

The Constitutional Status of Islam in the Iraqi Legal Order

المكانة الدستورية للإسلام في النظام القانوني العراقي

پێگه‌ی ده‌ستووری ئیسلام له‌ سیسته‌می یاسایی عێراقیدا

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Abstract

The region of Iraq has been part of the Islamic world since the dawn of Islamic Caliphate. Hence, Islam has played an essential role in the foundation and function of the country's legal order until the downfall of the Ottoman Empire. Following the constitution of the new state of Iraq, Islam was incorporated as merely state religion and a civil right in the 1925 Constitution. This secular status remained in force until the republican era and the adoption of the 1964 Interim Constitution in which Islam was considered as the basic constitutional principle as well. Yet, the drafters of the 1970 Interim Constitution reformulated the relevant provision and rearticulated Islam as only state religion again. In 2003, the US-led Intervention resulted in the change of the political system in Iraq. The new regime incorporated Islam as a foundation source of legislation and a mirror principle in the 2005 Constitution which accordingly the law-making process must completely be based or conformable with the religion.

However, the Iraqi legal order has been experiencing many incompatibilities of its legislative instruments with this constitutional principle as primarily the drafting processes of the laws mostly date back to the reign of the previous regimes, specifically when the status of Islam was a mere state religion and not a constitutional basis for the ordinary and subordinate legislation.

Keyword : Islam, Iraqi legal order, constitution, ordinary legislation, constitutional supremacy.

پوخته

عێراق یه‌كێكه له‌و هه‌رێمانه‌ی كه به‌شێك بووه له جیهانی ئیسلامی هه‌ر له‌سه‌ره‌تای سه‌ره‌له‌دانی خه‌لافه‌تی ئیسلامیه‌وه، بۆیه ئهم ئاینه رۆلێکی بنچینه‌یی له بناغه‌گرتن و کارکردنی سیسته‌می یاسایی له ولاتدا گێراوه تا روخانی ئیمپراتۆریه‌تی عوسمانی. دوا‌ی دامه‌زراندنی ده‌وله‌تی عێراقی نوێ، ئیسلام وه‌ك ئاینی ده‌وله‌ت و مافێکی مه‌ده‌نی له ده‌ستوری سا‌لی (١٩٢٥) دا ده‌ركه‌وت، ئهو پێگه‌ سه‌یكیولاره‌ی ئیسلام تا سه‌رده‌می كۆماری و ده‌رچوونی ده‌ستوری كاتی سا‌لی (١٩٦٤) له كاردا مایه‌وه، به‌لام له‌ده‌ستوری سا‌لی (١٩٦٤) دا سه‌ره‌رای پێگه‌كه‌ی وه‌ك ئاینی ده‌وله‌ت، ئیسلام وه‌ك بنه‌مایه‌کی ده‌ستوری بنچینه‌یش دانپێدانرا، هه‌رچه‌نده دارێژهرانی ده‌ستوری كاتی سا‌لی (١٩٧٠) دوباره ماده‌ پهیوه‌ندیدارمه‌کیان دارشته‌وه و پێگه‌ی ئیسلامیان ته‌نیا وه‌ك ئاینی ده‌وله‌ت جێگیرکرده‌وه. ده‌ستوردانی سه‌ربازی له عێراق به‌سه‌روکایه‌تی ئهمریکا له سا‌لی (٢٠٠٣) دا، بووه هۆی گۆڕینی سیسته‌می سیاسی به ته‌واوی له عێراقدا ورژیمی تازه‌ش، وه‌ك سه‌رچاوه‌ی بنچینه‌یی یاسادانان و بنه‌مایه‌کی ده‌ستوری، له ده‌ستوری (٢٠٠٥) دا دانی به ئیسلامدا نا، به گۆیره‌ی ده‌ستوره‌که ده‌بێت پرۆسه‌ی ده‌رکردنی یاساکان به‌ته‌واوی له‌سه‌ر بنچینه‌ی ئاینی ئیسلام بێت، یان کۆک و گونجاو بێت له‌گه‌ڵ بنه‌ما جێگیرمه‌کانی ئهم ئاینه‌دا. له‌گه‌ڵ ئهو راسه‌تی ده‌ستوریه‌شدا، سیسته‌می یاسایی له عێراقدا ئهم‌مونی گه‌لێک دژیه‌کی یاساکانی کردووه له‌ گه‌ڵ ئاینی ئیسلامدا، به‌هۆی ئه‌وه‌ی که پرۆسه‌ی ده‌رکردنی یاساکان له ولاتدا به‌زۆری له‌سه‌رده‌می رژێمه‌کانی پێشوودا بووه، کاتیک پێگه‌ی ئیسلام ته‌نیا ئاینی ده‌وله‌ت بووه، نه‌ک بنه‌مایه‌کی ده‌ستوری بۆ یاسای ئاسایی (التشريع العادي) و یاسای لاوه‌کی (التشريع الفرعي).

كليه وشهكان: ئيسلام، سيستمى ياساى له عيراقدا، دهستور، ياساى ئاسايى، بالايى دهستورى.

ملخص

كانت منطقة العراق جزءاً من العالم الإسلامي منذ فجر الخلافة الإسلامية، ومن ثم لعبت الشريعة الإسلامية دوراً أساسياً في تأسيس وعمل النظام القانوني في البلاد حتى سقوط الإمبراطورية العثمانية، وبعد وضع دستور الدولة العراقية الجديدة، تم إدراج الإسلام باعتباره دين الدولة وحقاً مدنياً في دستور عام (1925)، وظل هذا الوضع العلماني قائماً حتى الاحاطة بنظام الحكم الملكي واعتماد دستور جمهورية العراق المؤقت لعام (1964) الذي اعتبر الإسلام فيه أيضاً المبدأ الدستوري الأساسي. وبعد ذلك، قام واضعو الدستور المؤقت لعام (1970) بإعادة صياغة الأحكام ذات الصلة وأعادوا الإسلام إلى وضعه السابق في هرم النظام القانوني في العراق، باعتبار الإسلام دين الدولة فقط. وفي عام (2003)، أثر التدخل الذي قادتته الولايات المتحدة إلى تغيير النظام السياسي في العراق، فقد أدرج النظام الجديد الإسلام كمصدر أساسي للتشريع، ووفقاً لدستور عام (2005) فإن عملية تشريع القوانين يجب أن تستند بشكل كامل إلى الدين الإسلامي ولا تتعارض مع ثوابته، إلا أن نظام القانوني القائم في العراق يحتوي على العديد من حالات عدم التوافق بين تشريعاته وهذا المبدأ الدستوري، ويرجع السبب في ذلك إلى أن عمليات صياغة القوانين النافذة في معظمها ترجع إلى عهد الأنظمة السابقة، وتحديدًا عندما كان الإسلام مجرد دين للدولة وليس أساساً دستورياً للتشريعات العادية والفرعية.

الكلمات المفتاحية: الشريعة الإسلامية، النظام القانوني العراقي، الدستور، التشريع العادي، السمو الدستوري.

Introduction

In 1921, the Ottoman Empire was dissolved and the new state of Iraq was established three years later.¹ The dissolution was

¹ For more detailed information on the establishment of the new state of Iraq and its political and legal order, see the following references: Charles Tripp, *A History of Iraq* (New York: Cambridge University Press, 2000); Zoe Preston, *The Crystallization of the Iraqi State: Geopolitical Function and Form*, PhD Thesis (University of London: 2000); Susan Pedersen, "Getting Out of Iraq—in 1932: The League of Nations and the Road to Normative Statehood", 115 (4) *American Historical Review* (2010); Phebe Marr, *The Modern History of Iraq* (Boulder, CO: Westview Press, 2003); Liam Anderson and Gareth Stansfield, *The Future of Iraq*:

not only followed by the constitution of some smaller nation-based states like Iraq but also the suspension of the enforcement of Islamic law as the basis of legal order in the former lands of the Empire, including Iraq. The Islamic identity of Iraq dates back to the first expansion attempt of the Islamic Caliphate to outside of the Arabian Peninsula and specifically to the reign of the Caliph Abubakr al-Siddiq² when he set out

Dictatorship, Democracy or Division? (New York: Palgrave Macmillan, 2004); *Rebuilding the Iraqi State: Stabilisation, Governance, and Reconciliation*, European Parliament, 2018. Retrieved 1 June 2024, [https://www.europarl.europa.eu/RegData/etudes/STUD/2017/603859/EXPO_STU\(2017\)603859_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2017/603859/EXPO_STU(2017)603859_EN.pdf); Dlawer Ala'Aldeen, *State-Building in Iraq*, Middle East Research Institute, 2013; Miranda Sissons and Abdulrazzaq al-Saiedi, *Iraq a Bitter Legacy: Lessons of De-Baathification in Iraq*, International Center for Transitional Justice, 2013; Joseph G. Melaragno and James O. Ollunga, *Rebuilding Iraq: The United States Role* (Stanford University, 2003); *Creation and First Trials of the Supreme Iraqi Criminal Tribunal*, International Center for Transitional Justice, 2005. Retrieved 1 June 2024, https://www.ictj.org/sites/default/files/IC_TJ-Iraq-Creation-Tribunal-2005-English.pdf; Ali Bakht and Saad Sultan et al., *Transitional Justice in Iraq: Memories and Future Prospects* (Amman: Friedrich-Ebert-Stiftung, 2021); Harith al-Qarawee, *Sectarian Relations and Socio-Political Conflict in Iraq*, ISPI, (2013). Retrieved 2 June 2024, https://www.researchgate.net/publication/280099809_Sectarian_Relations_and_Socio-Political_Conflict_in_Iraq; Rebaz Khdir, "The Fate of Prisoners of War between the Quran, Traditions of the Prophet Muhammad and Practice of the Islamic State in Iraq and Syria", 13 (34) *European Scientific Journal* (2017); Rebaz R. Khdir, *The Jurisdiction of the International Criminal Court: The Crimes of the Islamic State in Iraq and Syria*, PhD Thesis (University of Minho: 2018).

