

## THE STATUS OF ISLAMIC SHARIA AS A FUNDAMENTAL SOURCE IN IRAQI LAW

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### Abstract

This research examines the status of Islamic Sharia as a source of legislation in Iraqi law by analyzing the constitutional provisions adopted by the Iraqi constitution regarding Islamic Sharia, as well as the interpretations of the Federal Supreme Court aimed at strengthening Islamic legislative texts in line with the fundamental principles of Islam. The study employs both analytical and comparative methodologies, referencing sources from Islamic jurisprudence and secular law. The findings indicate that Sharia serves as a primary source in certain legislations and as a supplementary source in cases of legal gaps. However, it has not been comprehensively codified within the legislative system. The research concludes with the necessity of reinforcing the legislative position of Islamic Sharia in a manner consistent with constitutional principles and the contemporary legislative context.

**Keywords:** Islamic Sharia, Iraqi Law, Sources of Law.

### Introduction

Islamic Sharia is considered one of the most prominent and profound legal systems known in history, distinguished by its comprehensiveness, flexibility, and capacity to adapt to the developments of human life. Sharia has held a firmly established position within Arab legal systems, with Iraqi legislation standing at the forefront, given the predominance of Islamic culture in the society.

Despite the legal pluralism that characterizes the Iraqi legal system, the current Iraqi Constitution of 2005 adopts several principles in favor of Islamic Sharia, thus reinforcing its status. Article 2 of the Constitution states that Islam is the religion of the state and recognizes Sharia as one of the fundamental sources of legislation. Additionally, Principle Three affirms that no law may be enacted that contradicts the established tenets of Islam. This clearly reflects the central role that Islamic Sharia plays in the legal framework of the state.

However, the actual legislative reality in Iraq reveals a significant variation in the extent to which Islamic Sharia is directly relied upon in lawmaking. This is particularly evident in the absence of a unified law outlining the mechanisms for its application, the lack of a precise definition of Islamic tenets, and the presence of laws that rely on Sharia principles implicitly or as a supplementary reference without explicitly recognizing it as a binding source.

In this context, the importance of this research lies in examining the extent to which Islamic Sharia is considered a primary source of legislation in Iraq, through the lens of constitutional texts, legislative practice, and judicial interpretation.

### 1. Research Problem

Although the current Iraqi Constitution of 2005 includes several principles stated in Article 2 that affirm the status of Islamic Sharia, the legislative reality reveals that

Sharia serves as a fundamental source only in specific areas within Iraq's civil legal system. Accordingly, the research problem lies in assessing the effectiveness and scope of Islamic Sharia as a principal source of legislation in Iraq, in light of both constitutional provisions and legislative practices. This involves presenting the constitutional texts and principles that have reinforced the status of Sharia and analyzing their impact on the legislative landscape.

## **2. Research Significance**

The scientific significance of this research lies in its contribution to the analysis of the constitutional and executive frameworks surrounding the concept of a "primary source" of legislation. It highlights the existing gap between constitutional provisions and legislative and jurisprudential applications. Practically, the research serves as a useful tool for lawmakers and decision-makers in drafting laws that align with constitutional principles. It also contributes to the development of a balanced legislative vision that respects Islamic tenets while safeguarding individual rights and accommodating the requirements of legal pluralism in Iraq.

## **3. Research Objectives**

This study aims to achieve a number of academic and practical objectives that clarify the position of Islamic Sharia within the Iraqi legislative system, including:

1. To outline the constitutional framework of Sharia's status through an analysis of the constitutional provisions in Article 2 of the 2005 Constitution.
2. To monitor legislative applications that have relied on Islamic Sharia in Iraqi laws, particularly those that have adopted it as a fundamental basis.
3. To investigate the gap between constitutional text and civil legislation, and to identify the reasons behind the disparity between the constitutional principle affirming the primacy of Sharia and the practical implementations in which this source is absent.

## **4. Research Methodology**

This research adopts an analytical approach in studying the constitutional and legal texts related to the status of Islamic Sharia in Iraqi legislation. It also relies on the comparative method by examining the Iraqi statutory provisions in contrast with Islamic legal texts.

