

PalArch's Journal of Archaeology
of Egypt / Egyptology

THE PRINCIPLES OF ISLAMIC SHAREAA AND ITS RELEVANCE WITH PRINCIPLE OF LEGITIMACY IRAQI LEGISLATION (COMPARISON STUDY)

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Ass. Lect. Rizan Hamodi Kareem Al-Shamiri, The principles of Islamic shareaa and its relevance with principle of legitimacy Iraqi legislation (comparison study)-Palarch's Journal Of Archaeology Of Egypt/Egyptology 17(9), ISSN 1567-214x

Introduction

Islam, as the last of the monotheistic religions, is important, what this religion calls for an examination of all the eloquence of rulings and greatness in the goals of service for the benefit of all humanity, and the Islamic religion has among the principles that it transcends any topic at all times and places, whether this topic is a new principle or law and legislation or something else, how strange it is for the Arab nation to be honored by it and the latter adheres to some of its principles and overlooks others in the name of courtesy of progress and development, no development can arise except according to legitimate principles such as the principles of Islam. Therefore, the research project required that it be a title to discuss the following:

Research problem:

The first look at the title of the research suggests to the reader how easy it is to reach a conclusive conclusion, that no problem even exists, because the truth lies in the categorical sanctity of the principles of Islamic law, and their superiority over any other man-made laws. It was closely related to the principle of legality, and this source of sanctity and sublimity stems from the majesty of God Almighty because it was revealed in the arbitrator of his noble book to our Prophet Muhammad, may God bless him and grant him peace, that the principle of legality is nothing but an overflow of these principles, but mental contemplation requires standing at

several questions before we reach a known conclusion, The text might be correct, but the application is wrong, because proving the principles of Islamic Shareaa is obligatory for its application in positive laws. The content of the above problem may not be consistent. Here the issues arise, and here we have to examine whether the legislator of man-made laws, followed a text in his legislation that was inspired by the principles of Shareaa. How legitimate is the text? Did the principle of legality intended in the texts of positive legislation derived its sources from Islam and was applied according to what Islam intended?. Or when legislations complimented the interests of development and foreseeable progress in accordance with international agreements, laws and treaties?

Research Elements:

That this problem includes elements that interfere in its formation, and these elements were:

1. What was the concept of the principles of Islamic Shareaa (Islamic law) and what are its sources?
2. What was the concept of the principle of legality, and were the principles of Islamic law a main source for it?
3. What was the legal value of the principle of legality and the principles of Islamic law and their place among the positive legislations?
- 4- What were the effects of a legislative text violating the principles of Shareaa?

Research hypotheses :

We assumed the following in order to think objectively about the study problem:

1. The principles of Islamic law are the Qur'an and Sunnah only.
2. The principles of Islamic law are a reserve source for the principle of legality.
3. The principles of Islamic Shareaa transcend the constitution.
4. The existence of legislative violations of the principles of Islamic law.

Research importance :

Lies in the necessity to shed light on the relationship of religion and the state on the one hand, highlighting the link between the

value of religion in its existence between the legislative and constitutional texts and its application as a primary source or a reserve of sources of the principle of legality on the other hand, also, do not miss the opportunity to search for the role of the judiciary in dealing with legal situations. That do not find a solution between paragraphs of the positive text, does the judge use the legitimate role in devising legal rulings to address such issues? Or was obligated to apply a text whose adaptation may be less inclusive of the circumstances of the case, the importance of researching this problem and its components. It stems from the fact that we are a Muslim society obligated to follow what God Almighty has revealed in His book, and the judgments that he showed came among his verses, and the hadiths and commandments of the Prophet, which presuppose solutions to all problems, were brought about by the Sunnah of the Noble Prophet, because our Islamic religion is an honor to have the seal of the monotheistic religions keep pace with progress and development over time.