² Abubakr al-Siddiq was a close companion of the Prophet Muhammad before and after the revelation of Islam. He played a crucial role in the history of Islam through his physical and capital strive. During the life of the Prophet, he stood by his side and participated in all the major historical events with him. After the Prophet died, he was elected and

an army to conquest Iraq from the Sassanid Empire. The conquest process of the entire land was accomplished in 637 and the today's Iraq has since then been part of the Islamic world and the majority of its population is Muslim. Moreover, the Muslims annexed the land to Arabia and extended their legal order to the land which was entirely based on the Islamic norms and values.³ The Islamic based legal order remained in force in Iraq throughout the reigns of all the Islamic dynasties until finally was suspended as the consequence of the collapse of the Ottoman Empire and replaced with secular western principles.⁴

The new state of Iraq was established in 1924 and the country has since then enacted six constitutions in which the political system and legal order have been based on different world views and political ideologies. The first national constitution was adopted in 1925 which was the complete reflection of the modern western ideals. The constitution adopted a constitutional monarchy as the political system of the land and a representative government which in coordination of the king

entrusted with the position of the Caliph and within the two years of his reign, he overcame various rebellions and expanded the Islamic rule to the other regions of Arabia as well as Iraq and the Levant, see Ibn Ishaq, *The Life of Muhammad*, Translated by: A. Guillaume (Oxford et al.: Oxford University Press, 2004); Ibn Athir, *Al-Kaml fi al-Tarikh*, Vol. 2, 3 (Beirut: Dar al-Ktub al-Ilmiyah, 1987).

³ Tabari, *The History of al-Tabari (Ta'rikh Al-Rusul wa 'l-Muluk)*, Translated by: Gautier H. A. Juynboll, Vol. XI, XII, XIII (New York: State University of New York Press, Albany, 1989).

⁴ Constance A. Johnson, *Iraq: Legal History and Traditions* (the Law Library of Congress, 2004), 4-11; Reginaldo Nasser and Rodrigo Amara, "The End of the Ottoman Empire and the Creation of the Iraqi State beyond Sykes-Picot: Between Imperialism and Revolution", 8 (4) *estudos internacionais* (2020), 35-58.

was responsible for ruling the country.⁵ The constitution remained in force until the republican revolution occurred in 1958, specifically when a new interim constitution was adopted in which the political system was transformed into republic.⁶ Iraq experienced a series of revolts and military coups during the 1960s and each resulted in an interim constitution which were the 1964 Constitution, 1968 Constitution and 1970 Constitution. Although the constitutions shared many basic and fundamental principles, they differed in the articulation of political system and the objective of the political elite from realizing a socialistic to a popular democratic state.⁷ The constitutions generally theorized many ideals and promises to the Iraqis as their agendas but the legal order practically turned into a repressive mechanism to suppress people and compel them to submit to their manipulative and oligarchic policies.⁸ The 1970 Constitution remained in force throughout the reign of the Baathist Regime from 1970 to the fall of the Regime in 2003, specifically when it was finally replaced by the Law of Administration for the State of Iraq for the Transitional Period

⁵ The Constitution of the Kingdom of Iraq (adopted 21 March 1925) (The 1925 Constitution), Arts. 1, 2.

⁶ The Interim Constitution of 1958 (adopted 1958) (The 1958 Constitution), Art. 1.

⁷ See the Law of the Interim Constitution (adopted 29 April 1964) (The 1964 Constitution), Art. 1; The Interim Constitution (adopted 21 September, 1968) (The 1968 Constitution), Art. 1; The Interim Constitution of 1970 (adopted 16 July 1970) (The 1970 Constitution), Art. 1.

⁸ Constance A. Johnson, *supra* note 4, at 20-31; Rebaz Rasul Khdir, "The Iraqi High Criminal Court: Judicial Lessons and Necessary Steps", 22 (36) *Zanco Journal of Law and Politics* (2023), 131-132.

(LASITP) in 2004⁹ and lately by the 2005 Permanent Constitution.¹⁰

Although Iraq was designed to form a secular state from its establishment but it preserved religion as a prominent sociological characteristic of its pluralistic society in its constitutions. The state, in other words, articulated Islam as the state religion and incorporated the practice of other religions within the scope of human rights and fundamental freedoms from the very beginning.¹¹ However, the status of Islam has slightly changed from time to time within the secular constitutional scop, from being a mere state religion to a constitutional legislative principle, as it is evident in the 1964 Constitution, 1968 Constitution and 1970 Constitution.¹² Yet, following the adoption of the LASITP and particularly the 2005 Constitution, the status of Islam was dramatically enhanced to the basic source of legislation, besides being the official state religion and a constitutional mirror for the reflection of its principles in the ordinary and subordinate legislation of the country.¹³

⁹ The Transitional Administrative Law was a provisional constitution that was adopted by the Iraqi Governing Council on 8 March 2003 after the Council was granted authority from the Coalition Provisional Authority. It is worth mentioning that the Constitution entered into force on 28 June 2004 and remained in effect until the permanent constitution superseded it in 2005, see Law of Administration for the State of Iraq for the Transitional Period (LASITP) (adopted 8 March 2004).

¹⁰ See LASITP, *supra* note 9; The Iraqi Constitution (adopted 18 September 2005) (The 2005 Constitution).

¹¹ The 1925 Constitution, *supra* note 5, Art. 13.

¹² See the 1964 Constitution, *supra* note 7, Art. 3; The 1968 Constitution, *supra* note 7, Art. 4; The 1970 Constitution, *supra* note 7, Art. 4.

¹³ See LASITP, *supra* note 9, Art. 7; The 2005 Constitution, *supra* note 10, Art. 2.

However, there is still a serious practical challenge as to the legal order of the country which is the lack of the complete compliance of the ordinary legislation with the Islamic established principles. This issue violates constitution twice as once: violates Islamic law itself as the religion of the state and as an independent constitutional reference and second: as the constitution is the highest law in the land and all the other laws must be enacted in conformity with or in the light of it. Otherwise, constitutional supremacy and legislative gradualism as a fundamental constitutional principle would not be realized.¹⁴

There may exist numerous academic references on the reflection and role of Islam in some ordinary legislations but there is still a lack of a comprehensive legal analysis and comparison of the status of Islam in the Iraqi constitutions and the constitutional reflection of the religion in the ordinary legislation and practice in Iraq. The article, in other words, aims to outline the pragmatic approach of the drafters of the country's different constitutions as to the status of Islam as well as the reflection of the relevant constitutional principles in the ordinary legislation and legal practice of the country to illustrate the scope of the applicability and enforcement of the religion and find alternative mechanisms to improve the state of legal order and rule of law in the country. This article is a historical and analytical study in nature that is primarily based on the Iraqi constitutions and legislations.

The article answers the following questions: What is actually Islam? What was the role of Islam in the pre-secular legal order in Iraq? What was the constitutional articulation of Islam in the post-Islamic legal order in Iraq? What was the status of Islam

¹⁴ The 2005 Constitution, *supra* note 10, Arts. 2, 13.

in the pre-2005 constitutions? What is the status of Islam in the 2005 Constitution? What is the extent of the constitutional reflection of Islam principles in the ordinary legislation in Iraq? The article is divided into six main arguments which are: Iraq and Islam, Iraq and the foundation and function of legal order, the articulation of Islam in the Iraqi constitutions, the status of Islam in the pre-2005 constitutions, the status of Islam in the 2005 constitution and the practical extent of legislative gradualism and constitutional supremacy relating to Islam in Iraq.

1. Iraq and Islam

Islam is one of the major world religions alongside Christianity and Judaism which is considered a divine revelation and a monotheistic faith. This religion was delivered as principles of guidance to mankind through the prophethood of Muhammad Ibn Abdullah al-Quraishi in the middle of the first millennium after the sending of Christianity.¹⁵ After the announcement of the religion in the early 7th century, Prophet Muhammad introduced a number of spiritual and moral principles that led to a profound regulation of social life of people. The effect of the principles later extended to other aspects of life and finally become the foundation of a comprehensive legal system known as Islamic law in Medina, in the Arabian Peninsula.¹⁶

¹⁵ See Ibn Hisham, *The Biography of the Prophet*, Translated by: Inas A. Farid (Cairo: al-Falah Foundation for Translation, Publication and Distribution, 2000); Ibn Katir, *The Life of the Prophet Muhammad*, Translated by: Trevor Le Gassick (Beirut: The Center for Muslim Contribution to Civilization, 1998).

¹⁶ See Ibn Athir, *supra* note 2, Vol. 1, 2; Tabari, *supra* note 3, Vol. VI, VII, VIII, IX.

