

Inconsistencies in Constitution Rights; Iraqi Constitution as a Case Study

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Abstract

This study addresses a lack of compatibility or similarity between two or more facts. Discrepancies in the meta-law, body of law or law above law. The study is to find out the obstacles and challenges of rights in constitution and Iraqi constitution as a case study. In post-2003, after the fall of Saddam Hussein, new constitution been imposed on Iraq (as some scholars affirm that) by the US. Moreover, both liberalism and Islamism been pushed as a law in “Iraqi New Constitution”. The study will focus on the individual, minority, and gender rights Islamism principle in Iraqi constitution and the inconsistency between both liberalism and Islamism in Iraqi Constitution. To test our argument, the study is using quantitative data. The study finds out that Iraqi constitution articles are inconsistent with each other. What is more, there are declining in the rights of individual, minority, and women.

Keywords— Liberalism, Iraqi Constitution, Constitution, Individual, Rights

I. INTRODUCTION

Meta-law, body of law or law above law; all these are the other meaning for the constitution. The idea of meta-law is belonging to the end of the seventeenth century in the US in which it was written during the Philadelphia Convention. According to the scholars, one of the main purposes of the constitution is a “protection”. Moreover, the first protection of the constitution was property rights, as a first generation and then other rights have been added by liberalisms, in which it is the rights of liberties as a second generation of rights. Furthermore, as Heringa and Kiliver said that; “constitution is a central written document, in its narrow or formal meaning, that sets out the basic rules that apply to government of sociopolitical entities, in particular state” (Heringa and Kiliver, 02, 2009). Many things are affected the principles of constitution. Although, the core of the liberalism theory was emerged from Protestant perspectives in which it is considering as a Christine religion, many other religions stand against the separation of liberalism, especially, in the Asia and the Middle East such as Confucianism. Samuel P. Huntington, for example, has written that “Confucianism democracy” is a contradiction in term” (2001: 27). Moreover, many scholars claim that in the Middle East, Islam is one of the

main religions inconsistent with constitutionalism. As a result, this study will examine Iraqi constitution. Although, some claim that there are many inconsistency in Iraqi constitution, this study will focuses on individual rights, minority rights, and women’s rights as a inconsistent issues in Iraqi constitution due to Islam principles. I am arguing that Islamic front in the Iraqi constitution are declined the rights of liberal front in the Iraqi constitution in three main aspects; Individual rights, minority rights, and gender rights.

Statement of the research problem

It is obvious that constitutionalism is one of the main principles for giving the rights to the nations, ethnicities, groups in any societies. What is more, in constitutionalism, the right of Individual is granted. On the other hand, Islamism is restricting some of these rights in a society and especially in the Muslim countries. Moreover, Sharia is one of the main immovable sources for Islam. During Saddam ruling the secularism was basic for the laws in Iraq, as a result, many of these rights was granting by the government. In post-2003, after the fall of Saddam Hussein, new constitution been imposed on Iraq (as some scholars affirm that) by the US. Moreover, both liberalism and Islamism been pushed as a law in “Iraqi New Constitution”.

Objectives of the study

One of the main goals of this study is to find out the obstacles and challenges of rights in Iraqi new constitution. Because the Iraqi constitution is rooted in both liberalism and Islamism principles, the study aims to accomplish the combination with both of the principles in order to refine the basis for the understanding of the problem. Another important part of the study is to show that Iraqi constitution is at risk due to Islam principle. In addition, the study aims to look at origins of different principles, how both principles are not fit in same constitution.

Significance of the study

The study is focusing on IFC struggles in order to refine the problem due to sensitivity of the case in Iraq. The study will show how the individual, minority, and gender rights been violated due to Islamism principle in Iraqi constitution and can be a part of inconsistency between both liberalism and Islamism. IFC is one of the most divisive cases between the Iraqi people, and the government. The liberalism perspective is something new for the case of Iraqi constitution because the law people of Iraq been familiar with is Sharia law. Moreover, this law is imposing on Iraqi people due to the majority (Muslim) rule.