Research objective:

Proving that the Islamic legal rule is indispensable as one of the main sources of legitimacy, any deviation from the course of these principles is intended to keep pace with the development of civilization, and keeping pace with man-made texts without using the provisions of Islam, what makes available to derive the correct judgment before the courts, he will suffer a defect in the text and a defect in the application. The glorious Islamic Shareaa fully guarantees social reform, it should be at the top of the legislative hierarchy, because it guarantees all humanitarian principles, including the principle of legality.

Study methodology:

You will adhere to the descriptive approach, with possibility of making use of other approaches, if the nature of the study requires. The texts of the law, the opinions of the jurists and the judiciary rulings are read. The study elements are deduced from it in order to access scientific knowledge.

Research Plan:

The research was divided into two sections as follows:

The first topic: The concept of the principles of Islamic law, the principle of legality and their sources.

The first requirement: Definition of the principles of Islamic law and its sources.

The second requirement: Definition of the principle of legality and its sources.

The second topic: The value of the principles of Islamic law and the principle of legality in Iraqi legislation.

The first requirement: The legal value of the principles of Islamic law and the principle of legality in the Iraqi constitution.

The second requirement: The impact of the Iraqi Penal Code's violation of the principles of Islamic law and the principle of legality.

The first topic

The concept of the principles of Islamic law and the principle of legality and their sources

In this topic we learn about the concept of the principles of Islamic law, we address its sources and characteristics, in addition to identifying the concept of the principle of legality, its sources and its characteristics, because these two concepts are the first elements of the problem, therefore, this topic needs to be divided into two requirements, as follows:

The first requirement

What are the principles of Islamic law and its sources.

The Islamic religion, including the principles and provisions it holds, organize human life completely, no shortage of that organization was left, and because this religion keeps pace with all stages of the progression of time, in order to regulate relationships and dealings between people. God Almighty bestowed upon man the grace of thinking, leaving him the right to ijihad in deriving rulings from the principles of Islamic law, to apply it to the situations he encounters, may find it difficult to find a fixed legal text and it has become definitive in significance, but the problem that we find disagreement over, after the civilization transformation in the states, and after setting its foundations, entities, and constitutions. What was the extent of the adoption of the principles of Islamic law in its positive legislation, and what is the order of these principles among the sources of legislation?Is it the only

source of legislation? Are there other sources besides it? Are all principles of Islamic law applicable?

The questions that arose required a lot of unilateral efforts by the commentators and jurists to reach answers, for that, we divide this requirement into two branches:

First branch

Definition of the principles of Islamic law and its difference from Islamic rulings.

The principles of Islamic law are consultation, justice, equality, freedom, and the responsibility of the caliph, there were many definitions that dealt with these principles, some of them explain the linguistic aspect of the principles in detail. It was said Shareaawas the language of (the straightway, which is the water resource intended for drinking) (Mousa, 1989). The term Shareaa was applied to all of the rulings that God enacted for His servants. Since was a tight posture, she has no warp), and because the meaning of principles. The definition of the principles of Islamic law is (the principles of Shareaa law and its general rules are one and the same. There is no difference between the sects in explaining rulings as they were attributed to it, as for what is required by the principles of Shareaa. Islamism from the obligation to work with the legal provisions of definite evidence and significance, such as the prohibition of usury and the prohibition of gambling, because there is no difference in it between the schools of thought)(Saleem, 1996). These principles do not change with changing times, places, or conditions, they were assets that came with the aim of reforming society. Although there must be change and change, it is the change in the means of applying these principles, according to temporal change and civilization progress. The researcher believes that this definition is a collection of the meaning of principles in Islamic law, and the importance of differentiating between the concept of Shareaa principles and Islamic jurisprudence rulings, because of the need to know which of them is obligatory to adopt positive laws. The jurists have defined rulings of jurisprudence (they are knowledge of the legal rulings from their detailed evidence)(Anwar, 1990). The rulings of Islamic jurisprudence have become a science that is taught is the science of UsulAl-Fiqh. It was the acquired practical legal rulings as detailed evidence, the knowledge of these rulings, their awareness, and the supremacy of the world with these rulings that are inferred for them in jurisprudence) (Shalabi, 1991). The content

of the evidence is detailed, it means all that was brought by firm and conclusive evidence, and its implications are clear, according to what was revealed in the Book of God Almighty, from the verses of the Holy Quran, and what was brought by the Sunnah of the Prophet Muhammad (PBUH). Likewise, the companions and jurists unanimously agreed on rulings that were proven by conclusive evidence. The measurement is all considered to have categorical connotations that are not disputed, and the disagreement is only in terms of desirability, sending interests, custom and the desirability of the case, there were those who add an analogy to the conclusive evidence.

