

Iraq at a crossroads: Constitutional Review Committee fills in crucial gaps

Domestic, regional turmoil stand in eerie contrast with equanimity, wisdom displayed by CRC

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BAGHDAD: Iraq is at a historical crossroads on the bumpy road to democracy. The Constitutional Review Committee (CRC) has all but completed the task assigned to it by the 2005 Constitution under the chairmanship of Sheikh Humam Hamoudi, the delegate of the largest parliamentary bloc, together with Dr. Fouad Masum, the head of the Kurdish bloc, and Dr. Selim Jiburi, a leading MP from the speaker's bloc. This smaller committee sits in the midst of concentric rings, first

within a larger committee of strongly representative currents, from Prime Minister Nouri al-Maliki's colleagues MPs Ali Allaq and Abbas Bayyati, to the more secular-liberal MPs Aliya Nsayyef, Communist party secretary general Majid Hamid and Kurdish Feryad Rawanduzi. The Committee is supported by a small technical group comprising Dr. Mayyada Ihtishami, head of research in the Iraqi Parliament (the CoR, Council of Representatives), a dedicated rapporteur in the person of Dr. Hasan Yasiri, and Dr. Hamoudi's able aide Ali Fadhel Muhsin. A larger ring of the CRC consists of 27 MPs, then the full Parliament who must vote with a simple majority on the amendments before they are put before the people for approval. Nor did the CRC hesitate in soliciting comparative constitutional expertise to Dr. Law on the best practices it saw fit for Iraq's constitution

Since the relatively recent constitutional pacts emerging from the American and French revolutions, one of two routes is available for writing a constitution. Either one person is entrusted with drafting the full document, as is said of constitutional scholar Hans Kelsen for Germany's Weimar constitution or General de Gaulle's trusted aide Michel Debré for France's 1958 Constitution, or it is a decidedly collective endeavor of several "founding fathers." The advantage in sole authorship is the coherence of the text, but the result gets inevitably constrained by the philosophy of the drafter, however scholarly and detached he tries to be. The advantage of the alternative collective route is in the daily exchange of arguments and the participation of representatives from large sectors of the national constituency. The disadvantage of committee work is that the text inevitably loses coherence and style.

This was the case in the collective route Iraqis chose for both drafting the Constitution in 2005 and the work of the CRC since, and we had the signal honor of accompanying

some of its recent deliberations, and witnessing a special Iraqi moment on the road for the rule of law in the country.

Domestic and regional turmoil stand in eerie contrast with the equanimity and wisdom constantly displayed in the CRC's work. There was no taboo in the discussions, and the measured and engaging style of the CRC chairman will secure a choice place in history for Iraqi constitutionalism.

The CRC work is unprecedented because of an Iraqi constitutional specificity. The Committee was tasked to complete the unfinished aspects of the 2005 text under the Constitution's own exceptional terms. It operates under Art. 142, which allows the amendments agreed to be passed by Parliamentary majority in one go, whereas the normal procedure of Article 126 makes its adoption far more difficult because of the lengthier procedure and a higher parliamentary majority required.

Despite the continued violence forced onto Iraqi society, there was a profound difference in the atmosphere of the CRC work with the one prevailing in 2005. Then, the committee drafted the Constitution amidst rivers of blood that saw the daily sacrifice of between 60 and 100 civilians. This also forced the constituents to leave some 50 out of the 144 articles of the 2005 text unfinished by its own accord, and the need for the CRC to remedy these gaps. We saw the members of the Committee discuss articles one by one, addressing loopholes that are inevitable in any constitution arising after 40 years of dictatorship, and improving upon areas where consensus could be reached. Corrections and addenda were necessary in large and small matters, ranging from dates and deadlines to quotas and majorities.

In addition to important details of a technical nature, in one case the date of the parliamentary elections which remained long uncertain because of the obscurity of Article 56, some constitutional gaps were particularly important. The Committee had to address the increase in the number of deputies in the light of continued population increase, the delineation of financial and budgetary principles, and the structure of the judiciary, especially in its constitutional role as protector of the basic rights of Iraqis, as individuals and as groups.

