

Republic of Iraq
Federal Supreme Court
Ref. 112 / federal /2021



Kurdish text

The Federal Supreme Court (F S C) has been convened on 9/11/2021 headed by Judge Jassim Mohammed Abood and membership of Judges Ghaleb Amir Shunain, Hayder Jabir Abid, Hayder Ali Noori, Khalef Ahmed Rajab, Ayoob Abbas Salah, Abdul-Rahman Suleiman Ali, Dyar Mohammed Ali, and Munthir Ibrahim Hussein who are authorized in the name of the people to judge and they made the following decision:

The Plaintiff: the President of the Supreme Judicial Council/ being in this capacity – his agent the official jurist Labeeb Abbas Jaafar.

The Defendant: the Speaker of the ICR/ being in this capacity – his agents the legal counselor Haytham Majid Salim and the official jurist Saman Muhsin Ibrahim.

The Claim

The plaintiff claimed/being in this capacity that the defendant/ being in this capacity had already enacted the law of public prosecution and approved by the Presidency of the Republic law No. (49) of 2017 published in the Iraqi Gazette in the number (4437 on 6/3/2017) in violation of the text of the article (47) of the Constitution of the Republic of Iraq, which established the principle of separation of powers and precisely defined their functions and competencies, but violated this principle in the legislation of law in violation of the powers provided for by articles (60 and 61) of the Constitution, whereas law proposed by the Supreme Judicial Council and sent to the Council of Ministers is different from the law passed without consultation with the Council of Ministers or the Supreme Judicial

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Council, considering that the Public Prosecution Service is a component of the federal judiciary in accordance with the provisions of article (89) of the Constitution of the Republic of Iraq 2005, and these constitutional violations were the following: 1. Article (1) under which the Public Prosecutor's Service was granted financial and administrative independence in addition to giving it a moral personality, and he wanted to make it an entity independent of the Supreme Judicial Council, which was not mentioned in the text of the proposed law, contrary to the text of articles (89, 90 and 91/1st, 2nd and 3rd) of the Constitution. 2. Article (3/1st) under which he added a job title called "Prosecutors' Assistants" which corresponds to the job degree in the Supreme Judicial Council represented by the judicial assistant and is not included in the proposed law. 3. Article (3/2nd) under which the judicial status of prosecutors is removed in contravention of Law No. (10) of 2006, which is not reflected in the proposed text and contrary to the article (47) of the Constitution. 4. Article (4) under which the appointment of the Chief Prosecutor was set at four renewable years with his consent, i.e. (The Council of Representatives) and dealt with his deputy by limiting his appointment to four renewable years once, which is not listed in the proposed law contrary to the text of the article (47) of the Constitution of the Republic of Iraq 2005. 5. The law referred to the appointment of a member of the Public Prosecution, a graduate of the Federal Judicial Institute, the Judicial Institute of the Territory, or of jurist lawyers under the age of 50 with at least 10 years of work experience, separate

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from their fellow judges, which was not included in the proposed text contrary to articles (47, 87, 88 and 96) of the Constitution. 6. In paragraph (7th) of article (4), it gave specialties for prosecutors that were not originally listed in the proposed law contrary to the article (96) of the Constitution. 7. Added a new jurisdiction for the prosecution in the article (5) in paragraph (12th) of investigating crimes of financial and administrative corruption and all crimes contrary to the duties of the post and the creation of the Department of the Public Prosecutor for financial and administrative issues of public finance and offices of the Financial and Administrative Prosecution headed by a prosecutor exercising its competence in accordance with the provisions of paragraph (12th) concerning the investigation of crimes of financial and administrative corruption, although these functions are the prerogatives of the integrity. He wanted to create some kind of interference in the powers and confuse the investigation of such crimes. The proposed draft did not list such paragraphs in contravention of articles (47, 89, 90, and 102) of the Constitution. 8. The absence listed in the article (7) of the Law, which gave the right to the Head of the Public Prosecution Service to take measures to avoid breaking or violating the law, while this article did not specify the body to challenge the challenged provisions and decisions in the interest of the law as defined by article (30) of the repealed Law No. (159) of 1979, which is a legislative deficit that harms the interests and funds of the State and is contrary to public order and contrary to the article (27) of the Constitution of the Republic of Iraq. 9. Article (13/2nd) gave the

