



The Federal Supreme Court (F S C) has been convened on 5.3.2019 headed by the 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, Michael Shamshon Qas Georges, Hussein Abbas Abu Al-Temmen and Mohammed Rijab AL-Kubaisi who authorized in the name of the people to judge and they made the following decision:

The Plaintiff: (ain.ra.mim) – his agents the barristers (sad.mim.kha) and (ha.sin.ain).

The Defendants: 1. (heh.mim.ha).

2. The Speaker of the ICR/ being in this capacity – his agents the jurist officials, the director (sin.ta.yeh) and the legal consultant assistant (ha.mim.sin).

The Claim

The agents of the plaintiff claimed that during the litigation procedures in the case No. (784/shin/2017) which initiated by their client before the civil status Court in Al-Baya'a, and the stages it reached by issuance of rejection cassation decision with the correction request issued by the Ref. (38/general committee/2018) on 25.11.2018. Aforementioned decision relied on the text of article (57/1) of valid civil status law No. (188 for 1959) and its amendments, while aforementioned text becomes not corresponding to applications and the social facts, as well as what the circumstances became in the Iraqi community. Besides, the interpretation of the federal cassation Court decision which doesn't corresponds to the daily life, it also violates the Holly Quran verses

and the legal right which stipulated in article (4) of the law No. (1) For 2005 (the law of work process in the federal Supreme Court). For the above-mentioned reasons they present this challenge because there is a clear violation for the text of the law in article (57/1) with the provisions of Islamic Sharia texts and the Iraqi valid Constitution for 2005, according to the following details: 1. The text listed in article (57/1) of valid civil status law (the mother has the right of the boy's custody and upbringing him during her marital life, and even after divorce if this matter doesn't aggrieve the embosomed). This text granted a definite right without any restriction for the mother, and this matter is a violation. Whereas the father has the right of custody as the mother, if the enactor meant when enacted the text (embosomed) by the age of custody and it stipulated to mention the age, but not to mention it definitely. The father's right of custody shouldn't be wasted, and grant it to the mother only. 2. The violation of Islamic Sharia above-mentioned is also contradicts with the valid Constitution according to provisions of article (2/1st/alif), as well as clause (2nd) of article (29) of the Constitution which mentioned (children have the right to upbringing, care and education from their parents. Parents have the right to respect and care from their children...). Therefore, the constitutional text came in harmony not distinguishing between parents, it also granted the rights and duties equally between both. No text can be implemented, and grant the mother right more than the father in care, custody or else. 3. God Almighty had granted the equality between parents without distinguishing in his says in Surat Al-Isra'a (and your Lord has decreed that you not worship except Him, and to parents, good treatment) Verse (23). And Surat Al-Nisa'a (worship Allah and associate nothing with Him, and to parents do good). Verse (36). And in Surat Al-Baqarah (and [recall] when we took the covenant from the Children of Israel, [enjoining upon them], "Do not worship except Allah; and to parents do good) Verse (83) and Surat Al-An'am (say, "Come, I will recite what your Lord has prohibited to you. [He commands] that you not associate anything with Him, and to parents, good treatment) Verse (151). And in Surat Al-Ahqaf (And we have enjoined upon man, to his parents, good treatment) Verse (15). And in Surat Luqman (and we have enjoined upon man [care] for his