## **5. Research Structure**

This study is organized into an introduction, three main sections, and a conclusion that presents the key findings and recommendations, as follows:

- First Section: The Constitutional Basis for the Status of Islamic Sharia
- Second Section: The Position of Statutory Laws on Sharia
- Third Section: Practical Applications of Sharia as a Fundamental Source of Legislation

### **First Section**

#### **The Constitutional Basis for the Status of Islamic Sharia**

Islamic Sharia holds a significant position within the Iraqi Constitution, as reflected in various principles embedded throughout its articles. These provisions explicitly affirm a set of principles that collectively demonstrate the constitutional status of Islamic

Sharia in Iraq. Accordingly, this section is divided into three sub-sections, each corresponding to one of these constitutional principles.

### **Subsection One**

#### **The Principle of Islam as the Official Religion of the State**

Iraq has gone through various stages in its modern history, with each phase accompanied by changes in its constitution. Throughout these constitutional developments, the legal and regulatory framework in Iraq has consistently acknowledged religion. Every Iraqi constitution has declared the adoption of a specific religion, which reflects the religious identity of the majority population Muslims. The choice of Islam as the official religion stems from the demographic reality and the legitimate right of the Muslim majority to preserve their religion, adhere to its rulings, and believe in its doctrines. Religion, in this context, serves as a foundational element in shaping the values and principles of the state.<sup>(1)</sup>

The various Iraqi constitutions have preserved the religious identity of the Iraqi people by explicitly stating in several constitutional articles that Islam is the official religion of the state.

Defining the identity of a people holds great importance and is rarely absent in constitutions that adopt a religion as part of their identity framework. Religion is considered one of the most significant elements of identity<sup>(2)</sup>. It is defined as “the metaphysical belief that a person holds,” and religious identity is the affiliation to that religion.<sup>(3)</sup>

The first constitution in modern Iraqi history was the Fundamental Law, which explicitly adopted Islam as the religion of the Iraqi state at that time. Article 4 of this law states:<sup>(4)</sup> “Islam is the official religion of the state...,” making it the first constitution to explicitly establish the religious identity of Iraqi society.

The repealed Iraqi Constitution of 1968 also affirmed the religious identity of Iraqi society, as stated in Article 13, which declares: “Islam is the religion of the state.”<sup>(5)</sup>

The Iraqi constitution that followed the 1968 constitution also affirmed the religious identity of Iraqi society in its provisions.<sup>(6)</sup>

The most recent Iraqi Constitution has followed the path of its predecessors by explicitly affirming the religious identity of Iraqi society in multiple instances. In the first instance, it declares that the religious identity of the society is Islam<sup>(7)</sup>. In the second instance, the Constitution emphasizes the protection of Islamic identity.<sup>(8)</sup>

However, despite this approach adopted by the Iraqi constitutions, some legal scholars specializing in this field have opposed the inclusion of a religious identity in constitutional texts. They argue that identity is multifaceted, and that emphasizing religious identity alone while excluding other dimensions such as ethnic, linguistic, or cultural identities could lead to exclusion, violence, and societal isolation.<sup>(9)</sup>

Others argue that while religious identity can serve as a means of fostering national unity, it can also deepen divisions among various sectarian and doctrinal groups.<sup>(10)</sup>

Meanwhile, some Islamic jurists view the inclusion of religious identity in constitutions as stemming from its deep connection to heritage and language, emphasizing its significant role in shaping the state.<sup>(11)</sup>

Through the examination of various juristic opinions, it becomes clear that the inclusion of Islamic identity in constitutions particularly the Iraqi Constitution reflects an approach grounded in historical realism and continuity with previous constitutions. Even though Islamic Sharia may not have a substantial impact on actual Iraqi legislation, the constitutional affirmation of Islamic identity can be seen, on one hand,

as a gesture of appeasement toward the Muslim majority, and on the other hand, as a form of reassurance to Islamic scholars in Iraq.

## **Subsection Two**

### **The Principle of Islamic Sharia as a Fundamental Source of Legislation**

The Iraqi Constitution does not stop at affirming the Islamic identity alone; it also establishes another equally important principle namely, that Islamic Sharia is a source from which Iraqi legislators may derive legal rulings and incorporate them into legislation.