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right of the head of the judicial supervision authority to carry out his duties of supervising and controlling the destination provided for by item (1st) of this article to inspect the public prosecutor's office in all its formations or to attribute to this purpose a member of the authority to carry out this task as appropriate and to report to the Head of the Public Prosecution Service, the Supreme Judicial Council and the Council of Representatives without taking into account the hierarchy of the components of the federal judiciary and to include the Council of Representatives in the aforementioned text contrary to articles (47 and 89) of Constitution. Whereas the Council of Representatives had included a new text into the law which didn't exist in the proposed bill and created new departments, job titles, and investigative jurisdictions for the Public Prosecution despite its listing as an exception in the text of the article (5/4th) of the law in effect. This creation was regarded as exceeding the constitutional precedence, among them is the judgment in the lawsuit 21/Federal /2015 on April 14, 2015, which stipulates that the federal judiciary must be referred to in its laws if there is an idea to amend the projects it has submitted, as well as the need to refer to the Council of Ministers if the amendment contains financial obligations to the State and since the amendments made by the Council of Representatives of the law fall within this section, so the law as a whole is contrary to the principle of separation of powers contained in the article (47) of the Constitution. Therefore, for all of the above-mentioned reasons, he requested to judge by unconstitutionality of the Public Prosecution Law No. (49) of 2017 and to burden the defendant

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with all judicial fees and expenses. The case was registered with this court in number (112/Federal/2021) and the legal fee for it was collected in accordance with article (1/3rd) of the Bylaw of the Federal Supreme Court No. (1) of 2005, and the defendant/ being in this capacity was notified with its petition and documents in accordance with the provisions of article (2/1st) of the aforementioned Bylaw, and his agents replied with the answering draft dated 14/9/2021 which summarized as following: 1. There is a proposal for a new law for public prosecution submitted by the Supreme Judicial Council and adopted by the Parliamentary Legal Committee amended the law in question and has been read twice and is ready to vote by the Council of Representatives so he asked for the delay of this case until the new law is enacted. 2. The judiciary power consists of the Supreme Judicial Council, the Federal Supreme Court, the Federal Court of Cassation, the Public Prosecutor's Office, and the judicial oversight commission in accordance with article (89) of the Constitution. These components are contained as a census of the components of the judiciary, which is part of the Supreme Judicial Council and has specific functions in accordance with article (90) of the Constitution, each of which has its specificity, competencies, and functions in accordance with its law, which is reflected in financial and administrative independence and moral personality to perform each of them in their role, and the components of the judiciary are members of the Supreme Judicial Council that do not belong to him. 3. The addition of a functional address in the name of the Deputy Public Prosecutor under article

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(7/1st) of the law in question was a legislative option that does not violate a constitutional provision with evidence that the plaintiff's agent/being in this capacity acknowledges that the job address is matched by their functional degree, which represented by the judicial assistant. 4. The agent of the plaintiff interpretation of article (3/3rd) of the Law as having abolished the judicial status and its argument against prosecutors is out of the question of the content of the aforementioned legal text, particularly since it indicates that prosecutors enjoy all the rights and privileges of judges. 5. The text of article (4) of the Law is a legislative option and the appointment of special grades is subject to the approval of the Council of Representatives and there is no constitutional violation in this regard of the article (47) of the Constitution. 6. Concerning the reference to the appointment of a member of the Public Prosecutor's Institute graduates and the violation of the provisions of the Constitution mentioned in the case list, the text in question did not deviate from what is done in the appointment of members of the Public Prosecution or the Judicial Regulation Law on lawyers with ten years of service and accumulated experience, and no constitutional violation of it. 7. The jurisdictions of the Prosecutor in the article (4/7th) are job jurisdictions for the assistant and this does not constitute a constitutional violation. 8. Concerning article (5, paragraph 12, 13, and 14) of the law in question, the objectives of the law are listed in the article (2) it and the legislative will has been to involve the prosecution in the investigation based on the oversight role and contribute to the speed of disclosure of criminal Laws, the resolution of

