

In The Name Of God, Most Gracious, Most Merciful

Republic of Iraq
Federal Supreme Court
Ref.37 /federal/media/2019



Kurdish text

The Federal Supreme Court has been convened on 21/5/2019, 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-Nagshabndi, Abood Salih AL-Tememi, Michael Shamshon Qas Georges and Hussein Abbas Abu Al-Temman, who authorized in the name of the people to judge and they made the following decision :

The Plaintiff: Basim Khazaal Khashan- his agent the barrister Hazim Rasool AL-Saffar.

The Defendant: the ICR speaker/ being in this capacity- his agent the legal counselor Haitham Majid Salim.

The Claim:

The Plaintiff agent claimed that provisions of the prison were issued previously for his client according to the article (226) Qaf. Ain and the judiciary are still trying other eight cases according to the aforementioned article, and he challenged the Constitutionality of the article (226) from the penal code (111) for 1969 for the following reasons:

First: the challenged article has not been fitting with what the free world settled on for what related to the freedom of speech and the democratic states and most of the developing states left the principle of ((government insulting)).

Second: the challenged article is retroactive comparing with AL-Baghdadi penal code, and the decided penalty for the crime ((insulting)) is tougher

than the decided penalties in the penal code for dangerous crimes touches the citizen's life and the rights of children and the state.

Third: according to its nature the insulting is a crossing of a line of a legislative right, thereby its penalty shall not exceed the penalty of a misdemeanor, and annulling is more suitable (article provision measurement (45) Qaf.Ain.)

Fourth: the crime that covers by the article which is challenged by its unconstitutionality, it is covered in the texts of other articles from the penal code, and the insistence to apply it is violating the provision of the article (19/6th) from the Constitution.

Fifth: the challenged article has been used as an instrument of repression and rights and freedom violation through realistic example not hypothetical.

Sixth: crossing the line of the freedom of speech, is an answer to their feeling of insulting that didn't attach them as a result of the corruption of the government foundations. The increased corruption in the states departments is insulting to the people and the government department. The procedures of the challenged article are limited to the penalty of reactions. And what the free world settled on is ((the legal prohibition for the opinion expression which corresponds to the people insulting, it is no covering the criticism or even the insulting of public personalities, not even the state's foundations. It is limit to the false information which may cause harm or insult with no reason. The Russian legislator deviated from this rule, lastly, he headed for obliging penalties of prison and fines for government insulting on the internet or publishing what is calling ((Fake news)). And the resolution of the Russian Parliament to legislate a law that criminalizes ((the state insulting)) in Russia is an evidence of the absence of a previous text that prohibits it as consider it a part of the citizens' right of freedom of opinion expression. the unconstitutionality of the challenged article is clear, by proceeding a subjective comparison with the democracies and experiences of other countries, in Zimbabwe, the supreme court has decided the unconstitutionality of the law of criminalizing ((the president insulting)) because it contradicts with the Constitution. In Iraq, the decided penalty of ((insulting crime) is so tough that it is unconstitutional, the article (122) from AL-Baghdadi penal code (annulled) was deciding to oblige an imprisonment

penalty for a period, not exceeding one year or a fine or both if the insulting was for a judiciary court, administrative, council or one of its members during the session. The direction of Iraq legislator in the present penal code to innovative ((penalty of president insulting)) and to emphasize the penalty of insulting the state departments is evidence of using it as one of the instruments of repression that was innovated by the previous system, this contradicts with the democracy principle and the principle of equality between Iraqis all of them before the law, and contrary to the article (13/2nd) from the Constitution. And the decided penalty in the article that is challenged by its unconstitutionality is tougher than the penalties that other articles stipulated it which including the penal code such as the articles ((180 211 212 214 250 304 231 236 328 341 343 355 378 381)). Insulting is the crossing line of ((legislative right)) and the penalty for him because crossing the line shall be a misdemeanor or violation penalty. The decided penalty for the article that is challenged by its unconstitutionality doesn't fit with the committed crime according to it, compared with the article (45) Qaf. Ain. Which its meaning is that the legislative right of defense doesn't allow to make damage tougher than what this defense required, and crossing the line of this right purposely or negligently is under ((the responsibility of the crime he committed)) and the committer is sentenced by misdemeanor penalty instead of felony penalty, and by violation penalty instead of the misdemeanor penalty. The plaintiff agent claimed that the above-challenged article had been used after the falling of the system because of freedoms and individuals rights violation even after deciding the Constitution which guaranteed it and protects. There are many examples of that including the decisions and cases that were issued against his client such as:

1. the case No.(29/90/2017) the complainant is the head of the commission of integrity/being in this capacity.
2. the case No. of the decision of Referral to Felonies (589) the complainant is the head of the commission of integrity/being in this capacity.
3. the case No. of the decision of Referral to Felonies (590) the complainant is the head of the commission of integrity/being in this capacity.

the aforementioned decisions against his client had been issued in the above cases. The Trial Court takes its procedures in all of the twelve cases of the

integrity against his client according to the article (226) Qaf. Ain. Separately without unifying them, this violates the provision of the article (130/Alif/2 and 3) from the criminal procedure law also, the competent court of investigation violates the provision of the article (30) from the press law No.(206) for 1968 which prohibit to accept the criminal case after 30 days from the date of publishing, it accept all the cases and referred it to the court of felonies which reject his client defense of prescription The crimes covered in the article (226)Qaf. Ain is covered in texts of other articles from the penal code, whereas the article (229) Qaf. Ain. Has determined the penalty of insulting or threatening officers during their work or because of it, and it grants the government department or the official commission or semi-formal that belong to it, the right to initiate the case by the public right. Thereby there is no more need for the challenged article.

4. the case No. of the decision of referral to the felonies in it (588). The complainant is the head of the integrity commission/being in this capacity.

5.the case No. of the decision of referral in it to the felonies (591) and the complainant is the head of the integrity commission/being in this capacity.

There are decisions was issued by cases against activist and barristers based on the presented complain from the head of AL-Muthana governorate council and from the head of AL-Muthana investment commission/being in their capacities, for accusing them by bribe and corruption. Also, the barrister (Fouaad Ahmed Farman) was sentenced to imprisonment for three years according to the provision of the article (229) Qaf. Ain. For the charge of judge insulting. Crossing the line of freedom of speech is a response for exceeding the corruption limit, as the obligation of people through a legal text determines formula that limiting his freedom of speech for his angry from the increased corruption in state's departments, this obligation violates the principle of democracy and violates the provision of the Constitution which oblige the state to guarantee the rights and freedoms. Most of the cases that initiated are about activists and from parties involved in corruption or from parties that made mistakes while proceeding their jobs. Most of the cases that were initiated against the plaintiff are according to the provisions of the article (226) Qaf.Ain., it was initiated by parties saturated with corruption and exceeding the citizens' rights. The plaintiff's agent has added

