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The Iraqi Federation and the Kurdistan Regional Government: the conflict between communal and oil and gas policies

by

Adriano Dirri*

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Abstract

The purpose of this paper is to analyse the role and place of oil and gas politics in the Iraqi Federation. This aspect is investigated in its relationship to ethnic conflict. These two features are considered in their interplay, which permeates the whole Iraqi constitutional experience. The 2005 Iraqi Constitution embodies specific but vague dispositions related to the ownership and the 'management' of oil and gas revenue sharing. In addition, other disputes are shaking the relationship between the Kurdistan Region and the central government, especially the status of Kirkuk, which is strictly connected to the ownership of natural resources. Therefore, the 'imported' Iraqi Constitution is critically examined, above all in those ambiguous and carefully drafted dispositions and where the Constitution has not been implemented. Two specific sections are devoted to federalism, decentralisation and oil and gas revenue sharing. An analytical framework of such dispositions is provided, as well as their cumulative reading within the federal structure. In the last sections, it is argued that the interplay between oil and gas disputes and ethnic conflict are shaping the asymmetric Iraqi Federation, especially between the Kurdistan and the Iraqi central government. This issue is highlighted by the unsolved status of Kirkuk and the impossibility to address the constitutional shortcomings through constitutional amendments' rule. Therefore, the Constitution is caught in between the informal agreements and the undefined horizon of the Iraqi (un)constitutional politics.

Key-words

Iraq, federalism, ethnic conflict, constitutional asymmetry, Kurds, comparative federalism

1. Introduction

This paper seeks to examine the future of the Iraqi federation on a constitutional perspective, arguing the main sources of conflict affecting the country is grounded on ethnicity, and oil and gas revenue sharing. The analysis will be carried out without leaving aside the social and political dimension, such as the ISIS experience together with the ongoing protests in the whole country. The main topic of this paper is federalism, which was introduced and prompted by the US administration during the occupation. Recurrent shortcomings and ambiguities of the Iraqi constitutional framework are, as a matter of fact, often connected to the deficient Constitution-making process, which was driven by the US. This deficiency consisted specifically in a short constitution-drafting period and limited participation; a fact, which also affected constitutional dispositions on the core value of federalism in terms of 'self-rules and shared-rules'. Unfortunately, the constitutional ambiguities of the 'transplanted' Constitution, even though on the one side provided actors with a bargaining range, on the other side these ambiguities have worsened the relationship between the three main religious-ethnic groups: Shia's, Sunnis and Kurds. In this light, and together with this historical background, one should be able to understand that the rise of ISIS in Iraq is strictly connected to the Sunnis' insurgency during the occupation. Recent developments, such as the faltering Kurdish referendum, have definitively shown the fragility of the Iraqi federal institutions facing a difficult integration among different ethnic groups. Thus, is clear that, in practice, the Iraqi constitutional Text is not likely to represent the so called *idem sentire*, grounded on shared values and aspirations (sec. 4). In this logic, a carefully analysis of the constitution-making process is required in order to understand the current constitutional and political reality (sec. 3). On the ground of constitutional dispositions, above all, the absence of the upper Chamber shall be highlighted. Constitutional ambiguities and shortcomings are the main features of the disposition related to the structure of the Federation and decentralisation. The first shows the existence of one ethnic based region (the Kurdistan), alongside with 15 Governorates. The Iraqi decentralisation represents a unique model in the world, taking into consideration the legislative power of the federal government, regions and governorates, and the deference to regional laws in case of 'contradiction' among the federal and regional government (par. 5). Besides that, the

constitutional dispositions on oil and gas exploitation and revenue sharing, which is likely to represent the main field of conflicts and source of instability for the country, shall be taken into account. The recent disputed 2018 Federal Budget, alongside the failed 2007 hydrocarbon law, is the best example thereof (sec. 6). The conclusion and hypothesis on the future of the Iraqi federalism are strictly connected to a serious commitment to shared path in matter of oil and gas issue. The agreement in this field could be conductive to a broader arrangement between the three major groups on reducing US constitutional legacy. The inclusion of the Sunnis' group is strongly recommended and could lead to key constitutional amendments and implementations. Broadly speaking, a shared and inclusive constitutional reform is recommended in the light of fixing the shortcomings in an 'autochthonous way'. It goes without saying that, the influences of external actors, such as the US, Iran and Turkey, are fully considered in this paper, even though not explicitly addressed.

2. Historical background

After the invasion led by the United States army and the consequent fall of Saddam Hussein's regime, a foggy and never ending transitional period began in Iraq. Federalism has been introduced in Iraq in the aftermath of Saddam Hussein's regime. The reason for its application has been, mainly, its flexibility which makes it still today the sole way to accommodate ethnic diversity in Iraq, whose society is deeply divided between the three major ethno - religious groups: Shias, Sunnis and Kurds[I] . These divisions are grounded in the country's turbulent political and institutional history since the 1980's Iran-Iraq war (1980 – 1988), during which Saddam Hussein's Sunnis regime systematically intensified to the repression of the Kurd population in the North. After the First Gulf War (1991) persecutions took place in the South, due to the failure of the Shia's rebellion. As a consequence of that, in the new Iraq[II], the feeling of being discriminated has spread among the Sunnis[III], mainly due to the de-Ba'athification and their economic marginalization, becoming what has been considered as the main reason of ISIS successful insurgency in the early summer 2014[IV].

Indeed, preliminarily it shall be noted that the Federal Constitution was promoted by foreign forces (United States above all), and largely boycotted by the Sunni minority, to which belonged Saddam Hussein's family and the majority of the former Iraqi political elite (par. 2). Furthermore, the Iraq Kurdistan was *de facto*, under the no fly zone umbrella since 1991,

being a semi-independent territory under the direct administration of the Kurdistan Regional Government (KRG), which was *de facto* divided in two separated government (Kurdistan Democratic Party in Arbil and Duhok and Patriotic Union Party in Sulaimaniya)[V].

Between the three major ethno-religious groups, only the Shi'a (60% of the population) firmly supported the new federal institutional framework, due to the limited role they were assigned during the previous regime. In fact, under Saddam Hussein's despotic rule, Shias were highly underrepresented in the major institutions and they were subject to systematic repression which included mass executions, especially after 1988 (Anderson and Stansfield 2004: 117 and ff.).

The federal model adopted in Iraq raised severe confrontation between Shias and Kurds[VI]. Two were the federal models discussed in Iraq: the territorial or majoritarian and the ethnic or multinational federal model[VII]. The first was supported by Shias while the second by Kurds. The first model tends to a major centralization of the State. As explained above, the Shias promoted a territorial federalism, which is likely to assign them the majority in the federal institutions. The Kurds have generally favoured the second model of federalism, consisting in weak federal institutions and in a Kurdistan Region. The country's current constitutional arrangements have basically entrenched the second model of federalism. This means that, after the fall of Saddam Hussein's regime, the Sunnis, skeptical about federalism, were excluded from the political debate. Moreover, the only feasible way to address the question is the substantial reintegration of the Sunni minority through inclusive policies (Al-Qarawee 2014: 33-41; Romano 2014a: 547-566, especially 548-551). To sum up, the Iraqi constitutional engineering is arguably defined as asymmetric ethnic federation due to the presence of the Iraqi Kurdistan Region. There are several factors which satisfy this definition, whose terminological declinations have been manifold: ethnic, multinational, plurinational and more recently hegemonic autonomy (Kössler 2018: 400). First and foremost, the Kurdistan represents the homeland of the Kurdish people, where they can exercise their autonomy. Secondly, the Kurdish identity in Iraq is strictly connected to their territory. Finally, the Kurdish are territorially concentrated and this makes the territorial accommodation the only viable option[VIII].