Operation concepts

Liberalism, Islamism, Constitution, Individual, Rights, Minority, Gender

II. LIBERALISM AND ISLAMISM

Many scholars are agreeing and disagreeing about both terms. For example, liberalism in which it is western perspective is mostly grants the rights for people in constitutional system. Moreover in both the UDHR in article 18 and ACH in article 12 are affirming that the rights of everyone in thought, conscience, and religion (Universal Declaration of Human Rights, Article 18 & American Convention of Human Rights, Article 12). Many western states are confirming the right of people according to both declarations of human rights standards in their own constitutions. "The liberal constitution, the fundamental document for a modern political democracy, is now viewed as the best vehicle for protecting individual rights" (Mutua, M. 2004). In Islam principles is totally different. Quran and Sunah are the main two sources of sharia for the Islamic law or moral codes. "For most Muslims, the moral life is primarily, if not exclusively, about living in accord with the divine law, or *shari'ah*" (Barre, E. A. 2012, p.142). Quran is the main basic law for Muslim. "And whoever desires other than Islam as religion - never will it be accepted from him, and he, in the Hereafter, will be among the losers" (Surat 'Āli 'Imrān,3:85). This is one of the main verses in which supporting Islam as main sources of law. Moreover, "My

favor upon you and have approved for you Islam as religion" (Surat Al-Mā'idah,5:3). As a result, this study is focusing on Quran as a main source for moral codes in Islam for Islamic perspectives on individual, minority, and women.

2.1 Perspectives on**2.1.1 Individual rights**

Individual rights are granted in liberalism rather than Islamism as a perspective to the term "rights". "As the single most important site for the vindication of both individual and group rights, the state, which is the obligor of international norms, is required to provide for the protection of minorities both in its basic and other laws" (Mutua, M. 2004). For example, same sex marriage is one of rights that been given, constitutionally, to the people under the liberalism rule. Although, the term "marriage" has different explanation, both liberalism and Islamism scholar affirm that it means contract between two people. Furthermore, Islamic scholars affirms that it means contract but between one man and one woman. Islamism's Quran interpreters are saying, gay marriage is, totally, prohibited in the Quran. "And of His signs is that He created for you from yourselves mates that you may find tranquility in them; and He placed between you affection and mercy. Indeed in that are signs for a people who give thought" (Surat Ar-Rūm, 30:21). In light of this verse, Islamic interpreter to the Quran are prohibiting the homosexuality as one of the freedom rights according to constitutional system. What is more, "And if you fear that you will not deal justly with the orphan girls, then marry those that please you of [other] women, two or three or four" (Surat An-Nisā', 4:3). The right of polygamy is granted from men rather than women. A man has right to have two or three or four women as wives, while, women are not. Furthermore; another verses that proof same polygamy in Sharia law is;

"O Prophet, indeed We have made lawful to you your wives to whom you have given their due compensation and those your right hand possesses from what Allah has returned to you [of captives] and the daughters of your paternal uncles and the daughters of your paternal aunts and the daughters of your maternal uncles and the daughters of your maternal aunts who emigrated with you and a believing woman if she gives herself to the Prophet [and] if the Prophet wishes to marry her, [this is] only for you, excluding the [other] believers" (Surat Al-'Aḥzāb,33:50)

2.1.2 Minority rights

Protecting the rights of minority is one of the important issues in constitutional states. The concept of protection was emerged in 1648 as one of the rights in the laws. "Historically, the 1648 Treaty of Westphalia attempted the first regime for the international protection of minorities, even though parties to it only agreed to respect the rights of certain, but not all, religious minorities" (Mutua, M. 2004). Moreover, according to same sources, the reason of this strengthening of minorities is ensuring their survival and to augment the entire body politic. In Islamic perspective is different too. For example, in the case of fair election, people are not allowed to vote for non-Muslim leaders in a country. "O you who have believed, do not take the Jews and the Christians as allies. They are [in fact] allies of one another. And whoever is an ally to them among you - then indeed, he is [one] of them. Indeed, Allah guides not the wrongdoing people" (Surat Al-Mā'idah, 5:51). Thus, could be seen that according to Sharia not allowed to vote for non-Muslim leader, while, in the liberalism everyone is free to be elected.

