



The Federal Supreme Court has been convened on 9.9.2018 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-Nagshabndi, Abood Salih AL-Tememi, Michael Shamshon Qas Georges and Hussein Abbas Abu Al-Temman, who authorized in the name of the people to judge and they made the following decision :

The Plaintiff : (Ain.Sad.Mim)- his agents the barristers (Mim.Alif.Ain) and (Beh.Alif).

The Defendant : ICR Speaker/being in this capacity-his agents the legal officials, the manager (Sin.Ta.Yeh) and the assistant counselor(Heh.Mim.Sin).

The Claim :

The Plaintiff agents claimed in the case No.(134/federal/2018) that their client defends in the case No.(1078/Shin/2018) before personal status court in AL-Karkh and its subject(compensation for abusive divorce) by the unconstitutional of the clause (3) from the article(39) from the amended law of the personal status No.(188) for 1959. Because its violation for the provisions of Iraqi constitution for 2005 and the provisions of the holy Islamic sharia for the following reasons :

First : its violation for Iraqi constitution in the following article :

1. the article (2/1st) - Islam is the official religion of the State and is a foundation source of legislation.
2. the article (2/1st/Alif)- No law may be enacted that contradicts the established provisions of Islam.
3. the article(2/2nd)- This Constitution guarantees the Islamic identity of the majority of the Iraqi people.
- 4.the article(37/2nd) - The State shall guarantee protection of the individual from intellectual, political and religious coercion.

5. the article(41)- Iraqis are free in their commitment to their personal status according to their religions, sects, beliefs, or choices, and this shall be regulated by law.

Second : its violation for the holy sharia for following reasons:

1. The word "abuse" was not mentioned in the Quran or in the Sunnah or in the jurisprudential provisions of all the Islamic sects related to the compensation for divorce by the husband.

2. Divorce is a contract between a man and a woman which expires unilaterally which is a spouse based on:

Alif. the Holy Quran in the following verses from AL-Baqarraah (2) verse (228) (Divorced women shall keep themselves..... etc), verse(229) (Divorce can be pronounced twice: then, either honorable retention or kindly release), verse(230) (Then, if he divorces her...), verse (231) (And when you divorce women and they reach the end of their waiting term, then either retain them without offending their honor and in a fair manner, or release them without offending their honor and in a fair manner. Do not retain them to their hurt and to transgress). In addition that the emphasizing on divorce state is in the husband hand without any condition for his custody but Allah the mighty decided in it to prevent the bad retain (Do not retain them to their hurt and to transgress) the retain of the husband to his wife (transgress) is the abuse and not the other way around he cited by the verse-236- from AL-Baqarraah(There is no blame upon you if you divorce your wives) and the verse-130- from AL-Nisa(But if they separate [by divorce], Allah will enrich each [of them] from His abundance). Based on that and according to what consistent in law knowledge, (abuse decision) is one of the decisions which stated by roman law jurisprudents then it passed on from generation to another by France jurisprudence legitimists until the modern France law which the Iraq law jurisprudents and based on it, they made the valid civil law and personal status law which is challenged by its unconstitutionality of the clause (3) from the article(39) of it. To confirm the fact that the origin of the rule of abuse is inherited from the Roman law, and asked to give time to provide detailed research to prove this incident.

Beh. The Sunnah of the Prophet (PBUH) did not contain one statement that the Prophet decided to order the husband to pay any financial compensation due to the fact of divorce.

Third : For the violation of the provisions of the sect of Jaafari, which is the sect of the defendant and that their client which is imitators of the doctrine of Jaafari, which consider the use of the received money (illegal money). He cited the opinion of the wise reference in Najaf, which is constitutionally recognized (as they claimed), which prohibits the action of the provisions of this clause, which is challenged by its constitutionality, they requested to approach the wise reference in Najaf as the owner of the religious competence and its decision is valid constitutionality. On all the personal status courts which issued its decisions according to the jaafari sect.

Fourth : because of the absence of intrinsic contradiction between the legal clause which is challenged by its constitutionality and between the provisions of the articles (34/35/36/37/38) from the valid law of the personal status, this contradiction shows that the aforementioned articles regulates the divorce fact to achieves its truth legally without any objection with Islamic Sharia provisions. In terms of performance form and its conditions which the Quran stipulated it and according to what listed in the sunnah of the prophet and applying the jurisprudence provisions, each according to his sect. the challenged legal clause didn't list in provisions (performance and conditions) of legitimacy which is one of Islam invariable, it had a special decision proves its unconstitutionality.

