

Challenges Facing the Implementation of Federalism in Iraq: A Case Study of the Contradictions and Inconsistencies in the Sharing of Power between the Central Government and the Regions in Iraq Constitution of 2005

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Abstract: Until now, federalism adoption as a form of the Iraqi state after the US occupation of Iraq at 2003 is still debatable. While many believe that the adoption of federalism in the Iraqi constitution of 2005 is suitable for the Iraq political system others believe that it cannot be a solution to preserve the unity of Iraq from divisions and conflicts. This study, therefore, examines and analyses the constitutional challenges related to the extent of the possibility of the federalism implementation with a particular focus on the mechanics of power-sharing between the central government and the regions in accordance with the provisions of the Constitution. Due to this, a qualitative data was generated from constitutional texts, criticisms theoretical and the legal analysis. The study revealed that although the federal considered one of the options contained within the constitutional framework, nevertheless, the ambiguity and contradiction of constitutional provisions on power-sharing makes implementation of federalism is not suitable for Iraq as a system of government. The finding also revealed that federalism in light of the current constitutional provisions could create many problems and challenges that negatively affect the Iraqi regime in general.

Key words: Constitutional challenges, power-sharing, central government, regions, federalism, Iraq

INTRODUCTION

Since, the establishment of the modern Iraqi State in 1921, Iraq is considered one of the simple states in terms of the system of governance and administration. Iraqi is composed of 18 provinces administered by the central government in the capital Baghdad (Al-Skeini, 2009). However, three of these provinces which are populated by Kurds nationalists have been approved to adopt a system similar to that of decentralized system of government otherwise known as self-government or autonomous government but these provinces still belong and remain under the control of the central government (O'Leary, 2002). Then, after the occupation of Iraq by the United States in 2003, one of the options imposed by the American administration and the politicians who came to rule Iraq is implementation of federalism. Moreover, this was confirmed by the law of administration the state of Iraq for the transition period (2004-2005) "issued by the Coalition Provisional Authority (CPA)" which was stipulated that "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" (Iraqi Interim Constitution, 2004).

In 2005, a referendum on a new constitution after the transitional period which contained also confirms the application of the federal option in Iraq with a statement of the provisions of the power-sharing between the central government and the Iraqi provinces after its formation according to the federal style. Article 2 of the Iraqi constitution of 2005 stipulated that "The Republic of Iraq is a single federal, independent and fully sovereign state in which the system of government is republican, representative, parliamentary and democratic and this constitution is a guarantor of the unity of Iraq" (Iraq's, 2005).

Generally, there can be some extant studies which examined the implementation of federalism in Iraq in terms of its importance and its compatibility with the present situation of Iraq politically and legally. However, the findings of the extant studies are inconsistent as some studies posited that federalism is not suitable for Iraq,

given the current situation of the country (Al-Qarawee, 2010). Some of these suggested that federalism can be adopted in the provinces populated by Kurds who have been preserving and maintaining a kind of autonomy since the first Gulf War in 1990 (Hadji, 2009; Anderson and Stansfield, 2005; Anderson, 2007; Roeder, 2009). As for the rest of the provinces, it is preferred to keep the decentralized system of government in order to preserve the unity of Iraq and avoid division among the people in the society (Al-Skeini, 2009). Conversely, some studies indicated the importance of implementation of federalism in Iraq because it can enhance development and democratic administration, especially after the era of centralized system of government which was adopted by the Saddam's rule (Brancati, 2004; Anderson and Stansfield, 2005).

Related problems and issues: Presently, regardless of the above trends, adoption of federalism remained one of the cardinal features which should be implemented based on the Iraqi Constitution of 2005. However, implementation of federalism in the legal aspect, faces inter alia a myriad of problems created by the constitutional provisions regarding the sharing of powers between the central government and the regions. For example, among the core features of a federalism system in many countries of the world is that the federal constitution would provide for the ways of power sharing and the ways of resolving the conflict that may arise as a result with the emphasis on the sovereignty/supremacy of the federal constitution and federal legislations over the regional constitutions and legislations. The reason is that federal constitution is the basis for establishing the authority of constituent states of the federal system. Also, the federal laws should override those laws promulgated by the regions, they are usually the most effective and they have the strongest impact compared to the laws issued by the regions (constituent regions of the federal system) given their significant and influential power (Dawisha and Dawisha, 2003).