3. The 'imported' Iraqi Constitution

The Iraqi Constitution is a typical example of the transplants of the liberal constitutional model set by external actors (on constitutional transfers see Frankenberg 2018: 111 and ff.). These actors, alongside the majority of scholarship, have focused on features such as the degree of 'democracy' and 'stability' in post authoritarian countries, instead of fostering efforts on widening socioeconomic gaps, immigration policies and democratic deficit (especially in Afghanistan and Iraq). Therefore, the exportability of 'key Western constitutional concepts and ideals to troubled and often idiosyncratic settings' has been carelessly accepted. Thus, the so-called 'Global South' (Sub-Saharan Africa, Central America, Middle East and Eurasia) constitutional experiences, which should be furtherly investigated, have been largely ignored. Indeed, the constitutional experiences of the regions mentioned above remain nowadays a *terra incognita*, which deserves still even more attention[IX]. Last but not least, and this is the case of Iraq, constitutional experiences in the Global South tend to be considered only in terms of the failure of the rule of law[X].

The Iraqi case deserves attention for the abovementioned reasons. The dawn of the new Iraqi constitutional framework began when the United Nations, enacting the UN Security Council Resolution (UN SCR) n. 1483, recognised to US and UK the status of occupation forces according to the Hague Convention 1907 and Geneva Convention 1949[XI]. The Resolution n. 1483 formally authorised US and UK to exercise the legal power, on behalf of the Coalition Provisional Authority (hereinafter CPA)[XII]. The CPA Regulation n. 1, 13 May 2003, assigned to the CPA itself the faculty to 'exercise powers of government temporarily in order to provide for the effective administration of Iraq during the period of transitional administration, to restore …' (Section 1, 1) and that 'the CPA is vested with all executive, legislative and judicial authority necessary to achieve its objectives, to be exercised under relevant U.N. Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war. This authority shall be exercised by the CPA Administrator' (sec. 1, 2)[XIII]. The following UN SCR 1511 pointed out the temporary nature of the CPA, recognised the Iraqi Governing Council (IGC) appointed by the CPA on 13 July 2013, and 'called on the Coalition Provisional Authority in Iraq to return governing authority to the people of that country 'as soon as practicable". Furthermore the UN SCR 1511/2003 invited the IGC to provide, no later than 15 December 2003, to the UN SC a 'timetable and a programme for

the drafting of a new constitution for Iraq and for the holding of democratic elections under that constitution'[XIV].

Consequently, on 15 November 2003, the CPA and the ICG contracted an agreement[XV], which tasked CPA and ICG to write a Transitional Administrative Law (TAL), which was signed on 8 March 2004. The document drew up by the CPA and the ICG was basically a provisional constitution which, alongside the Iraqi Interim Government (IIG), came into effect on 28 June 2004, two days before the scheduled CPA's dissolution, as set out by the UN SCR 1546/2004 (Marr 2012: 279; Allawi 2007: 214-218). The 15 November Agreement and the TAL still represent the cornerstone of the current Iraqi constitution.

In fact, the Agreement firstly introduced key constitutional features of the following TAL such as federalism, bill of rights, separation of powers and also regional caucuses aimed at providing the selection of members of the transitional assembly. Secondly, as mentioned above, although the TAL was the interim constitution drafted by CPA and its appointed body (IGC), this document *de facto* was 'a full-fledged constitution that commits Iraqis to many important decisions'[XVI]. The TAL embodied many provisions concerning federalism (art. 4)[XVII] and the Kurdistan Region status. The federal structure was set out in article 52 which promoted the consociation model of federalism (supported by Mcgarry and O'Leary 2007: 670-698). The goal of this federal structure, for the US, was 'to prevent the concentration of power in the federal government and to encourage the exercise of local authority' (Lugar, Biden and Hyde 2004: 8). Moreover, art. 53 letter a) recognised the Kurdistan Regional Government (KRG) as the official government of the Kurdistan Region and (letter b) eighteen governorates with their right to form regions from amongst themselves (not more than three). The following art. 54 letter b) assigned legislative autonomy to the Kurdish National Assembly including the power to amend 'the application of any such law within the Kurdistan region, but only to the extent that this relates to matters that are not within the provisions of articles 25 and 43(D) of this Law and that fall within the exclusive competence of the federal government'. On matter of sources of law, Islam was recognised source of legislation and official religion of the State (art. 7) alongside fundamental rights (Chapter 2, articles 11 – 23). This was another basic TAL provision, which become a key point of the Iraqi Constitution. In fact, article 3 stated also that 'no law that contradicts the universally agreed tenets of Islam, the principles of democracy, or the rights cited in Chapter Two of this Law may be enacted during the transitional period' (see

par. 3). Ultimately, it's clear that the TAL has been basically the framework of the permanent constitution[XVIII].

In addition, the TAL set the agenda for the Constitution drafting process, calling for the election of the National Assembly by 31 January 2005 (art. 2, let. b) (Binda *et al.* 2005: 6-13)[XIX]. Later, the elected National Assembly assumed the office as a transitional parliament and a constituent assembly, with the main task of writing the draft of the permanent constitution by 15 August 2005 (art. 61 let. a). The last step was the popular referendum on the draft constitution (art. 61 let. b), held on 15 October 2005, which gave way to the adoption of the current Iraqi Constitution[XX].

The result of the TAL engineering was highly favourable to the Kurds. The significant Kurdish victory during the constitution drafting process remains the main feature of the Iraqi federalism. Both the TAL and the permanent Constitution provided for a highly decentralised system, because the KRG was granted, in the areas under its control, the right to stay in charge over the security forces and raise taxes. The Kurdish rule has led experts to strongly highlight the tentative to ignore the Arab identity of Iraq overwhelmed by western liberal constitutionalism and its 'Kurdo-centrism'[XXI].

The lack of legitimacy of the constitution making process came from the absence of the participatory nature due to, together with the external influence[XXII], the absence of an inclusive national dialogue and consensus. Moreover, the US did not deal with the whole Iraqi ethno-religious communities, having marginalised Sunnis[XXIII], constrained Shias issues[XXIV] and boosted Kurds. As a consequence, the relation between the Constitution and the sovereignty principle remains highly problematic (Brown 2005: 931-932; Benomar 2004: 95; Arato 2009: 88-97)[XXV].

4. Basic principles and key features of the Iraqi Constitution

Understanding the Iraqi Federation means taking into consideration the relevance of the Preamble, which summarises the main challenges of the Iraqi future. Generally, preambles, among Arab countries, are longer than those in western constitutions. Such preambles contain several common features, first of all the frequent evocation of God (Allah)[XXVI]. Besides that, what makes the Iraqi preamble a distinctive example is the first sentence: 'We the people of Mesopotamia … the cradle of civilization … home of numeration' (cf. Hischl

2014: 275; Voermans, Stremler and Cliteur 2017: 49, 53-54, 60). The description of the glorious past might be understood as an attempt to state that Iraq can reborn from the ashes of the war. The second paragraph clearly points out an additional and relevant indication: remembering the past, being aware of the present violence, sectarianism and division, seemed to be, for the drafters, the right tool in order to rebuild the statehood. Furthermore, religious and ethnic groups, Shias and Sunnis, Arabs, Kurds, Turkmen etc, are underlined and mentioned.

Only after such "clarifications" the classic US based formula, 'we, the people of Iraq', is set out. In addition, in the same paragraph, the Preamble lays down the regime of the new Iraq: republican, federal, democratic and pluralistic (par. 4). Federalism, in its narrow meaning of 'unity in diversity', is widely promoted in the last paragraph, where it's stated 'we the people of Iraq, of all components and across the spectrum … The adherence to this Constitution preserves for Iraq its free union of people, of land, and of sovereignty'. Moreover, another basic feature is the management of resources, plainly recalled in the Preamble – 'just distribution of resources' (par. 3), which has become the main struggle within the country. The reason of the Preamble's consistency, recalling the past, being aware of the present and hoping for a better future, is grounded on the specific commitment to rebuild the new statehood. Finally, as Tushnet has argued, the length of the Preamble is likely to reflect 'the kinds of negotiated compromises that pervade constitutional details'[XXVII].

The basic principles enshrined in the Preambles are recalled in the first Section of the Constitution (art. 1-13). The first article 'the Republic of Iraq is a single federal … state in which the system of government is republican, representative, parliamentary, and democratic and this Constitution is a guarantor of the unity of Iraq' is strictly connected to article 13 sec. 1[XXVIII] where it's stated that 'this Constitution is the preeminent and supreme law in Iraq and shall be binding in all parts of Iraq without exception'. The meaning of 'without exception' might be referred to secessionist aspirations of the Kurds. Hence, the combination between the first and last article of the first section aims to enforce the supremacy of the Constitution as supreme law of the Federation (Zedalis 2009: 32).

