

Republic of Iraq
Federal Supreme Court
Ref. 136/ federal /2023



Kurdish text

The Federal Supreme Court (F S C) has been convened on 10/9/2023 headed by Judge Jassim Mohammed Abood and membership of Judges Sameer Abbas Mohammed, Ghaleb Amir Shunain, Khalef Ahmed Rajab, Hayder Ali Noori, Hayder Jaber Abid, Ayoob Abbas Salih, Abdul Rahman Suleiman Ali, and Dyar Mohammed Ali who are authorized in the name of the people to judge and they made the following decision:

The Plaintiffs: Murtadha Mohammed Sahib – on his own behalf and on behalf of the second plaintiff Akeel Muhsin Radhi.

The Defendant: Speaker of the ICR/ being in this capacity – his agent the official jurist Saman Muhsin Ibrahim.

The Claim

The first plaintiff claimed before this court that he went to the People's Personal Status Court in order to contract a second marriage for his client (the second plaintiff) due to his desire to marry a second wife, and he was unable to obtain a proof of permission for his client to marry a second wife in order to apply Article (3/4 - Alif, Beh and 5) of the Personal Status Law No. (188) of 1959, which stipulates (4 - It is not permissible to marry more than one woman except with the permission of the judge, and in order to grant permission, the following two conditions must be met: Alif - That the husband must have financial sufficient to support more than one wife. B- There must be a legitimate interest. 5- If there is fear of unfairness between wives, polygamy is not permissible, and this is left to the judge to determine.) which violates the Constitution of the Republic of Iraq for the year 2005 in Article (2 - First: Islam is the official religion of the state, and it is a basic source of

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legislation: Alif - It is not permissible to enact a law that conflicts with the constants of the provisions of Islam) in addition to that this article included restrictions that contradict the provisions of the noble Islamic Sharia, with There is no jurisprudential opinion in Islamic schools of thought that supports taking permission from a judge in order to marry a second wife, nor the conditions mentioned in the article, because marriage is a bond between a man and a woman, and it has a special nature that differs from any other bond that a person assumes in his life, and from its conclusion it results in a new situation for both parties, it is as old as the history of humanity, as God Almighty said in His Holy Book, addressing Adam, peace be upon him (We said, “O Adam, inhabit the Garden, you and your spouse) Surat Al-Baqara verse (35) Islamic law has dealt with its provisions in detail in accordance with what is stated in the Holy Qur’an and the Noble Prophet’s Sunnah, as it is the basis for the formation of the family and society. The challenged article stipulated that the husband must have financial sufficient to support more than one wife, and this is contrary to the Qur’anic verse (And wed the singles among you, and those who are fit among your servants and maids. If they are poor, God will enrich them from His bounty. God is All-Encompassing, All-Knowing.) Surat An-Nur verse (32) Marriage does not have one consistent ruling that applies to all those responsible, but each person has a special ruling according to the circumstances surrounding him, and he knows best about himself than others, as God Almighty said (And man will be evidence against himself) Surat al-Qiyama verse (14), he also said (then marry the women you like—two, or three, or four. But if you fear you will not be fair, then one, or what you already have. That makes it more likely that you avoid bias.) Surat An-Nisa’a verse (3) Polygamy is an important and sensitive subject, and Islamic law does not require a woman and her family to accept or reject it if they find a benefit or interest in it. The judge does not have the right to refuse, approve, or

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determine the interest, as mentioned in the contested article regarding the existence of a legitimate interest, and since many courts refuse to permit it due to the existence of the conditions mentioned in the contested article result in the husband resorting to an external contract before a cleric and ratifying it before the Personal Status Court. The husband is considered to have committed a crime and is punished with a penalty of no less than three years and no more than five years based on Article (10/5) of the Personal Status Law No. (188) of 1959, amended, whereas Islam guarantees the interests of both spouses, and the legitimacy of polygamy is based on the Qur'anic texts, the noble Prophet's Sunnah, and what the majority of jurists have stated regarding the permissibility of marriage of two, three, or four, as for the conditional justice according to the aforementioned verse, it is justice in love and heartfelt affection between women, as God Almighty said (You will not be able to treat women with equal fairness, no matter how much you desire it. But do not be so biased as to leave another suspended. If you make amends and act righteously—God is Forgiving and Merciful) Surat An-Nisaa verse (129) This justice is not possible, as stated in the verse, except that the husband must not completely abandon one of his wives and leave her alone, as she is neither married nor divorced, since it is inconceivable that God Almighty would permit polygamy and condition it on a condition that is impossible to fulfill, even if God wanted it to prevent polygamy is to prevent it directly with one word because God is able to do that and he knows the conditions of His servants. As for the honorable Sunnah of the Prophet, it is stated in the interpretation of Al-Manar that when Ghailan bin Salamah Al-Thaqafi converted to Islam, he had ten women under his guardianship, so the Messenger of God, may God's prayers and peace be upon him and his family, ordered him to choose from them. (Four) and he separates from the rest of them, and in the Hanafi

