FREEDOM OF SPEECH: A COMPARATIVE ATUDY BETWEEN THE U.S. AND IRAQ

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Abstract: The value of free speech comes from the constitutional protection, and the way of providing this right within the constitutional framework. The American Constitution has protected this right in an absolute language, which restricts the government to not impose any limitations on the right of freedom of speech, unless with having a compelling governmental interest. In comparison with the U.S., the Iraqi Constitution has restricted freedom of speech, which allows the government to put limitations on this fundamental right. Consequently, a number of legislationhas been adopted in Iraq in a way that conflicted with free speech. Hence, for returning the value of free speech, such those legislations must be changed under the current international principles.

Keywords: Fundamental right, constitutional protection, Limitation, Public interest, Morality.

INTRODUCTION

This paper is a comparative study between the United States and Iraq, regarding freedom of speech as an important constitutional right. The importance of this study refers to pointing out the strong and defect sides of both states in respect of this fundamental right, and the way to redress them.

In the United States, free speech is a fundamental right that is protected by the First Amendment in the US Constitution. This right is a resource for most of the fundamental rights, which are valuable in the life of American people. It is said that freedom of speech is the best way to protect people from tyranny by the government because it allows people to speak out against the government and any other institution. Moreover, it is a crucial point in the democratic system, which promotes ideas, leading to progress.

In Iraq, even though the various constitutions and laws guaranteed the right of free speech since the first Iraqi Constitution was enacted in 1925, this right was never respected until after the Iraq war in 2003. The war ended the dictatorship regime which had precluded the right of expression, especially in media and broadcast. The year 2003 is considered the birthday of freedom of expression in Iraq, and particularly in the media. After the openness that was obtained after the Iraq war in 2003, the prospect for an expanded role for the broadcast and media of a high level of freedom of expression began to become a reality. After the ratification of the new Constitution in 2005, a concept of fundamental human rights was confirmed again, including a basic guarantee to the right of freedom of speech. This was another step, which was significant to build a free and independent media in Iraq. Even Though, the current constitution established most of the fundamental rights, the right of free speech still needs more guarantee to be protected in the governmental restrictions.

On one hand, the ratification of the new Constitution in 2005 is considered a big turning point to enhance free speech in Iraq. On the other hand, it became lethal weapons for the government as a means to restrict freedom of expression because the way of the constitution to protect this right is not crucial.

CONSTITUTIONAL FRAMEWORK COMPARISON

Both the U.S. and Iraqi Constitution include provisions, which provide the right of free speech. This means that the right of free speech is a valuable right in both nations. “It is very surprising how much the constitutions of both nations are alike.”[1] But, the similarity in the issues does not mean the similarity in the concepts. Even though, the Iraqi Constitution granted the freedom of speech as a constitutional right, this right is subjected to a lot of restriction. Unlike the U.S. Constitution which protects free speech strongly.

2.1. Iraqi Constitutional Framework

The current Iraqi Constitution includes the right of freedom of speech, which is mentioned in articles 38, and 46.[2] It is noticed that these two articles do not protect the right of free speech adequately, however, they just recognized this right narrowly.

2.1.1. Article 38

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

A. Freedom of expression using all means.

B. Freedom of press, printing, advertisement, media and publication.

C. Freedom of assembly and peaceful demonstration, and this shall be regulated by law.”[3]

Even though, this article established the right of free speech constitutionally, it is considered a dangerous point to stifle this right. This fear comes out in reading the beginning of the article, which provides the right of free speech conditionally, and stood on the non-violation of the public order and morality.

According to this article the freedom of speech should not be conflicted with public order and morality, otherwise, it should not be respected.[4]

In addition, neither the constitution nor Iraqi judiciary did not define the concept of public order and morality. That means this restriction remains as a vague and overbroad restriction, which provides an excuse by authorities to show an accurate and necessary purpose in restricting this right. The Iraqi judiciary has defined the right of criticism as a sort of free speech, through the decision of the Federal Court of Cassation number 206/ public body/ on 8/31/2009, where it talks about criticism as "any opinion or correction for the performance of public officials in order to protect the public interest"[5] without determining the concept of the public interest. The public order and morality then, will be subject to the mood of the executive branch, and may leading to negative effect on the integrity of the exercise of freedoms.

