

IN THE NAME OF GOD, MOST GRACIOUS, MOST MERCIFUL

Republic of Iraq  
Federal Supreme Court  
Ref. 91/federal/2019



Kurdish text

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The Federal Supreme Court (F.S.C.) has been convened on 14.10.2019 headed by the Judge Madhat Al-Mahmood and the membership of Judges Farooq 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 Muhamad Rajab Al-Kubaysi who are authorized in the name of the people to judge and they made the following decision:

The plaintiff: Emad Abd Al-Ameer Salih -his agent the attorney Qasim Sadam Al-Abody.

The defendants:

1. The speaker of the Iraqi council of representatives (I.C.R.)/ being in this post- his agents the legal officials the director Salim Taha Yasein and the legal advisor Haytham Majid Salim.
2. President of the republic/ being in this post- his agent the legal consultant Ahmad Sraieh Mohsin.

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## The claim

The agent of the plaintiff claimed that on 13/5/2019 the court of investigation in Al-Bayaa decided to approach the reference of the accused (Raad Qasim Khayoon) who is officer in the Iraqi army/ the air force to obtain the approval of the commander in chief of the armed forces or whoever he authorizes in order to implement the arrest warrant according to the provisions of article (406) of the penalty law in the case presented before the mentioned court and entrusted before the crimes combating office in Hay Al-Amiel in accordance with the provision of article (19) of marital criminal proceedings law, whereas this procedure violated the Iraqi constitution, the justice principals, the individual rights, and damaging his client's right, and has nullified all the legal principals in the Iraqi criminal law that required arresting the crime committer as fast as possible, which caused direct harm to his client, the plaintiff agent found that the mentioned article is illegal and contradict the constitution, therefore, as a sense of him –under his claim- in the spirit of justice he challenge the constitutionality of the mentioned article requesting to judge it unconstitutionality for the following reasons:

- 1) It contradict with article (19/1<sup>st</sup>) of the Iraqi republic constitution for 2005 which stipulated that (the judiciary is independent and no power is above the judiciary except the law) the challenged article included waste to the principal of separation of powers and limit the jurisdiction of the judicial in prosecuting the accused in committing crime against the civilians or the state institutions. In the same time it authorizes individuals other than the judges the right to postpone the implement of the court

decision or even to abeyance it (completely), knowing that the court enjoy the required efficiency to estimate if the committed crime (resulted from) performing the military duties or not, and it have the legal custody in that, furthermore the standard procedures gives the opportunity, especially in the important crimes, to the accused to escape and influence the progress of the investigation or conceal the evidence and all these caveats certainly affect the course of justice and litigation procedures.

- 2) The challenged article contradict with article (14) of the constitution which stipulate that (Iraqis are equal before the law) as it affected the principal of equality before the law and created priority to one party on the other in the criminal cases furthermore it granted an individuals the immunity just because they are officers or military from implementing the judicial decisions unlike other Iraqis who don't have such immunity which was clear in the case of the plaintiff of the murder of his son first lieutenant (Amjed Emaad Abd Al-Amier), as it is an important murdering incident, where the listed restriction in the mentioned article (19) violated the course of justice.
- 3) The challenged article contradict with article (19/3<sup>rd</sup> and 6<sup>th</sup>) of the constitution as paragraph three has guaranteed the right of litigation for all, but the challenged article has limited the constitutionally guaranteed right and made this right of the civilians case' parties, as a result it affected the constitutional principal stipulated in paragraph (6<sup>th</sup>) of article (19) of the constitution which stipulated (every person shall have the right to be treated with justice in judicial and administrative proceedings).

4) The judicial precedents of the F.S.C. that judged the unconstitutionality of some of the legal articles that included similar principals and involved the affecting of the constitutional powers separation principal, for example article (136/beh) of the criminal proceeding law No.(23) for 1971, and article (117) of the criminal proceeding law of the internal security force.

For the aforementioned reasons the agent of the plaintiff requested to judge that article (19/2<sup>nd</sup> and 3<sup>rd</sup>) of the marital criminal proceedings law No.(22) for 2016 to be unconstitutional. The agent of the defendant (the speaker of the I.C.R./ being in this post) respond to the case petition stating that the challenged article is a legislative choice and doesn't contradict article (19/1<sup>st</sup>) of the constitution, as it was set for the nature of the duties of the officers in the Iraqi army, and there is no conflict with article (14) of the constitution, as the constitutional article stipulated the equality (in similar status), as for the individual' right to be treated with justice, the judicial parties shall oversee the implement of the justice mentioned in these texts, as for the judicial precedents of the F.S.C. that matter is related to the specialty of each challenge and how it violated the constitution, for the mentioned reasons the agents requested to reject the case. the agent of the second defendant (the president of the republic/ being in this post) respond to the case petition stating that his client is not a litigant in this case according to the provisions of article (4) of the civil procedures law, therefore under the provisions of article (80) of the civil procedures law he requested to reject the case. the agent of the plaintiff reply on the answering draft of the first defendant agent' draft by his draft dated on (30/9/2019) included repeating to his case petition. After the case

