



The Federal Supreme Court (F S C) has been convened on 2.7.2019 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, Aboud Salih Al-Temimi, Michael Shamshon Qas Georges and Hussein Abbas Abu Al-Temmen who authorized in the name of the people to judge and they made the following decision:

Objector of the others: the Head of the Higher Judicial Council/ being in this capacity – his agents the judge and the judicial supervisor Haider Ali Noori and the official jurist Esam Fadhil Hilwas.

Objected (against):

1. The Plaintiff Mazin Abdul Wahid Makkiya – his agents the barristers Mohmmaed Majeed Al-Sa'aedi and Ahmed Mazin Aabdul Wahid.
2. The Defendants: Alif: the President of the Republic/ being in this capacity – his agent the legal counselor Ahmed Surayeh.
Beh: the Speaker of the ICR/ being in this capacity – his agents the official jurists/ the director Salim Taha Yaseen and the legal counselor Haytham Majid Salim.

The Claim

The agent of the objector of the others that the FSC previously issued its decision No. (38/federal/2019) on (26.5.2019), the aforementioned decision adjudge by unconstitutionality of article (3) of the FSC's law No. (30) For 2005. This article stipulates (the FSC

shall be consist of a Head and eight members assigned by the Presidency Council according to a nomination from the Higher Judicial Council in consultation with the regions Judicial Councils according to what stipulated in clause (heh) of article Forty-four of the State's administration law for the transitional period). The objector of the others sees that this judgment is touching the right of the Higher Judicial Council because the Council considered a reference for the judges in the federal judiciary, and the responsibility is completely duty of it. The Higher Judicial Council nominating the Higher Judicial posts, including the Head and the members of the FSC. The objector of the others proposed to challenge the judgment (case's subject) and he requested to consider it void, and to clarify it. He also requested to reject the case for the reasons listed in the objection case, and the case No. (38/federal/2019) must be rejected for litigation, whereas no interest for the plaintiff in it. As long as there is no interest for the plaintiff in the case, this matter means that the litigation shouldn't be accepted from the beginning. The judgment issued about the case considered void because the conditions of the interest are not available. Accordingly, the objector of the others/ being in this capacity is requesting to unveil the status of the judgment voidance in the case No. (38/federal/2019) on 21.5.2019 and to consider it void. Then, to reject the case above-mentioned. After the case was received and registered by the Court, the objector has been notified with a photocopy of it. Each party presented an answering draft which included their rebuttals and requests. Whereas the agent of the objector of the others (Mazin Abdul Wahid Makkiya) presented a draft dated on 26.6.2019 which included his rebuttals, and these rebuttals are considerable to reject the case of the objection. He relied on article (94) of the Constitution which listed that the decisions of the FSC are decisive and obliging for all powers, and the Court didn't inhibit to introduce the objector of the others as a third party in the challenged case. The Court took in its considerations the implementation of the law and the constitutional texts in what related to interest availability. Initiating the case of objector of the others is violating the article (224) of the civil procedure law, and the objector previously initiated a case by the No. (19/federal/2017) to annul a legal text with the same meaning of article (2) of the FSC's law text. He requested to annul the text of

article (3/2nd) of the Higher Judicial Council law No. (45) For 2017, and the Court adjudge by unconstitutionality of it. It's the same decision which had been issued in the objected judgment. As for the objector, his challenge that there is no interest in the objected case. The plaintiff (the objector) as his agent says, is not requesting a personal request, but he challenge an article in a general law. This matter is an interest of all Iraqis as he claimed. The Court accepted this type of case in the decision No. (51/federal/2018) on 14.5.2018, and he requested to reject the objection. As for the objected (against) the President of the Republic/ being in this capacity, he presented an answering draft dated on 25.6.2019, and he requested to reject the objection case because article (94) of the Constitution had regarded the FSC's decisions decisive and obliging for all powers. Also, the FSC bylaw in article (17) of it clarified that the decisions of the FSC doesn't accept any methods of challenge. As for the objected (against) the Speaker of the ICR/ being in this capacity had presented an answering draft dated on 25.6.2019, he clarified in this draft his previous opinion about the subject of the case in an answering draft of the challenged case No. (38/federal/2019) on 23.4.2019. He requested to reject the case because the litigation is not directed, and the plaintiff has no interest with it. After that, the Court set a date for argument, and both parties were called upon. The agents of the both parties attended, and each party repeated his previous requests and sayings. Whereas nothing left to be said, the Court decided to make the end of the argument clear and the decision has been recited publicly.

The Decision

During scrutiny and deliberation by the FSC, the Court found that the objector of the others is challenging the judgment issued by the FSC on 21.5.2019 by Ref. (38/federal/2019) by the method of others' objection, and he regarded this judgment is touching the rights of the Higher Judicial Council as it considered the reference of the judges in the federal judiciary. He also regarded that the judgment is void, because the case (judgment subject) had been initiated by individual has no interest, and it didn't affect its financial, social or legal position. Therefore, the litigation is not

