

## Iraqi Constitution : A Divided Future

**Arsalan H. AlMizory** - Ph.D. In Public International Law University of Nawroz, Iraq.

**Email** - arsalanmizory@yahoo.com

**Abstract:** The Iraqi election in 2005 is viewed by most as a success for the Kurds, they won the large number of seats as an apposite and deserved outcome. However, many obstacles stand in the way of their autonomy. These include the style of government in Iraq, as many, including the Arabs and Turkmen of Kirkuk, oppose the federal state structure. In addition, the claim of Kirkuk has instilled fear among Iraq's neighbours and poses a threat to the future of the Iraqi State itself. The city has become a source of ethnic-sectarian conflicts, as well as the possibility of a regional conflict. This article explains that, what would happen if Iraq proves to be a failed State that cannot sustain a federal democracy? Rather, it will explain that whether federalism will become the road to secession for the Kurds, as the language of the new constitution is problematic and illustrates a lack of sophistication in constitutional writing.

**Key Words:** Iraqi Constitution, Federalism system, Secession, Article 140 other contested Articles.

### 1. Introduction:

In post-Saddam Iraq, the Iraqi Kurds have managed to gain formal limited autonomy in the form of the IKR within the Iraqi State, as stipulated in the constitution. Today, the IKR rules much of the Kurdish areas of Iraq and the Kurdish Parliament exercises significant legislative powers. The region of Kurdistan after Operation Iraqi Freedom (OIF) in 2003 has been recognised as a constitutionally federal region within Iraq and it enjoys broad international diplomatic relations.<sup>1</sup>

On October 15 2005, Iraqis approved the constitution in a referendum. The Kurds firmly believe that four core principles cannot be omitted: federalism, equal rights for women, freedom of individual conscience, and justice for the victims of Baathism.<sup>2</sup> The constitution establishes a federal central government and regional governments as a form of self-rule. It approved the IKR and its regional and federal authorities. Kurdish is recognised as an official language alongside Arabic.<sup>3</sup> Rather, 'oil and gas revenues belong to all Iraqis and the revenue will be shared equitably by the regions'.<sup>4</sup> It is also agreed to decide the status of Kirkuk and disputed areas according to Article 140. The constitution, guarantees small minorities such as Turkomen, Chaldeans, Assyrians and all other constituents, 'the administrative, political, culture, and educational rights'.<sup>5</sup> Article 35 (4), which states that the 'State will promote cultural activities and institutions in a way that is appropriate with Iraq's civilizational history and cultural'.<sup>6</sup> However, the provision Yildiz argued could be 'used by the State to sanction the discrimination of funding of activities and organisations of minorities and it is recommended that the provision be amended to include the guarantee of non-discriminatory State support'.<sup>7</sup> Eventually, the constitution states that Iraq will be an independent federal State with full sovereignty, parliamentary and democracy.<sup>8</sup>

<sup>1</sup> 'Iraqi Constitution', 2005 <[http://www.iraqinationality.gov.iq/attach/iraqi\\_constitution.pdf](http://www.iraqinationality.gov.iq/attach/iraqi_constitution.pdf)> accessed 28 July 2016.

<sup>2</sup> Q Talabani, 'What the Kurds want', *The Wall Street Journal* (NY, 22 August 2005).

<sup>3</sup> Article 4 'Iraqi Constitution' (n 1).

<sup>4</sup> M Dewhurst, 'Assessing the Kurdish Question: What Is the Future of Kurdistan?' USAWC STRATEGY RESEARCH PROJECT ASSESSING (2006).

<sup>5</sup> Article 125 'Iraqi Constitution' (n 1).

<sup>6</sup> Article 35 (4) 'Iraqi Constitution'.

<sup>7</sup> K Yildiz, *The Kurds in Iraq, the Past, Present and Future* (Rev edn, London: Pluto press 2007) 138.

<sup>8</sup> Article 1 'Iraqi Constitution' (n 84). It is true that the Iraq established is re-established based on "administrative federalism" and not geographical, ethnic, or historical regional distinctions. See, R Fatah, 'Kurdistan Identity Denied in the Iraqi Constitution' (UNPO, 2006) <<http://www.unpo.org/article/3897>> accessed 29 July 2016.

## 2. Dilemma of Federalism:

Significantly, the Iraqi constitution creates a federation, 'federations incorporate elements of self-rule in the sense that their component units enjoy a certain degree of autonomy *vis-à-vis* the federal government even as they share in the control of that government'.<sup>9</sup> It concerns IKR relationships with the Iraqi central government, based on freedom and independence. The constitution is built on the concept of voluntary unity and sovereignty and optional partnership between the Kurds and Arabs. The last item of the preamble states that, 'We are the people of Iraq, who in all our forms and groupings undertake to establish our union, 'freely and by choice' and to adhere to this constitution, which shall preserve for Iraq its free union of people, land, and sovereignty, adhering to this constitution will protect the Iraq's free union as people, land, and sovereignty'.<sup>10</sup>

