

Legal Developments and Constitutional Structures in Iraq

Chibli Mallat*

SJ Quinney College of Law, University of Utah

Adapted from Dr. Mallat's Address to the International Law Section of the State Bar of Michigan

Dearborn, Michigan

September 19, 2008

It is a great privilege to address such a knowledgeable audience. I was delighted to hear from my colleagues about their practice in important Middle Eastern jurisdictions. In order to practice business under the rule of law, you need to have one, and the Iraqi theatre is most unusual in this respect. This is because post-dictatorship Iraq offers lawyers equally immense hopes and immense disappointments.

Immense disappointments are tied to security, first and foremost. Iraqi citizens generally, and people of the law in particular, cannot operate freely in Iraq. This is not because they are constrained by the government, but because they are the privileged targets of a brutal, unprecedented policy of mass violence aided and abetted by neighboring dictatorships that do not want freedom and democracy to prevail in Iraq. To date, applicants waiting in line for recruitment in the army and the police force continue to be the choice target of suicide and other unconscionable bombings. Dozens of judges and their families have been attacked by insurgents, and forty of that group have been killed since 2003. Perhaps the most poignant example is Chief Justice Midhat al-Mahmud's sacrifice, who suffered in the loss of his son the Abrahamic archetypal price for his dedication to the rule of law in the country.

One can see the drift of this presentation: immense disappointments, surely, but also heroic sacrifices, which are the hallmark of a society whose freedom in peace cannot be durably denied. Immense hopes because the prospects of democracy, human rights and the rule of law cannot be allowed to fail after so many sacrifices. All these hopes have been built on the strength of these incalculable costs, which will be perceived in history, despite the gruesomeness of violence in years past, as a joint American-Iraqi venture.

I know this is controversial, both in Iraq and in the United States. I was personally opposed to the war, but I also fought for twenty odd years against Saddam Hussein's dictatorship, far longer and far more intensely than I did for my own country, Lebanon. Dictatorships, in the Middle East and elsewhere, will come to pass. The question is how (and how long it will take). I am convinced that we can remove them mostly without violence, should we take the high moral ground of human rights, with a firm and relentless conviction that has led to the collapse of a far more entrenched system, and a far more powerful one than even the Soviet empire.

I am also aware that the freeing of Lebanon from cynical Syrian-government control, frail

and relative as it remains, would not have been possible had the Iraqi earthquake not taken place. Leadership by example is not a theoretical exercise in the Middle East or elsewhere.

Yes, persistent disappointments and promising hopes. Which will prevail? History bends toward justice, or so the old saying goes: the better future always trumps the past and its mistakes.

Comparisons may be an elusive exercise whenever Iraq is concerned. Yet I contend that Iraq has since 2004 been the freest and most democratic country in the Middle East, and that includes Israel and my native Lebanon. You can say whatever you wish in Iraq. Iraqis denounce daily and openly foreign military presence, call even for violence against foreign soldiers and Iraqi recruits, without fear of being arrested. I do not know one other country in the world where free speech reaches such a magnitude. It may have been an error to have allowed this freedom to such an extent, as calls to kill must be restrained even in a democracy. Perhaps especially in a democracy when these calls materialize brazenly everyday. Yet, freedom, even excessive freedom, in Iraq is undeniable.

Iraq, at once occupied and the freest country in the Middle East, is a paradox. Despite the heavy reality of foreign military presence, I do not hear enemies of US policy in Iraq suggesting that the US or other members of the coalition have tampered with the many elections that have taken place. For an observer of modern Shi'ism, a paradox worth dwelling on is that the current and previous Prime Ministers of Iraq are leaders in the Da'wa party, the legacy of the leading Iraqi cleric of the 20th century, Muhammad Baqer al-Sadr. Neither the Da'wa, which sprang with Sadr from the world of legal learning at Najaf, nor Muhammad Baqer al-Sadr or his heirs can be doubted on their Iraqi nationalist pedigree. Nor are they known to be particularly pro-American in their worldview. Yet the fact remains, they presently lead Iraq thanks to America's continuing sacrifices.