Islamic law is particularly derived from the Quran and therefore the Quran constitutes the first and primary source of the law. However, the Book is a body of general and comprehensive principles that we may need their clarification and illustration and hence we can resort to the teachings and practices of the Prophet Muhammad as secondary references.¹⁷ According to the historical records, Muslims faced many complicated sociopolitical challenges during and following the expansion of the Islamic Caliphate which could not be technically settled in the light of the primary references; therefore, they sought recourse from scholars and scholars resorted to the interpretation of the main sources and such interpretative rulings become the secondary references.¹⁸ As the scholars might have disputed on some of the issues and given different rulings based on the tradition of the people, geographical location or public interest, different schools of thought appeared which were known as the schools of jurisprudence. The examples of such schools are Hanafi

¹⁷ For a detailed account of *sharī'ah* and Fiqh as sources of Islamic law, see the following references: Irshad Abdal-Haqq, *Islamic Law: An Overview of its Origin and Elements*, In H M Ramadan (ed.) *Understanding Islamic Law: From Classical to Contemporary* (New York et al.: Alta Mira Press, 2006); Abdur Rahman Doi, *The Cardinal Principles of Islam* (Zaria: Hudahuda, 1981); Bernard G. Weiss, *The Spirit of Islamic Law* (Georgia: University of Georgia Press, 1998).

¹⁸ See Mawil Izzi Dien, *Islamic Law: From Historical Foundations to Contemporary Practices* (Edinburgh: Edinburgh University Press, 2004), 40-56; Rebaz R. Khdir, "Child Recruitment and Use during Armed Conflicts by Muslims between International Law and Islamic Law", 18 (26) *European Scientific Journal* (2022), 123,124.

School, Maliki School, Shafihi School, Hanbali School and Jahfari School.¹⁹

Some few years after the establishment of the Islamic Caliphate in 637, Muslims accomplished the conquer of the region which is today recognized as Iraq, from the Sassanid Empire²⁰ who had been ruling the region since hundreds of years. The region thereafter become part of the Islamic territory and the majority of people converted to or accepted Islam as their new religion.²¹ Hence, the Caliphate entrusted its governors with the extension of the enforcement of the Islamic law to the newly conquered region to function as the only mechanism to regulate the overall social, political, economic

¹⁹ For more information on the subject of the jurisprudential schools in Islam, see Ahmed Hasan, *The Early Development of Islamic Jurisprudence* (Delhi: Adam Publishers and Distributors, 1994); Wael B. Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press, 2005), 150-177; Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law: A Systems Approach* (London et al.: The International Institute of Islamic Thought, 2007); Abdurrahman Al-Jaziri, *Kitab al-Fiqh 'la al-Mazahib al-Araba'a*, Vol. 1, 2, 3, 4, 5 (Beirut: Dar al-Ktub al-'ilmiya', 2003); Hossein Modarresi Tabatabai, *An Introduction to Shi'i Law: A Bibliographical Study* (London: Ithaca Press, 1984).

²⁰ The Sassanids were the predecessors of the today's Iranians who lived under the Sassanid Empire in today's Iran and Iraq from the 3rd to nearly mid of the 7th century. The Sassanid Empire was a major world power at that time and had a great cultural influence over the world. The Empire was eventually fell at the consequence of the Islamic conquests in the region and the Islamic Caliphate took control over its territory and people in 637. For more information on the Sassanids and Sassanid Empire, see Touraj Daryaee, *Sasanian Persia: the Rise and Fall of an Empire* (London et al.: I.B.Tauris & Co. Ltd in Association with the Iran Heritage Foundation, 2009).

²¹ See Ibn Athir, *supra* note 2, Vol. 2; Tabari, *supra* note 3, Vol. XII.

and cultural affairs of the newly converts. From then on, Islamic law become the only constituent of the country's legal order and remained in force throughout the Umayyad, Abbasid and Otman dynasties²² until finally the region was separated from the historical Islamic Caliphate and become a secular independent country at the collapse of the Otman empire in 1924.²³

In 1917, Britan invaded the today's Iraq as part of the Otman Empire and ruled the country as its colony until 1924 when they established a new political entity and named the state of Iraq.²⁴ The newly established state was meant to officially become secular which would rule by western values and standards; however, as the country's majority of people was Muslim, it was hard to remove it from the official functioning of the country's legal order. Therefore, they instead resorted to marginalize its role to a minimal engagement in the life of citizens through redefining it as a civil right of people.²⁵ Iraq gained its independence from Britain in 1932²⁶ but the role of Islam and Islamic law was solely remained within the limits of private life and symbolic rituals of Muslims until the

²² The Islamic Caliphate that was established following the death of the Prophet Muhammad was known as the Rashidun Caliphate (632-661). The Rashidun Caliphate was succeeded by three other major Islamic caliphates which were the Umayyad Caliphate (661-750), the Abbasid Caliphate (750-1517) and the Ottoman Caliphate (1517-1924), see T. W Arnold, *The Caliphate* (Rome: Tawasul International, 2019).

²³ See Constance A. Johnson, *supra* note 4, at 4-12.

²⁴ See Reginaldo Nasser and Rodrigo Amara, *supra* note 4, at 36-40; Liam Anderson and Gareth Stansfield, *supra* note 1, at 17.

²⁵ The 1925 Constitution, *supra* note 5, Art. 13.

²⁶ Rebaz Rasul Khdir, *supra* note 8, at 131.

republican era in 1958²⁷ and even later periods.²⁸ It was only after the fall of the Baathist regime²⁹ and the adoption of the new Constitution in 2005 that the role of Islam and Islamic law was actively restored within the legal order of Iraq as the religion become the legislative source and bases of all laws once again.³⁰

Iraq these days is a multi-ethnic and multi-religious country, yet Islam constitutes the religion of %95 to %98 of its 42 million residents. The Muslim population is divided into Shiite and Sunnie: the Shiites form around %61-64 and the Sunnis constitute about %29-34 of the population including the Kurds³¹ who are ethnically a different group.³² During and

²⁷ The Republican Era in Iraq was the period started from the revolution of 14 July 1958 and ended with the military coup of the Baathists in 1968. The start of the era was ending the monarchic rule in 1958 under Colonel Abdul Karim Qasim and its end was the commencement of a totalitarian rule under Ahmad Hassan al-Bakr in 1968, see Jahfar Hamidi, *Tarizh al-'Eraq al-Mu'asir 1914-1968*, 2nd ed. (Dar u Maktabat 'Adnan, 2015).

²⁸ The 1958 Constitution, *supra* note 6, Art. 4.

²⁹ The Baathist Regime was one of the most oppressive political regimes that Iraq has ever experienced. The Regime seized power in a military coup in 1968 and later ruled Iraq by fear and terror for three decades until finally collapsed in 2003 as the result of the US-led Intervention. It is worth mentioning that the Baathist Regime committed the most serious crimes such as genocide, crimes against humanities and war crimes against the Iraqi communities in its thirty-five year-rule, see Rebaz Rasul Khdir, *supra* note 8, at 131,132.

³⁰ The 2005 Constitution, *supra* note 10, Art. 2.

³¹ The Kurds are one of the indigenous peoples of the Middle East region that currently reside in Turkey, Iran, Iraq and Syria. The group is regarded as an ethnic minority in these countries and is referred to as the largest ethnic minority who possesses not a state yet. The Kurds in Iraq constitute %15-17 of the total Iraqi population. They have a federal region which is known as Kurdistan Region and situated in the north of the country, see Gerard Chaliand, ed., *A People Without a Country: The Kurds and*

from the reign of the Otman Empire until 1959, the Sunnis would refer to the Hanafi School in conducting the affairs relating to their personal status while the Shiites would apply the rulings of Jahfari School in this regard.³³ However, since 1959, the country has adopted a specific law known as the Iraqi Personal Status Law in which it collected all the relevant rulings from all the jurisprudential schools which deemed appropriate the most to its citizens.³⁴ It is worth mentioning again that the role of Islam was once again extended from being a mere source of personal status to the concrete incorporation as a foundation source of legislation in the Iraqi legal order after the fall of the Baathist Regime.³⁵ The reason was simply considering the historical and religious realities of the country's societal constituents and the pragmatic legislative necessities in establishing a decent and efficient legal system and order.³⁶

Kurdistan (London: Zed Press, 1993); David McDowall, *A Modern History of the Kurds* (London: I. B. Tauris, 1996); Ofra Bengio, *The Kurds of Iraq: Building a State Within a State* (Boulder: Lynne Rienner, 2012).

³² The World Factbook, Explore all Countries-Iraq, last update (13 June 2023). Retrieved 25 June 2024, <https://www.cia.gov/the-world-factbook/countries/iraq/>.

³³ See 'Alaaddin Khrufah, *Shar' Qanun al-A'wal al-Shakhsyat Raqam (188) Sanat (1959)*, Vol.2 (Baghdad: Matba'at al-'Ani, 1962), 8, 9.

³⁴ See the Personal Status Law, Law no. 188 of 1959 as amended.

³⁵ See LASITP, *supra* note 9, Art. 7; The 2005 Constitution, *supra* note 10, Art. 2.

³⁶ See Sharon Otterman and Lionel Beehner, Iraq: Drafting the Constitution, *Council of Foreign Relations*, (27 April 2005). Retrieved 28 June 2023, <https://www.cfr.org/background/iraq-drafting-constitution>; Iraq's Draft Permanent Constitution (September 2005), *United States Commission on International Religious Freedom*, (28 September 2005).

2. Iraq and the Foundation and Function of Legal Order

As we mentioned in previous, Iraq was part of the Islamic Caliphate before the recognition of its modern borders and political sovereignty and therefore its legal order was completely based on religious norms and principles. The Islamic principles played a very efficient role in the regulation of the individual life of early Muslims in Mekka.³⁷ Following the migration of Muslims to the city of Medina, the Prophet applied the principles and harmoniously theorized the social life of the anarchist tribes of the city through the adoption of the Medina constitution.³⁸ In the later periods, the Islamic Caliphates developed the Islamic model of legal governance to cover regional questions and as they also succussed in encountering the relevant challenges, the principles become

Retrieved 29 June 2024, <https://www.uscifr.gov/publications/iraqs-draft-permanent-constitution-september-2005>.