2.1.3 Women rights

Other half of the societies or women are one of the important standard to grantee their rights in the liberal democracy system in constitutional states. Moreover, in both the UDHR in articles and ACH in articles the only term used is everyone as equality to both sexes. As Islamic perspectives to gender, there are three main points that should be mentioned. Inheritance, equality and witness are the three main issues. For example, men and women under Sharia law are not equal. "male the equivalent of the portion of two females, and if there be women more than two, then theirs is two-thirds of the inheritance, and if there be one (only) then the half"(Surat An-Nisā',4:11). This is a measurement for inequality in inheritance according to sharia law. Moreover, "Men are the protectors and maintainers of women, because Allah has given the one more (strength) than the other, and ... they support them from their means" (Surat An-Nisā',4:25). Furthermore, another point is witnesses in Islamic court for women inequality could be seen in the Sharia law. For example, According to Quran that two women are considering as a one witness in the court, while, one man is considering as one witness in Islamic courts. "And bring to witness two witnesses from among your men. And if there are not two men [available], then a man and two women from those whom you accept as witnesses" (Surat Al-Baqarah, 2:282).

2.2 Summary

To sum up, both liberalism and Islamism are different from each other for understanding the constitutional issues. It seems to be that rights on individual, minority, and gender are more grantees in liberalisms point of view for rights of

people. There are no limitations on the rights of people in liberalism perspectives for human being. American Convention on Human Rights and Universal Declaration of Human Rights are the two main supporters to rights of nations, states, and people. On the other hand, the main constitution for Islamic principles is share law in which depends on the Quran and Sunnah. Sharia laws are putting many restrictions on the rights of individual, minority, and gender.

III. ISLAMISM AND LIBERALISM

Post-2003, the invasion of the CPA on Iraq, is numerous damages to the country. October 15, 2005 a new Iraqi constitution been emerged among Iraqi people and on influences of the US. Seymour 2006 affirms, Iraq's new constitution "is not without its controversy. While it is claimed by its supporters to enshrine the rights of all Iraqis regardless of their religion, ethnicity or sect, many among those very sects, religious and ethnic groups consider the constitution to be dangerously divisive" (Seymour, R. 2006). Iraqi constitution are contains a lot of contradiction within the articles itself. For example, article 2 it says the basic source of law is Islam. Moreover, article 2.2: 'This constitution guarantees the Islamic identity of the majority of the Iraqi people and the full religious rights for all individuals and the freedom of creed and religious practices" (IFC, 2012). In addition, article 14 of IFC states;"Iraqis are equal before the law without discrimination based on gender, race, ethnicity, origin, colour, religion, sect, belief or opinion, or economic and social statues"(IFC,2012). While, Iraqis are still suffering from illegal matter that would be challenges of the unity of Iraq in the future, without any constitutional reaction. "Religious reference are given priority in the text over Iraqi's ancient civilizations and laws" (Hanish, S. 2007, p.33). According to Mutua that "the matrix of Iraqi minority populations makes political democracy, and the resultant Shia domination, both a blessing and a curse" ((Mutua, M. 2004). Moreover "Sunni Muslims, greatly outnumbered by Shi'as, are uncertain they will be protected from persecution, which has been well-documented before, and since, ratification" (Seymour, R. 2006). Another point that showing inconsistency could be seen in the Iraqi constitution is Islamism; 'Islam is the official religion of the state and a basic source of legislation.' It goes on to say: 'No law can be passed that contradicts the undisputed rules of Islam "(Seymour, R. 2006). The right of minority and individual are under threat in Iraqi constitution due to inconsistency of the articles.