that he has previously presented (50) complaints about the corruption of heads and members of AL-Muthana governorate council as a defense for the public funds, and the aforementioned decisions in his case petition were issued against some of them. The plaintiff agent has continued that there were complaints initiated against his client by AL-Muthana court of appeal because of paper he published on the page of social media (facebook) he criticized the decision of the releasing of the former member of AL-Muthana governorate council (Rasool Radhi). And the other complaints that were initiated against the plaintiff by the head of the integrity commission according to the provisions of the article (226)Qaf.Ain., as it mentioned before and the purpose of the complaint to suppress the plaintiff and prevent him from continuing of facing the corruption and defending the rights that were guaranteed by the Constitution, that had been done as a violation of the article (19/6th) from the Constitution. The biggest insultings for the state's foundations these that is caused by the behavior of its officers who involved in corruption and bribe and the breach of their jobs duties, it is not acceptable to punish the citizens because of the defense of their rights, the solution is to change the behavior of the state's foundation and to develop the means of supervision and enhance of the citizens' trust in it. The cases that were initiated against the plaintiff in AL-Muthana governorate according to the challenged article are (28) cases, and they were used to suppress him and deprive him of practicing his right and duty to defend the public funds and people rights –according to the claims. The procedures that are taken against the civil activists and the barristers according to the article (226) Qaf.Ain (challenged) violates the provisions of the article (19/6th) from the Constitution. Based on this the plaintiff's agent requested the decision of the unconstitutionality of the article (226) from the penal code No.(111) for 1969 for the reasons listed in his case petition. The two agents of the defendant/ being in this capacity answered on the case petition that the subject of the case has been already decided, according to the FSC decision No.(204/federal/2018) dated on (4/2/2019), and the challenging of the article (226)Qaf.Ain. by its unconstitutionality had been rejected, regardless of the time of its legislation and it doesn't violate the provisions of the Constitutional articles that the plaintiff relied on it and his case has no substan-

tiation from the Constitution. Based on this they requested to reject the case. After the case has been registered according to the provisions of the clause (2nd) from the article (1) of the FSC bylaw No.(1) for 205 and after the requested procedures has been completed according to the clause (2nd) from the article (2) from the aforementioned system, the day (21/5/2019) had been appointed as a date for the argument, and the plaintiff agent attended and the legal counselor Haitham Majid attended as agent for the defendant ICR speaker/ being in this capacity. The argument was started publicly, the plaintiff agent repeated the case petition and requested to decide according to it, the defendant agent answered on him that he repeats his answering draft and requests to reject the case for the reasons listed in it. The plaintiff commented that the applying of the provisions of the article (226) from the penal code is a wrong applying has been used for non-symptoms that it has been legislated for it. His agent commented as well that the challenge reasons which we listed are not the same reasons that the previous challenge has been rejected. During the scrutiny, the court found that the case has been completed the reasons for the decision, so the end of the argument had been decided and the decision was understood publicly in the session.

The Decision:

During the scrutiny and deliberation by the SC, the court found that the plaintiff's agent claims in his case petition that the decisions of imprisonment has been already issued against his client according to the article (226) from the penal code No.(111) for 1969, and the judiciary is still trying (8) other cases against him according to the mentioned article. The provisions that the article included violates the principles of democracy and equality between all of Iraqis before the law, and restricts the freedom of speech without any the necessity for this restriction because of the crimes that are punished by the article (226) from the penal code No.(111) for 1969 aforementioned above, it is covered in other texts of articles also, that article has been used to suppress and violates the rights and freedoms which the Constitution stipulated to guarantee and protect it, and approved by the countries of the free world and the procedures that are taken against the civil

activists according to the article violates what was stipulated by the article (19/6th) from the Constitution. Where it stipulated ((Every person shall have the right to be treated with justice in judicial and administrative proceedings.)) for the above and other reasons included by the case petition the plaintiff agent requested ((the decision of the unconstitutionality of the article (226) from penal code No.(111) for 1969)). And the FSC found that it has tried a challenged of the unconstitutionality of the mentioned article (226) from the penal code through the case No.(204/federal/2018) and it issued a decision fo it on 4/2/2019, it rejected the challenge of the unconstitutionality of the mentioned article according to the recitals that listed in it, based on this and whereas the issued decisions by the FSC are decisive according to the article (94) from the Constitution and the decisive decisions are proof for what it was decided for if the matter related to the same subject according to the provisions of the article (105) from the law of evidence No.(107) for 1979, so the plaintiff case has no legal and constitutional substantiation because of its subject has been already deiced. The court decided to reject the case and to burden the plaintiff all the expenses and fees of the advocacy of the agent of the defendant/being in this capacity amount of hundred thousand dinars. The decision had been issued unanimously and decisive according to to the provisions of the article (94) from the constitution and the article (5) of the FSc law No.(30) for 2005, and has been understood publicly on 21/5/2019.