Fighting for rule of law in Iraq: Why Iraqis should uphold judiciary's decision on polls

THE CASSATION CHAMBER ACHIEVED A PYRRHIC VICTORY THAT CAN SAVE THE ELECTIONS

Chibli Mallat

It took the US Supreme Court 180 pages to issue the controversial – and by most accounts, poor – Citizens United decision which equated corporations with individual human beings and which threw overboard a hard-to-reach bipartisan law meant to reduce the power of money in US elections.

In its Abd al-Amir decision of February 3, 2010, it took the Iraqi Cassation Chamber 10 lines to bring hope to an endangered electoral process in Iraq. It was published on February 4 on the Higher Judicial Council's website. An English translation of the decision and a line by line comment follow.

I argued that last month's Citizens United decision repeated the ill-bent precedent of the infamous Bush v. Gore decision of December 2000 because the judges appeared to act as mere political agents for the parties of the presidents who appointed each of them. At great cost to the judiciary's credibility, both cases split down the middle politically, with five Republicans against four Democrats. Hence the finesse, in contrast, of the Iraqi judiciary's Abd al-Amir decision.

In an occasionally endearing ruling about the risk of being a judge in a country like Iraq, the Cassation Chamber admitted the appeals lodged by some 500 candidates on the basis of their exclusion from the electoral lists. That exclusion was decreed by the Accountability and Justice Committee on account of the candidates' organic ties with the previous Baath regime. The court declared that it did not have time to examine the appeals, and that while candidates had a constitutional right to run for elections, the court could cancel the results in case of success if the "democratic credentials" required by the anti-Baath law had not been met.

At the origins of the electoral turmoil in Iraq was the precedent created by the botched Afghani presidential election, which saw the rigging of the election of incumbent President Hamid Karzai go unpunished.

Challenges to the stability of the electoral system in Iraq started with the late approval of the electoral law on November 8, 2009. From the start, this appeared to be a harbinger of fishy dealings because it left candidates with little time to establish their tactics and coalition strategy. Then Tareq al-Hashimi – one of the three members of the Iraqi Presidency Council – unreasonably vetoed the law on November 18, pushing the date beyond the January deadline requested by an earlier ruling of the Federal Supreme Court. In a country with deep national and sectarian divisions, this was perceived as a Sunni ploy – Hashimi being Sunni. The unease was continued by rumblings of the president of the Kurdish region, Masoud Barzani, who threatened that same week to boycott the elections if certain Kurdish demands were not met. This was perceived as a Kurdish ploy. As soon as the date was finalized in the wake of a last-minute compromise with Hashimi and the Kurds, the crisis of the excluded candidates was set by the decision of the Accountability and Justice Commission on January 19, 2010. This was perceived as a Shiite ploy.

Since almost one-sixth of the candidates were excluded, the crisis is grave and threatens the integrity of the elections.

At the heart of the last crisis lie two conflicting basic principles: the candidate's freedom to run, and the public's right to be shielded from self-styled advocates of the Baath system.

The Court rendered nothing less than a Solomonic judgment. Tempers run high in elections, and Iraq is no exception. The Accountability and Justice Commission certainly erred in delaying the examination of candidates' credentials until so late in the day, and disqualified too many people for its decision not to appear excessive so close to the elections.

On the other hand, in a country where some politicians continue to boast about a ruthless "resistance" which kill dozens of innocent civilians at a time when American troops are anxious to leave the country, there is a legitimate question as to whether some of the unrepentant Baathists should be allowed to use what they decry as "US-imposed democracy" to run for elections. Some thought should also be given to the quandary faced by the Accountability and Justice Commission: it can only vet candidates' qualifications once they are announced, and when the announcement comes so late in the day, only basic conditions can be checked, like the age and nationality of the candidate. As soon as the candidate's "political" credentials are at stake, the process becomes fraught with impossible deadlines.

The Cassation Court tried to square the circle with a remarkable ruling. By holding that their democratic credentials might still be examined after the elections, because it simply did not have the time to thoroughly and professionally examine every file, the Cassation Chamber achieved a Pyrrhic victory that saves the polls, but only if its writ is widely accepted in Iraq.

