

## TRANSITIONAL JUSTICE IN IRAQ: LEARNING THE HARD WAY

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*The relationship between transitional justice and democracy is fraught and complex, and nowhere more so than in Iraq since the fall of Saddam Hussein. Iraq has experienced a range of transitional justice initiatives, including the trial and execution of its former leader, purges of the civil service and the military, and a series of reconciliation conferences. Yet democracy has not fully taken root and violence continues to plague many parts of the nation on a regular basis. This article argues that initiatives aimed at changing the structure of society – including but not limited to constitutionalism, frequent elections and the development of an independent judiciary – are more likely than purely symbolic efforts to contribute to the consolidation of democracy in the long term. It is these structural developments that have the greatest potential to transform society into a true democracy under the rule of law.*

**Keywords:** transitional justice, Iraq, reconciliation, post-war politics

### 1. INTRODUCTION

Transitional justice and democracy are closely linked, but the relationship may not be exactly what we think. The tendency is to assume that political transitions take countries towards democracy – that is, that what happened in Latin America in the 1980s is the norm. This is reinforced in part by the relative smooth transitions toward democracy of some of the westernmost Eastern European countries such as Germany, Poland and the Czech Republic, and in the Baltic States after the fall of communism. But most of the world's transitions over the last 30 years have not been so velvety. In some countries transitions have stalled, while in others democracy may appear to be just as distant on the horizon as it ever was. Even the countries of the so-called Arab Spring reflect the diversity that can be seen worldwide: while democracy in Tunisia seems to be consolidating relatively smoothly, the outcome of the transition is still uncertain in Egypt and Libya; in other countries the transition itself seems to have stagnated, while in Syria it is explosive. So there is reason to be sceptical of the model that suggests that transitions produce democracy efficiently and ineluctably.

In fact, transitions and democracy may be more likely to be in tension with one another than in harmony. Looked at closely, transitions and the consolidation of democracy may even seem to be incompatible in their natures. The former seeks closure and repose and is embodied in the metaphor of closing the book, or at least turning the page. Processes of transitional justice are often one-time only events, like truth commissions and trials of former leaders; they often involve a small group of people, the leaders of the discredited regime paying their debts to society under terms imposed by the leaders of the new dispensation; the involvement of the population as a

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whole is often passive – as witnesses, as spectators to judicial theatre, as visitors to museums or, sometimes, as representative ‘window’ cases through which others channel their own life stories. Transitions are defined by faith in abstractions: justice, reconciliation, forgiveness and amnesty, while democracy is defined by the scruffiness of politics and the complexities of elections. Democracy in many ways appears as transitional justice’s negative. Democracy is fundamentally about opening up the space for political discourse, to the exclusion of other (violent) forms of dispute resolution. It seeks to develop a grammar of public participation, and so it involves multitudes working in concert as voters, poll workers, campaigners, candidates, advocates, editorialists and journalists, in the ongoing process of democratic praxis. Transitional justice is most meaningful when it provides answers and limits the array of contestable arguments; democracy is real when the discourse is not predictable, when the results of the next election are uncertain.

The question that challenges nascent governments from South Africa to Iraq, from Latin America to Central Europe, and in parts of the Arab world is how to use the tools of transitional justice to develop the habits of democracy.

This article seeks to find answers to these questions in the most unlikely of places – Iraq – which, since the 2003 invasion that ended the government and the life of Saddam Hussein, has experienced both transition and elections, though there has been little transitional justice and little consolidation of democracy. Yet, notwithstanding the uniqueness of Iraq and its transition, there are insights to be gained and even some lessons to be learned from the Iraqi experience over the last ten years. Moreover, these lessons may be of particular relevance to other Arab countries as they embark on the challenges of democratisation and transitional justice.

When we put Iraq’s transition under a microscope, we find that those processes that have the potential to change the structure of society are the most likely to contribute to a durable peace and to reinforce democratic governance. These structural elements of transitional justice, including constitutionalism and an electoral process, further democratic goals because democratisation requires not only a transition from one mode of governance to another, but also a full transformation of civil society.

This article proceeds in five substantive sections. We start with a brief overview of the situation in post-invasion Iraq, which suggests that, though it is unique in some important ways, Iraq’s post-invasion history may offer some useful lessons for other Middle Eastern and Arab nations currently undergoing transitions. Section 3 rejects the conventional way of classifying reconciliation initiatives which dichotomises between the past and the future and posits instead that the tools in the reconciliation toolkit can be more fruitfully thought of in terms of whether they affect the structure of society or whether they have predominantly only symbolic significance. Section 4 considers the latter category, focusing on de-ba’athification and on the trial of Saddam Hussein, while Section 5 analyses the transformative potential of elections and constitutionalism and their ability to contribute to democracy and to long-term peace and stability. Section 6 then offers some lessons from the Iraqi experience that might be useful for other countries currently undergoing transitions and explains why structural efforts are more likely to be effective than purely symbolic initiatives. Section 7 concludes.

## 2. IRAQ AS A MODEL

In many ways, of course, the Iraqi experience is unique. Unlike the transitions that started during, or were spawned by, the ‘Arab Spring’ of 2011, and unlike most modern transitions around the world that preceded it, the transition in Iraq was brought about not by indigenous forces who protested against the status quo and sought to change their form of government from within, but by the invasion of an uninvited foreign military power. The immediate aftermath of the transition, too, is different in Iraq: the foreign military authority occupied the nation legally for more than a year (from the invasion in March 2003 to the restoration of sovereignty at the end of June 2004) and directly influenced, if not determined, the course of events for the following seven years until the United States military withdrew in December 2011. With the exception of the use of NATO forces for a brief period to help to effectuate the transition in Libya in 2011, no country in the Middle East and North Africa (MENA) region has been occupied by a foreign sovereign for any period of time in the context of the Arab Spring; nor is foreign occupation and so-called liberation the typical precursor to transitional justice in any other part of the world. Iraq’s devolution into what is generally now called a civil war in 2006–07 and its ongoing potential for renewed civil warfare also, one hopes, distinguish Iraq from its peers that have undergone transitions. On the other hand, other nations typically do not have the resources that the United States poured into nation-building efforts in Iraq between 2003 and 2011.

Iraq is unique also for reasons independent of the nature of its transition. Of course, it boasts the oldest civilisation on earth, dating back more than 7,000 years, even before the Sumerians, to the Ubayids. But the point at which Iraq became Iraq – and, more importantly, the point at which Iraqis became Iraqis – is deeply contested, with some scholars maintaining that Iraq has been a relevant national identity for centuries and that it grew organically from absorption within and opposition to the Ottoman empire, if not before; others maintain that Iraq was constructed out of British expediency and greed at the end of the First World War, and that at no time have all parts of the nation in fact accepted the mantle of Iraqi nationhood. The continued contestation of the nature or even existence of Iraqi nationhood constitutes a significant impediment to post-war reconstruction and to the long-term stability of the country.<sup>1</sup>

In any event, Iraq’s current population is unusually mixed: it is one of only four countries in which Shia Muslims are in the majority,<sup>2</sup> and one of only three countries with a very sizable population of non-Arab Kurds. Ethno-sectarian divides have become endemic in Iraq, resulting

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<sup>1</sup> There are countless histories of Iraq, including, for instance, Fanar Haddad, *Sectarianism in Iraq: Antagonistic Visions of Unity* (Hurst & Company 2011); William R Polk, *Understanding Iraq* (Harper Perennial 2005); Charles Tripp, *A History of Iraq* (3rd edn, Cambridge University Press 2007). For a particularly insightful history of the Kurdish situation, see Jonathan C Randal, *After Such Knowledge, What Forgiveness? My Encounters with Kurdistan* (Farrar, Straus, Giroux 1997).