Maybe the most important achievement in the four-year, on and off work of the CRC, was to address the more general constitutional structure in Iraq obtaining from its unique social fabric, whether in the national division between Kurds and Arabs, or the deep communitarian cleavages between Sunnis and Shiites, amidst a large number of smaller national and religious groups which form an unusual mosaic even by Middle Eastern standards. The overall constitutional structure departs from Iraq's "unity" (Arabic "wahda," Art.1), but its real distinctiveness is its "federal" (Arabic "ittihadi", also in Art.1) character, which expresses the desire of citizens, national and religious groups to live together in a constitutional mode that needs to be reinvented every day. Federalism is always a process, unlike "unity," which is a mere statement of fact. The federal process requires institutions to ensure that the normal differences and disagreements get resolved without violence, producing at the same time what a famous decision from the American Supreme Court called a "laboratory" for the whole country. The diversity secured by federalism constitutes a permanent lab in which a particular region or institution or group experiments a preferred model, which

can fail or succeed. Only if it succeeds is the experiment likely to be adopted elsewhere in the country.

The constitutional construct, in a federal system, cannot be completed without a body that actively shares in the legislative process. Names of this “upper chamber” vary. In the US it is called Senate, in Germany Bundesrat. In Iraq, it is the “Federation Council, majlis al-ittihad,” which is established by Art. 48 (“The federal legislative power shall consist of the Council of Representatives and the Federation Council”), but it is not developed other than in the stipulation by Article 65 that the Federation Council shall be established later by law.

The Federation Council is needed by the Iraqi constitutional construct for other reasons than underlined usually. The diversity of the country in its various aspects, national, ethnic, linguistic, sectarian, even tribal, is a fact that does not require the Constitution to acknowledge it. Rather, the Federation Council is needed to transform the factual diversity of Iraqi society in a constitutional process that touches upon a wide range of the citizen’s concerns: from freedom of movement to the power of the police and the courts, to sharing the country’s resources and wealth. The Federation Council secures a process and does not consecrate a fact. The people’s elected representatives in the Federation Council do not congregate so much to defend the interests of their constituencies within the regions as to offer the appropriate channels to convey these interests and views in the heart of the constitutional and political decision. As President Jalal Talibani told us in conversation, “federalism is meaningless in the absence of democracy.” A democratic system naturally ensures the representation of Kurds in Irbil, or Najafis in Najaf, or Mosulites in Mosul on their respective home turfs. But it is the federal system that guarantees the voice of Kurds, Najafis and Mosulites in the heart of national decision-making, in Baghdad.

It is true that Kurds, Najafis and Mosulites also elect their representatives in the Council of Representatives, the lower house, but the functional difference is essential here, because the function of the Council of Representatives blurs representation into one, whereas the members of the Federation Council are expected to project a representation which is specific to the interests of their regions, and so adds a voice which is constitutionally different from the vote of the deputy. The regional voices in the center ensure that federal laws are institutionally attentive to the diversity and expectations that come from the periphery.

This marks the most important achievement of the CRC, which has filled the Federation Council gaping hole left by the Iraqi Constitution.

It may be that the Council of Representatives can create the Federation Council by passing a law (requiring a two-third majority), but the seriousness required by an institution as important as the FC suggests that its natural place is the constitution, and not a mere law passed by parliamentary majority even if qualified.

Any jurist, indeed any citizen who cares to peruse a constitution, or its amendments, will be able to discern remaining gaps, and it is in the nature of a constitution to remain a dead letter outside daily political practice, and the review by courts of rival interpretations when the constitutional text is applied. Regardless of inevitable shortcomings, the completion of the constitutional amendment process provides for a national coming together which is unprecedented in a young democracy like Iraq.

Such reconciliation operates at the highest possible level, the constitutional level. The CRC's hard work deserves to be enacted if only because to show that Iraqis take their constitutional institutions seriously, especially the Federation Council.

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