects of equality are based and means that all similar legal centers are subject to the same legal treatment without discrimination based on sex, origin, language, religion, or faith, as well as non-discrimination and discrimination between individuals who meet the same conditions and are present in the same circumstances. It is the cornerstone of every democratic organization of public rights and freedoms, it is democratic as a spirit of the body without which the meaning of democracy is banished and every meaning of freedom collapses, and any organization of the electoral process by the legislator is not enough to achieve its desired goals unless this organization conforms to many requirements, the most

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important of which is the principle of equality between individuals and considers political equality as the basis of true democracy, influenced by this idea of equality, modern democracy has adopted the principle of equal universal suffrage so that every human being has one vote. Therefore, the participation of citizens in political activity through election and candidacy is the only tool for electoral legitimacy in democratic countries, which are complementary rights, one of which is not one parliamentary democracy without the other, and the legal foundations that include the emphasis on the principle of equality are multiplied in the preamble to the Charter of the United Nations of 1945. (We, the peoples of the United Nations, have given ourselves the right to reaffirm our belief in the fundamental rights of man, the dignity and destiny of the individual, and the equal rights of men, women, and nations, large and small) article (1) of the Universal Declaration of Human Rights of 1948 stipulates that (all people are born free and equal in dignity and rights and they have given reason and conscience and must treat each other in a spirit of fraternity) and article 2 of it (every human being has the right to enjoy all rights) The freedoms mentioned in this declaration without discrimination of any kind, particularly discrimination based on race, color, sex, language, religion, political opinion or any other situation and without discrimination between men and women). Article (7) of the Declaration stipulates that "all people are equal before the law and have the right to equal protection and without any discrimination, and they all have the right to equal protection against any discrimination that violates this declaration". 4. The Constitution of the Republic of Iraq 2005, as in the constitutions of the comparative countries, contains many texts that affirm and protect the principle of equality of all kinds, the most important of which is article (14), which emphasized the equality of all

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individuals, which stipulated (Iraqis are equal before the law without discrimination based on sex, race, nationality, origin, color, religion, belief, opinion, economic or social status), as we note that the wording of the texts on rights and freedoms came All of them affirm equality between individuals. Article (15) stipulates that (everyone has the right to life, security, and freedom, and these rights may not be denied or restricted except in accordance with the law and based on a decision issued by a competent judicial body), and article (16) affirms the principle of equal opportunities for all Iraqis it stipulated that (equal opportunities are a right guaranteed to all Iraqis whereas it stipulated that the State ensures that the necessary measures are taken to implement this) and article (20) stipulates (for citizens men and women, the right to participate in public affairs and to enjoy political rights, including the right to vote, elect and be nominated). Therefore, what was listed in the challenged statement of the article (46) of the Iraqi Parliament Elections Law No. (9) of 2020 contradicts the provisions of the above-mentioned articles because replacing the winning mp who did not take the constitutional oath from his list represents a violation of the principle of equality and an attack on the right of voters and the right of candidates, as the purpose of achieving the principle of equality in elections is to ensure that each citizen has what other citizens have. Every citizen (voter) should have the same right to choose rulers or representatives and every citizen should have the political weight that other citizens have. The principle of equal electoral vote extends to all stages of the electoral process and is aimed at safeguarding the rights and freedoms of citizens in the face of all forms of discrimination. 5. Article 4/1st of the Iraqi Parliament Elections Law No. 9 of 2020 affirmed that (election is the right of every Iraqi who has met the conditions stipulated in this law to exercise this right without

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discrimination on the basis of sex, race, nationality, origin, color, religion, belief, opinion, economic or social status) and confirmed paragraph (2nd) of the same article that (Every voter exercises his or her right to vote for elections freely, directly, confidentially and individually and may not vote on deputation) and general suffrage is a postulate of constitutional life in the democratic state because it recognizes effective equality among members of society, where article (5) of the Constitution of the Republic of Iraq affirms that (sovereignty of the law, the people are the source of powers and their legitimacy, exercised by direct public secret ballot and through its constitutional institutions). Therefore, replacing the losing candidate with the highest votes from the winning mp's list to that mp who has not been sworn in within his constituency, regardless of the number of votes received by the remaining losing candidates within the same constituency from other lists, contradicts the principle of the equal electoral vote. 6. Article (15/5th) of the Iraqi Parliament Elections Law No. 9 of 2020 addressed the vacancy of any seat in the Council of Representatives in accordance with the nature of the division of electoral districts in one province, which stipulated that "if any seat in the Council of Representatives is vacant, He will be replaced by the candidate with the highest votes in the electoral district, and this is in line with the provisions of articles (14), (16) and (20) of the Constitution of the Republic of Iraq for 2005 by replacing the losing candidate with the highest votes. Within the electoral district, the deputy has been replaced for any reason, regardless of the list to which they belong. 7. If the principle of equality is achieved for all stages of the electoral process, it must include all procedures carried out by the Independent High Electoral Commission, where the Board of Commissioners exercises the powers provided for in article (10) of the Independent High

