



Supporting a functional federation in Iraq

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Introduction

In August 2014, after ISIS announced a caliphate over territory it controlled in Syria and Iraq, the international community were galvanised into a military response. Yet, little has been done to address the power vacuums and disaffection that allowed ISIS to establish such a large footprint. In Iraq, the central government continues to ignore its constitutional obligations to all Iraqis, and lacks the political will to implement many articles in the 2005 constitution. To defeat ISIS and save Iraq, it is crucial the international community support the implementation of the Iraqi constitution.

The Iraqi constitution outlines a federal system of government. Broadly speaking, federalism means a vertical division of political-economic power. Beyond this, there is little agreement on what defines federalism. Of 195 countries, 25 are federations, including Australia, Belgium, Brazil, Canada, Germany, India, Indonesia, Nigeria, Russia, South Africa, Spain, UAE and USA. Many more countries have devolved power to regional governments since the 1950s, including China, while some federations have broken into independent countries, as has the former Czechoslovakia, USSR and Yugoslavia (Erk and Swenden, 2010). Among current federations there is a continuum of how power is distributed between levels of government. Whatever form it takes, federalism has proved useful in accommodating diverse regions and ethnic groups, and is a solution for undemocratic and/or ineffective central governments (Erk and Swenden, 2010; Kelly 2009).

Federal constitution of Iraq (2005)

In 2005, a new constitution of Iraq was approved by 78.59% of voters. In a country of about 35 million people (2015) consisting of an estimated 75% Arab; 17-20% Kurd; 5% Turkmen and 2% Assyrian, and religiously, 70-75% Shia, 22-27% Sunni, and others (e.g. Christian, Jewish, Mandaean, Yezidi, Zoroastrian etc.), a majority of Iraqis voted for a federal structure that recognised diverse ethnic and religious affiliations. Only in the Sunni provinces of Anbar and Salah al-din did a majority vote against a constitution that stipulated a federal system of government.

The constitution contains vague language (e.g. Article 7 is unclear about what defines a 'terrorist' and Article 112 is unclear about a region's right to exploit its natural resources) and anomalies (e.g. Article 2 states that the source of all legislation should be Islam, the principles of democracy and the principles of liberty, which may not be compatible). Jawad (2013) concludes that 60 out of 144 articles need clarification.

In 2005, only the Kurds demanded their federal rights to administer a semi-autonomous region. The central government agreed for the Kurdistan Regional Government (KRG) to have jurisdiction over the provinces of Dohuk, Erbil and Sulaimani. Other territory to which the KRG lays claim are disputed territories.

Outside the three provinces of the Kurdistan Region of Iraq, another 15 provinces have provincial governments beholden to the central Government of Iraq (GoI). As a result of the sectarianism and neglect of the GoI, since 2011, nine of these 15 provinces, including four Shia provinces, have declared an interest in, or have officially applied to become a semi-autonomous region. See Table 1. The GoI has failed to process any application, partly because it has not enacted the required procedures, but also because it fears that if other regions gain the level of autonomy negotiated by the Kurds, the GoI would be limited in power and resources.

Table 1. Iraqi Provinces wishing to adopt a federal system of government (2015)