I have shown enough of my political colors for this presentation, and I accept that many will not find them to their taste, either in the Middle East or in the United States. Such colors may not be that important for the task ahead, which is drawn to the future rather than pulled back into the past. The building blocks are there. They are called a Constitution; an electoral process; an increasingly respected government which was freely elected; an attention to diversity in Parliament and elsewhere, with a fourth of Parliament's membership reserved for women; a unique experience in federalism in the Middle East; and a slow but clear retreat of the foreign military in favor of an Iraqi takeover of the security. In late summer 2008, this Iraqi takeover occurred in the eleventh of eighteen provinces and counting. This was not an insignificant one considering that the province was Anbar, a mostly Sunni populated hotbed of the rebellion in 2005.

The building blocks are frail to be sure, and sectarian and nationalist violence could flare up again at any moment. Iraqi history is full of disappointed expectations. But the improvement on the ground is real, and it is useful to start from these building blocks, which explain my renewed personal engagement with Iraq.

This re-engagement has taken two forms: First, we are establishing the Global Justice Project Iraq, a legal think-tank in Baghdad, with the College of Law at the University of Utah thanks to a major grant from the State Department. The team being built up is exceptional, and is tasked with assisting the emergence of an independent judiciary in Iraq that fulfils the highest promises for Iraqis and Americans. It will also assist with constitutional and legislative work on a wide range of issues. With trust in and from Iraqis, gained from twenty years of work against the dictatorship, and remarkable counterparts in the US Embassy and in the Government of Iraq, and the open collaboration with the United Nations and Iraqi and international NGOs, the brainpower deployed is simply formidable.

Second, is an invitation from the Iraqi Prime Minister to develop a network of supporters of Iraqi democracy in the United States and elsewhere. This is still a long shot, but such a network may well be unique in modern history, and its success is premised on the ability to structurally involve Iraqis and Americans primarily. Of course there is room to all people inclined to be part of the most promising democratic adventure in the Middle East in that joint and difficult adventure for freedom.

This is in terms of the actual outreach. One aspect of re-engagement in Iraqi matters developed from a course on Iraq in Spring 2008 at the College of Law. The seminar saw students offer such dedication and quality that the effort resulted in a book in press at the prestigious Aspen Legal Education publishing house. The book is called *Iraq: Guide to Law and Policy*, and I would like to devote the rest of this brief talk to some pointers elaborated on, and sometimes elucidated, in the book.

The book is far-ranging, and its seven chapters give an idea of the breadth of the undertaking. Each provides a set of documents which articulate major questions lawyers and policy makers ask in Iraq: the roads not taken in Iraq (Chapter 1); a timeline from Mesopotamia to Iraq (Chapter 2); constitutional issues, including electoral laws (Chapter 3); the judiciary and the rule of law (Chapter 4); international law and the UN (Chapter 5); economic issues, including Islamic economics, oil and water (Chapter 6); and security, including the agreements recently negotiated on strategic cooperation and the standing of the US military (Chapter 7).

From this vast agenda, let me discuss three examples.

First, most pressing, is an elaboration on security. A formidable, heated debate, has been taking place for the past several months in Baghdad and in Washington over the legal format of future American presence in Iraq, if any. It was originally called a SOFA agreement, dovetailing with a Strategic agreement, which started with an exchange of letters between Prime Minister Maliki and President Bush in 2007. The ramifications of such an arrangement, which regulates mainly the withdrawal of US troops and the immunity of soldiers, are immense. In the United States, my colleagues Bruce Ackerman and Oona Hathaway have decried the short shrift to the US Constitution, which, they argue, the outgoing administration has given to such important commitment. I had the

occasion in June to participate in a long televised debate with the Iraqi Foreign Minister on the dangers of a lightly negotiated treaty on the Iraqi political fabric. Other important aspects include the criminal prosecution of soldiers and contractors by Iraqi courts that the US government wants to avoid in Iraq. Now that the agreements have been signed, they need to be successful. On the issue of immunity, I have been a strong advocate of mixed or hybrid courts that could allay the fears of impartial justice not done or not seeming to be done.