On the contrary, it is noteworthy that the Iraqi constitution has some provisions which are inconsistent with the principles of the supremacy of the federal constitution and federal laws over the regional constitutions and laws. For example, there was not a mention and definition of the roles of the federal government with regard to the power and the authority it has in the federal system. In addition, there is inconsistency in the mechanisms for resolving the disputes over the sharing of powers between the central government and the regions, although Article 13 of the constitution provides for the supremacy of constitution

and must not be violated. Also, there is a provision which deals with sharing of power between the federal government and the regions, apportions sovereignty and supremacy to the regional powers and laws over the federal power and laws. There is no doubt that these contradiction and inconsistency would give rise to chaos and conflicts when federalism is implemented given the fact that many of these problems are as a result of constitutional inconsistencies. Given the above exposition, there are two issues bordering on the effect of limiting the powers of the central government and the effect of violating the principle of supremacy of the federal constitution and the federal laws over the regional laws in the context of current constitutional provisions.

MATERIALS AND METHODS

To address the above issues, this research adopts a qualitative approach to discuss and analyze the issues bordering on the inconsistencies and contradictions in constitutional provisions on the adoption of federalism. This study is a pure legal research, therefore, the analysis of the data collected from the constitutional and legal materials and the government documents would be analyzed based on inductive, interpretive and analytical method. Additionally, critical and comparative analysis method is adopted to analyze the constitutional mechanisms for the sharing of power and dispute resolution between the federal government and the regional authorities. The approach is also adopted to examine the consistency of the constitutional mechanisms for the sharing of power and dispute resolution between the federal government and the regional authorities with the confirmed principles of federalism as implemented in many countries.

The challenges of constitutional regulation on the sharing of power between the federal government and regions: It is generally held that the federal constitution of the federal state has provisions for the mechanism of sharing of power, authority and jurisdiction between the central government and the regions. This sharing of power and authority is not one-way and it is significantly influenced by the way in which the federalism is formed and the degree of the desire of the constitution makers in strengthening the federalism or the regions in the light of the circumstances surrounding the federalism (O'Leary, 2002). For example, the federal constitution in some countries like Spain, Malaysia and India depends on the support of the federal government power and authority. This kind of approach is a reflective of the desire to strengthen the federalism through the

constitutional provisions with respect to the definition of the power of the regions on certain issues and the rest of the power and authorities belong to the federal government (Al-Kubaisi, 2007). On the other side, some federal constitutions provide for apportionment of the major power on some important issues for the federal authority and leaving the rest of the power to the regions. Such a trend reflects a system in which the regions are given greater autonomy as in the case of the constitution of the United States of America (Dawisha and Dawisha, 2003). Finally, sharing of power through the definition and separation of power of both the federal authority and the region reflects the need to create a kind of balance in the sharing of power between the federal government and regions in which the power in the exclusive list would be apportioned to the federal government and the rest for the regional government. The third kind of power would be shared between two governments. The example of this is that of constitution of the Federal Republic of Germany (Al-Skeini, 2009).

Generally, it is noteworthy that in all the previous methods regarding the sharing of power, the powers of the federal government dominate all the issues associated with the public interests such as external sovereignty, national defense, nationality, currency, natural resources and public policy making. The remaining power is apportioned to the regional governments. In addition, the federal constitution and the federal laws would remain supreme over the regional laws in the event of conflicts on the sharing of powers (Al-Kubaisi, 2007).