<sup>2</sup> The Pew Forum on Religion and Public Life, ‘Mapping the Global Muslim Population: A Report on the Size and Distribution of the World’s Muslim Population’, Pew Research Center, October 2009, 9 <http://www.pewforum.org/files/2009/10/Muslimpopulation.pdf>.

in varying degrees of violence and strife, some of which have, unfortunately, been exacerbated rather than alleviated by reconciliation efforts. Indeed, when we think of reconciliation in Iraq, we tend to think in terms of the large population groups. The most obvious divide is between the Shia and Sunni communities, which have suffered from the most pervasive violence. Almost as palpable are the ethnic tensions between the Arab and the non-Arab Kurdish populations, mostly located in the north of the country. While the balance of power between the Kurds and the Arabs has historically been fragile, this fissure does not garner most of the post-war headlines, in large part because of the strategic alliance that has developed between the Kurds and the Shi'ites. But there are many other domains in Iraqi life which are begging for conciliatory attention, such as class, gender and generational differences, and divides between moderates and extremists and between secularists and islamists. Because of the location of the population centres, moreover, Iraq presents very difficult questions of governance and power-sharing; and because of the distribution of oil reserves in the different regions of the country, questions of power-sharing invariably devolve into questions of how to divide or share the significant revenues that oil may produce. Nor is there widespread agreement over what Iraq should look like in the future, and where its internal or external boundaries should be. All of these controversies are live, with implications for ongoing efforts at state-building, democratisation and reconciliation.

While these particular historical contingencies and features distinguish Iraq from its neighbours, it is also the case, of course, that every country is unique. Tunisia has its own cultural mix and historical experiences, as does Egypt, as does every other country. Iraq's uniqueness, then, is not a reason to ignore its experience, but rather counsels studying it in perspective.

### 3. THE HIDDEN STRUCTURES OF TRANSITIONAL JUSTICE

Transitional justice is a relatively new field but some precepts have already become entrenched. Chief among them is that transitional justice presents a Hobson's choice between the past and the future: mechanisms of transitional justice are often described in terms of whether they are backward- or forward-looking.<sup>3</sup> To some extent, this is the result of the view put forward by early practitioners of transitional justice that one cannot have it both ways: the only way for a nation to move forward out of the dark woods of political trauma is to grant amnesty to the

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<sup>3</sup> For analysis of the role of the past and the future in reconciliation initiatives, see generally Erin Daly and Jeremy Sarkin, *Reconciliation in Divided Societies: Finding Common Ground* (University of Pennsylvania Press 2006). See also Elin Skaar, Siri Gloppen and Astri Suhrke (eds), *Roads to Reconciliation* (Lexington Books 2005); Naomi Roht-Arriaza and Javier Mariezcurrena, *Transitional Justice in the Twenty-First Century* (Cambridge University Press 2006); Desmond Tutu, *No Future Without Forgiveness* (Doubleday 1999); Sorin Antohi and Vladimir Tismaneau (eds), *Between Past and Future: The Revolutions of 1989 and their Aftermath* (Central European University Press 2000); Robert Rotberg and Dennis Thompson (eds), *Truth v. Justice: The Morality of Truth Commissions* (Princeton University Press 2000); Emiliós Christodoulidis and Scott Veitch (eds), *Lethé's Law: Justice, Law and Ethics in Reconciliation* (Hart North America 2001); Neil J Kritz, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (United States Institute of Peace 1995).

perpetrators of political abuse, thereby closing the book on the past.<sup>4</sup> But recent experience has shown that transitions are invariably more complex than the models suggested: they can take years or even generations, in part because perpetrators of massive human rights violations may retain some measure of political power, and the longer they endure the more likely participants on both sides are to have dirty hands. These experiences have taught us that there is no simple choice between the past and the future, or between looking backward or forward. Not only is it essential to do both, but it is in fact impossible to separate the past and the future: the past leaves scars that continue to fester long after the political transition has taken place. Indeed, many of the tools in the transitional justice toolkit partake of both the past and the future: truth commissions and trials seek to learn about the past for the purpose of laying a foundation of truth and justice for the future, while rule of law initiatives, such as constitutions, are rooted in the past while they try to provide a framework for the future.

Rather than trying to split temporal hairs, it might be more useful to consider the tools in the transitional justice toolkit in terms of whether their utility is mainly symbolic or mainly structural. The former category would include transitional justice mechanisms that are intended primarily to represent a particular value or principle – such as the break with the past, rule of law, or justice – but that are not designed to make actual changes in society. The latter would include tools that help to restructure the nation or a segment thereof. While it is true that, here again, there are overlaps – a truth commission report may include recommendations for structural changes within society, just as a new constitution has symbolic as well as structural significance – most elements of transitional justice can nonetheless be understood as aiming to produce predominantly either structural or symbolic benefits.

This article proceeds on the basis of two premises. First, transitional justice mechanisms are often insufficient to produce democratic consolidation; in most modern complex situations, a full social transformation is needed. Second, structural elements of transitional justice are far more likely than symbolic initiatives to promote the kind of social transformation that is necessary for democracy to take root.

The need for social transformation emanates from the fraught relationship between transitions and democracy. For democracy to take root in a post-traumatic society, more is needed than simple transition, and more even than justice or reconciliation. What is necessary for a full-scale social transformation is to convert subjects and victims into citizens, to develop the habit of

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<sup>4</sup> This view emerged very strongly in the South African transition of the late 1990s: see, eg, Charles Villa-Vicencio with Wilhelm Verwoerd, *Looking Back, Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* (University of Cape Town Press 2000); Charles Villa-Vicencio (ed), *Transcending a Century of Injustice* (Institute for Justice and Reconciliation 2000); Alex Boraine, *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission* (Oxford University Press 2000). On the other hand, other countries have rejected the amnesty or forward-looking model, and focused their transitional attentions on the past, as illustrated most notably in Rwanda in the aftermath of its 1994 genocide: see, eg, Erin Daly, 'Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda' (2002) 34 *New York University Journal of International Law and Politics* 355. See also Juan Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Johns Hopkins University Press 2011) on similar choices outside of Africa.

citizenship in the population as a whole, and to teach leaders to work for the common good and for the long term.<sup>5</sup> It is only when the population begins to demand rights, to develop the confidence to speak out and the consciousness of participants in the political life of the nation that democracy can begin to take root. It is only as democracy becomes consolidated that the threat of recurrence of past violence begins to dissipate because the people no longer accept the oppressive conditions in the first place. Demonstrations throughout the Arab world since 2011 have evidenced the evolution in the expectations of these populations; this has been particularly evident in the demands by Egyptians for good governance, economic opportunities and dignity, first against Hosni Mubarak, and then even against the popularly elected Mohamed Morsi. The attention of practitioners of transitional justice, then, should be focused on the structural changes that are most likely to produce the social transformation that is needed for the transition to produce stability and democratic governance in the post-transition period.