It is true that, the preamble shows that the Kurdish participation in establishing the constitution and volunteering in building the Iraqi State. Hence, it is argued that the Kurds can abandon their participation anytime if the desire is not there. This right to abandon the Union-which means 'Separation', is affirmed by the same constitution through many other clear statements; since the Kurds have the right to abandon the voluntary union and separate at any time they feel that their rights have been violated or broken. Given the attachment of Kurds to Kirkuk and to other disputed territories, any attempt to prevent their union with Kurdistan in the future, would be likely to provoke more violence, rather than peace.<sup>11</sup> In other words, the Kurdish relationships with the central government McGarry and O'Leary argued that, they are built in congruence with the condition of not breaching the constitutional rights of the Kurds by the central government.<sup>12</sup> Meanwhile, any violation of Kurdish rights gives them the right to practice the external dimension of the right of self-determination.<sup>13</sup> Thus, Dawoody argued that, 'by identifying the unity of Iraq as a 'free' act of its people, at least indirectly acknowledges that the Iraqi union is a form of 'union at will' that is subject to change according to the determination of its groups'.<sup>14</sup> Alongside Article 109 obligates the federal government 'alone' with the responsibility of maintaining the integrity of the Iraqi State by stating that, 'the federal authorities shall preserve the unity, integrity, independence, sovereignty of Iraq, and its federal democratic system'.<sup>15</sup> This Article Dawoody argued, considerably exonerates the region of Kurdistan from such obligation, and frees it to secede if it chooses to do so in the future.<sup>16</sup>

Furthermore, some elements in the Iraqi constitution such as, the constitutional provisions on natural resources are a source of controversy. An instance of this, Baghdad's control over the country's natural resources is a *sine qua-non* for centralisation.<sup>17</sup> O'Leary argued that 'the constitution makes clear that natural resources are not an exclusive competence of the federal government'.<sup>18</sup> Article 111, states that 'oil and gas are owned by all the people of Iraq,' is McGarry argued deliberately not a sub-clause of the preceding Article 110, which specifies precisely the exclusive competences of the federal government.<sup>19</sup> Article 111 functions as a saving clause, and should be read in conjunction with Article 115, which states that, 'All powers not stipulated in the exclusive powers of the federal government belong to the authorities of the regions and governorates that are not organised in a region'.<sup>20</sup> With regard to other powers shared between the federal government and the regional government, priority shall be given to the law of the regions and governorates not organised in a region in case of dispute'.<sup>21</sup>

<sup>9</sup> J McGarry and B O'Leary, 'Iraq's Constitution of 2005: Liberal consociation as political prescription' (2007) 5 ICON 670.

<sup>10</sup> See, the Preamble of 'Iraqi Constitution' (n 1).

<sup>11</sup> McGarry and O'Leary, 'Iraq's Constitution of 2005: Liberal consociation as political prescription' (n 9).

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

<sup>14</sup> A Dawoody, 'The Kurdish Quest for Autonomy and Iraq's Statehood' (2006) 41 Journal of Asian and African Studies 483 <<http://jas.sagepub.com/cgi/doi/10.1177/0021909606067405>> accessed 20 July 2016.

<sup>15</sup> Article 116 'Iraqi Constitution' (n 1).

<sup>16</sup> Dawoody, 'The Kurdish Quest for Autonomy and Iraq's Statehood' (n 14).

<sup>17</sup> McGarry and O'Leary, 'Iraq's Constitution of 2005: Liberal consociation as political prescription' (n 9)

<sup>18</sup> M E Bouillon, David M Malone and Ben Rowswell, Iraq: Preventing a New Generation of Conflict, in Brendan O'Leary (ed), *Federalizing Natural Resources* (Lynne Rienner 2007) 189.

<sup>19</sup> McGarry and O'Leary, 'Iraq's Constitution of 2005: Liberal consociation as political prescription' (n 9).

<sup>20</sup> Dewhurst argued that 'the Constitution contradicts itself in Article 13 and Article 116 with respect to the supreme law of the Federal Constitution and the ability of the regional governments to amend Federal Laws.' see Dewhurst, 'Assessing the Kurdish question: what is the future of Kurdistan?' (n 4).

<sup>21</sup> Article 115 'Iraqi Constitution' (n 1).

Here, Dawoody explained that ‘how is it possible for the federal government to share its power in matters as specified as the priority of the regional government?’<sup>22</sup>

In addition, Article 121 (2) states: ‘The regional authority has the right to amend the implementation of the federal law in the region in the case of a contradiction between the federal and regional laws in matters that do not pertain to the exclusive powers of the federal authorities.’ Rather, Article 111 should also be read in conjunction with Article 121, which gives ‘the regions a general power of nullification outside the domain of exclusive federal competences’.<sup>23</sup> Here, if the constitution is the Supreme law of the land, how is it possible for the region to amend or abolish such a law?<sup>24</sup> Moreover, Article 121 (4) grants considerable power to the regional governments, stating, ‘Offices for the regions and governorates shall be established in embassies and diplomatic missions, in order to follow cultural, social, and developmental affairs’.<sup>25</sup> Thus, Dawoody argued that, ‘Iraq would be the only country in the world that allows diplomatic representation of its provinces in its embassies’.<sup>26</sup> Rather, Article 119 supports the establishment of other administrative regions stating ‘one province or more have the right to form a region, based on a request for a referendum’.<sup>27</sup> Accordingly, the Iraqi constitution's federal system (union system) Fatah argued, is contradictory, and the authorities of the regional governments are very limited and weak, and arguably threatens the disintegration of the State of Iraq.<sup>28</sup>