Governate	Total area km2	Estimated Pop. (2011)	Capital	Religion	Federal Status
Dohuk	6,553	1,128,700	Dohuk	Sunni	Kurdistan Region
Erbil	15,074	1,612,700	Erbil	Sunni	Kurdistan Region
Sulaimani	17,023	1,878,800	Sulaimani	Sunni	Kurdistan Region
Kirkuk	9,679	1,395,600	Kirkuk	Sunni Kurd/Arab	Disputed territory; Disputed status: Some want to join Kurdistan; some want special status/autonomy.
Diyala	17,685	1,443,200	Baqubah	Sunni Kurd/Arab	Some disputed territory. Voted to be a region in 2011
Nineveh	37,323	3,270,400	Mosul	Sunni Kurd/Arab	Some disputed territory. Interested in autonomy since 2012
Salahaddin	24,751	1,408,200	Tikrit	Sunni	Interested in autonomy since 2012
Al Anbar	138,501	1,561,400	Ramadi	Sunni	Interested in autonomy since 2012
Baghdad	4,555	7,055,200	Baghdad	Shia/Sunni	Capital
Kerbala	5,034	1,066,600	Kerbala	Shia/Sunni	
Najaf	28,824	1,285,500	Najaf	Shia/Sunni	
Muthanna	51,740	719,100	Samawah	Shia/Sunni	
Maysan	16,072	971,400	Amarah	Shia	Interested in autonomy since 2012.
Digbar	12,900	1,836,200	Nasiriyah	Shia	Interested in autonomy since 2012.
Qadisyah/ Diwaniyah	8,153	1,134,300	Diwaniyah	Shia	
Babylonia	5,119	1,820,700	Hillah	Shia	
Wasit	17,153	1,210,600	Al Kut	Shia	Official application to become a region
Basra	19,070	2,532,000	Basra	Shia	Official application to become a region

Key issues related to Iraq becoming a functioning federation

For Iraq to become a functioning federation many articles in the constitution need to be enacted or clarified. This section outlines the main ones.

Status of Armed Forces

In 2014-2015, the Iraqi armed forces failed to confront ISIS in Mosul and Ramadi despite these forces having received extensive training and equipment. There are many reasons for the failure, but contributing factors include that the army is not representative of the Iraqi population and its commanders are not selected on merit independent of political affiliations, as stipulated in Article 9(A). This leads to poor commanders and low morale among the troops.

Since June 2014, about 30 Shia militias have been formed outside the Iraqi Security Forces despite Article 9(B) prohibiting the formation of militias outside the armed forces. At least three major militias (the Badre Brigade, the League of the Sons of the Righteous, and (Iraqi) Hezbollah) are outside the control of the Iraqi Ministry of Defence. These militias are funded and trained by Iran, and are paid regularly, receive adequate weapons, advice and command. After a number of military successes, they seek to increase their political influence.

Under the governments of Prime Minister Maliki and Prime Minister Al Abadi, patronage (i.e. the purchase of rank) and Article 61(5C) have prevented the formation of an inclusive, merit-based army independent of political interests. Article 61(5C) states that it is the responsibility of the elected Council of Representatives based on recommendations from the Council of Ministers to select all armed service ranks from division commander and above. In the sectarian politics of Iraq, Article 61(5C) has resulted in a dominance of politically connected Shia commanders and the exclusion of other more experienced commanders. The exclusion of Sunnis from the national armed forces, and the Sunnis' fear of Shia militias, has led some Sunnis to accept ISIS control in Nineveh, Salah al-din and Anbar. For a merit-based army that reflects Iraq's diverse peoples, the application of Article 61 (5C) needs to be based on transparent criteria in accordance with Article 9(A). The purchase of rank must be prohibited. There needs to be an avenue of redress if selection does not follow due process and Article 9(B) needs to be enforced. If these issues are not addressed no amount of equipment or training will turn the Iraqi Security Forces into an effective fighting force.

Federation Council

Article 48 of the constitution places all federal legislative power in (1) Council of Representatives and (2) Federation Council. Article 65 outlines the formation of the Federation Council from regional and provincial representatives but Article 65 has not been enacted and the Federal Council has not been formed, leaving Iraq with a unicameral system without a legislative review process.

Article 105 states that an independent public commission for guaranteeing the rights of regions and governorates, comprising representatives from the central government, region/s and provinces, needs to be formed. Article 105 has yet to be enacted.

As a result of these inactions, the only way to review legislation or resolve disputes between the GoI and a regional or provincial government is through the Federal Supreme Court (Article 93). Hence, Articles 65 and 105 are in need of enactment for Iraq to become a functioning federation.

