

УДК 322.172.3

ISLAM'S STRENGTHENING ROLE IN THE IRAQI CONSTITUTION OF 2005

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Поступила в редакцию 22.01.2019

Анализируются нормы Конституции Ирака 2005 года, касающиеся шариата и ислама в целом. С этой целью проводится сравнительный анализ Конституции Республики Ирак с предыдущей Конституцией 1970 года. В ходе анализа выяснилось, что минимальное содержание норм, касающихся шариата в Конституции 1970 года, связано с тем, что у власти достаточно долгий период находилась Партия арабского социалистического возрождения (Баас), для которой характерна националистическая социалистическая идеология. С приходом американской администрации в 2003 году, количество норм шариата было увеличено, в связи с дискредитацией прежнего секулярного режима, а также заигрывания американцев с различными исламистскими течениями страны.

Ключевые слова: конституция, шариат, ислам, шииты, сунниты, демократия, Ирак.

The Republic of Iraq has made a significant way in its constitutional development. Its first constitution was adopted in 1924, and Iraq was one of the first countries in the Middle East that got on the path of construction of a modern law-based society self-regulating through clear government institutions described in the Basic Law.

The Constitution is not just a main regulatory legal act of any country but it is a symbol of cultural and historical identity of the people living in the given territory. This is especially important for Iraq. The country whose roots ascend to the Mesopotamian civilization, that is populated by a variety of ethnoconfessional groups has a need for the Basic Law which can reflect all these features.

However, it can be concluded that throughout the extremely complicated political history of the country the consensus in constitutional construction has not been obtained so far. From the Constitution of 1924 to the Constitution of 2005 Iraq failed to produce a constitution which can be constant in time and include mechanisms to change particular provisions without adopting a new constitution.

From the declaration of the Republic in 1958 and up till 2003 the country was governed by military officers who used tough authoritarian methods. They blocked creation of real representative democratic bodies to prevent emergence and organizational structuring of real opposition to their power [7, c. 44], till the intervention of external forces in 2003.

At different times monarchs, socialists, democrats and others were in power in Iraq. They offered their own decisions to national contradictions. However, there were disagreements on ethnocon-

fessional issues in practice. In Iraq, religious issues have an especially important meaning concerning relationship between state and society.

According to estimates, 97% of Iraqi population exercise Islam, whereas 65% of Iraqi Muslims are Shia and 32% are Sunni. Small percent of the population exercise Yazidism. The main part of them are Yazids living in the north of Iraq (Iraqi Kurdistan). There are a few Mandaism followers in the south of Iraq (about 10,000) [14]. The rest of the population follow various Christian confessions and Churches: Chaldean Catholic Church, Syrian Catholic Church, Armenian Catholic Church, Roman Catholic Church, Assyrian Church of the East, Syrian Jacobite Orthodox Church, Armenian Apostolic Church, Ancient Assyrian Church of the East and others [5, c. 142].

Needless to say, it is impossible to identify the influence of Islam on Iraqi Constitution without the analysis of the Constitution itself.

Drafting of the Constitution 2005

It should be pointed out that the provisional American administration that was controlling Iraq in the transitional period agreed rather reluctantly that the future Constitution would declare commitment to any Islamic principles. The administrator of the Coalition Provisional Authority of Iraq Paul Bremer produced a tough resistance to the attempts to include Islamic principles in any project of future Constitution [16, p. 7]. However, American lawyers were accompanied in their work on the Constitution project by Iraqi jurists including the

reputable Shia spiritual leader Ayatollah Ali al-Sistani; as a result, one could observe the formation of a certain consensus regarding the inclusion into the Constitution some references to Islam [18, p. 554]. However, their number turned out to be rather limited (especially, when compared with the basic laws of Iran or Saudi Arabia).