In the early drafts of the constitution, Article 119 stated that two Regions can unite to create a larger Region, that two Governorates or more can unite to create a Region, and a Governorate can declare itself as a Region based on a request for a referendum.<sup>29</sup> However, in the current constitution draft this Article has been removed.<sup>30</sup> Although, the new constitution approved the region of Kurdistan and its authorities, however; it is true that, the Kurdish areas outside the Kurdish government’s control cannot unite with the region of Kurdistan in the future. They also cannot declare themselves, ‘in a referendum, a Kurdish Governorates according to Article 119, because Kurds do not make up the majority in these Governorates’.<sup>31</sup> This means that Kirkuk and other disputed areas cannot legally unite with the Kurdistan region even after their normalisation. Thus, Baker and Hamilton argued that ‘the fear is that these provisions will promote an ethnic or communal federation, with associated dangers of ethnocentrism/sectarianism and dissolution’.<sup>32</sup>

Additionally, Article 112 is the second major constitutional article dealing with oil and gas, which states that, ‘The federal government, with the producing governorates and regional governments, shall undertake the management of oil and gas extracted from present fields, and that the federal government, with the producing regional and governorate governments, shall together formulate the necessary strategic policies to develop the oil and gas wealth in a way that achieves the highest benefit to the Iraqi people’.<sup>33</sup> In fact, Article 112 and 114 establish other areas in which the regional governments and the federal government share power. However, Article 112 should

<sup>22</sup> Dawoody, ‘The Kurdish Quest for Autonomy and Iraq’s Statehood’ (n 14).

<sup>23</sup> McGarry and O’Leary, ‘Iraq’s Constitution of 2005: Liberal consociation as political prescription’ (n 9).

<sup>24</sup> Dawoody, ‘The Kurdish Quest for Autonomy and Iraq’s Statehood’ (n 14).

<sup>25</sup> Article 121 (4) ‘Iraqi Constitution’ (n 1).

<sup>26</sup> Dawoody, ‘The Kurdish Quest for Autonomy and Iraq’s Statehood’ (n 14).

<sup>27</sup> Article 119 ‘Iraqi Constitution’ (n 1).

<sup>28</sup> Section 5, Articles 116 to 121, explain authorities of regional governments cannot be compared to the authorities of the dominant central government. In addition, Article 121 states that regional governments cannot interfere with the agendas of the central government. Regional constitutions and laws must not contradict the central constitution as described in article 13. The regional constitutions therefore must shadow the central government’s constitution (Articles 13 and 121). See, Fatah, ‘Kurdistan Identity Denied in the Iraqi Constitution’ (n 8).

<sup>29</sup> Text of the Draft Iraqi Constitution 2005. <[http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/24\\_08\\_05\\_constit.pdf](http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/24_08_05_constit.pdf)>accessed 29 July 2016

<sup>30</sup> Fatah, ‘Kurdistan Identity Denied in the Iraqi Constitution’ (n 8).

<sup>31</sup> (...), ‘Kirkuk can’t come back to Kurdistan’ (AllIraqi, 2005) <<http://www.aliraqi.org/forums/showthread.php?t=56233>> accessed 25 July 2016.

<sup>32</sup> J A Baker III and L H Hamilton, ‘The Iraq Study Group Report’, (Vintage Books, New York 2006) <[http://online.wsj.com/public/resources/documents/WSJ-iraq\\_study\\_group.pdf](http://online.wsj.com/public/resources/documents/WSJ-iraq_study_group.pdf)>accessed 1 Aug 2016.

<sup>33</sup> Article 112 ‘Iraqi Constitution’ (n 1).

also be read in conjunction with Article 115 and 121, 'which authorise regional supremacy'.<sup>34</sup> Most importantly, Article 112 Horowitz argued 'restricts the federal government's role to present fields, and claims that this 'seems to tie the distribution of future oil revenue to the location of the resource in one region or another'.<sup>35</sup> Iraq's oil is in the Shiite south and Kurdish north.<sup>36</sup> Consequently, this would alarm and leave the Sunni Arab community landlocked and without oil.<sup>37</sup> In addition, McGarry and O'Leary argued that, the constitution makes clear that, 'the territorial status of the Kirkuk governorate has been decoupled from the oil revenues that flow from its oilfields'.<sup>38</sup> Meanwhile, as Kirkuk's oil comes from currently exploited fields, its revenues are to be redistributed across the State regardless of whether Kirkuk joins Kurdistan or not. This fact needs to be clearly understood, it is a major constitutional compromise.<sup>39</sup> Thus, Dewhurst argued that, the constitution explains that oil and gas revenues will be shared equally by the regions but is unclear on the exploration rights of oil.<sup>40</sup>

### 3. Most problematic aspect in the Iraqi Constitution:

Perhaps, the most problematic aspect about the new constitution is its embodiment of articles that threaten the disintegration of Iraq. Dawoody argued that, depending on a 'quota system' in governance is 'an attempt to resolve the country's historic social problems at the expense of a weak central government'.<sup>41</sup> In other words, the constitution contains articles that are vague, 'and that would leave a large room for misinterpretation and speculation', which properly threatens the disintegration of the State of Iraq, specifically the relationship between the federal government and Kurdistan region.<sup>42</sup> The following examples are specific concerns that may pose a threat on the federal structure and the national security of Iraq in the future.

- Article 13 and 121 contradict each other, with respect to the supreme law of the Federal constitution and the ability of the regional governments to amend Federal Laws. Accordingly, regional laws and constitutions must not contradict the central constitution; they must therefore shadow the federal government's constitution.<sup>43</sup> The role of the Kurdish parliament will be similar to the role of a 'Council' for the region, and will not have the power of a regional parliament in a federation.

- Article 1, 109 and the Preamble threatens integration and the free union system in Iraq. Importantly, the constitution does not describe Iraq as a 'voluntary union' between the two peoples the Arabs and the Kurds.

