

State's Responsibility to Respect Constitutional Guarantees of the Rights of the Accused

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Abstract--- The subject of human rights and its guarantees has now become one of the basic demands of the peoples, especially after the changes witnessed in the political systems of the Arab countries in the period (2003-2010) called the Arab Spring, and those that followed in the collapse of some repressive political regimes in the Middle East. These changes in the countries reached by the spring have been instrumental in consolidating the concept of individual rights and freedoms, especially those relating to the accused as the weak party to the criminal case. Governments that came to power after the changes had to reinforce this concept and prove to their people that they believed in their constitutions, since the Constitution was the most powerful and supreme source of protection for fundamental rights and freedoms - particularly the rights of the accused in the criminal case. However, the State is the only side that translates this protection prescribed in the Constitution; for that the Iraqi Constitution of 2005 has been devoted chapter II for this subject (rights and freedoms) in articles (14-46) in addition to Article (13). Iraq has ratified many international conventions related to this subject according to the special law on ratification of International Conventions and Treaties No. (111) of 1979, making Iraq at the forefront of the States that respect the individual rights and freedoms, including the rights of the accused. In order to translate these guarantees into reality, we must activate the issue of monitoring the legitimacy of the actions taken by the state during the course of the criminal case, in addition to monitoring the constitutionality of laws, which is a legal mechanism to verify the conformity of laws with the Constitution.

Keywords--- State responsibility, rights of the accused, constitutional guarantees, etatisation, criminal case

I. INTRODUCTION

This research is related to the rights and freedoms of citizens, especially the rights of the accused, who represents the defendant in the criminal case, which makes it at the forefront of the issues that require researchers to give their interests in this matter, which ensures respect for the human dignity of Iraqi citizens who suffered a lot of injustice and tyranny by the ruling authority in past times.

This research aims to ensure the existence of adequate human rights guarantees in the Iraqi 2005 Constitution, verify the existence of adequate substantive and procedural legislation to guarantee human rights in Iraq, especially the rights of the accused as a defendant in the relationship between the state and the citizen during the course of criminal proceedings. Disclosure of the Authority's commitment to legislative guarantees (constitutional and ordinary) for the rights of the accused.

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II. RESEARCH OBJECTIVE

Accordingly, the research aims to show the weaknesses and strengths in the legislatives in order to highlight the attention of the Iraqi legislator as well as the Iraqi executive authorities to respect human rights, especially the rights of accused (defendants), hoping that we may contribute to clarify the idea or draw the attention of the concerned authorities to a matter that must be addressed in the future [20, 21].

III. RESEARCH METHODOLOGY

Due to the nature of this research's topic, our study requires us to adhere to the descriptive approach based on the study of the constitutional and legislative texts and describe them as they are, as well as the analytical scientific method based on the discussion and analysis of the views of thinkers and scholars, as well as to discuss and analyze the provisions of the Constitution and criminal legislation (substances and procedural) in order to identify the strengths and weaknesses and provide alternative proposals for treatment in the future. Accordingly, this study relies on the analytical descriptive approach.

IV. RESEARCH OUTLINE

Researchers are relying on the following brief plan: chapter one: Define the guarantees of the rights of the accused and their importance in the criminal case. Chapter two: Concept of State and distinguishing it from the concept of authority. Chapter three: Dealing with accused and etatisation. (We mean by the etatisation of power: the transfer of power to the state, and we don't mean the concept of internationalization)[5, 7, 9].

(1) Define the Guarantees of the Rights of the Accused and their

Importance in the Criminal Case.

The criminal case has several phrases, in two of these phrases the person is a suspect or accused, these phrases are, the preliminary investigation and trial phrase, and the phrase in which that person is sentenced, is the phrase of enforcement of penalties, after he was sentenced to be a (criminal) based on the evidence established in the case, so it is about the most precious thing the individual has - the freedom his consideration, and if that freedom is left without any guarantees, it will result in being violated [8, 15].

Faced with this situation, there must be a mechanism to ensure respect for the individual freedom and personality of the accused and through all phrases of the criminal proceedings in order to achieve the greatest care and respect, this mechanism is the framework that guarantees the protection of the accused and non-prejudice of his rights, Namely, the impartiality of the investigator, and the empowerment of the accused's deputy to appear during the preliminary investigation as this allows him to check the progress of the investigation and enables him to monitor the investigator during the investigation proceedings [10, 12].

Other guarantees are respecting the right of silence of the accused pending the presence of his attorney, recording the proceedings of the preliminary investigation, confidentiality to the public and publicity for adversaries, and observing certain guarantees for the accused during interrogation, search and trial.

