



Legal and Constitutional Analysis of Federal Court Decision No. 230/Federal/2022 Regarding Marriage to Second Wife in the Province of Kurdistan

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Received: 2024-07-28

Revised: 2024-09-05

Accepted: 2024-12-20

Abstract

The Federal Court of Iraq issued Decision No. 230/Federal/2022, declaring that Article 12 of Law No. 15 of 2008, which grants the first wife the right to request a divorce if the husband marries a second wife, is unconstitutional. This article, enacted in the Kurdistan Region, violated Islamic law and Article 2(a) of the 2005 Iraqi Constitution, which prohibits laws that conflict with Islamic principles. The decision sparked a heated debate in the region's courts as they grappled with whether to follow the now-invalidated article or to adhere to the court's ruling, which is the final authority on interpreting legal texts and resolving controversial issues. This study examines the legal foundation behind the Federal Court's decision, referencing applicable articles in the current Iraqi Personal Status Law. It will also highlight the conflicts raised by the Kurdistan Region's legal amendments and evaluate the strengths and weaknesses of the decision. This study reviews and interprets relevant legal texts within the context of Iraqi Personal Status Law using an analytical approach. Despite the Federal Court's supervisory authority and the justifications provided for the annulment of Article 12 in the Kurdistan Region, the court's decision has flaws. The ruling contradicts the stance of certain sects and denies the wife the right to request separation, arguing that doing so would violate constitutional and Islamic law. The study demonstrates that the court's decision, which deemed the provision contrary to Islamic law, is flawed. This issue remains a point of disagreement among scholars, and the court's interpretation cannot be considered an absolute representation of Islamic rulings, as there is no consensus among jurists on such matters.

Keywords: Federal Court decision, Marriage to more than one person, Kurdistan, Unconstitutionality



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Introduction

The Federal Court issued ruling No. 230/Federal/2022, declaring the unconstitutionality of Article Twelve of Law No. 15 of 2008, which amends the Iraqi Personal Status Law No. 188 of 1959. In the context of the Kurdistan Region of Iraq, this law states that "If the husband marries a second wife, the first wife has the right to request a separation." The ruling also considered implementing the amended Article Eighteen in the region invalid from the ruling date, stating that it conflicted with the constitution and violated Islamic law.

This study will explore the article that the Federal Court canceled, presenting the justifications the Court used to support its decision. It will also provide an overview of the Federal Court's role, jurisdiction, and decision invalidating the amended Article Eighteen in the Kurdistan Region. Additionally, the study will address the inconsistencies in the Kurdish legislator's position regarding the conditions for polygamy, highlighting how the Kurdish legislator failed to adhere to his amendments. The study will also refer to the existing provisions in the Iraqi Personal Status Law to strengthen the Federal Court's ruling.

Moreover, the paper will examine the shortcomings and objections against the Court's decision. The significance of this research lies in its broader approach, going beyond the Court's focus on the unconstitutionality of Article Twelve of Law No. 15 of 2008. It will also discuss the Kurdish legislator's argument for the legal amendments on this issue, showing that the legislator did not comply with the amendments he introduced. From a practical perspective, the research may serve as a reference for judicial bodies, offering clarity and reassurance based on the rulings presented.

The researcher has reviewed numerous previous studies on this subject, including¹ the Federal Court's decision, which ruled that a wife's right to seek separation due to her husband marrying another woman contradicts Islamic law.

¹ "Federal Supreme Court," Resolution 230/Federal/2022.

Judge Salem Radwan Al-Moussawi critiqued this, stating that² impediments to marriage under the law are limited to permanent or temporary prohibitions and do not extend to a wife's right to seek separation. Hadi Aziz, in his book³, argued that achieving justice between multiple wives is beyond human capability, asserting that the Qur'anic verse on polygamy was not a license for it but rather a restriction for certain individuals. Scholars Adnan Hashim Jawad Al-Sharoufi and Aziza Khamis⁴ discussed polygamy under Islamic law, emphasizing its conditional nature. Researchers Yahya Muhammad Sahib, Rania Muhammad, and Musawifin Sofil Al-Mutawaki⁵ examined Islamic law and Indonesian law regarding the prohibition of marriage to more than four women and the silence of Indonesian law regarding this.

This research goes beyond these viewpoints, addressing other aspects seen as shortcomings in both the court's decision and other studies. It argues that the condition is not contrary to Islamic law, as determined by the court. It is supported by Qur'anic verses, the Sunnah of the Prophet, and scholarly opinions, at least as a matter of disagreement among scholars. Furthermore, it asserts that the court's decision is not contradictory to the constants of Islamic rulings, as jurists have no consensus on such constants. This right is also recognized in certain Arab legal systems. If the court's argument is seen as conflicting with these constants, it is important to note that the Iraqi Constitution prohibits laws contradicting democratic principles, rights, and freedoms.