In the context of Iraq, it is observed that the Iraqi constitution of 2005 makes provision for mechanism of power sharing between the federal government and regional governments through the determination of the list of exclusive power of the federal government, the list of the shared power between the federal government and regional governments (concurrent list). The remaining list of power (residual list) would be apportioned to the regional government by the constitution. For example, with regard to the functions of the federal authority, the constitution explained that the federal government shall have exclusive authorities in the following matters: "first: formulating Foreign policy and diplomatic representation; negotiating, signing and ratifying international treaties and agreements; negotiating, signing and ratifying debt policies and formulating Foreign sovereign economic and trade policy. Second: formulating and executing national security policy including establishing and managing armed forces to secure the protection and guarantee the security of Iraq's borders and to defend Iraq. Third: formulating fiscal and customs policy; issuing currency; regulating commercial policy across regional and

governorate boundaries in Iraq; drawing up the national budget of the state; formulating monetary policy and establishing and administering a central bank. Fourth: regulating standards, weights and measures. Fifth: regulating issues of citizenship, naturalization, residency and the right to apply for political asylum. Sixth: regulating the policies of broadcast frequencies and mail. Seventh: drawing up the general and investment budget bill. Eighth: planning policies relating to water sources from outside Iraq and guaranteeing the rate of water flow to Iraq and its just distribution inside Iraq in accordance with international laws and conventions. Ninth: general population statistics and census" (Iraqi's constitution, 2005).

On the other side, the constitution explained the list of competence that should be shared between the federal authorities and regional authorities which are.

First: To manage customs, in coordination with the governments of the regions and governorates that are not organized in a region and this shall be regulated by a law.

Second: To regulate the main sources of electric energy and its distribution.

Third: To formulate environmental policy to ensure the protection of the environment from pollution and to preserve its cleanliness, in cooperation with the regions and governorates that are not organized in a region.

Fourth: To formulate development and general planning policies.

Fifth: To formulate public health policy, in cooperation with the regions and governorates that are not organized in a region.

Sixth: To formulate the public educational and instructional policy, in consultation with the regions and governorates that are not organized in a region.

Seventh: To formulate and regulate the internal water resources policy in a way that guarantees their just distribution and this shall be regulated by a law". And Finally, the constitution gave the Regions all the authorities which are not mentioned to the federal authority. Moreover, the constitution pointed out that with regarding other powers shared between the federal government and the regional government, priority shall be given to the law of the regions and governorates not organized in a region in case of dispute (Iraqi's, 2005).

As, it is discernible from the above constitutional provisions, the constitution gave the regional governments a considerable amount of powers at the expense of the limited power allotted to the federal authority. In addition, there are inconsistencies and contradictions in these constitutional provisions which have undermine the implementation of federalism in Iraq. These contradictions and problems are discussed as follows.

Firstly: The constitutional provisions which granted the power of the federal government are ambiguous and extremely concise. It is contained in one section without defining how the main legislative, executive and judicial powers will be shared. Moreover, these provisions did not stipulate the number of powers to be reserved for the federal authority. For example, issues relating to the elections to the federal parliament, federal financing system, finance of the federal budget, administration of the federal capital, issues relating to the staff of the federal government and the federal judiciary and formation of political parties et cetera. Therefore, the present constitutional provisions have created many problems related to the mechanism of separation of power. This is inconsistent with the federal constitutions of many countries which provide for the mechanism of separation of the legislative, executive and judicial powers between the federal government and the regional governments (e.g., Article 3 of the Indian constitution, Articles 73-81 of the Malaysian constitution, Article 120 of the constitution of the United Arab Emirates, etc).

Secondly: The constitutional provisions did not spell out many of the powers to be allotted to the federal government and the regional governments. For instance, the issue of civil law, criminal law, prisons, personal status, etc.). This implies that such power would be impliedly reserved for the regional governments. Also, the constitutional provisions did not address some important issues that should be granted to the federal government; the issue bordering on the power of the federal government to prevent the regions from seceding from the state, protection of the democratic system and the implementation of the fundamental rights contained in the federal constitution.

Thirdly: The powers of the federal government in the exclusive list is limited. Likewise, the constitutional provisions put restriction on power of the federation government in the concurrent list. For example, the issues relating to the management of water resources and the oil resources and environmental affairs (Alkadiri, 2010).

