

**IN THE NAME OF GOD, MOST GRACIOUS, MOST MERCIFUL**

Republic of Iraq  
Federal Supreme Court  
Ref. 80/federal/media/ 2015



Kurdish text

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The Federal Supreme Court (F.S.C.) has been convened on 26.10.2015 headed by the senior Judge Farooq Mohammed Al-Sami and the membership of Judges Jaafar Nasir Hussein, Akram Taha Mohammed, Akram Ahmed Baban, Mohammed Saib Al-Nagshabandi, Abood Salih Al-Temime, Michael Shamshon Qas Georges, Hussein Abbas Abu Al-Temmen and Sulaiman Abd Allah Abd Alsamad who are authorized in the name of the people to judge and they made the following decision:

The plaintiff: (ain.ain.ha.) -his agents the attorneys (beh.kaf. sin.) and (ha.mim.sin.).

The defendants:

1. the speaker of the Iraqi council of representative (I.C.R.)/ being in this post – his agents the legal officials (Sin.Ta. Yeh.) and (Heh.Mim.Sin.).
2. head of the supreme judicial council/ being in this post – his agent (feh.ain.ain.).

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*Achraa*

## **The claim:**

The agents of the plaintiff claimed that their client challenge the constitutionality of article (57) of the personal status law No.(188) for 1959 with its amendments, because this article violated the Iraqi republic constitution of 2005, and contradicts the principal of Islamic Sharia, whereas no law may be enacted that contradicts the established provisions of Islam because his client is a follower of the Jaafary sect that make the custody duration (two years for male and seven years for female then transfer to the father) as stated in the book (Jurisprudence of the five sects) of Muhamad Juad Magnia and the rest jurisprudents of the Jaafary sect, and not as what listed in the text of the mentioned article (57), as the challenged article contain clear violation for the provision of article (2/1<sup>st</sup>/beh) of the constitution for contradicting the democratic principles, the text of paragraph (C) of the constitution stipulated that no law may be enacted that contradicts the rights and basic freedoms, it also violated the provision of article (15) of the constitution which stated that ((every individual has the right to enjoy life, security and liberty, deprivation or restriction of these rights is prohibited except in accordance with the law and based on a decision issued by a competent judicial authority)), the challenged article also violated the provision of article (41) of the constitution which stipulated ((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)), for all that the agent of the plaintiff requested to judge the unconstitutionality of article (57) of the personal status law No.(57) for 1959 with its amendments, the F.S.C. shall supervise the constitutionality of the laws and regulations in force in

accordance with the provisions of article (93) of the constitution, he also requested to issue the required legal legislation for that and to oblige the defendants/ being in this posts to commit to the constitutional provisions. The agents of first defendant (the speaker of the I.C.R./ being in this post) responded to the case petition stating that the objectives of enacting the provisions and laws is the human interest in bringing benefits and removing damage for them, according to that the Iraqi legislator has extract the text of article (57) of the personal status law from these concepts to save the embosomed interest and to remove the damage from him, by that the mentioned text has taken into consideration achieving justice and ensure the interest of the embosomed by staying with his custodian if the required condition that are stipulated in the challenged article, according to that the challenged text didn't violate the principle of the Islamic sharia and the constitutional text listed by the plaintiff agent, for all that they requested to reject the case. The agent of the second defendant (head of the supreme judicial council/ being in this post) responded to the case petition stating that her agent has nothing to do with the enacting of article (57) of the amended personal status law No.(188) of 1959 because this law was legislated by the legislation office on the time of its issuance, and article (4) of the amended civil procedure law No.(83) for 1969 required that the defendant must be a litigant, his admission leads to a judgment by assessing issuing an admission from him, therefore her client is not fit to be litigant in this case, and requested to reject the case for the mentioned reasons. After the case was registered according to paragraph (3<sup>rd</sup>) of article (1) of the F.S.C. Bylaw No.(1) for 2005, and completing the required

procedure according to paragraph (2<sup>nd</sup>) of article (2) of the mentioned bylaw the date 26/10/2015 was scheduled for argument, the court convened and call upon the parties the plaintiff' agent didn't attend despite the notification and the plaintiff himself didn't attend also, the first defendant' agents and second defendant' agent has attended, the agent of the first defendant commented (we request to consider the case with the absence of the plaintiff and to judge by it rejection) the agent of the second defendant commented that (we request to reject the case for the absence of the plaintiff. Whereas nothing left to be said the argument is closed and the decision is issued publicly.

### **The decision:**

During scrutiny and deliberation by the F.S.C. the court found that the plaintiff has challenged article (57) of the personal status law No.(188) for 1959 with its amendments requesting to repeal it for violating the constitution of 2005 and contradicting the Islamic sharia principals as he is a follower of the Jaafary sect which make the custody duration two years for male and seven years for female then to be transferred to the father, and that considered as clear violation to the provisions of article (2- 1<sup>st</sup>/b) of the constitution for contradicting the democratic principles, and violating article (41) of the constitution which stipulate that ((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)). The F.S.C. finds that second defendant (head of the supreme judicial council/ being in this post) is not fit to be litigant in this lawsuit because article (4) of the civil procedure law No.(83) for 1969 the

amended, required that the defendant must be a litigant, his admission lead to a judgment by assessing issuing an admission from him, and he also must be convicted or obliged by something if the case was approved, because the second defendant wasn't the party that issued article (57) of the personal status law No.(188) for 1959 the amended that is under challenge, therefore he doesn't have the jurisdiction to repeal it, and if the litigation is not directed the court shall judge by itself to reject the case without considering it bases according to article (80/1) of the amended civil procedure law No.(83) for 1969. Accordingly the court decided to reject the case for the second defendant formally from the point of litigation, on the other hand the F.S.C. found that article (41) of the constitution of 2005 has suspended the work in what stipulated in it on the legislation of a law that regulates the personal status of the Iraqi Muslims with the different of their sectarian affiliations, so it won't exceed or contradict the cancelation of the text to be repealed, according to the opinions of all the Islamic jurisprudents and the combining between these opinions, as such law is not legislated until now, therefore, article (57) of the personal status law No.(188) for 1959 the amended (under challenge) is authentic and in accordance with the constitution from the result aspect. Accordingly, the court decided to reject the case from this aspect also and to burden the plaintiff the expenses and advocacy fees for the agents of the first and second defendant amount of (one hundred thousand) Iraqi dinars distributed on them equally. The decision has been issued final and unanimously according to article (94) of the constitution and article (5/2<sup>nd</sup>) of the F.S.C. law No.(30) for 2005 on 26/10/2015.