2.1.2. Article 46

Article 46 of the Constitution states "Restricting or limiting the practice of any of the rights or liberties stipulated in this Constitution is prohibited, except by a law or on the basis of a law, and insofar as that limitation or restriction does not violate the essence of the right or freedom."[6] So, the restriction could be imposed on the right of freedom of speech "by a law or on the basis of a law" as long as it does not infringe the substance of this right. This constitutional article allows the legislative power to restrict rights and freedoms by enacting the law. Moreover, the article also authorized executive power to limit these rights, when the latter is empowered by the legislative power to issue decrees that have the force of law. In fact, it is an absolute permission to restrict freedom of speech by legislative and executive power, which will reflect negatively on the limitation of rights and freedoms. Because according to this article, the government is not required to show any legitimate purpose, while it imposes any restriction on the right of free speech.[7]

2.2. American Constitutional Framework

Freedom of speech in all its forms is a fundamental right and it is highly protected by theU.S. Constitution. It is mentioned in the First Amendment, which states "Congress shall make nolaw …. abridgingthe freedom of speech or of the press; or the right of the people peaceably to assemble..."[8] It is clear that the U.S. Constitution used an absolute language to protect free speech, which prohibits the U.S. Authorities to restrict this right without justification.

The absolute protection for this right by the constitution does not mean that this right is not subject to restrictions. But it is to ensure protection of this right against unreasonable conditions or any vague restrictions, which may be imposed by the legislative and executive powers.

The Supreme Court in the United States has struggled to define speech and expression and expand the concept of speech in a way which promotes and protect this right from infringement by the government. Some, like Justice Hugo L. Black, believed that freedom of speech is an absolute right, while most scholars and most U.S. citizens, support Justice Oliver Wendell Holmes JR, who believed that the U.S. Constitution allows some restrictions on free speech based on certain circumstances.[9] To explain this point, Holmes wrote, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic" **Schenck v. United States, 249 U.S. 47, 39 S. Ct. 247, 63 L. Ed. 470 [1919].** Even though, the Supreme Court allows some restrictions, but these restrictions should meet a high level of scrutiny to show compelling government interest, otherwise it must be struck down.[10]

RESTRICTIONS ON FREE SPEECH

As we have seen in the first chapter, the right of freedom of speech is restricted constitutionally. Unlike the U.S. Constitution, the Iraqi Constitution allows restrictions to be imposed on free speech by enacting the law. Consequently, both the legislative and executive powers are allowed to impose limitations on this right because the first power has the right to enact the law originally, and the latter will be empowered to enact the law in some exceptional circumstances.[11] This constitutional permission for limitations on free speech becomes a lawful excuse for the Iraqi authorities when they violate this fundamental right. At the same time, the judiciary can do nothing to stop the Iraqi authorities in cases of infringement this right because the legislative power have constitutional arguments on this point. One of the current examples of this is the decision of the Iraqi Federal Court in October 7, 2012, which dismissed an appeal against "Rights journalists Law in Iraq" under the pretext, that it does not violate the IraqiConstitution because it is consistent with articles 38, 46.[12] Even though the Iraqi JournalistsAssociation alleged that the mentioned law violated the right of expression in a lot of its articles,the court affirmed the law and dismissed the appeal without compelling the government to showany necessary interests in enacting this law.[13] This is the way the Iraqi judiciary deals with thecases regarding the right of free speech, which disappoints most of journalists and jurists, whocare to protect free speech in Iraq.

Hence, this chapter will focus on the legal framework of free speech and how this right isrestricted under Iraqi laws compared to the American legal system in most of the points.

