Republic of Iraq
Federal Supreme Court
Ref. 41 / federal / 2021

Kurdish text

The Federal Supreme Court (F.S.C.) has been convened on 15.6.2021 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 Request:

The Deputy Public Prosecutor of the Public Prosecution Office in the Hashemite requested the Federal Supreme Court, according to the letter No. (154) dated 23.5.2021, to consider the list of constitutional appeals submitted by him and attached to the aforementioned letter, which includes that the judge of Hashemite First Instant Court in his capacity as judicial executor, has issued in the executive dosser No. (2/kha/2020) his decision dated on 1.3.2021 which included the imprisonment of the debtor, Malik Attia Khudair, who is over sixty-six years of age, in executive detention, until a guarantor is presented to him in accordance with the provisions of paragraph (3rd) of Article (32) of the Execution Law No. (40) of 1980 amended by the law No. (13) of 2019. The text of the mentioned article as he stated in his draft is contradicting the Constitution for the following reasons:

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1. The Constitution in the article (2/c) stated that no law may be enacted that contradicts the rights and basic freedoms stipulated in the Constitution, represented in the provisions of article (37/1st/a) of it which stated (the liberty and dignity of man shall be protected), also contradicts what stated in paragraph (c) of the same article that stated (all forms of psychological and physical torture and inhumane treatment are prohibited….), and contradicts the text of the article (46) of the Constitution that stated (restricting or limiting the practice of any of the rights or liberties stipulated in this Constitution is prohibited, except by a law or based on law, and insofar as that limitation or restriction does not violate the essence of the right or freedom).
2. The article being a challenge for unconstitutionality violates international conventions and the universal declaration of human rights, and it violates the Iraqi legislation that sets an upper limit for the periods of deprivation of freedoms and their restriction, no matter how heinous the crime committed.
3. The article being a challenge for unconstitutionality violates the law of Execution itself represented by the bases listed in Article (2) of it, which achieves a balance between the interest of the creditor and the

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interest of the debtor, as well as violating the provisions of the article (43) of it that required the debtor's imprisonment period not to exceed four months, except specific cases under the aforementioned law, including the failure to hand over the debtor to the minor in accordance with what was stated in the article (48) of the Execution Law.

4. Imprisonment of the debtor until the presentation of a guarantor turns the imprisonment into a means of retaliation if the debtor is unable to pay the debt because he is insolvent, therefore he requested, based on the provisions of paragraph (11th) of Article (5) of the Public Prosecution Law No. (49) of 2017, to rule the unconstitutionality of the paragraph (3rd) of Article (32) of the Execution Law No. (40) of 1980 added by the Sixth Amendment No. (13) of 2019.

The request has been set under scrutiny and deliberation by the F.S.C. and it decided the following:

The decision:

During scrutiny and deliberation by the F.S.C., it found that societies, through their constitutional institutions, seek to protect the rights of society represented by the state and individuals, and by protecting the right of the individual, protection is achieved for society. Those institutions differed in

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how to achieve that goal, which is the greatest guarantee to achieve the stability of social life for individuals and society. The legislator always confirms that the purpose of enacting laws is to strive hard to surety those rights, among those laws in Iraq is the Amended Execution Law No.(45) of 1980, as it came in the reasons for it (in order to address the underdevelopment that the enforcement departments suffer from and to ensure the simplification of implementation procedures and the good delivery of rights to their owners, which It is the purpose of the judicial rulings themselves and in order to develop methods of implementation in a way that leads to the elimination of the phenomenon of obstructing the implementation of rulings and documents that have the power of execution and in a manner that ensures the protection of trust and stability of legal relations and the preservation of the rights of the state and individuals from loss and taking into account the balance between the two interests creditor and debtor, so that neither one of them is superior to the other, nor is any of them sacrificed for the benefit of the other, taking into account the humanitarian, social and economic considerations related to the debtor, so that nothing is taken from his money unlawfully and his dignity is not affected in any case). several mechanisms for obtaining and protecting rights have been mentioned in the aforementioned Execution Law, including consensual execution and forced execution, and that executive detention is one of the