Independence of commissions

Articles 102 – 108 relate to establishing an independent Central Bank of Iraq and various commissions. Article 61(E) states that a majority in the Council of Representatives can remove heads of independent commissions, without defining the grounds for removal. These grounds for removal need clarification and due process needs to be guaranteed.

Right to become a semi-autonomous region

Article 119 states that one or more provinces can apply to become a region by either one tenth of all eligible voters showing support for the idea, or one third of all provincial council members submitting the request. Article 118 states the Council of Representatives must enact executive procedures for processing an application within six months of its first session. Article 118 has not been enacted. There is an urgent need to enact executive procedures so applications can be processed.

Revenue distribution

Article 62(1) states that the Council of Ministers is responsible for drafting and submitting the general budget bill for approval by the Council of Representatives. Article 61(2) states that the Council of Representatives can make amendments to budget allocations for a region or governorate, without specifying under what conditions. Article 61(2) needs clarification, procedure and means of redress.

Articles 17 to 20 of Iraq's 2009 Budget Law outlines the process of revenue sharing, which stipulates that the KRG be allocated 17% of Iraq's annual national revenue, after sovereign expenses are taken out. Other provinces are allocated a portion of revenue dependent on population percentages and specific needs. The 2009 Budget Law states that revenue allocations need to be revisited after a national census. No national census has taken place (Blanchard, 2010).

The Kurdistan Region of Iraq, the disputed territories and many provinces, including Shia dominated Basra, which produces 85% of Iraq's oil, are not receiving their correct national revenue allocation. Taking the Kurdistan Region as an example, before January 2014, the KRG claimed it did not receive its full allocation and compensations. Between January and December 2014, the KRG did not receive any revenue from the central government. This revenue remains unpaid. Following an agreement in December 2014, the KRG received four part payments (each less than half the estimated amount for one month) in return for exporting 550,000 barrels of oil a day through a KRG built pipeline to Ceyhan in Turkey, despite the population of Kurdistan swelling by 28% due to an influx of Syrian refugees and 46% of Iraq's 3.5 million internally displaced people (IDP) (Karasapan and Kulaksiz, 2015). The agreement was not fulfilled to the satisfaction of either party, and the KRG has been independently exporting oil since June 2015. To avoid political and military disputes

that impact the population of the Kurdistan region and disputed territories, there are two options that are not mutually exclusive. The first is for the GoI to pay the KRG its allocated revenue as well as an increase in revenue to compensate for the dramatic increase in the population, providing the KRG is transparent about oil exports and revenue and fulfils its obligations according the constitution. The second option is to grant the KRG economic autonomy provided it complies with these conditions.

Overall, there is a need to develop formulas for revenue sharing based on a national census and need, so the process is not subject to political interests (Blanchard 2010). Tied to this issue the need to clarify the right to exploit natural resources and how the revenues from this exploitation are to be distributed.

Exploitation of natural resources in a region or province

Article 111 states that the people of Iraq own Iraq's gas and oil. However, the management of oil and gas is not an exclusive power of the GoI. Article 112(1) states 'The federal government, with the producing governorates and regional governments, shall undertake the management of oil and gas extracted from present fields, provided that it distributes its revenues in a fair manner in proportion to the population distribution in all parts of the country ...'. Article 112 (2) goes on to say that both levels of government will 'together formulate the necessary strategic policies to develop the oil and gas wealth in a way that achieves the highest benefit to the Iraqi people'.

Article 112 contains a number of ambiguities. Firstly, it is unclear what should occur if the GoI fails to fairly distribute revenue. Secondly, the term 'present fields' could refer to operating fields (20 at the time) or known fields (80 at the time, i.e. 2005-2006) (Donovan, 2011). Similarly the meaning of 'management' of future fields is unclear, while there is no agreement on how the wealth from new fields is to be distributed.