Security remains a big issue in Iraq, of course, and both Iraqis and Americans face the danger of their success in the emergence of over 500,000 security personnel in Iraq. While law needs power and order, the danger is dual: the specter of another strong man emerging from an oversized army, and the converse difficulty of the fissiparous nature of the army. Another central question hovering over Iraq derives from the success of the Sunni militias, known as 'The Sons of Iraq' or 'The Awakening,' and their integration and interaction with the regular army and other security forces and agencies. That proliferation itself of security and intelligence agencies and groups is particularly worrying for the rule of law.

The second, less pressing dimension, has to do with constitutional revision or review. Iraq's 2005 Constitution was supposed to be final. It is not. Most glaring is the still undecided structure of federalism, which is the one major contribution of modern Iraq to Middle East history, and another reason why centralized, brutal metropolises around Iraq, namely Tehran, Damascus, Amman, Ankara, and Riyadh, want the Iraqi experiment to fail. While the Constitution proudly announces that the Iraqi system is republican and federalist, the institutions of federalism, most notably in the center in Baghdad, remain conspicuously absent. In the legislature, there is a Council of Representatives (COR), the Iraqi Parliament. A Senate-like chamber that represents the regions, which are themselves ill-defined, has yet to be created. Article 62 states that "a legislative council shall be established named the 'Federation Council' to include representatives from the regions and the governorates that are not organized in a region." It leaves it to the law to organize the Federation Council and its competence. This means that the skimpy articles that regulate legislative federalism in the Constitution remain to be developed into an effective representation of the regions in Baghdad.

Power of the capital's regions is the crucial matter. It is one major paradox of federalism, which I emphasize against the traditionally received view, that it secures the power of the regions not in the regions, but in the center. One might rail endlessly about the tentacular power of the capital over the regions because of the weakness of local decision-makers in the periphery. I do not share this view: to secure power in a federal country in accordance with legitimate democratic expectations, the problem is far less who rules in Kurdistan or in Michigan. Kurds naturally rule in Kurdistan and Michiganders rule in Michigan, Irbil citizens govern Irbil, and Dearborn citizens govern Dearborn; those from the outside do not stand a chance in a non-repressive society, and even in a repressive one, it is just a matter of time before the overbearing outsider is kicked out or brought down to size. This was true even in Saddam's Iraq. Imagine what it meant to be Saddam's governor in Suleymaniyya in the North or in Najaf in the South: a continuous, daily nightmare, in

which he is restricted to his desk unless he physically gets his security forces to trample on the local population to carry out his decisions. This is why the rule by Baghdad of the provinces is secondary to the participation of the provinces to the rule in Baghdad. What federalism secures, and this is its central battle, is how much sway Kurds have in Baghdad, and Michiganders in Washington. Without a Senate, no federalism is conceivable. With the COR standing alone, without that other crucial Chamber that represents the power of the regions in Baghdad, there will be no federalism to speak of in Iraq, and the country will go adrift.

The third dimension is the build up of the judiciary. In addition to the federal judicial dimension, especially in the context of the go-it-alone of the Kurdish judiciary so far, there is the problem in the rule of law cohering in the central judicial institutions, specifically the Higher Judicial Council, the Federal Supreme Court, and the Court of Cassation. By luck, they are all under the banner of one president, the aforementioned Chief Justice Midhat al-Mahmud. The question is whether this felicitous alignment is personal, or institutional, and if the latter, of other satellite and important courts stands with regard to that coherence: the Shura Council, the highest administrative court; the High Criminal Tribunal, which condemned Saddam Hussein to death and continues to judge the leaders of the prior regime; and the military courts. One can see how daunting the work is to secure judicial independence, and an effective judiciary.

* * *

History may bend toward justice, but not on its own. We each have a responsibility in guiding it, making the sacrifices, recognizing the challenges, committing to the principles, and applying the creative solutions so that justice can prevail over violence and hope can overwhelm the despair of our repeated disappointments.

*Chibli Mallat is Presidential Professor of Law at the University of Utah. This address was given before the Global Justice Project-Iraq, started in Baghdad, for which he is acting as Senior Legal Advisor. The opinions expressed are the author's exclusively personal ones, but he wishes to acknowledge Dean Hiram Chodosh's comments on the text, as well as the invitation to Dearborn, and help in Baghdad of Attorney James Rayis, the first in-country Director of the Project. The text was only slightly updated after two visits to Baghdad in October and December.