This is not to say that symbolic initiatives should be abandoned. Symbolic and structural programmes *may* be complementary and a government in transition could proceed down both tracks simultaneously. But there are three reasons why transitional governments may be cautious about taking on symbolic reconciliation efforts. First, they may not be effective. Certainly this has been true in Iraq where, as will be seen, significant but ultimately ineffective efforts were undertaken to promote symbolic justice and demonstrate the elimination of the past regime. Second, they may have costs, not only in terms of the limited fiscal resources with which transitional governments have to operate but in other terms as well: failed symbolic efforts may diminish the legitimacy of the emergent government and may exhaust the limited public attention and hope of a war-wearied population. Third, they may have adverse consequences: as demonstrated below, administrative purges in Iraq caused unemployment, disaffection, short- and long-term personal and social anxiety, and resentment (now culminating in renewed potential civil war<sup>6</sup>).

If Iraq had focused its attention simply on one type of reconciliation or the other, it would have gained more from focusing on elections and rule of law initiatives to the exclusion of trials and lustration; it would have ended up in an even more precarious place had it had only the symbols and not the structures of reconciliation. If a government has to choose, and sometimes it does or should, it should choose the measures that will produce long-term stability and a commitment to democratisation, and not the measures that are as likely to produce ill-will and resentment as satisfaction.

#### 4. SYMBOLS OF TRANSITIONAL JUSTICE

Reconciliation efforts in Iraq have used a number of the conventional mechanisms of transitional justice, including trials, lustration and documentation. However, there has been no truth or truth

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<sup>5</sup> Erin Daly, 'Transformative Justice: Charting a Path to Reconciliation' (2002) 12 *International Legal Perspectives* 73.

<sup>6</sup> For example, Tim Arango, 'Clashes in Iraq Carry Worries of a New Civil War', *The New York Times*, 23 April 2013, [http://www.nytimes.com/2013/04/29/world/middleeast/clashes-in-iraq-carry-worries-of-a-new-civil-war.html?emc=eta1&\\_r=0](http://www.nytimes.com/2013/04/29/world/middleeast/clashes-in-iraq-carry-worries-of-a-new-civil-war.html?emc=eta1&_r=0).

and reconciliation commission, although several high-level national reconciliation conferences have been held since 2005. Overall, these phenomena have produced photos and headlines, moments of high drama and legacies of controversy, but little movement towards a more settled peace or a more entrenched democracy. In the main, these processes were so deeply flawed that they produced more confusion and hostility than reconciliation.

#### 4.1 SEEKING JUSTICE

The most significant trials, of course, were those of Saddam Hussein and his co-defendants in the Iraq Special Tribunal (later known as the Iraqi Higher or Supreme Criminal Court).<sup>7</sup> The tribunal was specifically created for the purpose of trying the leaders of the ba'athist regime for war crimes, crimes against humanity and genocide – the same crimes over which the International Criminal Court has jurisdiction. Prosecutors planned to bring a series of cases against Saddam Hussein, but ended up bringing charges in respect of only two incidents.

In the first case, Saddam and seven co-defendants were charged with murder and other crimes associated with the government's retribution for an ambush against Saddam's convoy when it passed through the Shi'ite village of Dujail in 1982. The villagers killed some members of Saddam's entourage, and the retribution was swift and vicious: between 100 and 400 villagers were killed, some immediately and others after show trials; an additional 1,500 residents were arrested, some spending years in prison. In addition, the government was accused of destroying cropland.<sup>8</sup> The trial of these charges began in October 2005 and continued intermittently for over a year until a sentence of death was passed against Saddam Hussein and two co-defendants; other co-defendants were sentenced to prison, and one was acquitted. The judgment, which was announced in November 2006, was appealed against and affirmed at the end of December. On the morning of 30 December, Saddam Hussein was executed by hanging, video of which was immediately available on YouTube and elsewhere, and remains so. To add a further sting, the execution was carried out on a day that was holy for the Sunni population but not for the Shi'ites.

A second trial was started in August 2006, in which Saddam and others were charged with crimes against humanity stemming from *al-Anfal*, the killing of more than 100,000 Kurdish people in 1988. This trial was not pursued after Saddam's death.

The trials were roundly criticised by Amnesty International and Human Rights Watch and others on grounds of legitimacy as well as specific alleged violations of due process and bias. Yet, they did manage to accomplish some of the goals most often associated with transitional justice: to bring about some form of justice, to draw a clear line between the past and the future, and to prevent the return (if not the martyrdom) of the topmost leaders of the previous repressive regime.

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<sup>7</sup> See generally Justice In Perspective, [http://www.justiceinperspective.org.za/middleeast/iraq/the\\_iraqi\\_higher\\_criminal\\_court\\_formerly\\_the\\_iraq\\_special\\_tribunal.html#iraqupdate](http://www.justiceinperspective.org.za/middleeast/iraq/the_iraqi_higher_criminal_court_formerly_the_iraq_special_tribunal.html#iraqupdate).

<sup>8</sup> Rory Carroll, 'Saddam Trial to Open with Village Massacre', *The Guardian*, 6 June 2005, <http://www.guardian.co.uk/world/2005/jun/07/iraq.rorycarroll>.

These first-ever criminal trials of an Arab leader did symbolise the possibility of justice or retribution for abuses that had taken place under his watch or by his hand. Moreover, they presented the former leader as a prisoner, without power or authority, defeated in his official capacity as in his person. The only tools available to him during the trials to assert his will over his fate were to yell defiantly to disrupt the proceedings and to engage in hunger strikes to call attention to his claims of mistreatment and abuse at the hands of his captors. These he used well, knowing that the proceedings were televised. But he had no power to protect himself or his associates (lawyers or co-defendants), and no way to control the course of events. He was, at the end of his life, the exact opposite of the all-powerful dictator, the object of the personality cult he had nurtured over decades and cultivated through a wide network of heavy-handed agents, family members and associates. Those who wanted assurance that the Saddam regime was a thing of the past got it in the radio, television and internet images of his capture, trial and execution.

However, several caveats should be mentioned here. First, political trials do not necessarily produce justice or even the sense of justice in the population. For the Shia population that opposed Saddam, the events in Dujail 25 years earlier represented neither the extent nor the apotheosis of Saddamist oppression; his humiliation and execution were welcomed by much of the population but as good riddance more than as a balancing of the scales of justice. Some Shi'ites actually wanted him to live, so that his suffering would be increased. Moreover, one of the principal attractions of prosecution is to show the nation and the world that the present regime is characterised by justice and the rule of law, in contrast to the despotic regime of the past. This is particularly true when the proceedings are televised. According to this metric, too, these trials produced mixed results: yes, the trials showed Western-style justice but they did not effectively demonstrate the new dispensation's commitment to the rule of law, particularly insofar as the criticisms on due process and other grounds were well-founded, and insofar as the results were all but certain. Again, it is likely that those who were predisposed to supporting Saddam continued to do so, finding that the trials were little more than political propaganda, and those who were supportive of regime change continued to believe that Saddam was a despot who did not deserve any more due process than his victims received. Events the significance of which is largely symbolic do not trade in nuance or subtlety; their narrative is a blunt instrument, sounding in innocence or guilt, good or evil. Those on the receiving end are compelled to choose sides and tend to have their intuitions confirmed; they do not tend to cross out of their comfort zone on the basis of symbols alone. As symbolism, then, the trials did little to diminish the divisiveness spreading throughout the country.