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cases and respect for the application of laws, protection of public money, but the establishment of a public prosecutor's service to supervise and control the disclosure and reduce financial and administrative corruption and to identify issues related to public money and administration, as well as no overlap Between the prosecution departments and the work of the Integrity Commission, each has its role. 9. As for what the plaintiff referred to regarding the absence in the article (7) of the Law and his description of legislative disability, what he went on to impose what he said needed legislative intervention and not challenge it, and the amendment referred to in paragraph (1) of this regulation might address this. 10. About the appeal of the text of the article (13/2nd) of the law and its violation of the provisions of the Constitution, paragraph (1st) of the same article of the law in question indicated that the original is that the chief prosecutor has the right to supervise the public prosecutor's office and to monitor the good performance of its members in accordance with the Constitution and to carry out a report of the aforementioned parties, which is a matter of good performance control and the standing of the Council of Representatives and informing it of this as the legislative and supervisory authority in accordance with the Constitution and a representative of the people who are the source of the aforementioned Authorities in accordance with Article 5 of the Constitution. For these reasons and reasons considered by the honorable court, the defendant's agent requested from the Federal Supreme Court to dismiss the plaintiff's case and to burden him with all judicial fees, expenses, and

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advocacy fees. After completing the required procedures in accordance with the provisions of the Bylaw above, a date was set for the argument and the parties were informed in accordance with the provisions of article (2/2nd) of it, and on the appointed day the court was formed and as an agent of the plaintiff/ being in this capacity, the legal counselor Haitham Majid Salim and the official jurist Saman Mohsen Ibrahim and the public in presence argument proceeded. The plaintiff's agent repeated what was stated in the petition and requested to judge according to it, the defendant's agents answered that they repeat what was listed in their draft of 14 September 2021 and requested to reject the case. Both parties repeated their previous sayings and requests. Whereas nothing left to be said, the Court had decided to end the argument and scheduled 9/11/2021 as a date for the decision issuance. On an aforementioned day, the Court had convened and issued the following decision publicly.

The Decision:

Upon scrutiny and deliberation by the Federal Supreme Court, it was found that the plaintiff/ being in this capacity, claimed that the defendant had already enacted the Public Prosecution Law No. (49) Of 2017, published in the Iraqi Gazette (4437 on 6 March 2017). In violation of the provisions of articles (47, 60, 61, 87, 88, 89, 90, 91, and 96) of the Constitution, the defendant requested to plead and rule that the above-mentioned law was unconstitutional and charged with judicial fees and expenses, By scrutinizing the plaintiff's case and requests and the defendant's agents'/ being in this capacity claims and

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requests, the court reached the following conclusions: 1. The federal system in Iraq, in accordance with article (47) of the Constitution of the Republic of Iraq 2005, is based on the principle of separation of federal legislative, executive and judicial powers, where they exercise their powers and functions on the basis of this principle, which requires that federal authorities abide by and do not exceed the limits of their constitutional competences, as the overriding of those powers makes the work of the authority that exceeds its jurisdictions contrary to the Constitution. 2. Under the Constitution of the Republic of Iraq in 2005, the constitutional legislator sought to grant the judiciary independence in accordance with the nature of judicial work. The judiciary and the independence of the judiciary for the importance and specificity of judicial work and its distinction from the work of the legislative and executive branches, the Constitution on the other hand affirmed the independence of judges, as article (88) of it stipulates (judges are independent and have no authority in their judiciary other than the law and no authority may interfere in the judiciary or in the affairs of justice) and that the purpose of emphasizing the independence of the judiciary, the independence of the judiciary and the independence of judges and under the above-mentioned articles is that each authority abides by the limits of its jurisdiction and prevents the legislative and executive branches from interfering with the judicial work and the requirements for achieving justice and work to provide the requirements of its independence and impartiality in order to ensure that the target of judicial independence is achieved, including those obligations, to submit proposals for bills concerning the judiciary by the Supreme Judicial Council, where article (3/10) of the Supreme Judicial Council Law No. (45) of 2017 stipulates (the Supreme Judicial Council shall take over the following