One should mention the Shia – Sunni contradictions when analyzing the process of the Constitution design of 2005. It appears appropriate to begin with the fact that during the times of Saddam Hussein Shia majority was underprivileged, with Saddam's reliance on the Sunni minority. Accordingly oppressed Shiites had harbored hostility to charismatic leader during the long period when Saddam Hussein was in power. The balance of forces was changed with the arrival of the USA-led allied intervention forces and the overthrow of the Ba`thist regime. The Americans had no choice but to rely on the Shiites who mostly were their natural allies as a result of their antipathy toward the Ba`thist regime in general and to Saddam Hussein in particular. In such circumstances, many Shiites chose to make a tactical alliance with the American administration. The new Constitution reflected influence of some of those Shia Muslims. Moreover, some outstanding Shia jurists (including the Shia spiritual leader, Ali al-Sistani) took part in the preparation of the new Iraqi Constitution. But they could not write a Shia Constitution (like the one in Iran), as this would lead to a too explicit exclusion of the Iraqi Sunni population. In addition, representatives of the provisional American administration would not permit this project because Iran was one of the main enemies of the USA. Sunni jurists were unable to make an impact on the new constitution by definition. As a result, the final version of the constitution was neither Sunni nor Shia. Against this background, the very fact of a reduced number of references to Islam (without Shia or Sunni connotations) might have been regarded as a sort of compromise (note also that such a compromise was very attractive for the American provisional administration).

The analysis of every article of the Constitution goes far beyond the scope of this article. It will rather focus on the provisions which concern Islam and Sharia expressly or implicitly.

One of the first articles of the Basic Law identifies Islam as the official religion of the state with reference to which the legislation is developed. This is maintained in Article 2.1 of the Constitution:

«Islam is the official religion of the state and it is a fundamental source for the legislation» [4].

The statement that Islam is a fundamental source for the legislation is a very important indicator of the role of Islamic law for a country where

Muslims constitute the overwhelming majority of the population. It should be pointed out that the Constitution of 1970 restricted itself to the following statement (Article 4):

«Islam is the state religion» [3].

There is no mention of fundamental Islamic principles of legislation.

It should be noted that there were disagreements among the Iraqi lawyers whether, according to the new constitution, the laws should not contradict «provisions of Islam» or «provisions of Sharia». The final choice was in favor of the former alternative (Hamoudi, 2010: 699). As a result, Section 2 of Article 2 of Iraqi Constitution (2005) was formulated as follows:

«It is not allowed to enact a law which is contrary to the principal provisions of Islam» [4].

Herewith there is an addition:

«It is not allowed to enact a law which is contrary to the principles of democracy» [4].

The provision is complemented with the following legal norm:

«It is not allowed to enact a law which violates rights and freedoms declared by the Constitution» [4].

Of course, one may suspect here some influence of the provisional American administration [12, p. 122]. Moreover the provisions concerning principles of democracy, human rights and freedoms significantly reduce the applicability of some Islamic legal rules such as the punishment for theft by cutting of the hand as required by Sharia [9, c. 203].

Declaring Islam the state religion, the Constitution, however, «guarantees Islamic identity of the majority of Iraqi people and provides full religious rights and freedom of belief for all individuals (including Christians, Yazidi, and Mandaeans)» [4].

On the one hand, the provision should help to prevent communal hostilities. On the other hand, it leads to liberalization of social relations. There is a very different situation in Saudi Arabia where the basic law contains a strong injunction to exercise Islam excluding any other confessions [6, c. 142]. In this respect, the Republic of Iraq is a multireligious state. That is why the provision about freedom of belief in the Iraqi Constitution is the same as in many secular states.

On the other hand, one should note Article 3 which declares Iraq a part of the Islamic world:

«Iraq...is...a part of the Islamic world» [4].