Donovan (2011) argues in support of the KRG and provincial governments having the right to exploit new fields, based on the aforementioned Article 112; Article 110 (exploitation of oil and gas not being an exclusive power of the central government); and that all powers not exclusive to the central government belong to the regional or provincial governments (Article 115), and that a region has the right to amend the application of national legislation (Article 121). In practice, the KRG has been more efficient in exploiting new fields than has the central government (Kelly, 2009), having signed production and risk sharing contracts with more than 35 oil companies since 2005 (Donovan, 2011). However, the right for the KRG to exploit new oil and gas fields is disputed by the GoI, although its policy has fluctuated. For instance, the GoI allowed Kurdistan to sell oil in 2010-2011 (Donovan, 2011), but in 2014, it thwarted international sales and deliveries from Kurdistan, arguing that they were illegal, and that all oil and gas must be sold through the Iraq Ministry of Oil. Kelly (2009, p. 756-759) outlines arguments for and against the right of a region or province to manage new fields. His arguments in support of this right are in line with Donovan's (2011). Arguments to the contrary include reference to how the constitution was negotiated, Article 111 being the framework for all other relevant

articles, and the need for clarifying legislation.

Hence, there is an urgent need to clarify the constitutional rights of regions and provinces to manage new oil and gas fields and how revenue from these fields is to be distributed. Considerations include Article 111, which says oil and gas belongs to all the people of Iraq; there is a lack of oil or gas resources in Sunni Arab provinces (Blanchard, 2010); and the GoI's failure to allocate revenue to the KRG, disputed territories such as Kirkuk and other provincial governments. Kelly (2009) suggests Canada's constitutional framework may provide a way forward.

Status of disputed territories

Article 140 relates to the status of disputed territories to which the KRG lays claim. The article specifies that their status is to be decided by a census and a referendum by 31 December 2007. The GoI has taken no action to resolve the status of these territories. The disputed territories are the province of Kirkuk; six districts and three subdistricts in Nineveh (Akra, Shekhan, Shingal/Sinjar, Tal Afar, Telkeif and Qaradash districts and the subdistricts of Zumar, Bashida and Aski Kalal); two districts in Diyala (Khanakin and Mandali); one district and a subdistrict in Wasit (Badra and Jassan) (Kelly, 2009, p.774) and one district in Salah al-din (Tooz) (Kurdistan Development Organisation, 2008).

Article 143 states that Article 53(A) and Article 58 in the Transitional Administrative Law (TAL) must be enforced. TAL Article 53 (A) states, 'The Kurdistan Regional Government is recognized as the official government of the territories that were administered by that government on 19 March 2003 in the governorates of Dohuk, Erbil, Sulaimaniya, Kirkuk, Diyala and Nineveh'. Article 58 relates to restoring property and opportunities to Kirkuk residents expelled from Kirkuk as a result of the Arabisation policies of the Baathist Regime (1963-2003); conducting an accurate census and resolving which government should have jurisdiction over Kirkuk.

In 2009, Kirkuk city had a mixed population of about 52% Kurds, 35% Arabs, 12% Turkmen and 12,000 Christians. The UN offered four recommendations to resolve the status of Kirkuk (two proposing a single entity, a third creating an autonomous region run by Kurds, Arabs and Turkmen, and a fourth creating a special region run by the KRG and GoI, delaying a final decision for five years). KRG President, Massoud Barzani, rejected these alternatives (Kelly, 2009). Kelly (2009) proposed another solution involving two conditions for the KRG to gain jurisdiction over Kirkuk. Firstly, the KRG should guarantee Arab, Turkmen, Armenian and Christian political representation in Kirkuk. This is likely given the Kirkuk Provincial Council and district and subdistrict governments already include multi-ethnic representation. Secondly, the KRG could allow the central government to manage Kirkuk's oil for a period of 10 to 12 years. This is unlikely given the impasse over revenue distribution, and Kirkuk not receiving a fair share of its oil.