³⁷ The Prophet Muhammad was born in 571 in the city of Mekka and lived there until 622 when he migrated to the city of Medina based on a previous pledge and invitation from some of the Medina residents. He therefore taught the Islamic principles to the people of Mekka and tried to enforce the principles in the individual life of people there in the beginning of his prophethood and call, See Sayed Ameer Ali, *The Spirit of Islam: A History of the Evolution and Ideals of Islam with a life of the Prophet* (New York: Cosimo Classics, 2010), 1-50.

³⁸ The Medina Constitution was a legal instrument that the Prophet adopted after his arrival to the city of Medina in 622 AD. The Constitution included the rights and obligations of the different city tribes and residents as well as the mechanisms of settling social disputes among people, see Safi-ur-Rahman al-Mubarakpuri, *The Sealed Nectar: Biography of the Noble Prophet*, 1st ed. (Riyadh et al.: Dar-us-Salam, 1996), 181-198; Muhammad Tahir al-Qadri, *The Constitution of Medina* (London: Minhaj-ul-Quran Publications, 2012).

universal in nature and they could possibly address universal concerns and offer alternative mechanisms.³⁹

After the collapse of the Otman Empire and its foundation in 1924, Iraq adopted a constitutional hereditary monarchy. The country sought to the replacement of Islamic law with positive western principles and standards and therefore the country, under the auspices of Great Britain, adopted its first constitution in 1925.⁴⁰ In the constitution, the drafters introduced the newly established state as a sovereign, independent and free which would be governed by the king along with a representative government.⁴¹ The constitution was the complete reflection of the modern European civil law system and its secular legal ideals such as citizenship and rights and responsibilities within the efficient jurisdiction of the state.⁴² Besides the positive role of the principles in Europe, the newly established legal order in Iraq functioned not alike as it was expected; it resulted not in establishing efficient legal institutions to enforce the constitutional rules relating to the rights and obligations of people, neither succeeded in maintaining peace and security in the country. Consequently, Iraq experienced constant political and social tensions throughout the monarchic reign.⁴³

³⁹ See, for Example, Sema Yilmaz Genc and Hassan Syed, "Quranic Principles of Universal Law on the Quranic Exegesis", XXXIX (3) *bilimname* (2019), 165-186.

⁴⁰ See the 1925 Constitution, *supra* note 5.

⁴¹ *Ibid*, Art. 2.

⁴² *Ibid*, Arts. 5-26. See also: Donald S. Lutz, *Principles of Constitutional Design* (New York: Cambridge University Press, 2006); European Parliament Resolution on the Treaty Establishing a Constitution for Europe (2004/2129(INI)).

⁴³ The tensions and upheavals were the result of adopting a land reform policy, sectarian conflicts between the Shia and Sunni groups, the

After the revolution of 14 August occurred through a military coup, the political system was transformed into republic and the country was reidentified as being part of the Arab Nation.⁴⁴ The newly adopted constitution in 1958 recognized the Iraqis as the only source of state authority and separated the powers within the legal order to some extent, besides the incorporation and recognition of civil, political and economic rights of people including the collective rights of the Kurdish minority within the unity of Iraq.⁴⁵ However, the Iraqis witnessed not much of the constitutional promises and their overall situation improved not considerably by the heads of the revolution.⁴⁶ During the 1960s, Iraq experienced two other military coups which were in 1964 and in 1968.⁴⁷ The heads of the coups might have

political and military strives of the Kurds and Assyrians against the Iraqi Army for their own independence, the conscription law to expand the military forces and refusing people to abide by, the assassination of the kings of the country, military coups, banning political parties, censorship of media, imposing curfews, declaration of martial law, see Constance A. Johnson, *supra* note 4, at 16-20; See also: Anne Alexander, "Daring for Victory: Iraq in Revolution 1946-1959", 99 *International Socialism* (2003).

⁴⁴ The 1958 Constitution, *supra* note 6, Arts. 1, 2.

⁴⁵ *Ibid*, Arts. 1- 23.

⁴⁶ See Uriel Dann, *Iraq Under Qassem: A Political History, 1958-1963* (New York: Praeger, 1969); Avshalom H. Rubin, "Abd al-Karim Qasim and the Kurds of Iraq: Centralization, Resistance and Revolt, 1958-63", 43 (3) *Middle Eastern Studies* (2007).

⁴⁷ The military coups were carried out by the notable political figures: Abdu Salam 'Arif led the coup of 1964 and Ahmed Hassan al-Bakir led the coup of 1968. Although these two personalities were both considered themselves socialists but their worldviews different. 'Arif was a rightist pan-Arabist who advocated the unity of Iraq with Egypt while al-Bakr was a leftist and nationalist supported the remaining independent Iraq, see Constance A. Johnson, *supra* note 4, at 21-29.

disputed over many political issues but the consequence of their political agenda brought about nothing new practically except for a minor constitutional change relating to the reflection of the major world ideologies from democratic socialism to democratic popularism.⁴⁸ Moreover, the coups pragmatically resulted in repressive dictatorship through keeping the state powers within their oligarchic cycle. Consequently, the legal order, besides its poor theoretical legislation and codification, turned into a suppressive mechanism by the state institutions against the popular will of the Iraqis, particularly during the reign of Baathist Regime and more particularly during the presidency of Saddam Hussein.⁴⁹ Following the intervention of the US-led Coalition in Iraq in 2003, the LASITP as a provisional constitution passed by the Iraqi Governing Council in 2004.⁵⁰ The law initially led to establish a semi democratic legal order in the country through the popular representation of the Iraqis and the legislation, amendment and abolishment of some legal rules⁵¹ but the state institutions endured not the political and sectarian violence and the legal order consequently was entirely destroyed and the

⁴⁸ See the 1964 Constitution, *supra* note 7, Art. 1; The 1968 Constitution, *supra* note 7, Art. 1; The 1970 Constitution, *supra* note 7, Art. 1.

⁴⁹ Saddam Hussein was one of the key figures of the Baathist party who was active since the military coup of the 1968. After the Baathist party came to power in 1968, Saddam became the vice president of Iraq until 1979 when he compelled President, Ahmed Hassan al-Bakr to leave the power to him. In 1979, he took the power as the state president and ruled the country tyrannically until he was eventually overthrown by the US-led- Coalition in 2003, Constance A. Johnson, *supra* note 4, at 21-31; Rebaz Rasul Khdir, *supra* note 8, at 131,132.

⁵⁰ See LASITP, *supra* note 9.

⁵¹ Bruce R. Pirnie and Edward O'Connell, *Counterinsurgency in Iraq (2003–2006)* (Pittsburgh: Rand Cooperation, 2008), 10, 11.

country become a *de facto* tribal and militia led state.⁵² The LASITP remained in force until finally was superseded by the 2005 permanent constitution which was essentially based on and also derived many rules from the LASITP.⁵³ The 2005 Constitution was the most ever pragmatic constitution that Iraq has ever experienced.⁵⁴ The reason was that this constitution was entirely based on the historical, socioeconomic, religious and denominational realities of the societal constituents of the country and not the imported ideals of other peoples and societies.⁵⁵ However, the state has still been suffering from a considerable ordinary and subordinate legislative dilemma which has eventually led to improper organization of the state's legal order.⁵⁶

⁵² Ariel I. Ahram, *War-Making, State-Making and Non-State Power in Iraq* (Yale Program on Governance and Local Development, 2015) 11-19.

⁵³ See the 2005 Constitution, *supra* note 10.

⁵⁴ The 2005 Constitution was drafted by a committee of 70 members of the Transitional National Assembly who represented different Iraqi religious and ethnic groups, besides the participation of foreign lawyers and diplomats through their drafting advices to enact a constitution which reflect the needs and demands of all Iraqis, see Zaid Al-Ali, *The Struggle for Iraq's Future: How Corruption, Incompetence and Sectarianism have undermined Democracy* (London et al.: Yale University Press, 2014); Haider Hamoudi, *Negotiating in Civil Conflict: Constitutional Construction and Imperfect Bargaining in Iraq* (Chicago: University of Chicago Press, 2013).

⁵⁵ See the 2005 Constitution, *supra* note 10, Preamble.

⁵⁶ The laws in Iraq are a series of decrees issued from various rules such as Ottoman, Monarchic, Baathist and parliamentary. The laws are the necessary result of different periods and different political ideologies and philosophies; therefore, there exists substantial confusion in their application and implementation and to solve this confusion, the country's legal order needs to be reorganized through a proper process of determination of the valid laws and the ones that need to be amended or

3. The Articulation of Islam in the Iraqi Constitutions

In 1839, the Ottoman Sultan, Abdülmecid I⁵⁷ issued the first imperial decree called *Tanzimat*. The purpose behind the issuance of the decree was to reform and reorganize the legal order of the Ottoman Empire on the basis of the new Western legal developments and ideals. The Sultan's reforming campaign lasted nearly four decades and eventually ended with the adoption of the first Ottoman constitution in 1876.⁵⁸ The constitution mentioned Islam as the official state religion along

repealed, see *Classification of Laws in Iraq*, Institution for International Law and Human Rights, (2009). Retrieved 2 July 2024, https://iilhr.org/wp-content/uploads/2022/09/Classification-of-Laws-in-Iraq_08.01.22.pdf.