The country has been witnessing increasing insecurity after the overthrow of Saddam Hussein by US-led coalition forces. The instability has been growing due to the following reasons: firstly, there were internal conflicts and rifts after fall of the regime which escalated the confrontation between Shia and Sunni. The representatives of the Shia majority (with the coalition forces support) were

able to take power into their own hands because during Saddam's time they were oppressed. As a result, mutual mass terror attacks between Sunni and Shia militias began. This led to numerous civilian casualties. According to the UN, 34 thousand civilians were killed in 2006 only [6, c. 142]. Secondly, there were terror threats. Since 2003 there is a continuous confrontation between republican authorities and the Iraqi division of al-Qaeda. Due to this fact the Constitution gives special consideration to anti-terrorism efforts. Article 7 states the following:

«The activity of any organizations and groups that use, justify, advocate racism, terrorism, *takfir*¹, ethnic cleansing and incitement to such actions is forbidden. Moreover, the Ba`ath party, its symbols and any kind of new appellations are forbidden. Such organizations cannot be a part of pluralistic system which must be regulated by the law. The state is committed to fight against terrorism in all of its aspects, to provide protection of the state territory from becoming a terrorist base» [4].

In the context of this research, the main interest for us in this Article is constituted by the prohibition of activities of any organizations and groups which use, justify or advocate takfir, i.e. radical Islamist organizations.

Anti-terrorism efforts have produced mixed results despite the constitutional provisions. The famous terrorist al-Qaeda organization triggered the emergence of new terrorist group «Islamic State of Iraq». It occupied some adjacent parts of Syria and renamed itself as «the Islamic State of Iraq and the Levant» on April 8, 2013. Today it is also known as «Islamic State». By 2015 the IS constituted a direct threat for the existence of two nations [2, c. 142]. Before the emergence of the Islamic State the Iraqi government with the help of US succeeded to decrease al-Qaeda activity and push it out to the north of the country. The situation became more complicated and less predictable with the emergence of the Islamic State.

The Constitution establishes flag, national emblem and anthem of the country as symbols of the state that help to consolidate various strata of the population in Iraq. Along with that it recognizes and controls «distinctions, statutory holidays, national and religious events, as well as Hijri and Gregorian calendar» [4].

Thereby the government tries to take into account traditions of the main confessions: Christianity and Islam.

Any Iraqi has the right to freely decide his personal status according to their own confession or other religious choice (Article 41) [4]. Hence, «followers of any religion or sect are free in their own confessions including the Hussayni ceremony (Shia religious ceremony). The disposal of the donations

and the solution of other religious questions are subject to the law. The state guarantees freedom of belief and security of religious places» [4].

Obviously, the Article recognizes the existence of such Muslims institutions as *waqf* and so on.

The influence of Islam as a normative regulator has manifested itself in the activities of the Supreme Federal Court. This judicial authority controls over constitutionality of new laws and explains legal standards. Also, it gives judgments concerning implementation of federal laws and rules. The Court consists of lawyers and experts in Islamic Law and secular regulations.

However, the endowment of the Supreme Federal Court with such wide powers was caused by unwillingness to create a special constitutional court which would be concerned exclusively with the identification of constitutionality of new laws. Thus, article 89 of the Constitution states:

«The Supreme Federal Court is a financially and administratively independent judicial authority. The Court consists of a fixed number of judges and experts in the Islamic Law. The law regulates its membership, method of naming and functioning of the court with the approval of two-thirds of Council of Representatives» [4].

However, it does not appear appropriate to speak of a religious nature of the Supreme Court, because it engages in decisions whether certain laws contradict Islamic principles. It is also supposed to detect whether these laws contradict principles of democracy and human rights. Experts in Islamic Law are employed to find if the laws are compatible with Islamic principles. This firstly shows the respect of judicial authority to Islamic traditions of the country [7, c. 104]. On the other hand, one has all grounds to expect that against the background of the post-2003 balance of power in Iraq, experts in Islamic Law would be representatives of the Shia majority. That is why any compliance test would be in favor of Shia jurisprudence with discrimination against Sunni or it seems like this. The sense of Shia supremacy can disrupt legitimacy of the court in the eyes of Sunni and Kurdish minorities. It can also undermine the spirit of common residence and tolerance. As a result, such a division between Islamic and secular experts in the Supreme Court can potentially produce more harm than good [13, p. 70].

