

In the name of God most Gracious most Merciful

Republic of Iraq
Federal supreme court
Ref. 81/federal/2013



Kurdish text

The Federal Supreme Court (F S C) has been convened on 3. 9. 2013 headed by 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-Temman who authorized in the name of the people to judge and they made the following decision:

The Request:

The Investigative court of Ain Al-Tamar requested the FSC in its letter No. (122) on 19/8/2013 the following:

On 11/11/2012, the Directorate General of Electricity Transmission (Middle Euphrates) requested by its legal representative to complain against the accused (Rahim Hamid Hani) in accordance with the provisions of decision (154) of 2001 for bypassing the electrical power distribution networks building on its prohibited area and where this court considers that article (5) paragraph (2/jim) and article (9) of the above-mentioned decision and also the article (3) of the law No. (17) of 2005 it became contrary to the provisions of the Constitution of the Republic of Iraq of 2005 for the following reasons:

First - Article (19/paragraph 6) of the constitution valid stipulates that (Every person shall have the right to be treated with justice in judicial and administrative proceedings) and the paragraph (5) of the article above stipulates that (The accused is innocent until proven guilty in a

fair legal trial. The accused may not be tried for the same crime for a second time after acquittal unless new evidence is produced.).

Second - The filing an editorial complaint includes the claim of the criminal and civil right as stipulated in article (9) of the Criminal Procedure Law No. (23) of 1971 amended, the article (9) of decision (154) of 2001 prevented the courts from hearing the emerging cases from implementing the provisions of this decision. Although there are punitive texts in the mentioned decision, article (6) of it is even if we assume that they mean civil courts, even though they came in absolutely.

Third - the text of the paragraph (2/jim) of article (5) of the decision No. (154) of 2001 state that (give the head of the administrative unit the power to detain the violator and not release him until after he has paid the full amount of one deal) stated in the mentioned decision, it thus became contrary to the text of Article (37/1st –alif), which states that (The liberty and dignity of man shall be protected.) and the paragraph (5) of the mentioned article which states that (No person may be kept in custody or investigated except according to a judicial decision.) it also contradicts the text of Article (19/ paragraph 12) of the Constitution, which stipulates that (A- Unlawful detention shall be prohibited) as well as with the text of Article (15) of the Constitution which stipulated that (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).

Fourth - the text of Article (3) of the law No. (17) of 2005 prohibits the courts from hearing cases arising from the application of decisions on the prevention of abuse on state land, which in this way became contrary to the provisions of Article (19/3 &5&6) of the Iraqi Constitution valid.

Fifth - The highness of the constitutional rules requires that the entire state's legal system be governed by constitutional rules in accordance with article (13) of the Constitution valid, which stipulates that (Any text in any regional constitutions or any other legal text that contradicts this Constitution shall be considered void.) add to that the article (47) of the Constitution stipulates that (The federal powers shall consist of the legislative, executive, and judicial powers, and they shall exercise their competencies and tasks on the basis of the principle of separation of powers.).

Sixth - The article (87) of the Constitution stipulates that the (The judicial power is independent. The courts, in their various types and levels, shall assume this power and issue decisions in accordance with the law.) Since article (5) paragraph (2/jim) has given the authority to detain the overriding and not release him until after paying the full allowance to the head of the administrative unit since the head of the administrative unit is a civil servant and not a judge of the judiciary who exercises purely judicial jurisdictions, since the power to investigate, arrest, detain or prosecute people is exclusively entrusted to the courts, these powers may not be exercised by non-judges other than before the 2005 Iraq Constitution was passed and enforced where the laws and decisions of the Revolutionary Command Council (dissolved) were permissible to grant penalty powers to administrative employees, as in article (2 item jim) of decision (154) of 2001 because there are no judicial courts in the administrative formations in full, but at present the courts have covered all administrative formations and irregularities can be filed to resolve them quickly in accordance with the law and text of article (9) of decision (154) of 2001 is contrary to the constitution valid, which gives everyone the right to be treated fairly in judicial proceedings as stipulated in Article (19) sixth of the Constitution. Also, the text of Article (5/2 jim) of the Revolutionary Command Council (dissolved) decision No. (154) of 2001 became contrary to the text of Article (37/1st/alif & beh) of the

Constitution, and the text of Article (3) of Law No. (17) of 2005 became contrary to the above texts relating to the decision above.

As it deals with the same issue and based on the above, this court asks your esteemed court to decide on the legitimacy of articles (5/2/jim) and the article (9) of decision No. (154) of 2001 and the article (3) of the law No. (17) of 2005 (Law abolishing legal provisions that prevent courts from hearing cases) or not based on the provisions of article (4/2) of FSC's Law No. (1) of 2005 with appreciation.