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Since the decision was issued, all hell broke loose, in large part because the main parties in government and Parliament did not appreciate the quality of the ruling considering the difficulties. The seven-member court was originally appointed by the Higher Judicial Council on the request of Parliament in order to give the candidates banned by the commission the right to see their appeals adjudicated in a court of law. The judges simply did not have time to examine several hundred cases, nor did the law allow them to accept candidates who supported or who continue to support the members or advocates of the former regime, which was rightly described by Tony Blair as "monstrous" in his recent appearance before the Chilcot commission. Candidates whose rights to run were reinstated should take the decision seriously and should avoid triumphalism during the campaign. Similarly, all factions in Iraq must abandon posturing and must run a decent campaign which has for all intents and purposes fully started, while the brutal bombings meant to derail the elections continue and intensify.

The political maneuvers since the decision was issued are ill-conceived, and one should salute President Jalal Talibani's refusal to attend a session to which the chief justice was summoned. A "compromise" was announced, according to which the court would look into the candidacies by January 12, and the Iraqi electoral commission (IHEC) postponed the official opening of a campaign – which has been in full swing since the electoral law was passed – to give window dressing to the announced compromise. This does not bode well for the rule of law in Iraq, or the integrity of the elections. For where will the right of the disqualified candidates to a proper hearing stand in such a rush?

When the ill-advised decision Bush v. Gore was issued, losing candidate Al Gore expressed impressive democratic poise on December 13, 2000: "Now the US Supreme Court has spoken." Iraq should be shielded from further uncertainties created by suspicious candidates and parties. All must accept that "the Iraqi Court has spoken" in a far better decision. The Iraqi judiciary gave Iraqis a respite which will only take effect if its decision is upheld for its extraordinary humane and legal quality. Its hasty reversal bodes ill for Iraqi democracy.

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An Iraqi man shouts slogans next to a picture of National Dialogue Front chairman Saleh al-Mutlaq during a rally to show support for the politician in next month's general election in Baghdad on Wedneday.

AFP/Khalil Al-Murshidi

The Abd al-Amir decision: Iraq Cassation chamber rules that disqualified candidates can run, but cannot sit in Parliament before their 'democratic credentials' are confirmed

Special Cassation Chamber, Iraq

Editors note: Comments by Chibli Mallat in italics. Summary: The Special Chamber appointed by the Higher Judicial Council upon Parliament's request ruled that candidates disqualified for ties with the former ruling party are entitled to run, but that conformity with the legal conditions will be examined after the elections on March 7 before they are allowed to take their seat in Parliament.

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Date: February 3, 2010

A special Cassation Chamber looking into the appeals against the decisions of the Commission for Accountability and Justice in the Federal Cassation Court met on February 3, 2010, and issued the following judgment:

Appellant: Abd al-Amir Jasem Muhammad Asad Muhammad

The Appellant brought his complaint against the decision of the Commission for Accountability and Justice to prevent his candidacy to membership in the Iraqi Council of Representatives for the session that starts in 2010, and the complaint was put to deliberation.

Only one appellant, Abd al-Amir, is mentioned. He was the first among an unspecified number who appealed to the court, 177 according to some journalistic accounts. Iraq doesn't know class action, but the decision in his case was used by the Court to reinstate the candidacies of all 511 disqualified candidates. Note also that there were no contradictory arguments normally required in court. The Commission of Accountability and Justice does not appear as a formal defendant.

Judgment: The decision under appeal includes the appellant in the measures taken under Law No. 10 of 2008 of the Higher Commission for Accountability and Justice,

Under Article 17 of the Accountability and Justice Commission Law 10, the Cassation Court's decision is considered "final, qatiyya wa batta." It is unclear whether they could be appealed to the Federal Supreme Court.

and prevents his candidacy to the elections by Letter 232 of the Higher Commission for Accountability and Justice on January 19, 2010, addressed to the Independent Higher Election Commission (IHEC). Cassation appeals have since January 20, 2010 not ceased coming to the present Chamber, and the examination of these appeals requires first a look into the legality of the commission that issued them,

This is the first important ruling: the court is promising to look into the constitutionality of the commission, or at least the constitutionality of disqualifying measures it takes.