Another point should be taken under consideration is gender. The Iraqi constitution is starting with "*In the name of God, the compassionate, the Merciful*", it is like we will

read a verse in the Quran not Constitution. Moreover, following another verses 17:70, " Verily we have honored the children of Adam", without mentioning Eve's name, as a first violate to women's right (Hanish, S. 2007, p.33). According to the same source that, "The preamble does not mention Iraq's adherence to international conventions and laws where many are related to women's rights, despite a general statement about women and cultural diversity". It is vague on the rights of women and the effect of Islam on their rights ((Mutua, M. 2004, p.954). The problem is with that, when a suspicion issues are emerging. "The suspicion being that when the critical moment arrives, the rights of just 3% of the people will be brushed aside" (Seymour, R. 2006). As a result, IFC contains many inconsistencies that unrelated to each other. Another problem that scholars are worry about is not Sharia law but it is, "formulation establishes Islam, or a particular sect of it, over other faiths. It is also inconsistent with equal protection notions, and may even favor Shia Islam over others' ((Mutua, M. 2004, p.954). Mutua in page 944 went to deeply with case and affirms that the main anxious is with "an Iran-style Shia state, in which Islamic clerics wield influence over the state, is inconsistent with the protection of minorities" Finally, one of the main be anxious is not Shariah law; «The worry is that the people of Iraq will one day be forced to comply to Sharia's law even if they are not Muslim. It is not Sharia's law itself that non-Muslims object to but the possibility that the rule of law will come directly from it" (Seymour, R. 2006).

Summary

To sum up, Iraqi constitution articles are not agreeing with each other's. In one side, the constitution are grantee the rights and on the other side been limited by religious factors. Many scholars are affirming the priority of Islam over other laws. "This is a kind of constitutional double-talk that only disguises the deeper conflict over whether majority rule will, under whatever disguise, end up as religious rule in Iraq"(Schorr, D. 2005). Moreover, the religious are restricting the rights of individual, minority, and gender within Islamic principles. The rights of women are demolished due to Islamic influence over other laws. Furthermore, the Shia denominations of the sect of religion could be seen in the Iraqi Federal Constitution. "Islam remains central to the Arab's and Muslim's way of life" (Barlow, R., & Akbarzadeh, S. 2006). What is more, is Iranian style of law are affected the Iraqi constitution's Sharia. Finally, the constitution is representing a struggle between the Islamists and the secularists in Iraq' (Hanish, S. 2007).

IV. THE DISCUSSION

According to CIA World Fact Book; Iraq is one of the counties, which is divided among multiethnic society and sectarian groups. The same source confirmed that the two main ethnic groups in Iraq are Kurds and Arabs, and the Arabs are divided between Shiite and Sunni sects. For example, Shiite is the majority group and they are about 60% -65% of the Arab population, whilst the Sunni are 32%-37% (CIA World Fact Book), there is other minorities such as Turkmen, Yazidi and Mandaeans. The differences between both main sects in Iraq belong to the period of the Khalifa rule in the area and were perpetuated into a political issue in Iraq. Moreover, the disagreement between Shiite and Sunni went its greatest depth when the Iraqi state was formed in 1920's. For example, as Ki confirmed; "The major challenge to Iraqi state reconstruction is ethno-religious conflicts among the Sunnis, the Shiites, and the Kurds that emerged from the birth of Iraq in 1921" (Ki, 2010, p. 1). In addition, the sensitivity between these two groups increased in post 2003 after the collapse of Saddam Hussein's regime. The Iraqi state failed due to most of its institutions being dissolved by, L. Paul Bremer, of the Coalition Provisional Authority (CPA). Furthermore, during the constitution this problem increased too. In the Iraqi constitution there are many inconsistencies between articles and especially among the rights that been given constitutionally to Iraqi people. In Iraqi constitution and in article 2 the idea of both Islamic and liberalism could be seen. Many scholars argue that both ideas are contradictory to each other. The main problem is Islamic dominance rather than liberalism and it could be seen as follow:

4.1 Individual rights in Iraqi constitution

Universal Declaration of Human Rights, American Convention on Human Rights, and many other organizations are confirming the basic human rights in theory and practice too. Iraqi constitution that affirms human rights are facing many question about this issues. For example, "How can women be equal before Islamic law, according to which they are unequal? How can a non-Muslim be equal in a Muslim state? Who decides which Islamic rules are undisputed and which are, well, disputable? As with our own multiple versions of Christianity, doesn't that depend on which imam is holding the Koran?" (Pollitt, K. (2005). Same six marriage is one of rights that been given to the people under liberalism system. According to Islamic perspectives, it is totally prohibited in Islamic Sharia as we discuss it in the chapter two. The question that should be asked is: where is the right of individual in Iraqi constitution? It could be seen that articles are contradicting each other's. Moreover, another point that this study focuses on is the right of having more than one wife by man or polygamy. According to human

rights in liberal perspectives, both man and woman are equal and born free. In the Islamic Sharia it is in opposite way. Man is more equal than woman. Man has the right to have more than one wife, while, woman only has the right for one husband, this point has been confirmed by (Surat Al-Ahẓāb,33:50) and (Surat An-Nisā', 4:3) in Quran (as a basic for Sharia law in Iraqi constitution). It could be seen that individual rights by Iraqi constitution are contrasting to liberal in same article for right of individual. Furthermore, in article (44): *All individuals have the right to enjoy rights stated in the international human rights agreements and treaties endorsed by Iraq that don't run contrary to the principles and rules of this constitution*". Iraq has signed many human rights documents including the Universal Declaration of Human Rights in which it is a clear rejection of the rights and contradicts with Islamic Sharia law (Hanish, S. 2007). Hence, it could be seen that Iraqi constitution are contradicting each one's articles in which it was according to literature review too.

4.2 Minority rights in Iraqi constitution

In Iraqi parliament, Out of a total of 275 seats in the legislature, the Shiite received 140, or more than half, the Kurds seventy five, and the Sunni most of the rest. "Sunni Muslims, greatly outnumbered by Shi'as, are uncertain they will be protected from persecution, which has been well-documented before, and since, ratification" (Seymour, R. 2006). According to Iraqi constitution that, "Islam is the official religion of the state and a basic source of legislation", It goes on to say: 'No law can be passed that contradicts the undisputed rules of Islam" (Seymour, R. 2006). Question that should be asked; what about other non-Muslim minority? "Bill of Rights must guarantee to minority groups, such as the Assyrians, Christians, and Armenians, the right to use their own language, the right to practice their own religion, and the right to enjoy their culture" (Mutua, M. 2004). Article 14 in Iraqi constitution stated: 'Iraqis are equal before the law without discrimination based on gender, race, ethnicity, origin, color, religion, sect, belief or opinion, or economic and social status'(IC,2012). For example, April 24, 2001, church explosion in Baghdad is one of the examples. "The bomb rocked Sacred Heart church in Baghdad's central Karrada district, shattering windows in nearby buildings and severely damaging a police pick-up truck at the church gate, according to witnesses" (BosNewsLife Middle East Service, 2011). As a result, of this explosion and many other against Christian people, the number of minority Christian are decreasing in south of Iraq. "The matrix of Iraqi minority populations makes political democracy, and the resultant Shia domination, both a blessing and a curse" (Mutua, M. 2004). What is more, the Islam in Iraqi constitution, favor sheia Islam over others Mutua, M. 2004),

according to the same source, "An Iran-style Shia state, in which Islamic clerics wield influence over the state, is inconsistent with the protection of minorities". Iranian Shiite styles are imposed on Iraqi constitution rather than liberalism. Ayatollah Ahmad Jannati, the haead of Iran's ultra-Shiite Guardian Council: "Fortunately, after years of effort and expectations in Iraq, an Islamic state has come to power and the Constitution has been established on the basis of Islamic precepts." (Pollitt, K. (2005). Hence, it could be seen that Iraqi constitution are not just affected by Sharia law, while, it is Shiite law too. Moreover, the Iranian Shiite law is imposed in Iraqi constitution as been confirmed by literature review in chapter three.