Not unlike the Preamble, art. 3 sets out that Iraq is a country of multiple nationalities, religions and sects (art. 3) (Castellino and Cavanaugh 2013: 224 and ff.). Additionally, more significant is art. 4, which defines some central issues closely related to the legal status of the Iraqi minorities. In the first section, Arabic and Kurdish languages are labelled as official

languages of Iraq (Bammarny 2016: 487). Moreover, the Constitution lays down the right to educate children in their mother tongue such as Turkmen, Syriac, and Armenian in government educational institutions. Turkmen and Syriac languages are guaranteed by par. 4. The Constitution points them out as official languages in the administrative units 'in which they constitute density of population'. Similarly, in order to safeguard the other minorities, the last section confers to all administrative units the possibility to choose an additional official language through referendum.

Moreover art. 45 par. 1 of the Constitution, stressing that 'the State shall seek to strengthen the role of civil society institutions, and to support, develop and preserve their independence', outlines a further key feature, the political socialization function of the Constitution, which means, as Burgess has argued, the promotion of the federal political culture. Ethnies, tribes and religious groups are recognised at the lowest level. According to art. 45 par. 2, 'the State shall seek the advancement of the Iraqi clans and tribes […] heir noble human values in a way that contributes to the development of society'. The mention of tribal traditions, consistent with religion and the law, meets the prohibition respecting of the human rights protection. Finally, art. 125 underlines and promotes the other minorities or 'nationalities', such as Turkomen, Chaldeans, Assyrians, and all other constituents (Burgess 2013: 312).

5. Decentralization: Governorates and the status of the Iraqi Kurdistan Region

Before providing a more in-depth analysis on some particular federal arrangements of the Iraqi Constitution, as well as the distribution of the legislative competencies between the central government and the Kurdistan Region and governorates, the main features of the Iraqi parliamentary system shall be outlined[XXIX]. To begin with, Section four of the Constitution concerns the federal institutions. Currently, the Iraqi Parliament is composed of the Lower Chamber only (328 members), the Council of Representatives, which 'shall consist of a number of members, at a ratio of one seat per 100,000 Iraqi persons representing the entire Iraqi people' (art. 49).

However, the upper chamber, named the Federation Council, has not been established yet and it would entail a huge constitutional reform, with the purpose to shape legislative

power, legislative process and the internal rules of both the chambers[XXX]. To date, in spite of art. 49, the legislative power is wielded by the Council of Representatives only[XXXI]. The constitutional provision of art. 65 lays down that the Federation Council shall represent the regions and governorates not organised in regions. Besides that, the Federation Council may come into force only after the enactment of a law by a two-thirds majority of the members of the Council of Representatives. One viable explanation of the failure of such enactment is grounded on the different interpretation of Iraqi federalism by the Shias and Kurds. In federal systems the upper chamber promotes regional or states member interests and, in the Iraqi context, it would work as an anti-majoritarian agent in decision-making process, especially in constitutional amendment procedure. Moreover, a direct representation to governorates can be granted and it might also have the effect of reducing the influence from the above.

Consequently, it has been emphasised that the Federation Council will constitute a basic tool of the Federation in matter of negotiation policies affecting regional or local interests, having considered that no other place for negotiations between the federal government and the federal units has been foreseen. Moreover, the upper house could play a key role in the appointments of judges of the FSC (Mcgarry and O'Leary 2008: 46). Without the establishment of the upper house, asserting that the Iraqi federal system is incomplete is the crude reality. The Iraqi Federation is affected by a chronical imbalance, given by the existence of only the Kurdistan Region alongside the 15 governorates. The current federal engineering makes nearly impossible any intraregional cooperation in order to check the federal government (Romano 2014b: 199-200)[XXXII].

The hallmark of federal systems is the division of legislative power between federal institutions and regional entities. Section 4 and 5 of the Iraqi Constitution deal with the powers of the Federal Government (Sec. 4, artt. 109 - 115), Region(s) and Governorates (Sec. 5, artt. 116 - 125). Currently, the Iraqi Federation is composed of 19 Governorates including four contained in the Kurdistan Region – Arbil, Sulaymaniyah, Dohuk and Halabja[XXXIII].

Article 109, which is strictly connected to article 1 and article 13, fosters and promotes the unity and integrity of the Iraqi Federation (Zedalis 2009: 34). The following article spells out the list of federal (exclusive) competencies: foreign policy; national security policy; fiscal and customs policy; standards, weights, and measures regulation; citizenship; frequencies;

budget bill; planning policies related to water sources from outside Iraq and its just distribution inside Iraq; general population statistics and census. To oil and gas management are properly devoted many articles in Sections four and five. Firstly, article 111 is a general provision, which states that oil and gas are owned by the Iraqi people in regions and governorates. The constitutional provision spells out that the Iraqi people are the owners of the oil and gas without specifying who holds authority over that resources. Consequently, the role of the federal government is not enlightened, notwithstanding art. 111 is within Section 4, related to powers of the Federal Government (Zedalis 2012: 59-60).

The authority over oil and gas is not even clarified in article 112, which has little if any technical rationale together with an ambiguous hierarchy between the level of governments (Al-Ali 2019: 109-110). The language of the first paragraph, 'the federal government, with the producing governorates and regional governments, shall undertake the management of oil and gas extracted from present fields …' together with the Second, 'the federal government, with the producing regional and governorate governments, shall together formulate the necessary strategic policies', epitomises another serious source of ambiguity (Blanchard 2010: 7). To what extent are sub-national units involved in the management of oil and gas policies? Basically, in both paragraphs the role of regions and governorates shall be taken into account but, despite that, the two constitutional provisions are slightly different. Regarding the First paragraph, it may be argued that the Federal Government is supposed to drive the policy making, whereas the sub-unit authorities are likely to play a secondary role. The collaborative spirit is recommended and strengthened in the Second paragraph, where the word 'together' suggests a more inclusive and decisive role of regions and governorates in the formulation of the strategic policies. Moreover, the scheme of the Four Section of the Constitution shall be acknowledged. Article 114, see below, spells out shared competencies; hence, article 112 is something different by the content of article 114. Substantially, art. 112 might be understood as a generic provision which encourages, under the guide of the Federal Government, the principle of mutual collaborations between the Federal Governments and its sub-units (Zedalis 2012: 61-64). Similarly, art. 113 points out the principle of cooperation between the Federal Government and Federal Units, concerning 'antiquities, archeological sites, cultural buildings, manuscript and coins', but it's explicitly expressed that cultural goods are 'under the jurisdiction of the federal authorities' and 'shall be regulated by law'.

Section 114 lays down shared competencies between federal and regional authorities[XXXIV], while article 115 outlines one of the most critical provisions of the Constitution. Article 115, read together with the provisions of article 110, represents, as Romano points out, a 'very strong devolution of power—making the Iraqi federation one of the most decentralised (at least on paper) in the world' (Romano 2014b: 195). In fact, this provision states that 'all powers not stipulated in the exclusive powers of the federal government belong to the authorities of the regions and governorates'. The key role of article 115 in shaping the federal nature of Iraq is emphasised where it states that 'with regard to other powers shared […] priority shall be given to the law of the regions and governorates not organised in a region in case of dispute'. This article is indirectly referred to the Kurdistan Region: based on this provision, Kurdistan Region's laws should take precedence over federal laws in matters included in the shared competencies list (Bammarny 2016: 489). Furthermore, pairing the first and second sentences, the sub national units are granted powers not assigned to federal government. Zedalis points out that Article 115 is similar 'to what might be denominated a retained or reserved powers provision' (Zedalis 2012: 56).

