

## Western model fails in Iraq, Afghanistan

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Constitutionalism and democracy are seen by many, especially Western powers, as the routes towards peace. But the journey is unlikely to be smooth the whole way, writes Mohammad Hashim Kamali.

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The twin concepts of constitutionalism and democracy normally nurture and endorse one another, yet they are not the same and can, in certain circumstances, stand in a state of tension. Whereas democracy is focused on majoritarian rule, constitutionalism demands commitment to the rule of law.

The United States and Europe tend to see drafting a constitution as a way towards a negotiated peace, especially in post-conflict situations. This may theoretically seem appealing, yet it could also run counter to its desired objectives and cause greater instability by accentuating the wishes of the majority of citizens over a suppressed minority.

It may be relatively easy to impose elections on a given country, but more difficult to establish legality, commitment to basic rights, and a constitutional order of checks and balances within the organs of power. If democracy can be defined as "popular political self-government", a simple definition of constitutionalism could be "the containment of popular decision-making by a basic law".

At the heart of constitutionalism lies the deliberate choice of a representative government to constitute its political life in terms of commitment to a binding agreement by the ruler and the ruled, structured so as to be difficult to change. As Ronald Dworkin put it, "the constitution, and particularly the Bill of Rights, is designed to protect individual citizens and groups against certain decisions that a majority might want to make, even when that majority acts in what it takes to be the general or common interest".

Apart from its obvious relevance in all societies, this aspect is of concern, particularly to politically polarised and ethnically divided societies, such as those of Iraq and Afghanistan. Constitutions are drafted either at the end of a conflict to seal its outcome or prior to the eruption of conflict in an attempt to stave it off.

In Iraq, for example, the occupation powers attempted to forge a national and political reconstruction through the medium of a constitutional drafting. Through an inordinate amount of cajoling, a document was drafted and ratified in 2005 but the process of arriving there severely exacerbated existing divisions and yielded a result that was feared to ultimately lead to the disintegration of the state.

Afghanistan provides a similar example, although different in some ways. But the constitution that was drafted and ratified (in January 2004) under the auspices of the United Nations Assistance Mission for Afghanistan (Unama) and American support has fallen short not only of its desired objective of facilitating a negotiated peace between the rival factions, it may have actually exacerbated factional rivalry and political instability in the country.

In the midst of an ongoing conflict, and against the background especially of a humiliating foreign occupation, it is questionable whether the process could live up to the expectations made of it. The same holds true for external attempts at mediation, which sometimes pre-empt the emergence of a stable social consensus. This seems to be the case with external constitutional support also given to political and military actors in the Sudanese and Somalian civil conflicts.

Commitment to justice, constitutionalism and judicial review can ultimately provide the necessary protection against the "tyranny of the majority". There is strong empirical evidence that constitutional legality will in time nurture democracy, but that democracy on its own will not necessarily bring a constitutionally committed government.

Democracy and constitutionalism are not only different concepts but can exist in a state of tension as the former advocates majoritarian preferences, whereas the latter imposes pre-existing restraints on the range of choices available to governing majorities.

The Western experience since 1945 has largely embodied both democracy and constitutional government, making it thus difficult to imagine the two apart. Yet evidence shows that only in the late 1940s did most Western countries become actually democratic, but that, importantly, already a century earlier most of them had put in place significant constitutional elements such as the rule of law, private property rights, free speech and assembly, and increasingly also constitutional separation of powers, without being democratic.

Government in North America and Western Europe was not characterised by democracy as by constitutional legality. Thus according to an informed observer "the Western model is best symbolised not by the mass plebiscite but the impartial judge".

Some agreement seems to have developed over time that the best realisable form of government is a mixed or constitutionally structured government, in which freedom is constrained by the rule of law, and popular sovereignty is tempered by state institutions that produce order and stability.

Even if we do not conclude that democracy is simply not viable in an environment of intense ethnic preferences, it seems evident that merely holding elections is insufficient and that additional institutional mechanisms and constitutional restraints are necessary to make it work.

Early indicators over the results of the recent parliamentary elections in Iraq suggest a contentious scenario between the two leading figures, one of whom has yet to concede to the results. Iraq is at a politically precarious situation that calls for skilful handling and restraint on all sides to prevent a new twist to the Iraq conflict.

The electoral fiasco that left President Hamid Karzai in a compromised predicament and even more dependent on foreign military presence does not bode well for the future of Afghanistan. The scale of conflict has widened, corruption is more rampant and the rule of law also a more remote prospect -- after a new constitution, two presidential elections, and a second parliamentary election due this year.

The prospects of a sustainable peace for Afghanistan now seem to be linked to the promised exit of the US military -- that is also, ironically, likely to precipitate regime change in Kabul. If the US indeed leaves Afghanistan next year, a traditional Loya Jirga (Grand Council), not the foreign powers, should plan its political future.

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