



The Federal Supreme Court (F S C) has been convened on 3.11.2018 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-Nagshabandi, Aboud Salih Al-Temimi , Michael Shamshon Qas Georges and Hussein Abbas Abu Al-Temmen who authorized in the name of the people to judge and they made the following decision:

The Plaintiff: (ra.ain.ain) – his agent the barrister (mim.ain).

The Defendants: 1. The President of the Republic of Iraq/ being in this capacity – his agent the Head of jurists (ghain.jim).
2. The Speaker of the ICR/ being in this capacity – his agents the legal officials the Misters/ director (sin.ta.yeh) and legal consultant assistant (heh.mim.sin).

The Claim

The plaintiff claimed that his client previously initiated the case No. (3431/beh/2016) in the first instance Court of AL-Najaf to end commonage of the real estate No. (13/195) county (18) Alwat AL-Fahal. This case was referred to AL-Kufa first instance Court according to the venue jurisdiction by the number (256/beh1/2017) which the agent of the litigant defended that the heir spouse residing the real estate – case's subject – and he requested to reject the case according to the decision of revolution Leadership Council (dissolved) No. (1041 for 1982). Aforementioned decision prohibited real estate commonage ending if the heir's spouse were residing the real estate, whereas the decision (1041) for 1982 violates the Constitution and Islamic law, he requested to judge by its unconstitutionality for the following reasons:

1. The decision No. (1041) for 1982 is unconstitutional and violates Islamic law, and it also contradicts with constants of Islam provisions which mentioned in clause (1) of article (2) of the Constitution. This decision will be a reason that delays heirloom distribution, while Islamic law obliges its settlement and distribution on the heirs after death. 2. The decision (1041) for 1982 in addition to its contradiction the provisions of Islamic law in delaying heirloom distribution, it also contradicts with the provisions of clauses (alif) and (jim) of article (2) and (2nd) of article (13) and clause (1st) of article (23) and (46) of the Constitution. Whereas the decision contradicts with rights and basic freedoms, and the heirs' right in heirloom distributing is basic and can't be restricted according to texts abovementioned, and the constants of Islamic which mustn't be violated by any text. Accordingly, the agent of the plaintiff requested from the FSC to judge by unconstitutionality of the decision No. (1041) for 1982 which issued from revolution Leadership Council (dissolved) because it violates the Constitution and the Islamic law. The agent of the first defendant Mr. (ghain. Alif.jim) the Head of jurists in the Presidency of the Republic according to his power of attorney which attached to the file of the case and according to its written draft dated on (2.18.2018) answered the petition of the case, and he requested to reject it, with burdening the plaintiff its expenses and advocacy fees. He pretended that challenged unconstitutional decision by the plaintiff doesn't violates the Constitution, because the Constitution indicated clearly to the protection of the woman and supporting her to live safe and stable life with her minors. Therefore, the freedom of residing in her husband shouldn't be stripped of her, whatever the other heirs circumstances were according to what listed in article (30) of the Constitution. In addition to that, the state shall maintain the family and guarantees motherhood and childhood protection, and it also shall provide them the adequate circumstances to develop their faculties and abilities according to what listed in article (29) of the Constitution. For the other reasons listed in the draft, he requested to reject the case. The agents of the second defendant/ being in this capacity answered the petition of the case by an answering draft dated on (2.19.2018) that the decision (challenge subject) had been executed for a specific status, and it not exist after execution. Whereas the FSC competences were determined by overseeing the constitutionality of laws and regulations

in effect according to provision of article (93/1st) of the Republic of Iraq Constitution for 2005, and it is not competent in trying laws, decisions and regulations which are not valid anymore. So, challenging unconstitutionality of aforementioned decision is out of the FSC competences which stipulated in abovementioned article, and they requested to reject the case with burdening the plaintiff all expenses and advocacy fees. The Court called upon both parties for pleading, and on the set day of the pleading the agent of the plaintiff and the first defendant attended and the agents of the second defendant as well according to their power of attorney which attached to the file of the case. The public in presence pleading proceeded. The agent of the first defendant repeated what listed in the petition of the case, and he requested to reject the case with burdening the plaintiff the expenses and advocacy fees. Also the agents of the second defendant repeated what listed in their answering draft, and they requested to reject the case with burdening the plaintiff all the case expenses and advocacy fees. Whereas nothing left to be said, the end of pleading and the decision were made clear publicly.

The Decision

The FSC finds that the revolution Leadership Council (dissolved) decision No. (1041) for 1982 which challenged because of unconstitutionality by the plaintiff in pretence it is violates the Constitution, and he requested from the FSC to judge by unconstitutionality of this decision for the reasons he listed in the petition of the case. The decision (challenge subject) abovementioned didn't inhibit the plaintiff from selling his share in the inherited real estate consensually, also aforementioned decision came to protect the Iraqi family, especially that the woman and the deceased minor sons. Deporting the family from residence house which they occupy it after the death of the testator considered a dispersion for the family, and deprivation of dignified living conditions. This house was providing for hers and her sons stability and safe life. The Constitution clearly indicated to protect the woman and supporting her to live stably and securely with her sons according to article (30) of it. In addition to that, the state maintain the family and guarantees motherhood and childhood protection, also it must provide them the adequate circumstances to develop their faculties and abilities according to the

text of article (29) of it. This decision also grants old heirs to get similarly fee of their right in the real estate with a percentage of (1 %) of evaluated value from taxes department. The laws of tolerant Islam doesn't accept to displacing the spouse and minor sons after she lost her breadwinner. The jurisprudence rule mentions that keeping bad matters away is prior than bringing benefits, furthermore the property is a social occupation. For aforesaid reasons, the decision No. (1041) for 1982 (amended) which issued by revolution leadership Council doesn't contradicts with the Constitution's provisions, on the contrary it was complying with its provisions. Therefore, the case of the plaintiff is lacking to its constitutional substantiation, also the case against the first defendant must be rejected according to article (4) of civil procedure law. If litigation was not available in the case, the Court shall take a decision itself by rejecting the case without discussing its basics according to article (80) of civil procedure law. The FSC decided to reject the case of the plaintiff against the first defendant the President of Republic of Iraq/ being in this capacity for litigation directing, and rejecting the case against the second defendant the Speaker of the ICR/ being in this capacity objectively. The Court also decided to burden the plaintiff the case's expenses and advocacy fees amount of one hundred thousand Iraqi dinars divided between the agents of the defendants according to the law. The decision issued decisively and unanimously according to article (94) of the Republic of Iraq Constitution for 2005 and article (5/2nd) of the FSC's law No. (30) for 2005, and the decision was made clear on 3.11.2018.