The purpose of this study is to demonstrate that a wife's right to divorce or annul her husband's marriage is not contrary to Islamic law, as the Federal Court decided in all cases. It also aims to present the legal provisions of the Iraqi Personal Status Law that support the Federal Court's decision and to examine the shortcomings of the ruling. Additionally, the research aims to explore the conflicts within the Kurdish legislator's stance on this issue.

² Salem Radwan Al-Moussawi, "Al-Hiwar Al-Mutamaddin," *Legal Studies and Research*, no. 7451-2022/12/3-20:15.

³ Hadi Aziz Ali, *Personal Status Law: Reality and Aspiration*, 1 ed., 201920.

⁴ Dr. Adnan Hashim Jawad Al-Sharoufi, and researcher Aziza Khamis Sadiq, "The husband's abuse of his rights arising from the marriage contract," *Sulaymaniyah University Journal, Legal and Political Studies*, no. 12 (Agustus 2018): 60.

⁵ Thaib dkk, "Marriages of More Than Four and its Impacts on Community Perspective of Islamic Law and Indonesian Law," *Demak Universal Journal of Islam and Sharia* 1, no. 2 (2023): 67–82.

The study highlights the Kurdish legislator's failure to implement some of the amendments he introduced, even though he required others to abide by them. The core problem of this research is the uncertainty that followed the Federal Court's decision, leaving courts, judges, and legal specialists in a state of hesitation over whether to uphold the amended article in the region or to adhere to the Court's ruling, which is the sole constitutional authority for interpreting legal texts and resolving controversial issues. This research seeks to address these uncertainties and offer a clear response to the question of whether a wife's demand for separation or divorce upon her husband's remarriage contradicts Islamic law and its constants across Islam and Islamic sects.

Research Method

In this study, the authors adopted an analytical-inductive approach. The researcher will collect, extrapolate, and analyze data from various legal texts, focusing on legal rulings and providing appropriate solutions. Methods used to gather information will include consulting references such as books on interpretations, hadiths and their explanations, personal status law, letters, research, constitutions, and laws, along with other relevant materials. The study will also explore related topics, examining and analyzing the texts of the constitution, laws, and scholarly opinions. It will evaluate these based on the strength of evidence and their alignment with Islamic law principles and constitutional texts.

This research is divided into two sections: The first section discusses the article that the Federal Court annulled and the justifications presented to support its decision. The second section focuses on instances where the Kurdish legislator contradicted himself and failed to adhere to the amendments made, including relevant legal articles that support the Federal Court's decision regarding the unconstitutionality of Article Eighteen.

An Analysis of the Federal Court's Jurisdictions and Justifications for Annulment

1. Definition of the Federal Court, Its Jurisdiction, and the Decision Canceling the Amended Article 18 in the Kurdistan Region

Following the Article (92/First) of the Iraqi Constitution 2005, Article (1) of the Internal Regulations, and Article (2) of Law No. (30) of the Federal Court, the Federal Supreme Court is a financially and administratively independent judicial body.⁶

The Federal Supreme Court's jurisdiction, according to Article (93) of the Iraqi Constitution and Article (4) of Law No. (30) of the Federal Court are:

- (1) Oversee the constitutionality of applicable laws and regulations.
- (2) Interpret the provisions of the Constitution.
- (3) Decide on cases arising from applying federal laws, decisions, regulations, instructions, and procedures issued by federal authorities.⁷

To understand the roots of the issue and make an informed decision, we must refer to the conditions set by the Iraqi Personal Status Law regarding polygamy. The Kurdish legislator amended these conditions, granting the first wife the right to request separation if her husband married another woman. This amendment led to a decision by the Federal Court to annul the article that granted this right to the wife after the marriage took place. We have included the relevant paragraphs and articles to clarify the matter further. The issue is as follows:

The fourth paragraph of Article Three of the Iraqi Personal Status Law, before the Kurdish legislator amended it, states: "It is not permissible to marry more than one woman except with the judge's permission. The following two conditions must be met to grant this permission:

- a. The husband must have the financial ability 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

⁶ The Constitution Al-Iraqi, (2005) and Bylaws of the Federal Supreme Court, No. (1) 2022, Federal Law No. (30), 2005).