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means of forced execution. As the Iraqi legislator singled out chapter three of part three of the Execution Law in Articles (40-49), as the debtor's refusal to pay the debt in accordance with what was stated in the decision of the judge or the executed written despite being facilitator and the inadmissibility of his imprisonment means sacrificing the interests of the creditor, and that the inadmissibility of his imprisonment in an absolute way leads to the decisions of the courts, in which an exerted great effort and activity for a period of time was given, in which the debtor refrains from implementing what is stated in it becomes an expression of (pronouncing the right and putting it in its correct legal position without delivering it to its owner), especially since the competent authority for implementation is not linked to the courts that issued those decisions, considering that the implementation directorates that handle this are linked to the Ministry of Justice and not to the Supreme Judicial Council , the inadmissibility of imprisoning the debtor means the inviolability of public funds and the inability to preserve private property that the constitution mandated in its article (23/1st) which stipulates (private property is protected. The owner shall have the right to benefit, exploit and dispose of private property within the limits of the law), and article (27/1st) of it that stated (public assets are sacrosanct, and their protection is the duty of each citizen), restricting the freedom of the debtor who refrains from paying the debt to his creditor

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despite his ability to pay it for a period of time is a feasible way that resorts to the rebellious and procrastinating debtor to pay his debt and incites him to show his money that he has hidden, and it is a surety for the stability of commercial and economic transactions, the experiences have shown that imprisonment of the debtor often leads Some of them rush to pay their debts for fear of imprisonment and before their imprisonment is carried out, and some after they understand the decision of imprisonment, and some of them pay off their debts after spending a short period of imprisonment. From extrapolating most of the opinions of Muslim jurists of their various sects, they unanimously agree that it is permissible to imprison a debtor who is procrastinating and who can fulfill it, as opposed to an insolvent debtor, who is not allowed to be imprisoned, according to the Almighty's saying in His Glorious Book ((280) And if someone is in hardship, then [let there be] postponement until [a time of] ease. But if you give [from your right as] charity, then it is better for you, if you only knew.)), also, his delay was not unjust except for the rich. If he was not able to pay the debt, then it is not permissible to imprison him because imprisoning the debtor is prescribed to pay the debt with the debtor being able to do so. It is not discharged except by fulfilling what he owes himself or by third parties or releasing the creditor from his debtor. However, the Execution Law sets in Article (40) of its conditions for imprisoning the debtor,

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which is the obligation to submit a request from the creditor and a decision from the executor of justice if he is a judge and if he is not a judge The matter was presented to the competent judge of the first instance to decide whether or not to imprison him. The debtor may not be imprisoned for the same debt except once. imprisonment is not permissible if there is a legal impediment that prevents the debtor from being imprisoned. Article (41) of the Execution Law specifies the impediments to imprisoning the debtor, which is (if he is insolvent if he has not completed one-tenth of his age if he exceeded fifty years of age if he is one of the ascendants of the creditor or his descendants, brothers, or wives unless the debt is a judged alimony if he has a salary or wage that he receives from the state, and if the debt has expired or forfeited in any way), the period of imprisonment may not exceed four months in accordance with Article (43) of the Execution Law. But if the convict refuses to hand over the minor, he must be imprisoned no matter how long the period is until he surrenders him, and he may not be imprisoned when the non-delivery is beyond the will of the convict according to Article (48) of the Execution Law, it should be noted that the general rule stipulates that the creditor cannot recourse directly to the guarantor unless the debtor first demands it. If the debtor does not pay what he owes, the creditor has the right to recourse against the guarantor unless the debtor first claims it. If the debtor does not pay what he