The second branch

Sources of Islamic Shareaa principles.

Numerous studies have shown the sources of the principles of Islamic law, most of the studies have indicated that the main sources of Shareaa were the Holy Qur'an, the Sunnah of the Prophet, the consensus of jurists and analogies. They were sources that are not disputed, as they are major and based on definitive indications that are fixed in the text of the Qur'an or the hadith of the Prophet's Sunnah. There were other sources of dependency on the principles which are measurement and approval of the interests sent, the suitability of the situation, the correct custom and the blocking of excuses, and that these sources were the subject of disagreement among the positive law jurists, among them the jurists of Egyptian law, some of them believe that the sources of Shareaa principles obligate legislators and judges to follow them, not to deviate from it in terms of legislation and implementation of legal texts.

The Egyptian jurists distinguished between the sources of Shareaa principles, the sources of rulings of jurisprudence, so they considered the sources of principles were the Qur'an and the Sunnah. They were two major definitive sources that are not disputed, they include the principles of Shareaa, as for the rest of the sources, they are sources for the provisions of jurisprudence, because it is subject to Ijtihad, it does not obtain the authoritative and peremptory consensus binding on the Egyptian legislator. Al-Ijmaa and the sources below it have a disagreement that is not binding on the followers in the legislation (Saleem, 1996).

We see through the opinions of scholars, the reason for the disagreement is whether or not to adhere to the principles of the

entire Shareaa. It was caused by the difference in the sources of these principles, which was the cause of the criticism directed at positive legislation, if you did not initiate a text that may not agree with the consensus, the analogy, or the association. It was the same criticism that dealt with the legislation, it was inconsistent with the principle of legality of the applicable Islamic text. Some of the jurists believe that the main binding source is the Qur'an and the Sunnah only, it supports the opinion that the legislator is not obligated to draw up texts that are consistent with what the rest of the sources have taken on board, because in his opinion it is a matter of dispute. Some of them differentiate between the sources of Shareaa principles and the sources of jurisprudence. They made it clear that the sources of Shareaa principles are categorical, and it is not permissible to declare their contravention in legislation, and that the main sources of jurisprudence are based on Quran and Sunnah, unanimously agreed that these jurisprudential jurisprudential rulings change with changing times and conditions (Al-Zarqaa, 1988).

In our opinion, the provisions of Islamic jurisprudence are the face of the dispute in the interpretation of the texts of legislation regarding what is required of the legislator or not, because the evidence for it is of two types agreed upon (Quran, Sunnah, Ijmaa and Qiyas), and it is not agreed upon and they are desirability, measurement, interests sent, reclamation, escapism, custom, the doctrine of the companions, the law of what came before us and blocking pretexts. The majority of jurists believe that six of the sources are not proven, and they are the approval, the interests sent, the escaping, the custom, the law of what came before us, and the saying or the doctrine of the Companion (Al-Zuhaili, 2004).

We believe this disagreement over the power of binding sources is the main reason in cases of divergence of the principle of legality from the principles of Islamic law in positive legislation.

The second requirement

The concept of the principle of legality and its sources.

In order to identify the meaning of the concept of legitimacy, and from which sources it arises. The researcher divided this requirement into two branches as follows:

First branch

Define the principle of legality.

The defining feature of the modern state is that it is a legal state, it seeks to impose the rule of law on all its individuals and bodies in their behavior and activities, and obliging rulers and the ruled to submit to the rules of law, it was an appearance that confirms the legality of the state or the existence of the so-called state of law. This submission is the so-called principle of legality. The principle of legality means that the state, with its organization and all its individuals, is subject to the provisions of the law, and not to go beyond its limits and summarize this principle as (The rule of the rule of law, and according to which the state submits its actions to the existing law, and that individuals can, by legitimate means, control the state in the performance of its function) (Al-Tamawi, 1961).