2.3. Restrictions on Free Speech in Iraqi Legal System

The Iraqi legal system is a civil law system, which "depends heavily upon written codesof private law."[14] Most of the Iraqi laws were codified by the Ba'ath Regime; they imposedmany restrictions on the right of expression. In particular, broadcast and free press are hangedunder the Iraqi legal system. Though, the Ba'ath Regime has collapsed, the negative effect of theBa'ath's laws still exist regarding the rights and freedoms. Moreover, the current constitution inarticle 130, states "Existing laws shall remain in force, unless annulled or amended in accordancewith the provisions of this Constitution."[15] As stated in the decision of the Coalition ProvisionalAuthority[16] Order No. (7) Most of the provisions of the Penal Code of 1969 are still in forceduring the interim administration of the CPA.[17]As a result, a large number of codified lawsrestricting the rights and freedoms are still available for Iraqi authorities in the reduction oflegitimate criticism against government practices.

Most of the journalists, observers, and jurists have noticed that the Iraqi Criminal Law isthe most dangerous codified law in regard to freedom of expression. This law has imposed a lotof restriction upon the right of free speech, which could be collected in the following points:-

2.3.1. Restrictions Based on Public Order and Morality

Iraqi Criminal Law has prohibited many forms of freedom of expression and publication pursuant to the principle of public order and morality, and it made them crimes, which are punished by several years in prison and up to the death penalty. Whereas, the current constitution has established the principle of public order and morality as a condition for freedom of speech, the judiciary does not contest those restrictions. However, this principle is considered as a vague and overbroad restriction in the Iraqi legal system. Neither the constitution nor the judiciary defines the public order and morality. Under this vague restriction, the following acts will be a crime:-

- Being a part of dissent against principles of constitution or inciting the overthrow of the appointed regime in Iraq.[18]
- Insulting the Arab nation or the national flag or the State emblem is punishable by a term of imprisonment no more than 10 years.[19]
- Importing, exporting or gaining pictures, books or symbols for the purpose of trade, distribution of which is considered as dangerous for public security and tarnishing for the country's reputation.[20]
- Insulting the President or his representative or government.[21]
- Distributing books, films, or pictures, or any other materials that violate the public integrity.[22]

Through reviewing these restrictions above, we notice that the principle of public order and morality serves the political system in Iraq. In general, this principle promotes the government, and protects its establishments from any dissent. It was used by Saddam Hussein as a legal weapon to suppress all freedoms. The idea of public order in this format is to benefit an authority or political system even if it is not acceptable by the people. It makes the government more powerful than the people. Furthermore, the actions of the government will be more legitimate than the will of the people. Thus, any will or movement by the people towards reform and political change is considered a crime and should be punishable by the law.

It is not reasonable that the idea of public order in Iraq still suppresses political speech, while political speech is highly protected in democratic countries. Even though freedom of speech is generally protected under democratic systems, political speech is specifically promoted and is a crucial point for the democratic systems.

In the U.S. the First Amendment promotes core political speech before all other forms of freedom of expression. Any sort of speech that intends to criticize government policies or intends to incite political change is core political speech, and should be protected highly. The U.S. Supreme Court found that core political speech includes any "interactive communication concerning political change." **Meyer v. Grant, 486 U.S. 414, 108 S. Ct. 1886, 100 L. Ed. 2d425 (1988)**. Hence, restrictions on political speech must be tested by strict scrutiny to determinea compelling state interest; otherwise they will be struck down.[23]

2.3.2. Restrictions Based on Defamation and Libel

The Iraqi Legal system uses criminal law to prevent defamation against public officials. Italso negatively affects freedom of speech, especially, political speech, which should be protectedhighly. Though libel suits are recognized legally, and are a protection for the public officials, tostop media from using the right of free speech unfairly, they must not impede the media fromperforming its function within its constitutional rights. In practice, defamation law became a bigfortress to protect public officials who represent the political system, from criticism by people ormedia in particular. As a result, most of the political speeches fall under defamation charge infavor of the political system.