Moreover, the nature of trials does not lend itself to creating a grand narrative that will explain or make sense of the suffering endured during the previous regime. Trials expose only those facts relating to the legal responsibility of the defendant in relation to particular events; they do so in a way that is neither linear nor comprehensive, but rather defined by rules of evidence and other strictures of professional legal practice. In other words, there is at the end of the trial no greater understanding of the Saddam regime, but just more facts about the retribution of the Shi'ite villages in Dujail and some additional information about the *al-Anfal* campaign, almost all of which remain deeply contested.



Even if the trials had been able to change minds, there is little to be gained from the symbolic removal of the previous regime unless people transfer their allegiance to the current regime; if the predominant reaction is to feel disdain for the past but no more affection for the present leadership, then the people have lost an article of faith and neither they nor the new government have gained anything. Closing the book on the past does not, without more, open a new one for the future; a lot more work needs to be done.

Some of these deficiencies might have been reduced had more cases been pursued, as had originally been planned. The Associated Press had reported that prosecutors were preparing to charge Saddam with crimes relating to the chemical attacks against Kurds in the 1980s, the invasion of Kuwait in 1990, and the 1991 suppression of a Shia uprising. But these plans were scuttled in favour of the quicker resolution by hanging four days after Saddam's appeal in his first case was lost.

Even if the trials produced some good in terms of highlighting the abuses of the Saddam regime, they exacted a significant cost as well. Eight people associated with the trials (two defence lawyers, one judge and five other court officials) were killed during the course of the trials and others were wounded or forced to flee.

#### 4.2 PURGING THE PAST

Though the trials of Saddam Hussein were the most visible of the transitional justice initiatives, the de-ba'athification processes affected far more people and had more significant consequences. Where the trials were meant to produce justice but instead produced mostly symbolism, de-ba'athification was intended to be largely symbolic, but produced chaos and disaffection.

The de-ba'athification process was initiated by the US-controlled Coalition Provisional Authority (CPA) early in the American administration, but it was pursued after Iraq regained sovereignty, and continues in some form to this day. Within days of the establishment of the CPA under the control of plenipotent Paul Bremer, it issued Order Number One: De-ba'athification of Iraqi Society on 16 May 2003,<sup>9</sup> which sought to remove from public employment certain categories of people who had been involved in the Ba'ath party. The CPA plan went further than competing proposals put forward by the US Department of State and elsewhere within the Bush Administration, which would have sought to purge from public employment only those who had allegiance to Saddam Hussein, or only the highest-ranking members of the Ba'ath party. The order not only terminated current employment in the civil service but precluded employment at any later time. Although it allowed exceptions on a case-by-case basis within the absolute discretion of the CPA, it did not contain procedures for making individualised assessments of guilt or liability, thereby violating a basic principle of due process.

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<sup>9</sup> Coalition Provisional Authority Order Number 1, CPA/ORD/16 May 2003/01. For a discussion of the Regulation, see International Center for Transitional Justice, *Briefing Paper: Iraq's New Accountability and Justice Law* (ICTJ 2008) 4–5.

Order Number One concerning the civil service, was supplemented by Order Number Two concerning the military. Combined, the lustration programme was implemented broadly, resulting in the dismissal of an estimated two million people from the civil service and an additional 350,000 from the military, although estimates vary.<sup>10</sup> Between 10,000 and 15,000 teachers alone were fired (with some estimates running as high as 40,000).<sup>11</sup> This led not only to vast unemployment among the most capable and educated segment of Iraqi society, but also resulted in a noticeable lack of capacity and experience in the administrative and military sectors at a time when the provisional government's most immediate task was to build capacity. Noting that the effects of these two decisions were to be felt for years to come, Charles Tripp writes that the two orders 'put some 300,000 armed young men out of work at a stroke, stopped the pensions of tens of thousands of ex-officers and purged the slowly recovering government ministries of roughly 30,000 people, including their most experienced administrators'.<sup>12</sup>

As in the case of trials, de-ba'athification has the potential to promote the line-drawing goals of transitional justice: if those who were protected, promoted and valued in the previous regime are forced to give up the benefits of their allegiance, then they become powerless in the new dispensation. Conversely, those who were previously denied the spoils of oppressive governance are now able to fill the empty offices, classrooms and barracks, resulting in a form of justice – or at least come-uppance. But de-ba'athification, like other mass purges, also frustrated reconciliation efforts. It reinforced the lines that were drawn in the previous regime: in making allegiance to ba'athism just as important post-Saddam as it was during his time in power, even if the consequences were different, it compromised efforts to nurture an Iraqi politic that transcended ba'athism and focused instead on the transpartisan issues that would be relevant in the post-Saddam era, including matters relating to the economy, federalism, the role of religion in public life and other issues important to civil society.

It may have been possible for Iraq to recover from the Bremer debacle if good governance had followed. But that is not what happened. Instead, government leaders, including both the top leadership and many of those with limited portfolios, typically ruled in their own private interests or promoted ideological partisan goals. Throughout this period, ministers routinely treated their ministries as fiefdoms, with the spoils of power allocated on the basis of loyalty and favouritism, sometimes at the risk of arrest or death. Charles Tripp referred to this as the 'ghost politics' of the 'shadow state': 'an arena in which the rules of the game were not explicit and where loyalties were uncertain, but which had to be navigated by those who knew that to err was to risk death and collective punishment.'<sup>13</sup> Instances of political retribution too numerous to mention

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<sup>10</sup> See also James P Pfiffner, 'US Blunders in Iraq: De-ba'athification and Disbanding the Army' (2010) 25 *Taylor & Francis Group Intelligence and National Security* 80. See also Guy B Balfour and Danny L Adams, 'Ethical Failings, Incompetence and Administrative Evil: Lessons from Katrina and Iraq' in Raymon W Cox (ed), *Ethics and Integrity in Public Administration: Concepts and Cases*, (ME Sharpe 2009) 57 (estimating that 400,000 conscript members of the regular army were let go).

<sup>11</sup> Balfour and Adams, *ibid* 57; Pfiffner, *ibid* 79.

<sup>12</sup> Tripp (n 1) 282.

<sup>13</sup> *ibid* 304.

are described; it has even been reported that Nouri Al-Maliki ordered tanks to be deployed around the homes and offices of an opponent.<sup>14</sup> Indeed, perhaps the element of democratic consolidation that is most painfully lacking from post-Saddam Iraqi politics is the commitment to govern in the public interest. Katzman explains that after the 2005 election, '[p]art of the difficulty forming a government was the close result, and the dramatic implications of gaining or retaining power in Iraq, where politics is often seen as a *winner take all* proposition'.<sup>15</sup> There is little opportunity for democratic values to take root where the traditions of male dominance, power limited only by power, and a sense of entitlement produced by foreign invasion and nurtured by American ill-governance prevail.<sup>16</sup>

The de-ba'athification process was illustrative of this as much under the Iraqis as under the CPA. In May 2003, Bremer established the Iraqi De-Ba'athification Council,<sup>17</sup> which included more Iraqis in the process; the Council then created the Higher National De-Ba'athification Commission (HNDBC) which would be headed by Ahmed Chalabi, the Iraqi exile who wielded enormous influence with the Bush Administration in the lead-up to the war. Under the CPA's authority, the HNDBC had broad authority and virtually unchecked power; individuals investigated by the HNDBC had little opportunity to appeal against adverse decisions to any judicial body.