If such guarantees are observed for the accused at the preliminary investigation phase, the rights of the accused are protected. Therefore, protection is the legal cover that must be available to judge whether the guarantees of the rights of the accused have been sponsored, and if guarantees are provided to protect the rights of the accused in the preliminary investigation phase, it will reflect on the rights of the accused at other phase of the proceedings, especially the trial phase [6].

Protection at the trial phase means providing all guarantees for the rights of the accused in terms of fair trial before a competent, impartial and independent court, provided that the trial is public, presuming the innocence of the accused until proven guilty, and providing defense rights to him and adherence to the principle of legality of crimes and penalties [15].

All these guarantees will protect the rights of the accused at the trial phase because that phase is one of the most important phases of the criminal case because it entails conviction and acquittal, while taking into account his rights during his stay in correctional institutions after sentencing.

Therefore, protecting the rights of the accused through the phases of criminal proceedings in general means ensuring the exercise and moving it from the phase of theoretical texts as ideal rules to the practical reality, since protection can only be manifested through scientific application, which gives the guarantees of great importance in practice.

The protection of human rights in the face of the authority is meant to restrict the activity of that authority and limit its areas of intervention during the course of the criminal case, considering that the exercise of freedom within the limits prescribed in the Constitution places a duty on the Authority to respect it, we tend to protect the rights of the accused by balancing the right of society to punishment and human rights and ensuring that they are respected through the phases of criminal proceedings to ensure that the theoretical texts are applied in practice.

The importance of such protection appears in that the texts in the legislation remain mere theoretical texts unless accompanied by means to ensure their effective protection, however, the absolute practice of humanitarian activities may lead to a disturbance to the security of society and the balance between the rights of citizens on the one hand and the right of citizens to face the might of power on the other hand, Here the power is supposed to intervene in favor of protection, not against it.

The importance of protecting the rights of the accused, which is based on the need to find psychological and procedural means to ensure the commitment of the authority not to attack the rights of the accused under the pretext of protecting the security of society.

A society that believes in human rights in a balanced manner with the right to punish those who tamper with its security is a democratic and developed society; On the other hand, giving the rights to protect human dignity would lead to reintegration of that individual into society in the event of a conviction[7].

Thus, the importance of criminal protection of the rights of the accused is clear as they are the most important guarantees known in the legal field to protect public freedoms and personal freedom in particular, the fact that the accused is a weak person in the relationship between the individual and the authority [16].

If the state guarantees those rights sufficient to deter others from undermining the freedoms of others, there is a correlation between the scope of such protection and the extent of the democracy of the government system and vice versa as well, the protection of the rights of the accused is the real choice to indicate whether the legislative text on the protection of his rights find a way of scientific application.

(2) Concept of State and Distinguishing it from the Concept of Authority

The concept of state has a deep philosophical meaning, which precedes the political and legal meaning, in other words; we cannot actualize the concept of state in its political and legal frame without comprehending its philosophical dimension, for this comprehension would aides to pass by authority phase and get to state phase or authority etatization phase. Clarifying this idea requires from us to distinguish between the concepts of state and authority, because we might confront a confusion of between two concepts, when we hear about it from some politicians and even some intellectual heads, in case intellectual recognition is supposed to put a range to define some criterions for authority and state, for the relation between authority and state is synthetic, for the ruling authorities have many forms throughout history, and each of the adopt some values and concepts that had been considered as contradicted. But mostly didn't adopt any understanding or comprehending of their position in a period of time. And that's why ruling authorities were transforming, or living in changeable levels; some of them were long-period levels and others were short-terms. As long as we cannot interpret state as authority, so we necessarily authority does not equal to states, the reason is that state never was a simple idea to be interpreted by some narrow-minded theories, which tried to adopt some non-methodological ideas to satisfy the rulers, so interpreted state as a space of land which some people dwelled in it, and these people are ruled by a sovereign or ruler. This interpretation is a superficial to an extent that it cannot be practiced on the lowest criterion of state in its true and wide meaning, if this definition of state was appropriate so we can to ascribe state to any family or tribe.

So, the authority is working on strengthening the state or falling it down, but breaking or defeating of authority is not equal to falling down of state, especially when the state is strong and able to protect itself and achievements, and also when an authority generates and develops its self, it does not necessary for a state to be built, it might be generated and take the power, and even control the society, but fails to build a strong state with glory, prestige and sovereignty[4].

There is a difference between state and authority, but we must distinguish between political authority and state, for there wouldn't be any confusion between the above type of authority and political authority that represents state and manage its institutions, which are a common confusion among people, so what is the difference?

1. State is an historical production of social consciousness (economically, culturally and politically) which is formed with existence of a people on a land, and actualized in the frame of constitutional law, which aims to put sovereignty of state in practice, whether inside (in relation of state with authority, and relations of authority to citizens) or outside (in relations of state to other states) [4].

