

Rule of Law in Iraq

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With the deposition of the totalitarian Saddam's Baath Regime in 2003, Iraq was faced with the challenge of establishing the rule of law, taking into consideration Iraq's particular political, ethnic and religious circumstances. Currently the rule of law in Iraq gives an example of the difference between theory and practice. The Iraqi Constitution of 2005 contains many provisions, which together are more than sufficient to ensure the attainment of the Rule of Law. However, the implementation of the rule of law is hampered by many obstacles.

I. Historical Background

The present-day Iraq covers the greater part of the territory of Mesopotamia. Here, the first laws of the world were adopted, and here the major schools of Islamic law emerged. Islamic law came to fruition in Iraq, especially during the Abbasid Empire (750-1258 AD), at a time when a constitutional law according to current understanding was unknown. Islamic law lacked a constitutional or legal code which settles constitutional issues. Islamic law was in general not a codified system according to the present Western pattern.

The Islamic territories were under the rule of the caliphs, who saw themselves as successors of the Prophet. The caliph was named by a form of homage or acclamation of the Shura, or Council, which was not always expressed voluntarily. The caliph appointed rulers of the Muslim provinces, who to a large extent exercised their own authority. Therefore, the Islamic state was not a centralised state in the modern sense. During the Islamic period the office of the judiciary came into being. The legislative power was not an issue, as the Islamic Caliphate relied on God's law or Shari'a. The

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fundamental rights and freedoms in the current sense were not known. However, during the period of Islamic rule some non-Muslim religious communities, especially Christians and Jews, had far-reaching rights to practice their own rules, especially in the areas of family and inheritance law.

After the Abbasid Empire the territory of today's Iraq formed a part of the Ottoman Empire. It consisted of three provinces: Baghdad, Basra and Mosul. In 1876 a Constitution was adopted for the first time. The Constitution of 1876 aimed at limiting the power of the sultan-caliph. The Constitution is associated with the name of Medhat Pasha, who had ruled in several provinces of the Ottoman Empire, including Baghdad. He saw that the Ottoman Empire was in need of reforms and used his influence to enforce them in the territory of Iraq/Mesopotamia against the will of the sultan. In effect, this was the first time the power of the Ottoman sultan was limited and a kind of separation of powers was established. The Ottoman sultan, however, insisted that he had the right to declare a state of emergency when necessary (Article 113). In 1878 he exercised this right and the Constitution was suspended, until in 1908 it came back into effect, due to the growing opposition.

After the collapse of the Ottoman Empire after the First World War in 1920 the British mandate in Mesopotamia was assigned to the United Kingdom by the League of Nations. A constitution was written in 1925. The Constitution of 1925 consisted of 125 articles. Article 2 declared Iraqi sovereignty and the indivisibility of the territory, and the parliamentary monarchy.

Some changes in the Iraqi political system then followed, but the big change came in 1958, when Iraq was declared a Republic. The result was unfortunately not positive. There was often a change of power by the military accompanied by violence and subsequently new laws and constitutions were adopted. The Baath Party took over power in Iraq, from 1968, and after a short time Saddam Hussein could concentrate all power in his hands.

For decades Iraq was in an abnormal situation and was dominated by terror and uncertainty, war and embargo. During this long period the political system was determined by the domination of one party and one person. Though the Iraqi constitutions did contain a number of fundamental rights and freedoms, they were just a piece of paper. In particular, this was the case with the Constitution of 1970, which was valid up to 2003 in Iraq. This Constitution did neither include a constitutional court nor any court of appeal for constitutional complaints.

After the military occupation of Iraq starting in 2003 by the United States of America and its allies, a transitional constitution (TAL - Transitional Administrative Law) was issued in 2004. The influential religious leader in Iraq, Al-Sistani, called strongly for elections to be held as soon as possible and thereby bring an elected government to power through the Iraqis them-

selves. He also emphasized that a constitution in Iraq could only be enforced if it was written by Iraqis and approved by a referendum. In fact the political forces created a draft constitution within a record time of three months, which was confirmed by a referendum on 15 October 2005. This constitution reflects the religious, ethnic and political diversity of Iraq.

II. Protection of Fundamental Rights and Freedoms

Article 37 of the Iraqi Constitution of 2005 contains many provisions for the protection of fundamental rights and freedoms:

Article 37

First: A. The liberty and dignity of man shall be protected.

B. No person may be kept in custody or investigated except according to a judicial decision.

C. All forms of psychological and physical torture and inhumane treatment are prohibited. Any confession made under force, threat, or torture shall not be relied on, and the victim shall have the right to seek compensation for material and moral damages incurred in accordance with the law.