In 2008, the Iraqi government established the Supreme National Commission of Accountability and Justice, which supplanted the CPA's Supreme National Commission of De-ba'athification. Though the new Commission adopts as its own the same backward-looking principal policy of its predecessor – namely, to '[p]revent the ideological, administrative, political and practical return of the Ba'ath Party under any name into power or public life in Iraq', and the 'cleansing of the public and mixed sectors, the civil society organizations and the Iraqi society from the Ba'ath Party system in any form whatsoever'<sup>18</sup> – it does add several other policy goals that are potentially more constructive; these are to help refer perpetrators to the criminal justice system, to help victims secure compensation, and to locate illegally seized funds and return them to the state treasury.<sup>19</sup> The final purpose of the new policy is to<sup>20</sup>

<sup>14</sup> Kenneth Katzman, 'Iraq: Politics, Governance, and Human Rights', Congressional Research Service, 22 August 2012, 15.

<sup>15</sup> *ibid* 12.

<sup>16</sup> It is not without irony that Adams and Balfour describe the Bush Administration in this way: '[W]e see the egregious misuse of political appointments, with multiple appointments of people who simply had no visible qualifications for the positions they assumed, and who went on to act incompetently. One question that arises is whether the explanation for these appointments was simple corruption (seeing these appointments as the "spoils" of winning political office) or ideology (in this case, the conviction that government is simply not able to do anything well, so that whoever is in any given government position really does not much matter)': Balfour and Adams (n 10) 60.

<sup>17</sup> Coalition Provisional Authority Order Number 5, 'Establishment of the Iraqi De-Baathification Council', CPA/ORD/25 May 2003/05, 2.

<sup>18</sup> Law No 10 of 2008 (Iraq), arts 3(4) and 3(5). Unofficial translation by GJPI, University of Utah, SJ Quinney College of Law, <http://gjpi.org/wp-content/uploads/law-no-10-of-2008-on-accountability-and-justice-eng.doc/>.

<sup>19</sup> *ibid* arts 3(1) and 3(2) respectively.

<sup>20</sup> *ibid* art 3(6).

[s]erve the Iraqi memory through documenting the crimes and illegal practices of the elements of the Ba'ath Party and its Repressive Services, and provide a database about those elements to be accessible to the public in order to fortify future generations from falling into the clutches of injustice, tyranny and oppression.

Although these additional goals have the *potential* to contribute to the transformation of Iraqi society – by providing support to the victims of repressive Ba'athist policies and by enhancing public knowledge about the abuses of the past – even these goals are undercut by the laxity of the procedures used and the ideological way in which the law has been implemented by the present regime. In the 2010 parliamentary elections (which will be discussed further below), the Commission barred 511 candidates from electoral lists, including some incumbents.<sup>21</sup> According to Human Rights Watch, '[t]he appeals court then reversed the disqualification of only 26 candidates; another 145 were rejected; the rest did not appeal or their parties replaced them with other candidates'.<sup>22</sup> The elections produced a near tie between Maliki's largely Shia State of Law party and Allawi's largely Sunni Iraqyia party, which resulted in months of negotiations and court challenges before anyone could form a government. Finally, Maliki was allowed to become Prime Minister, but only after agreeing to a number of conditions, including the suspension of the Accountability and Justice Commission and its replacement with a body that would have greater accountability and transparency; however, the Maliki government has not abided by this condition and, on the contrary, has used the Commission in bold and divisive ways that lend credence to charges that it is simply a political tool in the ruling party's arsenal. In 2011, scores of teaching and staff employees were fired from the University of Tikrit (long associated with Saddam Hussein) and other academic institutions, including those in the Kurdish city of Mosul, resulting in threats by the regional governments to 'cut off the electricity and oil produced in the state'.<sup>23</sup>

The impact of these actions reflects the tensions of present-day Iraqi society. At the elite level of national politics, deals are made and routinely broken; the present government of Nouri Al-Maliki has shown no inclination towards conciliation or cooperation with other groups. Indeed, the sentencing to death of his Sunni Vice-President is a dramatic illustration of the failure of normal politics. At the social level, violence is still a far too common reaction to adversity, as was evidenced in 2011 when Ali al-Lami, the chair of the Justice and Accountability Commission, was assassinated, and by the continued high levels of violence in parts of the country.

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<sup>21</sup> Dai Yamao, 'National Reconciliation as a Tool of Political Struggles: An Inquiry into Nation Building in Post-War Iraq', presented at the World International Studies Committee: Third Global International Studies Conference, University of Porto (Portugal), 18 August 2011, 12.

<sup>22</sup> Human Rights Watch, 'World Report 2011 – Iraq', *Human Rights Watch*, 24 January 2011, <http://www.unhcr.org/refworld/docid/4d3e801ed.html>. See also <http://www.hrw.org/node/88800>.

<sup>23</sup> Khaled Waleed, 'No More Ba'aths: Wiping out Saddam or Starting the Next Civil War?', *Niqash*, 27 October 2011, <http://www.niqash.org/articles/?id=2929>.

### 4.3 SYMBOLS OF RECONCILIATION

A third mechanism to promote reconciliation has not been used in Iraq: while there have been calls for a national truth and reconciliation commission (TRC), no significant effort has yet been undertaken. This might have been useful for two reasons in particular. First, because of the targeted nature of Saddam's repression, the nature and extent of human rights abuses may not have been widely known. Much of the abuse was targeted and information about it suppressed. In such an environment, truth commissions can be especially important, as they were in Latin America, in disgorging details about covert torture and disappearances. They might be even more effective in Iraq than was the TRC in South Africa, where many of the costs of apartheid were widely experienced by most people and known throughout the population. In the circumstances of Iraq, a truth commission might give voice to those who had been silenced and might vindicate their sense of justice. A truth commission may be valuable for pragmatic reasons as well. Like that of many strongmen, Saddam's regime did produce some notable benefits, among them stability, security and a sense of social cohesion, especially for women, who in general enjoyed a higher quality of life under the previous regime. Even though much of this was undercut by the effects of sanctions and wars against Iran and Kuwait, many Iraqis who have endured the last ten years of violence, sectarianism, social upheaval and personal and economic insecurity might nonetheless be tempted to return to the pre-invasion years to regain a sense of predictability and security. A truth commission that revealed the true costs of these social benefits might make Iraqis less inclined to accept a return to a dictatorial past.

However, the decision to seek and tell the truth of a previous repressive regime always needs to be made with attention to the costs of focusing on the past and with a realistic assessment of the likely benefits. While it is reputed to lead to reconciliation, truth can often be divisive and can produce more harm than good, particularly when it takes place in the context of a deeply divided society; in these situations, truth can be used to vindicate, but not necessarily to clarify and to heal. Given the failure of moral leadership and the near absence of governance in the public interest that Iraq has seen since 2003, there is not much basis for hope that a truth and reconciliation process would be pursued in a way that would repair the common weal. Indeed, the tools of reconciliation in Iraq, as Dai Yamao has shown, have become political tools as the dominant forces have vacillated between the politics of inclusion and exclusion, because neither has exclusive moral authority, and both have some legitimacy including some support among Iraqis.<sup>24</sup> Even the Iraqi experience with the trials and with the de-ba'athification commissions demonstrates the perils of reconciliation efforts when there is no consensus on even the basic facts of nationhood, history or the future of the nation that is

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<sup>24</sup> Yamao (n 21) 13: 'Each party used the reconciliation and De-Baathification policy according to its own understanding to criticize its political opponents; thus, the reconciliation policy became a political tool'; Yamao provides an overview of anti-ba'athist lustration policies since 2003, including analysis of governmental structures and comparison of the CPA's 2003 orders and the Supreme National Commission of Justice and Accountability, established under Law 10 of 2008.

envisaged.<sup>25</sup> Unlike in South Africa and in many Latin American countries, there is in Iraq no agreed upon truth that a commission can expose and confirm, and a truth commission is unlikely to be able to produce one.

