

Forum: Op-eds on legal news by law professors and JURIST special guests...

Pluralism and the Iraqi Constitution: Critical Issues For All of Us

JURIST Guest Columnist Chibli Mallat, visiting professor at Princeton University and the EU Jean Monnet Professor in Law at St. Joseph's University in Beirut, Lebanon, says that Iraq's constitutional response to pluralism may yet make it an example to the world...

Criticism of post-invasion Iraq has become a cottage industry; at latest count there are over fifty books showing why Iraq has turned into a disaster. This outpouring of opinion is healthy and natural. The question is what form such exercises should take to best help the situation, beyond the general humdrum that shapes up into consensual speech, in this case the nostrum that the situation is disastrous.

I recently participated in an unusual conference on the Iraqi constitution at the University of Pennsylvania, unusual even for people like myself who helped organize three full exile conferences on 'A Constitution for Iraq', in 1992 and 1996 in London, and in 1993 at Princeton. Thinking ahead about frameworks for the rule of law is not a vain exercise, if one accepts that such exercises will inevitably be transformed, possibly even totally brushed aside, by the pace of events. This should not stop the debate, however eerie it may sound, from continuing doggedly in the search for law as a social regulator - sooner or later Iraq will stabilize, and one must have faith: the accumulation of analysis will contribute to a better shape of things to come than any retreat into silence. Who could know, when, together with US Ambassador Peter Galbraith and now Iraqi Ambassador to the UN Hamid Bayati, we founded Indict to bring Mr Hussein to justice, that we would see a day when the man and his aides would be in court? Who could know that introducing federalism in 1992 to skeptical participants would have any effect? Who could predict that the Shi'i colleagues, of all participants, would find it a valuable tool of governance despite their strong majoritarian community presence in Iraq?

In a dynamic and fluid situation, there is no closure. Goethe underlined that theory is gray, and green the tree of life. I have just written a reflection on the Iraqi High Tribunal, underlining its shortcomings and suggesting that it be moved abroad to salvage whatever can still be salvaged of due process. Some will lament the tribunal's shortcomings, and wish that Saddam, like his sons, had been killed rather than arrested. Considering the toll on lives that this trial has generated, including the deaths of some of his hapless defense lawyers, the argument will find its supporters. I am not one of them: the trial is a remarkable happening in the history of Iraq - let's keep trying to improve the conditions in which it is taking place, rather than turn our back on basic values and principles that make us believe in it, and in the rule of law in Iraq as the way forward.

So 'take stock and move on' is the motto. Let me therefore depart from the second Iraqi post-Baath Constitution to underline its main failures and the way to remedy them in the context of a celebration of pluralism, but also to underline how much Iraq is a laboratory for the region, and

for constitutionalism the world over.

First problem. Pluralism and federal arrangements, a.k.a. Iraq and its communities, in other words federalism. In the rush to complete the constitutional process before the referendum last year, one key institution was left out: the Federation Council (majlis al-ittihad, Art.62), which is the equivalent of the US Senate, or the Bundesrat in Germany. This is one gaping hole, and it needs to be remedied. The Article states that the current parliament decides on the competence and composition of this Council, but we know that owing to an awkward electoral legislation, the current Parliament essentially operates federally, with three blocs, Kurdish, Sunni, Shi'i. So two problems: first, why duplicate federated - in US parlance, states - power? And even if the Federation Council gets established, what is its relation to the current federal parliament? This is an ongoing issue, which will not go away, and a clear framework is needed. I have argued to Iraqi friends time and again that for Iraq to work, the problem is not how Kurds exercise their powers in Kurdistan, or how Shi'is protect their holy places in the South. The problem is how to secure the involvement of federal states and peripheral communities at federal level. The role of the Federation Council will therefore be central, and cannot remain undefined as it is presently.

Second problem. Pluralism and Islamic law. Iraqi constituents have missed the one major challenge which the world put to them: reconciling world constitutionalism and universal human rights with the Islamic legal tradition. Under the chairmanship of Hasan Chalabi, the most respected jurist of Iraq, who presides over the Islamic University in Lebanon, I suggested the need to take Islamic law seriously as the drafting process was engaged. Taking Islamic law seriously is premised on two elements: scholarship and humanism. Humanism means that any bill of rights, whether Islamic or not, must subscribe to the basic values shared on the planet. This includes the refusal of compulsion, even in religion, and the equality between men and women. Scholarship means hard work. All kinds of Islamic congresses have failed to transcend an obscurantist interpretation of the tradition, as was shown in the important book of Ann Mayer a decade ago. Obscurantism is a direct function of laziness, which gets manifested in circuitous and obsessive shortcomings. You dismiss the issue, either through general clauses, e.g. in endless discussion whether Islamic law is a source or the source of legislation; or, as in the Afghani and Iraqi constitution, you juxtapose Western-style bills of rights and Islamic law, and brazenly proclaim that we respect everything. Well, laziness and ignorance will not work. What we need is a paradigmatic shift: take Islamic law seriously, and, as in the Ottoman Majalla, work hard on classical sources and style, also making sure that Islamic law becomes Iraqi law, I mean law that non-Muslims can identify with. Iraqi law for all Iraqis, Middle Eastern law in the region. The Iraqi constitution was a failure, and, if only for its poor style, with the possible exception of the preamble, an exercise in laziness. So let's get back to the drawing board, and get it right this time: make Islamic law universal law, which it is no less capable of being than French or American law.

Third problem. Women and pluralism. Here I confess there has been moderate success, as the Constitution continues the tradition of a quota of a quarter women in Parliament introduced in the first electoral law established under Paul Bremer's rule in the Coalition Provisional Authority. Success, because the arrangement ensures that Iraq joins on that score the most advanced countries. Moderate, because I tried to instill a more important locus for the quotas, that is in government, on the occasion of a seminar held with leading Iraqi women in Beirut to

discuss that very topic. More important than women MPs are women ministers and women judges. At least that is an undertaking that I have translated into the Lebanese presidential program. Together with the idea of electing directly the Lebanese president by the people, it has proved the most popular item of the program in the country. This quota system, of course, raises problems of a universal nature, whether it is called in American legal theory reverse discrimination, affirmative action, or representation-reinforcement mechanisms. It is a problem that begs a response of planetary import.

In conclusion, let me try to extrapolate from pluralism and communities, and pluralism and women, on Lebanon in particular, and on constitutional theory in general. When an American president, 42 tenures removed from George Washington, 41 tenures removed from Thomas Jefferson, says without blinking that Sunnis must be represented in government in Iraq, then surely there is a problem of constitutional values. To my knowledge, one and only one country has such an arrangement, whereby a minority sect has a numerus clausus in the constitution, and that is Lebanon. Now we know that such an arrangement plagues the constitution with terrible deadlocks, but what is the alternative? Majoritarianism does not work - it is brutal with minorities. A way to lessen the impact of majoritarianism is called federalism, another is called Lebanese-style sectarianism. So you see, the problem in Iraq is not only Iraqi, it is certainly Middle Eastern, with Arabs victimized in Israel, and Copts victimized in Egypt, and Berbers victimized in Algeria, and Shafi'ites victimized in the Saudi Hejaz. Iraq, as the rest of the Middle East, is offering a counter-constitutional example the world over, which majoritarianism does not have clear cut answers to.

So you see, if you choose your priority list well, it can come with a number of surprises. We need a new post-Montesquieu constitutional theory. That it starts in Iraq may not be a total coincidence.

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