Fourthly: Which is the last of it, the constitutional provisions encourage deviation from the principles of the federal system of government by allotting a very limited power to the federal government with emphasis on the supremacy of the regional laws over the federal constitution and federal laws in the event of conflict between the two sets of laws. Also, regional governments are given edge over the federal government in the event of exercising the power in the concurrent list. This negates the established principles of federalism which give the federal government priority and edge over the regional governments in the exercise of power in the concurrent list and which consider the federal laws sovereign and supreme over the regional laws. Moreover, the Iraqi constitution failed to address the overlap in the concurrent list by giving priority to the regional laws over the federal laws.

Therefore, this kind of misplaced prioritization has been considered one of the factors causing division and increasing internal rifts between the federal government and the regional governments. Also, this issue of separation of power and granting greater power to the regional government have made the federal system of government failed as happened to the federal system of government adopted in the West Indies Rhodesia and Slovakia (Al-Kubaisi, 2007).

Given the above analysis, it is discernible that there are ambiguity and contradiction in the division and sharing of power between the federal government and the regional governments. This kind of system has given the regional governments more power than the federal government. This kind of division of power system is inconsistent with the many of the principles adopted by many of the countries that adopt federalism as a system of government. In fact, the method adopted by the Iraqi constitution has gone beyond the concept of federalism to the concept of the confederation. In sum, implementation of federalism in Iraq using the current constitutional provisions will pave ways for divisions and conflicts that may consequently lead to the devastation of Iraq in the form greater than the current devastation of the American occupation and terrorization of Iraq.

RESULTS AND DISCUSSION

The challenges of mechanisms adopted for the resolution of the dispute associated with the sharing of powers between the federal government and the regional governments: Given the impossibility of avoiding overlaps and conflicts in the sharing of powers between the federal government and the regional governments in a given federal system, majority of the countries that

adopt federalism have resorted to identify some specific mechanisms through which the ensued conflict is resolved, because this kind of issues always requires the existence of constitutional mechanism to enforce the constitutional provisions. Based on this, some countries which practice federalism adopt judicial solution by taking such kinds of conflicts to the federal court for adjudication, because the federal court is the primary embodiment of rights, freedom and justice (e.g., this approach was adopted in America, South Africa, Germany and Spain, etc.). But some countries adopted political solution to resolve the conflict between the federal government and the regional governments through mutual understanding, consultation, legal advice and court arbitration or through the federal bodies with political feature and accumulated expertise on issues that are likely to be caused by political factors rather than legal factors (e.g., Canada, Belgium, Ethiopia and Russia) (Al-Kubaisi, 2007). In the two approaches outlined above, there is agreement on giving supremacy of the federal constitution and the federal laws over the regional legislations when it comes to resolution of the dispute and disagreement on a particular issue. This implies that regional legislations and decisions would be considered invalid in the event it contradicts and negates the federal constitution and the federal laws (Al-Qarawee, 2010).

With regard to the present situation in Iraq, it is observed that that the Iraqi constitution has ideally given the federal high court the authority to decide conflicts and contradictions that ensue on the sharing of powers between the federal government and the regional governments. However, resolution of these disputes suffers some setbacks which are connected with the supremacy of the regional legislations over the federal constitution and federal laws in the event of contradiction between the two. This is discerned from the provision of the Article 115 of the Iraqi constitution with regard to the conflicts arising from the shared power in the concurrent list. Moreover, there is another provision which is ambiguous and inconsistent with the principles of conflict solution in the federal states in which this inconsistent provision grants the regional government the power to amend the federal laws (Iraq's, 2005 constitution). More so, where the constitution stipulated that in the case of a contradiction between regional and national legislation in special 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 (Article 121/second, Iraq's 2005 constitution).

It is clear that the approach followed by the constitution of the Republic of Iraq for the year 2005 is very critical because the provision stresses that it is the regional government that have the power to decide the existence or non-existence of this contradiction or conflict or dispute. Thus, this gives the regional government the authority to amend the federal law in those regions. In other words, that the federal laws would be subject in all cases to the decisions of regional interests whose power has supremacy over the federal government. Indeed, to address these issues in this manner is contrary to the legal logic and contrasted with the text of Article 13 which stipulates "first: this constitution is the preeminent and supreme law in Iraq and shall be binding in all parts of Iraq without exception. Second: 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" (Iraq's, 2005).