was registered before this court according to the provision of paragraph (3<sup>rd</sup>) of article (1) of the F.S.C. Bylaw No.(1) for 2005 and completing the required procedures according to paragraph (2<sup>nd</sup>) of article (2) of the mentioned the Bylaw, the date (14/10/2019) was scheduled for the argument, the court convened and the agent of the plaintiff and the agent of first defendant has attended, the second defendant the president of the republic didn't attend or his designee despite the notification according to law so the court decided to continue with the argument in his absent, the agent of the plaintiff repeated the case petition and requested to judge according to it, the agents of first defendant repeated the answering draft and requested to reject the case. The court reviewed the defendant answer and found that the case is completed for reasons of judgment, the argument is closed and the decision is issued publicly.

### **The decision:**

During scrutiny and deliberation by the F.S.C. the court found that the agent of plaintiff claimed in his case petition that on (13/5/2019) the court of investigation in Al-Bayaa decided to approach the reference of the accused (Raad Qasim Khayoon) who is officer in the Iraqi army/ the air force to obtain the approval of his reference (the commander in chief of the armed forces) or whoever he authorizes, in order to implement the arrest warrant against the mentioned accused, according to the provisions of article (406) of the Iraqi penalty law No.(111) for 1969 (the amended), for causing the murder of the plaintiff's son first lieutenant (Amjed Emaad Abd Al-Amier), under the provision of article (19) of the marital criminal proceedings law No.(22) for 2016, the agent of the plaintiff

claimed that the mentioned procedure violating articles (19/1<sup>st</sup>, 3<sup>rd</sup>, 6<sup>th</sup>, and 14) of the constitution, and for the judicial precedents of the F.S.C. in that regard he requested to judge the unconstitutionality of article (19/2<sup>nd</sup> and 3<sup>rd</sup>) of the marital criminal proceedings law No.(22) for 2016 (aforementioned). The F.S.C. finds that paragraphs (2<sup>nd</sup> and 3<sup>rd</sup>) of article (19) of the marital criminal proceedings law No.(22) for 2016 it was set for the nature of the duties of the officers in the Iraqi army, and there is no conflict with article (14) of the constitution, as the mentioned constitutional article stipulated the equality in similar status between the same category in the society, it doesn't means the equality between the officer and the civil individual, as each of them belong to deferent category from the other in his assigned duties, the F.S.C. finds from other point by reviewing the listed constitutional article above, and the reasons of issuing the mentioned marital criminal proceedings law, that what was meant on article (99) of the constitution is to achieve fair investigation and trial for the officer regard the crimes he committed during the performance of his official duties as insurance for the required legal guarantees, and that required the referral to his reference to estimate what he committed and whether it require to be trialed for it or not after completing legit investigation by competent board of inquiry, if the reference become arbitrary on not giving the permission to summon, implement the arrest order, postpone its implementation, or referring the officer to the competent court, his decision will be submitted to challenge before the administrative judicial as stipulated in article (7/4<sup>th</sup>) of the state consultative council law No.(65) for 1979 which was amended by the law No.(71) for 2017,

that include enough guarantee for the injured of the decision of the accused reference in this regard. Accordingly it is clear that the decision issued by the military party required by the privacy and duties of that party' members, this decision is up to the judicial and not outside it, which was confirmed by the F.S.C. in it issued decision in this regard Ref.(147/federal/2018 and 21/federal/2019) on 27/2/2019. Accordingly for the mentioned reasons the F.S.C. decided to reject the case formally from the point of litigation for the second defendant the president of the republic/ being in this post because he is not the party that enacted the law the subject of challenge for unconstitutionality of some of it article, and objectively as there is no conflict between the provision s of the mentioned constitutional article by the plaintiff' agent with the paragraphs (2<sup>nd</sup> and 3<sup>rd</sup>) of article (19) of the law of marital criminal proceedings No.(22) for 2016, and to burden the plaintiff the expenses and the advocacy fees for the agents of the defendants amount of (one hundred thousand Iraqi dinars) divided on them according to law. The decision has been issued unanimously and final according to article (94) of the constitution and article (5/2<sup>nd</sup>) of the F.S.C. law No.(30) for 2005 and issued publicly on 14/10/2019.