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tasks: Proposing bills on the affairs of the federal judiciary) as well as the obligations of judicial independence that the Supreme Judicial Council should be the reference in the appointment of judges, their promotion, discipline and retirement, as stated in paragraph (6th) of the above-mentioned article of the Supreme Judicial Council Law, therefore, legislation regulating how prosecutors are appointed without reference to the Supreme Judicial Council makes that law constitutionally flawed because it violates the principles of judicial independence, because what applies to judges applies to prosecutors in terms of appointment, promotion and everything related to their judicial affairs, and the assignment to serve as a judge or to carry out functions of justice. The member of the public prosecution or on the contrary returns his appreciation to the Supreme Judicial Council as needed by the courts. Therefore, the introduction of a new mechanism for the appointment of a member of public prosecution and the development of a functional degree entitled "Assistant Prosecutor" is contrary to the functions of the Supreme Judicial Council in the management of the affairs of judicial bodies provided for in article (90) of the Constitution. The Public Prosecution Law No. (49) of 2017 violates the principle of judicial independence and contradicts the provisions of articles (19/1st, 87, and 88) of the Constitution, and the provisions of the two paragraphs mentioned in the above-mentioned article were not proposed by the Supreme Judicial Council and the Iraqi judicial system did not witness a functional degree entitled "Assistant Prosecutor" neither under the Amended Judicial Regulation Law (160) of 1979 nor under the Supreme Judicial Council Law No. 45 of 2017. 3. The types and grades of the courts are determined by the provisions of the Judicial Regulation Law No. (160) of 1979 amended, where article (35/1st)

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stipulates it (one or more investigating courts are formed everywhere where a court is initially a court and the judge of the court of beginning shall be a judge of inquiry unless a special judge is appointed It investigates in accordance with the provisions of the law) and determines the jurisdiction of the investigating courts under articles (51, 52, 53, 54, 55, 56 and 57) of the Criminal Procedure Law No. (23) of 1971 amended and which shall The investigation is the investigating judge and the member of the public prosecutor performs his duties in accordance with article (5) of the Public Prosecution Law No. (49) of 2017, so since article (37/first/b) of the Constitution stipulates that(No one may be arrested or investigated except by judicial decision) and therefore the judicial decision must be issued by a competent judge and, with the exception of that, the prosecutor may, according to article (5/IV) of the Public Prosecution Law exercise the powers of the investigating judge when he is absent at the scene. Therefore, giving the prosecutor original powers to investigate crimes of financial and administrative corruption and all offenses contrary to the duties of the public service, in accordance with article (12th) of Article 5 of the Public Prosecution Law, is a constitutional violation, making the provisions of article 5/12, 13 and 14 of the contested law inconsistent with the provisions of the Constitution. 4. The Supreme Judicial Council exercises its powers under article (91) of the Constitution, including nominating the Chief Prosecutor and submitting it to the Council of Representatives for approval, so legislation includes limiting the duration of the presidency of the public prosecution and determining the duration of the appointment of the Deputy Chief Prosecutor by four years in accordance with the article (4/first and second) of the challenged law makes the said texts contrary to the provisions of articles (47 and

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91/2nd) of the Constitution of the Republic of Iraq 2005. For all the above and for violating the provisions of articles (19/first, second, third, fourth, fifth, seventh, eighth and ninth), (37/1st/Beh), (47), (88), (89), (90), (91/ first/ second) and (96) of the Constitution of the Republic of Iraq 2005 the Federal Supreme Court decided:

First: Ruling that the following terms and items of the Public Prosecution Law No. (49) of 2017 are unconstitutional:

1. The term (enjoying financial and administrative independence) is contained in the article (1/first) of the law.
2. Section (2nd) of Article (1) of the Law.
3. The phrase (and prosecutors) contained in the article (3/first) of the Law.
4. The phrase (for four years) and the phrase (renewal may be made once at the suggestion of the Supreme Judicial Council and the approval of the Council of Representatives.) contained in section (1st) of the article (4) of the Law.
5. The phrase (4) four years renewable once) contained in section (2nd) of the article (4) of the Law.
6. The phrase (or from lawyers and jurists under the age of 50) years and who have experience in their field of work for a period of not less than (10) ten years) contained in section (3rd) of the article (4) of the Law.
7. Section (7th/1, 2, and 3) of Article (4) of the Law.
8. Clauses (12th, 13th, and 14th) of Article (5) of the Law.
9. The phrase (and to the Council of Representatives) is contained in section (2nd) of the article (13) of the Law.

Second: to reject the plaintiff's claim in addition to his function of challenging the rest of the above-mentioned articles of law.

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Third: The parties charged fees, expenses, and relative legal fees in accordance with the law.

The decision has been issued unanimously, decisive, and binding for all powers according to the provisions of the articles (93,94) of the Republic of Iraq Constitution for 2005 and the articles (4,5) of the Federal Supreme Court Law No. (30) for 2005 which was amended by the Law No. (25) for 2021. The decision has been made clear on 3/Rabea'a Al-Thani/1443 Hijri which coinciding 9/November/2021 AD.

**Signature of
The president**

**Jasem Mohammad
Abbood**

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