⁷ The Constitution Al-Iraqi, (2005) and Bylaws of the Federal Supreme Court, No. (1) 2022, Federal Law No. (30), 2005).

this is left to the judge to determine

- (6) Anyone who concludes a marriage contract with more than one person in contravention of what was mentioned in paragraphs (4-5) shall be punished with imprisonment for a period not exceeding one year or a fine not exceeding one hundred dinars or both.
- (7) As an exception to this article's provisions of paragraphs (4-5), it is permissible to marry more than one woman if the person to be married is a widow.⁸

The text in the fourth paragraph clearly states that the only authority capable of granting permission for a man to marry a second wife legally is the judge, and only under certain conditions: financial capability to support multiple wives, the achievement of a legitimate interest, and justice between the marriages. The responsibility of ensuring justice is entrusted to the judge, as outlined in the fifth paragraph.⁹

The fifth paragraph emphasizes that the judge is responsible for assessing matters related to justice, given that monitoring the equitable treatment of multiple wives is challenging and requires significant expertise. The judge must evaluate the family's social and financial circumstances and ensure continuous supervision. The criteria upon which the judge assesses justice are critical. According to the Qur'an, the fear of injustice rests with the husband: "So if you fear that you will not be just, then marry only one" (The Holy Qur'an, An-Nisa: 3).¹⁰

Mernissi interprets this: "So marry as many women as you please, two, three, or four. And if you fear you cannot do justice, then marry one, or what your right hands possess. That is more appropriate." This verse is significant because the only condition that determines a man's right to polygamy is the fear of his

⁸ Girran Ali Muhammad, *Iraqi Personal Status Law, Law No. (188) amended, of 1959 in force. And Precedents in the Judiciary of the Personal Status Court* (Erbil: Erbil Library, 2021)98.

⁹ Judge Muhammad Hassan Kashkul, *Explanation of the Personal Status Law No. 188 of 1959, and its amendments* (Baghdad: The Legal Library, Chashkul, 2011) 67.

¹⁰ Ahmed Al-Kubaisi, *Al-Wajeez fi Sharh Personal Status Amendments* (Baghdad: Legal Library, 2012) 37.

inability to achieve justice, which is subjective and difficult to define legally¹¹

The husband is the one most aware of his intentions behind polygamy, the real motivations, and his ability to meet the financial obligations and promises associated with multiple marriages. He understands better than anyone else his needs for polygamy and the justifications he has. If he exceeds these limits, he may be seen as abusing his rights and facing legal accountability for such actions.¹²

The Qur'anic text, "And you will not be able to be just between women, even if you strive" (An-Nisa: 129), definitively indicates that justice between wives is beyond human capacity, no matter how much effort is exerted. The noble legislator recognized that polygamy is not a license but a regulated matter. The Islamic religion gradually addressed the shortcomings of pre-Islamic Arab society with patience and kindness, avoiding actions that would alienate them from the new religion.¹³

The latter part of the verse on polygamy specifies who has the authority to decide on the matter, and polygamy mustn't be practiced in a manner that marginalizes or discriminates against one wife over another. Achieving justice does not necessarily mean equality between wives in all aspects; justice, in this context, is about fairness, not equal division of material or moral matters.

The exceptions noted in paragraphs 4 and 5 are problematic for two reasons. First, lifting the exception for widows may contradict the law's purpose of alleviating their suffering, as ignoring the requirements for justice and financial sufficiency would worsen their situation. Second, it conflicts with the principle of justice in the Qur'an: "And if you fear that you will not do justice to orphans, then marry such women as please you, two, three, or four. But if you fear that you will not do justice, then marry only one" (An-Nisa: 3). This could lead to the marginalization of widows and other women, depriving them of their rights while

¹¹ Hadi Aziz Ali, "Brief Reading of Modern Readings of Women's Jurisprudence," *Iraqi Amal Society. All copyrights or republication rights are reserved for the Iraqi Amal Society*, no. 1 (2019): 100–105.

¹² Dr. Adnan Hashim Jawad Al-Sharoufi, and researcher Aziza Khamis Sadiq, "The husband's abuse of his rights arising from the marriage contract."

¹³ Hadi Aziz Ali, *Personal Status Law: Reality and Aspiration*.

granting the husband legal protection.¹⁴

Regarding the conditions of legitimate interest and financial sufficiency in paragraph 4, the Iraqi legislator could have benefited from subjecting these to judicial oversight, as is done in paragraph 5. The judge should investigate and confirm the presence of these conditions before granting permission for a second marriage, as this is part of the judicial procedure in court.

2. Justifications for the Law Invalidating Article 18 Determined by the Court

The Federal Court confirmed in its statement that “the article ruled unconstitutional stipulates that: ‘If the husband marries a second wife, the first wife has the right to request separation.’” The court provided several justifications for issuing this decision, including the following:

- (1) According to the text, the right to request separation is granted to the first wife; even if she authorizes the marriage, she authorizes the marriage and does not suffer any harm as a result.
- (2) The husband’s marriage to a second wife is sufficient to obligate the judge to grant separation upon the wife’s request.
- (3) The text is considered contrary to the provisions of Islamic Sharia. It contradicts the permissibility outlined in Qur’anic verses, such as: "So marry those that please you of [other] women, two, three, or four. But if you fear that you will not be just, then [marry only] one" (The Holy Qur'an, Women: 3), and the practical Sunnah of the Prophet, which permitted polygamy up to four wives, except in cases where justice could not be maintained, with the determination of fairness resting with the husband, as evidenced by the Almighty's saying: "And if you fear that you will not be just, then [marry only] one" (The Holy Qur'an, An-Nisa': 3).
- (4) The text conflicts with the provision of Article 2, Paragraph 1 of the Iraqi Constitution of 2005, which states: “It is not permissible to enact a law

