IN THE NAME OF GOD, MOST GRACIOUS, MOST MERCIFUL

Republic of Iraq
Federal Supreme Court
Ref. 129/federal/2019

Kurdish text

The Federal Supreme Court (F.S.C.) has been convened on 11.11.2019 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, Abood Salih Al-Temime, Michael Shamshon Qas Georges and Hussein Abbas Abu Al-Temmen who are authorized in the name of the people to judge and they made the following decision:

The Request:

The presidency of the Baghdad federal court of appeal/ Al-Karkh sent it letter No.(19/216) on (30/10/2019) contain it request to this court from Alkarkh criminal court/ first committee, and it stated the following:

Sub/ a request to decide the legitimacy of the dissolved revolutionary command council's decision No.(234) of 2001

((in referring to the criminal lawsuit No.(2306/Jim/2019) of the accused each of Shifaa Hayder Bader Muhsen, Tahany Mnaather Samary, Zohoor Wahab Abd Alnaby Sekar, and Ahmad Hatem Leftaa, who were refer to this court to trial them in non-concise

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lawsuit according to the provisions of decision (234) for 2001 that was issued by the revolutionary command council (dissolved), this decision violated the provision of paragraphs (A, B, C) of article (2) and article (14) of the Iraqi republic constitution of 2005 for the following reasons:

1- The mentioned decision violated the text of paragraph (A) of article (2) of the constitution which stipulated that (no law may be enacted that contradicts the established provisions of Islam) as it violated the most important principal of Islam which is the equality, were the Islamic sharia has equalize between people in assignments, rights, and duties, and it did not differentiate between men and women only within the limits of each other's physical energy, and it equate them in the doctrinal provisions, but the legislator of the challenged decision has violated the principle of equality in paragraph (1st/3) of it which stipulated that any female found (guilty of prostitution) shall be punished by execution, the mentioned paragraph criminalized the woman who has been found guilty of prostitution, but it has not criminalized her partner the man who has committed adultery and instead he shall consider as a witness in the criminal proceedings, the mentioned text didn't criminalizing the man if he was proven to be involved in prostitution, and that consider

clear violation to the principal of equality which is the most important principal of Islam. Paragraph (1st/2) of the mentioned decision has violated the principal of equality as it stated that (whoever commits incest with one of his relative and at the time of committing the crime he has completed the age of eighteen years, he shall be punished by execution) it appears that the legislator in this text meant the linguistic meaning of the adultery which is any illegal sexual relationship, and not the terminological meaning which is that one of the illegal sexual relationship parties is married, also it appears from the text that the legislator meant the meaning of intercourse between the incest with consent and not by rape or coercion, as the crime of rape has its specific provisions stipulated in the Penalties Law, if the illegal sexual relationship is between relatives (incest) and both parties has completed the age of eighteen years old and the intercourse was with consent of both parties then according to the mentioned decision, the man shall be punished by considering him as adulterer incest with one of his relative, while the women shall not get punished even though if she seduced the man. But we found that the Penalties Law in article (385) of it stipulated the crime of the adultery of incest if she have completed the age of eighteen years old and it suspended the proceedings of the

criminal prosecution of this act or taking any action in it unless on a complaint of the victim or her family members, relatives or brothers, while the challenged decision for being illegitimate didn't stipulated such text, also the decision of the dissolved revolutionary command council No.(488) that was issued on 11/4/1978 treated the crimes of coitus a female of third degree relatives if the crime is committed without her consent, this decision has distinguished between the female who has completed fifteen years old and the one that didn't complete fifteen years old in the paragraphs (1st/1 and 2) of it which stated the penalty of execution for those crimes, while in paragraph (1st/3) it stated a provision for who coitus a female of the third degree relatives if the crime is committed with her consent, and she hasn't completed fifteen years old and it leads to her death or deflower her as it penalty is execution also, but it stated in paragraph (2nd) of the mentioned decision a provision to the coitus with consent between adult of third degree relatives as it stipulated that (the perpetrators shall be punished with life imprisonment for the act of coitus or sodomy, male or female, if the act was done with their consent and they have completed eighteen years old of age and the degree of kinship between them is to the third degree) this text punished man and women alike

without discrimination, accordingly paragraph (1st/1, 2, 3) spares of paragraph (1st/2) of the challenged decision for being illegitimate, also paragraphs (1st/3) and (2nd) of it spares the paragraph (1st/2) of the challenged decision, and these provisions are more in line with the Constitution and the human rights principles, its looks like the legislator when enacted the decision No.(234) for 2001 was unaware of the existence of the decision No.(488) of 1978, on the other hand, the discrimination in the criminal responsibility as mentioned contradicts the provisions of article (14) of the constitution which stated that (Iraqis are equal before the law without discrimination based on gender, race, ethnicity, nationality, origin, color, religion, sect, belief or opinion, or economic or social status). from the foregoing, it appears that discrimination in criminal responsibility as mentioned above has no religious or moral basis except that negative perception for women, in reflecting of the prevailing tribal values and devoting to the concept of (gender).