Moreover, the Constitution does not establish an exact proportion between Islamic and secular judges. Though Islamic parties demand that experts in Islamic Law should constitute no less than 50% of members of the Supreme Federal Court, secular parties in the Parliament are against such an allocation because it can infringe secular identity of the state established by Article 1 of the Constitution [1, c. 28].

In fact, one may maintain that the Republic of Iraq has given rather limited opportunities to the Islam Law and Islam to affect its constitutional development since 1970. However, the present Iraqi Constitution is characterized by a more pronounced influence of Islam in comparison with the Constitution of 1970 [11, с. 42]. The Constitution of 2005 has four [4] explicit and two [4] implicit references to Islam and Sharia, whereas the Constitution of 1970 has only one [3] such reference.

Nevertheless, it should be pointed out that the implicit references to Islam in Articles 7, 12 of the present Constitution can hardly be defined as a result of Islamic influence because of their characteristics. The concept of *takfir* (that may be related to Islam) is used in Article 7 for proscription of radical Islam. In its turn, the mention the Islamic Hijri calendar in Article 12 of the Constitution involves no prescriptive or binding effects. It rather demonstrates a tolerant position of the Legislator toward a free use of either Gregorian calendar or Hijri calendar.

The new Constitution of Iraq which was adopted by the referendum in October 5, 2005 appears to reflect an attempt to synthesize some Islamic principles with basic rights and freedoms, as well as democratic institutions. However, one may also suppose that the pressure of US occupation authorities played a certain role in the reduction of number of references to Islam in the Iraqi Constitution of 2005.

The revolutionary events of the Arab spring, which swept the entire Arab region, led to a massive change of regimes and the adoption of new Basic Laws [10, с. 118]. In the Wake of these sentiments, the situation in a multi-faith Iraq could serve as a pretext not only for regime change and the adoption of a new Constitution, but also for a bloody civil war, as happened in neighbouring Syria. Therefore, the issues of stability of state power and constitutional order against the background of the surge of Islamism and international terrorism remain relevant not only for Iraq, but also for the entire Arab region. It is difficult to give a certain forecast for further constitutional development because of the unstable political situation in the region, however, further growth of instability will pose a direct threat to the state and constitutional system of the country.

Примечание

1. Takfir is a prosecution in unbelief. Muslim radicals tend to condone their crimes with necessity or religious duty to fight unbelief and apostates (Muslims who have departed from the faith). for Ex.: Siukiainen L.R.

Islamskaia pravovaia mysl' protiv ekstremizma i terrorizma // Pravo. Zhurnal Vysshei shkoly ekonomiki, 2011. № 1. P. 23–43.

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The article presents an analysis of the norms of the Constitution of Iraq of 2005 concerning Sharia and Islam in general. Our comparative study shows that in the Constitution of 2005 the number of norms relating to Islam is much greater than in the previous Constitution of 1970. The minimal presence of Sharia law in the 1970 Constitution was due to the ideology of the ruling Baath nationalist party, which was incompatible with the principles of Islam. After the American invasion of Iraq in 2003 and the overthrow of the Baath regime, there was a change of power and reconfiguration of the political system. The Iraqi Constitution of 2005 witnessed a marked increase in the norms of Sharia and Islam in general. The reason for this was the intensification of Sunni-Shiite contradictions after the overthrow of Saddam Hussein's regime, as well as the policy of the new American administration. The events of the Arab spring that began in 2011 brought additional destabilization not only to the political system of the country but also to the entire Arab region. The continuing instability poses a direct threat to the state and constitutional order of the country.

Keywords: constitution, Sharia, Islam, Shia, Sunni, democracy, Iraq.

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