Section 5 recognises the Kurdistan Region as a federal region 'along with its existing authorities' (art. 117) (Shakir 2017: 131 and ff.). Articles 118 and 119 lay down the two procedures about the formation of new regions, while articles 120 and 121 grant them the right to adopt constitutions and regulate their autonomy (Deeks and Burton 2007: 77 and ff.). It shall be noted that, alongside the abovementioned article 115, article 121 par. 2 points out that 'in case of contradiction between regional and national legislation in respect to a matter outside the exclusive authorities of the federal government, the regional power shall have the right to amend the application of the national legislation within that region' (Deeks and Burton 2007: 65-68, 72-74; Zedalis 2012: 52). Finally, articles 122 and 123 are related to governorates not incorporated into a region. The latter enshrines by some means the principle of subsidiarity, where outlines that 'powers exercised by the federal government can be delegated to the governorates or *vice versa*, with the consent of both governments, and this shall be regulated by law' (Romano 2014b: 197). The federal and regional powers alongside the role of governorates not organised into a region, are highlighting the high level of decentralization set out by the Iraqi Constitution. Related to governorates, the autonomy is only on paper because, especially related to governorates, autonomy has been severely reduced by Law n. 21/2008 'Governorates not organised into a region', which gave way only

to a pure administrative decentralisation. First and foremost, relevant ministries refused to transfer their powers, such as the Minister of Finance, Health and Education. This has created huge consequences due to the dependency of governorates from fiscal transfers from Baghdad and for the suspension of decentralisation in key sectors as health and education. Furthermore, recently the Iraqi Parliament dissolved all provincial councils. Thus, the trend is towards a centralisation and the annihilation of the provincial representative institutions, whose elections have been postponed indefinitely[XXXV].

The current relationship between the KRG and the Federal Government is undermined by article 140 par. 2, which points out one of the core problem of the Iraqi Federation: Kirkuk and other disputed areas[XXXVI]. Moreover, it shall be acknowledged that, the controversy outlined by Article 140 is interrelated not only to the ethnic management, but also to oil and gas management and revenue sharing[XXXVII].

According to this provision, a referendum should have taken place on such an issue by December 31, 2007; however, to date, article 140 par. 2 has never been implemented by the federal government. On the other hand, the Kurds heavily insist for the implementation of article 140 (Kane 2011: 11-15). The result of this political conflict between the Kurds and the Federal Government is a stalemate in seeking accommodation on future constitutional amendments, according to article 142. The Kurds have been blocked the Constitutional Reform Commission and, as a consequence, any other Constitutional amendment are not likely to come into force, because the referendum outlined in article 142 par. 4 requests: a) the majority of the voters and b) if not rejected by two-thirds of the voters in three or more governorates. The Kurds hold the absolute majority in the four governorates within the Kurdistan Region: Arbil, Sulaymaniyah, Dohuk and Halabja (Bammarny 2016: 490; Khan and Kirmanj 2015: 374). Finally, the non-implementation of article 142 has blocked also article 126, dealing with the constitutional amendment procedure, which states, in its par. 5, that 'article 126 of the Constitution shall be suspended, and shall return into force after the amendments stipulated in this article have been decided upon'[XXXVIII].

Related to art. 140 issue, 'an unexpected *de facto* resolution' seemed to be occurred after the successful Peshmerga's offensive, which recaptured around the 90% of the disputed territories, including Kirkuk (Danilovich 2017: 58). Nevertheless, diverging from this expectation, in mid-October 2017, the Iraqi Government launched a successfully military operation regaining the military control over Kirkuk and other disputed areas (Loveday

2017). The resolution of this issue remains unpredictable and, currently, the situation on the ground could be seen as a direct result of the missed implementation of the Iraqi Constitution, above all Article 140. Therefore, the situation has worsened because the offensive has displaced again thousands of Kurds[XXXIX].

6. Oil and gas 'management': the turning point of a State

The renewed Kirkuk crises between Iraqi Army, sustained by several Shias militias, and Peshmerga is the mirror of the total mismanagement of the oil and gas issue given by a) the shortcomings and deficiencies of the Iraqi Constitution and b) the ambiguous text of the constitutional disposition concerning oil and gas (Al-Ali 2013)[XL]. The ambiguity is heavily outlined in the aforementioned article 112, where is stated that the federal government, 'with the producing governorates and regional governments, shall undertake the management of oil and gas extracted from present fields'. Zedalis pointedly has argued that art. 112, due to its language, has a 'limited reach', especially in the first paragraph. These limits are mainly represented by the terms 'management', 'extracted' and 'present fields'[XLI].

About the first issue it's hard to achieve accuracy, insofar as the term 'management' has no juridical meaning. The Federal government 'shall undertake the management …', but what kind of political and juridical actions fall within the possible interpretation of 'management'? What are the boundaries between the management activity and else? The lack of clarity on what could be included in the management of oil and gas affects, thus, the role of the Federal government and its competencies. The Second problematic issue derives from the word 'extracted' referred to oil and gas. This word is likely to be connected to resources already been extracted, excluding oil and gas fields discovered but not entered yet in production. Hence, oil and gas extracted are subject to federal government's control and doesn't matter where oil fields are placed or when the extraction has begun[XLII].

The most remarkable limit is outlined by the involvement of the only 'present fields' in the federal oil and gas management. No other words are said on future fields and the federal authority is legitimate to carry out its power solely on oil and gas fields discovered at the time of the Constitution's enactment. The meaning of 'present fields' is strictly connected to other two words, the aforementioned 'producing' and 'extracted'. Together with 'present fields', the reference is to present oil and gas fields currently in production. The result is that merely

the producing 'present fields' fell into article 112, leaving aside those not under production, no matter whether discovered or not. This constitutional disposition shall be read taking into account the large amounts of proven crude oil reserves (148.766 billion barrels as of 2017)[XLIII], considering that oil fields are not all under production. In such way, the silence of the Iraqi Constitution is harmful. Furthermore, another issue shall not be forgotten, because in both paragraphs of article 112 the producing governorates and regional governments are mentioned. The interpretation of article 112 might signify the exclusion, from the management of oil and gas (art. 112.1) and from the formulation of the necessary strategic policy (art. 112.2), of the non-producing sub-central units (Zedalis 2009: 46-51; Kane 2010: 11; Al-Moumin 2012: 424; Zedalis 2012: 69-70).

Furthermore, article 112 sets out the basic principles or, better to say 'guidelines', concerning the redistribution of revenues. Alongside the neutral and fair 'proportion to the population distribution in all parts of the country', is outlined the 'allotment for a specified period for the damaged regions' deprived by the former regime (Saddam's dictatorship). Moreover, it's specified that the same allotment is owed also to regions, which is likely to mean those 'areas of Iraq', 'damaged afterwards'. The oil and gas management shall be regulated by law but, due to several disagreements mainly between Shias and Kurds, the *Hydrocarbon Law* has never been enacted yet[XLIV].

The interpretation of the words 'damaged afterwards' is likely to represent a key point of the Iraqi future. The Sunni's governorates (Nineveh, Saladin and Al-Anbar), have suffered broad damages due to ISIS conquest followed by the ongoing joint counter offensive of the Federal Government and Peshmerga (*de facto* the Kurdistan Army[XLV]). Related to the governorates aforementioned, considering the large amount of damages and refugees, will be necessary allocate special founds due to several damages of a large number of cities and towns, above all Mosul. This constitutional provision might constitute a sufficient legal basis for a proportional allotment of resources to this area of Iraq. Shall be acknowledged that, being Sunnis the majority of the population within the recalled governorates, is recommended that, the Shias' based Federal Government promotes inclusive policies narrowly directed to accommodate Sunnis' vindications. Besides that, it might help to fill the gap in terms of inclusion feeling of Sunnis minority in the political arena, fostering state-building and avoiding future religious and ethnic conflict (O'Driscoll 2016: 61-73).

Hence, article 112 shall be understood linked to article 121 par. 3, which lays down the allocation to regions and governorates of an 'equitable share of the national revenues sufficient to discharge their responsibilities and duties, but having regard to their resources, needs, and the percentage of their population'. This provision, enshrines the equalization principle, having considered the different incomes across governorates and regions, especially in matter of oil and gas. Furthermore, article 121 par. 3 is recalling article 111, which states that oil and gas belong to Iraqi people 'in all the regions and governorates' (IDEA 2014: 64, 72).