- Articles 112-122 recognise a balance of power between the federal government and the regional governments of Iraq, whereas they leave many details to be determined by the council of representatives. With respect to the distribution of authorities, they grant a considerable power to the regional governments, and limit the powers of the federal government. In particular, the Federal system in Iraq has been highly interpretive and vague. The system is in a very loose arrangement that would support the regions especially the Kurdistan region's maximum autonomy over their own affairs. In other words, Hiltermann argued that the constitution describes the federal system with two exceptional characteristics: 'it guts the powers of the federal State through extreme devolution to federal regions, and it provides scope to governorates to form regions, either standing alone or in conjunction with other governorates, that would replicate the Kurdistan region in their powers'.<sup>44</sup> Hence, the KR has been the principal, and so far sole beneficiary of this arrangement, being the first through the gate. While the other Iraqi

<sup>34</sup> This include for example, the development of oil and gas, customs, water resources, environmental policy, antiquities, enforcement, educational, electric energy distribution and health policy. See Article 112 and 114 of the Iraqi Constitution, *ibid*.

<sup>35</sup> D L Horowitz, 'The Sunni Moment', *The Wall Street Journal* (USA, 14 December 2005) <<http://online.wsj.com/news/articles/SB113452228580321836>>accessed 2 Aug 2016.

<sup>36</sup> *Ibid*.

<sup>37</sup> International Crisis Group, 'The Next Iraqi War? Sectarianism and Civil Conflict', *52 Middle East Report* (27 February 2006) <<http://www.crisisgroup.org/en/regions/middle-east-north-africa/iraq-iran-gulf/iraq/052-the-next-iraqi-war-sectarianism-and-civil-conflict.aspx>>accessed 27 July 2016.

<sup>38</sup> McGarry and O'Leary, 'Iraq's Constitution of 2005: Liberal consociation as political prescription' (n 9).

<sup>39</sup> *Ibid*.

<sup>40</sup> Dewhurst, 'Assessing the Kurdish question: what is the future of Kurdistan?' (n 4).

<sup>41</sup> Dawoody, 'The Kurdish Quest for Autonomy and Iraq's Statehood' (n 14).

<sup>42</sup> N Brown, 'Q&A: Iraq's Draft Constitution' *New York Times* (NY, 12 May 2005).

<sup>43</sup> Fatah, 'Kurdistan Identity Denied in the Iraqi Constitution' (n 8).

<sup>44</sup> J Hiltermann, 'Iraqi Kurds and Their Future, Middle East Research and Information Project' [MER 247] (2008) <<http://www.merip.org/mer/mer247/protect-or-project>>accessed 3 Aug 2016.



regions will depend on the ability of the territories parties' power, to mobilize enough support in each concerned governorate to win a local referendum, which is key to forming a region.

- Article 9 requires the Iraqi armed security and forces, to keep in consideration their 'balance and representation', whereas it (sec B) bans militias from being formed outside of the framework of armed forces. However, the Kurdish 'Peshmerga' is allowed in the Kurdistan region, and that would permit the current Shiites and Sunni militias to be incorporated into the Iraqi armed forces. In other words, the federal government will have to come to terms with its militias and Armed forces. With the Kurdish Peshmerga as the most established, each prominent ethnic group has established militias to protect their regions. The Armed forces in Iraq are made up of all ethnic groups, to protect the country from external and internal threats. However, Dewhurst argued that 'some Iraqi units are composed of a majority or entirely of one sect or group in their ranks, the militia's loyalty is first to their ethnic group, and region; many Shiite and Kurdish units take their orders from the Shiites and the Kurdish political parties'.<sup>45</sup> Thus, in order for a federal government to succeed, the role and the use of these forces will have to be clarified, so that, the particular points in the new constitution are considered as enormous challenges toward the new government, may require amendments for clarification to assist in the creation of a successful federal system.

- The *quota* system has extended to the exploration of oil and gas in Articles 111 and 112, with respect to the fair distribution in a manner compatible with the demographic distribution of the country. However, it is unclear on the exploration rights of oil and gas.

- Article 1 and 2, defines Iraq as a 'Democratic' and 'Islamic' country. However, Fatah argued that 'there are no universal agreements on the meaning of these two totally different, even contradicting, concepts'.<sup>46</sup> Accordingly, based on such concepts, no law can be legislated or enacted that contradicts the immutable standards of Islam; similarly, no law may contradict democratic standards.<sup>47</sup> Consequently, such illusive language will restrict the democratic, civil, and human rights of the entire Iraqi populations.

- Article 23 (3) B, states that 'ownership with the purpose of demographic change is forbidden.' Does this mean that one ethnic group could not own property in another ethnic group region? If this is correct, then the constitution is indefensible and does not represent all Iraqi equally.

- Article 140 is the most contested and the major reason behind the rising tension between the federal government and the region of Kurdistan. It represents 30 to 40 territories in dispute in Iraq.<sup>48</sup> Its status has not been resolved in the Traditional Administrative Law (TAL), and was supposed to have been completed in the negotiation of the permanent constitution in accordance with Article 140. However, its implementation dead line of December 2007 was not met by the federal government, which has frustrated the Kurds.<sup>49</sup> So that, after the Kurdish Peshmerga forces claimed to have taken control of Kirkuk on 12 June 2014,<sup>50</sup> Kurdish President Masoud Barzani announced that 'Article 140' of the Iraqi constitution, on the disputed areas, has been implemented in Kirkuk province, stressing that 'no return shall be for this decision'.<sup>51</sup>

Thus, perhaps it was a historical milestone by the Kurdish political leadership when the Kurds voted for the Iraqi constitution in 2005. However, many argue that, the Iraqi constitution marks a new era in the history of Kurdish oppression. On the one hand, the idea of federalism is not helpful to the Kurds; especially as it has been diluted to

<sup>45</sup> Dewhurst, 'Assessing the Kurdish question: what is the future of Kurdistan?' (n 4).