Looking at the Iraqi legal framework, one finds numerous provisions that have adopted this principle. One of the earliest examples is found in the 1964 Iraqi Constitution, which explicitly stated that Sharia should serve as a source of legislation.<sup>(12)</sup>

Similarly, the National Charter of 2004 explicitly stated that Islamic Sharia is to be a fundamental source of Iraqi legislation.<sup>(13)</sup>

This principle was also affirmed in the current Iraqi Constitution of 2005, which reinforced what was stated in the National Charter by recognizing Islamic Sharia as a source of legislation.<sup>(14)</sup>

However, the inclusion of this principle in the body of the Constitution raises several interpretations regarding the true intent of the legislator. Did the Iraqi legislator intend to adopt all Islamic rulings and principles in their entirety? Or was the aim rather to selectively apply certain aspects of Sharia, leaving others aside based on the interests of the state?

Some Western jurists argue that Islamic Sharia was initially a framework for moral guidance rather than a source of legislation for the modern state. However, this view can be criticized by pointing out that although Islamic Sharia indeed encompasses ethical principles, it also contains a wide range of rulings and legal provisions addressing numerous civil, commercial, political, and economic matters. Therefore, Islamic Sharia cannot be confined to a single domain, as it extends across various areas of life.<sup>(15)</sup>

Meanwhile, others argue that making Islamic Sharia a fundamental source of legislation may open the door to authoritarian tendencies, due to concerns over potential alliances between the state and religious figures or institutions. Such alliances, they argue, could compromise democratic independence. However, this view is also subject to criticism, as religious scholars and institutions can play a constructive role in interpreting Sharia and applying its rulings properly, provided that the implementation is carried out in a sound and balanced manner.<sup>(16)</sup>

However, we believe that designating Islamic Sharia as a fundamental source of legislation is necessary for several reasons. Among these is the matter of marriage and divorce, where applying non-Sharia rulings to Muslims would render such marriages or divorces invalid. This would have a significant impact on the family, which Islam seeks to preserve and protect.

## **Subsection Three**

### **The Principle that No Laws Shall Be Enacted Contradicting the Provisions and Constants of Islam**

The Iraqi Fundamental Constitution does not merely adopt Islam as the state religion and recognize Islamic Sharia as a source of legislation; it goes further. The 2005 Constitution explicitly includes an important principle obligating the legislative

authority not to enact laws that contradict the provisions and established principles of Islam.<sup>(17)</sup>

This principle is considered one of the constitutional principles embedded within the Iraqi legal system and is regarded as part of the supreme rules of the country, which cannot be contravened by ordinary laws enacted by the legislative authority in the Iraqi Parliament. This principle reflects a positive interaction between ordinary laws and Islamic Sharia, which the Iraqi Constitution recognizes as a source of legislation, thereby complementing this principle.

Although Iraqi law adopts multiple sources, including customary practices, it explicitly stipulates non-contradiction only in relation to Islamic Sharia. This underscores the significant role and elevated status assigned to Islamic Sharia as a legislative source under Iraqi law.

Regarding the legal nature of this principle, it possesses constitutional binding force, as constitutional rules take precedence over other legal norms in the hierarchy of laws. This obliges the legislative authority, when enacting ordinary laws in the country, not to exceed the provisions and constants of Islam. This is reinforced by the constitutional prohibition stating "shall not," which constitutes a strict limitation on the legislative authority in Iraq. In the event that the legislative authority violates this principle, the laws it enacts may be subject to annulment and challenge before the Federal Supreme Court, whether in whole or in part.

The Federal Supreme Court has affirmed in numerous rulings the importance of respecting the constants and provisions of Islam when legislating laws. One of the most significant rulings in this regard is the challenge to the Personal Status Law No. 188 of 1959, in which the court emphasized that any amendment must not contradict the constants of Islam.

Regarding what constitutes the "constants of Islam" that must not be violated by the legislative authority, there is debate over whether this refers only to those rulings with definitive indication or also includes juristic interpretations and *ijtihad* (independent reasoning).

Some researchers argue that the "constants of Islam" refer to those unanimously agreed-upon rulings that do not admit interpretation or change, such as the prohibition of usury (*riba*), the prohibition of adultery (*zina*), and others.<sup>(18)</sup>

Some believe that the immutable aspects of Islamic rulings must be limited to those that are definitive (*qat'i*); otherwise, this would lead to legislative stagnation.<sup>(19)</sup>

Meanwhile, some Islamic jurists argue that the immutable principles are those on which the Muslim Ummah has reached consensus in matters of creed, worship, and transactions, and that sectarian disagreements should not be included among the fundamental tenets of Islam.<sup>(20)</sup>

In light of the aforementioned jurisprudential opinions regarding the concept of Islamic constants, it can be observed that these constants are those upon which the Muslim Ummah has agreed and established consensus. Anything beyond that does not fall within the core tenets of Islam, as incorporating sectarian views into these constants leads to legislative stagnation, in addition to other issues that may result in public disorder within the country.