Article 140 also stipulates that disputed land claims in the disputed territories must be resolved. This has not occurred leaving communities to informally negotiate disputes and returning people having no registered land title.

Since June 2014, Kurdish peshmerga have defended the Kurdistan Region and the disputed territories from ISIS attack. Given the potential for future military conflict over the disputed territories, the status of these territories and land claims need to be resolved as soon as possible.

Division of powers between levels of government

To prevent frequent disputes between levels of government, the federal constitution needs clarifying legislation to delineate the division of powers. Article 114 outlines shared powers, but legislation is required to define roles and responsibilities. Article 115 states that powers not exclusive to the central government belong to the regional or provincial governments and Article 123 states that the central government can delegate any power to a provincial government, and visa versa. However, between and within articles there are contradictions and ambiguities.

The federal constitution of Iraq gives the central government exclusive powers to:

1. Manage a national armed force (Articles 9 and 110);
2. Manage foreign policy, international treaties, debt, economic and trade policies (Articles 9, 61, 110);
3. Decide the national flag, anthem, emblem of Iraq and public holidays (Article 12);
4. Regulate citizenship, naturalisation, residency and political asylum (Articles 18 and 110);
5. Ensure the independence of the judiciary, the right to personal justice and protection and other liberties, including the right to own private property anywhere in Iraq (Articles 19, 20, 22, 23, 30, 37-46);
6. Guarantee freedom of movement throughout Iraq for manpower, goods and capital (Article 24);
7. Impose taxes (Article 29);
8. Declare war or a state of emergency (Article 61);
9. Formulate fiscal and customs policy, currency, commercial policy, the national budget, monetary policy, and establish and manage a central bank (Articles 110 and 61);
10. Regulate standards, weights and measures (Article 110);
11. Regulate broadcast frequencies and mail (Article 110);
12. Gather and hold population statistics through census (Article 110);
13. Enact procedures to process applications to form regions (Article 118);
14. Propose constitutional amendments (by the president, Council of Ministers or one fifth of the Council of Representatives), providing that no amendment takes away the powers of any region (Article 126).

In urgent need of clarification are the powers shared by the central government and regional/provincial governments. These are:

1. Encourage investment (Articles 26 and 121);
2. Manage public health care, and allow private health care (Articles 31 and 114);
3. Protect the environment (Article 33 and 114);

4. Ensure access to free public education; allow private educational institutions; and encourage scientific research (Articles 34 and 114);
5. Promote cultural activities and institutions; and manage antiquities (Articles 35 and 113);
6. Manage the exploitation and distribution of oil and gas, and the wealth from oil and gas (Article 112).
7. Manage customs (Article 114);
8. Regulate and distribute electricity (Article 114);
9. Devise planning policies (Article 114);
10. Manage water resources, guaranteeing the rate of flow within Iraq (Articles 110 and 114).

The federal constitution of Iraq gives the following powers to a region but not a governorate:

1. Adopt a constitution and define the structure of powers, authorities and mechanisms (Article 120);
2. Exercise executive, legislative and judicial powers and the right to amend the application of national legislation within the region providing the amendment does not contradict the national constitution (Article 120 and 121);
3. Manage its own internal security forces, including police, security forces and guards (Article 121).
4. In the Kurdistan region, as Kurdish is one of two official languages, Kurdish can be used in any official domain of government, courts and publications, passports, stamps and bank notes (Article 4). These powers have led to the KRG to issue visas for the KRI. Not enacted is the right to use Kurdish banknotes.

The constitution of Iraq gives the following powers to regional and provincial governments over and above the shared powers outlined in Articles 112-114:

1. Nominate and decide by referendum an official language other than Arabic or Kurdish (Article 4).
2. Make an official application to become an autonomous region (Article 119);
3. Discharge duties and responsibilities in the use of allocated revenue (Article 121).
4. Establish offices in embassies and diplomatic missions to follow cultural, social and developmental affairs (Article 121).

