

Reconciliation in Iraq: Taking the Constitution Seriously

In coming weeks a revised document will either fail or succeed in the volatile country

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A striking dimension on the Iraqi scene nowadays is the constant reference to the Constitution. Professor Haider Hamoudi articulated last week on this page how, four years after his last visit, he enjoyed seeing parliamentarians employing studied legal arguments for and against the sale of alcohol in Baghdad.

Four years also after my own last visit to Baghdad, I took similar comfort when I saw again Jalal Talibani, now the president, in October: this was a difficult moment of pogroms against Christians in the North, alas repeated this week in the capital, but it was refreshing to hear Talibani's arguments, and those of his guest Masoud Barzani, the president of the Kurdish Regional Government.

They referred time and again to the Iraqi Constitution, quoting this or the other article. Talibani is a lawyer, Barzani is not. When Barzani made a mistake about the number of the article quoted, he was noisily corrected by the chorus in attendance, and I upbraided him jokingly for not knowing the Constitution by heart. To hear political leaders making constitutional arguments so heartily is remarkable: Where in the Middle East is the constitution taken seriously?

This is why the present moment is so special in Iraq, as the drawdown of American troops is being reinforced by a call across the board for reconciliation. No one disputes the value of reconciliation. The question is how to make it effective.

Two routes – not necessarily antagonistic – are possible. One is eminently political, the second is constitutional. Under the first route, parties and groups sidelined since 2003 are called to share power. This reconciliation would theoretically include the Baath party and al-Qaeda.

Across the board in Iraq, al-Qaeda is a nonstarter, in part because those who speak for it are not interested in anything less than total power on their terms. With the remnants of the Baath party, the issue is more complex, as some of its leading protagonists are suggesting they will lay down their arms, but only if they are included in government.

I tend to share the reluctance of Prime Minister Nuri al-Maliki, and the majority of the political leaders in the country, to accept these terms. The rivers of blood associated with Baathism over the past 40 years in Iraq cannot be so easily washed away.

There may be a lesser way to accommodate some self-styled Baathists into public life – not directly into power, although why one should be attracted to boasting of that tragic legacy is a mystery to me.

This is a political process of heavy significance which does not generate much enthusiasm in Iraq and among defenders of human rights.

Political reconciliation without some justice process is difficult to stomach morally and practically, and I do not detect in the more vocal Baathists much regret over the ruthlessness of the previous regime.

The second route to reconciliation is constitutional. In Iraq, a constitutional revision has been under way since 2005, when the Constitution was enacted. In the coming weeks, it will fail or succeed. My argument is that a far better type of reconciliation will emerge from its success than any political reconciliation, which is by nature temporary. Constitutional reconciliation means a process, and an institutionalization of that process.

Iraqis have different interpretations of the Iraqi Constitution, and this is healthy. More importantly, the Federal Supreme Court (FSC), which is presided over by a respected and active jurist, Midhat al-Mahmud, and the courts increasingly across Iraq, are using the Constitution as a basic text of reference to settle disputes at the highest possible level. Two examples have been chosen for this page on critical issues decided by the FSC: on the date of the next parliamentary elections, which the Court settled with a basic display of common sense; and on the electoral system, which looms large over the impending electoral law.

The Iraqi Constitution is an unusual text, because of its birth in immense violence. When it was discussed, the background was a de facto sectarian civil war. By any measure of comparison, Iraq fares far better in 2009. This is owed in no small measure to the displacement of violence by political arguments rooted in constitutional terms. The Kurdish Regional Government has just produced its own Constitution, which is the subject of great controversy and will not doubt be the basis for profound disagreements over territory, oil, water, and taxes. Fair enough: as long as the main parties do not resort to violence, such disputes are in the order of things. Federalism is the name of that constitutional game. It offers a number of legal routes to address inevitable problems, and provides ways out of political deadlock.

But the Iraqi Constitution is also lacking, indeed of its own accord. Over 50 from among 144 articles postpone one or the other difficult issue : sometimes it is as apparently secondary as the appointment of a commission “to be regulated by a law.” Sometimes it is as important as the Federation Council, the upper federal chamber which has yet to be established. Dr Fouad Masoum, the distinguished head of the Kurdish parliamentary group in the Iraqi Parliament, has been a lynchpin of the constitutional process from the very early days of his overseeing the Transitional Assembly constitutional committee. With a touch of bitterness, he explained how the device of “leaving the matter to be regulated by a law” was a way to allow the Constitution to pass in the teeth of profound disagreements.

Iraqis are blessed by a Constitutional Revision Committee (CRC) of unique human and intellectual quality: Sheikh Humam Hamoudi, who draws immense respect across the Iraqi spectrum, presides over it with Dr. Masoum and Dr. Salim Jabouri, an elegant lawyer and legal scholar from the Tawafuq party. The Tawafuq party, a coalition of mainly Sunni lawmakers, is headed by Dr. Eyad Samarrai, the parliamentary speaker who wants to get things done. CRC members tend to be exceptional, both in their diversity and their congeniality, and it would be unfortunate if the committee did not complete its work in time for the next parliamentary elections in January.

Reconciliation, which draws the necessary constitutional principles over which Iraqi parliamentarians are called on to vote, and the Iraqi citizens to endorse (or reject) in a national referendum, offers a far better way than any other type of reconciliation. An improved Iraqi constitution provides an institutionalized reconciliation of unprecedented legal portent in the region.

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