Articles 111 and 112 shall also be combined with the aforementioned articles 114 and 115. Particularly, the second, third and fourth paragraphs of article 114 (shared competencies), shall be analysed related to oil and gas management. The second and third paragraphs, being related to the regulation of 'the main sources of electric energy and its distribution' and the formulation of 'environmental policy to ensure the protection of the environment from pollution', are strongly connected to oil and gas industry. Even though paragraphs two and three on one hand deal with the generation of electricity and its distribution and the environmental protection, on the other hand they are implicitly linked to oil and gas, due to their environmental implications and being them the primary source of electricity in Iraq. Moreover, paragraph four lays down the shared competence 'to formulate development and general planning policies', passing on activities or policies. It's likely to assert that the formulation of oil and gas policies may fall into general policies, having considered that a) oil and gas 'management' represents undoubtedly the main issue in Iraq and b) this disposition is placed among shared competencies and not within article 110. Another question arises, without any answer as of today: might this paragraph be referred to art. 111 and 112? (Zedalis 2012: 78-81).

To make more intricate the interpretation must be recalled articles 115 and 121 which, as stating that in case of conflicts on the ground of shared competencies, between the law of sub-units and the Federal Governments, priority shall be given to sub-units' law. These articles allow, as noted above, significant autonomy to KRG and governorates' authorities. Hence, sub-units could strongly claim the legitimacy of their request of control over oil and gas fields[XLVI]. The ambiguity detected with reference to oil and gas revenue sharing, is worsened by the absence of any Supreme Court's decisions on matters of constitutional interpretation dealing with oil and gas issues. Once again, the constitutional ambiguities and

deficiencies shall be considered as a consequence in the light of the Constitution-making process. The price of a quick Constitution adoption has been a poorly drafted constitutional text, which leaves unsolved the hallmark of the Iraqi Federal system, the oil and gas management and revenue sharing (Kane 2010: 12; Zedalis 2012: 88).

Currently, without any chance to enact the Hydrocarbon Law, the revenue sharing is outlined in the annual Federal Budget, which represents an additional field of conflict. For the first time since 2005, the 2018 Federal Budget Law, then confirmed in the 2019 Federal Budget Law, has broken the agreement between the Federal Government and the Kurds, because it has reduced the Kurdistan Region's share from 17% to 12.67%, due to the fact that KRG signed contracts and exported oil without taking into account the central government. As a consequence, an additional institutional conflict has risen: on March 13, 2018, President Fuad Masum, leader of the Patriotic Union of Kurdistan (PUK), refused to sign the bill due to 31 constitutional violations. Nevertheless, on April 3, 2018, the Federal Budget has become law without any amendments, confirming the 12.67% to Kurds[XLVII]. The 12.67% share has been confirmed in the Iraq's 2019 Budget, although some encouraging steps towards the reconciliation have been done. Despite that, the KRG has been weakened and economic crisis continued to deteriorate the Region[XLVIII].

7. After ISIS and the Kurdistan referendum: which perspectives for the Iraqi federation?

The defeat of ISIS in West Iraq, at least on physic chart, sets out again the issue of the Iraqi statehood. Undoubtedly, the rise and fall of ISIS have revealed the weakness of the Iraqi institutions[XLIX]. On the other hand, ISIS defeat might represent a new chance for the Iraqi statehood, strictly connected to ethno-religious rivalries. Besides that, the proliferation of Shias militias is a threat to national reconciliation and statehood as well as the influence of Iran. Shias militias, alongside Peshmerga and KRG, made the best effort in ISIS defeat and could be hard leaving them aside in the future (Strategic Comments 2017; Rosen 2017). Hence, ISIS defeat might be the best chance to build trustworthy representative institutions and implementing the constitution, in order to shape State authority, weakened by the complete mismanagement of the public administration and the high level of corruption (Mansour 2017; 2-4, 14-17, 26-28; Abrams *et al.* 2017).

But this is only a part of the story. The main issue remains the evaluation of the very heart of federalism, self-rule and shared rule: the relationship between the Federal Government with its sub-units and among sub-units themselves. Federalism has been invoked and then quickly applied in Iraq as a solution for one among those of the world's most intractable conflicts[L]. Not surprisingly the Iraqi main issue, oil and gas revenue sharing, has also been defined 'intractable' (Kane 2010: 5; Anderson 2012: 2).

An appraisal of the Iraqi federal arrangements involves, above all, the Kurdish, their autonomy and their possible secession. The non-binding independence referendum, held on 25 September 2017, it's only the last manifestation of this desire[LI]. Even though the Kurdish referendum is legally groundless and out of the constitutional order, having examined above articles 1 and 13[LII], the legal status of Kirkuk and the other disputed territories (including the Nineveh governorate) shall be taken into account. In fact, other scholarship has argued that the legitimacy of the referendum is given by the failure of the Federal Government to set into its agenda the will of the people of Kirkuk and disputed areas, scheduled by art. 140. Such a major issue is based on the constitutional provision, which recognizes the illegitimacy of internal boundaries. The referendum is rooted in the Arabization of former regime together with the negligence of the current Federal Government. In addition, referendum was held also in the light of undermine the economic crisis in the Region, as well as for empowering the KRG in the negotiation with the federal government [LIII]. The independence is unlikely to become reality in the future, given the opposition of regional and international actors and the hostility of the Iraqi Government, which launched the offensive on such areas on October 16, 2017, fully restoring its control on Kirkuk and the majority of disputed areas (Abebe 2017; Riegl *et al.* 2017: 153-165). The future is unpredictable and, to this regard, a confederal option between Erbil and Baghdad has been proposed. For instance, a Confederation between KRG and Baghdad could give the Kurds the opportunity to manage their own oil and gas and, moreover, to solve Kirkuk's issue (Natali 2011: 3; Knights 2016; Salih 2017). Instead, others have recently recommended a different structure for the Iraqi Federation: three regions, (Kurdish, Shiite and Sunni), redrawn along ethno ethnic-religious line, leading Iraq to a typical ethno-federation. This solution is justified by the Sunnis' decreased opposition to federalism, due to the centralising actions pursued by Shias' governments[LIV]. On the other hand, this proposal, in practice, would face the hard task of

drawing internal boundaries and it is likely to create a big Shia's region, driving the Federation into a more problematic 'federal imbalance'.

Basically, the first step is the resolution of the issue embodied in art. 140 and the implementation of the abovementioned constitutional dispositions. Concerning the former, the FSC has recently stated that art. 140 is valid 'until achieving its requirements and the objective of its legislation according to the steps stipulated in article (58)' of the TAL, which seeks to address the previous Arabization and, in the paragraph C, states that 'the permanent resolution of disputed territories, including Kirkuk, shall be deferred until after these measures are completed'[LV]. Without any doubt, this is a landmark judgement, which can be hardly reversed in the future. If we consider the Constitution-making process, this judgement reminds us to connect the TAL to the Final Constitution fourteen years later. It may be argued that the clear message of the Court can be conducive to a comprehensive constitutional bargain, which can lead to the resolution of the thorny issue embedded in art. 140.

Nevertheless, as of today, the debate is still about constitutional shortcomings and ambiguities and whether or not they can favour the consensus-building and incremental constitutional development[LVI]. Among these ambiguities the primacy is given here to the debate over oil and gas revenue sharing, alongside a fair mechanism of dispute resolution on this matter. The likelihood that the Court could act as arbiter is remote, due to divisive nature of that issue. To this regard, are these ambiguities and omissions part of a strategic flexibility? Are open ended frameworks, constitutional deferrals and postponements used strategically in Iraq? Indeed, constitutional ambiguities and open ended frameworks request to set their meaning through interpretation or practice. Instead, where ambiguities are postponements, the risk is that they consist in agreements on contentious issues which are interpreted and understood differently by different parties 'and it is acceptable on this basis'[LVII]. Moreover, what matters is the specific nature of postponement and deferral: 'what is deferred, how much, to whom and by whose authority' (Arato 2014: 810). That is the case of Iraq where ruling parties and political elites refused to apply the Constitution (for instance art. 140), refused to implement it where is requested to (the upper chamber) and even they have taken advantages from those crucial ambiguities, especially in matter of oil and gas revenue sharing. In this specific case, which constitutes the gist of the Iraqi federal system, the abovementioned ambiguities have been deliberately interpreted by main political actors only