Second: The state shall guarantee protection of the individual from intellectual, political and religious coercion.

Third: Forced labor, slavery, slave trade, trafficking in women or children, and sex trade shall be prohibited.

Article 38 guarantees the freedom of expression and press freedom and the freedom of assembly and peaceful demonstration:

Article 38

The State shall guarantee in a way that does not violate public order and morality:

First: Freedom of expression using all means.

Second: Freedom of press, printing, advertisement, media and publication.

Third: Freedom of assembly and peaceful demonstration, and this shall be regulated by law.

Article 39 guarantees the freedom to form and join associations and political parties.

Article 39

First: The freedom to form and join associations and political parties shall be guaranteed, and this shall be regulated by law.

Second: It is not permissible to force any person to join any party, society, or political entity, or force him to continue his membership in it.

Article 40 guarantees the freedom of communication.

Article 40

The freedom of communication and correspondence, postal, telegraphic, electronic and telephonic, shall be guaranteed and may not be monitored, wiretapped, or disclosed except for legal and security necessity and by a judicial decision.

Article 42 guarantees the freedom of thought, conscience and belief.

Article 42

Each individual shall have the freedom of thought, conscience, and belief.

Article 44 guarantees the freedom of movement, travel and residence of Iraqi citizens.

Article 44

First: Each Iraqi has freedom of movement, travel, and residence inside and outside Iraq.
Second: No Iraqi may be exiled, displaced, or deprived from returning to the homeland.

In a decision (No. 34 of November 24, 2008) the Iraqi Federal Supreme Court relied on these articles and cancelled a decision of the Iraqi Parliament which had deprived a parliamentarian of his membership because he had travelled to Israel.

III. Fair Trial

Article 19 of the Iraqi Constitution guarantees Fair Trial.

Article 19

First: The judiciary is independent and no power is above the judiciary except the law.

Second: There is no crime or punishment except by law. The punishment shall only be for an act that the law considers a crime when perpetrated. A harsher punishment at the time of the offense may not be imposed.

Third: Litigation shall be a protected and guaranteed right for all.

Fourth: The right to a defense shall be sacred and guaranteed in all phases of investigation and the trial.

Fifth: The accused is innocent until proven guilty in a fair legal trial. The accused may not be tried for the same crime for a second time after acquittal unless new evidence is produced.

Sixth: Every person shall have the right to be treated with justice in judicial and administrative proceedings.

Seventh: The proceedings of a trial are public unless the court decides to make it secret.

Eighth: Punishment shall be personal.

Ninth: Laws shall not have retroactive effect unless stipulated otherwise. This exclusion shall not include laws on taxes and fees.

Tenth: Criminal laws shall not have retroactive effect, unless it is to the benefit of the accused.

Eleventh: The court shall appoint a lawyer at the expense of the state for an accused of a felony or misdemeanor who does not have a defense lawyer.

Twelfth:

A. Unlawful detention shall be prohibited.

B. Imprisonment or detention shall be prohibited in places not designed for these purposes, pursuant to prison laws covering health and social care, and subject to the authorities of the State.

Thirteenth: The preliminary investigative documents shall be submitted to the competent judge in a period not to exceed twenty-four hours from the time of the arrest of the accused, which may be extended only once and for the same period.

IV. Equality before the Law

The Iraqi Constitution contains many provisions that call for the equality of all citizens of Iraq, such as Article 14, 16, and 20.

Article 14

Iraqis are equal before the law without discrimination based on gender, race, ethnicity, nationality, origin, color, religion, sect, belief or opinion, or economic or social status.

Article 16

Equal opportunities shall be guaranteed to all Iraqis, and the state shall ensure that the necessary measures to achieve this are taken.

Article 20

Iraqi citizens, men and women, shall have the right to participate in public affairs and to enjoy political rights including the right to vote, elect, and run for office.

Article 49 Paragraph 4 requires a minimum quota of women in parliament of not less than one-quarter of the members of the Council of Representatives.

V. Separation of Powers

To anchor the rule of law in Iraq, the principle of the separation of powers is stated in Article 47 of the Constitution. Furthermore, the political system in Iraq is no longer a centralized presidential republic, as it was before, when all power was concentrated in one hand and abused, but now the political system is a federal and representative parliamentary system (Article 1 Iraqi Constitution). The power is no longer in the hands of one person who cannot be held responsible.

The legislative power consists of the Council of Representatives and the Federation Council (Article 48). However, by 2011 the Federation Council had not yet been formed, so that the Council of Representatives must make many decisions, which is also viewed critically.

According to Article 89 Iraqi Constitution the federal judicial power is comprised of the Higher Juridical Council, the Federal Supreme Court, the Federal Court of Cassation, the Public Prosecution Department, the Judiciary Oversight Commission, and other federal courts that are regulated in accordance with the law.

