

## 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

Thursday, February 11, 2010

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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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 postpone 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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