⁵⁷ Abdülmecid I was one of the prominent figures of the Ottoman Empire who took the authority of the Empire's sultan through succeeding his father in 1839. Following his assention, the Sultan announced the process of reorganization of his Empire through the enactment of the *Tanzimat* Edict. The reason which encouraged the Sultan to take such a step was the spread of nationalism among people and the *Tanzimat* edict was an Ottomanist policy of the Sultan to encounter it, see, for example, Jakub Mazanec, "The Ottoman Empire at the Beginning of *Tanzimat* Reforms", 2 *Prague Papers on the History of International Relations* (2016), 21-45; Indra Permana and Rulian Putra *et al.*, "Political Struggle for the Renewal of the Ottoman Empire", 12 (1) *Journal Program Studi Pendidikan Sejarah* (2024).

⁵⁸ Constance A. Johnson, *supra* note 4, at 9-10; For detailed information on the subject of *Tanzimat* see: Wajih Kawtharani, "The Ottoman *Tanzimat* and the Constitution", 1 (1) *Al Muntaha* (2018), 50-64; Ishtiaq Hussain, *The Tanzimat: Secular Reforms in the Ottoman Empire, Faith Matters* (2011); Alan Palmer, *The Decline and fall of the Ottoman Empire* (London: John Murray Publishers, 1995); Yusuf Çifci, "Modernisation in the *Tanzimat* Period and the Ottoman Empire: An Analysis of the *Tanzimat* Edict within the Scope of the Modern State", 2 (2) *MM-International Journal of Social and Humanistic Science* (2019), 14-24.

with guaranteeing the freedom of faith for the non-Muslims within the empire in article 11.⁵⁹

When the Iraqi state was established in 1924, the political system was founded on the modern positive ideals.⁶⁰ However, Islam still remained as the state religion as it was the prevailing faith and its practice was preserved as the right of all Muslims with the consideration of its different sects and practices within the country. The 1925 Constitution included: "Islam is the official religion of the State. Freedom to practise the rites; of the different sects of that religion, as observed in Iraq, is guaranteed..."⁶¹

This provision was likely derived from the 1876 Ottoman Constitution and the Ottomans had probably copied its formulation from the European reference to Christianity in their constitutions.⁶² It is worth mentioning that this constitutional provision became an official and repetitive reference to Islam in the subsequent Iraqi constitutions of 1958, 1964, 1968, 1970 and 2005.⁶³ In other words, all the constitutions that were enacted after the 1925 Constitution, included two articles relating to Islam which one was a direct

⁵⁹ The article states: "Islam is the state religion. But, while maintaining this principle, the state will protect the free exercise of faiths professed in the Empire, and uphold the religious privileges granted to various bodies, on condition of public order and morality not being interfered with", see the Ottoman Constitution, Promulgated the 7th Zilbridje, 1293 (11/23 December, 1876) (The 1876 Ottoman Constitution), Art. 11.

⁶⁰ See the 1925 Constitution, *supra* note 5.

⁶¹ *Ibid*, Art. 13.

⁶² See the 1876 Ottoman Constitution, *supra* note 59, Art. 11.

⁶³ See the 1958 Constitution, *supra* note 6, Art. 4; the 1964 Constitution, *supra* note 7, Art. 3; The 1968 Constitution, *supra* note 7, Art. 4; The 1970 Constitution, *supra* note 7, Art. 4; The 2005 Constitution, *supra* note 10, Art. 2.

and the second one was an indirect reference to the religion. The direct reference was the same articulation of the 1925 Constitution which was that 'Islam is the state religion'. The indirect reference was, on the other hand, the recognition of the right of people to enjoy the freedom of religious practice.⁶⁴ However, the relevant articles of the 1964 Constitution, 1968 Constitution and the 2005 Constitution demonstrated more profound objectives; the role of Islam is more than just the state religion and a civil right in these constitutions but rather a fundamental principle and a source of legislation. Article 3 of the 1964 Constitution and article 4 of the 1968 Constitution similarly stated: "Islam is the state religion and the fundamental rule in the constitution....".⁶⁵ Article 2 of the 2005 Constitution states: "Islam is the official religion of the State and is a foundation source of legislation".⁶⁶ Thus, such articulations aimed to pragmatize the constitutions to play greater practical roles in improving the situation of the country. The 2005 Constitution furthermore prevents the adoption of any law that in any way contradicts Islam, as another provision of the same article states: "[n]o law may be enacted that contradicts the established provisions of Islam".⁶⁷ The article, in other words, is a reacceptance of Islam as a basis of legal order in the country to utilize its alternative mechanisms in the process of societal and state regulation and development.

⁶⁴ See the 1958 Constitution, *supra* note 6, Arts. 4, 12; the 1964 Constitution, *supra* note 7, Arts. 3, 28; The 1968 Constitution, *supra* note 7, Arts. 4, 30; The 1970 Constitution, *supra* note 7, Arts. 4, 25; The 2005 Constitution, *supra* note 10, Art. 2 (2).

⁶⁵ See the 1964 Constitution, *supra* note 7, Art. 3; The 1968 Constitution, *supra* note 7, Art. 4.

⁶⁶ The 2005 Constitution, *supra* note 10, Art. 2 (1).

⁶⁷ *Ibid*, Art. 2 (1) (A).

It is worth mentioning that the content of article 2 of the 2005 Constitution was previously mentioned in article 7 of the LASITP and was entirely derived from that article. The article stated: “Islam is the official religion of the State and is to be considered a source of legislation. No law that contradicts the universally agreed tenets of Islam...may be enacted during the transitional period”.⁶⁸ However, a comparison of the wording of the two articles indicated that the formulation of article 2 of the 2005 Constitution was linguistically more precise and much stronger for the application and enforcement of Islam and revival of its principles within the Iraqi legal order.

4. The Status of Islam in the pre-2005 Constitutions

As we previously mentioned that the 1925 Constitution fully reflected the Western secular principles and referred to religion within the scope of the fundamental rights and freedoms.⁶⁹ According to article 13 of the Constitution, Islam was the official religion of the state and the followers of this religion would enjoy the right to freely perform their religious ceremonies regardless of any denominational affiliation or

⁶⁸ See LASITP, *supra* note 9, Art. 7.

⁶⁹ In 1918, Great Britain occupied Iraq as part of the Ottoman Empire and two years later the League of Nations classified the occupied land as a British Mandate based on article 22 of its Covenant but the 1920 revolt in Iraq resulted in the abolishment of the mandate status and the establishment of the Kingdom of Iraq under King Faisal I. Two years later in 1922, the two countries entered into Anglo-Iraqi Treaty and based on which Great Britain was instead granted a role in the process of administration of Iraq. Such a role continued until 1932 when the two countries concluded another Anglo-Iraqi Treaty which led Iraq to achieve its full independence and form the Hashemite Kingdom in 1932, see Constance A. Johnson, *supra* note 4, at 12-16.

discrimination.⁷⁰ In addition to the Islamic religion, the constitution entailed the freedom of conscience and the freedom of practicing any other form of worship on condition that the practice conforms the accepted customs of the country and endangered not the order, violated not the discipline and infringed not the public morality in the country.⁷¹

As to the 1958 Constitution, the constitution referred to Islam in two articles which were article 4 and article 12.⁷² Article 4 was a direct and brief reference to Islam which accordingly Islam was the official religion of the state.⁷³ Article 12, on the other hand, was an indirect reference to the religion which guaranteed the freedom of performing religious rituals as long as the rituals conflicted not with the preservation of public order and morality.⁷⁴

The 1964 constitution referred to Islam more profoundly and Islam possessed a higher status in it comparing to the other

⁷⁰ See the 1925 Constitution, *supra* note 5, Art. 13.

⁷¹ *Ibid.*

⁷² As we previously mentioned that the 1958 Constitution was adopted following the revolution of 14 July 1958 in a military coup led by the Colonel Abd al-Karim Qasim against the Hashemite Monarchy and thus the colonial era and its political influence ended in the country. Qasim was Ideologically known to be an Iraqi Nationalist; He was not a communist nor was he a pan-Arabist who favored the unification of Arabic nations and lands into a modern political organization. He however retained a balance between the two directions in the country through the constitutional definition of Iraq as part of the Arabic Nation and establishment of friendly relations with the Soviet Union and seeking political recommendations from the country's communists, see Jamal Mardan, '*Abd al-Karim Qasim al-Bidayat wa al-Squt* (Maktabat al-Sharqiyat, 1999).

⁷³ See the 1958 Constitution, *supra* note 6, Arts. 4.

⁷⁴ *Ibid.*, Art. 12.

mentioned constitutions.⁷⁵ The first reference to Islam in the constitution was made in the preamble which regarded the Islamic spirit alongside the Arab culture, the bases of serving people, the land and the national unity of the country.⁷⁶ This reference was an essential turning point as it was the reflection of the belief of the country's majority population in the process of the regulation of political system and legal order. The second reference to Islam was made in article 1 which dealt with the country's political system. The article identified Iraq as a democratic socialistic state on the bases of the Arab cultural heritage and Islamic spirit.⁷⁷ The article, on the other hand, demonstrated that the drafters of the constitution were less influenced by the major world ideologies and rather were pan-Arabists and attempted to draft a constitution that was a pragmatic reflection of the common Arabic and Islamic culture as well as regional political aspirations. Article 3 of the constitution still enhanced the status of Islam; the article recognized it as the official state religion as its previous constitutions but also considered it as the basic principle of the constitution.⁷⁸ Although the interpretation of Islam as the basic rule of the constitution might have caused some jurisprudential

⁷⁵ The 1964 Constitution was adopted after the victory of the Ramadan Revolution in a military coup led by the Baathists and Pan-Arabists of Iraq against the Regime of Abd al-Karim Qasim on 8 February 1963. The Pan-Arabists led by Abd al-Salam Arif finally expelled the Baathists from their government and established an Arabic based republic. Arif planned to join Egypt and Syria to form an Arabic federation under the Egyptian President, Jamal Abdul -Nasr but he was assassinated in 1966 and the federation was never realized, see Ali Khiun, *Thawrat 8 Shubat 1963 fi al- 'raq: Al-Sira 'Aat wa al-Ta'awlat* (Dar Sh'un al-Thqafat, 1990).