¹⁴ Hamid Sultan Ali dkk, “Al-Muhaqiq Al-Hilli, Legal Notes on the Legislative Drafting of the Provisions of the Iraqi Personal Status Law,” *Journal of Legal and Political Sciences, University of Babylon College of Law* 3, no. 2 (30 Juni 2011): 266.

that conflicts with the constants of the provisions of Islam,” necessitating its ruling as unconstitutional for conflicting with these provisions.¹⁵

- (5) The second paragraph of Article 13 of the Iraqi Constitution mandates that no law should conflict with the Constitution and declares invalid any legal text or provision in regional constitutions that contradicts it.
- (6) The Federal Court is authorized to monitor the constitutionality of laws and regulations in force, interpret constitutional texts, and decide on cases arising from the application of federal laws, decisions, regulations, instructions, and procedures issued by the federal authority following Article (93/First) of the Constitution.
- (7) There is consensus across all sects on the permissibility of polygamy, and no opposition exists to this practice.¹⁶

Based on the reasons and justifications outlined above, the Federal Supreme Court ruled that Article 18 of Law No. (15) of 2008, as amended in the region, is unconstitutional. This article pertains to the application of Personal Status Law No. (188) of 1959, as amended in the Iraqi Kurdistan Region (currently the Parliament), was deemed invalid. The ruling is based on the provisions of Article (37/First) of the Internal Regulations of the Federal Supreme Court No. (1) of 2022 states: "The effect of the ruling issued by the court in matters other than penal texts shall apply from the date of its issuance unless the ruling stipulates otherwise."¹⁷

It is important to note that the Federal Court's decision is final and binding on all Iraqis, following Article (94) of the Iraqi Constitution (2005), which stipulates: "The decisions of the Federal Supreme Court are final and binding on all authorities."

Consequently, based on this decision and Article (94) of the Constitution, Article (18) of Law No. (15) of 2008, as amended in the region, concerning a wife's right to request a divorce when her husband marries another woman, is considered null and void as of the date of the decision's issuance. Although the

¹⁵ *Lbid.* Law No. 15, 2008 .

¹⁶ Resolution 230/Federal/2022.

¹⁷ *Lbid.*

Federal Supreme Court ruling is binding and conclusive for all Iraqis and cannot be appealed under Article 94 of the Constitution, retired Judge Salem Radwan al-Moussawi has made several important observations on the decision. These observations merit consideration by researchers and specialists, and they are as follows:

- (1) The Federal Supreme Court's reasoning for declaring the law unconstitutional is that "the wife's request for separation constitutes an obstacle to completing the marriage contract with another woman." However, it is well-established that the impediments to marriage are strictly defined under Articles 12-18 of the Personal Status Law No. 188 of 1959, as amended. These impediments do not include a wife's request for separation, even if it is due to the husband's intention to marry another woman.¹⁸
- (2) Suppose the decision's rationale for declaring the law unconstitutional stems from the obligation imposed on judges to grant separation, which is considered an impediment to marriage, as stated on page 9 of the ruling. In that case, other provisions in Article 40 of the Personal Status Law obligate the judge, provided certain conditions are met. For instance, paragraph 3 of this article states that if a marriage contract was concluded before one of the spouses reached eighteen, should this also be ruled unconstitutional on the same grounds? This is especially relevant since Islamic law permits the marriage of minors, with puberty marking the beginning of eligibility, typically considered to occur around the age of nine in some schools of thought. Therefore, there should be no violation of Islamic principles in such cases.
- (3) In its decision in Issue No. 52/Federal/2016, dated 10/10/2016, the Federal Supreme Court ruled that the provisions of Article 40 of the Personal Status Law were designed to regulate marriage matters and do not violate the fundamental principles of Islamic Sharia, including the provisions of Paragraph 5, whether under Law No. 15 of 2008 or the current law in Iraq.
- (4) The legislator holds the general authority to determine the provisions that

¹⁸ Al-Moussawi, Al-Hiwar , 2022.

regulate the affairs of the people and the country in line with legal and constitutional jurisprudence. They act in what they deem to be in the best interest of society, imposing restrictions, prohibitions, or obligations with specific controls and conditions. This approach aligns with the consensus of Muslim scholars.