as well as the perusal of the evidence and documents on which this commission has based its decision to include the above appellant and the rest of the appellants against the above measures, as well as the perusal of the appellants' evidence as to the incorrect nature of what they are accused of. [All this] requires from the seven-member Chamber to have a time that is not available given the beginning of the election campaigning on February 7, 2010,

The argument of time is novel, because it is rare to see a Court admitting it does not have enough time to issue a judgment. Time is essential to both effective (time is key in due process, to allow a full hearing for the parties) and bad justice ("justice delayed is justice denied"). It is hard to factor "time" in a decision, and the Iraqi court is forcing the world to take note of a universal issue, often present in challenges to elections. The acknowledgment by the Iraqi Court of the dilemma is especially endearing: should courts be forced to take on such politically frayed disputes when it does not have the time to listen to the contenders, amidst immense commotion in the country?

especially since today (February 3, 2010) is a Wednesday, and roads are likely to be cut tomorrow Thursday and maybe also Saturday because of the 40th visits, with the end of the visits corresponding to the beginning of the campaign.

The reference to Arbaeen is to the tradition of massive popular visits to the Holy Mosques, which takes place for Iraqi Shiites 40 days after Ashura, the martyrdom of Imam Hussein on 10 Muharram 61 AH (October 2, 680 CE) at the battle of Kerbala. They were barred and repressed under the former regime. The tragic context reveals a further endearing side of the decision: the court refers to the extremely difficult circumstances in which it is being asked to rule. 500 dossiers are on its docket, there are only seven members, and the campaign is about to start, while the streets are full of pilgrims on Arbaeen, and a string of horrible attacks against them has claimed dozens of lives.

Therefore the Cassation Chamber sees [the need to] postpone the examination of the [current] appeal, together with the other appeals, and to allow the appellant to participate in the candidacy to the elections in order to exercise his constitutional right in the electoral session that starts in 2010;

This is the fundamental constitutional argument that deserves to stand the test of time: a citizen is entitled to run, and the presumption of meeting the legal conditions stands in his favor until shown otherwise. The importance of the principle should be appreciated against the vetting procedure developed by the Iranian Council of Guardians, which has emptied parliamentary and presidential elections from any democratic content. The Council of Guardians routinely disqualifies hundreds of candidates on account of their being "un-Islamic." Note also the collapse of the Lebanese Constitutional Council in the wake of the 1996 parliamentary polls, and the heavy criticism of Bush v. Gore and Citizens United in the US.

But in case of success under Amended Law 16 of 2005,

The main positive amendment to the 2005 law is the open-list system, which allows the voter to choose any candidate on the list rather than be forced to adopt the list as is, which was the case in 2005.

such success does not allow him to take up his seat in the Council of Representatives and does not give him the rights and privileges that the law grants to the members of the Council of Representatives, including parliamentary immunity and financial compensation and the like.

This second ruling is where the Chamber appears at its most "Solomonic": while it gives the disqualified candidates the right to proceed, it prevents them from becoming MPs before they have proved their "democratic credentials." The concept of "democratic credentials" is where one hopes the court eventually breaks new ground for Iraq and a world afflicted with extremist, undemocratic candidates, for whom the ballot box is a way to get to power and then turn against the democratic system to perpetuate their rule. In the case of Iraq, the anti-Baath law is in my view natural and necessary, because it mitigates the public request to try former second-tier officials associated with one of the worst dictatorships in modern history, and substitutes trials with preventing unrepentant authoritarian leaders from seeking power through a democratic system they continue to decry. But the question is whether this characteristically anti-democratic bent should be restricted to former Baath officials.

Therefore the chamber decides unanimously to pospone the decision on the appeal on both procedure and substance until the end of the electoral exercise in accordance with the above.

Judgment taken unanimously on 18 Safar 1431 AH corresponding to February 3, 2010.

Two other endearing dimensions of the judgment: the court repeats twice in three lines that the judgment is unanimous. It realizes the difficult context it operates in, and offers a judicial wall of solidarity which would otherwise be far easier to undermine. Also, the names of the judges are not mentioned, contrary to previous practice. In large part, this is owed to the dramatic context in which Iraqi judges rule. Some 40 judges have been killed since 2003, and the Chief Justice Midhat al-Mahmud lost his son in one attack. The Higher Judicial Council's headquarters were the target of a huge car bomb on December 25, 2009.

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