⁷⁶ See the 1964 Constitution, *supra* note 7, preamble, para.1.

⁷⁷ *Ibid*, Art.1.

⁷⁸ *Ibid*, Art. 8.

confusion, especially at the time of the enactment of the constitution, yet one could interpret such an articulation as that the laws that would be legislated on the basis of the constitutional principles, must be compatible with Islamic principles and values. It is worth noting that this reference was repeated in the 2005 Constitution but in much clearer articulation.⁷⁹ Article 28 of the 1964 Constitution once again referred to Islam but the reference was indirect and within the scope of the fundamental human rights and freedoms, such as the freedom of worship. According to the article, religious freedom was guaranteed for everyone in Iraq and everyone was free to perform religious ceremonies so long as the performance conflicted not with public order and public moral values.⁸⁰

As for the 1968 Constitution, many of its articles were copied from the 1964 Constitution, especially those related to the status of Islam.⁸¹ In other words, the status of Islam was similarly and considerably high and essential for the ordinary legislation in the country. Article 1 of the constitution defined

⁷⁹ The 2005 Constitution, *supra* note 10, Art. 2.

⁸⁰ See the 1964 Constitution, *supra* note 7, Art.28.

⁸¹ The 1968 Constitution was adopted after Abd al-Rahman Arif succeeded his brother Abd al-Salam Arif in 1966. Abd al-Rahman Arif was ideologically known to be more nationalistic than his younger brother, Abd al-Salam Arif but continued his policy and retained relations with the Jamal Abd al-Nassir's Regime. The difference between the constitutions of 1964 and 1968 was mostly related to article one on the country's political system which was a socialistic republic in the 1964 constitution and a popular republic in the 1968 Constitution, see Zainab al-Zahiri, '*Abd al-Rahman 'Arif wa dawruhu al-Syasi fi al-'Iraq lil fatrat* (1916-2007) PhD thesis (University of Yarmouk, 2010); the 1964 Constitution, *supra* note 7, Art. 1; the 1968 Constitution, *supra* note 7, Art. 1.

Iraq as a democratic state and also attributed the basis of such a system in the country to the Arab cultural heritage and Islamic spirit.⁸² Article 4, on the other hand, declared Islam as the religion of the state and also the basic rule of the constitution as its predecessor.⁸³ Article 30 similarly guaranteed the religious freedom in the country according to which citizens could freely perform their religious worship and ceremonies including Muslims.⁸⁴

The drafters of the 1970 Constitution referred to the formulation of the 1968 Constitution as to the definition of the republic of Iraq and identified the state as popular democratic; however, in determining the state's main goal, they adopted the approach of the drafters of the 1964 Constitution which was realizing a socialist system.⁸⁵ Furthermore, the 1968 Constitution attributed the basis of its political system to the Arab heritage and Islamic spirit but the 1970 Constitution entailed no such reference which a *contrario* reading signified that it derived its political system from the socialist heritage

⁸² See the 1968 Constitution, *supra* note 7, Art. 1.

⁸³ *Ibid*, Art.4.

⁸⁴ *Ibid*, Art. 30.

⁸⁵ The 1970 Constitution was enacted after the Baathist party overthrew the Abd al-Rahman Arif's Regime and gained power in a military coup known as the revolution of 17 July under the leadership of Ahmad Hassan al-Bakr in 1968. The Baathist party was based on the principles of secularism, socialism and Arab nationalism but endorsed not the idea of unification with Egypt within an Arabic federation under Jamal 'Abd al-Nasr, see Rakia al-Kayassi, *Iraq under Saddam Husayn and the Ba'th Party*, PhD thesis (University of Glasgow: 1998); the 1970 Constitution, *supra* note 7, Art. 1; the 1968 Constitution, *supra* note 7, Art. 1; the 1964 Constitution, *supra* note 7, Art. 1.

and the experience of the communist countries.⁸⁶ Although this constitution recognized Islam as the state religion in article 4, it considered not it a fundamental principle in the constitution which consequently enabled the legislative authority to enact laws without any regard to their compatibility with Islamic established principles.⁸⁷ The last article that made a reference to Islam in this constitution was article 25 which guaranteed the freedom of religion, belief and performance of religious rituals as long as the enjoyment of the freedom contradicted not the legal and constitutional principles, public order and morality.⁸⁸ In brief, the status of Islam in the 1970 constitution was merely symbolic and the constitutional reference to Islam was secular in the sense that Islam was not meant to be part of political life and the basis of social and administrative regulation.

5. The Status of Islam in the 2005 Constitution

In the 2005 Constitution, unlike other constitutions, the drafters commence in an Islamic way: “In the name of God, the Most merciful, the Most compassionate”.⁸⁹ Such a commencement indicates the belief of man in God and in His absolute sovereignty and supervision in the universe. It further implies the man's successive responsibility to God on earth and the constant needs of all creation for His generosity and kindness

⁸⁶ See the 1970 Constitution, *supra* note 7, Art. 1; the 1968 Constitution, *supra* note 7, Art. 1.

⁸⁷ See the 1970 Constitution, *supra* note 7, Art. 4.

⁸⁸ *Ibid*, Art. 25.

⁸⁹ The 2005 Constitution, *supra* note 10, preamble.

as Islam refers to within the scope of God's oneness and His attributes.⁹⁰

After beginning in the name of God, the drafters refer to Surah al-Isra, verse 70 of the Quran which says: "We have honored the sons of Adam".⁹¹ The literal meaning of this verse is that 'God has indeed bestowed favor upon the descendants of Adam' but the famous Islamic exegetes conceptually interpret the verse as follows: al-Tabari says the meaning of honor in this verse, is giving man the power over other creation.⁹² As for al-Razi, al-Qurtubi and Ibn Kathir, they all interpret the meaning of honor as a decent body and soul or the best and perfect form for man.⁹³ It is worth mentioning that the purpose of the

⁹⁰ See Abi al-Fida' al-Dimashqi, *Tafseer al-Quran al-'Azim*, Ta'qiq: Sami al-Salamat, Vol. 1 (Beirut, Dar Taibat lil Nashr wa al-Tawzih, 1997), 116-127.

⁹¹ The 2005 Constitution, *supra* note 10, preamble.

⁹² Al-Tabari interprets the verse as follows: "By giving them power over other creations and by making the rest of the creation subservient to them", see Al-Tabari, *Tafsir al-Tabari: Jamih al-Bayan 'an Ta'wil āi al-Quran*. Vol. 14. (Cairo: The Centre for Arabic and Islamic Research and Study in Dar Hijr, 2001), 672-673.

⁹³ Al-Razi, in the interpretation of the verse, states: "and know that the human being is a composite essence of the soul and body and the human soul is the most noble of the souls in the underworld...", see Imam Muhammad al-Razi, *Tafseer al-Fakhr al-Razi*, Vol. 21 (Beirut: Dar al-Fkr, 1981), 13; Al-Qurtubi says: "we granted them generosity in the sense of honor and favor. This is the generosity of denying deficiency and not the generosity of wealth. This generosity includes their creation in the form of tall stature and good appearance...", see Abi 'Abdullah al-Qurtubi, *Al-Jami' li Ahkam al-Quran*, Vol. 13 (Beirut: Muasasat al-Rsalat, 2006), 125.126; Ibn Kathir states: "God Almighty, from His honor and generosity to the children of Adam, informs that he has created them in the best and most perfect forms", see Abi al-Fida' al-Dimashqi, *supra* note 90, at 97.

drafters of the 2005 Constitution in referring to this verse, is first of all, to reiterate the belief in God and His guidance for the earthly life of mankind as expressed in Islam. Moreover, they want to demonstrate that the Qur'an is the most true and worthy expression that one can refer to and follow it in carrying out his/her affairs. As for the meaning of the verse, the drafters aim to define the Iraqi citizen through the God's expression, as an honorable creation and personality. He/she therefore deserves a dignified life through a comprehensive and strong organizational system for his/her life.

In the first paragraph of the preamble, the drafters describe Iraq as the land of prophets and messengers and the resting place of righteous men⁹⁴ as a reminder to the Iraqis that the inhabitants of this land have previously been responsible for reforming and organizing the lives of all humanity and not just themselves. Therefore, they must take on this responsibility again but first by reorganizing their lives and their social system. In the second paragraph of the preamble, the drafters recognize the God's right over citizens, among other principles, to build a new Iraq which is free of sectarianism, racism, and discrimination.⁹⁵ In the last paragraph of the preamble, the

⁹⁴ The paragraph states: “[w]e, the people of Mesopotamia, the homeland of the apostles and prophets, resting place of the virtuous imams, cradle of civilization, crafters of writing, and home of numeration. Upon our land the first law made by man was passed, and the oldest pact of just governance was inscribed, and upon our soil the saints and companions of the Prophet prayed, philosophers and scientists theorized, and writers and poets excelled”, see the 2005 Constitution, *supra* note 10, Preamble, para.

1.