But authority is a transitory political entity, gets its legitimacy from the historical entity (which is the state), and through this the state would be sovereign. So the authority is a part of this whole, and must submit to it (to its principles, values, political, cultural and moral criterions), as every other parts that submit to it. State is the center that all other intuitions are connected to, in a way that transcend the link that they had to authority (symbol of authority) which manage these institutions in the state on one hand, and links the citizens to these institutions on the other hand, that submitting to the authority holds the meaning of submitting to state, and not to state itself as it is authority [4].

2. The meaning of “state” is the most ambiguous term, not because it is translated from foreign languages, but the reason is those who used it twisted its meaning, for they didn’t distinguish between state, authority and other terms that are connected to it. For instance, in English as well as French there is an obvious difference between them: In French language, it is called: Etat, pouvoird’ Etat, Autoritespubliques, Autorite. Regime and systeme. In English language, it is called: State, State Power, Public Authorities, Authority, Regime and System.

Also the political practice settled in people’s mind (especially in Middle East) some similarity, sameness and synonym among the terms that are used in political science which originally are not similar or same or synonym, and this confusion generated a dilemma that makes building a modern state out of question, for it represents state as “only a political authority. When the state becomes a mere power, it becomes an instrument in the hands of a narrow social and political elite, and it lose their democratic and popular legitimacy and resort to force, violence and tyranny[5]. However the main question is how to get through this phase and build a legislated state and institutional state? Before we answer this question, we must point out that authority contains ruler and ruled, and no authority is able to transform to a state in its deep meaning unless we pass both ruler and ruled , and it is possible to leave this dualism unless they fade away in people’s mind, and the importance of this fading away is birthing of a new being that is difference from both of them, called “State”, and at the same time bigger than them, which means that the ruler and ruled are both submitted to the state. From this point, political and legal scholars justify the centrality of concept of sovereignty of law and institutional authority, for the law is generated from this new-born being, and the institutions, depending on this law, form. In another words, both ruler and ruled participate in producing law and institutions, but at the same time must obligate to them. The majority of jurists agree on a legislated personal of state – as an expression of new-born being- for the state is ajuridical personification to nation [14].

And this means that the state represents as a legal unity which is independent from those rulers that practice authority in its name [11, 13]. There are many consequences, when we have a juridical personification of state: such as considering state as a legal unity which is independent and different than those whom practice the power in its name. The treaties entered into by the State shall remain whatever the shape of the state or the system of government changes. Legislation shall remain in force if the State, the system of government changed unless such legislation is amended or repealed, and the rights and obligations of the State shall remain in force regardless of any change in the form of the State [13].

(3)Dealing with Accused and Etatisation

The way of dealing accused is considered as a primary and precise criterion for success in the process of etatization. And to answer this question, we must point out some points, it is worthy to mention that these points are

the main and elementary tasks of state, which means that the range of practicing these points affirms the success of etatization:

A. *Restituting the Right to Rightful One and Principle of “The Accused is Innocent, Until Proven Guilty”*

There is no doubt that restituting the right to rightful one is among the most elementary tasks of state, here, which is connected to accused, state must –which represented by those who acts on accused’s issues through the course of criminal case including judges, public prosecution and crime scene officers – respect accused and deal with him as innocent depending on principle (the accused is innocent, until proven guilty). This is the same thing that most international documents and constitutional laws in world justify, for instance, the Article (11/1) of Universal Declaration of Human Rights drew out this matter as follow “Everyone charged with a penal crime has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense”, and also the Article (14/2) of International Covenant on Civil and Political Rights as follows “Everyone charged with a crime shall have the right to be presumed innocent until proved guilty according to law.”[17, 18]. Iraqi Constitution in article (19/5) goes on this issue as follows: “The accused is innocent until proven guilty in a fair legal trial. The accused may not be tried on the same crime for a second time after acquittal unless new evidence is produced” [19]. The right of assuming accused’s innocence would bring up some consequences:

1. Only by a judicial side, formed in a legal way, condemnation or innocence of an accused could be settled, and of course after following a just trial procedure which is stipulated in the related national legislations.
2. It’s not possible for anyone to be condemned because of doing something or not doing some other things, unless these doing and not-doing, according to national law, considered as a crime in the time of performing it.
3. All of those who go through investigation must be dealt as innocence, whether they were stopped or arrested or been released on bail.

So when the state does not respect rights of accused and does not guarantee him, and deal with him as a criminal before his trial, the state itself becomes a criminal, and after when we get a criminal state, the concept of (whole – state) is spoiled and corrupted, for as it is obvious the task of ruler, according to social contract theory is commitment to the requisites of the social contract, to managing the social life, and protecting those rights that the individuals did not gave up on them, making justice among them [3]. and correct the mistakes of society and build a good government and strive crimes.