Several specific initiatives have been designed to move reconciliation forward, although it is not clear how effective these have been. In particular, periodic reconciliation conferences have been tried over the years. These tend to include high-level participants, and produce documents and good feelings when they are successful, but rarely produce deep changes that resonate in the culture and that will transform the society. The most recent such conference, in May 2009 in Erbil, produced a final communiqué containing 40 ‘practical steps’ that could be taken, most of which have been ignored. Nonetheless, there may be indirect benefits from these conferences, particularly in the confidence-building measures they make available and in consistent re-enforcement throughout the society of the expectation of reconciliation.

## 5. STRUCTURAL TRANSFORMATION

In the midst of the violence and the sectarian intransigence of parliamentary politics that have become familiar in Iraq, particularly since the withdrawal of American troops at the end of 2011, it is difficult to see the strides that have been made in the nation’s evolution towards a rights-respecting constitutional democracy. It is decidedly hard to see reconciliation in the Sunni boycott of parliament, or in the bombings that kill scores of people on a regular basis. But even at the lowest points, Iraq has not engaged in government-sponsored ethnic cleansing as happened in Bosnia, nor genocide as happened in Rwanda, nor the kind of chaos that is currently engulfing Syria, to which it is difficult to see an end. This is decidedly a low bar by which to measure success, but still, contrary to predictions, Iraq has not experienced this degree of lawlessness. It is worth, therefore, considering some of the institutions and processes that have been put in place that may nonetheless serve to strengthen civil society and regularise governance – that is, the institutions of reconciliation that have transformative potential. These are the structural features of transitional justice.

To date, polls have consistently indicated that there is and remains popular support for ‘One Unified Iraq based on National Reconciliation’ as compared with decentralised options or the balkanisation of Iraq.<sup>26</sup> The level of support across Sunni and Shia in Iraq fell at the height of the 2006–07 civil war, but still always remained above 50 per cent and, overall, has hovered at around 70 per cent or more, and climbs steadily.<sup>27</sup> (Among the Kurdish population, the

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<sup>25</sup> See above, Section 2; see also, eg, Henri J Barkey, ‘Iraq may be Destined for a Break-Up’, *Gulfnews*, 28 March 2013, <http://gulfnews.com/opinions/columnists/iraq-may-be-destined-for-a-break-up-1.1164084>; see also Arango (n 6).

<sup>26</sup> Yamao (n 21) 10.

<sup>27</sup> Anthony H Cordesman, *Barriers to Reconciliation in Iraq: Tensions between Sunnis, Shi’ites, and Kurds, and the Role of External Powers* (Center for Strategic and International Studies 2010) 56.

level of support for a centralised government has not surpassed 20 per cent; there is broader support for a regional government, or for separate states.<sup>28</sup>)

### 5.1 THE TRANSFORMATIVE POTENTIAL OF REGULAR ELECTIONS

In the last eight years, Iraqis have taken part in several election cycles at both provincial and national levels.<sup>29</sup> Elections promote transitional justice in two ways. Part of the value of elections is indeed symbolic: the fact of elections indicates that the period of authoritarian politics has yielded to a new era of democratic politics. Elections also embody the need for and importance of public participation in political decision-making. Both of these are important, but they are effective only to the extent that the elections are free and fair.

To that extent, elections can promote transitional justice by helping to move the country towards substantive democracy. A few caveats should be mentioned here. First, the most recent provincial elections, in March 2013, were marred by violence and low voter turnout, thus diminishing confidence that Iraqi politics are moving in the right direction. Second, to the extent that one can still find in the recent elections cause for hope, there remains the complex and sometimes perplexing question of the relationship between the formal incidents of democracy (namely elections) and the substantive culture of democratic governance. This article assumes, for the sake of argument, that formal democracy will eventually lead Iraq to substantive democracy. This assumption is based in part on the fact that formal democracy is a necessary predicate to substantive democracy: a nation committing to democracy must at least establish regular multi-party elections and must at least commit to a form of rule of law (such as constitutionalism) that binds government officials and limits the choices available to them. That said, formal indicia of democracy are not a substitute for substantive (or liberal) democracy; nor are they sufficient to establish democratic values and a pervasive sense of constitutionalism that precludes resort to violence to settle political disputes. There is no shortage of countries around the world that conduct regular, though not substantively legitimate, elections. Ultimately, it is an open question whether, and if so when, Iraq, or any of its neighbours in the Middle East or in North Africa, will metamorphose into liberal democracies. This article's aim is not to assess the myriad social, political and economic factors that are either conducive to or militate against the consolidation of liberal democracy; rather, it is to evaluate the ability of some of the particular tools in the transitional justice toolkit that contribute to the promotion of democracy and stability. It is for these reasons that the article includes regular elections in its catalogue of useful tools of transitional justice and favours structural transformation rather than symbolic gestures.

In Iraq, elections are profoundly contested, often with thousands of candidates representing dozens of parties and competing for hundreds of seats; while some parties are sectarian, others

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<sup>28</sup> *ibid* 56. See also International Republican Institute, 'Survey of Northern Triangle Opinion', 13–18 April 2011, <http://www.iri.org/sites/default/files/2011%20June%2016%20IRI%20Releases%20Survey%20of%20Iraqi%20Public%20Opinion,%20April%2013-18,%202011.pdf>.

<sup>29</sup> Human Rights Watch (n 22).

cut across ethnic and sectarian lines and permit people to identify on the basis of political ideology. Voter turnout in Iraqi parliamentary elections is certainly respectable, at 79 per cent in 2005 and 64 per cent in 2010<sup>30</sup> (slightly higher than voter turnout in the United States, which was 63 per cent in 2004 and 2008).<sup>31</sup> In the 2013 provincial elections, though, voter turnout was only about 50 per cent or less, with ‘many Iraqis express[ing] frustration, apathy, or disgust toward the emerging political elite’.<sup>32</sup> According to one analyst, Aziz Jaber, ‘[p]eople no longer care about what’s going on. They don’t believe that anything will really change’.<sup>33</sup> This is obviously of enormous concern if it portends the decline of democratic praxis in Iraq.

But in the past Iraqis have found that boycotting elections – as the Sunnis did in 2007 – is not an effective form of protest and that it is better to participate, and try to use the power one gains from the legitimacy of electoral politics to secure desired outcomes, than to opt out of the political process altogether. This is surely a sign of the gradual entrenchment of democratic values into the fabric of Iraqi society. The same is true of boycotts at the elite level, as the Iraqiya party found out when it ended its two-month boycott of parliament in 2012, with few gains to show for it. To this extent, Iraqis are invested in the political process, which indicates a desire to regulate society and to resolve competing claims on power not by means of violence but through democratic processes. The faith in the political process that is necessary for the consolidation of democracy, however, builds over time, as elections, governance through politics and the eschewing of violence between elections reinforce democratic values and practices. But it is absolutely essential that the *governors* supply the governance that satisfies the needs of the governed; if they want the public to use politics rather than violence to settle disagreements, they must do so, too.