⁹⁵ The paragraph states: “[a]cknowledging God's right over us, and in fulfillment of the call of our homeland and citizens, and in a response to the call of our religious and national leaderships and the determination of our great authorities and of our leaders and politicians, and in the midst of

drafters take upon themselves through the values and standards of the divine messages along with the scientific findings and man's civilization, to decide on the enactment of the constitution to create a bright future in Iraq.⁹⁶

In article 2, the drafters clearly illustrate the status of Islam as the official religion of the state and also refer to it as a basic source of legislation: "Islam is the official religion of the State and is a foundation source of legislation".⁹⁷ The drafters moreover, in the same article, ensure that no law shall be passed in the country whose content contradicts the essence of Islam: "[n]o law may be enacted that contradicts the established provisions of Islam".⁹⁸

As for the first principle, "Islam is the official state religion", the drafters recognize the religious identity of the majority of the Iraqi population by recognizing their religion as the official religion of the country. This constitutional recognition in the 2005 Constitution and previous ones was considerably crucial, yet it was just a secular frame for the enjoyment of the freedom of religious practice and worship and not identifying Iraq as a religious state. Therefore, the status of Islam within this constitutional articulation is only symbolic and the paragraph

international support from our friends and those who love us...", see the 2005 Constitution, *supra* note 10, Preamble, para. 2.

⁹⁶ The paragraph states: "[w]e, the people of Iraq, of all components and across the spectrum, have taken upon ourselves to decide freely and by choice to unite our future, to take lessons from yesterday for tomorrow, and to enact this permanent Constitution, through the values and ideals of the heavenly messages and the findings of science and man's civilization. The adherence to this Constitution preserves for Iraq its free union of people, of land, and of sovereignty.", see the 2005 Constitution, *supra* note 10, Preamble, para. 5.

⁹⁷ See the 2005 Constitution, *supra* note 10, Art. 2 (1).

⁹⁸ *Ibid*, Art. 2 (1) (A).

only demonstrates Islam as a spiritual message between man and God and not as a comprehensive system for organizing social life. However, in the second paragraph: “Islam...is a foundation source of legislation”, the drafters aim to extend the status of Islam from only being the recognized belief of people to also regard it as an important legal basis for the social and political organization, since the role of Islam in directing human behavior is more efficient than the positive rules, particularly in such a composite state like Iraq which constantly suffers from political conflicts and distrust among its communities. It is worth mentioning that the drafters of the Egyptian Constitution have used the term ‘Islamic Shari’a’⁹⁹ and the drafters of the Syrian Constitution have used ‘Islamic jurisprudence’¹⁰⁰ instead but due to the fact that the linguistic scope of the term ‘Islam’ is broader that includes the general principles of the religion whether primary or secondary, the drafters of the Iraqi Constitution preferred to use such a term. Another important word in this articulation is the word ‘source’. The drafters’ intention in using this term while formulating the paragraph, was regarding Islam as the basis of legal rules and the framework for the legal regulation of social behavior in Iraq.¹⁰¹ As for the word ‘foundation’ the implication is that the legal rules were entirely to be derived from the basis of the belief, social organization, political agenda, economic solution, cultural framework, geographical development and historical

⁹⁹ See the Constitution of the Arab Republic of Egypt (adopted 11 September 1971), Art. 2.

¹⁰⁰ See the Constitution of the Syrian Arab Republic (adopted 13 March 1973), Art. 3.

¹⁰¹ Haidar al-Kariti, *Al-Tanzim al-Dasturi limakanat al-Sharihat al-Islamiyat fi al-Nizam al-Qanuni*, 2 (5) *Mujalat al-Atruhat lil ‘Lum al-Insaniyat* (2017), 5-20.

influence of Islam.¹⁰² In simpler words, the drafters' intention in using the term 'foundation source' was considering Islam as the primary source of legislation which is based on the objective and material means. It should also be noted that when the ordinary legislation is passed by parliament on the basis of Islam or taking the Islamic principles into consideration, the laws must enter into direct force and be binding upon all. In the event of any violation, the judiciary must take the violators accountable. In carrying out this task, the court, according to some constitutional scholars, must apply the Islamic principles as its main source, because the constitutional provisions are not only enacted for the legislative authority alone but for the judiciary as well.¹⁰³ Here a question arises whether Islam is the only main source of legislation or is it one of the main sources of the process in Iraq? The answer to this question is that although there are many different views among the constitutional scholars but the reasonable view to the researcher of this study is that considering the cultural situation, societal reality, linguistic implication and the purpose of the constitution, Islam must be interpreted as one of the main sources alongside custom and rules of justice and not the main source of legislation.¹⁰⁴ With regard to the term 'legislation', the term is read comprehensively and refers to any institution which makes laws, whether it is constitutional,

¹⁰² *Ibid.*

¹⁰³ Zaid Al-Ali and Yussef Auf, *The Iraqi Constitution: Analysis of the Controversial Articles, Solutions and Recommendations*, 1st ed. (Amman: Friedrich-Ebert-Stiftung, 2020), 41.

¹⁰⁴ For more information on this subject, see Fathi Fkri, "Ta'liq 'Ala Iqtra' Tahdil al-Maddat (2) Min al-Dastur al-Kwaiti", 18 (4) *Mujalat al-Hquq* (1994), 286; 'Awz Muhammad, *Dirasat fi al-Fiqh al-Jinai al-Islami* (al-Qahira, Dar al-Matbu'at al-Jamhiyat), 7.

ordinary legislative institution or any governmental entity which issues regulation and instructions. However, there is also a view in constitutional jurisprudence that interprets the term 'legislation' as only parliament.¹⁰⁵

As for the third paragraph of article 2: “[n]o law may be enacted that contradicts the established provisions of Islam”, it reflects the socio-political reality of Iraq that requires Islam to be more than just the state religion and a main source of legislation; accordingly, the whole process of socio-political formation and organization must be conducted in the light of Islam.¹⁰⁶ In other words, the constitution places a strong restrain on the legislative power in the process of enacting laws to take into account the constant and complete compatibility of the enacted laws with the principles of Islam. The main question in this paragraph, is that what is actually meant by the established principles of Islam? To answer this question, we ought to make a reference to the decision of the Egyptian Supreme Constitutional Court which interprets the term as: “the general principles of Islamic law which are definite by proof and implication”.¹⁰⁷ It is worth mentioning that if the parliament passes a law that contradicts such Islamic principles, the contradiction will lead to the unconstitutionality of the laws and consequently their annulment before the Federal Supreme Court. This is not only based on article 2, paragraph 1 but it is also in the light of article 13 which is on the superior characteristic of the constitution and the nullity of

¹⁰⁵ Fathi Fkri, *supra* note 104, at 283-287; ‘Abdul ‘Amid Mutawalli, *Al-Sharihat al-Islamiyat Kamasdar Asasi lil tashri*’ (Al-askandariyah: Munshaat al-Ma’arif), 23.

¹⁰⁶ Zaid Al-Ali and Yussef Auf, *supra* note 103, at 39, 40.

¹⁰⁷ The Ruling of the Supreme Constitutional Court of Egypt (4/5/1985), in Zaid Al-Ali and Yussef Auf, *supra* note 103, at 42.

any law or provisions of any law that contradict the content of the Constitution whether the law is federal or state law.¹⁰⁸

It is worth mentioning that article 2, paragraph 2 of the 2005 constitution reaffirms the Islamic identity of the majority of the Iraqi population along with the recognition of the religious rights of non-Muslims in Iraq through the freedom of belief and practice of religious minorities in their worship.¹⁰⁹ Article 3 recognizes Iraq as a multi-ethnic, multi-religious and multi-sectarian and also identifies it as part of the Arab League and the Islamic world.¹¹⁰ Finally, article 43 once again refers to the freedom of Iraqi citizens to worship and perform religious ceremonies.¹¹¹

¹⁰⁸ The article states: “[f]irst: This Constitution is the preeminent and supreme law in Iraq and shall be binding in all parts of Iraq without exception. Second: [n]o law that contradicts this Constitution shall be enacted. Any text in any regional constitutions or any other legal text that contradicts this Constitution shall be considered void.”, see the 2005 Constitution, *supra* note 10, Art. 13.

¹⁰⁹ The article states: “[t]his Constitution guarantees the Islamic identity of the majority of the Iraqi people and guarantees the full religious rights to freedom of religious belief and practice of all individuals such as Christians, Yazidis, and Mandeans Sabians.”, the 2005 Constitution, *supra* note 10, Art. 2 (2).

¹¹⁰ The article states: “Iraq is a country of multiple nationalities, religions, and sects. It is a founding and active member in the Arab League and is committed to its charter, and it is part of the Islamic world.”, the 2005 Constitution, *supra* note 10, Art. 3.

¹¹¹ The article states: “[f]irst: The followers of all religions and sects are free in the: 1. Practice of religious rites, including the Husseinite rituals. 2. Management of religious endowments (waqf), their affairs, and their religious institutions, and this shall be regulated by law. Second: The State shall guarantee freedom of worship and the protection of places of worship.”, see the 2005 Constitution, *supra* note 10, Art. 43.

6. The Practical Extent of Legislative Gradualism and Constitutional Supremacy Relating to Islam

Iraq has experienced many serious challenges related to the legal regulation of its internal issues including the challenges of constant political changes, the ancient enactment of its ordinary legislations, the poor mindset of political representation and pragmatic and intentional negligence in reviewing and enacting new laws. Therefore, the principles of legislative gradualism and constitutional supremacy have not been fully implemented until the enactment of the 2005 Constitution and even after the enactment process of the Constitution.¹¹²

A look at the ordinary legislation in Iraq makes us understand clearly that the essential laws of the country like civil law, criminal law, administrative law, criminal procedure law and civil procedure law are outdated as their enactments date back to the second half of the previous century.¹¹³ The laws might have often undergone some little amendments but there are still

¹¹² See *Classification of Laws in Iraq*, *supra* note 56. The Iraqi Supreme Constitutional Court states: “the legislative hierarchy in Iraq is constitutionally and legally based on the regulation of laws from highest to lowest Status (constitution - laws - regulations - instructions) if the constitutional legislator limits the jurisdiction of the Federal Supreme Court to only examining the constitutionality of the laws and regulations in force....”, see the Iraqi Federal Supreme Court Decision no. 144/Federal/2018, in Republic of Iraq: Federal Supreme Court, Decisions and Judgments Issued by the Federal Supreme Court. Retrieved 2 July 2024, <https://www.iraqfsc.iq/Judgments-decisions-en.php>.