Despite the large number of definitions that dealt with this principle, however, agreement on its meaning is the submission of rulers and ruled to the law of supreme authority, do not differentiate between everyone for me a reason. All were equal before the law, whether individuals or all legislative, executive or judicial authorities, this principle is not new as some believe that it has transformed from the framework of the police state, which was ruled without oversight or accountability to a legal state, subject to its rulers and those charged with the law, as Islam was a pioneer in creating this principle in order to organize the Islamic society.

The concept of legitimacy in Islam is determined by the texts of the Qur'an and the Prophet's Sunnah, it states (to adhere to the principles of Islamic law because it is a religious and worldly duty) (Ruslan, 1999). The Islamic religion is based on ((Judgment is God)), and all human beings are obligated to follow what God has determined in terms of rulings and principles in the Qur'an and Sunnah (((And whoever does not judge by what God has revealed, those were the unbelievers)) (Ruslan, 1999). The content of this verse is clear, that there is no discrimination in submitting to the command of God, as all are equal before God Almighty, and everyone is obligated to obey him. The aim of the principle of legality is to guarantee the rights of individuals and society together, the need for a system that everyone is obligated to respect. Whether it was motivated by religious commitment, it was due to obedience to God Almighty, or was motivated by respect for the summit of legal progression in modern countries. In the form of constitutional rules and the development of oversight of compliance. The authorities most closely related to this principle

are the executive authority because of its direct interference in the lives of individuals.

(Individuals' submission to the law does not raise a problem of legal equality between the two parties to the relationship, the injured person can turn to the authorities to claim his rights, as for public law, the problem arises in the form of the ruler's commitment to the law and his submission to it. The ruler has a higher hand over individuals, it was not equal with them in the legal relations that bind them to him. The legal necessity also proved the necessity of recognizing him a special space of freedom in the actions of the supreme authority) (Muhammed, 2009).

The second branch

Legitimacy principle sources

The principle of legality, whether in Islam or in modern man-made legislation, has sources from which I derive its concept. That was why we can look at these sources in the following division:

First / Sources of the principle of legality in Islam:

Legitimacy in Islam requires a ruler who obeys God before he is obedient, and adheres to the principles of religion before asking individuals to comply with its rulings, derives judgment from the condemnation of the religion that gives him the right to exercise sovereignty, therefore, the Holy Qur'an and the Prophet's Sunnah were the main sources of the principle of legitimacy in Islam. (The ruler and the ruled in Islam are bound by the legislative rulings brought by the sources of legitimacy, not entitled to legislate on his own outside the limits of these provisions because will be baseless, legislation). As for the subordinate sources that came after the Qur'an and Sunnah, they are the consensus, the analogy, the approval, the interests sent, the escaping, the custom, and the Shareaa before us. All that is considered first is according to the development in society, provided that the provisions are not contrary to the Qur'an and the Sunnah.

Second / Sources of the principle of legality in modern legislation:

The principle of legality has multiple sources in modern legislation, it was the constitution and the higher legal value attached to it, such as declarations of rights and introductions to constitutions. The constitution follows the laws, then the organizational and

individual administrative decisions, custom and the judiciary, accordingly, the sources of the legality principle are of two parts:

1. Written sources: they were the constitution, ordinary legislation (law), and subsidiary legislation, that is, administrative regulations (of all kinds).