<sup>46</sup> Fatah, 'Kurdistan Identity Denied in the Iraqi Constitution' (n 8).

<sup>47</sup> B Roggio, 'Democracy and Iraq's Constitution', (*The Long War Journal*, 2005)

<[http://www.longwarjournal.org/archives/2005/08/islam\\_democracy.php](http://www.longwarjournal.org/archives/2005/08/islam_democracy.php)>accessed 4 Aug 2016.

<sup>48</sup> 'R Mardini, Rising Arab-Kurdish Tensions over Kirkuk Will Complicate U.S. Withdrawal from Iraq, Kurdish Aspect (26 February 2009)' <<http://www.kurdishaspect.com/doc022509RM.html>>accessed 4 Aug 2016.

<sup>49</sup> 'Neither a census nor a referendum has been completed because of unresolved disputes between Iraq's Arabs and Kurds. Further, the UN and the federal government are attempting to find a solution outside the Article 140 framework.' See, B Katulis and P Juul, 'The Kirkuk Impasse' (*Centre for American progress*, 2008)

<<http://www.americanprogress.org/issues/military/news/2008/07/28/4713/the-kirkuk-impasse/>>accessed 5 Aug 2016.

<sup>50</sup> T Goudsouzian and L Fatah 'Analysis: The Kurds take Kirkuk, now what?' *Aljazeera News* (16 Jun 2014).

<sup>51</sup> (...), 'Article 140 implemented in Kirkuk, Barzani', *Aswat al-Iraq* (27 June 2014).

a very simple form of federation.<sup>52</sup> The federation does not recognise the ethnic, historic, and geographical reality of a Kurdish homeland.<sup>53</sup> Most importantly, it will not lead to the right to self-determination in the future, unlike the case in Sudan. In Sudan, it has been illustrated earlier that, the constitution allowed the South to attain independence, if their people are not satisfied with the central government after 4 years of the accord.<sup>54</sup> On the other hand, the constitution Fatah argued does not clearly mention that Kurds are one of the two main people in Iraq, it also deprives Kurdish religious groups of their rights, for example: it does not identify some a half million Kurdish religious group Kakeyies, who have their own customs and rules, while it gives Arab Hussiyniye tribes freedom.<sup>55</sup> In addition, it fails to recognise crimes against humanity committed against the Kurds in the past few decades, such as, the Operation of Anfal, Arabization campaigns, murdering and burying people alive, destroying thousands of Kurdish villages, and the genocide of the Kurds in Halabja. Thus, dismissing such terms in the constitution as a vital parts of Kurdish identity is a step 'towards dissolving the Kurdish identity, it is cultural genocide, and the Kurds must never compromise on their historical identity'.<sup>56</sup>

Generally, federalism as an organising structure for governance, O'Leary argued 'can promote stability in multi-ethnic or multi-religious States through the establishment of political units whose relationship to the centre is defined in a constitution that provides written principles concerning structures and rules for governance and appropriation of federal funds'.<sup>57</sup> Federal arrangements are often used as a way of keeping deeply divided societies together. In particular, Steytler and Mettler argued that, where divisions, be they ethnic, linguistic, or religious, could develop into violent conflicts or the threat of a civil war, constitutional arrangements for self-rule and shared rule have been put forward as a key to peace.<sup>58</sup> The federal distribution of power is then used to satisfy sectorial demands for self-determination.<sup>59</sup> Yet a federation involves as self-rule as well as shared rule, 'and how Iraq's different communities and regions share power within institutions at the federal level will determine, arguably, whether loyalty to the federation can be developed and if the State will survive intact'.<sup>60</sup> Dewhurst pointed out that, ensuring successful federalism however to a country lacking in a democratic tradition with strong religion and ethnic division, is a massive challenge.<sup>61</sup> Specifically, Gunter and Yavuz argued, 'federalism as a sophisticated division and sharing of power between a central government and its constituent parts would probably require a democratic ethos for its successful operation'.<sup>62</sup> However, it is true that the Iraqi form of federalism is based on ethnic and sectarian considerations.<sup>63</sup> It originated Morgan discussed 'among formerly, exiled Shiite politicians and clerics and has never been an 'Iraqi solution', a demand arising from among all sections of the peoples and corresponding to their common needs and aspirations'.<sup>64</sup> It has been strongly rejected by the Iraqi Sunnis,<sup>65</sup> who see it favouring the economic and politic interests of Shiites, and supported by

<sup>52</sup> K Katzman, 'The Kurds in Post-Saddam Iraq', *CRS Report for Congress* (2010) <<http://www.fas.org/sgp/crs/mideast/RS22079.pdf>>accessed 5 Aug 2016.

<sup>53</sup> Fatah, 'Kurdistan Identity Denied in the Iraqi Constitution' (n 8).

<sup>54</sup> J Vidmar, 'South Sudan and the International Legal Framework Governing the Emergence and Delimitation of New States', *Texas International Law Journal*, 47, 2011, 541.

<sup>55</sup> Fatah, 'Kurdistan Identity Denied in the Iraqi Constitution' (n 8).