2- The mentioned decision No.(234) in the circumstances in which it was issued, and the inhuman practices that accompanied its implementation and the penalties that affected many women without trials under suspicion by non-legally competent bodies at that time, all this was in line with the campaign of faith (Alhamla

Alimanyaa) which was the motto of that stage, which made the punishments listed in it, which could holds up to execution to be acceptable at the time, so the arrest and referral to the special court in the Ministry of the Interior was more merciful from the proceedings carried out outside the law -like out of the frying pan into the fire- in that time, but today, after the decline of that era and the conditions that provided the issuance of such laws which included harsh penalties that are not commensurate with the crime, since any legislation that includes criminalizes of an act and set a punishment for it, the penalty must be commensurate with the crime, as the contemporary trends of criminal policy in different countries of the world, as the successive United Nations conferences about the prevention of crime and treating the criminals points to the importance of taking anti measures of preventing the crime and enacting texts that guarantee the protection of society from it, however, the legitimacy of these texts, which are taken as a means to achieve these objectives is subject to it conformity with the provisions of the Constitution and principles and requirements, thus, the legislator must, in this regard, conduct delicate balance between the interest of the community and concern its security and stability on one hand, and the freedoms and rights of individuals on the other hand,

whereas, the international comparative constitutional judiciary has settled on the legitimacy of the penalty criminally, civilly or disciplinary, is mandated to be commensurate with the acts that are criminalized by the legislator, as the origin of the penalty is its reasonableness, whenever the criminal penalty is abhorrent or severe, such as execution or life imprisonment, or it is related to acts that do not justify criminalization or appear to be on the contrary of the limits which it is commensurate with the seriousness of the acts criminalized by the legislator, therefore it loses the justification of it excitant, and it restriction to the personal freedom become arbitrary, as the wise criminal policy should be based on homogeneous elements, but if it is based on dissonance elements it will result to the lack of link between the texts and their objectives, so it will not conducive to achieve its intended purpose for lacking the logical link between them. Estimating that the original in the legislative texts in the legal state is the logical link with its objectives, as any legislative regulation it is not intended for itself, but is just a means to achieve the objectives, therefore it must always be recalled whether the challenged text to be illegal has adhered to logical framework for the cycle in which it operates to ensure the harmony of the targeted objectives or destructive with its

objectives or exceeding it, consequently, it contrary to the principle of State subordination to the law, as the constitutional censorship over the legitimacy of penalty texts is controlled by severe standards and criteria in accordance with the nature of these texts in their direct connection to personal freedoms, which are respected by the Constitution, this requires the criminal legislator to pursue peaceful legal means in both subjective and procedural aspects to ensure that the penalty is not a tool affecting the freedom, and the penalty that he imposed for the crime crystallizes a concept of justice to be determined in light of the social purposes he targeted not including just the desire of society or those who hold power to provoke or retaliate against what they consider to be contrary to their values or seeking to oppress the accused, it is not permissible for the legislator to make the penalty texts nets or traps cast to catch wide or hiding those who fall under them or mistake their positions, therefore according to the provision of the challenged text the female who practice prostitution and adulterous under the names of massage centers, nightclubs and other titles may not be punished, while who practice prostitution by traditional methods shall be punished and falls under the law, therefore, the criminal penalty can not be justified unless it is a duty to face social necessity and

in accordance with the criminal act, if it exceed that it become excessive in cruelty and contrary to justice and separate from its legitimate objectives and contrary to the objectives of the Constitution and human rights principles.