on the basis of self-interest, discharging the Constitution and federalism (Al-Ali 2019: 115-118). On the other side, formal constitutional amendments request a large bargain between the Kurds and the national government (art. 142, then art. 126), which is unreliable without a firm constitutional commitment to the solution of Kirkuk and other disputed areas issues. Hence, it can be argued that the Iraqi federation is in a double-faced limbo, the former shaped by informal agreements often broken and rearranged, the latter based on the indefinite waiting for empowering constitutional dispositions. The latter plays the game of the former but almost fifteen years after the adoption of the Constitution the positive effects of such ambiguities and postponements have not been seen. Formal changes and ordinary politics overcome constitutional law and formal amendment rules: *Verfassungswandel* tends to replace *Verfassungsaenderung*. This risk is huge putting the learning after the adoption of the final constitution, especially when the most important issues are not properly settled. Postponements may have their part in the growth of a given constitution, but only when the backbone of the constitution has been set up (Arato 2014: 812-816). Perhaps, the Iraqi constitutional life may be shacked only through a truly constitutional effort, not only promoted by the FSC. In order to overcome this sort of *sine die* constitutional ambiguity, a mutual constitutional commitment between the different ethnic groups may begin from the resolution of art. 140 and oil and gas revenue sharing. In this sense, informal intergovernmental relations may represent an additional and viable (informal) option in order to learn the basic requirement of a constitutional living: echoing the South African experience the Iraqi communities still have to talk about talks seriously.

Indeed, this is a long-term process, during which Iraqis will seek to reach their constitutional identity. On the other hand, the influence of external actors during and after the constitution-making process, requires an assessment of the degree or the scale of heteronomy. To this regard, Albert has recently pointed out that 'along this scale of heteronomy, many constitutions that we might not otherwise consider imposed reveal tinges if not full colours of imposition' (Albert 2019: 104). Furthermore, alongside measuring the degree of heteronomy, we shall consider also the autochthony of the Constitution and the degree of autochthony, consisting in how much 'a constitution is, legally speaking, 'home grown' or rooted in native soil' (Oliver 2016). Bearing in mind that the Iraqi Constitution needs to be implemented, it is likely to increase the degree of autochthony at the expense of

heteronomy. In this sense, the resolution of such constitutional issues and disputes may produce a new and more authentic federal product of the Global South[LVIII].

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* PhD in Public, Comparative and International Law, Sapienza - University of Rome. Email address: adriano.dirri@uniroma1.it. For helpful comments and discussions, I'm very grateful to Nico Steytler. My thanks also to Megan Connelly, Maja Sahadžić, Richard Albert and Haider A. Hamoudi. All errors are my own.

I The Iraqi population is composed of two major ethnic groups (Arab 75%-80%, Kurd 15%-20%) and many others (Turkmen, Assyrian, Shabak, Yazidi 5%). Islam is the first religion (Shias 60% mostly Arabs, 40% Sunnis, Arabs and Kurds) beside other minorities (Christianity 1%). Source: CIA World Factbook, retrieved July 2017. For a comprehensive account of sectarianism in Iraq see Haddad (2011).

II There is one more feature to take into account. The political mobilisation along sectarian lines, which is well defined in the Kurds and Shias traditions and weak among the Sunnis. The strong sense of ethno-nationalism is the *qawmiyya* for the Kurds. The Shias are driven by the *muthloomiya*, a sense of oppression which permeates the cultural background of the Shias. Unlike the Shias and Kurds, the Sunnis are fractured among themselves and crossed by intra-Sunni conflicts. See Mansour (2016).

III The Sunnis, in particular, ruled in Iraq since 1921. See Diamond (2005: 295); Dawisha Adeed (2013: 243-244).

IV On the Sunnis' marginalization the Report by the International Crisis Group (27 February 2006, 12 and ff.).

V UNSC Resolution 688 of 5 April 1991 condemned the repression of the Iraqi regime against the Iraqi population, especially the Kurds. The Resolution pursued humanitarian operations and did not establish the no-fly zone. It was unilaterally declared by USA, France and UK. *Ex multis*, on the development of the Kurdish statehood after the First Gulf War: Voller (2014); Ihsan (2017); Rafaat (2018). On the division of the KRG in two separated governments see: Ahmed (2012: 29 and ff.).

VI For a preliminary quick snapshot on the Iraqi contradictions and tensions see Benomar (2004: 81-95, 91).

VII This distinction owes much to Horowitz's theories. See Horowitz (1985: 563-652) Others (John Mcgarry and Brendan O'Leary) distinguish the two types of federalism in 'integrationist' and 'consociational' model, clearly based on Ljiphart's insights. Lijphart (1977). See also O'Leary (2005: 3-43). For a discussion over the different forms of federalism within the Iraqi context see: Mcgarry and O'Leary (2007: 670-698), O'Leary (2005: 47-91). These authors describe the Iraqi constitutional conflict as between 'integrationists' and 'consociationists'.

VIII Academic literature on ethnic or multinational federalism is broad and, generally, the word 'multinational' is referred to European and Western federal experiences, while the word 'ethnic' is related to federal experiences elsewhere, especially in Africa and Asia. They have in common that the territorial structure of a given federal State is shaped and based on cultural diversity of different groups. The main question is whether or not ethnic based (or multinational) federalism exacerbate or accommodate diverse groups. Nevertheless, it is also true that constructing sub-national levels of government for accommodating a specific group leads to a mere reproduction of the nation-State logic. In this sense a specific homeland of a given ethnic groups tends to discriminate its internal minorities and the like. Concerning the word ethnic/ethnicism is strongly recommended the reading of Ghai. In particular, Ghai stresses that ethnicism is a social and political construct and this happens when mere cultural distinctions (language, religion) became the basis of the political identity. The most interesting examples are Ethiopia and Bosnia and Herzegovina, whose territory is constitutionally modelled on the distribution of ethnic groups. See *ex multis* and for different contexts: Kymlicka (2001: 91 and ff.); Ghai (2000: 4-39); Ghai (2019: 53-69); Anderson (2013); Burgess (2012: 23 – 44); Kössler (2015: 245-272); Kössler (2018: 399 – 418, especially 400 – 410); Gagnon (2013).

IX Ran Hirschl highlights the gap of constitutional law literature between the so called 'Global North' and the 'Global South'. See Hirschl (2014: 3-4, 174, 209-216).

X See critically: Maldonado (2013: 1-37). Dann, for example, has argued that 'the need to temper and overcome the parochialism of Western constitutional thinking is obvious and urgent'. See Dann (2017).

XI Even if UNSC never authorised the military intervention, after the fall of Saddam's regime, it recognised USA and UK occupation forces. UNSC Resolution 1483, 22 May 2003, *The situation between Iraq and Kuwait*, preamble. Hague Convention, 18 October 1907, art. 42 and Geneva Convention 12 August 1949, art. 2.2. On such a basis the 1483 Res. recognised 'the specific authorities, responsibilities, and obligations under applicable international law of [the United States and United Kingdom] as occupying powers under unified command (the "Authority")'.

XII About CPA see Dobbins James et al. 2009, *Occupying Iraq a history of the coalition provisional authority,* RAND

Corporation, New York.

[XIII] Undoubtedly, 'recognizing the CPA was merely the recognition of a fact, the fact of belligerent occupation, which before the CPA was administered by the U.S. military, according to international law'. The head of the CPA was Paul Bremer (named US Presidential Envoy and Administrator) and the constitutional advisor the academic Larry Diamond. See Arato (2009: 20).

[XIV] UN SC *Resolution 1511*, 16 October 2003, parr. 1,4 and 6. This Resolution was heavily criticised because it accepted the IGC as a representative body of the Iraqi people, leading the Constitution-making process, although it was an unelected body. See Arato (2009: 20-21); Roberts (2005: 54, 27-48, 32). He argues that 'this UN resolution did not create the occupation: it simply recognised that it already existed'. See also: Ismael Tareq and Ismael Jacqueline (2015: 31-32). According to the Authors, the IGC was 'an effort to gloss an acceptable Iraqi cover for the occupation'.

[XV] *The November 15 Agreement: Timeline to a Sovereign, Democratic and Secure Iraq*.

