

Federalism In Iraq: A Liberal Idea In An Illiberal Place

Abstract

The introduction of federalism in Iraq was meant to address the lingering ethnic conflict between Kurds and Arabs and prevent an imminent breakup of the country. Federalism was supposed to offer the Kurds a form of local self-determination by setting up a bulwark against the Arab policy of assimilation and other forms of discrimination. The paper presents the Iraqi brand of federalism and attempts to explain its several shortcomings by testing the argument stemming from the paper's title.

We provide enough evidence to prove that Iraqi federalism rests mainly on imposed institutions with no supportive local political traditions and culture. Acute nationalist feelings among the Kurds, a result of historically unrealized statehood, constitute an important part of the problem, too.

Introduction

The introduction of federalism in Iraq was meant to address a lingering ethnic conflict and to keep the country from an imminent breakup. Kurdish politicians accepted the USA-sponsored idea of federal division of powers and carved out a significant autonomy within the new Iraqi political system. Federalism offers Kurds a form of local self-determination by setting up a bulwark against the Arab policy of assimilation and protection against other form of discrimination. Fifteen years later, we set about to look at the Iraqi federation's main features to see whether it has been up to the expectations.

Prolific Federalism Studies

Because of its significant conflict-resolution potential, federalism and federations have been subject to inexhaustible studies covering all its possible aspects: origins (coming-together vs. holding-together), structures, size, number of constituent units, forms of government (presidential or parliamentary), symmetrical and asymmetrical, ethno-religious or administrative. Political economy and revenue sharing, fiscal federalism, party politics, and even the type of legal tradition (common law or civil law federations, let alone cooperative and coercive federalism) have been systematically examined (Tarr, 2015: 70, 80). "In its most general sense, federalism is an arrangement in which two or more self-governing communities share the same political space" (Karmis and Norman, 2005: 3) and sometimes is referred to as a 'polity of polities.' Mature federations, tested for over fifty years, prove stable vis-à-vis emergent federations still in search for the equilibrium (Watts, 2015: 26).

The stability of a federation depends on many factors that go beyond the federal institutional design. These include predisposition to democracy, acceptance of political bargaining and compromise and respect for constitutionalism and the rule of law (Watts 2015). In other words, genuine federalism is not only about the institutions, but also about shared values, moral union, and a certain sense of togetherness.

Livingston calls federalism that involves shared values 'substantive,' as opposed to 'formal' federalism based mainly on institutions: "... the essence of federalism lies not in the institutional or constitutional structure, but in the society itself" (Livingston, 1952: 84). Erk echoes this by saying, "...without a federal society ... a principle commitment to the federal spirit is difficult to sustain" (Erk, 2015: 88).

This aspect of federal studies seems to come closest to helping understand the problems the Iraqi federation faces. On one hand, the introduction of a federal system stopped violence between Kurds and Arabs, but it has not gone far enough to establish genuine collaboration and interdependence. Iraqi Kurdistan remains linked to the rest of Iraq only by a few things, the common currency printed by Baghdad in particular.

Our Argument

This brief literature review and our direct observations of the situation in place have suggested a tentative explanation for why the Iraqi federal system remains unstable. We argue that Iraqi federalism rests mainly on imposed institutions with no supportive local political traditions and culture. Acute Kurdish nationalist feelings, a result of historically unrealized statehood, constitute an important part of the problem, too. The logic behind this assumption is simple: the 2005 Iraqi constitution that introduced the federal system demonstrates a radical departure from what Iraqi people are accustomed to, as it established a parliamentary republic (formerly strong presidential), Islamic state (formerly secular) and federal system (formerly highly centralized unitary state). Ethno-federalism is overly a liberal concept that, among other things, means protection of minorities against the tyranny of the majority, a pretty alien idea in Iraq. The idealized institutional arrangement is not underpinned by indigenous Iraqi values and traditions and is rocked by Kurdish nationalism.

Ethno-federations, such as Iraq, are laden with a fundamental contradiction: on one hand, the federal system helps to address conflict animated by nationalism/sectarianism; on the other, it empowers those who are eager to break away, the phenomenon known as 'the paradox of federalism.' In the Iraqi case, the negative outcome of the paradox of federalism is heightened by strong Kurdish nationalism that formally manifests itself in: (1) the existence of a Kurdish ethnic armed militia and (2) the regional government's strong activism in the international arena. At the federal level, problems are compounded

by the incongruity of constitutional principles: a fundamental contradiction of the Iraqi constitution that established an Islamic state and at the same time contains an elaborate liberal bill of rights.

Introducing Iraq's Federation

The Constitution and the Federal Law

The relationship between the Kurds and Arabs within Iraq has ranged from violent uprisings in the 1960s to administrative autonomy in the 1970s (promised but never realized by Saddam), a bitter standoff in the 1980s that culminated in the use of chemical weapons against Kurdish civilians, to a no-fly zone in 1991, that detached Kurdistan from the rest of the country, and, finally, the current federation.

