



The Federal Supreme Court (F.S.C.) convened on 20.10.2021 headed by Judge Jasem Mohammad Abbood and the membership of the judges Sameer Abbas Mohammed, Ghaleb Amer Shnain, Haidar Jaber Abed, Haider Ali Noory, Khalaf Ahmad Rajab, Ayoub Abbas Salih, Abdul Rahman Suleiman Ali, and Diyar Muhammad Ali, who are authorized to judge in the name of the people, they made the following decision:

The Appellant:

Deputy Public Prosecutor Areej Khalil Hamza before the Customs Court for the Central Region.

The requesting party:

Based on the provisions of Article (5/11) of the Public Prosecution Law No. (49) of 2017, which permitted the Public Prosecution to challenge the unconstitutionality of laws, regulations, and instructions, and as Article (245) of the amended Customs Law No. (23) of 1984 states (First: The customs courts are constitutes, and their location and jurisdiction are determined by a decision of the President of the Supreme Judicial Council and in agreement with the Minister of Finance, Second: The customs court is composed of two full-time judges, one of whom is of no less than the second category, named by the head of the Supreme Judicial Council, and the membership of an employee from the General Customs Authority holding an initial university degree in law with degree not less than

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the third degree, named by the Minister of Finance based on a proposal from the Director General of the committee, Third: the customs court applies the Civil Procedures Law and the law of Criminal Procedure in everything that is not provided for in this law.) the two clauses (1st and 2nd) of the aforementioned article violate the text of Article (19/1st) of the Constitution, as the presence of a member of the customs court from among the employees of the General Customs Authority violates the independence of the judiciary, especially since the aforementioned customs law was enacted under the constitution of the Republic of Iraq of 1970. On the other hand, the decisions issued by the customs courts that include a judgment of fine or confiscation, a percentage of it is distributed among the customs employees according to the provisions of Article (266) of the Customs Law, and the member of the customs court is among the employees who benefit from those decisions, which affects his impartiality. Therefore, she requested a ruling that the two items (first and second) of Article (245) of the Customs Law No. 23 of 1984 are unconstitutional.

The decision:

Upon examination and deliberation from the Federal Supreme Court, it was found that Article (245) of the Customs Law No. (23) of 1984, as amended, included three items. Item (First) stipulated that (the customs courts shall be formed and their location and jurisdiction shall be determined by a decision of the President of the Supreme

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Judicial Council and in agreement with the Minister Finance.) As for item (Second) it was stated (The customs court consists of two full-time judges, one of whom is not less than the second class, named by the President of the Supreme Judicial Council, and the membership of an employee from the General Customs Authority who holds an initial university degree in law and whose degree is not less than the third degree Named by the Minister of Finance based on a proposal from the Director-General of the Authority.) And the clause (Third) stipulated that (the customs court applies the Civil Procedures Law and the law of Criminal Procedure in everything that is not provided for in this law.) This court finds that the aforementioned article included Constitutional violations for the following reasons:

1. The Customs Law No. (23) of 1984 The amendment was initiated under the Constitution of the Republic of Iraq for the year 1970 and in accordance with the political and economic conditions that were followed by the previous regime.
2. The text of Article (245) violates the principle of separation of powers in accordance with Article (47) of the Constitution of the Republic of Iraq for the year 2005 and exceeds the competencies of the judicial authority, because the formation of courts is one of the exclusive competencies that belong to the President of the Supreme Judicial Council in accordance with what was stated in the law Judicial Regulation No. (160) for the year 1979, amended, and that the principle of separation of powers calls for strengthening and expanding the principle of legitimacy and

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recognition of the principle of the supremacy of the constitutional base and the inadmissibility of the authorities exceeding the powers granted to them by the constitution and the inadmissibility of delegating constitutional competencies to another authority, otherwise this is considered a violation of the constitution.