<sup>56</sup> *Ibid.*

<sup>57</sup> John McGarry, Brendan O'Leary, and Khaled Salih(ed), 'The Future of Kurdistan in Iraq', in Brendan O'Leary (ed) *Federative Possibilities* (UPP 2005) 79.

<sup>58</sup> Nico Steytler and Johann Mettler, 'Federal Arrangements as a Peacemaking Device During South Africa's Transition to Democracy', *The Journal of Federalism*, 31, 2001, 93.

<sup>59</sup> *Ibid.*

<sup>60</sup> J McGarry and B O'Leary, 'Iraq's Constitution of 2005: Liberal Consociation as Political Prescription', *International Journal of Constitutional Law*, 5, 2007, 670 <<http://icon.oxfordjournals.org/cgi/doi/10.1093/icon/mom026>>accessed 28 July 2016.

<sup>61</sup> Dewhurst, 'Assessing the kurdish question: what is the future of kurdistan?' (n 4).

<sup>62</sup> Michael M Gunter and M Hakan Yavuz, 'The Continuing Crisis in Iraqi Kurdistan', *Middle East Policy*, 12, 2005, 122.

<sup>63</sup> Dawoody, 'The Kurdish Quest for Autonomy and Iraq's Statehood' (n 14).

<sup>64</sup> S J Morgan, 'The Right of Iraq to Self-Determination' (*The Cheers*, 2007)

<[http://www.thecheers.org/Politics/article\\_2150\\_The-Right-of-Iraq-to-Self-Determination.html](http://www.thecheers.org/Politics/article_2150_The-Right-of-Iraq-to-Self-Determination.html)>accessed 5 Aug 2016.

<sup>65</sup> Adnan al-Dulaimi, head of an umbrella group called the National Conference for the Sunni People of Iraq, told reporters that, "We reject federalism in the central and southern regions. We reject it because it has no basis other than sectarianism." See, (...) 'Iraqi Factions Firm against Constitution', *Aljazeera* (24 August 2005)

<<http://www.aljazeera.com/archive/2005/08/200849131626497655.html>>accessed 6 Aug 2016.

Iraqi Kurds, who see it considerably favourable to keep their autonomy.<sup>66</sup> Rather, Dawoody argued that ‘basing federalism on sectarianism and ethnicity undermines the right of those in minority and transforms the country into warring factions’.<sup>67</sup>

Alternatively, to create a successful system of federalism, it will ultimately depend on the people of Iraq to make it work. A successful Iraqi federation must be democratic and voluntary, based on mutual trust and recognition among all ethnic groups,<sup>68</sup> with the full panoply of liberal democratic rights. Most importantly, Dawoody argued, is ensuring responsibility in governance, ‘balance in the distributions of missions among regional and federal authority, ethical standards of public officials, and maintenance of unity among the different components of the federated system’.<sup>69</sup> Hence, without these standards, a federal system is not going to work, and ‘ultimately will lead to internal disturbance and the partition of the State’.<sup>70</sup> However, the federal system in Iraq appears to be on a different path to other successful ones, on the one hand, it has failed to gain a national acceptance, on the other hand, it has been criticised for its proportional representation and promoting a national fragmentation.<sup>71</sup> This irregularity paved the way for Iraqi political groups to be interested in catering to their own political interests than to support the common interest of all Iraqis.<sup>72</sup> Similarly, after the collapse of Saddam's regime, it is thought that, Iraq may provide a legal mechanism for keeping the territorial integrity of the country and imminent Kurdish secession. In this regard, Mukhlis stated that:

*[The constitution was written with the interest of only one group in mind: the Kurds. The Shiites seem to think they can shape the country to their wishes if only they can appease the Kurds and gain their cooperation. However, the Kurds have their own plan: their ultimate goal is to form an independent State of Kurdistan, with or without Iraq's help. Even now, a "greater Kurdistan," which would absorb Kurdish areas of neighbouring countries, is in the cooking].<sup>73</sup>*

Thus, since the constitution exonerates the regional governments from preserving the integrity of the country, the IKR is not therefore required to remain within this union. In addition, since the constitution in Article 119, permits the regions to include any number of provinces in a referendum, Dawoody argued that ‘the inclusion of Kirkuk and other disputed areas into the region of Kurdistan is legally permissible by insuring their Kurdish identity’.<sup>74</sup>

#### 4. Conclusion

The article has shown that, the Iraqi constitution cannot guarantee peace; the Kurds have constantly renewed their warning against violations of the Iraqi constitution over the status of Kirkuk and oil resources and the other major problems. The Kurds insist that the problem of the ethnically divided city of Kirkuk is a constitutional issue and that it must be solved according to the constitution. Until its status is resolved, the Kurds are firmly opposed to any provincial elections in Kirkuk. However, the situations have changed drastically after the insurgents of the Islamic State of Iraq and Sham took control over the major key cities of northern Iraq including Mosul and Tikrit. Consequently, after the long-standing dispute over an oil-rich Iraqi city, the Kurdish Peshmerga forces claim to have taken control of Kirkuk, long the object of their dreams and aspirations, considering Article 140 to have been implemented. In this regard, President Barzani has said that the ‘dispute is finished’, meaning Kurdish control of the area would continue.<sup>75</sup>

<sup>66</sup> Morgan, ‘The Right of Iraq to Self-Determination’ (n 64).

<sup>67</sup> Dawoody, ‘The Kurdish Quest for Autonomy and Iraq’s Statehood’ (n 14).