The federal constitution was adopted through a referendum in 2005, in the aftermath of a devastating war and regime change that only worsened the country's severe disunity. The Arab Sunnis, the Saddam regimes' power base, largely boycotted constitution making and the referendum, rendering even its institutional legitimacy rather questionable. Later, many constitutional omissions have become evident and have been even dubbed black holes in the constitution (The Associated Press, December 2, 2019).

Notwithstanding constitutional oversights and controversies, federalism was meant to stay, as solid safeguards were built in to protect the federal system. Thus, the constitution can be amended via a rather simple procedure, except for the provision on the federal principle; Article 126 reads that the constitution cannot be amended, "if such amendments take away the power of the regions."

The new Iraqi federal system has in its origins as much of holding-together as coming-together federalism. The previous existence of Kurdistan as an integral part of Iraq, its detachment from the country by the no-fly zone in 1991, and then subsequent reintegration with Iraq blurred the difference between the two distinct origins of federalism.

The constitution-makers consented to the creation of one federal region, but at the same time they permitted establishing other federated units in the future, offering them potential autonomy similar to that of Kurdistan. Put differently, the constitution has created a federacy, which implies asymmetrical relations, yet it allows for an extension of federalism to other regions that would make Iraq a symmetrical federation.

The procedure of forming new federal regions is outlined in the constitution and is straightforward: one or more governorates have the right to become a federal region. The constitution states however that the process should be governed by a special federal law. In accordance with this provision, the national parliament enacted in 2006 a law that details the procedures for establishing other federal regions, called 'Federalism Law.'

As the idea of federalism is contrary to the Iraqi political tradition of a highly centralized state, the enactment of the Federalism Law was surrounded by controversies and carried out amidst protests and boycotts. Some details of the adoption of the law are rather telling: the minimum threshold for the law to pass was 138 out of the 275 MPs who took part in the vote. By some accounts, undecided parliamentarians were literally dragged into the hall where the voting took place while observers and journalists were not given access to the proceedings (Visser 2008).

The Federalism Law details the procedure of establishing new federal units: a new federal region can be formed out of one or more governorates, as well as a governorate can join an already existing federal unit. The method is rather forthright but requires a referendum in the affected governorates and needs a simple majority to pass.

The idea of further federalization has been caught up in Iraqi domestic politics. In June 2011, the Sunni speaker of the Iraqi parliament said that the Sunni community might wish to seek the formation of a Sunni federal region out of the Sunni-dominated governorates in the center of the country – Salahaddin, Anbar, Nineveh and Diyala. Curiously enough, the Sunni minority had always adamantly advocated a unitary Iraq, vehemently opposed the very idea of power devolution and pursued assimilation policy towards other minorities when in power under Saddam.

As of today, the Iraqi federal system remains a federacy where Kurdistan is the only federal region, while a few rather furtive

attempts to establish new autonomies have not been seriously pursued. In other words, the federal Islamic Republic of Iraq consists of two parts: main Iraq, made of 15 administrative units called governorates, and the federal Kurdistan Region, composed of four governorates.

The Federal Government

The Iraqi constitution established a parliamentary republic, in which the federal legislative and representative branch is to comprise a Council of Representatives (lower chamber) and a Federal Council (upper, territorial chamber). The Council of Representatives shall consist of “a number of members representing the entire Iraq people” (Article 49), while the Federation Council shall “include representatives from the regions and the governorates that are not organized in a region” (Article 65). Unlike the Council of Representatives that has been formed and successfully functioning, the Federation Council remains in existence on paper only.

The federal executive consists of the President, a significantly symbolic figure under the parliamentary system, elected by a qualified majority of the Council of Representatives, and the cabinet, formed by the majority block in the parliament. The term in office of both the president and the prime minister ends with the expiration of the Council of Representatives mandate.

The constitution accords an outstanding role to the Iraqi judiciary, which is rather unusual in a parliamentary system characterized by what constitutional scholars call ‘parliamentary supremacy.’ The Constitution endows the Supreme Court with exceptional judicial review powers. It is tasked to oversee the constitutionality of laws and regulations in effect, in other words, US-style judicial review after enactment. It also settles disputes between the federal government and those of the regions and governorates. Given the strong review power of the Iraqi Supreme Court, and the contradictory obligations under a constitution that proclaims both Islam and democracy as the foundation for legislation, the Supreme Court has been keeping a low profile to avoid issues arising from these contradictions, including federal relations.^[1]

Non-Implementation of Important Constitutional Provisions

Fifteen years after the enactment of the constitution, its several provisions have not been implemented. The most important unimplemented provision relevant to our discussion is spelled out in Article 48, “The federal legislative power shall consist of the Council of Representatives and the Federation Council,” and Article 65 reads:

A legislative council shall be established named the “Federation Council,” to include representatives from the regions and the governorates that are not organized in a region.

As of January of 2020, the federal chamber has not been established, leaving the federal relationship largely unmediated. No wonder that quite often the central government in Baghdad selectively applies certain constitutional requirements, as does the KRG in Erbil.

A big blow to Iraqi constitutionalism has been dealt by the non-implementation of Article 140, which requires the resolution of the thorny issue of disputed territories, Kirkuk in particular.^[2] The Constitution obliges the federal government to conduct a referendum in the disputed territories and implement its results by a specific date, December 31, 2007. The non-execution of this high-profile constitutional provision keeps protracted tensions lingering and sends a negative message to all Iraqis that the constitution may be simply ignored.

