



The Federal Supreme Court (F S C) has been convened on 11.7.2017 headed by the Judge Madhat Al-mahmood and membership of Judges Jaafar Nasir Hussein, Akram Taha Mohammed, Akram Ahmed Baban, Mohammed Saib Al-Nagshabandi, Aboud Salih Al-Temimi, Mikael Shamshon Qas George, Hussein Abbas Abu Altemmen and Mohammed Qasim AL-Janabi who authorized in the name of the people to judge and they made the following decision:

Plaintiff: (alif.teh.sad) – his agent the barrister (ghain.ain.ain).

Defendant: Speaker of the ICR / being in this capacity – his agents the legal official as a general director & the legal consultant assitant (heh.mim.sin).

Claim

The agent of the plaintiff claimed, that her client previously got the decision No. 1993/shin/2017 on 6.15.2017 from personal status court in AL-Shaab which judge with obliging the defendant (zin.ha.mim) to enabling her client from seeing his daughter (ra) in the (AL-Rahmah AL-Ainsaniyah society headquarter) for two times in the month. Whereas seeing subject and custody shall be according to article (57) of personal status law No.(188 for 1959 (amended)) and this article violates the honest Sunna, and one the incidents in this field there were a woman said ((prophet of God, my son was in my womb as a vessel for him and my palm is a safe place for him, my breast is his feeder, his father claims to take him form me by force, so, the prophet said (pbuh) (you deserve the child, if you are not married)). As well as, it is violates religious his eminence the greatest ayatollah Ali AL-Husseini AL-Sistani (May God bless him). And this matter is permanent about his opinion in custody subject in questions (402) & (403) of (AL-Saliheen course/treatments/third part) book, as following: 1. If the parents were separated by annulment or divorce before the boy reaches two years his

mother's right never forgoes in his custody if she did not married from someone else, therefore, they must approve to practice their mutual right. 2. If the mother married after she left the father, she forgone in the custody of the boy, and the custody is a special right for the father, and if the second husband left her, does this right return to her or not? And these are two sides each one of them is not out of strength. Whereas clause (1st) of article (2) of the Iraqi constitution which stipulates on: (Islam is the official religion of the State and is a foundation source of legislation) and clause (alif) of this article (2) which stipulates on: (no law may be enacted that contradicts the established provisions of Islam). So, article (57) of personal status law No. (188) for 1959 violates the Iraqi valid constitution, the Islamic rite, prophetic Sunna and supreme religious reference fatwa for the custody subject, and remaining this article on its current drafting forms a violation to the provisions of the constitution and contradicts with Islamic rite and prophetic Sunna, as well as the opinion of the supreme religious reference. Narrated from prophet of God (pbuh): (whosoever introduces a good practice in Islam, there is for him its reward of those who act upon it after him without anything being diminished from their rewards) (and whosoever introduces an evil practice in Islam, will shoulder its sin and the sins of all those who will act upon it, without diminishing in any way their burdens). Therefore, he requested to judge with unconstitutionality of article (57) of personal status law No. (188 for 1959 (amended)) and to cancel it, and to burden the defendant/ being in this capacity all the expenses and the advocacy fees. After registering the case at this court according to clause third of article (1) of its bylaw, the answer of the plaintiff/ being in this capacity had been received and he requested to reject the case, reasoning his request that it is a common-sense matters the texts if were legitimate or illegitimate it does not meaning itself, but the purpose of what its implementing accomplish, and execute its provisions from benefits which represented in regulating the man's life to bring benefits and avoid damage, and took the holly verse as example (when you judge between people to judge with justice). So, the avoided aim from legislating the provisions are the human interests and the Iraqi legislator brought the text of article (57) of personal status law from theses resources to protect the interest of the embosomed. Therefore, the text had cared to achieve justice and had never violated Islamic rites

principles which the agent of the plaintiff indicated to. After completing the required procedures in the case according to clause (2nd) of article (2) in the aforementioned bylaw. The day 11.7.2017 was assigned as a date for pleading. On that date the court were convened, and the agent of the plaintiff attended, as well as the agents of the ICR speaker/ being in this capacity attended. The public on presence proceeded, the agent of the plaintiff repeated what listed in the petition of the case and added that she restrict the challenge with unconstitutionality of (clause 2 of article 57) of personal status law and she added that the constitution in article (41) granted the option to the person to choose in personal status field according to their sects and the marriage of her client was on AL-Jaafri sect. Based on the enquiry of the court about article (41), is there a law issued about it, so, she testified with denial. The agents of the defendant because they repeat what listed in the answering draft. Whereas the court completed its investigations and nothing left to be said, the end of the pleading ended and the decision recited publicly.

The decision

After scrutiny and deliberation by the FSC, the court found that the plaintiff challenges unconstitutionality of clause (2) of article (57) of personal status law No. (188) for 1959 after the agent of the plaintiff restricted the case with unconstitutionality in this clause as it is related to the custody of the child because it is violates Islam established, and for the traditions which mentioned in the petition of the case that the marriage of the mother from another spouse after separation forgoes its custody, also the jurisprudents' opinion in this subject. The FSC finds by the prophetic traditions and the opinions of the jurisprudents and similar legislations in Islamic states, and what the judiciary settled on in judgments in personal status. All what abovementioned are not hindering to not treating with facts of custody each one according his circumstances, because the basic of legislations are to protect the man's benefit and avoiding damage against them, especially if it were related to children while they must have priority in care not litigants interests, caring in this point the interest of the embosomed and protect him from harm. The court when reviewing the case must investigate this interest by social research which done by experts, and through the litigants' proofs, and appreciate according to that where the embosomed interest is. Therefore, it is judge for the married woman of other or for the father if the custodian mother cause damage to the embosomed or take the

mother away from looking after her child, because the origin in the custody is goes behind the embosomed interest. The Iraqi personal status law detailed in its completed provisions in this concern, especially in the text of article (57/2) of personal status law (challenge subject) with unconstitutionality. Objectively, formally the plaintiff did not clarify in the petition of the case his interest in initiating the case, especially he got a judgment enables him from seeing the embosomed and this judgment became final, and he did not present case to forgo the mother's custody to his daughter and waiting for what the court will decide as a result of it. Based on that his case has no substantiation in the constitution and the law formally and objectively, therefore, the court decided to reject the case and to burden him the expenses and advocacy fees of the agents of the defendant/ being in this capacity. The decision issued decisively according to provisions of article (5) of FSC law No. (30) For 2005 and article (94) of the constitution and unanimously on 11.7.2017.