<sup>68</sup> Dewhurst, ‘Assessing the Kurdish question: what is the future of Kurdistan?’ (n 4).

<sup>69</sup> Dawoody, ‘The Kurdish Quest for Autonomy and Iraq’s Statehood’ (n 14).

<sup>70</sup> Ibid.

<sup>71</sup> (...) ‘Iraqi factions firm against Constitution’ (n 65).

<sup>72</sup> Ibid.

<sup>73</sup> H Mukhlis, ‘Voting “Yes” to Chaos’, *The New York Times* (18 October 2005)

<[http://www.nytimes.com/2005/10/18/opinion/18mukhlis.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2005/10/18/opinion/18mukhlis.html?pagewanted=all&_r=0)>accessed 6 Aug 2016.

<sup>74</sup> Dawoody, ‘The Kurdish Quest for Autonomy and Iraq’s Statehood’ (n 14).

<sup>75</sup> (...), ‘Iraq: Kurdish president proposes independence referendum’, *The Guardian* (3 July 2014).

Moreover, most compelling evidences have proven that the Iraqi constitution contains articles that threaten the disintegration of the state of Iraq. The linguistic structure of the constitution text is complex and contradictory, which ultimately leaves a large room for speculation and misinterpretation. In addition, it is argued that, the federal system in Iraq is a major controversial political problem. Ultimately, it will depend on the people's reliance and support to make it work. To ensure a successful federation, it is indeed an enormous challenge to a country lacking a democratic tradition and-with strong ethnic and religious divisions. After the fall of Saddam's regime, the Kurds generally have participated as a strong ally in the central government. However, for the Kurds, the future federal government remain ill-defined. Today, the Kurdish leaders consider independence is a natural right of the people of Kurdistan.<sup>76</sup> The recent situations have proven that Iraq is effectively partitioned. The Kurds are pushing themselves further towards independence after president Barzani asked the MPs to form a committee to organise an independence referendum.<sup>77</sup> Barzani said: 'The Kurdish people will not relinquish their right to a referendum and they will make their decision'.<sup>78</sup> He said 'if Maliki insists on a third term, then Iraq will be driven towards a precipice and no one can predict what will happen,' 'And no decision will bring the country back to its previous state'.<sup>79</sup> In his words, the constitution has been violated in many ways and on many occasions by Iraqi premier. Barzani said, all these years, 'we have only been asking for the implementation of the constitution'.<sup>80</sup> Thus, Kurdish leaders have long accused the central government of ignoring the constitution, particularly articles on disputed areas and on an oil and gas law, that are now under Kurdish control and Erbil's share of the national budget.

To sum up, it is true that there are many contested issues between the IKR and the central government, which may threaten a breakdown of constitutional order.<sup>81</sup> As a consequence, a deepening constitutional crisis could be taken as an advantage 'to try to break up the Iraqi State (such as through a declaration of Kurdish independence and/or a concerted push for Sunni 'federalism' an attempt to set up a separate Sunni region analogous to the KRG)'.<sup>82</sup> These developments have signalled that 'the Kurds could be hedging their bets and preparing for independence if a united Iraq does not come to fruition'.<sup>83</sup>

## References

### Books and Chapters in Edited Books

1. Bouillon M E, Malone M David and Rowswell B, Iraq: Preventing a New Generation of Conflict, in Brendan O'Leary (ed), *Federalizing Natural Resources* (Lynne Rienner 2007).
2. McGarry J, O'Leary B, and Salih K (ed), 'The Future of Kurdistan in Iraq', in Brendan O'Leary (ed) *Federative Possibilities* (UPP 2005).
3. Yildiz K, *The Kurds in Iraq, the Past, Present and Future* (Rev edn, London: Pluto press 2007).

### Journals

4. Dawoody A, 'The Kurdish Quest for Autonomy and Iraq's Statehood', *Journal of Asian and African Studies*, 41, 2006, 483 <<http://jas.sagepub.com/cgi/doi/10.1177/0021909606067405>>accessed 20 July 2016.
5. Gunter M M and Yavuz M H, 'The Continuing Crisis in Iraqi Kurdistan', *Middle East Policy*, 12, 2005, 122.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid.

<sup>78</sup> (...), 'President Barzani Blasts Accusations by Baghdad against Kurds', *Rudaw* (Erbil, 9 July 2014).

<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

<sup>81</sup> In the 2008 Iraqi budget deliberations (adopted February 13, 2008); Iraq's Arab leaders tried but did not succeed in efforts to cut the revenue share for the Kurds from 17% of total government revenue to 13%, the Kurds did agree to abide by a revenue share determined by a census that is to be held. The Kurds further require the Peshmerga's salaries to be paid out of national revenues. It is also not clear whether the Constitution allows the IKR to buy weapons from foreign resources. See, Katzman, 'The Kurds in Post-Saddam Iraq' (n 52). In addition, 'Tensions between the Iraqi central government and the IKR have risen recently over oil revenue disputes and Exxon's controversial decision to sign a contract with IKR to develop oil fields partly within the DIBs.' See, D A Ollivant, 'Renewed Violence in Iraq', (*Council on Foreign Relations*, 2012) <<http://www.cfr.org/iraq/renewed-violence-iraq/p28808>>accessed 6 Aug 2016.

<sup>82</sup> Ibid.

<sup>83</sup> Dewhurst, 'Assessing the Kurdish question: what is the future of Kurdistan?' (n 4).



