THE DAILY STAR
REGIONAL
LAW

The constitutional crisis in Iraq: What can the Federal Supreme Court do?

Wisdom suggests the FSC should not get dragged into breaking the government deadlock

By Chibli Mallat

Thursday, September 02, 2010

Contemplate the ongoing deadlock in Iraq following French historian Fernand Braudel's classification of two spans of time, two durées. One is the longue durée: how does the Federal Supreme Court (FSC), and the Iraqi judiciary in general, shape the rule of law for the Iraqi citizen, and for the body politic of Iraq at large? The other is immediate, and addresses the half-year-long constitutional crisis.

The crisis has actually been longer, with several worrying signs through voting day on March 7: one was the protracted discussion on the length prescribed by the Constitution to the Committee of Representatives' (CoR) mandate, leading to the Federal Supreme Court's opinion setting January 30, 2010 as the deadline for the elections. (Opinion 29/2009, May 13, 2009) Another was the prevention of a number of prominent candidates from running. (Special Chamber of the Court of Cassation, the Abdel-Amir decision, February 3, 2010).

The present crisis began on June 15, when the Iraqi body politic ignored the opinion of the FSC on the deadlines required by the Constitution for the formation of the government. Federal Supreme Court (FSC) Opinion 25/2010, issued on March 25, went to some length explaining the process: "The Council of Representatives meets in its new session on the basis of the invitation of the president in accordance with Article 54 of the Constitution [i.e. on June 15, 15 days after the FSC formally confirmed the results of the election]. 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. The president 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 his election."

Until June 15, matters were generally in order, or shall we say in tolerable disorder. That day, the new members of the CoR, save one, rallied behind a constitutional concept that made a mockery of the Constitution: it held after a few minutes that it was sitting in an "open" session, and adjourned sine die without accomplishing what the Constitution required from it, the election of its president and vice president according to Article 55 of the Constitution. MP Jaafar al-Sadr alone denounced the constitutional heresy of the "open" session, and called for the CoR to proceed immediately with the election of its chief officers.

He was right. With a Parliament not sitting, and the three top constitutional positions still unfilled, this crisis remains, and becomes more tragic as the ever-diminishing legitimacy of a caretaker government allows sustained killings in the streets of Iraq to be immune from a responsible, democratically elected government-to-be. Amid the concern of the world community, from the US president to the highest religious reference in Iraq – both Barack Obama and Ali al-Sistani have publically expressed their deep concern about a government-less Iraq – the question for the judges in Iraq is whether they can do anything about it.

This short durée, événementielle as Braudel has it, is taken up after we examine the longer term, that is the promise of the rule of law for Iraqi citizens within the current structure of the judiciary.

1. Longue durée: how the judiciary, and the rule of law, can be streamlined

The longue durée is eminently constitutional. We know that constitutions can last a long time when they are well conceived, and well interpreted, and otherwise disappear. Recently disappearing constitutions include the European Union's. Solid, well-conceived enduring constitutions include Germany's. The Federal Republic of Germany not only stuck to its Constitution for over half a century, it extended it seamlessly to the other half of the German nation. The US of course, has the oldest comprehensive constitutional text in play.

Iraq's Constitution is young, and the trauma of its birth, unlike for Germany and America, is still with us. Some 50 articles in the Constitution remain incomplete, notably those on the other key chamber in the Federal Constitution, the Federation Council. Also incomplete, because it is incoherent, is the structure of the judiciary. A chart of the several legal tenders of the Iraqi judiciary is illuminating. It was prepared by Andrew Allen after many a false start due precisely to the elusive and contradictory nature of the constitutional provisions on the judiciary: for what is the highest judicial body in the land? The FSC? The Higher Judicial Council? The Shura Council? The Iraqi High Tribunal? The Court of Cassation? Not to mention the Kurdish courts. Are the constitutional and civil courts of the Kurdistan Regional Government (KRG) the highest Iraqi courts in Kurdistan, as many Kurdish citizens live it in the North ?

This is not correct, constitutional experts would say. Each court or judicial body has its own, clear sphere of competence, and ways to balance it against the competence of other courts. If you look more closely, the FSC deals with constitutional matters, the Court of Cassation deals with civil, criminal and family matters, the Higher Judicial Council is an administrative body which does not render judgments, the Iraqi High Tribunal will disappear after the last trials of former top officials are completed, and the Shura Council deals with challenges to the administrative actions of the state (it is in any case being slowly brought under the writ of the FSC through administrative appeals). As for Kurdish courts, they are prepared to manifest more respect toward the

federal judiciary when things clear up in Baghdad in terms of security and government.

To this expert rebuttal, the answer is, fair enough. There is more law in Iraq than in any other country in the region, and more law in 2010 Iraq than ever in modern Iraqi history. The detached observer can only acknowledge this promising reality which makes one proud to work for Iraq with Iraqis. Still, the system does not work well enough, for its own coherence, or for the Iraqi citizen. It is incoherent, and judges in Iraq step all the time on each other's toes, while citizens are at a loss to know who holds the right to say what the law is where they need a unified, unifying voice for the way forward.

It would take some time to deconstruct the system, article by article. Over the past two years, we have done it, with our colleagues in the University of Utah's Global Justice Project: Iraq and the leaders of Iraq: by commenting on the Shura Council, on the two draft laws still pending for the HJC and the FSC, by working with Kurdish judges, with the justice minister, and by expressing our support to the important work achieved by the Iraqi High Tribunal members who put their lives on the line to try Saddam Hussein and his top aides.

