



The Federal Supreme Court (F S C) has been convened on 27.2.2019 headed by the Judge Madhat Al-Mahmood and membership of Judges Farouk 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 Mohammed Rijab AL-Kubaisi who authorized in the name of the people to judge and they made the following decision:

First: The Request (147/Federal/2018):

The Presidency of Wasit appeal Court requested according to its letter No. (2708) on 19.7.2018 to take decision about legality of article (19/3rd/beh) of military criminal procedure law No. (22) For 2016 which received by the aforementioned Court from the judicial investigation office in Al-Hay area according to their letter No. (4410) on 16.7.2018. The letter had been received with a photocopy of investigation file which related to the accused each of (ha.zin.ain) and (mim.ain.mim) and (mim.kha.ha) and (qaf.ra.fa) and (alif.ra.kaf) and (fa.ain.kaf) and (ain.ain.dal) and (alif.ra.ra) and (ha.kaf.fa), the investigation file has listed ((an order has been issued to summon aforementioned accused according to article (332) of penal law No. (111) for 1969 on 10.11.2018)). Their military reference was notified to inform them by summoning order which issued concerning them, and after several confirmations lasted for a period more than a year, a reply from the Ministry of defense/ secretariat had been received by the Ref. (legal department/ta.jim/3/2027 on 20.1.2018). The letter was about the approval of the Minister of defense not to execute summoning order against accused above-mentioned, because the case is related to executing a military mission. This reply relied on article (19/beh) of military criminal procedure law No. (22) for 2016 which

stipulates ((the Minister has the right not to approve on executing the arrest warrant issued concerning the militant, or refers him to the competent Court, if the act he did was produced from carrying out his military duties or because of it according to recommendation from the Court of inquiry which is formed for this purpose)). The request indicates that the article (19/beh) is contradicts with some texts listed in the Republic of Iraq Constitution for 2005. Accordingly, the judicial investigation office in Al-Hay proposed to challenge unconstitutionality of article (19/beh) aforementioned, and for the following reasons: 1. It is contradicts with what listed in article (14) of the Constitution which stipulates ((Iraqis are equal before the law without any discrimination... etc.)). Whereas the militant had been granted a privilege will inhibit him from attending before the civil judiciary, in spite of there are legal guarantees for him before aforementioned judiciary. 2. Challenged article is contradicts with the provisions of article (19/1st) of the Constitution which stipulates ((the judiciary is independent and no power above the judiciary except the law)). 3. It is contradicts with article (47) of the Constitution which stipulates on the principle of ((separation between powers)). Whereas the disapproval of the militant's reference to not execute the arrest warrant or summoning order concerning him, this matter considered a clear intervention from the executive power in the judicial power affairs, and it also leads to disrupt its decisions...). The Court decided to make the end of the argument clear, and the decision was recited in the session publicly.

Second: The Request (21/Federal/2019)

Also the Court of Nineveh federal appeal Court/ the Head of the Court office requested according to its letter No. (329/office/2019) on 10.2.2019 to take decision about legitimacy of article (19/1st and 2nd) of military criminal procedure law No. 22 for 2016 which had been received by aforementioned Court with the attachment of a letter issued by Nineveh investigation Court which specialized in integrity cases No. (88) on 5.2.2019, with a photocopy of investigation file concerning the accused each of ((the captain mim.ain.mim, and the sergeant shin.alif.ain, and the associated alif.mim.ha)) which they are under investigation according to provisions of article (332) qaf.ain

within the meaning of affiliation articles (47 & 48 & 49) ain.qaf. The investigation and referral procedure are depending on the attendance of the accused (the captain mim.al.mim) which is order of summoning issued concerning him, and it also was depending on executing the arrest warrant concerning the accused. Whereas the approval of the Minister of defense had been acquired not to let the accused to attend before above-mentioned Court, and the military inquiry Court had closed the investigation because they weren't defaulters according to provisions of article (10/4th) of military criminal procedure law No. (22) For 2016. This matter was interpreted (the case is related to military duty according to provisions of article (19/2nd/alif) of aforementioned law. The Court of investigation clarifies that the articles – request subject – are limiting the judiciary authority in trialing the accused when they perpetrate a crime related to a civil party when they carrying out their duty. It also contradicts with article (19/ 1st and 3rd and 6th) of the Republic of Iraq Constitution for 2005, and contradicts article (47) of this Constitution. Whereas the civil judiciary in the criminal part of it providing the legal guarantees for accused in a fair trial...). Accordingly, the Judge of Nineveh investigation Court which specialized in integrity cases is challenging unconstitutionality of article (19/1st and 2nd) of military criminal procedure law No. (22) for 2016, and he requests to take a decision about its legitimacy according to what listed in the two decisions (32/federal/2016) on 7.6.2016 and (115/federal/2017) on 24.10.2017.

The Decision

During scrutiny and deliberation by the FSC, and by reviewing the two requests which had been received from the investigation of Wasit and Nineveh appeal Courts above-mentioned. These requests included the challenge of unconstitutionality of the clauses (1st-2nd-3rd/beh) of article (19) of military criminal procedure law because it violates the provisions of articles (14, 19/1st and 3rd and 6th) and (47) of the Constitution. After studying the provisions of these constitutional articles, and about rationales of the military criminal procedure law issuance which article (99) of the Constitution meant by reaching an investigation process, or fair trial for militant in what related to crimes he perpetrated during his official duties to provide

legal guarantees for his duties. This matter requires to return to his reference to estimate his deed, and if he deserve to be suited or not, after a process of investigation by Court of inquiry which must be competent. If the reference didn't agree to execute the summon order, the arrest warrant or trial. His decision is subjected to be challenged before the administrative judiciary as article (7/4th) of the Council of the State law No. (65) For 1979 which amended by the law of the State Council law No. (71) For 2017, and this will be enough guarantee for aggrieved of the accused's reference decision by not permitting the summon order, executing the arrest warrant or the trial. Accordingly, and for the aforementioned reasons, the Court decided to reject the requests which had been received from the investigation Courts aforementioned in this decision because there is no contradiction between the provisions of the constitutional articles they mentioned and the article (19/1st/2nd/3rd-beh) of military criminal procedure law No. (22) For 2016. The decision has been issued unanimously and decisively according to article (5/2nd) of the FSC's law No. (30) for 2005, and article (94) of the Constitution on 6.2.2019.