In Iraq, the media faces many challenges because of libel suits which are filed by thepublic officials against the media. Libel suits have become lethal weapons to restrict the mediaand limit the freedom of criticism. Recently, filing large numbers of libel suits against the mediaand journalists has led to the withdrawal of many journalists in the press, and contracted the roleof media fact-finding in political issues due to fears of prosecution. In addition, the

large numberof judicial decisions to fine journalists, and the effects of these decisions on the freedom of thepress, resulted in the issuance of Order No. 7 of 2003, which prevented the courts from accepting complaints about publishing crimes without the consent of the Coalition Provisional Authority (dissolved) in accordance with item (2) of section (2) thereof.[24] This means that any complaint or prosecution for any media or a journalist, as well as any newspaper or other media, could not begin without the approval of the Coalition Provisional Authority in Iraq. But after the Coalition Provisional Authority was dissolved and replaced by Prime Minister of Iraq, the mentioned article was canceled, which weakened the legal status of the media and journalists again.

Defamation is defined by the Iraqi legislature in article (433), section (1) of the Penal-

Code, which says:-

"(1) Defamation is the imputation to another in public of a particular matter which if true, would expose such person to punishment or cause him to be scorned by society. Any person who defames another is punishable by detention plus a fine or by one of those penalties. If such defamation is published in a newspaper or publication or other press medium it is considered an aggravating circumstance.

(2) Such person is not permitted to establish the proof of his imputation unless that imputation is directed at a public official or agent or public deputy or he is carrying out an act in the public interest or if such imputation is connected with the office or employment of the aggrieved person but if he establishes the proof of all imputations made, then there is no offence."[25]

It is noted the Iraqi legislature has defined defamation in criminal law, but did not set a standard to distinguish between this crime and the exercise of freedom of expression and criticism, especially if it is directed to public officials. The legislature left it to the interpretation of courts to distinguish between them.

2.3.2.1. Objections on Defamation Law in Iraq

Through looking at the article cited above, which defines defamation, and the judicial applications of the article, we observe some defects in regards to the provisions of defamation in Iraq. These defects will negatively affect the right of free speech, especially on the media. We can talk about these defects in the following three points:

1- Iraqi legislature described defamation as a criminal offence. The use of criminal law to protect reputation constitutes imminent danger in regards to the right of expression and freedom of press.[26]This is a threat that makes the media a place to commit crimes and does not respect its role in the society. We note in the most democratic countries that the reputation and privacy are protected by civil law, not criminal law.

2- If the defamation is published in the media it is considered an aggravating offence. This is another attempt by the Iraqi authorities to silence media which reports critically on the government or public officials, while the recent trend in developed countries is to reduce liability upon the media to develop its role in progress.

3- The most dangerous point in the article (433), is observed in section (2) thereof, which makes the burden of proof truth of statements on the defendant for the purpose of absence of offence, if it is directed to the public officials. Hence, the journalists or media have to prove the truth of statements when they become defendant in the libel suit, if it is filed by the public officials. This often weakens the legal status of the defendant, and convicts the media and journalists in cases when courts are not convinced validity of defendant statements towards the public officials. It is the main reason beyond the large number of libel suits upon the media in Iraq where the public officials sure in winning libel suits.