## **Section Two**

### **The Position of Ordinary Laws Toward Sharia**

The stance of ordinary laws toward Islamic Sharia varies some laws maintain a neutral position, while others derive their provisions from it. Therefore, this section will be divided into four subsections.

#### **Subsection One**

##### **The Position of the Personal Status Law No. 188 of 1959**

The Personal Status Law No. 188 of 1959 is considered one of the most prominent laws that reflect the extent to which Iraqi legislation relies on Islamic Sharia as a fundamental source. This stems from the law's subject matter, which is religious and social in nature, dealing with issues such as family, marriage, and inheritance.

Upon its enactment, the Iraqi legislator emphasized that this law is based on jurisprudential reasoning derived from Islamic jurisprudence, which enjoys consensus among the majority of Muslim scholars. However, the Iraqi legislator also took into account the public interest and the requirements of the contemporary era when drafting this law. Additionally, the legislator did not adhere strictly to a specific Islamic school of thought but rather selected rulings from various schools in a manner that aligns with the spirit of the times and serves the interests of the family and society, while still maintaining compliance with the provisions of Islamic Sharia.<sup>(21)</sup> . What distinguishes this law is that it did not limit itself to the literal application of jurisprudential texts; rather, it sought to reconcile between Islamic schools of thought while considering social circumstances and contemporary developments. This approach led the Iraqi legislator to adopt an interpretative and reformative methodology grounded within Sharia, rather than outside it. This reflects the flexibility inherent in Islamic texts and rulings.

However, this law has not been free from criticism since its enactment. Critics have pointed out that it did not provide specific provisions for individual sects, particularly the Ja'fari school of thought. Additionally, it involved the state judiciary in matters of marriage, divorce, separation, and guardianship issues considered by some as interference in private religious affairs, which they rejected. Consequently, some have called for the establishment of alternative laws, such as the Ja'fari Personal Status Law, which sparked significant debate on issues of jurisprudential pluralism and women's rights concerns that some viewed as conflicting with women's rights if applied in practice.

#### **Subsection Two**

##### **The Position of Civil Law No. 40 of 1951**

Iraqi Civil Law No. 40 of 1951 is one of the most prominent laws that reflects the influence of Islamic Sharia on the Iraqi legislative framework, despite the law incorporating some concepts derived from Western legal systems, particularly French law.

The Egyptian jurist Abdul Razzaq Al-Sanhuri was responsible for drafting the Iraqi Civil Code. He also played a significant role in drafting the Egyptian Civil Code <sup>(22)</sup> after spending many years studying law in France and being influenced by French civil law and its adopted principles.<sup>(23)</sup> .

When Al-Sanhuri drafted the Iraqi Civil Code, he was keen to incorporate Islamic jurisprudential rules, particularly those derived from Maliki and Hanafi schools of thought, alongside modern civil law principles inspired by Western legal systems.<sup>(24)</sup> .

Among the provisions that demonstrate the influence of Islamic Sharia on the Iraqi Civil Code, and despite their multiplicity, some can be highlighted as examples.

1. The Theory of Obligation (Consent as the Basis of Contract)

A contract is not formed except through the concurrence of wills, a principle affirmed by Islamic Sharia and followed by Iraqi law<sup>(25)</sup>.

2. In the Field of Obligations and Contracts

The provisions related to contracts such as sale, lease, and gift have been derived from Islamic jurisprudence, particularly regarding essential elements and conditions. This reflects the significant role of Islamic Sharia in this area of legislation.<sup>(26)</sup>

For example, the provisions related to contract termination and force majeure are derived from the principles of harm and necessity addressed in Sharia. Regarding force majeure, the Civil Code states that exceptional events causing undue hardship to one party in fulfilling the contract grant the court the authority to balance the interests of both parties and annul the burdensome obligation. This corresponds to Islamic Sharia, particularly the Maliki school of thought, which empowers the judge to annul or amend contracts under exceptional and burdensome circumstances.<sup>(27)</sup>

