

IN THE NAME OF GOD, MOST GRACIOUS, MOST MERCIFUL

Republic of Iraq
Federal Supreme Court
Ref. 122/federal/2019



Kurdish text

The Federal Supreme Court (F.S.C.) has been convened on 28.10.2019 headed by the Judge Madhat Al-Mahmood and the membership of Judges Farooq Mohammed Al-Sami, Jaafar Nasir Hussein, Akram Taha Mohammed, Akram Ahmed Baban, Mohammed Saib Al-Nagshabandi, Michael Shamshon Qas Georges, Hussein Abbas Abu Al-Temmen and Muhamad Rajab Al-Kubaysi who are authorized in the name of the people to judge and they made the following decision:

The Request:

The judge Salim Rudhan Al-Musawey/ deputy prosecutor before Al-Bayaa misdemeanors court has requested the federal supreme court to judge the unconstitutionality of the last part of paragraph (2/Jim) of clause (5th) of the dissolved revolutionary command council decision No.(154) for 2001 according to his submitted request to this court by the presidency of Baghdad appeal court/ alkarkh federal throw its letter No.(dhal/9/13953) dated on 14/10/2019 that stated the following:

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**The honorable Mr. President and Members of the
Federal Supreme Court
Through the estimated judge of Al-Bayaa misdemeanors
court**

Sub/ Unconstitutionality

Al-Bayaa misdemeanors court is considering the lawsuit (No.1160/ Jim/2019) in which the accused Taleb Obayd Mahdi Husayn Aljumaili was referred for trial on a detailed lawsuit under the provisions of paragraph (1/alif) of clause (6th) of the dissolved revolutionary command council decision No.(154) for 2001 based on the claim of Baghdad Municipality- Al-Rasheed municipality department, the deputy prosecutor before Al-Bayaa misdemeanors court sees that the mentioned decision included a violation to the human rights' principles that are listed in the Iraqi constitution in force for 2005, and requesting to rule the unconstitutionality of the last part of paragraph (2/Jim) of clause (5th) of the dissolved revolutionary command council decision No.(154) for 2001 which stated the following: (in case he didn't do the payment, he shall be detained by a decision of the head of the administrative unit and shall not be released until he has paid the full amount in one transaction), according to the following reasons:

First: The lawsuit facts: the facts of the case are summarized by the complaint of Baghdad municipality against the accused above claiming that he had exceeded the plot of land belonging to it No. 14974/23/1 al-khur and the exceeding date is on 2/11/2018, from the investigation proceedings the accused stated that he is a

displaced person from Al-anbar governorate as a result of the colonization of Daesh to the governorate, and since 2014 he displaced to Baghdad governorate and lived in a shelter next to a mosque in the Saydiya area with his family of young daughters and children, then one of the women offered him a simple rental allowance of a house built before her home, made of (blocks) after he lived in and for his poor financial status as he is ill with chronic illness (kidney failure) that lady authorize him to live freely but the municipality of Baghdad after month of living in the house notify him to evacuate the house because it was built on the property of Baghdad municipality in addition to other houses, and indeed after many days he moved to another shelter given to him by one of the wealth people in the area and was constructed with (ginkgo) sheets, these facts are stipulated in the case petition therefore Baghdad municipality consider him as exceeding on the plot land of it, the cost of removing the exceeding amounted by more than two million Dinar, and now is proceeding before Al-Bayaa misdemeanors court.

Second: The reasons of the challenge of unconstitutionality: the decision No.(154) for 2001 in paragraph (2/Jim) of clause (5th) stated the following text (bind the exceeding individual to pay the expenses of removing the exceeding and the value of the damages resulting therefrom and double the wage of the proverb in one transaction within a period not exceeding 10 days from the date of notification, and in case he didn't do the payment, he shall be detained by a decision of the head of the administrative unit and shall not be released until he has paid the full amount in one transaction), the end part of this text included clear violation

to the provision of the Iraqi constitution for 2005 as it made the individual remain in prison for indefinite periods and infinitely, the constitutional violations that listed in the text above are as the following:

1. Violating the text of article (37/1st/alif) of the constitution which stipulates the following (the liberty and dignity of man shall be protected).
2. Violating the text of article (2/1st/jim) of the constitution which stipulates the following (no law may be enacted that contradicts the rights and basic freedoms stipulated in this Constitution).
3. Violating the text of article (46) of the constitution which stipulate the following (restricting or limiting the practice of any of the rights or liberties stipulated in this Constitution is prohibited, except by a law or on the basis of a law, and insofar as that limitation or restriction does not violate the essence of the right or freedom).
4. Violating the text of article (15) of the constitution that stipulates the following (every individual has the right to enjoy life, security, and liberty. Deprivation or restriction of these rights is prohibited except in accordance with the law and based on a decision issued by a competent judicial authority).
5. Violating paragraph (12th) of article (19) of the constitution which stipulates the following (unlawful detention shall be prohibited) the challenged text has guaranteed the executive authority and the local management the power to detain the individual infinitely.