2. Non-written sources: They are the general principles of law, judiciary, custom and administration. The principle of legitimacy with its sources in Islam, graduation in binding legal rules is required, as Islam was the first to establish the Grievances WilayatQadha, which knows (a type of court that settles grievances and disputes. In which one or both of the parties were of power, prestige and influence. Whether it is derived from his job, or because of it, or any other reason), adopted the theory of exceptional circumstances (necessities permit prohibitions). This corresponds to the recent contingency theory, as for the modern positive legislation, the legal base must be graded, so that it does not deviate from the most important sources of legitimacy, which is the constitution. The rest of the sources may not contradict what they set of rulings with him because he is at the top of the legal hierarchy. Modern legislation has also taken into consideration the mandate of grievances, it was the control over the work of administration and administrative judiciary, which did not rise to the level of the mandate of grievances (due to the presence of a spectrum of acts of sovereignty, which has not become fully censored yet, and it is considered a black point in the brow of legitimacy) (Al-Tamawi, 1961).

During previous studies, despite the criticism leveled at the collision of the application of the principle of legality with acts of sovereignty, whether in the normal conditions of the country or in emergency circumstances. The researcher believes that the principle is one of the most important principles of law enforcement. The most important guarantees for the survival of the legal state and for its realization are laying down all kinds of judicial, political and administrative censorship over everything issued by the authorities. It may harm individuals' rights or abuse the right granted to the authority, from the researcher's point of view, this principle is in modern legislation, it did not rely on the principles of Islamic law as its main source or reserve, even if the constitution, which is the top of the legal pyramid, was adopted as the first major source among its sources. The latter will turn, did not take all the principles of Islamic law as his main source. The first gap in the principle of legality is its failure to adopt the

principles of Islamic law in its sources, and through it flow the rest of the criticism for the application of the principle of legality in all the work of the legislative, executive and judicial authorities.

The second topic

The value of the principles of Islamic law and the principle of legality in Iraqi legislation

The current Iraqi constitution issued in 2005 is considered the top of the legal hierarchy that should be followed, which requires non-violation in the rest of the regular legal legislations and other regulations, regulations and instructions issued by any of the bodies. In order to discuss the content of this constitution and the extent to which it adopts the principles of Islamic law and the principle of legality or not, to know the rank of these principles, their legal value, and the consequences of violating them. We have divided this topic into two requirements as follows:

The first requirement

The legal value of the principles of Islamic law and the principle of legality in the Iraqi constitution.

Both principles of Islamic law and the principle of legality, they had a large space to exist between the texts of the current Iraqi constitution, that was why we discuss the topic through two sections:

First branch

The legal value of the principles of Islamic law in the permanent Iraqi constitution

The text of the Iraqi constitution in Article 2 (First) Islam was the official state religion, it was a basic source of legislation.

A. It is not permissible to enact a law that contradicts the established provisions of Islam (The Iraqi Constitution, 2005): before talking about what was mentioned in this text, the researcher wants to make a comparison between this text and the same in the Egyptian constitution before its 1971 amendment, which was mentioned in Article 2 (the principles of Islamic Shareaawere a main source of legislation), where this article was a source of great jurisprudential controversy, because some jurists of law made it clear that the text refers to directing the legislator who is authorized to issue legislation, until was inspired by what is prescribed from

the principles of Islamic law. In other words, the latter does not become a legal rule binding the followers. No. If the legislator included it in a legitimate legal rule, in addition, some jurists criticized the language of denial. Means that there are other sources appreciated by the legislator, and side by side the principles of Islamic law in order to establish the legal basis. There was also criticism that the legislator would adopt the principles, or the different rulings of Islamic jurisprudence between the sects until the debate on the necessity of inspiration for legal texts was resolved. Inconsistent with the constants of the Islamic principles, that does not change by changing times and security. Thus, the principles of Islamic law were placed as constitutional rules, what was issued otherwise is considered to be contrary to the constitution itself (Saleem, 1996).

If this was the opinion of the jurists because of the linguistic denial of the text, and with the purpose for which it was set to direct the legislature despite mentioning the expression of the principles of Islamic law, so how about the text in the Iraqi constitution when the expression was denied, use the word source as a basis and not a primary source as mentioned. It is not permissible to enact a law that contradicts the fundamentals of the provisions of Islam and not the principles of Islamic law. Although the text in the constitution raised the status of Islam to the status of constitutional rules, but the loophole in the application of the text when interpreting it. How can the rulings of Islam among the constants that they are jurisprudential rulings that change with the change of times, places and conditions? Is it intended by constants are principles of Islamic law? Why did he avoid expressing the expression of the principles of Shareaa explicitly in the text of the constitution?