- (5) The court holds that the wife's request for separation, in this case, is not an obstacle to completing the marriage contract with another woman. According to established principles of jurisprudence and law, an obstacle prevents the act or disposition from occurring. The resulting disposition is deemed invalid if the act is completed despite the obstacle. The obstacle may be temporary, meaning the prohibited act becomes permissible once the impediment is removed. Applying this principle, the wife cannot request separation before the husband marries another woman. Thus, before the marriage, the wife's request does not constitute an obstacle or violate Islamic rulings. The right to request separation arises only after the marriage to another woman is finalized. Therefore, the power to prevent marriage lies not with the first wife before marriage and cannot be considered an obstacle.¹⁹

Despite the strength of the observations presented by Al-Moussawi, the Kurdish legislator's decision to grant the first wife the right to request a separation if her husband marries another woman, whether we agree with it or not, as stated in the amended paragraph, forces men to be cautious. It encourages them to refrain from marrying a second woman while still having a first wife. On the other hand, Al-Moussawi's claim that the region's decision falls within the framework of regulating polygamy is inaccurate. Legal norms for regulatory procedures involve the legislator and judicial authority permitting an action according to specific controls and conditions. However, granting the first wife the right to request a separation simply because the husband marries another woman—without any restrictions, conditions, or permissions—does not constitute a regulatory procedure for polygamy. Instead, it represents an intervention within the prohibition of polygamy, effectively forcing men to reconsider their decision

¹⁹ *Lbid.*

to marry a second wife. This action, in effect, constitutes a prohibition on polygamy, as the questioner asserts—matters are judged by their outcomes, not by their initial state.

Regarding the issue of marrying a minor before the age of eighteen and obligating the judge to separate upon request, comparing it to the right to request separation for the first wife is an analogy that overlooks the significant differences in each case. In the matter of child marriage, there has been disagreement among jurists about its permissibility, and they have varied in their views on the age of puberty. As for the right to request separation for the first wife solely based on the husband's decision to marry another woman, no scholar in Islamic law has endorsed such a measure, as stated on page 9 of the Federal Court's decision.

The Kurdish Legislator's Stance on Polygamy and Its Impact on the Federal Court's Decision

1. Cases in which the Kurdish Legislator Opposed the Conditions of Marriage with More than One Wife

The Kurdish legislator amended paragraphs (4, 5, 6, and 7) of Article Three of the Iraqi Personal Status Law, which pertains to the subject of marriage to more than one wife and stipulates the following:

Following Article (1) of Law No. (15) of 2008 for the Kurdistan Region, the following amendments shall apply to paragraphs (4, 5, 6, 7):

Marrying more than one woman without the judge's permission is prohibited. The following conditions must be met for the judge to grant permission:

- a. The first wife must consent to her husband's marriage before the court.
- b. There must be evidence of a chronic illness that prevents marital intercourse, with no hope of recovery, or proven infertility of the wife, supported by a report from a specialized medical committee.
- c. The applicant for a second marriage must have the financial capacity to support more than one wife, which must be proven by official documents submitted to the court at the time of the marriage contract.
- d. Before the marriage contract is concluded, the husband must submit a

written pledge to the court, committing to ensure justice between the spouses in terms of both material and moral obligations.

- e. The wife must not have stipulated in the marriage contract that she would not permit her husband to marry another woman.
- f. Anyone who enters into a marriage contract with more than one woman in violation of any of the conditions listed in paragraphs (a), (b), (c), (d), or (e) above shall be subject to imprisonment for not less than six months and not exceeding one year, along with a fine of ten million dinars.
- g. The judge may not suspend the implementation of the penalties mentioned in paragraph (f) above.²⁰

The amendments made by the Kurdish legislator in this article, although seemingly in the name of reform, were intended to prevent legal marriage to more than one wife. These amendments act as legal obstacles, and each condition in itself presents a significant challenge to polygamous marriage. Together, they create conditions nearly impossible for an individual to meet. There is little to contradict this interpretation, even from the Kurdish legislator's perspective. However, what is truly puzzling is that the legislator did not adhere to the amendments and conditions he set forth. Instead, he revisited the issue of polygamy through another amendment related to judicial separation, which states: "The work of paragraph 5 of Article 40 of the law shall be suspended and replaced by the following: 'If the husband marries a second wife, the first wife has the right to request separation.'²¹

As demonstrated by this amendment to the fifth paragraph of the Iraqi Personal Status Law, even if the husband manages to meet all the conditions outlined for marrying a second wife in paragraphs (4, 5, 6, 7) of Article Three, the new amendment grants the first wife the right to divorce unconditionally, regardless of the conditions set in paragraphs (4, 5) of Article Three. The amendment to the fifth paragraph of Article 40 by the Kurdish legislator can be seen as an implicit retraction of the previously set conditions for polygamous marriage. It appears as an escape from the responsibility of adhering to these

²⁰ *Ibid.* Law No. 15, 2008.

²¹ *Ibid.*

conditions, even for those who successfully fulfill them. The amendment allows the first wife to request a divorce simply by the husband marrying a second wife, without any restrictions. This holds whether or not the wife is harmed, whether the marriage was with or without her consent, whether the husband was forced to marry a second wife, and regardless of whether all the conditions set by the Iraqi and Kurdish legislators have been met. In addition, the conditions themselves are extremely difficult to fulfill.