2.3.2.2. Judicial applications of the defamation law

Because of the defects mentioned above in the defamation law, the approach of courts in Iraq to resolve libel suits often leads to suppressed free speech. In particular, it happens when the media and journalists who have written critically of public officials, are the defendant in the libel suits. For instance, Kamal Sayid Qadir, an Iraqi Kurd, was arrested in October 2005 in Erbil because of publishing online articles on Kurdistanpost criticising the Kurdistan Democratic Party and its leader, Massoud Barzani, whom he accused of corruption and abuse of power. Mr Qadir was convicted and sentenced to thirty years' imprisonment on 19 December 2005 for "endangering national security". On 26 February 2006, the Supreme Court of the Kurdish Region overturned the conviction and ordered a retrial on the charge of defamation the Kurdish regional leadership. Finally, in March 2006, Mr Qadir was convicted for publishing "defamatory" articles about the authorities in Kurdistan and was sentenced to one and a half years' imprisonment.[27]

3.2. Restrictions on Free Speech in American Legal System

As we noted the function of the First Amendment is to protect free speech not establish it. In the procedural protection, the First Amendment requires the Supreme Court to strike down any law, which restricts free speech in a vague way or broadly. Hence, the most interesting point that has been adopted by the U.S. Supreme Court is to protect expression from vague and overbroad statutes that restrict speech or expression. Because under vague and overbroad statutes people cannot know what speech is prohibited and what speech is protected; therefore, these statutes should be struck down. Also, "under vague statutes and ordinance the government can choose who to prosecute based on their views or politics."[28]

3.2.1. "Clear and Present Danger" test

The U.S. Supreme Court has constructed some tests to prevent any vague and overbroad statutes which are submitted by the government. One of the most important tests to repeal any vague law that regulates speech or expression, especially political speech and criticism of the government, is the "Clear and Present Danger" test. While political speech is in the high level of protection, it may constitute an incitement to illegal activity, which has a present danger regarding public safety. Political speech could be regulated if it has present danger to public safety, nonetheless, the Supreme Court has interpreted "Clear and Present Danger" test accurately, and ruled "Speech can be prohibited if it is directed at inciting or producing imminent lawless action and it is likely to incite or produce such action."[29] Hence, it is standard to define a clear and present danger. There is no clear and present danger, if speech does not actually incite imminent lawless action. "The failure to make this distinction rendered the law overly broad and in violation of the Constitution."[30]

Here is the primary difference between the U.S. and Iraq as related to the public interest. In the United States, any restriction on free speech based on the public interest or public safety, must pass an accurate process to determine what the public interest is, and how it is being violated. But in Iraq, the public order is just a vague restriction to serve the political system.

3.2.2. "Actual Malice" test

Actual Malice is another test established by the Supreme Court to protect free speech from unreasonable restrictions. This test is related to defamation in the American legal system, if the defamation is directed at public officials. This is the key of different points between the United States and Iraq regarding defamation law, and how the freedom of speech and freedom of press in the U.S. limit the government's ability to award libel damages brought by a public official against their critics. "The challenge for the court in this area is to balance the need to protect reputation, the obvious central concern of defamation law, with the desire to safeguard expression, which can be chilled and limited by tort liability."[31]The constitutional protection for the right of expression in all its forms and the historic value of this right for American people, made the Supreme Court protect this right substantially. The Supreme Court doctrine in regards to this constitutional right is clear, protecting free speech from any attacks or attempts to convict it, or turn it to criminal conduct.

While in most countries in Middle East such as Iraq, defamation law takes a way in stricture the right of expression and criticism, in the American legal system, defamation law has been regulated in a way does not contradict with this constitutional right. The first approach of the Supreme Court regarding defamation law, in a way that does not contradict with the right of free speech, is distinguishing between the condition when the plaintiff in the libel suit is a public official, and condition when the plaintiff in the libel suit is a private figure.[32]

The consequences of this differentiation, is to make proof of defamation more difficult if the plaintiff in the libel suit is public official. The burden to proof is the responsibility of public officials who are claiming for damages for defamatory falsehoods pertaining to their official conduct to prove that the statements were made with actual malice. Otherwise, public debate on important issues would be lessened. Citizens have the right to criticize their government officials without fear of a libel suit. As long as free speech has a high level of protection and the right to criticize the government comes through the constitution, there should be a severe standard in turning this right to unprotected speech by the libel suit.