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school of thought we find in Al-Mabsoot by Al-Sarkhi the Book of Marriage, he stated that (it is not permissible for a man to marry more than four women), since the conditions mentioned in the contested article obligated the judge to permit after they are met, and he has the right to refuse if they are not met, whether the first or second wife accepts or not, this represents a denial of legal permission from God Almighty for his servants, which makes the contested text in violation of the provisions of Islamic law and violation of the Constitution based on Article (2/1st/Alif) of the Constitution of the Republic of Iraq for the year 2005, so they asked this court to rule the unconstitutionality of Article (3) Paragraph (4/Alif, Beh) and Paragraph (5) of the Personal Status Law No. 188 of the year 1959 and charging the defendant with fees, expenses, and advocacy fees. The case was registered with this court in the number (136 / Federal / 2023) and the legal fee was collected in accordance with Article (21/1st) of the internal regulations of the Federal Supreme Court No. (1) of 2022, and the defendant is notified of its petition and documents in accordance with Article (21/2nd) thereof. The defendant's agent replied with the answering draft dated 6/26/2023, the summary of which is: The two paragraphs - the subject of the appeal - are among the laws in force following the provisions of Article (130) of the Constitution of the Republic of Iraq for the year 2005 (the legislation in force remains in force unless they are repealed or amended following to the provisions of this Constitution). Their text is considered a legislative option that does not violate any of the constitutional texts and is in accordance with Islamic law, as stated in the Almighty's saying (But if you fear you will not be fair, then one) (An-Nisaa:3) The text of Article (3/7) of the Personal Status Law permits a man to marry more than one woman if the person he intends to marry is a widow, and this is an application of the first part of the noble verse (If

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you fear you cannot act fairly towards the orphans—then marry the women you like—two, or three, or four), therefore, he requested to reject the lawsuit of the plaintiff and to burden him with the expenses an advocacy fees. After completing the procedures required by the court's Bylaw, a date for the argument was set based on Article (21/3rd) thereof and the parties were notified of it. On the appointed day, the court was formed and the two plaintiffs attended, and the defendant's agent attended and the public in-person pleading proceeded. The two plaintiffs repeated what was stated in the lawsuit petition and requested to judge according to it, the defendant's agent replied and requested that the case be dismissed for the reasons stated in the draft attached to the case papers, and each party repeated its previous statements and requests, and since there was nothing left to say, the end of the argument has been made clear and the court issued the following decision:

The decision:

Upon examination by the Federal Supreme Court, it was found that the plaintiffs (Murtada Muhammad Sahib and Aqeel Mohsen Radhi) had filed this lawsuit, opposing the Speaker of the House of Representatives in addition to his job, and that the People's Personal Status Court had previously been reviewed by the first plaintiff in his capacity as a lawyer in order to contract the second marriage. To his client/the second plaintiff, because he desires to marry a second wife, and the argument for permission to marry has not been completed due to the application of the provisions of Paragraph (4/A and B) and Paragraph (5) of Article (Third) of the Personal Status Law No. (188) of 1959, which stipulates (4- It is not permissible to marry more than one woman except with the permission of the judge, and in order to grant permission, the following two conditions must be met: Alif - That the husband has financial

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sufficient to support more than one wife. Beh - That there is a legitimate interest. 5 - If there is fear of unfairness between the wives, then polygamy is not permissible and discretion is left. That's up to the judge.). Claiming that the aforementioned texts violated the provisions of Article (2/1st/Alif) of the Constitution of the Republic of Iraq for the year 2005, which states (First - Islam is the official religion of the state and is a basic source of legislation. Alif- No law may be enacted that conflicts with the constant provisions of Islam.), The aforementioned texts have imposed restrictions that are contrary to the provisions of Islamic law, as there is no jurisprudential opinion in Islamic schools of thought that supports taking permission from a judge to marry a second wife, nor the conditions mentioned in the challenged texts. Therefore, they requested that the defendant be summoned, in addition to his job, to plead and rule that the text of Paragraphs (4/Alif and Beh) and Paragraph (5) of Article (Three) of the Personal Status Law No. (188) of 1959 is unconstitutional, and that he shall burden the fees, expenses, and advocacy fees. The court reviewed the answering draft of the defendant's agent in addition to his letter dated 6/26/2023, in which he requested that the plaintiffs' lawsuit be rejected since the challenged texts are effective following the provisions of Article (130) of the Constitution of the Republic of Iraq for the year 2005 (the legislation in force remains in force unless Cancelled or amended following the provisions of this Constitution.). The text - the subject of the appeal - is considered a legislative option that does not violate any text of the Constitution and follows the provisions of Islamic Sharia. The court also heard the defenses and requests of the two parties during the pleading session, and upon review and deliberation, the Federal Supreme Court found the following:

