Establishing the Rule of Law in Iraq: Judicialisation of the Constitution between Rights and Structural Protection

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Introduction

One of the primary challenges for an emerging democracy is the weakness or absence of horizontal accountability, (O'Donnell 1994, 1996, 1999) in particular where the executive branch seems to violate the other two branches which can result in arbitrary rule and breed corruption. An empowered constitutional judiciary is considered a central institution in creation and maintenance of a constitutional order. Its engagement in relevant cases is considered of essential impact on either hindering or promoting the rule of law (e.g. experiences of Latin American and Eastern European emerging democracies).

Some common features of constitutions in emerging democracies:

- initial agreements;
- outstanding considerations including central questions about the basic structure of the government (as in Iraq);
- fragility or absence of non-judicial interpretation of the constitution due to legislature, party system, and civil society being.

Not in a strong position to resolve crucial, potentially contentious questions of power and fundamental rights

Struggling to develop their efficiency+ legitimacy

Constitution in emerging democracies [Iraq]

The IFSC’s decisions in 2010

<table>
<thead>
<tr>
<th>The Federal Cases [including constitutional interpretation]</th>
<th>No</th>
<th>Decided</th>
<th>Not decided</th>
<th>%</th>
<th>No. of sessions</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Appellant Cases [review of decisions of administrative court]</td>
<td>123</td>
<td>107</td>
<td>16</td>
<td>87%</td>
<td>13</td>
</tr>
</tbody>
</table>

Some celebrated cases of the Iraqi Federal Supreme Court:

IFSC has contributed to the development of the constitutional order e.g.:
1. Directing the Committee on Constitutional Amendments to propose the mechanism of electing the president of the Council of Representatives in the case of vacancy of the post (ruling No. 10/Federal/2009 on 26/5/2009)
4. Obligating local authorities in using Turkmen and Syriac languages in areas where there is population density of these minorities. (ruling No.15/Federal/2008 on 21/4/2008)
5. Declaring unconstitutionality of the open session of the Council of Representatives following the 2010 election.

| Constitutional or and election related disputes accounted for the 75% of federal cases decided by the IFSC, in comparison there are far fewer individual and group rights cases. (Source: Survey on Iraqi Federal Supreme Court on the percentage of decided cases in 2010.) |

Three controversial cases

Independent Commissions

Two main types of commissions which to be regulated by law:
1. subject to monitoring by Council of Representatives including: the High Commission of Human Rights, the Independent Electoral Commission, the Public Integrity Commission (Art 103/4 IC);
2. Responsible before or attached to the Council of Representatives including: the Central Bank of Iraq, the Supreme Audit Board, the Communication and Media Commission (Art 103/4 IC).

The Endowment Commission shall be attached to the Council of Ministers.

The IFSC decision on 18/01/2011: Placing Independent Commissions under ministerial control, citing ambiguous language from (Art 80) in contrast with other explicit Arts, arguing that “their functions are mainly of executive nature”.

Questioning of PM and ministers by Council of Representatives:

Constitutionally (Art 617-e of IC):
- A mere 25 deputies can “hold them accountable for matters within their specialization”. It means 65 deputies in the current 325-member assembly
- A fifth of deputies for a subsequent no confidence vote.

WHAT SHOULD THEY ASK ABOUT?

According to The IFSC decision on 09/07/2012:

It should be on a specification of alleged constitutional and legal infractions and must define breaches and material damages in terms of criminal procedure.

These decisions have been Criticized:

Questioning legitimacy of the current IFSC;
Accusing for overruling the constitution;
requesting formal clarification from the IFSC on relevant provisions on independent commissions;
estensive attempts by the parliament to dissolve the court and to draft a new law to better govern IFSC.

The term – limit law ( of three presidential positions)

Constitutionally (Art 72 of IC):
- the presidential mandate limited to two terms;
- silent on the number of terms for Prime Minister and Parliament speaker;

on Jun 26, 2013, the Iraqi Council of Representatives approved the terms limit law which:
- limits to two terms the mandates of President, Prime Minister and Parliament speaker.

Justifications cited by the Council of Representatives a third term is a threat to political process because of:
- the young Iraqi experience;
- the instability of state institutions;
- the sectarian conflict;
- and the history of dictatorship in the country.

Current Prime Minister tends to concentrate political, security and economic powers in his hands.

The IFSC decision

On March 12 the IFSC found that formally the session was “1 legal”

The matter of its constitutionality has yet to be decided by the IFSC.

Initial conclusions

1. It is observed that judicialisation in emerging democracies is not always an indication of the improvement of the rule of law, in particular where judiciary struggles to establish and maintain its independence. Instead, courts seem to have exercised restraint and promoted constitutional dialogues without deciding on substance of politically sensitive cases.
2. Newly established constitutional judiciaries in many instance have been more attracted to power contestations brought by elected institutions, and less for mistransmigations brought by individuals.
3. The IFSC caseload indicates that cases on rights discourses are less frequently presented before it compared to issues of structural constitutional order.
4. The first election in 2010 under new Iraqi constitution has resulted in more contestations, disputes concerning constitutional order and administration and adjudication of election in which their resolution seem uneasy task for the IFSC.
5. It is argued that the IFSC’s concerns over its legitimacy have at times prevented it from engagement in politically sensitive issues concerning ownership of oil and gas, or the fate of Kirkuk and the other intergovernmental concerns.
6. What the experience of the IFSC and the insights from the experiences of the other emerging democracies illustrate about constitutional judiciary and the rule of law.