B. *Working on Maintaining Balance Between the Contradicted Interests*

The accused would lose his freedom in stopping phase, so it is necessary to provide guarantees that allow him to defend himself. Although he is accused to have committed a crime, but he first of all, is a rightful human whom his rights must be safeguarded through precise dealing with him between involvements of state to punish him in order to protect the society and safeguarding the rights of accused as a human.

Although maintaining this balance considered as one of main tasks of state, but the state must respect the accused and look after him for he could get to his rights according to constitutional, because the accused, despite

anything he did, is in vulnerable position in one hand, his freedom is restricted, and on the other hand he is under the control of investigators and judges. So from this point, state must respect the accused.

If the state failed to maintain this balance between itself and the accused, it would also fail to achieve the balance between rich and poor, citizen and foreign, men and women...etc. and failing to maintain the balance between these dualities which are in society means failing to success the process of etatization.

C. The Responsibility of State in the Case of Engaging one of its Citizens to Accusation and Charge

When an accused has been condemned of performing a crime by courts and his crime would be justified through correct judicial ways, Some psychologist and sociologists believe that the state is partially responsible for this engagement, even there are some others who think that even state is condemned as well, depending on the following ideas:

A. Some psychologist entitle criminals as psychos or at least as a human which is not normal, for instance the Italian doctor, Lombroso Cesare, define criminal as “a unique type of human and is distinguished from other by his generation and has mental disease”. And emphasize that a criminal has some particular mental characters: such as weak feeling of pain and coarsen heart, rarely shy”. Sigmund Freud claims that the reason of this criminal character is the inability of Ego to adapt his instincts with social life, or the absence of super Ego or its disability to perform his task to monitor or prevent. Freud mentions some examples about what happens to the psychological conditions of human through anxiety and mental disorders like - Oedipus complex and guiltcomplex, and from this point claimed that morality and divine and earthy laws must necessary regard those people who has this type to character [10]and[2].

B. There are some factors which affects someone to be a criminal, which means there is an appropriate ground for a crime to occur, and the state, more than any other one, is responsible to make this ground. From this point some holds that the state is, because of this, responsible. And this is what the positivist intellectuals hold when they emphasize that the individual is always committed to the internal and external influences[1] also social doctrine intellectuals[8].

D. Respecting the Accused is Considered the First Step to Rehabilitate him, and Eases the State's Responsibility and Declaring State as Accused

there are many reasons to load the state with responsibility of a citizen to be engaged in circle of crimes, for the state is responsible – before any other one- for the objective factors that would make a ground for a crime to occur, but when the accused is be respected by the state, this would eases its responsibility on one hand, and on the other hand dealing with the accused in a humanity way and not violating his fundamental rights by those who acts on accused's issues is considered as an important step toward reforming the criminal, especially the jails, in the point of view of modern states, is an environment to reform them and prepare them once again to go back to their societies. Thus we concluded that reforming the accused begins with dealing with accused in a good way, before his condemnation and after.

E. Humane Dealing Brings us Closer to the True Concept of State

It's a right of accused to be treated in a good and humane way, aiming toward safeguarding his dignity and physical and mental safety together; this is one of the duties of state that he must provide to all of those people that

deprived from their freedoms, and this is what the article (10) of International Covenant on Civil and Political Rights emphasized on as follows “ All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”, and the article (10/2) claimed the necessity of “Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons”. But obviously those who acts on accused’s issues use violence and torturing, and they do that to force the accused to confess on the crime, but why these actors use torture?

As we see, there is a wide attention to the “the accused is innocent, until proven guilty” principle, respecting accused’s rights and also texting on it in every international documents and constitutional of the states, and their sources are these five points that we just mentions previously, for regarding these points not only for the benefit of the accused, but for the benefit of the concept of etatisation and achieving justice and equality in society.

V. CONCLUSIONS

Based on the above, the researchers conclude that:

1. The 2005 Iraqi Constitution is one of the most important Iraqi Laws which deal in detail with all the principles relating to human rights, including those related to the rights of the accused those enshrined in international declarations and covenants.

2. Increased legal support for human rights principles, in particular those relating to the accused through the enactment of legislation that intensifies the punishment for violations of the rights of the accused during the course of the criminal proceedings

3. How the state deals with the accused is one of the most basic and accurate criteria to demonstrate the success of the process of (etatisation) of power. And that humane treatment with the accused brings us closer to the correct embodiment of the concept of the state whose mission lies - in connection with the rights of its citizens that their social conditions dragged them into the crime circle –to work on achieving a balance between conflicting rights, to return the right to its owner and to act according to the principle “accused is innocent until proven guilty”, And bear a part of the responsibility of engaging its citizens into the crime circle. And respect for the accused is an important start to reform and also reduces the State's responsibility towards its citizens.

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