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owes, the creditor has the right to recourse On the guarantor, the obligation of the guarantor is a subordinate obligation to the original obligation of the debtor, as stipulated in the article (1030/1) of the Civil Law (there is no solidarity between the guarantor and the debtor unless it is stipulated in the surety contract or a separate contract), when that is the case, the guarantor has the right to prevent the creditor from executing on his money before he starts executing on the money of the original debtor, the surety, as stated in the article (1008) of the amended civil law No.(40) of 1951, is (the joining of a debt to a debt in the demand for the implementation of the obligation), and the surety is divided into civil and commercial sureties, according to the nature of the contract concluded between the guarantor and the guaranteed, with reference to the fact that the debtor's surety in a commercial debt is considered a civil surety even if the guarantor was a merchant based on the provisions of Article (1016/1) of the Civil Law, that the guarantee arising from the guarantee of commercial papers as a backup guarantor or from endorsing these papers is always a commercial guarantee based on the provisions of the paragraph (2) of the aforementioned article. The guarantee is also divided according to the source that obligated the debtor to provide a guarantor to a legal and judicial guarantee and an agreement and it is legal if the source of the debtor's obligation the provision of a guarantor is the text of the law. As for the judicial guarantee,

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the source of the debtor's obligation to provide a guarantor is the court's decision. The agreement guarantee is the one that arises as a result of the debtor's agreement with the creditor on the obligation of the first to provide a guarantor to the second. The debtor did not pay it and a guarantee in kind, where the guarantor provides (real estate or movable money) owned by him with a guarantee of fulfilling the obligation owed by another person, where he mortgages a real estate or movable property he owns to guarantee the fulfillment of the obligation and in the judicial, legal and commercial guarantee, the guarantors are joint with each other and jointly with the debtor based on the provisions of the article (1030/2) of the Civil Code. If the sponsor's demander and his demand for one of them do not forfeit the right of his claim to the other, after claiming one of them, he may claim the other and he may claim both of them based on the provisions of Article (1031) of the Civil Code. This court finds that what was stated in the two paragraphs (2nd, 3rd) of Article (32) of the Execution Law came with the same purpose as Article (42) of the Execution Law, which states that (first: if the just enforcer is satisfied that the debtor is able to pay the debt or part of it and does not show an appropriate settlement, and he did not have visible funds that could be seized according to the settlement offered to him by the just enforcer, he may be imprisoned, second: if the debtor stops fulfilling the settlement he agreed to, he may be

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imprisoned), what is common to the two aforementioned articles is the fulfillment of the following two cases, which are (the debtor's refusal to settle the settlement offered to him by the just executor, or the debtor's refusal to fulfill the settlement he agreed to), but article (32) stipulates that the debtor refuses to provide a guarantor when they are realized, Article (42) the debtor refuses to pay with the fulfillment of the two mentioned cases. According to the two articles (32, 42), the debtor may be imprisoned, but his imprisonment under Article (42) is limited to four months in accordance with what was stated in Article (43) of the Execution Law, which states (the period of imprisonment may not exceed four months), while the debtor's imprisonment in Article (32) (continues until a guarantor is presented), the legislator's goal in legislating the third paragraph is to find a new mechanism within the means of forced execution through which the debtor who is procrastinating is forced to implement with his financial ability and not to leave the room for him to prolong the period of debt repayment or to smuggle his money. Therefore, the legislator achieved two goals when legislating the first mentioned paragraph is notification the debtor stated that the period of imprisonment for the purpose of presenting a guarantor was not restricted to four months, and the second was that he did not extend the period of imprisonment of the debtor in vain, since by submitting the debtor to the guarantor, the debtor must be