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First: Marriage is a bond between a man and a woman that is lawful for him. It has a special nature that differs from any other bond. It is a complementary residential relationship based on affection, mercy, forgiveness, and preserving the rights of both the man, the woman, and the children. It is a relationship drawn up by the Holy Law, as God Almighty said in the decisive text of His Noble Book (And of His signs is that He created for you mates from among yourselves, so that you may find tranquility in them; and He planted love and compassion between you. In this are signs for people who reflect.) Surat Ar-Rum verse (21). (God Almighty has made the relationship between spouses and the affection and mercy that bind them one of His verses, which indicates the sanctity of this relationship with God Almighty, Glory be to Him. God Almighty did not associate cohabitation, which is part of tranquility, except with marriage, and the Sunnah of the Prophet had a great interest in this relationship, as the Messenger said The Most Honorable Muhammad, may God's prayers and peace be upon him and his family, "Marriage is my Sunnah, so whoever deviates from my Sunnah is not from me." And he, may God's prayers and peace be upon him and his family, said, "Whoever marries has achieved half of his religion, let him fear God in the other half."). Second: What is meant by the constants of the provisions of Islam is following what is stated in Article (2/First/A) of the Constitution of the Republic of Iraq for the year 2005, it is what is not permissible to make ijtehad. Because they represent the textual principles of Islamic law that do not bear interpretation or change, such as establishing the obligation of the five daily prayers, the prohibition of adultery, and the prohibition of marriage by lineage, affinity, and breastfeeding (Forbidden for you are your mothers, your daughters, your sisters, your paternal aunts, your maternal aunts, your brother's daughters, your sister's daughters, your foster-mothers who nursed you, your sisters through nursing, your wives' mothers, and your stepdaughters in your guardianship—born of wives you have gone into—but if you have not gone into them, there is no blame on you. And the wives of your genetic sons, and marrying two sisters simultaneously. Except what is past. God is Oft-Forgiving, Most Merciful.) Surat An-Nisaa verse (23), As for

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what is permissible to do according to ijtiḥad, it falls outside the scope of the principles of Islam and enters the scope of speculative rulings in their validity and significance, which expand with development and arise with the emergence of new facts that must be regulated to achieve the interests of the people. Third: In marriage, there are constants regarding which there is no disagreement or ijtiḥad among all Muslim jurists, which are the dowry or dowry, voluntary or non-coercive, and non-homosexual spouses, and anything other than them is subject to discussion and ijtiḥad, such as guardianship in marriage, the presence of witnesses in the marriage contract, etc. Therefore, it is not permissible to legislate any text. A legal text that contradicts these constants, as it is not permissible to legislate a text that permits a marriage contract without a dowry or a dowry, or that permits a marriage contract without the consent of both spouses, just as it is not permissible to legislate any legal text that permits marriage between two people of the same gender, as Islamic jurists from their different sects have unanimously agreed to prohibit this. Rather, they considered it a heinous obscenity and a heinous crime that violates nature and contradicts nature, due to the combination of the texts of the Qur'an and Sunnah on that, and among what is mentioned in its prohibition in the Book is the Almighty's saying: (And Lot, when he said to his people, "Do you commit lewdness no people anywhere have ever committed before you?" "You lust after men rather than women. You are an excessive people." And his people's only answer was to say, "Expel them from your town; they are purist people." But We saved him and his family, except for his wife; she was one of those who lagged behind. And We rained down on them a rain; note the consequences for the sinners.) Surat Al-A'raf (80-84), and his Almighty say (And forsake the wives your Lord created for you? Indeed, you are intrusive people.") Surat Ash-Shu'ara, The saying of the Noble Messenger Muhammad, may God's prayers and peace be upon him and his family,