2. Legal Justifications and Challenges to Decision No. 230/Federal/2022: Examining the Constitutionality of the Amended Article 18

This section discusses the legal foundations supporting the issuance of Decision No. 230/Federal/2022 and the objections raised against it. Central to this analysis is the contention that Article 18, as amended in the region, is unconstitutional. This issue unfolds across two primary branches.

a. The Legal Foundations of the Decision

In addition to the evidence presented by the Federal Court to invalidate Article 18 in the region, the court can also rely on legal articles still in force in both the federal government and the Kurdistan Region. These include the third and fourth paragraphs of Article 6 of the Iraqi Personal Status Law, which can be used to strengthen the court's decision and complete its legal framework within the personal status legal system of Iraq and the Kurdistan Region. The third paragraph states: "The legitimate conditions stipulated in the marriage contract are considered and must be fulfilled," while the fourth paragraph reads: "The wife has the right to request the annulment of the contract if the husband does not fulfill what was stipulated in the marriage contract" (Iraqi Personal Status Law, No. 188, 1959).

According to these two paragraphs, in all cases, the first wife has no right to demand separation or annulment of the marriage contract. This is because the right to demand separation is contingent upon two specific conditions: 1) if the wife has stipulated legitimate conditions in the marriage contract and the husband fails to meet these conditions, and 2) if the husband does not fulfill the legitimate

conditions stipulated by the wife in the marriage contract. Based on these two provisions, the wife's right to separation and annulment is removed unless she specified such conditions in the marriage contract. This raises questions and concerns when considering the amendments made by the Kurdish legislator to the fifth paragraph of Article 40, which allows the wife to demand separation if the husband marries another woman under any circumstances.

If this amendment grants the first wife the power to seek separation in all cases simply by the husband marrying another wife—even if the husband adheres to all the conditions for multiple marriages set out in the amendments to the fourth and fifth paragraphs of Article Three in the Kurdistan Region, and the wife has not stipulated in the marriage contract that the husband is forbidden from marrying another—then what justification remains for the wife's right to demand separation? On the other hand, if the wife is given the right to seek separation solely because the husband marries another wife, what purpose does the amendment to the fourth and fifth paragraphs of Article 3 serve, which imposes exceedingly difficult conditions for polygamy? Consequently, the Kurdish legislator finds himself in a contradictory position, with conflicting legal texts. He imposed impossible conditions on those wishing to marry more than one wife through amendments to the fourth and fifth paragraphs of Article 3, yet violated these provisions when amending the fifth paragraph of Article 40 regarding polygamy. This amendment granted the wife the power to request a divorce as soon as the husband marries another woman, thereby failing to uphold the amendments made to the fourth and fifth paragraphs of Article 3. In light of this, it is unclear why the convicts should be required to adhere to these amendments.

b. Legal Implications for the Decision

The decision contradicted the views held by some schools of thought regarding the loyalty and commitment of spouses to the conditions imposed upon each other, effectively depriving the wife of the right to demand separation under the pretext of violating the principles of the constitution and Islamic law. However, if the wife explicitly stipulated during the marriage contract that the

husband should not marry another woman, both parties to the contract are obligated to uphold and fulfill the conditions they mutually agreed upon. This condition is not considered contrary to Islamic law, as determined by the court. It is supported by Qur'anic verses, the Sunnah of the Prophet, and scholarly opinions.

One of the key pieces of evidence cited by scholars is the verse from the Qur'an: "O you who have believed, fulfil your contracts" (Al-Ma'idah: 1). Another is the hadith: "The worthiest of conditions is that which you give in full with that which you have made lawful for private parts."²² The Prophet Muhammad (peace be upon him) said: "Muslims are bound by their conditions, except for a condition that forbids what is lawful or permits what is forbidden."²³

Omar ibn al-Khattab, may God be pleased with him, told a man who ruled that he was obligated to fulfill the conditions stipulated by his wife. The man questioned whether this would lead to a divorce, to which Omar responded, "He granted rights based on the conditions."²⁴

Ibn Qudamah, may God have mercy on him, stated: "If he stipulates that he will not take her out of her home or country, or will not travel with her, or will not marry her, then he is obligated to fulfill it. If he fails to do so, she has the right to annul the marriage. This was narrated from Omar, Saad ibn Abi Waqqas, and Amr ibn al-Aas, may God be pleased with them."²⁵ Ibn Taymiyyah said: "If he stipulates in the contract that he does not marry another woman, and if he does, her affairs are in her hands. This condition is valid and binding in the doctrines of Malik, Ahmad, and others. If he marries another woman, she has the option to stay or leave."²⁶

²² Muhammad bin Ismail Al-Bukhari, *Authentic Hadiths*, Beirut, Dar Ibn Qays - Lebanon, January 1, 2018, Hadith No: 2721. And Sahih Muslim, Muslim bin Al-Hajjaj Al-Qushayri Al-Naysaburi Abu Al-Hussein, Beirut, Dar Al-Kutub Al-Ilmiyya - Beirut - Lebanon, Hadith No,1418.