6. Violating paragraph (1st) of article (19) of the constitution which stipulate the following (the judiciary is independent and no power is above the judiciary except the law), as it guaranteed the judicial jurisdictions to the executive managements because imprisonment and detention of a individual shall be effected only by a judicial decision in accordance with the provisions of article (15) of the constitution.

Your estimated court has decided that it is not permissible to guarantee the executive management the power to arrest and detain the individual because that is an exclusive jurisdiction of the judiciary according to the principle of separation of powers including the following decisions and rules:

1. The F.S.C. decision No.(32/federal/2013) on 6/5/2013 that decided the unconstitutionality of the dissolved revolutionary command council No.(1246) for 1983 which granted the director of the general intelligence the power to arrest people without judicial decision and consider it unconstitutional as it represents a violation for several constitutional articles including what related to human rights, and the principal of powers separation, and the independence of the judicial.
2. The F.S.C. decision No.(15/federal/2011) on 22/1/2011 that decided the unconstitutionality of clause (2nd) of paragraph (alif) of article (237) of the amended Customs law No.(23) for 1984, the decision includes revoking the text of the mentioned paragraph, this paragraph had granted an executive employee who consider as part of the executive authority the general

director of Customs department the power to arrest and detain persons for limited time without judicial decision.

The decision of the F.S.C. No.(57/federal/2017) on 3/8/2017 which decided the unconstitutionality of the dissolved revolutionary command council decision No.(120) for 1994 which included the judgment that the convicted individual shall not be released for the crime of embezzlement or theft of state funds or for any other intentional crime committed against it after serving his sentence unless such money is recovered or it was transferred to or replaced with or its value, (as it stated the following (the government's debt collection is a right guaranteed by the law and that this right must be obtained in accordance with the procedures stipulated in the laws and not by execution on the debtor's himself and to the extent that restricted him to show his funds for the period of time stipulated by the law and not infinity, as the executive law No.(45) for 1980 had set this period in article (43) of it not to exceed four months to obligate the convicted to show his funds in addition to other methods stipulated in Government debt dues collection Law No.(56) for 1977 that ensure the obtaining of the state rights, to say otherwise and to keep the convicted detained or prisoner un limited if he was destitute and the state with what it has of capabilities could not detect his funds and obtaining its rights from, by the legal means and resorting to the implementing of the decision No.(120) for 1994by keeping him prisoner without stating his prison period, that contradict with the principals listed in the constitution chapter two of section two related to the freedoms articles (37 and 46). For the aforementioned and any other reasons cleared by your estimated court, I request to judge the unconstitutionality of the final part of

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paragraph (2/Jim) of clause (5th) of the dissolved revolutionary command council decision No.(154) for 2001 which stated (in case he didn't do the payment, he shall be detained by a decision of the head of the administrative unit and shall not be released until he has paid the full amount in one transaction) according to the provisions of the mentioned constitutional article above and article (93) of the constitution and article (4) of the F.S.C. Law No.(30) for 2005 and article (3) of the F.S.C. bylaw No.(1) for 2005.

Please to accept all regards.))

The F.S.C. placed the request under scrutiny and deliberation and reached the following decision:

The decision:

During scrutiny and deliberation by the F.S.C. the court found that the aforementioned request challenged the last part of paragraph (2/Jim) of clause (5th) of the dissolved revolutionary command council decision No.(154) for 2001, which includes a corporal and financial penalty for the acts on real estate belonging to the state and municipalities within the limits of the basic designs of the cities without obtaining a fundamental approval, and considered that act as exceeding opposite by that penalty which is obliged the exceder with double the cost on one transaction within a period not exceeding (10) ten days from the date of notification, in case he didn't do the payment, he shall be detained by a decision of the head of the administrative unit and shall not be released until he has paid the full amount in one transaction. The F.S.C. found that article (19/12th/alif) of the constitution prohibited the detention of the

persons infinity, and if that detain considered as a type of arresting then arresting the persons need to be by decision of one of the federal judicial authority' judges stipulated in articles (47) and (87) of the constitution and no one else is authorized to practice this jurisdiction which was stipulated only for the judges, therefore the challenged paragraph is violating the constitutional provision of the mentioned articles because it authorized the presidents of the administrative units to practice this jurisdiction, and also violated the provision of article (15) of the constitution which didn't authorized restriction the rights of individuals except in accordance with the decision issued by a competent judicial authority, and that what the F.S.C. has decided in many of its decisions including No.(32/federal/2013) on 6/5/2013, and (15/federal/2011) on 22/1/2011, and (57/federal/2017) on 3/8/2017. Accordingly, the court decided to rule the unconstitutionality of paragraph (2/Jim) of clause (5th) of the dissolved revolutionary command council decision No.(154) for 2001. The decision has been issued final and binding to all authorities according to article (94) of the constitution and article (5) of the F.S.C. Law No.(30) for 2005.