[XVI] See Benomar (2004: 92-93). Benomar argued that often interim constitutions provisions have found their way in final constitutions.

[XVII] Art. 4: 'The system of government in Iraq shall be republican, federal, democratic, and pluralistic, and powers shall be shared between the federal government and the regional governments, governorates, municipalities, and local administrations. The federal system shall be based upon geographic and historical realities and the separation of powers, and not upon origin, race, ethnicity, nationality, or confession'.

[XVIII] Clearly Allawi stressed 'It (the Constitution) talked about pluralism, gender rights, separation of powers and civilian control over the armed forces – none of which were even remotely familiar terms in Iraq. The TAL embodied western, specifically American notions, and was carefully supervised by the CPA. Each significant point had been pre-cleared with the NSC in Washington. Neither the CPA nor its drafters envisaged it as anything less than the basic model for Iraq's permanent constitution'. Allawi (2007: 222); Bremer (2006: 271).

[XIX] The political significance of the quickly adoption of the TAL, alongside the agenda of the first elections in Iraq, was the upcoming US Presidential election of November 2, 2004, which vested G.W. Bush President of the United States for the second mandate. See Arato (2009: 129).

[XX] Over the 77% of the registered voters participated to the elections. The Shia's coalition, United Iraqi Alliance (UIA), gained 128 of 275 seats, while Kurdish Alliances 53 seats, the main Sunni party (Concord Front) 44 seats and others 50 seats. See: Dawisha and Diamond (2006: 89-103); Dawisha (2013: 248-259). The voter turnout was at 63%, while 79% voted for the constitution. The Kurdish and Shia's Governorates voted in favour and the Constitution was rejected by the population of the three Sunni Governorates. Rules and procedures of referendum were outlined in articles 60 and 61 of the TAL. See: *Strategic Comments* (2005); Arato (2009: 188-189, 242); Shakir (2017: 102).

[XXI] See International Crisis Group (18 July 2006); Deeks and Burton (2007: 1-89, 65); Allawi (2007: 224); Molloy, Zulueta and Welikala (2017: 19).

[XXII] Substantially, the foreign intervention, made by the US, may be summarised as follows: a) the occupation authorities selected the makeup of the TAL drafting committee; b) they determined the procedural framework and c) influenced the procedure of the Iraqi Constitutional Committee; d) finally, personnel of the US embassy were deeply involved during the negotiations. See: Dann and Al-Ali Zaid (2006: 440-442); Dann 2013: 248-250, 260); Al-Ali (2013); Ismael Tareq and Ismael Jacqueline (2015: 68).

[XXIII] The Sunnis exclusion from the political process and the constitution making-process has been one of the main problems to statehood. See: Anderson and Stansfield (2004: 150-153); Arato (2009: 211-218); Hamoudi (2016: 849-852).

[XXIV] After the occupation the insurgency begun in the whole Iraq, except for the Kurdistan Region, not only in the 'Sunni triangle', but also in the South (headed by the Sadrist movement). The rebellion sprang out after Bremer's refuse to take account of the Grand Ayatollah Ali Al Sistani's (leading *marji'* for Shias and Najaf *Hawza*) proposal, based on the direct election of the constituent assembly. On the TAL, the office of Al-Sistani stated that 'Grand Ayatollah Sistani has already clarified […] that any law prepared for the transitional period will not gain legitimacy except after it is endorsed by an elected national assembly. Additionally, this law places obstacles in the path of reaching a permanent constitution for the country that maintains its unity and the rights of its sons of all ethnicities and sects', 8 March, 2004. This statement was grounded on Sistani's *fatwa* of 25 June 2003, which underlined that '[…] first of all, there must be a general election so that every Iraqi citizen - who is eligible to vote - can choose someone to represent him in a foundational Constitution preparation assembly. Then the drafted Constitution can be put to a referendum'. The political meaning of this *fatwa* was the legitimation of the Shias into the new constitutional framework. For that reason, Sistani's fatwa was described as 'an epochal event in the annals of the interaction between Islam and democracy'. The contrast between Al-Sistani and Bremer was solved by the UN mediation led by Lakhdar Brahimi: Sistani capitulated on early

elections, while Bremer on the caucus issue. See Feldman (2005: 6-9); Feldman (2004: 36-43).

[xxv] Three main factors undermined the TAL and the permanent Constitution: the absence of consensus, the unfulfilled democratic culture among Iraqi population and politicians; the role of the US. See Shakir Farah, *The Iraqi Federation*…, at 96. In particular, others argue that the absence of participation was also connected to 'damaging deadlines'. See Brandt Michele et al., *Constitution-making and Reform*…above at 25, pp. 46, 76, 324, 337-339.

[xxvi] Islamic law is explicitly recognised as a foundation source of legislation (art. 2 par. 1). This typology of relationship between constitutionalism and religion has been conceptualised by Ran Hirschl as 'constitutional theocracy'. Cfr. Hirschl (2010: 2-4, 35-36). See also: Rabb (2008: 540-541); Ahmed and Ginsburg (2013: 615–695, 680-693).

[xxvii] Related to the Iraqi case he points out: 'The Iraqi preamble, for example, carefully includes as many of the peoples of Iraq as possible, so as to avoid the implication that one group has constitutional priority'. See Tushnet (2014: 26).

[xxviii] Sec. 2: 'No law that contradicts this Constitution shall be enacted. Any text in any regional constitutions or any other legal text that contradicts this Constitution shall be considered void'.

[xxix] The main features of the Iraqi parliamentary system are: the election of the President of the Republic by the Council of Representatives (CoR) (art. 70); the appointment by the President of the Prime Minister and the Council of Ministers (art. 76 co. 1); the Prime Minister with its Cabinet shall gain the confidence vote upon the approval by an absolute majority of the Council of Representatives (art. 76 co. 4). See Shakir (2017: 141-149).

[xxx] Eminent scholarship has recently argued that second chambers tend to be ineffective. Instead, intergovernmental or bilateral decision making are favoured by subnational entities in order to seek participation rather than representation. This can also explain the lack of attitude of Iraqi institutions to set up a comprehensive constitutional reform, with the exception of the Federal Supreme Court. See Palermo (2018). The Supreme Court issued a decision on January 17, 2018 calling for the establishment of the FC. See Lasky (2018).

[xxxi] Art. 48: 'The federal legislative power shall consist of the Council of Representatives and the Federation Council'.

[xxxii] Without the upper chamber, the federal 'scheme' and the relationship between the levels of government is incomplete. See, Danilovich (2014: 54); Danilovich (2017: 47).

[xxxiii] This arrangement makes the Constitution asymmetric. See Bammarny (2019: 255-286).

[xxxiv] According to article 114, the shared competencies are: to manage customs; to regulate the main sources of electric energy and its distribution; to formulate environmental policy; to formulate development and general planning policies; to formulate public health policy; to formulate the public educational and instructional policy, in consultation with the regions and governorates that are not organised in a region; to formulate and regulate the internal water resources policy.

[xxxv] Despite that, the path of the intergovernmental relations may be a viable tool for undertaking the dialogue between the national, provincial and regional (KRG) level as well. To this regard, Law 21/2008 set up a forum which seeks to manage the relationship between the provincial and the national level, the High Commission for Coordination among Provinces (HCCP). See Al-Mawlawi (2019); Fleet (2019: 10 and ff.).

[xxxvi] Liam Anderson stresses that the case of Kirkuk represents an example of gerrymandering of subunit boundary lines in order to divide an ethnic group. Moreover, the presence of several oil and gas fields in the area shall be taken into account. During Saddam's regime the Kurds were systematically expelled and replaced by Arabs. Besides the 'Arabization', the boundaries of Kirkuk's Province were altered and redrawn. See: Anderson (2013: 113-115); Rafaat (2008: 251-266).

[xxxvii] In Kirkuk district is placed a 'super giant oil field', estimating 5 billion oil reserves. See Mazeel (2010: 7-8, 51).