3- It is worth mentioning that prostitution, although there is a consensus on it prohibition, according to the books of Islamic jurisprudence, but today we find a clear disagreement among contemporary Muslim thinkers about its prohibition because of their differing in interpretation of the verse ((and do not compel your slave girls to prostitution, if they desire chastity, to seek [thereby] the temporary interests of worldly life. And if someone should compel them, then indeed, Allah is [to them], after their compulsion, Forgiving and Merciful)) (Al-Nur verse 33) some believe that prostitution in Islam is a freedom on the condition that it is without compel or coercion and see that the prohibition stated in the books of jurisprudence is an interpretation and human discretion revolves around the rotation of interests and does not have substantiation from the Quran and Sunnah, there are those who believe that prostitution is prohibited by the sharia as an abomination, away from all the debates in which books and social media pages are full of, we should consider that when criminalizing this act that there should be social justice and

equality between men and women, and the penalties should be commensurate with the seriousness of the crime, especially that the crime of prostitution differs from other criminal crimes, in which the crime of the prostitution ((if we exclude the cases of trafficking and incitement)) often characterized as criminal acts intended to gain money, enjoyment and self-entertainment and are classified in some Western countries as harmful recreational activities resorted to by some people for the purpose of satisfying sexual desire illegally, unlike other criminal acts, in which the criminal intent is considered one of it elements and are committed in order to harm others, also we do not find in the crime of prostitution in general an offender and a victim, as each crime is an attack on the right of the other but the crime of prostitution, it is committed by mutual consent and compatibility between the pleasure seeker and who practice prostitution.

4- The field studies of the inmates of the correctional complexes proved that the factors of poverty, need, family disintegration, wars with it social effects, low educational level, violence and physical or moral coercion against women were the main motives that led them to deviate mostly, many of them were victims of human trafficking, which is defined in the article (1st) of the anti-human trafficking law No.(28) for 2012, instead of being treated

as victims, the state is obliged to assist them in accordance with the provision of the article (11) of the mentioned law, but we find the opposite as they are treated as criminals according to the provisions of the challenged decision in its legitimacy, which suspend the provisions of the article (11) of the law anti-human trafficking in violation of the principles of human rights and the constitution, which aims to observe them.

5- what should also in this regard note that the crimes contained in the challenged decision had been stipulated in previous laws that criminalized these acts and set penalties for them and that the mentioned decision was an aggravation of those penalties only, as the listed crimes in paragraph (1 and 2) of paragraph (1st) of it had been treated by the provision of the dissolved revolutionary command council No.(488) for 1978, and also the Iraqi penalty law provisions in the amended article (393) about the crime of rape, while article (385) of it deals with the crime of incest, the crimes listed in paragraphs (3, 4, 5) of paragraph (1st) of it had treated the provision of anti-prostitution law No.(8) for 1988, while the anti-trafficking law No.(28) for 2012 has listed new rules wasn't included within the penalty law or the anti-prostitution law, the mentioned laws was more accordance with the constitution and the principles of the human rights and more

in line with criminal policy in reform and rehabilitation the criminals. Accordingly for the aforementioned the court decided to present the subject before your estimated court to decide the legitimacy of the decision No.(234) for 2001. With all respect.))

The F.S.C. placed the request under scrutiny and deliberation and reached the following decision.

The decision:

During scrutiny and deliberation by the F.S.C. the court found that the Alkarkh criminal court/ first committee challenged the legitimacy of the dissolved revolutionary command council's decision No.(234) of 2001 as the crimes listed in the mentioned decision was listed in previous laws which criminalized these acts and set it penalties, and the mentioned decision was just aggravating these penalties, and that violated the constitutional principles in articles (2/A, B, C) and (14) of it, as the in force constitution adopted the modern criminal policy that balance between the stipulated penalty and the seriousness of the committed acts, according to the detail mentioned by the challenge submitter in paragraph (5) of the request. The F.S.C. finds that the penalty aggravating of some criminal acts in amendment to what was listed

in previous penalty laws it will apply to (all categories of society) belonging to the same segment and does not exclude anyone within the same segment from being covered by its provisions, and that is what was meant by article (14) of the constitution when was stipulated (Iraqis are equal before the law…), also the F.S.C. founds that the challenged decision didn't contradict the principles of Islam (in equalizing between peoples), and not contradicting with the principles of democracy and basic rights and freedoms listed in paragraphs (a, b, c) of article (2) of it, the (principle of equality) herein is defined in the above-mentioned concept, which includes equality between all individuals belonging to the same segment of society if they are identical in their legal positions as mentioned above. The fact that the challenged decision does not contradict the basic rights and freedoms of citizens, as it is not affected those rights and freedoms only when the individual exceed the rights and freedoms of other citizens. For the aforementioned the F.S.C. found that the (dissolved) revolutionary command council's decision No.(234) of 2001 (subject of challenge) came as legislation choice in aggravating to the penalty for crimes that contradict the values and principles of society therefore it provisions doesn't violate articles (2/a, b, c) and (14) of the constitution. Accordingly the F.S.C. decided unanimously to reject the request. The decision has

been issued final and according to article (94) of the constitution and article (5/2nd) of the F.S.C. Law No.(30) for 2005 on 11/11/2019.