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on the authority of Jabir, may God be pleased with him, that he said (May God curse the one who does the actions of the people of Lot, the curse of God the one who does the actions of the people of Lot, the curse of God the one who does the actions of the people of Lot), which indicates the prohibition of what is called same-sex marriage. In both types, it contradicts the purposes of the Holy Law when it comes to legislating marriage. It contradicts the original purpose of marriage, which is the purpose of reproduction and the survival of the human species, in addition to the religious, psychological, and health damage that this forbidden relationship leads to on the individual, and the great harm it leads to on society, These include the collapse of the family system, the disintegration of society, the cutting of offspring, the prevention of the continuation of the human species, the severing of ties of kinship, the increase in the rate of spinsterhood, and the emergence of deadly diseases and epidemics. These are harms whose impact is not limited to homosexuals only but extends beyond them to society as a whole, which leaves no reasonable person any room to doubt its prohibition and its inclusion of major sins. The punishment is severe for those involved in it, so any legislation that permits this forbidden relationship is subject to the defect of violating the Constitution as it is contrary to the constants of the provisions of Islam. Fourth: Polygamy in Islam is a religious and legislative matter whose evidence is contained in the Qur'an and Sunnah. It is one of the constants of Islam, but it is a restricted license, not an absolute obligation, and it is the man's responsibility towards his society. The Qur'anic evidence for the permissibility of polygamy is what Muslim jurists have unanimously agreed upon, and it is what is stated in Surat An-Nisa'a from the Almighty's saying (And give orphans their properties, and do not substitute the bad for the good. And do not consume their properties by combining them with yours,

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for that would be a serious sin. If you fear you cannot act fairly towards the orphans—then marry the women you like—two, or three, or four. But if you fear you will not be fair, then one, or what you already have. That makes it more likely that you avoid bias.) whoever meditates on the two noble verses will become clear to him that the hadith is originally about orphans and about preserving their wealth and prohibiting consuming it unjustly. Then came the Almighty's saying: (If you fear you cannot act fairly towards the orphans—then marry the women you like—two, or three, or four. But if you fear you will not be fair, then one, or what you already have. That makes it more likely that you avoid bias.) The meaning of “do not be just,” meaning not to be just, and “fear” means knowledge or fear, meaning if you know or fear that you will not be just with orphan women whom it is permissible for you to marry, then marry as many other women as you wish, two, three, or four, and it is not permissible for it to be more than that, and it was stated in the interpretation of The statement by the scholar Al-Tabarsi ((And if you fear that you will not be just)) meaning, do not be fair and do not be just, O guardians of orphans. (Concerning orphans): (So marry what pleases you) meaning what is lawful for you. Its meaning is: So marry what is good. (of women): that is, of those who are permissible among them, that is, of those whom it is permissible to marry without the forbidden ones mentioned in the Almighty's saying: (Your mothers have been forbidden to you) - verse (23) of Surat An-Nisa', His assessment is based on the first saying: If you fear that you will not be fair in marrying orphans if you marry them, then marry adult women, and that is because if injustice occurs against the adult women, it is possible to ask the sincere one of them to purify their souls and seek their permission because they are among the people who are eligible to be permitted and waive their rights, unlike orphans, for if injustice occurs In their case, it was not possible to get rid of it. After all, they are not among the people

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of analysis nor the people of abrogating rights. It was mentioned in Tafsir Ibn Kathir ((and his Almighty saying “If you fear you cannot act fairly towards the orphans—then marry the women you like—two” That is, if it is under the lap of one of you, and he is afraid that it does not give it a skill, so let him adjust to what he has settled from the women, so they are the same. Al -Bukhari said: Abraham bin Moses told us, Hasham, on the authority of Ibn Jarraj, told me, Hasham ibn Urwah, on the authority of his father, on the authority of Aishah: And she had a taste, and he would hold him on him, and he had nothing to do with him (If you fear you cannot act fairly)

by the court about the petition of the lawsuit and the plaintiff's requests and the grounds on which he relied, the court finds that the plaintiff's company is a private public transport company and is not competent to rent or exploit weighing stations, and on the other hand, the plaintiff did not show proof of his contract with the competent authorities until his interests and the interests of his company are harmed by assuming the validity of what he claims, and thus the interest condition is absent from the plaintiff/ being in this capacity, this condition is one of the requirements for filing a lawsuit based on paragraphs (1st) and (2nd) of Article (20) of the Rules of Procedure of the Federal Supreme Court, which stipulates ((First: that the plaintiff in the subject matter of the lawsuit has a direct and influential interest in his legal, financial or social status, provided that it is available from the filing of the lawsuit until the issuance of the judgment thereon. Second: The impugned text has already been applied to the plaintiff)) The court finds that this is not

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available in the case of the plaintiff in this lawsuit. Accordingly, due to the lack of interest condition, the court decided to dismiss the lawsuit of the plaintiff (Ahmed Rahim Abtan), the managing director of the Iraq Saria Public Transport Company Ltd. / being in this capacity and to burden him with fees, expenses and advocacy fees to the first defendant's agent an amount of one hundred thousand dinars distributed in accordance with the law. The decision has been issued unanimously according to the provisions of articles (93 and 94) of the Constitution of the Republic of Iraq for 2005 and articles (4 and 5) of the FSC's law No. (30) for 2005 which was amended by law No. (25) for 2021. The decision has been edited in the session dated 4/Sufur/1445 Hijri coinciding with 21/August/2023 AD.

Judge

Jassim Mohammed Abboud
President of the Federal Supreme Court

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