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released and easy for the creditor to obtain his debt, and thus the legislator created a balance between the interest of the creditor and the debtor. What was stated in the third paragraph is an effective way to preserve public money by notifying those who owe a debt to the state for any reason whatsoever that it is possible to imprison him for an indefinite period and until the presentation of a guarantor and the submission of that guarantor is a guarantee to return those debts. this court sees that it is necessary that the implementation directorates shall take into account what was stated in Article (15/2nd) of the Law No.(13) of 2019, the Sixth Amendment Law to the Amended Execution Law No.(45) of 2019, which stipulates that (the debts of the state and the public sector and the accumulated alimony for the wife, children and parents that are ruled and executed in the implementation directorates are preferential debts of the first degree and are collected before any other debts, even if this debts is preferential debt and is documented with a mortgage), it also sees that (the state departments and the public sector, in order to preserve public money, are obligated to follow all the necessary legal means to collect the state debts that are owed by natural or legal persons for any reason, including what is included in Article (32) of the Execution Law in all its paragraphs, the state departments according to the aforementioned article, through the implementation directorates, requires the debtor to provide a guarantor capable

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of paying the debt, and when the debtor refuses to do so, the competent judge of first instance shall be approached for the debtor's imprisonment and continue his detention until the presentation of a guarantor), article (1) of the amended Government Debt Collection Law No.(56) of 1977 specifies the state's debts covered by its provisions, including (taxes, fees, and amounts due to official and semi-official departments resulting from the breach of contract by those contracting with them), in addition to what was mentioned in the aforementioned article. For all of the foregoing, this court finds that the third chapter of the amended Execution Law No. (45) of 1980 came under the title of (execution procedures) and included four parts. The first is (consensual execution), the second is (enforcing execution), the third is (physical coercion), and the fourth is (the suspension and delay of execution), article (32) was included in the second part. As for the articles (40-41) related to the debtor's imprisonment, they are included in the third party. As the aforementioned parts are contained within one chapter, and to reach the purpose of their legislation, they must be read in their entirety. therefore, what was stated in Article (32/3rd), which includes obligating the debtor and upon the creditor's request to provide a guarantor, is an expansion of the scope of the financial guarantee in return for the creditor's debt, and because it is a solidarity guarantee, the funds of the guarantor debtor become a guarantor of that debt, and that the

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creditor has the option to claim, if he wishes, to request the debtor or the guarantor, the claim of one of them does not forfeit the right to claim the other, after requesting one of them, he may demand the other, and he may demand both of them. The debtor and the guarantor are subject to the application of Article (43) of the Execution Law if both of them refuse to pay or stop it according to the presented settlement. It is required to apply the above paragraph (3rd) that the creditor proves that the debtor has the ability to pay, but that he is procrastinating and has not shown his money that may be seized against the debt, so what was stated in paragraph (3rd) of Article (32) of the amended Execution Law No. (45) for 1980 does not conflict with the constants and provisions of Islam stipulated in Article (2/1st/a) of the Constitution of Iraq of 2005, nor does it conflict with the rights and freedoms stipulated in the Constitution and guaranteed to all, but the Constitution's guarantee of those rights and freedoms does not mean it is not permissible to restrict or limit it if their practice is incorrect. Therefore, the legislator seeks to enact laws that deal with that, whether those laws are of a criminal or civil nature, provided that such restriction does not affect the essence of the right. Thus, Article (46) of the Constitution stated (restricting or limiting the practice of any of the rights or liberties stipulated in this Constitution is prohibited, except by a law or on the basis of a law, and insofar as that limitation or restriction does not violate

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the essence of the right or freedom). For the aforementioned, this court finds that paragraph (3rd) of the article (32) of the amended Execution Law No. (45) for 1980 does not conflict with the provisions of articles (2/1st/a), (37/1st/a), and (46) of the Constitution. This decision has been issued unanimously, final, and binding on all authorities according to the provisions of articles (93) and (94) of the Constitution of Iraq of 2005, and articles (4) and (5) of the amended Federal Supreme Court's law No. (30) of 2005, on (15.6.2021) A.D, (4/Dhu'lqa`da/1442) A.H.

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