1. The Theory of Gross Disparity and Deception

This theory holds that a contract is void if it is based on a gross disparity (ghabn fahish) affecting one of the contracting parties, provided that this disparity is accompanied by deception (taghrir)<sup>(28)</sup>, as established in the Hanafi school of thought. Iraqi law has adopted this principle in line with the Hanafi doctrine.<sup>(29)</sup>

2. The Theory of Legitimate Cause

The theory of legitimate cause requires that the subject matter of the contract be lawful; if so, the contract is valid, otherwise it is void. Islamic Sharia emphasizes the necessity of a lawful cause for a contract to be considered valid. For instance, if the subject of the contract is unlawful such as a sale intended to involve usury (riba) the contract is null and void, based on the prohibition of riba in Sharia. The Maliki school of thought particularly adopts this approach.<sup>(30)</sup>

As for the stance of Iraqi law regarding the theory of cause, it considers the contract void if the cause is legally prohibited or contrary to public order.<sup>(31)</sup>

### Subsection Three

#### The Position of Penal Code No. 111 of 1969

The amended Iraqi Penal Code is considered one of the laws that have had less direct influence from Islamic Sharia compared to the Civil Code or the Personal Status Law. However, this does not mean that it is unaffected by the principles of Sharia. The Penal Code contains clear influences of Sharia principles, both in the philosophical foundations of punishment and in certain crimes and prescribed penalties (hudud).

Among the most prominent crimes criminalized by Iraqi law under the influence of Sharia although not necessarily adopting the exact punishments prescribed by Sharia are:

1. Gradation in Homicide Crimes

It is observed that Iraqi law is influenced by the gradation present in Islamic jurisprudence regarding penalties for homicide. It distinguishes between intentional murder, quasi-intentional murder, and accidental killing, prescribing penalties accordingly.

## **2. Crimes Against Honor**

Iraqi law criminalizes adultery and punishes it, as Sharia does. However, it does not prescribe the hadd punishment stipulated in Sharia; instead, Iraqi law limits the penalty to imprisonment without corporal punishment.

## **3. The Crime of Defamation (Qadhf)**

Iraqi law criminalizes defamation, which is similar to the Sharia crime of qadhf. However, it does not apply the hadd punishment prescribed by Sharia (80 lashes), but instead penalizes with imprisonment or a fine.

### **Subsection Four**

#### **The Position of Economic and Commercial Laws**

Although Islamic Sharia contains detailed rulings on financial transactions, Iraqi economic and commercial laws have not strictly adhered to these provisions. Instead, they have largely relied on Western models (particularly French law), especially in banking, commerce, and company laws, leading to a clear disparity between Sharia and positive legislation.

Some of the most notable examples include the following:

#### **1. Banking Law**

The banking sector has permitted interest-based (riba) transactions, which creates a gap between the law and Islamic Sharia, as reflected in the Banking Law provisions. In contrast, Islamic Sharia strictly prohibits riba<sup>(32)</sup>.

#### **2. Companies Law**

Companies Law No. 21 of 1997 was enacted based on a purely capitalist philosophy, without regard to the principles of Islamic Sharia in contracts or types of companies. It permits the establishment of joint-stock companies whose activities may be considered unlawful from the perspective of Islamic Sharia, particularly companies engaged in prohibited activities such as usury (riba). Additionally, it allows the sale of shares that may represent non-existent or intangible assets<sup>(33)</sup>.

#### **3. Tax Law**

Iraqi Tax Law No. 113 of 1982 differs from Islamic Sharia and intersects with it in its philosophical and legal foundations. Most of its provisions are based on positive French or Anglo-Saxon legal texts, whereas Sharia relies on texts from the Qur'an and Sunnah, which regulate zakat, kharaj, and jizya.

The Iraqi law imposes taxes regardless of whether the source of the funds is pure or impure and does not distinguish between Muslims and non-Muslims in tax obligations. In contrast, Sharia requires zakat to be levied on Muslims and jizya on non-Muslims.<sup>(34)</sup>

### **Section Three**

#### **The Practical Applications of Sharia as a Fundamental Legislative Source**

The practical applications of Sharia as a fundamental source vary in degree, ranging from certain ordinary laws to the role of courts in addressing these applications.