²³ *Irwa' Al-Ghaleel*, Muhammad Nasser Al-Albani, second edition, 1985, Beirut, Islamic office, Hadith No: 1303.

²⁴ Saleh bin Fawzan bin Abdullah Al-Faizan, *The Jurisprudential Summary*, 1. (Kingdom of Saudi Arabia: Dar Al-Asimah, 2002).

²⁵ Ibn Qudamah, Abu Muhammad Abdullah bin Ahmed bin Muhammad bin Qudamah, Al-Mughni, Ali Mukhtasar: Abu Al-Qasim Omar bin Hussein bin Abdullah bin Ahmed Al-Kharqi, edited by: Taha Al-Zaini, and others, Cairo Library, first edition,)1969. 93.

²⁶ Ibn Taymiyyah, edited by Abdul Rahman bin Muhammad bin Qasim, *Majmo' al-Fatawa*, Kingdom of Saudi Arabia, King Fahd Complex for the Printing of the Noble Qur'an, Medina,)1995(32/170.

Ibn al-Qayyim noted: “It was also narrated from Omar ibn al-Khattab, Saad ibn Abi Waqqas, Amr ibn al-Aas, and Muawiyah ibn Abi Sufyan that a woman may stipulate that she remains in her home or country or that he not marry another woman. The Sunnah indicates that fulfilling such conditions is more deserving than fulfilling any other condition.”²⁷ He further stated: “These conditions must be fulfilled, as they align with Sharia, reason, and correct analogy. The woman did not agree to the marriage except under these conditions, and if they are not fulfilled, the contract lacks mutual consent, forcing her to comply with obligations not mandated by God or His Messenger.”²⁸

Sayed Sabiq explained: “Among the conditions are those that benefit the woman, such as stipulating that the husband not take her out of her country, not travel with her, or not marry another woman. Some scholars hold that the marriage remains valid even if these conditions are not fulfilled. Others assert that if the husband does not fulfill these conditions, the marriage can be annulled. As for the argument that these conditions prohibit what is lawful, we assert that they do not, but rather provide the woman with the option of annulment if the conditions are not met.”²⁹

Moreover, an authentic hadith demonstrates that the Prophet (peace be upon him) prevented Ali from marrying another woman. At the same time, his daughter, Fatima, was alive, regardless of any justifications she provided for such a marriage.³⁰

At the very least, this condition is considered a matter of disagreement among scholars. This condition is valid and warrants consideration based on previous texts, inferences, and reasonable opinions supported by evidence. If the husband remarries, the wife has the right to demand separation. This is because the requirements of the Qur'anic texts and the authentic Sunnah of the Prophet emphasize the fulfillment of contracts and the conditions stipulated within them.

²⁷ Abi Abdullah Muhammad bin Abi Bakr Ayoub Ibn al-Qayyim al-Jawziyyah, *Signatories' Information*, Dar Ibn Hazm, Beirut, Lebanon, Second Edition –)2019(, Part 4/313.

²⁸ *Ibid.*

²⁹ Sayyid Sabiq, *Jurisprudence of the Sunnah*, Lebanon, Beirut, Dar Al-Fikr, fourth edition, 44, 45. And Al-Zahrani, Jumaa bint Hamid Yahya Al-Hariri, *Polygamy between Islamic law and the modern vision 'A critical jurisprudential study'*, *Journal of the College of Islamic and Arabic Studies for Girls in Damanhour*, Issue Five, Part Four, (2020). P: 34.

³⁰ *Ibid.*, Al-Bukhari: 3110), (Muslim): 2449.

Therefore, a demand for annulment and separation by the wife, should she stipulate in the marriage contract that she will not be married to him, is not considered contrary to Islamic law.

Moreover, as stated in the Federal Court's decision, it is not deemed to contravene the principles of Islamic rulings. The court notes: "There is no jurisprudential consensus on such principles, not only in the field of transactions but also in the field of worship. Additionally, Islamic jurisprudence agrees that no general legal theory or overarching principle governs transactions in Islam. Instead, there are partial or individual provisions that do not rise to the level of a general principle or theory from which positive legislation derives its provisions. As Islam serves as a source of legislation, the constitution also stipulates that no law shall be enacted that conflicts with the principles of democracy or the basic rights and freedoms outlined in the Iraqi Constitution."³¹ Consequently, the wife has the right to take legal measures and demand her rights following the law, as stipulated in the third and fourth paragraphs of Article Six of the Iraqi Personal Status Law and the fifth paragraph of Article Forty in the region, should the husband fail to meet the conditions imposed upon him.