The application was put under scrutiny and debated by the FSC and reached the following decision:

The Decision:

After scrutiny and deliberation by the FSC found that the article (47) of the Constitution state that (the federal powers shall consist of the legislative, executive, and judicial powers, and they shall exercise their competencies and tasks on the basis of the principle of separation of powers.) The article (87) ruled that (The judicial power is independent. The courts, in their various types and levels, shall assume this power and issue decisions in accordance with the law.). The article (19/6th) state that (every person shall have the right to be treated with justice in judicial and administrative proceedings.) the paragraph (twelfth – alif) state that (unlawful detention shall be prohibited) also the paragraph (first- beh) of article (37) of the Constitution on (No person may be kept in custody or investigated except according to a judicial decision.). Since the paragraph (2/jim) of article (5) of Revolutionary Command Council (dissolved) decision No. (154) of 2001state that (Obligation to pay the expenses of removing the excess and the value of the damage caused by it double the comparable wage one deal within a period of not more than (10) days from the date of notification of this and in case of non-payment is booked by decision of the head of the administrative unit and is not released until after paying the full amount of one deal) since the head of the administrative unit who gave him the power to detain the

abuser is not a judge of the judiciary and since the investigation or detention of persons or their arrest or trial is exclusively entrusted to the courts and these powers may not be exercised without judges other than what was the case before the 2005 Constitution was issued, where the laws allowed for the granting of punitive powers to administrative officials, as in paragraph (2/jim) of article (5) of the Revolutionary Command Council (dissolved) decision No. (154) of 2001 because there were no judicial courts in all (sub-districted, districted, provincial centers) violations can be filed to resolve them quickly and in accordance with the law, especially since the Constitution and article (19/12) stipulate that (Unlawful detention shall be prohibited). Therefore, the text of article (5), paragraph (2/jim) of the decision of the Revolutionary Command Council (dissolved) is deemed to be inoperative on the basis of Article (19/12th –alif-) and Article (87) of the Constitution, which stipulates that the (The judicial power is independent. The courts, in their various types and levels, shall assume this power and issue decisions in accordance with the law.), this is what has been settled by the elimination of this wisdom in its judiciary, including its decision No. (15/federal/2011) on 22/2/2011, considering the text of article (237/2nd/alif) of customs law No. (23) of 1984, which gave the authority to arrest the accused to the Director General of Customs or who authorized him to be disabled. Because the provisions of the Constitution are upper in application, the text of article (5), paragraph (2/jim) of the decision of the Revolutionary Command Council (dissolved) No. (154) of 2001, is broken for violating the Constitution on the basis of articles (19/12th –alif-), (37), (47) and (87) of the Constitution of the Republic of Iraq of 2005 non-judges may not exercise judicial functions because these functions have become the prerogative of judges belonging to judicial jurisdiction exclusively on the basis of article (87) of the Constitution.

As for the challenge raised in connection with the unconstitutionality of Article (3) of the law No. (17) of 2005, it was found that regarding the subject of the complaint raised before the Court of Investigation of Ain Tamr related to the overreach of the land of the State, as stipulated in article 3 of the above law in the last part of it. As it excluded from its provisions the provisions contained in Article (1), which ruled that (The legal texts shall be repealed wherever they are contained in the laws and resolutions issued by the Revolutionary Command Council (dissolved) from 17/7/1968 to 9/4/2003, which prohibits the courts from hearing cases arising from the application of laws and decisions of the Revolutionary Command Council (dissolved), in article (3) of law above No. (17) of 2005 decisions to prevent abuse on the territory of the state from the provisions of the said law and since article (19/3rd) of the Constitution stipulates the right to (Litigation shall be a protected and guaranteed right for all.) the paragraph (6th) of it stipulated (Every person shall have the right to be treated with justice in judicial and administrative proceedings.). Article (100) of the Constitution stipulates the (It is prohibited to stipulate in the law the immunity from appeal for any administrative action or decision). Therefore, the last part of article (3) of Law No. (17) of 2005 shall be broken for violating the Constitution, but the appeal raised about the unconstitutionality of Article (9) of the Revolutionary Command Council (dissolved) decision No.(154) of 2001 which stipulated that (prevents the courts from hearing the emerging cases from implementing the provisions of this decision). Article (1) of Law No. (17) of 2005 (The Law on the Abolition of Legal Provisions prohibiting courts from hearing cases) was found to have provided for (legal texts shall be repealed wherever contained in the laws and laws issued by the Revolutionary Command Council (dissolved) from 17/7/1968 to 9/4/2003, which prohibits courts from hearing cases arising from the application of laws and decisions of Revolutionary Command Council (dissolved)).

Accordingly, Article (9) of the Decision of the Revolutionary Command Council (dissolved) No. (154) of 2001 is repealed and the appeal raised by the appellant shall be the Investigative Court of Ain Al-Tamar its unconstitutionality is rejected decided to reject it, so for the advanced reasons above, the text of paragraph (2/jim) of the decision of the Revolutionary Command Council (dissolved) No. (154) of 2001 and the last part of Article (3) of Law No. (17) of 2005 are suspended for violating the Constitution and the decision was unanimously issued in 3/9/2013.