In addition, Islam has many schools of thought, Iraq is a multi-religious, sectarian, and sectarian component, according to any sect, citizens will be equal before the law, in accordance with the law, and Article 14 of the constitution which stipulates (Iraqis are equal before the law without discrimination based on sex, race, origin, color, religion, sect, belief, opinion, economic or social status), according to any sectarian orientation, the judge will issue his rulings. If does not want guidance from an Islamic jurisprudential ruling, and if the litigants are from two different schools of thought?

The article most violating Iraqi society, which is Article (41), which states (Iraqis are free to adhere to their personal status

according to their religions, sects, beliefs, or choices, and this shall be regulated by law).

Here, the text collides with the text of Article 14, which stipulates that Iraqis were equal before the law without discrimination. How would equality be if, according to Article 41, everyone was given the freedom to adhere to their personal status, religion, sect, and belief? Can the legislator regulate every religion and belief in a law? Does the judge blame the law for every belief and religion?

This also requires that the Iraqi individual be aware of the law of every sect and the law of every belief in order to be able to deal with others, and we see that the Iraqi constitution has made it clear that the state religion is Islam. However, what was stipulated in Article Two is considered a breach that places the judiciary in the confusion of the search for the correct jurisprudential ruling, it was more appropriate to stipulate that Islam is the main source of legislation, as did the Egyptian legislator and to amend Article 2 of the Constitution by making it (It is not permissible to enact a law that contradicts the principles of Islamic law), from our point of view, the expression would be explicitly accorded the elevation of the principles of Islamic law to be of the same status as the constitutional rules and without ambiguity, on the one hand. On the other hand, the text of Article 14 and Article 41 is a clear confusion to activate the concept of Islamic Sharia principles in the constitution, did not have a text expressing the principles of Sharia, rather the legislator was satisfied with mentioning the constants of the rulings of Islam, this was what makes the researcher think that the current Iraqi constitution did not live up to the principles of Islamic law to the value of constitutional rules.

The second branch

The legal value of the principle of legality in the permanent Iraqi constitution

The constitutional rules have supremacy at all other legal levels in the state, that was, ordinary laws and regulations, instructions, regulations, and administrative decisions. It should not conflict with these rules. The lower rule was subject to the higher rule according to the principle of legality and the legal rule is included. The constitution defines the authorities and defines the competencies of each of them and the relationship between them. Every state authority has a basic obligation to respect the constitution and not to violate it, to defend the supremacy of the

constitution, it was necessary to find a practical way to counter any attempt to violate the constitutional rules, this method was: Monitoring the constitutionality of laws, and by looking at the articles of the permanent Iraqi constitution of 2005. We find texts that require the application of the principle of legality, as Article 13 of it stipulates the following

First: This constitution is the supreme and supreme law in Iraq, and it shall be binding in all parts of it, without exception.

Second: It is not permissible to enact a law that conflicts with this constitution, any provision in the regional constitutions, or any other legal text that conflicts with it, is considered null).

The meaning of the foregoing text is that the House of Representatives, which is the legislative authority in conjunction with the Federation Council, has no legislation or text that contradicts the rules of the permanent constitution. The same applies to the National Council of the Kurdistan Region. Conversely, legislation or a text that violates the constitution is described as unconstitutional, it can be revoked through a lawsuit before the Federal Supreme Court. Where Article 90 of the Constitution stipulates that (The Federal Supreme Court shall have jurisdiction over the following: First: Monitoring the constitutionality of laws and regulations in force), and Article 91 of the constitution affirmed that (the decisions of the Federal Supreme Court are final and binding on all authorities).