parents) Verse (14). 4. Many prophet Hadiths had mentioned this subject, as the Messenger of God says (all of you are shepherds and each of you is responsible for his flock. A man is the shepherd of the people of his house and he is responsible. A woman is the shepherd of the house of her husband and she is responsible). The challenged unconstitutional legal text in clause (1) of article (57) of civil status law had been written in a circumstances corresponds to the situation when the law written and enacted. There are many changes which occurred in the life during past decades, these changes makes the aforementioned text doesn't corresponds to the reality, and it also contradicts with the Quranic texts and the valid Constitution. Whereas the last cassation decision granted the mother the right of travelling with the embosomed without approval from the father for treatment purposes, or work. It also took the right of protection from the father by custody and care. In this case, the challenged text will be incomplete or a clear violation, and this matter instigated them to initiate this case before the FSC. They requested (to judge by unconstitutionality of the aforementioned text for the affirmed violations, and for another reasons may the Court sees). After registering the case at this Court according to clause (3rd) of article (1) of the FSC bylaw No. (1) For 2005, two answering draft has been received from the agents of the defendants. They requested to reject the case for the reasons listed in their drafts. After completing required procedures according to clause (2nd) of the article (2) of the same bylaw, the day 5.3.2019 has been set as a date to try the case. On this day, the Court has been convened and the agents of the plaintiff attended, as well as the agents of the defendant. The Court scrutinized who represent the first defendant, and it found that he is her father, not from barristers. As long as she was notified by the argument date according to the law, the Court decided to proceed the case with her absence. The public in presence argument proceeded, the agent of the plaintiff repeated the petition of the case and he requested to judge according to it. As well as the agents of the second defendant repeated what listed in their presented draft. The Court heard the sayings of both parties, and it completed its investigations. Whereas nothing left to be said, the Court decided to end the

argument and the decision was recited in the session publicly on 5.3.2019.

The Decision

During scrutiny and deliberation by the FSC, the Court found that the plaintiff is challenging the judgment listed in article (fifty seven-1-) of civil status law No. (188) for 1959 (amended) which stipulates (the mother has the right of the boy's custody and upbringing him during her marital life, and even after divorce if this matter doesn't aggrieve the embosomed) because it violates the Republic of Iraq Constitution in article (2/1st/alif) of it. This article stipulates (no law may be enacted that contradicts the established provisions of Islam), as well as it violates clause (2nd) of article (29) of the Constitution (children have the right to upbringing, care and education from their parents...). It also contradicts the principles of Islamic Sharia according to Holly Verses which has been mentioned in the petition of the case, and he requests to issue a judgment by unconstitutionality. The FSC finds in the litigation of the case that the first defendant (heh.mim.ha) whom the case proceeded with her absence because her father whom attended the argument session shouldn't pleading on behalf of her before the FSC in the challenge case of unconstitutionality for one of civil status law articles. If this was allowed for first instance cases and civil status according to article (51/1) of civil procedure law – she couldn't be a litigant in this case according to provisions of article (4) of civil procedure law No. (83) For 1969 (amended). Aforementioned article stipulates in the litigant (his admission should be based on an issuance of a decision, he was suited or obliged by something if the case were approved) because the defendant (heh.mim.ha) is not the one who enacted the legal article (challenge subject). Also she hasn't the power of annulling it, therefore she will not be a legal litigant is the case of the plaintiff, and if the litigation is not directed in the case, the Court shall take a decision by itself to reject the case without going in its basis. This matter shall be achieved according to article (80/1) of civil

procedure law. Therefore, the Court decided to reject the case for the first defendant for litigation, besides the FSC finds from Holly Hadith, jurisprudents' opinions and similar enactments in Islamic States. It also what the Iraqi judiciary settled on for the judgments which had been issued in the civil status field totally. But all these judgments doesn't inhibit to deal with the custody matter according to the circumstances of the custodian, and the base of the Islamic Sharia in addition to the other enactments are the man interest, also not to aggrieving him. Especially if this interest related to minors of them because they have priority in care from the interests of the litigants, and this matter will care the interest of embosomed and keep him away from aggrieve. The competent Court which tries the litigation case of custody should investigate well about this interest by social verification. Therefore, it will decide where the embosomed interest is. Clause (1) of article (57) of civil status law had clarified that (the mother has the right of the boy's custody and upbringing him during her marital life, and even after divorce if this matter doesn't aggrieve the embosomed). This challenged unconstitutional clause came within the complete provisions of the civil status law in the subject of custody. Accordingly, the case of the plaintiff is lacking to its constitutional and legal substantiation and it must be rejected. The Court decided to reject the case of the plaintiff, and to burden him the expenses and the advocacy fees amount of one hundred thousand Iraqi dinars. The decision has been issued unanimously and decisively according to article (94) of the Constitution and article (5) of the FSC's law. The decision has been made clear on 5.3.2019.