¹¹³ The Civil Law, Law no. 40 of 1951 as amended; the Penal Law, Law no. 111 of 1969 as amended; the Civil Procedure Law, Law no. 83 of 1969 as amended; the Criminal procedure Law, Law no. 23 of 1971 as amended; the Discipline for State and Public Sector Employees Law, Law no. 14 of 1991 as amended; the Juveniles’ Welfare Law, Law no. 76 of 1983 as amended.

many provisions that they need to be seriously and comprehensively reformulated and amended in the light of the new constitution and the contemporary legal principles.

These laws that we mentioned above have initially been issued at the time when Islam was only the official state religion and not the main source of legislation in the constitution, especially before the enactment of the 1964 and 1968 constitutions and after their suspension.¹¹⁴ Therefore, the influence of Islamic law on the laws is extremely limited except for the personal status law which has been entirely derived from the Islamic jurisprudence.¹¹⁵ Some of the laws in which Islam has not been considered the source of their enactment, they lack not the reflection of the Islamic principles solely but also some of their provisions contradict the basic principles of the religion, such as penal law and civil law.¹¹⁶

Following the adoption of the 2005 Constitution, the Parliament passed a number of new laws in the frame of civil, criminal and administrative legislation but the provisions of these laws also entailed serious issues as the principles of legislative gradualism and constitutional supremacy reflected not fully in them.¹¹⁷ Some of the factors might be new and

¹¹⁴ See the 1958 Constitution, *supra* note 6, Art. 4; the 1970 Constitution, *supra* note 7, Art. 4.

¹¹⁵ See the Personal Status Law, *supra* note 34.

¹¹⁶ See the Civil Law, *supra* note 113, Arts. 171, 1188; the Penal Law, *supra* note 113, Arts. 41, 377, 396, 397, 400, 401, 402.

¹¹⁷ See, for example, the Court's judgment on the articles 9/6, 22/2 and 44/2 of the law on the Political Parties, Law no. 36 of 2015, as violations of the provisions of the Constitution; the Court also ruled that article 2 of the Law relating the Exemption of Foreign Companies and Foreign Subcontractors including Iraqi Subcontractors from Fees, Law no. 46 of 2017, is unconstitutional because it included a financial aspect that would affect the federal budget; according to the ruling of the same Court,

related to the modern structure of the political system, political orientation, political objectives and the nature of contemporary conventional principles derived from Western culture and partially conflict with the Islamic spirit but the essential factors are the same factors that caused the lack of reflection of the principles of legislative gradualism and constitutional supremacy, particularly the principles of Islamic law in the laws before the enactment of the 2005 Constitution.

The issue that has complicated the question is the country's federal system and in particular the state of laws and their implementation in Kurdistan Region¹¹⁸. The Kurdistan Region, due to the ancient, inefficient and even incompatible nature of the laws with its societal realities and needs, its parliament has passed several laws and amended some old ones but the new laws and amended provisions are based on western human

articles 2/2 and 3/1 of the Law on the Authority of Judicial Supervision, Law no. 29 of 2016, was in violation of Articles 47 and 61/5/A of the Constitution; the Court also declared that article 43 of the Federal Traffic Law, law no. 8 of 2019, violated articles 78 and 80/1 of the 2005 Federal Constitution; The Court also considered article 25 of the Property Claims Law, Law no. 13 of 2013, explicitly breached article 14 of the 2005 Federal Constitution in conjunction with article 19 of the same Constitution, see Republic of Iraq: Federal Supreme Court, Decisions and Judgments issued by The Federal Supreme Court, *supra* note 112.

¹¹⁸ Kurdistan Region is a federal region in Iraq since the fall of the Baathist regime and the enactment of the 2005 Constitution. The Region is constitutionally autonomous and has its own parliament, cabinet of ministers and judiciary; However, the region's international relations are based on the Iraq's foreign policy and carried out by the Iraqi diplomatic institutions, see Rebaz Khdir, *the Right to Self-Determination in International Law: the Case of the Kurds in the Middle East*, Master Thesis (National Taras Shevchenko University of Kyiv Institute of International Relations: 2014), 63-65; the 2005 Constitution, *supra* note 10, Art. 1, 4, 117, 141.

rights values and transcends Islamic law, such as the 2011 Act of Combating Domestic Violence¹¹⁹ and the 2008 amendment to Article 3 of the Iraqi Personal Status Law¹²⁰ which restricted polygamy to nearly the extent of the limits of prohibition.¹²¹

Due to the many cases of unconstitutionality of the laws, the jurisdiction of the Federal Supreme Court is extremely active and the Court constantly consider such cases these days¹²², unlike the past times when the Court was merely a symbolic institution and had no practical constitutional review over the laws. It is worth mentioning that part of the cases before the Court are currently related to the incompatibility of the ordinary legislation with the principles of Islamic law.¹²³

¹¹⁹ See the Act of Combatting Domestic Violence in Kurdistan Region, Act no. 8 from 2011.

¹²⁰ See the Law on the Amendment of the Application of Personal Status Law no. 188 of 1959, as amended in the Kurdistan Region-Iraq, Law no. 15 of 2008.

¹²¹ It is worthy mention that the Court has dealt with many cases relating to the legislative acts of the authorities of the Kurdistan Region and decided on the extent of their constitutionality, see, for example, the unconstitutionality of article 46 of the Law of the Ministry of Higher Education and Scientific Research of the Kurdistan Region-Iraq due to the violation of the provisions of articles 19/3 and 100 of the 2005 Federal Constitution; the ruling of the Court on the unconstitutionality of the expression (eleven) in article one of the Iraqi Kurdistan Parliament Election Law on the seats of the minorities of the region, Law no. 1 of 1992, and replacing with (the Kurdistan Parliament shall consist of one hundred members), see Republic of Iraq: Federal Supreme Court, Decisions and Judgments issued by The Federal Supreme Court, *supra* note 112.

¹²² See the cases that the Court has dealt with since its new constitutional basis in 2005: Republic of Iraq: Federal Supreme Court, Decisions and Judgments issued by The Federal Supreme Court, *supra* note 112.

¹²³ *Ibid.*

However, due to the fact that the trial process is somewhat time-consuming, there is still a great deal of such cases which need to be brought before the Court, especially those related to the contradiction of the laws with Islamic law, as they technically and substantially need to be reviewed, reformulated or updated.

In brief, the principles of legislative gradualism and constitutional supremacy have reflected in the ordinary legislation of the country but the reflection is partial and needs to be broadened to cover the whole process of legal enactment, particularly through the activation of the Supreme Constitutional Court and also redrafting the laws or particular provisions of laws. As far as the Islamic principles are concerned, there are many violations in the form of contradictions and non-compatibilities. The reason is particularly that many of the laws have been enacted before the 2005 Constitution. Some have even been passed after the 2005 Constitution but they still entail non-compatible provisions. The reasons for these non-compliances were major political changes or the influence of regional or global ideological agendas or as the result of joining human rights instruments which somehow conflict with the essence of Islam.¹²⁴

¹²⁴ Some of the articles of the below conventions are regarded as incompatible with some established principles of Islam such as the articles on gender equality and non-discrimination and the articles on the religious conversion: International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS171; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3; Convention on the Elimination of all forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13; The Convention on the Rights

Conclusion

Iraq was one of territories that the Islamic Caliphate historically expanded to, following its initial military campaigns in the Middle East Region. The military conquest of the land ultimately resulted in its geographical annexation to Arabia and the transference of Arabia's legal order into it as the system of governance. The Islamic legal order remained in force in Iraq for more than a millennium until eventually was overruled by the British Mandate at the dissolution of the Ottoman Empire in 1921. The new state of Iraq was established as a modern secular political entity in 1924 and the state adopted its first constitution in 1925 in which the secular western principles reflected. One of the principles was marginalizing Islam from being the basis of legal order to a mere consideration of the state religion. This secular constitutional formulation and articulation remained in force until the occurrence of the republican revolution and the enactment of the 1964 interim constitution in which the formulation was slightly amended and Islam, besides its identification as the state religion, was also regarded the basic rule of the constitution. However, in the later interim constitution of 1970, the status of the religion was once again amended and Islam was reidentified as mere official religion of Iraq. The Baathist Regime continued as a secular socialistic regime in which the status of Islam was no more than a personal freedom of exercising religious rituals. Yet, the 2004 LASITP and particularly the 2005 Constitution reincorporated and reformulated Islam as a basic principle for legislative enactment and reflection. However, the legal order still suffers

of the Child (adopted in 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

from the lack of legislative gradualism and constitutional supremacy as to the Islamic principles. The reason is primarily that the enactment of the laws was during the effect of the previous constitutions and when Islam was a mere state religion and not a basic source of legislation. The enhancement of the constitutional status of Islam in the post Baathist legal order was extremely important as Iraq had tried almost all the secular mechanisms to establish a proper political system and legal order in the country but had only partially and tactically succeeded. The enhancement process, in other words, enabled Iraq to utilize the Islamic historical tradition, cultural homogeneity and jurisprudential variety as means to establish a co-existing spirit, national unity and cooperative political agenda which led the country towards a considerable political development, maintenance of security and social prosperity.

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