While, imposing a burden of proof on public officials who are suing for defamation and falsity strengthens the legal status of the defendant, which mostly represents the media or journalists in the libel suits. It is also responsibility of the public officials to pass a severe test.This test is called Actual Malice in order to win libel suit, which turns the right of free speech tothe defamation. The proof of falsity is not sufficient to convict the media by defamation withoutproof of actual malice in the media.The Supreme Court established the Actual Malice test in New York Times Co. v.Sullivan, which ruled "The constitutional guarantees require a federal rule that prohibits a publicofficial from recovering damages for a defamatory falsehood relating to his official conductunless he proves that the statement was made with actual malice – that is, with knowledge that itwas false or with reckless disregard of whether it was false or not."[33]

In its eventual ruling, the Supreme Court would aim to protect the right to criticize thegovernment through making actual malice a standard in libel claims filed by public official, as the Supreme Court in the same case said "the First Amendment required proof of actual malice in order to protect a wide open and robust debate about government affairs."[34]

Since the court imposed on public officials the requirement to prove actual malice, they have rarely won libel suits because actual malice deals with intent, which is hard to prove. It may be sufficient for the court to decide that an act was not malicious if a media publishes a story in good faith that aims to serve the public interest, even if the statements were false. Generally, the actual malice test provides a wide scope of freedom of expression thereby protecting the media from a variety of libel suits.[35]

CONCLUSIONS

Altogether, the right of free speech in both the United States and Iraq takes its place as a fundamental right Even though freedom of expression is mentioned at

the constitutional level in both the United States and Iraq; the differences exist between these countries in dealing with this right. The method of the U.S.Constitution to protect this right is quite strong, which requires the judiciary to protect this right broadly by imposing the severe scrutiny on the government, if the government's actions restrict the right of expression.

Unlike the U.S., the Iraqi legal system restricted the right of free speech constitutionally. While the Iraqi current constitution recognized the right of free speech, it allows the government to impose restrictions on freedom of expression pursuant to the public order and morality. Moreover, any restriction on free speech will be legitimate, as long as it comes through the law issued from a legitimate power. This defect of the Iraqi Constitution paves the way for the government to limit the right of expression without any high level of scrutiny from the judiciary to investigate whether the government has a compelling interest regarding the restriction of this fundamental right or not. Hence, there are a lot of restrictions on free speech at the legislative level, alleging benefit for public order and morality, while there is no any standard or definition for public order and morality. It is just a vague restriction, which completely serves the political system in suppressing freedoms.

In the same perspective, the defamation law in Iraq also serves the political system, and suppresses political speech. The fear of the defamation law makes people unable to criticize the government. It is a big threat that Iraqi Legislature makes defamation a criminal matter rather than a civil one, as it is in the U.S. Moreover, if the alleged defamation statement has been published in the media, the courts count this as an aggravating circumstance. For the same purpose, the defamation law also puts the burden of proof on the media in libel suits.

Finally, because of the freedom of expression is an asset for other fundamental rights, and it is a crucial point to becoming a developed country, which promotes freedoms to criticize the government without any fear, we suggest:

1- Restatement of the constitutional article related to free speech in a way that does not allow any restrictions to be imposed on free speech as it is in the First Amendment.

2- Compel the government by the judiciary to show a compelling public interest, if the government imposes any limitation on freedom of expression, otherwise, any enacted law by the government to restrict this right must be stuck down.

3- Definition of public order and morality by the judiciary, making it clear for the legislative power, so that the latter cannot impose many restrictions on free speech arbitrarily based on the public order and morality.

4- Cancellation of penal sanctions resulting from the crime of defaming public officials in their official conduct, and limiting that compensation for damages from libel to be determined by civil lawsuit, with the publication of a public apology by the defendant.

5- Restatement of the provisions of defamation in a way that makes the burden of proof the responsibility of the plaintiff to prove actual malice in the libel suit, thus strengthening the legal status of the defendant, represented by journalists or media against public officials.

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