### **Subsection One**

#### **The Reliance of Some Provisions or Laws on Islamic Jurisprudence**

The reliance of positive legislation on Islamic jurisprudence represents a manifestation of the activation of Islamic Sharia as a fundamental source within the Iraqi legal system. This reliance has appeared in several laws and issues, whether in



their content or through explicit references to jurisprudence or Islamic Sharia rulings, reflecting the interplay between positive law and Islamic jurisprudential sources.

Many legislative texts adopted by Iraqi legislation depend on jurisprudence or Sharia rulings, including the following:

### **First Personal Status Law**

This law is among the most prominent examples illustrating the Iraqi legislator's reliance on Islamic jurisprudence across its various schools of thought. It takes into account the harmonization of jurisprudential issues among different schools, while also considering contemporary developments and the requirements of social justice<sup>(35)</sup>.

#### **1. Provisions on Marriage and Divorce**

The law regulates marriage provisions in Articles 6 to 11, establishing as essential conditions for the validity of marriage the legal capacity of the spouses, their consent, and the documentation of the contract before the court. It prohibits polygamy except with judicial permission and requires the existence of a legitimate interest. The Iraqi law's regulation of these provisions is based on Islamic jurisprudence, particularly adopting the Hanafi opinion that the guardian's consent is not a condition for the marriage of a sane adult woman, contrary to the majority view. The requirement of judicial permission for polygamy is considered a regulatory restriction that does not contradict the permissibility granted in the Qur'an.<sup>(36)</sup>

#### **2. The Will (Wasiyyah)**

The Iraqi law regulates the provisions of wills in Articles (66–84), stipulating that a will in favor of an heir is not valid unless approved by the other heirs after death. Additionally, a will may not exceed one-third of the estate unless the heirs consent to the excess. These legal provisions are consistent with the principles of Islamic Sharia, which clearly establish these rules. It is reported that the Prophet Muhammad (peace be upon him) said: "There is no will for an heir" and also stated: "One-third, and one-third is much".

Accordingly, the Iraqi law in this regard aligns both in text and spirit with what Islamic Sharia has established, representing a clear application of its rulings on the matter of wills<sup>(37)</sup>.

#### **3. Inheritance**

Inheritance is considered one of the most important branches of personal status law. It is a right by which the estate is transferred to the legitimate heirs upon death, each according to their prescribed shares, without the need for acceptance or approval, and whether the estate consists of movable or immovable property.

The provisions regulating inheritance in Iraqi legislation are largely consistent with the rulings of Islamic Sharia as stated in the Holy Qur'an and the noble Sunnah of the Prophet<sup>(38)</sup>.

#### **4. Kinship**

Kinship, as a term, refers to the relationship that connects individuals to one another. It arises in two main ways: the first is by blood relation (consanguinity), and the second is by marriage (affinity). Some also refer to a third form adoption which is not recognized under Islamic Sharia.

Iraqi law divides kinship into three categories: blood kinship, kinship by marriage, and kinship through breastfeeding (radā'a). The latter is one of the most significant concepts adopted by the legislator from Islamic Sharia, as it was reported from the Prophet Muhammad (PBUH) who said: "What is forbidden through blood relation is also forbidden through breastfeeding<sup>(39)</sup>."

### **Second: The Law of Endowments (Awqaf)**

Waqf (endowment) is one of the institutions with deep roots in Islamic Sharia, and it has received significant attention in Islamic jurisprudence due to its prominent social, economic, and religious role. Therefore, the issue of codifying it in Iraqi legislation has been given special attention in an attempt to achieve a balance between the requirements of modern legislation and the principles of Islamic Sharia.

Given the diversity of Islamic endowments between the Sunni and Shia sects, each sect's respective law includes a provision stating that the Endowments Directorate in each is obligated to manage the endowments in a manner consistent with the rulings of Sharia.<sup>(40)</sup>

### **Third: The Juvenile Care Law**

This law, in some of its articles, relies on rules derived from Islamic jurisprudence, particularly with regard to provisions related to guardianship, custody, and maintenance. This area is closely connected to Islamic legal reasoning (ijtihad), especially in cases where there are no explicit legal texts or where a legislative gap exists.<sup>(41)</sup>

### **Subsection Two**

#### **The Formerly Established Sharia Courts**

Sharia courts constituted one of the foundational pillars of the Iraqi judicial system during the monarchical period (1921–1958). They retained jurisdiction over personal status matters and certain other religious cases, in accordance with the 1925 Constitution and the judicial system it established at the time.