We also note that the Iraqi constitution has guaranteed the principle of legality through the text of Article 46 (The federal authorities consist of legislative, executive, and judicial powers, it exercises its competencies and tasks on the basis of the principle of separation of powers), and given the text of Article 98 of the Constitution, we find it stipulated (it is prohibited to stipulate in laws the immunization of any action or administrative decision from appeal). Thus, all the legal texts in the Iraqi legal system that protect the actions and decisions of the administration from judicial appeal, it shall be null and void due to its conflict with the constitution and the judge. If this objection is found, the supreme law of the state should be implemented in application of the principle of legality that includes the legal basis. Through these texts it is evident that the current Iraqi constitution was keen to adopt the principle of legality in its clauses and paragraphs regarding its administrative organization, and defining the responsibilities of its three authorities to guarantee the rights of all

individuals. This principle has the constitutional value that necessitates appealing against the principle of legal legislations below the constitution.

The researcher believes that the texts of the constitution were more implementation of the concept of the principle of legality than the principles of Islamic law, when it was stipulated in Article 2 (First - Islam is the official religion of the state and is a basis for legislation), this means that Islam in the Iraqi constitution is a source that is not a primary one but rather a fundamental source, meaning that there are sources other than Islam from which Iraqi legislation receives the texts of its paragraphs, but despite the Iraqi legislator's taking the principle of legality. However, did not succeed in preserving the status of the provisions of the constitution itself, and it sometimes stipulates that the state religion is Islam and it is not correct to reject what contradicts the legislation, and the same constitution stipulates that Iraqis are equal before the law without discrimination. Then, with another article, it gives everyone freedom to adhere to belief, doctrine, and personal status, this shall be regulated by law, and this is considered according to the principle of legality, it is a violation of the non-commitment of one constitutional article to the obligation of another previous article in the constitution itself.

The second requirement

The impact of the Iraqi Penal Code's violation of the principles of Islamic law and the principle of legality.

We explained the extent of the confusion that befell the current Iraqi constitution, did not live up to the principles of Islamic law to the force of constitutional rules, explained that there is confusion from her point of view in some articles and paragraphs. In this study, we deal with determining the effect of a clear violation of the principles of Islamic law. Rather, the constants of the provisions of Islam and the principle of legality in the Iraqi Penal Code No. 111 of 1969 define the scope of the violation in relation to the rights of women in accordance with what is stipulated in the articles of this law.

First branch

The effect of the violation in approving the right to discipline the wife

This law, which is supposed to be in place to protect the rights of individuals, it contains many texts that constitute a major and serious violation of women's rights, due to its weak legal and legal hierarchy. It stipulates in Article (41) of the Law: (There is no crime if the act was committed in the use of a right established according to the law, and it was considered an use of the right: - The husband disciplining his wife within the limits of what is prescribed by Sharia, law, or custom). If we discussed this article in terms of its legal hierarchy, it would violate the Islamic Sharia principle of justice and equality, and it would contradict an established peremptory significance in the progression in the Holy Qur'an in dealing with women. When mentioned in Surat Al-Nisa 'verse No. 34 (and the ones who fear their disobedience, so bite them and abandon them in their beds and beat them). This is the case if the man fears that his wife will be defiant, it was a big matter, as Al-Bari stipulated the gradual treatment, if it reaches the level of beating, it will not be severe beating.

If we discuss the legal text and its agreement with the principle of legality, we found it contrary to the provisions of the Constitution, Article 14 of which is decided (Iraqis are equal before the law without discrimination based on gender), it also contradicts the provisions of Article (29) of the Iraqi constitution, which was decided in its fourth paragraph (All forms of violence and abuse in the family, school and society are prohibited), this article violates a woman's right to bodily integrity and ruins her dignity and humanity, allows the husband to hit his wife (to discipline her). The limits of this discipline may amount to severe physical and psychological abuse, whether the prevailing custom in a region, family, or clan of the husband or wife. This was permissible with the so-called discipline, according to the custom that will prevent the husband from prosecuting because the law permits him to do so (with the aim of disciplining his wife). Moreover, the introduction to the article explicitly suggests that the act of discipline that the husband will do will constitute a crime when the article begins with the phrase (no crime), if the wife disciplined her husband, she will be brought before the court, it is sentenced to the crime of harming according to Articles (410-416) of the Penal Code, because the law did not give her, like a man, the right to discipline her husband, no matter how bad his character and behavior became. This

discriminatory speech in the law contradicts the provisions of Article (14) of the Iraqi constitution, which states (Iraqis are equal before the law without discrimination based on gender).