So yes, with all our respect due to the achievements in Iraq, I remain critical of the constitutional-judicial structure, and would like to suggest a personal synthesis on the rule of law in Iraq, seen through the principle of judicial review.

There cannot be two rules of law in the country, and there cannot be two parallel, conflicting ways for the citizen to seek judicial review. Rule of law, by definition, is one.

Iraq is lucky: the head of the Cassation Court, of the Higher Judicial Council, and of the FSC is one and the same person.

These three key institutions are glued through the persona of one remarkable judicial leader, Chief Justice Madhat al-Mahmood. Without the man, Iraq could see its politicians dilute the judiciary by appointing three different heads for the three different judicial institutions. By definition, rule of law means the rule of law, not the rule of men. By definition, a fragmented rule of law, one that is not unified at the top, is a recipe for weakness, if not collapse. Look at Egypt: it has a wonderful Supreme Constitutional Court on record, but it can offer no recourse to the young Alexandria man recently beaten to death by the police.

So yes, my argument has been in our work with the judges, the politicians and the citizens of Iraq: rule of law cannot be plural, it must be one, so that the chance of having one judicial leader in the shape of the current chief justice does not evanesce as soon as he wearies of running three separate judicial bodies.

Even more emphatically, for the rule of law to come of age in Iraq, it needs to be perceived by the citizen to be unified. This is a longue durée exercise in constitutional law, an extremely important one that we should look at more closely with one key in mind: the need for the citizen to see one, coherent, effective, rule of law in the

country, and clear, convincing, coherent ways to seek judicial review on all matters, constitutional and otherwise.

2. The current crisis: judges please stay out

This brings up the present constitutional crisis. The record of courts solving constitutional crises is not good: in the Middle East, these efforts have all failed: whether in the case of the High Court in Israel, with decisions ending segregation not being honored (The Katzir cases), or decisions that perpetuate discrimination, occupation and brutality in the name of fighting terrorism; the Supreme Constitutional Court in Egypt, where the judges are demoralized by executive fiat then by the appointment of a yes-man by the three-decade dictator; in Algeria and Yemen by civil wars and military disturbance; or in Lebanon, with the then-president of the Constitutional Council resigning and the court set back at least a quarter of a century.

The record of courts solving constitutional crises is not good outside the Middle East as well.

I'll just mention the fact that legendary Chief Justice John Marshall sided with the government led by the opposite party to allow Marbury v. Madison to stand, back in 1804, and that practically all constitutional scholars consider Bush v. Gore (2000) as the worst decision of the US Supreme Court in recent history.

The conclusion should therefore be: please chief justice, do not allow your court to get dragged down into solving the current constitutional crisis. You cannot succeed, and if you do, the losing politician will hold a very long grievance against the FSC. World comparative constitutional wisdom suggests you shouldn't, and your recent experience shows that you shouldn't: the opinion about the maximal date for the election, which you set at January 30, 2010, was not respected, and the elections took place later than the date prescribed by a unanimous FSC; the decision on the de-baathification exclusion did not stand, and the Court of Cassation was forced to reverse that Solomonic decision two weeks after issuing it also unanimously in a Special Chamber.

Maybe that would be a cop-out of immense magnitude: the FSC could say, I cannot turn my back on my country. If the politicians cannot find enough wisdom to form a government, the FSC's sacred task is to show them the way.

I am skeptical, but let's play the game. News is that a number of NGO/citizens have lodged a case in the FSC on August 15 on the prolongation of the crisis because Parliament is not doing its job as prescribed by the Constitution. The FSC will have to decide whether it is competent, and whether it can adjudicate the matter. Maybe that citizen-initiated case can offer the occasion forward, so let us shed skepticism and examine it more closely. Two questions:

1. Who is the plaintiff to such a lawsuit? And who is the defendant?

2. What is the right constitutional question in the present crisis?

On the second question, surely the FSC cannot answer the question, "Can our politicians let us down?," or "how can we force our politicians to form a government," or even "Who is according to the FSC entitled to be speaker, president, premier?" How can it be rephrased?

The complaint lodged on August 15 is well thought, although the information we have suggests that it was put in relative haste. The complaint identifies plaintiffs as citizens and organizations naturally concerned by the political deadlock. The defendant is the acting speaker of Parliament, a dear friend and stellar parliamentarian, Dr. Fuad Ma'sum. He declared that he would appear before the FSC should he be called to the bar.

Now here's the catch: plaintiffs and defendant agree, and their agreement provides the ultimate irony. Even with the greatest constitutional acrobatics, I find it hard to see Ma'sum as plaintiff and defendant at the same time.

If this is the case, then what's the point of the FSC ruling on it? If the defendant considers he is wrong, he as acting speaker should summon Parliament and declare that no one leaves the building before the constitutional process is respected, and a permanent speaker and his deputies formally elected. But here is the problem: even if he says so, MPs might simply ignore him, and the leaders of the bloc who are not ready to lose will remain away, travelling as they have incessantly done in the past several months. For what sanctions can the FSC implement if it orders Parliament to meet and Parliament does not?

This brings us back to the first caveat, the main one. Courts are ill-equipped to solve constitutional crises. It might be a worthier subject to address the longue durée, how to offer the Iraqi citizen a robust judicial review, that is, a coherent, unified, swift, and efficient rule of constitutional law, rather than ask the judges to solve – whether in the FSC or any other court – the constitutional crisis in Iraq that is the work of the politicians.

Chibli Mallat is the Daily Star law editor. A version of this article was presented at the Max Planck colloquium: The role of the Federal Supreme Court in the resolution of the Iraqi constitutional crisis in Heidelberg, Germany, on August 23, 2010.