The Absence of Kurdistan’s Written Constitution

The absence of the Kurdistan Region’s own constitution after fifteen years of existence within the federal Iraq can be also considered a non-implementation of the federal constitution, whose Article 120 reads:

Each region shall adopt a constitution of its own that defines the structure of powers of the region, its authorities, and the mechanisms for exercising such authorities, provided that it does not contradict this Constitution.

Politics within the Kurdistan Region is less formally regulated than at the national level, as the Region does not have an enacted constitution. In a sense, the current political system in Kurdistan holds on gentlemen agreements, treaties between

political parties, legislative acts, executive orders and cabinet edicts.

The absence of a written constitution may be quite convenient for Kurdistan, as its political players are relieved of constitutional responsibilities when they make certain decisions, including initiatives regarding the Kurdish ethnic security forces, independent foreign policy and revenue sharing. This circumstance also allows the KRG not to fear sanctions under Article 13 of the federal constitution:

Any text in any regional constitutions or any other legal text that contradicts this Constitution shall be considered void.

No regional constitution means no possible formal breaches of the federal constitution except the non-existence is already a violation.

Power-sharing and Mechanisms of Mediation

Two parts of the Iraqi constitution specify the respective jurisdictions of each level of government and areas where they share powers – Section Four: Powers of the Federal Government, and Section Five: Powers of the Regions. The exclusive authorities of the federal government are stated in one article, Article 110, and they are as follows:

Formulating foreign policy and diplomatic representation, negotiating, signing and ratifying international treaties and agreements

Formulating and executing national security policy, including establishing and managing armed forces

Fiscal and customs policy, currency and monetary policy, regulating of commercial policy across regions

Regulating issues of citizenship

The management of oil and gas is also specified in Section Four: Powers of the Federal Government, but not as its exclusive powers. The wording of some provisions is imprecise and ambiguous; as a result of the vague wording of these provisions, Erbil and Baghdad significantly disagree over many issues, for example, which level of government can sign contracts with oil companies and how the revenues shall be ultimately used.

In 2017 the Kurdish Peshmerga defeated ISIS in Northern Iraq, liberated Kirkuk and its oil-rich fields and established regional authority in defiance of the federal government. When Erbil held an independence referendum right after the acquisition of Kirkuk, a move unanimously disproved by the international community, Baghdad sent troops to Kirkuk 'to re-establish constitutional order' and freed the disputed areas held by the Peshmerga, leaving some 70 casualties on the Kurdish side.

[3] This conflict constituted a major set-back for Kurdish plans for their own homeland. As a result, the KRG had to make a pledge in writing not to secede from Iraq. What is more, Erbil lost about 40 per cent of its land, including the Kirkuk oilfields, a significant source of revenue. As luck would have it, the ill-fated referendum and the ensuing actions by the central government have strengthened the Iraqi federal system. The KRG now is more dependent on the budget from the federal government and becomes more conciliatory in its relations with Baghdad.

Discussion and Conclusion

In this paper, we set about to present the Iraqi brand of federalism and attempt to explain why translating federalism from a liberal idea to a functioning federal system has been rather difficult. The Iraqi federation resulted from a foreign-assisted democratization that brought a sea change into the country's political system. We argue that the federal Iraqi system rests mainly on an imposed institutional setup with no supportive local political traditions and culture. Acute Kurdish nationalist feelings, a result of historically unrealized statehood, is also an important part of the problem; it manifests itself in the KRG's actions, ranging from maintaining a strong ethnic army, to conducting independent foreign policy and obstructing revenue sharing.

In addition to an unreceptive political culture, even the institutions designed to regulate the federal relationship are not in place or do not function properly. The only umpire of federal relations, the Federal Supreme Court, is, in a sense, incapacitated by the overly contradictory constitutional principles of Islam and liberal democracy. It remains to be seen how

the application of Western constitutionalism to Iraq, in which Islamic norms and discourse are dominant, will turn out in the long run.

The curse of oil is brought to bear on Iraqi federalism quite hard. Disputes over revenue sharing between Baghdad and Erbil seem irreconcilable. The KRG actively develops and explores natural resources available in the region. In the absence of an unambiguous legal framework for resource sharing, every new contract that the KRG signs with an international company causes nervousness and unease in Baghdad. The federalization of natural resources remains one of the toughest areas of the federal relationship.

Having said that, we admit that in the absence of interjurisdictional synergy within the Iraqi federation, the coalescence of interest of federal and regional ministries, global oil companies, and neighboring countries is likely to keep the current federal system in place. The only real danger to the survival of the Iraqi federal system could be some dramatic changes in the Middle East

[1] For more detail, see my chapter 'Combining Islam and Democracy in a Federal Constitutional System' (Danilovich, 2014).

[2] Kurds claim that as a result of the Arabization campaign in the 1960-70s the ethnic balance in Northern Iraq had been tilted in favor of Arabs.

[3] An independence referendum was held on 25 September 2017; 93 per cent of votes favoured independence.

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