## 5.2 CONSTITUTIONALISM, AND THE COMMITMENT TO THE RULE OF LAW

There are some other structural features of the Iraqi government that may contribute to a durable peace over time. The Iraqi constitution was drafted in 2005 and was ratified by popular referendum in October of that year, although over the opposition of many Sunni voters. It is no more or less perfect than any other constitution and, like all other constitutions, it sets out only a broad framework for governance, leaving open many questions to be resolved politically through negotiation and compromise in the years to come. In particular, it leaves open questions concerning the status of the Kurdish provinces; indeed, the required census and referendum that were supposed to provide the information necessary to resolve the status of those provinces has not yet taken place, notwithstanding clear deadlines in the constitution and

<sup>30</sup> Institute for Democracy and Electoral Assistance, ‘Voter Turnout Data for Iraq’, [http://www.idea.int/vt/country\\_view.cfm?CountryCode=IQ](http://www.idea.int/vt/country_view.cfm?CountryCode=IQ).

<sup>31</sup> Thom File and Sarah Crissey, ‘Voting and Registration in the Election of November 2008: Population Characteristics’, United States Census Bureau, July 2012, 1, <http://www.census.gov/prod/2010pubs/p20-562.pdf>.

<sup>32</sup> Mary Casey and Jennifer Parker, ‘Iraqis Vote in Provincial Elections’, *Foreign Policy Mideast Brief*, 22 April 2013, [http://mideast.foreignpolicy.com/posts/2013/04/22/iraqis\\_vote\\_in\\_provincial\\_elections](http://mideast.foreignpolicy.com/posts/2013/04/22/iraqis_vote_in_provincial_elections) (noting that ‘[a]bout 8,138 candidates are competing for 447 provincial council seats’).

<sup>33</sup> Daoud al-Ali, ‘Election Results So Far: Low Voter Turnout, More Compromise Needed’, *Niqash*, 25 April 2013, <http://www.niqash.org/articles/?id=3211>.



other laws.<sup>34</sup> Like any other constitution, the test of its fairness and efficacy will be the extent to which, in the years to come, politicians adhere to it, courts enforce it, and the people demand their rights under it.

### 5.3 INSTANTIATING RIGHTS: BUILDING AN INDEPENDENT JUDICIARY

A third structural element of transitional justice that may, over time, lead to a transformation of Iraqi society is the establishment of an independent judiciary. This is important because courts instantiate the rule of law: they can symbolise the justice and equity of a political system, ensure that rights of individuals and groups will be protected, and provide a necessary check on the otherwise uncabined power of the government. The Iraqi Federal Supreme Court has had a mixed record in the years since its establishment under the 2004 Transitional Administrative Law. Haider Ala Hamoudi has argued that, overall, the Court has been no more partisan and no less independent than any other apex court, including that of the United States, and that ‘the story of the Iraqi judiciary is largely a reassuring one to date’, both in terms of the quality of its rulings and its perceived authority and legitimacy within Iraq.<sup>35</sup> Walking through a selection of politically charged rulings, Hamoudi argues that in almost every instance, the Court’s opinions were legally defensible and as often in favour of Prime Minister Al-Maliki’s interests as against them. The principal exception was the Court’s decision to allow the exclusion of candidates from the electoral lists in the 2010 election. In this instance, he argues, the Court attempted, wisely, to defer the decision until after the election, which would allow candidates to stay on the ballots, in part because they were, statistically, unlikely to win and in part because there was insufficient time before the election to determine their qualifications. But, bowing to significant direct political pressure (including a meeting between the Chief Justice and parliamentary leaders), the Court ultimately agreed to review all the evidence in a rushed manner before the election, ultimately affirming the disqualification of all but 26 of the candidates.<sup>36</sup> Even here, however, it is worth noting the important underlying point, that the matter was settled by the Court and not by violence, and that the decision of the Court, however misguided, was nonetheless respected.

Furthermore, while it is true that neither the adoption of a constitution, nor the holding of frequent elections, nor the establishment of a court makes a democracy, it is also true that all of these can contribute to a durable peace and can help to settle expectations about the future,

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<sup>34</sup> The Iraqi Partners Forum has argued that ‘[n]ot addressing the status of these areas has been one factor in sometimes difficult relations between the central government and the Kurdistan region which, to date, has arguably held up legislation in Baghdad viewed as central to the process of national reconciliation in Iraq. This has included the hydrocarbon package of laws, efforts to promote a constitutional review, and the process of approving provincial and national election laws, among others’: Iraq Partners Forum, *The Iraq Briefing Book* (2010) 69–70, <http://unami.unmissions.org/LinkClick.aspx?fileticket=hSc1EtZQn4k%3D&tabid=3441&language=en-US>. See also International Republican Institute (n 28) 72–74.

<sup>35</sup> Haider Ala Hamoudi, ‘Judicial Independence in Times of Crisis: The Will of the (Iraqi) People’ (2011) *Utah Law Review* 45, 45–46.

<sup>36</sup> *ibid* 53–55.

particularly as the incidents of rule of law begin to seep into the public consciousness. It will be important to see, in the coming months and years, whether Iraqis continue to expect government to abide by the constitution and whether they state their claims against the government in constitutional terms, indicating the relevance of rule of law to the developing sense of Iraqi national identity. These evolutionary changes are indicia of the transformation of Iraqi civil society that will signal the post-transitional period.

A related point is the complex connection between violence and security. It is conventional wisdom that the first order of business in any post-conflict situation is to provide security, on the theory that reconciliation efforts cannot take place, nor can democratic culture take root in a climate of violence and fear. The assumption is that violence is produced by the conditions of the conflict and those conditions must cease to produce violence before the healing can start. Moreover, ensuring that there are enough safe physical spaces for social interaction can, over time, produce a less sectarian politic that permits people to define themselves politically by their ideas, goals and commitments, in order to produce a politic defined by greater inter-group coordination and less intra-group adhesion and isolationism. Universities are an important locus for social integration, but Iraqis have missed opportunities to protect the universities and create safer and more accessible public spaces in which people from different backgrounds can interact. More attention should be paid to protecting educational and other public institutions so that they may serve these purposes.<sup>37</sup>

But the ten-year experience in Iraq suggests that there are additional and complicating layers to the relationship between violence and reconciliation. While the invasion of Iraq was over in a matter of months, with the installation of the American governing authority and the return of sovereignty a year later, the violence that has plagued Iraq since then resulted not from the original conflict, but from the uncertainty and volatility of Iraqi politics in the post-invasion period. In Iraq, many who were inclined to violence chose to use it to shift the ground on which political fortunes are settled; but the move towards violence was prompted not by the original conflict of the 2003 invasion, but by the chaos of the ensuing years: the indeterminacy of the outcome of the electoral power struggles, the possibility of achieving political gains through violence and terrorism, and the knowledge that so much was at stake (not to mention general disaffection with the socio-economic condition of the nation). Thus, in Iraq, as perhaps elsewhere, it is the absence of reconciliation and stability that produces violence, even more than it is the absence of violence that is conducive to reconciliation.