It is critical for the central government, region/s and provinces to agree on power and resource sharing arrangements. The establishment of a Federation Council and independent commission would help in these matters.

The nature of Iraqi Federalism

As nine out of 15 provinces in Iraq have made official applications, or have expressed interest in becoming a region, it is important to analyse the form of a future functioning federal system of Iraq. The constitution allows for a highly devolved federal structure, as found in Belgium, Spain and Canada. This highly devolved structure is highlighted in articles related to regional and provincial legislative

powers; the right to have international representation and for a region to have its own security forces.

Regional legislative powers

In matters outside the exclusive powers of the Gol, four articles give considerable legislative power to provinces and/or regions. Article 115 enables regions and provinces to pass legislation and gives priority to this legislation in any dispute with the central government. Articles 121 and 126 give even more powers to a regional government. Article 121(2) states that a regional government can amend national legislation and Article 141 validates legislation (including contracts) passed by the KRG since 1992. Article 126(4) states that the constitution cannot be amended if the amendment takes away the powers of any region.

International representation

Article 121(4) allows regions and governorates to establish international diplomatic missions for cultural, social and developmental affairs. While Foreign Affairs and the development and ratification of international treaties are the exclusive domain of the central government, Article 121 (4) has enabled the KRG to establish offices in different countries and actively pursue international relations.

Security forces

Article 121(5) states a regional government is responsible for establishing and managing internal security forces, police and guards. The KRG does so. In 2009, Iraqi legislation clarified that the 'Armed Forces of the Kurdistan Region' are part of the Iraqi armed forces. The status of these peshmerga continues to be a matter of dispute between the KRG and Gol (Smith, Lunn and Page, 2014). This dispute needs to be resolved as it has legal and financial implications, the former in terms of fighting ISIS outside the Kurdistan Region, and the latter in terms of who pays for the salaries, training and equipment of Kurdish peshmerga. A related matter is the need for all peshmerga to come under the jurisdiction of the KRG Ministry of Peshmerga, without destroying its highly effective horizontal command structure, given that only about one third of all peshmerga currently come under the ministry's jurisdiction.

Given the precedent set by the Kurdistan Region, others wishing to become a region are also likely to want their own security forces. This would give Sunnis incentive to fight ISIS and maintain peace after ISIS is defeated. If the formation of militias outside the jurisdiction of the appropriate Iraqi authorities is prohibited, the formation of regional security forces would not necessarily increase the proportion of the population under arms. However, the status of these regional security forces in relation to defending Iraq outside the region or province would need clarification.

Steps to form a functioning federation of Iraq.

A White House press statement on 11 June 2015 expressed US support for a functioning federation in Iraq. For this to occur, the central government needs to be given incentives to co-operate with the KRG and provincial governments to address federal issues. The following steps are suggested.

1. Political milestones in the development of a functioning federal system for Iraq could be tied to loans and investment (e.g. by IMF and World Bank).
2. An international conference to discuss approaches in resolving the ambiguous, contradictory and neglected articles within the 2005 constitution, as outlined in this document, with international expertise providing case studies on how other federations have addressed issues. Following presentations, representatives of the GoI, regional and provincial governments and other organisations could workshop the relevant articles and present workshop outcomes to conference delegates.
3. Workshop outcomes to be taken by representatives for discussion with constituents.
4. Before or after (2) and (3) a Federation Council (Article 65), and a public commission for resolving disputes (Article 105) need to be established.
5. A second international conference would allow central, regional and provincial representatives (from the Federation Council?) to workshop common ground, matters for bargaining and solutions, and report back to the conference.
6. The Federation Council could then work through outstanding challenges.
7. The Council of Representatives and Federation Council need to pass legislation and enact procedures within specified time frames linked to international loans and investment.

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