The 1925 Basic Law explicitly stated, "Islam is the official religion of the state," granting legitimacy to the operation of Sharia courts. This constitutional provision specifically granted Muslims the right to litigate in accordance with Islamic law in matters of personal status and the administration of religious endowments (awqaf)<sup>(42)</sup>. This Iraqi constitution is considered a starting point for the application of Islamic Sharia, especially since it explicitly adopted Islam within its provisions. This laid the foundation for the incorporation of Islamic Sharia in the constitutions that followed.

### **Subsection Three**

#### **The Role of the Federal Supreme Court in the Application of Sharia**

Based on the constitutional authority granted to it, the Federal Supreme Court exercises its jurisdiction in interpreting constitutional texts and ruling on the constitutionality of laws and regulations. The Court is regarded as the supreme pillar in ensuring the supremacy of the Constitution. This role is grounded in three key principles affirmed by the Iraqi Constitution concerning Islamic Sharia:

1. Islam is the official religion of the state.
2. Islamic Sharia is a fundamental source of legislation.
3. No law may be enacted that contradicts the established rulings of Islam.

In line with its supervisory role, every law enacted in Iraq is subject to appeal if it violates a constitutional principle. Regarding Islamic Sharia, and based on the principles enshrined in the Constitution, any violation of these three principles may be subject to challenge before the Federal Supreme Court. The Court then investigates

whether the law violates the fundamentals of Islam. If it determines that a law is inconsistent with Islamic principles, it becomes subject to annulment.

An example of this is the appeal filed against the Law on the Care of Minors, which was challenged on the basis that it was incompatible with Islamic rulings. However, the Court rejected the appeal, affirming that the law conforms with the general principles of Islamic jurisprudence. The Court also emphasized that secular legislation must be interpreted in light of Islamic principles in cases where explicit provisions are absent.<sup>(43)</sup>

Similarly, in an appeal submitted against a provision of the Personal Status Law, the Court affirmed that the legal text does not conflict with the principles of Islam. This reinforces the Court's reliance on the authority of Sharia in interpreting the Constitution, as reflected in its Decision No. 88/Federal for the year 2010.

In addition, the Federal Supreme Court provided an interpretation regarding a provision in the Ja'fari Personal Status Law concerning the issue of setting the minimum age for marriage. The Court rejected the appeal on the grounds that it does not contradict the fundamentals of Islam.

Accordingly, and based on the foregoing, Islamic Sharia, when considering the constitutionality of laws, must take into account the immutable principles of Sharia as a constraint on the legislative process. This principle has been affirmed by the Iraqi judiciary in numerous rulings. Thus, the Federal Supreme Court is considered one of the most important mechanisms for the application of Islamic Sharia.<sup>(44)</sup> . .

### **Conclusion**

After reviewing and analyzing the status of Islamic Sharia within the Iraqi legal system, it becomes clear that it occupies a central position as one of the fundamental sources of legislation, especially in the fields of personal status, inheritance, and wills, as well as in areas affected by legislative gaps. The Iraqi Constitution has reinforced this through several principles set forth in Article 2 of the current Constitution.

This research has yielded several results and recommendations, as follows:

#### **First: Results**

1. The Iraqi Constitution affirms the status of Islamic Sharia, as reflected in several principles contained in Article 2.
2. Islamic Sharia holds a fundamental position in many fields, particularly in personal status law and endowments.
3. The Federal Supreme Court plays a pivotal role in the application of Islamic Sharia in accordance with the constitutional provisions related to Sharia.
4. Islamic Sharia serves as a source to be resorted to in cases of legislative gaps, as stipulated in Article 2 of the Iraqi Civil Code No. 40 of 1951.

#### **Second: Recommendations**

1. Enhance the activation of Article 2 of the 2005 Iraqi Constitution by obliging the legislature not to issue any law that contradicts the immutable rulings of Islam.
2. Develop existing legislation to align it with the objectives of Sharia, which can be achieved through reviewing certain statutory laws that still lack full conformity with Islamic jurisprudence.

3. Establish a legal-judicial advisory body affiliated with the Iraqi Parliament, whose mission would be to provide jurisprudential opinions on draft laws and new legislations to ensure their compliance with the principles of Islamic Sharia.