It is worth noting that this right is granted to wives in some Arab laws. For instance, the Jordanian Personal Status Law, in Article 37, states: "If a condition was stipulated at the time of the contract that benefits one of the spouses, does not contradict the purposes of marriage, and does not involve anything prohibited by Sharia, and is recorded in the contract document, it must be observed following the following:

- a. If a wife stipulates a condition with her husband that serves her interests, is not prohibited by law, and does not infringe on the rights of others—such as stipulating that he not take her out of her country, that he does not marry another, that he lives with her in a specific country, or that he does not prevent her from working outside the home, or if the divorce is in her hands—the condition is valid. If the husband fails to fulfill it, the contract may be annulled at the wife's request, and she is entitled to demand all of her marital

³¹ Riyadh Al-Zahri, *Legal Opinion on the Constitution*, vol. 6 (Democratic Papers, Opinions on the Constitution, 2005) 16.

rights from him.

- b. If a husband stipulates a condition with his wife that serves his interests, is not prohibited by law, and does not affect the rights of others—such as stipulating that she does not work outside the home or that she live with him in the country where he works—the condition is valid and binding. If the wife fails to fulfill it, the marriage may be annulled at the husband's request, and her deferred dowry and maintenance during her waiting period will be forfeited.³²

Second, according to the Egyptian Personal Status Law, Article (11) stipulates: "The husband must declare his marital status in the marriage certificate. If he is married, he must indicate the name of his wife or wives and their place of residence. The notary must inform them of the new marriage by sending a registered letter with acknowledgment of receipt. The wife may request a divorce if she suffers material or moral harm that makes it impossible for her to continue living with her husband, even if she did not stipulate in the marriage contract that he should not marry again. If the judge is unable to reconcile them, he must divorce her irrevocably. However, the wife's right to request a divorce is forfeited if one year has passed from the date she learned of the husband's new marriage to another woman, unless she had consented to the marriage, explicitly or implicitly. Her right to request a divorce is renewed whenever he marries another woman. If the new wife did not know of the husband's previous marriage, and it later comes to light, she also has the right to request a divorce."³³

Third, the Moroccan Family Code, Article 40, also prohibits polygamy when there is a possibility of inequality between wives and authorizes a woman to include provisions in her marriage contract that prevent her husband from marrying a second woman. Article 40 states that polygamy is prohibited if the wives fear injustice or if the wife conditions that her husband should not marry another woman.³⁴

³² The first and second paragraphs of Article (37) of Chapter Four: Conditions in the marriage contract from the Jordanian, Personal Status Law: Jordanian Personal Status Law No. (15) of (2019).

³³ Personal Status Law No. 25 of 1920, amended by Law 25 of 1929, amended by Law 100 of 1985, Personal Status Law No. 25 of 1920, with provisions for alimony and some personal status issues)1985.

³⁴ Article 40, The Moroccan Family Code (Moudawana) of February 5, 2004.

It is clear from the above that this condition is stipulated in the laws of these and other Islamic countries, and there is no need to list them all. This reinforces our legal evidence and opinions, confirming that such a condition is not considered a departure from Islamic law. Based on what has been presented, the wife retains the right to request a divorce based on Sharia evidence, legal texts, and the opinions of imams and scholars if the husband does not fulfill the conditions stipulated by the wife in this regard.

Conclusion

The study concluded that all individuals must comply with the rulings issued by the Federal Supreme Court, as it is the only authority authorized by the Constitution to interpret legal texts and resolve controversial issues. Its decisions are binding and final for all Iraqis. In addition to the scientific justifications provided by the court for canceling the article, the study suggested that the court could have pursued legal action against the Kurdish legislator for violating articles that remain in force within both the federal government and the Kurdistan Region, which would have further strengthened the court's position. Despite its supreme and supervisory role and the justifications it presented for the unconstitutionality of Article 18, the court's decision is not without its shortcomings and criticisms. In particular, it conflicted with the views of some groups regarding the loyalty of spouses and their adherence to the conditions they stipulated. On the other hand, the study concluded that the wife's right to seek separation and annul her husband's marriage to another woman is not in conflict with Islamic law, as the court ruled in all cases. The verses of the Qur'an, the Sunnah of the Prophet, and the opinions of scholars support this right. At the very least, it remains a matter of scholarly debate. It is not considered a violation of the core principles of Islamic rulings, as stated in the Federal Court's decision, since there is no consensus on such rulings. Furthermore, the Iraqi Personal Status Law recognizes this right for the wife, which is implemented with specific conditions. The study also concluded that if the court's argument against the violation of Islamic law's constants was valid, then the constitution also mandates that no law should conflict with the principles of democracy and

the fundamental rights and freedoms enshrined in the Iraqi constitution. Additionally, the study noted that the amendments made by the Kurdish legislator, though formally appearing as amendments, were, in reality, aimed at legally preventing marriage to more than one wife. The research also identified conflicts arising from the Kurdish legislature's amendments.

Author Contribution

S.H.B., as the primary author of this article, was responsible for the research activities, including data collection, presentation, and the writing of the report and manuscript.

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