4.3 Women's rights in Iraqi constitution

Another main point in this study is about the rights of women. "Modern and civic constitutions equalize between women and men and adhere to international conventions concerning the rights of women and children" (Hanish, S. 2007). "The promotion of women's rights has long been viewed as a 'secular enterprise' not only by Western development agencies but also by women's organizations and activists based in the Global South" (Kirmani, N., & Phillips, I.2011). Iraqi women are asking for more rights as they say; "We want a law that can be applied to everyone. We want justice for women"(Iraq: women protest draft constitution, 2005). Another impact of Sharia law is women in Iraq due to duality in the constitution. "All of the women's groups are against this constitution" (Deyine, S. 2006), due to their rights are demolishing. Moreover, "being married off at the age of 9, being a co-wife, having unequal rights to divorce and child custody, inheriting half as much as their brothers, having their testimony in court counted as half that of men, winning a rape conviction only if the crime was witnessed by four male Muslims" (Pollitt, K. (2005). For example, Yanar Muhammad, she is leading secular activist and the head of the OWFI, "worries that the Islamic provision will turn the country "into an Afghanistan under the Taliban, where oppression and discrimination of women is institutionalized." (Coleman, I. 2006). In the Iraqi constitution there are disseminations in women rights in Iraqi constitution. For example, one of the point that support the inequality of the rights of woman in Iraq is inheritances under Islamic Sharia, according to (Surat An-Nisā', 4:11), (Surat An-Nisā',4:25), and (Surat Al-Baqarah, 2:282), women receive smaller inheritance than men and they have fewer rights after the divorce. What is more, until today and after Iraqi constitution as meta-law in Iraq, this law was not changing in the Iraqi courts. As a result, it could be seen that the constitution is traditional and even backward-looking in regard to human rights and particularly to women's rights. "many Iraqis fear that women's rights will be curtailed and many civil rights will be open to different interpretation of

religious jurists” (Hanish, S. (2007, p.34). In addition, Islamic Sharia law forbids Muslim women from marrying a non-Muslim man. Another main point is witness in the court. Chapter three in literature review, it could be seen that woman is considered as a half human. “The new Iraqi constitution contains many constructive notions that do justice to Iraqi women” (Hanish, S. 2007, p.32). Hence, it could be seen that women due to Iraqi constitution, their rights are being violated. Moreover, this point also supports that the equality in front of the law according to Iraqi constitution is not correct too.

V. CONCLUSION

In conclusion, both liberalism and Islamism are having different understandings for rights in a constitutional system. Liberalism's thoughts in the constitutional system are more accurate in giving rights to individuals, minorities, and gender. Moreover, rights are unlimited in liberal perspectives to human beings. What is more, many organizations are supporting, considering, and understanding rights as modern viewpoints in western states, while, in Asia and the Middle East, they are opposite. Islamism is rejecting, limiting, and ignoring many rights of people due to Sharia law. The main sources of Sharia law in the Quran and Al-Hadith by the Prophet Mohammed. Moreover, this Sharia is different from one sect to another. For example, Shi'ite understanding of Sharia is different from Sunni. Pushing together both Shia law and liberal rights in the same constitution is the main problem for limiting rights in the Iraqi constitution. Furthermore, giving priority to religions in the Iraqi constitution is another obstacle to rights. Scholars are arguing that in the Iraqi constitution there are many inconsistencies between articles, especially articles 2 and 14. What is more, the Iraqi constitution is starting with some terms as same as Islamic books. Furthermore, the constitution is containing the elements of human rights. Thus, it is difficult to have both principles in the same legal document that is a meta-law for people. As a result, people in Iraq are still suffering from these inconsistencies in which they are not completing each other's. The dominance by one kind of sect of Islamic group over the constitution is ignoring the rights of minorities in which they are Sunni groups. Moreover, Iraq is a multi-ethnic society and religions such as Arabs (Shi'ite and Sunni), Kurds, Turkmen, Christians; among them Chaldeans, Armenians, and Roman Catholics, Mandaeans, and Yazidi. Furthermore, the rights of women are being abused in the Iraqi constitution due to Sharia law. Hence, it could be seen that Iraqi constitution articles are inconsistent with each other. What is more, there are declining rights of individuals, minorities, and women.

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