6. McGarry J and O'Leary B, 'Iraq's Constitution of 2005: Liberal Consociation as Political Prescription', *International Journal of Constitutional Law*, 5, 2007, 670 <<http://icon.oxfordjournals.org/cgi/doi/10.1093/icon/mom026>>accessed 28 July 2016.
7. Vidmar J, 'South Sudan and the International Legal Framework Governing the Emergence and Delimitation of New States', *Texas International Law Journal*, 47, 2011, 541.
8. Steytler N and Mettler J, 'Federal Arrangements as a Peace-making Device During South Africa's Transition to Democracy', *The Journal of Federalism*, 31, 2001, 93.

#### Journal Newspapers

9. Brown N, 'Q&A: Iraq's Draft Constitution' *New York Times* (New York, 12 May 2005).
10. Horowitz D L, 'The Sunni Moment', *The Wall Street Journal* (USA, 14 December 2005) <<http://online.wsj.com/news/articles/SB113452228580321836>>accessed 2 Aug 2016.
11. Goudsouzian T and Fatah L, 'Analysis: The Kurds take Kirkuk, now what?' *Aljazeera News* (16 Jun 2014).
12. Mardini R, 'Rising Arab-Kurdish Tensions over Kirkuk Will Complicate U.S. Withdrawal from Iraq', *Kurdish Aspect* (26 February 2009) <<http://www.kurdishaspect.com/doc022509RM.html>>accessed 4 Aug 2016.
13. Morgan S J, 'The Right of Iraq to Self-Determination' (*The Cheers*, 2007) <[http://www.thecheers.org/Politics/article\\_2150\\_The-Right-of-Iraq-to-Self-Determination.html](http://www.thecheers.org/Politics/article_2150_The-Right-of-Iraq-to-Self-Determination.html)>accessed 5 Aug 2016.
14. Mukhlis H, 'Voting "Yes" to Chaos', *The New York Times* (18 October 2005) <[http://www.nytimes.com/2005/10/18/opinion/18mukhlis.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2005/10/18/opinion/18mukhlis.html?pagewanted=all&_r=0)>accessed 6 Aug 2016.
15. Talabani Q, 'What the Kurds want', *The Wall Street Journal* (NY, 22 August 2005).
16. Roggio B, 'Democracy and Iraq's Constitution', (*The Long War Journal*, 2005) <[http://www.longwarjournal.org/archives/2005/08/islam\\_democracy.php](http://www.longwarjournal.org/archives/2005/08/islam_democracy.php)>accessed 4 Aug 2016.
17. (...), 'Iraq: Kurdish president proposes independence referendum', *The Guardian* (3 July 2014).
18. (...), 'President Barzani Blasts Accusations by Baghdad against Kurds', *Rudaw* (Erbil, 9 July 2014).
19. (...), 'Kirkuk can't come back to Kurdistan' (*AllIraqi*, 2005) <<http://www.aliraqi.org/forums/showthread.php?t=56233>> accessed 25 July 2016.
20. (...) 'Iraqi Factions Firm against Constitution', *Aljazeera* (24 August 2005) <<http://www.aljazeera.com/archive/2005/08/200849131626497655.html>>accessed 6 Aug 2016.
21. (...), 'Article 140 implemented in Kirkuk, Barzani', *Aswat al-Iraq* (27 June 2014).

#### Contributions to Collected Works and Reports

22. Baker J A III and Hamilton L H, 'The Iraq Study Group Report', (Vintage Books, New York 2006) <[http://online.wsj.com/public/resources/documents/WSJ-iraq\\_study\\_group.pdf](http://online.wsj.com/public/resources/documents/WSJ-iraq_study_group.pdf)>accessed 1 Aug 2016.
23. Dewhurst M, 'Assessing the Kurdish Question: What Is the Future of Kurdistan?' USAWC STRATEGY RESEARCH PROJECT ASSESSING (2006).
24. Hilterman J, 'Iraqi Kurds and Their Future', Middle East Research and Information Project [MER 247] (2008) <<http://www.merip.org/mer/mer247/protect-or-project>>accessed 3 Aug 2016.
25. Fatah R, 'Kurdistan Identity Denied in the Iraqi Constitution' (UNPO, 2006) <<http://www.unpo.org/article/3897>> accessed 29 July 2016.
26. Katzman K, 'The Kurds in Post-Saddam Iraq, CRS Report for Congress' (2010) <<http://www.fas.org/sgp/crs/mideast/RS22079.pdf>>accessed 5 Aug 2016.
27. Katulis B and Juul P, 'The Kirkuk Impasse' (Centre for American progress, 2008) <<http://www.americanprogress.org/issues/military/news/2008/07/28/4713/the-kirkuk-impasse/>>accessed 5 Aug 2016.
28. Ollivant A D, 'Renewed Violence in Iraq', (Council on Foreign Relations, 2012) <<http://www.cfr.org/iraq/renewed-violence-iraq/p28808>>accessed 6 Aug 2016.
29. International Crisis Group, 'The Next Iraqi War? Sectarianism and Civil Conflict', 52 Middle East Report (27 February 2006) <<http://www.crisisgroup.org/en/regions/middle-east-north-africa/iraq-iran-gulf/iraq/052-the-next-iraqi-war-sectarianism-and-civil-conflict.aspx>>accessed 27 July 2016.

30. 'Iraqi Constitution', 2005 <[http://www.iraqinationality.gov.iq/attach/iraqi\\_constitution.pdf](http://www.iraqinationality.gov.iq/attach/iraqi_constitution.pdf)>accessed 28 July 2016.