directed in this case. by returning to the described judgment (challenge subject), the Court found it had adjudged by unconstitutionality of article (3) of the FSC's law No. (30) For 2005 which included the nomination of the Higher Judicial Council for the Head and the members of the FSC according to its authority which stipulated in clause (heh) of article (Forty-four) of the State's administration law for the transitional period (the temporal Constitution) (annulled). The judgment (challenge subject) had relied in its adjudging by unconstitutionality of article (3) aforementioned to the provisions of articles (91/2nd) and (92) of the Republic of Iraq Constitution for 2005. It also adjudged by notifying the ICR to enact a replacement article of the FSC's law which its proposal is tried before the ICR, as article (92/2nd) of the Constitution stipulated. The FSC finds as starting pint that the (objection of the others) is irregular method of challenging, this method had been enacted to challenge the judgments issued by the first instance Courts which had been mentioned exclusively in article (224/1) of the civil procedure law No. (83) For 1969. These Courts are, the first instance Courts, civil status Courts and the appeal Courts as it considered the subject Court. The law didn't allows this method of challenge against decisions issued by the federal cassation Court, even if it took a decision in the case tried before it, as it considered the subject Court according to its power stipulated in article (214) of the civil procedure law, while the provision of the clause (1) of article (224) of civil procedure law is very clear. This is what the judiciary and the jurisprudence in Iraq settled on, as well as the other states. The FSC who represent the constitutional judiciary in Iraq is not first instance Court which counted by article (224) of the civil procedure law exclusively, besides, the judgments and the decisions issued by the Court are decisive and obliging for all powers according to the provisions of article (94) of the Constitution, and article (5/2nd) of its law, this is formal aspect for the case of objection of the other which initiated by the plaintiff/ being in this capacity. Objectively, the FSC finds that the Constitution of the Republic of Iraq for 2005 had removed the authority of the Higher Judicial Council in nominating the Head and members of the FSC starting from the date it became in effect, as it is permanent in the provision of article (61/5th/alif) of it. The

Higher Judicial Council took this authority from the provisions of clause (heh) of article (Forty-four) of the state's administration law for the transitional period (annulled), and when the Head of the FSC during that time is the Head of the Higher Judicial Council before the issuance of the Higher Judicial Council law No. (45) For 2017. Whereas the law of state administration for the transitional period had been annulled after the issuance of the Republic of Iraq Constitution, and it became in effect on 28/December/2005. Whereas the authorities of the Higher Judicial Council had been determined in article (91) of the Constitution exclusively, and these authorities are managing the affairs of the judiciary, supervise the federal judiciary, nominating the Chief Justice and members of the Federal Court of Cassation, the Chief Public Prosecutor, and the Chief Justice of the Judiciary Oversight Commission, and to present those nominations to the Council of Representatives to approve their appointment according to its authorities stipulated in article (61/5th/alif) of the Constitution. This article was an exception from the principle of separation between powers which stipulated in article (47) of the Constitution, and this article doesn't allow the expansion of this authority to another judicial titles except what had been mentioned exclusively, because the exception from a constitutional text which is it the text of article (91) and the text of article (88) and the text of article (92) which adjudge by the independence of the judiciary as a power beside the legislative and executive powers. As well as the text of article (47) of the Constitution can't be considered a comparison point, in addition to the authorities of the Higher Judicial Council aforementioned. The article (91/3rd) of the Constitution had authorized it to propose the annual budget of the federal judicial power, and to present to the ICR to approve it. This authority doesn't including the annual budget proposal of the FSC according to the provisions of clause (1st) of article (92) of the Constitution which stipulates ((the Federal Supreme Court is an independent judicial body, financially and administratively)). Listing this text after the text of article (91) of the Constitution becomes as a guarantee of the constitutional judiciary independence which represented by the FSC of the Higher Judicial Council, it is one of the federal judicial power components stipulated in article (89) of

the Constitution. The later text is restricting the previous text in jurisprudence, and this is what the FSC adjudged in the judgment issued by the Ref. (19/federal/2017) on 11.4.2017. Besides, the existence of article (3) of the FSC's law which granted the authority to the Higher Judicial Council to nominate the Head and the members of the FSC, this article had been enacted in the provisions of the State's administration law for the transitional period and this article in the present time is violating the provisions of the Constitution after it became in effect. The Constitution didn't authorize, as aforementioned, the Higher Judicial Council this authority, it was restricted for specific judicial titles, not among these titles the Head of the FSC and its members. This task was assigned as above-mentioned to the law that would be enacted by the ICR, as implementing of the provisions of article (92/2nd) of it. This article determined the method of how to nominate and appointing the Head of the FSC and its members. Therefore, the Court adjudged by unconstitutionality of article (3) of its law in the judgment issued by Ref. (38/federal/2019) on 21.5.2019 (challenge subject) by the method of the others' objection, before that, there was a judgment issued by the Court (19/federal/2017) on 11.4.2017, this judgment adjudged by unconstitutionality of article (3/3rd) of the Higher Judicial Council law, also in the case initiated by the Higher Judicial Council which had the same meaning of article (3) of the FSC's law. The judgments of the FSC as article (94) and article (5) of its law are decisive and obliging for all powers, regardless of whom initiated the case by unconstitutionality. The request of unconstitutionality of a law or text is a right exercised by the citizen for laws, and he expresses his opinion as a right which is guaranteed by the Constitution in article (38/1st) of it, with all legal means. Accordingly, the Court decided to reject the case of the plaintiff formally and objectively, and to burden him the expenses/being in this capacity. Also to burden him the advocacy fees of the defendant's agents amount of one hundred thousand Iraqi dinars, this amount shall be divided between them equally. The decision has been issued unanimously and decisively according to article (5) of the FSC's law No. (30) For 2005 and article (94) of the Constitution. The decision has been made clear on 2.7.2019.