

Supreme Court's opinion of Article 76 of Iraqi Constitution

Editor's note: Responding to a request for clarification made by Prime Minister Nuri al-Maliki's office on March 21, 2010, the Federal Supreme Court issued opinion 25 of 2010 on the meaning of Article 76 of the constitution on March 25, 2010.

Article 76 reads in part that "The president of the republic shall charge the nominee of the largest Council of Representatives bloc with the formation of the Council of Ministers within 15 days from the date of the election of the president of the republic." The coalition assembled by former Prime Minister Ayad Allawi eventually became the largest parliamentary bloc when the Iraqi High Election announced on March 27 that his coalition would get 91 seats – against Maliki's 89. Despite the possible interpretation that Allawi (or the person his bloc nominates) should be the premier-designate, the FSC held that this did not derive necessarily from Article 76. A "bloc" could be formed after the election.

In a discussion before the ruling was handed down, colleagues who have worked closely on the Iraqi Constitution, notably Professor Haider Hammoudi, defended the plain language of the text. Indeed, "the entity" which the court refers to in its decision has no place in the constitutional text, and its fuzzy character might create problems, especially if re-alignments start taking place within each pre-constituted blocs.

Despite this caveat, I think that the FSC was correct for the following reasons:

First, its decision appears to be consonant with past practice to the extent that "blocs" had collapsed after the elections, leading to two successive prime ministers in 2005-06, Ibrahim Jaafari then Maliki. Although they belonged to the same majoritarian bloc, only different alignments within Parliament at large, and not only internal disagreement within the bloc, explain Jaafari's replacement by Maliki.

Second, the choice of the prime minister is premised on his chances to form a government that gets a vote of confidence, and this always depends on the coalition he is capable of forming after the election. There is no point in nominating the head of the largest bloc if he is incapable of getting his government past the vote of confidence which ultimately determines in a parliamentary system such as Iraq's the validity of a the Council of Ministers and the beginning of its rule.

More importantly, the court also clarified the process to be followed after the elections. This clarification will hopefully facilitate filling in without undue delay the three important posts required by the Constitution: the speaker first, then the president, then the prime minister and his government.

"Federal Supreme Court's opinion on Article 76 of the Constitution concerning the nomination of the prime minister"

A letter came to the Federal Supreme Court from the Office of the Prime Minister (MTN 1979) including a request for the interpretation of Article 76 of the Constitution. The letter of March 21, 2010, asked for an interpretation of the expression "the largest bloc" in that article. The request was put to the deliberation of the Federal Supreme Court on March 25, 2010. After consulting the opinions of scholars of constitutional law and studying and perusing them, the Federal Supreme Court came to the following opinion:

The Federal Supreme Court found upon examining Article 76 of the Constitution in its five paragraphs and from examining the rest of the constitutional texts, that the application of the rules of Article 76 of the Constitution comes after the meeting of the Council of Representatives in its new session on the basis of the invitation of the president in accordance with Article 54 of the Constitution. Thereafter the Council of Representatives elects in its first session its speaker, then his first deputy and second deputy in accordance with Article 55 and then the new president under Article 70. Within 15 days from the date of his election, the president charges the nominee of the largest Council of Representatives bloc with the formation of the Council of Ministers.

The Federal Supreme Court found that the expression "the largest bloc" means either the bloc formed after the election through the electoral list which ran for the election under one number [the lists of candidates had different numbers] and won the largest number of seats, or the bloc which is formed of two or more lists which ran for election under different names or numbers and then coalesced into one entity in the Council of Representatives. Either of these that has the largest number of seats is the bloc whose nominee the president must call upon to form a government at the first meeting of the Council of Representatives.

This unanimous opinion was issued on 25/3/2010.

Midhat al-Mahmud, president of the Federal Supreme Court.