Based on the aforementioned, it can be inferred that there are many challenges popping up from the implementation of the provisions of the Iraqi constitution.

First: Granting the regional legislations sovereignty and supremacy over the federal legislations in the concurrent list in the case of conflict between the two legislations. This constitutes a blatant violation of the principle of the sovereignty and supremacy of the constitutional provisions contained in the Iraqi constitution in Article 13. This is also a breach of the rule of gradualness in the legal rulings and a deviation from the principles of federalism which are well known in many countries that adopt federalism.

Second: It is observed that the provisions of the Iraqi constitution create more cases of conflicts and inconsistencies between federal legislations on one hand and the regional legislations on the other. In addition, there can be conflict and contradiction between a regional legislation and another regional legislation in the federal system and each region would defend its laws, given the fact that each regional legislation emerged from different regions and different authorities. For example, water resources policy which is part of the power given to the regional governments should be consistent with the federal government. However, considering the above-mentioned provisions, two different regions can come up with conflicting legislations on this issue and both regions would hold that their legislations are supreme over the federal laws. Thus, another problem ensues with regards to the mechanism through the conflict between the two regions will be resolved.

Third: Sometimes there is no real conflict between two laws but federal government can oppose to a law ratified by another regional government if it perceived that the regional legislations is considered supreme to the federal laws. Such kind of conflict really happens when the federal government in Iraq objects to the oil contracts concluded by the regional government on the basis of the law it recently issued to regulate the matter (Alkadiri, 2010; Al-Qarawee, 2010).

It is discernible from the previous analysis that the provisions of the Iraqi constitution which deals with the cases of contradiction and conflict between the federal government and the regional governments, are originally contradictory with each other, because they have contributed to the many problems and challenges that prevent the implementation of federalism in Iraq. The inconsistency of the current constitutional provisions gave the regional governments the power to resolve the conflict ensued on the sharing of power in accordance with its will while the federal government has no any power/authority on it. Likewise, the regional governments have the authorities to retain, modify and cancel the federal legislations which means that there will be legislations in a part of the state that are in breach or contrary to the public legal system. Finally, the findings of the current study indicate the need to review the Iraqi constitution in order to remove all the provisions that are inconsistent with the confirmed principles of law and constitution in respect of implementation of federalism.

CONCLUSION

The implementation of federalism in Iraq is one of the options available to the Iraqi State administration after 2003 and it is contained in the State Administration Law for the transitional stage in 2004 in addition to the current Iraqi constitution for the year 2005. Thus, this study found that the constitutional provisions relating to the implementation of federalism and sharing of powers between the federal government and regional governments create many problems and divisions that prevent the implementation of federalism rightly and effectively. The constitutional provisions contributed to the allotment of the greater powers to the regional government and vague and limited power to the federal government. The constitutional provisions are a reflective of inconsistencies in the mechanism for the establishment of a federal system in Iraq by giving supremacy to the regional legislations over the federal laws. More so, the constitutional provisions give the regional government the power to modify the implementation of the federal law in the event of contradiction or conflict and dispute. All these provisions are inconsistent with all the established principles and standards which are being adopted in all

the countries that adopt federalism as their system of government. In fact, this would inevitably lead to the collapse of the implementation of federalism or create further divisions and problems within the country.

Thus, this research proposes that it is necessary to review all the constitutional provisions relating to the implementation of federalism and sharing of powers between the federal government and regional governments and formulate them in line with established principles and standards which are being adopted in all the countries that adopt federalism as their system of government. It is also necessary to emphasize the supremacy of the federal constitution and the federal legislations over all laws issued by the regional governments in Iraq and it is as well necessary to expand the scope of power of the federal government regarding all cases that have to do with state sovereignty, unity and cohesion.

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