This understanding of the basis and purposes of violence calls for a re-theorisation of the relationship between violence and reconciliation, and a recalibration of transitional time. In this view, the recognition that stability is more likely to end violence, even where the end of violence does not produce stability, requires devoting additional resources to transitional justice initiatives which may provide the structures in which politics play out, rather than focusing almost exclusively on security per se. Only if the political structures are in place can political

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<sup>37</sup> See generally Watson Institute for International Studies, 'The Costs of War – Education: Universities in Iraq and the US', 2011, <http://costsofwar.org/article/education-universities-iraq-and-us>.

decisions be made on the political playing field, and only then will politics dislodge violence. Similarly, only when elections are held regularly and courts are operational can we expect political and civil disputes to be resolved by the rule of law rather than by bombs and grenades.

## 6. LEARNING LESSONS THE HARD WAY

As violence erupts in Iraq on an almost daily basis, almost ten years after the deposition of Saddam Hussein, it is perhaps audacious – if not downright incredible – to suggest that there is anything we can learn from the Iraqi example. Yet Iraq does offer some lessons – both positive and negative – that might have relevance for nations currently undergoing transition.

First, Iraq serves as a reminder that where the goal is the consolidation of democracy, the tools of reconciliation must serve transformative, not merely transitional, ends. In Iraq, the transition from Saddamism to a democratic form of government has been complete, but the transformation to democratic consolidation has not. If reconciliation efforts are effective at all, they must help to transform society into one in which democracy can thrive and where the only rule is the rule of law.

But if we consider *why* Iraq's transformation has stagnated, we might learn a second lesson. Iraq's experience suggests that a democratic transformation cannot be forced on a people who did not seek it. Archbishop Desmond Tutu, who chaired the South African Truth and Reconciliation Commission, has written that for reconciliation efforts to be 'truly successful, people have to believe in the capacity to transform'.<sup>38</sup> This is true essentially because democracy is exercised, nurtured and experienced by those within the society; the commitment to it must arise from within. If people are unified at least in their commitment to create a democratic dispensation, in which all major decisions are made through democratic means and not by violence or through the unbounded exercise of political power, then they are more likely to be able to exert that pressure on their leaders. The Iraqi people have been unable to insist that their leaders both conform to democratic norms and adhere to the rule of law, in part because there may still be deep scepticism about the form of the state, the commitment to rule of law and the benefits of national unity. Moreover, without consensus on the non-viability of violence as a tool of political change, Iraqis have been unable to marginalise those terrorist organisations which have destabilised civil society by sowing fear and anxiety in the population whenever there seems to be a power vacuum. Part of this, as Archbishop Tutu suggests, is an act of faith. One has to believe that playing by the rules is worthwhile, and that democracy will ultimately (and preferably sooner rather than later) be more effective than violence in creating the kind of society that everyone wants.

But faith is nurtured by experience, not mandated by fiat, either indigenous or exogenous; and that experience must start somewhere. In Iraq, the transformative experience started with a constituent assembly that sought to set out the rules of engagement at the broadest levels in the constitution and it has been nurtured over the years by regular provincial and parliamentary elections.

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<sup>38</sup> Tutu (n 3) x.

These have certainly had their problems: the elections of 2010, as noted, were marred by the use of de-ba'athification for political ends and by the failure of the current government to comply with the conditions that put it in power; the 2013 election cycle has been beset by still more violence, even leading to the suspension of the elections in two provinces. Yet the fact that regular elections have been carried out, that the defeated accept their defeat and the winners in some manner seek to represent all of their constituents are not insignificant signs of social transformation. A third lesson might therefore be that initiatives that changed the structure of Iraqi politics, and that were designed to instil democratic values, were more effective in developing the habits of democracy than the tools of transitional justice that merely symbolised the break with the past, such as Saddam Hussein's trials and execution and the de-ba'athification policies.

Moreover, effective reconciliation can be seen in Iraq in some forms of power-sharing at the elite level, which is admirable, even if deeply flawed. The Sunni and Shia leaders were able to negotiate to form a government: again, this process was not without its substantial defects, in terms of the time it took to reach an agreement and of Maliki's apparent failure to comply with the terms, not to mention the spirit, of the deal. In addition, the recent trial *in absentia* of the Vice-President undercuts any sense of the effectiveness of normal politics. Again, though, it is worth recognising that it was recourse to the courts that set the boundaries for an intergroup negotiation to which all parties ultimately committed that produced the deal that created the government.<sup>39</sup>

Nonetheless, there are also ways in which Iraq offers *negative* lessons, or examples of what to avoid. Despite clear mandates in the constitution, the political authorities have failed to decide even the most fundamental questions about sovereignty and the location and significance of internal boundaries, particularly as this concerns the northern Kurdish areas. Similarly, and relatedly, significant questions remain about the control and allocation of revenue from hydrocarbon resources. These resource questions are critical not only because they entail matters of sovereignty, political legitimacy and the allocation of political authority at the highest levels; these unresolved matters also affect each individual, family and community in the nation because the nature and amount of the resources that are available in a community affect such matters as education, safety and the provision of basic services. It is these things – the extent to which the government can ensure access to clean water and electricity, open and safe schools for boys and girls and opportunities for employment and self-fulfilment – that will be the ultimate determinants of whether the Iraqi transformation is successful. The extent to which people feel safe and optimistic about the future will determine whether they put their trust in government and the forces of law or in extremist groups who speak the language of violence and terror. To date, the Iraqi government has been unable to establish the conditions of life that foster trust and confidence and enhance human dignity.

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<sup>39</sup> See also Mustafa Habib, 'An Unconstitutional Council? Tensions between Iraqi Leaders Deepen over New Political Body', *Niqash*, 19 October 2011, <http://www.niqash.org/articles/print.php?id=2923&lang=en> (describing the negotiation and point-allocation system for parliamentary posts).

## 7. CONCLUSION

Despite the ongoing and pervasive violence, it is possible to see in the transitional process the signs of incremental progress towards a commitment to the rule of law. While the three-month process in 2010 to ratify elections is not to be lauded, it is an important step forward when the objections to the electoral process are made with legal briefs, not bombs. And many of the barred candidates used the judicial process to assert their rights to run for office,<sup>40</sup> indicating faith in both the judiciary and the electoral process. The next step, of course, is to ensure that such faith is not misplaced. But small as it is, what we have seen so far is nonetheless an important predicate. And when people object to government policies, they now more than before use constitutional rhetoric to support their claims.<sup>41</sup> These are signs of progress that should not be minimised.

In the end, the success of reconciliation efforts must be measured by their transformative efficacy. The Iraqi transition used many of the traditional tools of transitional justice, including backward-looking, largely symbolic processes (such as trials and lustration) as well as forward-looking tools that aim to rebuild and unify (such as rule of law initiatives and a commitment to electoral politics). The conclusions developed at this juncture suggest that while symbolic processes may be valuable to mark a break with the past and the birth of the new dispensation, structural initiatives are more likely to perform the transformative work that is needed to entrench the values of democracy and dignity – those values that are often the very reasons for the change in regime. Structural changes, however, tend to be more challenging and more costly over time, and may require more committed human resources and sustained effort throughout the various stages of design, implementation and follow-through. Producing democracy is, after all, somewhat more difficult than even producing transitional justice.

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<sup>40</sup> 'It took nearly three months for the results of Iraq's parliamentary election on 7 March to be ratified, after numerous complaints and appeals': David Batty, 'Iraq Close to Forming a New Government', *The Guardian*, 2 October 2010, <http://www.guardian.co.uk/world/2010/oct/02/iraq-close-forming-new-government>.

<sup>41</sup> Yamao (n 21) 12.