[xxxviii] Art. 126 lays down two procedures: Sections one and two 'may not be amended except after two successive electoral terms with the approval of two-thirds of the members of the Council of Representatives, the approval of the people in a general referendum' (par. 2), while other sections may be amended with two thirds of the members of the Council of Representatives followed by the approval through referendum (par. 3). Finally, shall be pointed out an additional safeguarding clause regarding regions (par. 4): 'articles of the Constitution may not be amended if such amendment takes away from the powers of the regions that are not within the exclusive powers of the federal authorities, except by the approval of the legislative authority of the concerned region and the approval of the majority of its citizens in a general referendum'.

[xxxix] A possible solution, alike the Northern Ireland and Brčko (Bosnia and Herzegovina), is outlined by O'Driscoll, who argues that only the assignment of a special status to Kirkuk could solve the controversy, establishing shared cross-border institutions. See O'Driscoll (2017b).

[XL] The ambiguous ownership provisions have inflamed the ethnic and religious conflict in both horizontal and vertical level. See IDEA (2014: 23).
[XLI] Art. 112 and the aforementioned art. 111 are the two constitutional provision representing the primary reference to oil and gas. See Zedalis (2012: 58 and ff. 67); IDEA (2014: 23).
[XLII] *Ibid.*, at 68. The reference, in the Iraqi Constitution, to the management in oil and gas, without being specified management activities, represents a rarity. In comparative perspective, constitutions assigning the management authority to different levels of government are generally referred to specific activities, while where the word 'management' is assigned to a single level of government, it is replaced by another all-embracing term. See IDEA (2014: 34-35, 42-43). For instance, taking into account the federal constitutions examined in George Anderson edited book, '*Oil and Gas in Federal System*', Oxford University Press, Oxford, 2012, where a prominent role in their economy is represented by oil and gas resources, the word 'management' is not referred to oil and gas activities, except for the Constitution of Venezuela (art. 156). Anderson (2012).
[XLIII] Source of crude oil reserves: OPEC, *Annual Statistical Bulletin*, 2019.
[XLIV] Facing the inability and negligence of the Iraqi Government, the Kurdistan Regional Government adopted the Regional oil and gas Law, No. 22/2007. The KRG Law diversifies 'Current Field', being this 'a Petroleum Field that has been in Commercial Production prior to 15 August 2005' from 'Future Field', instead 'a Petroleum Field that was not in Commercial Production prior to 15 August 2005, and any other Petroleum Field that may have been, or may be, discovered as a result of subsequent exploration' (art. 1). Related to current fields, art. 18 lays down the cooperation and the 'joint management' with the Federal Government. On the other hand, KRG stressed its authority over future fields through the Kurdistan Exploration and Production Company (KEPCO) and Kurdistan National Oil Company (KNOC), articles 10-11. See: Zedalis (2009: 79-90).
[XLV] The legitimacy of the Peshmerga, basically the army of the Iraqi Kurdistan, is not clarified by the constitutional framework. Art. 9 points out that 'the formation of military militia outside the framework of the armed forces is prohibited', while accordingly to art. 121 'the regional government shall be responsible for … the establishment and organization of the internal security forces for the region such as police, security forces, and guards of the region'. See Danilovich (2014: 65-85).
[XLVI] KRG has stated that articles 115 and 121 are limiting the federal authority, meanwhile enhancing the regional government in oil and gas industry management. To this regard, the KRG received an expert's legal opinion (signed by Professor James Crawford) allowing Kurdish claims over its own oil and gas resources. See: Clifford (2016); Alkadiri (2016: 7).
[XLVII] The annual Federal Budget is composed of 84% from oil and gas revenues and 16% from non-oil-incomes. Moreover, shall be also noted that approximately 20% of Iraqi oil and gas are placed in Kurdistan Region, Kirkuk and disputed areas. The abovementioned 31 constitutional violations have not been published. On 2018 Federal Budget see: Iraqi Presidency, *The Presidency of the Republic Sends Back the Federal Budget Law to the House of Representatives*, 2018/03/13.
[XLVIII] The central government will pay the salaries of Peshmerga and the breakdown of spending for the three KRG provinces has been removed. Despite that, the KRG continue to not deliver the agreed 250.000 barrels of oil per day expected by the national government. See Al-Mawlawi (2019); Nawzad (2019); Bammarny (2019: 272-274).
[XLIX] As pointedly stressed by David Romano, shortly after the ISIS rise. See Romano (2014: 10).
[L] See Hueglin (2012: 27). In fragile States, Steytler and De Visser argue, 'the fragile federation was perhaps the best, if not the only, way out of fragility'. See Steytler and De Visser (2015: 79 and ff.).
[LI] Al Ali rightly underlines how the Kurds have stressed that Iraq is a voluntary union where Kurdistan has 'retained its sovereign status' in a Report just a day before the referendum. KRG Cabinet, Report: The Constitutional Case for Kurdistan's Independence**,** 24 September 2017. See Al-Ali (2019: 114).
[LII] The Iraqi Federal Supreme Court stated that 'the referendum occurred on 9.25.2017 in Kurdistan territory and the regions outside it […] has no substantiation in the constitution and violates its provisions'. Republic of Iraq Federal Supreme Court, Ref. 89 & 91 & 92 & 93/federal/2017 on 2017-11-20.
[LIII] Referendum turnout: 72%; voters for independence: 90%. Gökhan argued also that the referendum has been undermined by its unilateral proclamation. See: Gökhan (2017). *Contra* Shehabi has stated that the constitutional order allowed the right to carry out the consultative referendum. The referendum is based on its consultative nature, which involves a recognised minority. Moreover, Kurdish people has a 'constitutionally recognised claim' related to Kirkuk and other disputed areas: Shehabi (2017). See also the insightful comment of Bâli (2017).
[LIV] The Author stresses the implementation of art. 140 together with the creation of the Sunni and Shia region. Only ethnic federalism could prevent the Iraqi disintegration. The Shias Government, especially during Maliki's ministry, having denied the autonomy, has provoked the search for autonomy by the Sunnis. See O'Driscoll

(2017a: 315-332).

[LV] Republic of Iraq, Federal Supreme Court, Ref. 71/federal/2019, 28/07/2019.

[LVI] In support of the Iraqi Constitution is Hamoudi, who sees a positive outcome from ambiguities and postponements of the Iraqi Constitution. These features can lead to a positive path and a progressive convergence between the three Iraqi ethnic groups by the incremental development of the Constitution. Hamoudi (2013); *contra* Al-Ali (2014).

[LVII] According to Saunders among postponement techniques shall be emphasized those involving deliberate ambiguity in drafting potentially disputed provisions and a decision which does not aim to resolve a controversial issue leaving a place-holder in the constitution. See Saunders (2019: 348).

[LVIII] The wording 'Global South' was firstly used by Oglesky in 1969 and, in comparative constitutional studies, is different from 'Third World'. Among comparative constitutional scholars, Global South is widely used for emphasizing several features which leads to rethink the methodology of comparative constitutional law. Firstly, for understanding dynamics and patterns of constitutional law, the academy is tasked to investigate more than ever overlooked constitutions and constitutional experiences. The call is to study constitutional law beyond the 'usual suspects' (in the words of Ran Hirschl) of western constitutional experiences. Secondly, the Global South critique is not only closely linked to those constitutional experiences of States once under the colonial domination. The Global South critique aims at underlining the more sensitive approach towards marginalisation, group rights and exclusions. To this regard, the best book is that edited by Bonilla Maldonado, where the judicial activism of three Constitutional Courts (India, South Africa and Colombia) is underlined. Undoubtedly, the Global South critique poses two major challenges: a) methodological due the almost exclusive enlightenment of Global North experiences and b) the prioritisation of concepts like separation of powers, liberal democracy, instead focusing more on development, marginalisation and groups' rights. Hirschl has stressed that the Global South critique has challenges from the within as well. The broad and diverse constitutional experiences of the Global South make hard to group all together these constitutional jurisdictions. Moreover, it is not clear what is meant for Global South and the relevance of constitutional courts of India and South Africa is more studied than others in the 'North'. Nonetheless, the Global South critique sheds lights on diverse challenges and realities. In this sense, we can learn from something 'different' from our standards and from constitutional enrichment and variations of the Global South. See Oglesby (1969); Hirschl (2014: 205-223); Dann (2017); Maldonado (2013); Kumar (2017); Fowkes (2017).

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