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Electoral Commission Law No. (31) of 2019, including the ratification of the voter register and the register of political entities to contest elections, the approval of the register of candidate lists and the adoption of election observers and agents of political entities according to paragraphs (1st, 2nd, 3rd, and 4th) of the article above. The Board of Commissioners shall be based on the provisions of paragraph (5th) of the same article (decision on all electoral complaints and appeals and its decisions shall be subject to appeal to the Electoral Committee) whereas the Supreme Judicial Council is a judicial body consisting of three part-time judges to hear appeals referred to it by the Board of Commissioners or submitted by those affected by the Council's decisions directly to the judicial committee, and it is not permissible to challenge the Board of Commissioners decisions but before the electoral Judicial committee in what related to the electoral process exclusively. The decisions of the Judicial committee are decisive according to the provisions of the article (19/1st, 2nd, and 3rd) of the Independent High Electoral Commission Law No. (31) for 2019. As for the mechanism of presenting the challenges, so, according to the provisions of the article (20/1st of the same law stipulates (the political party or the candidate can challenge the decision of the Commissioners' Board within (3) days starting from the next of its publishing. The challenge request shall be presented to the National Office or any electoral office of the commission or directly to the Judicial Committee, later on, the Judicial Committee shall take a decision in the presented challenge within not more than (10) days of work from the date of receiving the response of the Commissioners' Board on the challenge according to the provisions of the article (20/3rd) aforementioned. Therefore, the competent body exclusively to trying the challenges on the decisions of the Board of Commissioners in matters relating to the

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electoral process is the judicial committee of the elections in accordance with the above mechanism and after the judicial committee of the elections completes all appeals and returns them to the Independent High Electoral Commission, the Commission presents the final results of the elections to the Supreme Federal Court for approval based on the provisions of article (93/7th) of the Constitution of the Republic of Iraq 2005, which stipulates (the Federal Supreme Court shall be competent (to ratifying of the final results of the general elections for the membership of the Council of Representatives) and the constitutional text mentioned includes the words (final results) which means that these results are submitted to the Federal Supreme Court for ratification after all their appeals have been exhausted by submitting them to the Electoral Tribunal and deciding by them, that the role of the Federal Supreme Court and under the aforementioned constitutional provision the ratification of those final results, and that the principle of equality must include all such procedures. When submitted and for violating the following texts of articles (5, 14, 16, and 20) of the Constitution of the Republic of Iraq in 2005, the Federal Supreme Court decided to judge by unconstitutionality of the phrase (Otherwise, his replacement, who received the highest votes from the losing candidates from his constituency list) and the phrase (singularly candidate) of the article (46) of the Iraqi Parliament Elections Law No. (9) of 2020 and its repeal and the article remains as follows (the winning candidate in the parliamentary elections is obliged to take the constitutional oath within a maximum of one month of the date of the first session, and in the event of not being sworn in by the winner, the alternative is the highest loser in his constituency) and to burden the defendant / being in this capacity the expenses and the advocacy fees for the agents of the plaintiff/ being in this capacity

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amount of one-hundred thousand Iraqi dinars. The decision has been made unanimously, decisive, and binding for all powers according to the provisions of articles (5,14,16,20,93,94) of the Republic of Iraq Constitution for 2005, and articles (4,5/2nd) of the Federal Supreme Court Law No. (30) for 2005 which amended by the Law No. (25) for 2021. The decision has been issued unanimously on 8/Rbea'a Al-Akhar/1443 Hijri coinciding 14/November/2021 A.D.

Signature of
The president

Jasem Mohammad
Abbood

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