The second branch

The impact of the violation on the provisions of freedom-restricting penalties

Article 377 states: (An adulterous wife and anyone who committed fornication with her shall be punished with imprisonment. The husband shall be punished with the same penalty if he committed adultery in the marital home). If we notice the explicit contravention in the text of the principles of Islam and the constants of its categorical rulings in the significance of the noble verse (The fornicator and the adulterer, and each one of them flogged one hundred lashes, do not take them with mercy in the religion of God if you believe in God and the Last Day, let a group of believers witness their torment). In addition, Islam did not distinguish between the punishments of adultery, as did the positive law (Islamic Sharia requires punishment for adulterers, whatever their circumstances and conditions). If we scrutinize the positive text, we will find that the husband commits adultery in a place other than the marital home. He is not considered a perpetrator or a perpetrator of a crime, and his action is legitimate, whereas wherever the wife commits adultery, she is considered a perpetrator of the crime of adultery. This is a violation of the principle of equality between women and men before the law stipulated in Article (14) of the Iraqi Constitution and Article (2) of the Constitution, which was decided in paragraph (first / a) that (it is not permissible to enact a law that contradicts the established provisions of Islam). Among the clear and explicit constants is what is stated in the Holy Quran regarding the punishment for the crime of adultery (The fornicator and the adulterer, then flog each one a hundred lashes). That is, the Almighty did not distinguish between a woman and a man in the punishment for the crime of adultery, as for the text of Article (409) of the Law (punishable by imprisonment for a period not exceeding three years, whoever surprises his wife or one of his female relatives, in the event that she is dressed in adultery or is in the same bed with her partner, then he kills them immediately or kills one of them or assaulted them or one of them in an assault that led to death or permanent disability), This article gives the offender's husband or mahram an excuse that reduces the penalty and may not even be punished under it. This was in the event that he kills his wife or one of his

female relatives and is sentenced to a year with a suspended sentence, excuse was granted to the man only, not to the woman. If the image was the opposite and the woman is the one who surprised her husband or one of her mahrams in the case of adultery, if she kills or harms him, she will be punished in full for her deed. This therefore contradicts the provisions of Article (14) and (29 - Fourth) of the Constitution (prohibiting forms of violence and abuse in the family, school and society).

Conclusion

Through these materials, we have reached the following results:

1. The existence of a major contradiction between the text of the constitution and legislative texts in the Iraqi penal code, under which he violated the principle of legality, did not follow the legal progression in his commitment to the provisions of the constitution. It is no secret to the honorable reader that the Iraqi Penal Code was issued in 1969 and the Iraqi Constitution was issued in 2005, and in our opinion it is the biggest legislative inconsistency on launching the whole research. The legislator did not adhere to the time hierarchy and the subsequent developments between the two mentioned years, had to amend the penal code in accordance with the current constitution, although the latter was confused in its contradiction with the principle of legality through what the researcher had shown in the constitution's texts of contradiction.
2. The relationship of the current Iraqi constitution to the principles of Islamic law and its stipulation on the foundations of the rulings of its jurisprudence. It was fundamentally changing according to chronological development, and it was neither successful nor clear, either for the average individual or for legal scholars, this was what the Iraqi judiciary has right with all the obstacles it did not do through the contradictory constitution. Rather, the Iraqi judge was forced to stick to old laws, it did not keep pace with the civilizational developments in Iraq, nor the events that have passed, and this is what is behind a confusing constitution and an old law that applies to everyone.

Recommendations:

The need to amend the current Iraqi penal code and articles on the right to discipline against a wife and imprisonment in cases related to marital adultery, in line with the principles of Islamic Sharia and the current Iraqi constitution of 2005.

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