

IN THE NAME OF GOD, MOST GRACIOUS, MOST MERCIFUL

Republic of Iraq
Federal Supreme Court
Ref. 54/federal/2019



Kurdish text

The Federal Supreme Court (F.S.C.) has been convened on 29/7/2019 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 challenge requester: Haider Ghaleb Shahd – his agent the attorney Salam Aleaysawii.

The challenge request is against: The speaker of the parliament/ being in this post - his agents the legal officials the director Salim Taha Yasein and the legal advisor Haytham Majid Salim.

The Claim

The challenge requester claimed that in the case no.(598/shin/2019) before the personal statues court in AlKufa were he is required to compensate for arbitrary divorce which is contrary to the constitution, he challenged it constitutionality for the following reasons:

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First: According to the provisions of article (2) of the valid Iraqi constitution paragraph (alif) of it stipulate that (no law may be enacted that contradicts the established provisions of Islam), and according to article (1) paragraph (2nd) of the valid personal statues law which stipulate that (if there is no legislative text then it shall be judged according to the principles of Islamic law), article (39 paragraph 3rd) of the valid personal statues law stipulated that (the wife shall giving compensation of the arbitrary divorce when demand) this text contradict the established provisions of Islam as it restrict the husband right to divorce which Allah almighty imposed in the provision of his glorious book.

Second: In addition to that, this text was legislated under the decision of the dissolved revolutionary command council, this council has violated when enacted the text of article (1) of the personal statues law, and there is no need to enact it, as article (1) paragraph (2nd) of it stipulate that (if there is no legislative text then it shall be judged according to the principles of Islamic law), accordingly it existence is violation to the provision of Islam.

Third: Despite the violation of this text to the Islamic law, the valid constitution, and the valid personal statues law, when imposing it, what was usual in implementing the mentioned article is violation to the text of article (39) paragraph (3rd) as it imposing was limit by specific mechanisms and controls, the compensation imposed on the husband in arbitrary divorce just for the absence of the wife of the divorce council, did not mentioned controls, conditions and mechanisms of this text.

Fourth: For all the mentioned reasons he request to perform scrutinize in the case no.(598/shin/2019) and to issue the fair decision (that the text of article 39 paragraph 3 of the personal status law is unconstitutional).

After the case was registered according to paragraph (3rd) of article (1) of the F.S.C. Bylaw No.(1) for 2005, and receiving the answering draft from the one who the challenge request is against him, where he request in it to reject the case for the reasons listed in it, after completing the required procedure according to paragraph (2nd) of article (2) of the mentioned bylaw, the date 29/7/2017 was set to consider the challenge, the court convened and the agents of defendant has attended, but the agent of the plaintiff did not attend despite the inform, the court decided to continue with the argument with his absence according to law. The court scrutinized what listed in the case petition and the answering draft and found that its judgment reasons are completed so the argument has closed and issued the following decision on 29/7/2019.

The Decision

During scrutiny and deliberation by the F.S.C., the court found that the plaintiff has challenged the constitutionality of paragraph (3) of article (39) of the personal status law no.(188) for 1959 which stipulated that (if the husband divorces his wife and the court finds that the husband was arbitrary in her divorce and that the wife has been harmed as a result of that, at her request, the court shall judge the divorcee with compensation commensurate with his financial situation and the degree of his arbitrariness, which is estimated in total and not to exceed her alimony of two years, in addition to its

other fixed rights), for the claim that this text violate the established provisions of Islam as it restrict the husband right to divorce that Allah almighty imposed in the provision of his glorious book, the defendant has argued that the plaintiff didn't show the constitutional text that he claimed to be violated by the challenged text, also this text don't deprive the husband from divorcing his wife if it was legal, the stipulated compensation in this text is only be with the arbitrary divorce. The F.S.C. found that the subject of this case has already been adjudicated by this court in many of its decisions including the decision no.(95/federal/2014) on 2/12/2014, decision no.(113/federal/2014) on 21/4/2014, decision no.(9/federal/2015) on (4/5/2015), and decision no.(134 unified with 135/federal/2018) on 9/9/2018. Therefore this case is ruled by article (106) of the law of evidence no.(107) for 1979 as it already has been adjudicated, on the other hand the Islamic law principal seek to achieve justice in the marital relations under the consideration that the family is the core of the society and it safety lead to the safety and security of the society, even if the divorce was legally legislated but it was legislated for it legal necessities, as if the husband was arbitrary then he has exceeded the legitimate limit of divorce, the Maxim rule that the arbitrary in using the right require to compensate the victim of such arbitrariness, this principal doesn't contradict with the established provisions of Islam but it by it side. Therefore the plaintiff case must be rejected because, it subject already has been adjudicated, and the wife's right to claim compensation when she divorced arbitrarily for the mentioned reasons. According to that the court decided to reject the plaintiff case and to burden him the expenses and advocacy fees for the agents of the defendant's amount

of one hundred thousand Iraqi dinars. The decision has been issued decisively and unanimously according to the provisions of article (94) of the constitution, and article (5) of the F.S.C. law No.(30) for 2005, and issued publicly on 29/7/2019.

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