3. Violating the provisions of Article (87) of the Constitution, which stipulates that (the judiciary is independent, and it is assumed by the courts of all kinds and degrees, and they issue their rulings in accordance with the law), so the courts of all kinds and levels are responsible for carrying out the tasks of the judicial authority, and this requires the legislative authority to observe a hierarchical rule of laws and considering the constitution as the head of the legal hierarchy, and the authorities that were formed according to it must adhere to it when exercising their powers, a distinction must be made between the authority of the legislature to legislate a specific law and the content of that law, which should not conflict with the Constitution, the formation of courts must be in accordance with the Judicial Organization Law No. (160) for the year 1979, amended based on the provisions of Article (96) of the Constitution, which states (The law regulates the formation of courts, their types and degrees, their competencies, the method of appointing judges, their service and members of the public prosecution, their discipline and their retirement.) Assigning the

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composition, types, degrees, and jurisdictions of courts to a law other than the Judicial Organization Law is not allowed.

4. The text of Article (245) contradicts the provisions of Article (88) of the Constitution, which states (Judges are independent. There is no authority over them in their judgment except the law, and no authority may interfere in the judiciary or the affairs of justice), because this is one of the pillars of the independence of the judiciary is not permissible to take over the judiciary without judges, as judges are selected and prepared with specific conditions and specifications to take over the judiciary, thus others can't do so. Therefore, Article (98) of the Constitution prohibits the judge and member of the public prosecution from combining the judicial position with the legislative and executive positions or any other work. Also, they may not belong to any party or political organization, but more than that, they are not allowed to work in any political activity, and that this prohibition prevents him when he is not abiding by it, from the continuation of the judge or member of the public prosecution in his judicial work, this prohibition is not binding for the state employees.
5. The crimes, based on the provisions of Article (23) of the amended Penal Code No. (111) of 1969, are classified according to their gravity into three types felonies, misdemeanors, and infractions. All are crimes, regardless of their description in the law in which they are mentioned under the aforementioned classification. The crime type is decided by the most severe

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penalty prescribed in the law, if the penalty for a crime is imprisonment and a fine, then the type of crime is determined by the amount of the imprisonment penalty prescribed for it in the law. Therefore, ruling the unconstitutionality of Article (245) of the Customs Law does not lead to a legislative void as customs crimes involve under the general classification of crimes which are heard from the criminal courts in accordance with their jurisdictions contained in the Code of Criminal Procedure No. (23) of 1971, as amended, and that the aforementioned reasons call for addressing the provisions of Article (247) of the Customs Law, which states (Other courts may not consider cases that are within the jurisdiction of the Customs courts), and Article (250) of the aforementioned law, which stipulates that (by a decision of the Minister of Finance in agreement with the President of the Supreme Judicial Council, a special cassation committee headed by a judge from the Court of Cassation and with the membership of a judge if the first category and one of the general managers in the Ministry of Finance, provided that he is not the director general of the General Customs Authority), and ruling its unconstitutional for violating the provisions of Articles (47, 87, 88 and 98) of the Constitution, also what was included in paragraph (2nd) of Article (251) of the same law, which stipulates that (the decision issued by the customs court is not to be appealed if it decides no more than (250,000) two hundred and fifty thousand dinars, including the value of all confiscated

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funds, except for the means of transportation or things used to conceal the crime of smuggling.) It violates the provisions of Article (100) of the Constitution that prohibits the provision in the laws of immunization of any action or any administrative decision from the appeal, which requires addressing it and ruling its unconstitutionality.

Accordingly, and for all of the above, the Federal Supreme Court decided to rule the unconstitutionality of Articles (245/1st, 2nd, 3rd), (247), (250), and (251/2nd) of the amended Customs Law No. (23) of 1984 and cancel it. The decision was issued final and binding on all authorities. Based on the provisions of Articles (93/1st) and (94) of the Constitution of the Republic of Iraq for the year 2005 and Articles (4/1st) and (5/2nd) of the Federal Supreme Court Law No. (30) of 2005 amended by Law No. (25) of 2021 and in agreement on the 13/ Rabi' Al-Awwal/ 1443 AH, corresponding to 20.10.2021 AD.

Signature of
The president

**Jasem Mohammad
Abbood**

Signature of
The member

**Sameer Abbas
Mohammed**

Signature of
The member

**Ghaleb Amer
Shnain**

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Signature of
The member

Signature of
The member

Signature of
The member

Haidar Jaber Abed

Haider Ali Noory

Khalaf Ahmad Rajab

Signature of
The member

Signature of
The member

Signature of
The member

Ayoub Abbas Salih

**Abdul Rahman
Suleiman Ali**

**Diyar Muhammad
Ali**

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