Fifth : They challenged constitutional of the personal status law. As a result, the constitutionally challenged legal clause are unconstitutional. The Iraqi Interim Constitution of 1958 stipulates that the Council of Ministers shall have the legislative authority with approval from Council of Sovereignty. The validity of the implementation shall be valid only after the approval of the Council of Sovereignty (assembly) (President and two members) according to the Article (20) from it, which stipulates ((the Presidency of the Republic shall be the Council of Sovereignty) which contain (head and two member) the known in the fact of approving on the personal status law No.(188) For the year 1959 amended, it is a constitutional violation where only two members of the Members of the Sovereign Council signed the law while the third member refused to sign, so it was not ratified according to the Constitution. based on that The Personal Status Law No. (188) for the year 1959 is unconstitutional, they requested (first - to issue a decision of the valid personal status law unconstitutionality. Second – the unconstitutional of the clause (3) from the article (39) from the same law for its violation of principle of Islam) after notifying the Defendant by the case petition, an answering draft listed from his agents, they requested rejection of the case for the reasons listed in it, after the requested procedures is completed according to the clause (2nd)from the article

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(2) from the FSC Bylaw. The court noticed that the Plaintiff initiated a case No.(135/federal/2018) through his agents and they are the same agents in the previous case No.(135/federal/2018) on the same Defendant, they requested the decision of personal status unconstitutionality No.(188) for 1959 amended , it's the same request which listed within the previous case , an answering draft from the Defendant agents being in this capacity- listed , they requested to reject the case for the reasons which listed in it and after the completion of requested procedures in the clause (2nd) from the article (2) from the FSC Bylaw . the day 9.9.2018 is appointed as a date for the argument , the Defendant agents attended , the Plaintiff agents didn't attend although the notification. The court examined what listed in the case petition and it found the case is able to be decided relying on the FSC Bylaw No.(1) for year 2005 and decided to be proceed according to the law, after the court returning to the case (134/federal/2018) which initiated by the same Plaintiff on the same Defendant and because it got the same subject and relying on provisions of the article (76) from civil argument law , it has been decided to unite the cases and hearing it together and considering the case (134/federal/2018) is the original according to its initiated date. The Defendant agent answered, we repeated what listed in the answering draft and requested to reject the case. Whereas the court completed its investigations , the argument end has been understood and the decisions has been announced publicly on 9.9.2018.

The Decision :

During scrutiny and deliberation the FSC found that the Plaintiff agents in the case No.(134/federal/2018) challenged the unconstitutional of personal status law No.(188) for 1959 amended, and the unconstitutionality of clause (3) from the article (39) from the same law and they requested from the court to issue the decision of its unconstitutionality, the same agents in the case No.(135/federal/2018) requested from the court the decision of unconstitutionality of personal status law because it is not approved according to the interim constitution of 1958, it is the same request which listed in the case (134/federal/2018) the Court united the cases and considering the case (134/federal/2018) is the original because its date of initiation. The FSC found that the valid Iraqi Constitution for 2005 annul the previous constitutions and the personal status law which challenged by its unconstitutionality has been remained open and valid where it is not annul or amended under the current constitution. If there is a desire to annual the personal status law which is challenged , This requires legitimate interference from the ICR , this is what obliged by the article (130) from the Iraq republic constitution for 2005. The

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challenge of the unconstitutionality of the clause (3) from the article (39) from the personal status law No.(188) for 1959 which is requested in the case (134/federal/2018) the FSC found that the principal of the Islamic sharia seeks to achieve the higher justice between the two couple which doesn't achieve Only to compensate women for the harm they suffered as a result of abusive divorce, not divorce, which is a legitimate matter. Since the marriage contract is binding on both sides and the husband's release as a license and an exception to the general rule, this license may not be used except within the legitimate limits. If the husband exceeds it, he is abuse in his divorce, and this entails compensating the woman for the harm she has suffered, and this does not contradict with the principles of Islam or any clause of the clauses which the plaintiff's agent was based in the above case. This is what the FSC going to in its decision for the case No.(9/federal/2015) which issued on 4.5.2015 . for the above the case No.(134 and its unified 135/federal/2018) is to be lack for its legal substantiation. Based on it the Court decided to reject both cases and to burden the Plaintiff all expenses and fees of the advocacy amount of thousand hundred Iraqi dinar. The decision issued unanimously, decisively relying on the article (94) from the constitution and has been understood publicly on 9.9.2018