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- <sup>19</sup> . Muhammad Fayyad, "The Extent of the Binding of Islamic Sharia in Positive Legislation," Iraqi Legal Journal (No. 4, 2012), p. 25..
- <sup>20</sup> . Salah Abdul Sadiq al-Sawi, "Constants and Variables in the Course of Islamic Action" (Cairo: Dar al-Fikr, 2019), p. 35.
- <sup>21</sup> . Iraqi Gazette, No. 3012, 1959, Explanatory Memorandum to Personal Status Law No. 188 of 1959..
- <sup>22</sup> . Kamil al-Samarrai, "Iraqi Civil Law" (Baghdad: al-Ani Press, 1951, 2nd ed.), p. 1
- <sup>23</sup> . Ibid.

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<sup>24</sup> .ibid.

<sup>25</sup> . Ibid. Article (73), Iraqi Civil Code No. 40 of 1951, states: (A contract is the binding of an offer issued by one of the contracting parties with the acceptance of the other(...

<sup>26</sup> . Kamel Al-Samarrai, op. cit., p. 1.

<sup>27</sup> . Malik bin Anas, "Al-Muwatta'," edited by Muhammad Fuad Abdul-Baqi (Beirut: Dar Ihya' Al-Turath Al-Arabi, no date of publication), pp. 450-457.

<sup>28</sup> . Bin Gharib Rabeh, "The Provisions of Fraud in Positive Law and Islamic Jurisprudence," Journal of Legal and Political Research (Vol. 6, No. 1, 2021), p. 483.

<sup>29</sup> . Paragraph (1), Article (124), Iraqi Civil Code No. 40 of 1951, states: (Mere fraud does not prevent the contract from being enforceable as long as the fraud is not accompanied by deception.(

<sup>30</sup> . Khaled Dhaham Al-Rashdi, "The Impact of Islamic Sharia on Contracts in Kuwaiti Civil Law," Journal of Arab Studies (University of Mina, College of Dar Al-Ulum, no publication year), p. 3660.

<sup>31</sup> . Paragraph (1), Article (132), Iraqi Civil Code, No. 40 of 1951, states: "A contract shall be void if the contracting parties are bound without a valid reason or for a reason prohibited by law and contrary to public order or morals".

<sup>32</sup> . Paragraph (3), Article (4), Central Bank Law (Executive Regulations), No. 56 of 2004

<sup>33</sup> . Abdul-Jabbar Hussein Zahir Al-Qahtani, "Companies in the Light of Islamic Sharia" (Damascus: Center for Strategic Studies and Scientific Research, 2019), p. 107.

<sup>34</sup> . Shaaban Raafat Muhammad Ibrahim, "Aspects of Tax Justice for Financial Obligations of Non-Muslims in Islam as Applied to the Legislation of Jizya," Legal Journal, p. 252.

<sup>35</sup> Abdul Karim Zidane, "Introduction to the Study of Islamic Law" (Beirut: Dar al-Qalam, 1999, 1st ed.), p. 321.

<sup>36</sup> . Abdul Karim Zidane, "Family Provisions in Islamic Law" (Beirut: Dar al-Qalam, 2002), p. 95.

<sup>37</sup> . Muhammad Abu Zahra, "The Will in Islamic Jurisprudence" (Cairo: Dar Al-Fikr Al-Arabi, 1970), p. 105.

<sup>38</sup> . Abdul Karim Zaidan, the previous reference, Introduction to the Study of Islamic Law, p. 250

<sup>39</sup> . Muhammad ibn Ali ibn Wahb, "Ahkam Al-Ahkam Sharh Umdat Al-Ahkam", edited by Muhammad Hamid Al-Faqih (Delhi: Sunnah Al-Muhammadiyah Press, 1953), vol. 2, p. 596 ..

<sup>40</sup> . Article (2), Shiite Endowment Law, No. 57 of 2012, states: "The Diwan shall be obligated to administer endowments in accordance with the Sharia provisions of the school of thought followed by the entity to which the endowment is based".

<sup>41</sup> . Abdul Wahhab Khallaf, "Personal Status in Islamic Law" (Beirut: Dar Al-Qalam, no year of publication), p. 20.

<sup>42</sup> . Article (76), Iraqi Basic Law, 1925, states: "The Sharia courts alone shall consider claims related to the personal status of Muslims, and claims (The competent authority for managing their endowments.(

<sup>43</sup> . Federal Court Decision No. 29/Federal of 2012.

<sup>44</sup> . Federal Court Decision No. 219/Federal of 2024 .