Most important is the creation of the Federal Supreme Court (Article 92). This court has the competencies of a constitutional court (Article 93) and is playing a very important role in Iraq. As the Iraqi constitution is new and many provisions are expressed vaguely, the Supreme Court has to provide answers to many issues and to offer solutions to subsequent problems in practice.

It is remarkable that the Iraqi Constitution provides for independent commissions in addition to the three powers, for example the High Commission of Human Rights, the Independent Electoral Commission, and the Commission on Public Integrity (Article 102). These commissions are intended to strengthen the democracy and the rule of law in Iraq, which is seen critically by the executive power in Iraq, as in its opinion they serve to limit the powers of the executive.

VI. Endorsement of the Principle of a Tolerant Islam

Article 2 of the Iraqi Constitution declares Islam as the official religion of the state and as a foundation source of legislation, as is the case in most Arab countries. At the same time the Iraqi constitution reflects the religious and ethnic diversity of Iraq and stresses the protection of the rights of groups (Article 2 Paragraph 2, Article 3, Article 4, Article 7, Article 8 Paragraph 1, Article 14, Article 41, Article 42, Article 43 of the Iraqi Constitution).

It is noteworthy that the Iraqi Constitution stipulates that on the one hand no law may be enacted that contradicts established provisions of Islam and, on the other hand, no law may be enacted that contradicts the principles of democracy (Article 2 Paragraph 1). This can be seen as contradictory, but also as an endorsement for the tolerant and moderate form of Islam, and a ban on all expression of extreme tendencies in this religion.

VII. Protection for the Rule of Law

Furthermore, for securing the rule of law in Iraq, given the bad experiences with abuse of power by the military, the Iraqi constitution prohibits military interference in politics and the participation of the military in state affairs and requires that the military forces must be under the rule of civilian leadership (Article 9 Paragraph 1). Therefore, it is prohibited to employees of the military to run for political office or to support other candidates (Article 9, Paragraph 3). The same applies to employees of the Iraqi intelligence service, which are also subject to a civilian leadership (Article 9, Paragraph 4).

Forbidden is any threat to democracy, in particular any entity or program that adopts, incites, facilitates, glorifies, promotes, or justifies racism or terrorism or accusation of being an infidel (takfir) or ethnic cleansing, especially the Saddamist Ba'ath party in Iraq and its symbols, under any name whatsoever (Article 7).

VIII. Conclusion

The new Iraqi Constitution contains many provisions, which together are more than sufficient to ensure the attainment of the Rule of Law. Nevertheless, the implementation of the Rule of Law in Iraq is not easy, since this country was a police state for decades and was ruled by a totalitarian regime and therefore constitutional traditions had hardly existed in this country.

Moreover, the religious and ethnic diversity in Iraq shows currently a problem for the Rule of Law and in particular for the principle of separation of powers. Furthermore, the persistence of corruption is a major obstacle to attaining the Rule of Law.

However, Iraq meets all formal legal requirements, which would ensure this country's future progress. And it possesses all the necessary financial resources, due to the enormous oil reserves (about 11% of total oil reserves in the world).

Bibliography

- Al-Istrabadi, Feisal Amin, Reviving constitutionalism in Iraq: Key provisions of the transitional administrative law. In: New York Law School Law Review 50/269, 2005, p. 269-302
- Al-Mahmood, Medhat, Al-qada fi al-iraq [The judicial system in Iraq], Bagdad 2nd ed. 2010 http://www.mpil.de/shared/data/pdf/mahmood-the_judicial_system_in_iraq_2004.pdf (last visit April 2011)
- Carlson, Scott, Establishing the rule of law. In: Georgia Journal of International & Comparative Law, 33/1, 2004, p. 119-141

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- Deeks at al., Iraq's Constitution: A Drafting History. In: Cornell International Law Journal 40/1, 2007, p. 1-87
- Hamoudi, Haider Ala, Toward a Rule of Law Society in Iraq: Introducing Clinical Legal Education into Iraqi Law Schools. In: Berkeley Journal International Law 23/112, 2005, p. 112-136.
- Hamoudi, Humam, My perceptions on the Iraqi constitutional process. In: Stanford Law Review, 59/5, 2007, p.1315-1320
- Iraqi Legal Database <http://www.iraq-ild.org/> (last visit April 2011)
- Mallat, Chibli Mallat, Iraq: Guide to Law and Policy, New York 2009
- Naji, Makki, Al-mahkama al-ithadiya al-ulya fi al-iraq [The Iraqi Federal Supreme Court], Bagdad 2007