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**Collaborative Federalism -**  
**An Alternative Model for Solving Oil and Gas Disputes**  
**In Iraq**

**By**

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**Thesis Submitted for the Degree of Doctor of Philosophy**

**University of Sussex**

**School of Law, Politics and Sociology**

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## **Declaration**

I hereby declare that this thesis has not been submitted, either in the same or different form, to this or any other University for a degree and work produced here is my own except stated otherwise.

Signed : .....

**Najmadeen Rashid Khorsheed**

Date: .....

## **Acknowledgments**

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apologize to – my lovely children Bilind and Bahasht for not giving them enough time because of this study.

## **Dedication**

This thesis is dedicated to my Father who died and did not see this day; a man who did not have the opportunity to study, but who encouraged me to stay in school. To my kind mother, who misses me all the time. To my beloved wife, Hero Abdullah, who accompanied me on this journey in all circumstances. Despite her difficult health conditions, she has endured all the suffering she has experienced in exile. To my lovely children (Bahasht and Bilind) who fill my life with joy and happiness. My Dear Father, Mother, my beloved wife and my kids, after all you have done for me, the least that I can do for you is dedicate this thesis to you.

## **List of Abbreviations**

APC- Annual Premiers Conference  
CCME- Canadian Council of Ministers of Environment  
CF - Collaborative Federalism  
CHST- Canada Health and Social Transfer  
CoF- Council of Federation  
CoR- Council of Representatives  
CPA- Coalition Provisional Authority  
FC- Federal Council  
FG- Federal Government  
FMC- First Ministers Conference  
FOGC- Federal Oil and Gas Council  
FSC- Federal Supreme Court  
GNOR Governorates not Organized in a Region  
IGC- Iraqi Governing Council  
IGR- Intergovernmental Relationship  
IKP- Iraqi Kurdistan Parliament  
INC- Iraqi National Council  
INOC- Iraq National Oil Company  
IOCs- International Oil Companies  
IPC- Iraq Petroleum Company  
ISCI- Iraqi Islamic Supreme Council  
KDP- Kurdistan Democratic Party  
KRG- Kurdistan Regional Government  
MoNR- Ministry of Natural Resource  
MoO- Ministry of Oil  
NEP- National Energy Program  
NNOC- Nigerian National Oil Corporation  
NNPC- Nigerian National Petroleum Corporation  
NR - Natural Resource  
PSC- Production-Sharing Contracts  
PUK- Patriotic Union of Kurdistan  
RC- Resource Control

SG- Subnational Governments  
SOMO- State Oil Marketing Organization  
TAL- Transitional Administrative Law  
TPC Turkish Petroleum Company  
TSC- Technical Service Contracts  
WPC- Western Premiers' Conference



## **Abstract**

Since adopting federalism as a new model of governance in the current Constitution of 2005, the distribution of power and wealth has become one of the most contentious issues between the major groups in Iraq; the Sunni Arabs, the Shiite Arabs and the Kurds. Federalism has caused major conflicts between the FG (Federal Government) and the KRG (Kurdistan Regional Government) over the management of oil and gas. Who owns oil and gas in Iraq? Which levels of government are entitled to enter into negotiations with IOCs (international oil companies) and conclude contracts with them in all matters related to oil and gas? Are the SGs (sub-national governments) entitled to export oil and gas in their region or governorates? All these questions have provoked significant disputes between the FG and KRG.

This thesis aims to clarify the nature of the federal dimension to disputes over oil and gas management in Iraq and their possible solution by adopting Elazar's theory of collaborative federalism. After presenting the main elements of Elazar's theory and conceptualization of collaborative federalism as a core pillar of this research, the study delves into an analysis of the constitutional and legal basis of the federal system in Iraq, as well as its social and political dimensions, with a particular focus on how it treats the management of oil and gas resources. The originality of this thesis lies in the fact that it is the first study to link comprehensively the Iraqi federal model to collaborative theory and to suggest that collaborative theory could be a mechanism for resolving internal disputes around the management of oil and gas and for achieving common constitutional and policy aims relating to natural resources within the Iraqi federation.

The thesis comprises an in-depth analysis of the Iraqi case using a comparative analysis. The structure of the Iraqi federation according to the Constitution of 2005 and the constitutional provisions regulating the relationship between the federal authorities and all sub-national government authorities suggest the need to adopt an approach based on negotiation, cooperation and compromise among all the governments (national and sub-national) within the federation. Therefore, in order to identify lessons for the Iraqi case (in terms of both successful and failed models of federalism) both the Canadian and Nigerian federations are examined and compared/contrasted with the Iraqi system. It is concluded that, while Canada and Nigeria offer valuable lessons in how to (and sometimes how not to) achieve a suitable federalist response to the management of

natural resources in a State, there is much that can be learnt from a collaborative federalist perspective to facilitate better negotiation, greater cooperation and eventual compromise between all parties involved. While recognising the extreme particularity and sensitiveness of the political situation in Iraq, it is suggested that the development of a legal framework and legal discourse around collaboration within the realm of federal relations may enable greater clarity, fairness and ultimately legitimacy in the distribution of oil and gas resources and revenue in Iraq.

# Table of Contents

Declaration.....	i
<b>Dedication</b> .....	iv
List of Abbreviations .....	v
Abstract.....	vii
Table of Contents.....	ix
Chapter One.....	1
Introduction .....	1
1.1    Background and Context.....	1
1.2    Research Questions .....	6
1.3    Theoretical Framework.....	10
1.4    Methodology.....	13
1.5    The Significance of the Study.....	23
1.6    Structure of the Thesis.....	24
2    Chapter Two: Theoretical Foundation of Collaborative Federalism.....	27
2.1    Introduction .....	27
2.2    Conceptions of Covenant.....	28
2.3    Elazar’s Theory of Federalism .....	31
2.3.1    General Review .....	31
2.3.2    Origins of Models of Polity.....	37
2.3.3    Decentralization and Non-centralization .....	38
2.4    Collaborative Federalism (CF).....	41
2.4.1    Conceptualisation of Collaborative Federalism .....	41
2.4.2    Assumptions of Elazar’s Theory of Collaborative Federalism .....	45
2.5    The Rationale for Collaborative Federalism.....	48
2.6    Limitations of collaborative federalism .....	52
2.7    Natural Resources Management in Collaborative Federalism .....	55
2.8    Conclusion.....	60
3    Chapter Three: The Constitutional Foundations of Federalism in Iraq .....	61
3.1    Introduction .....	61
3.2    General Background on Iraqi Legal System .....	61
3.3    Development of Federalism and decentralization after 2003.....	71
3.4    Federalism in the Iraqi Constitution .....	73
3.5    The Constitutional Institutions of the Iraqi Federation .....	74
3.6    Distribution of Powers in Iraqi Federalism .....	82
3.7    The Constitutional and Legal Framework of the Sub-National units.....	88

3.8	Evaluation of the Constitution, the Federal and the Decentralized Model Conclusion	93
3.9	Conclusion.....	95
4	Chapter Four: The Attitude of Political, Religious and Ethnic Groups towards Federalism in Iraq	97
4.1	Introduction .....	97
4.2	The Kurds and Federalism in Iraq .....	100
4.3	The Shiites and Federalism in Iraq .....	102
4.3.1	Advocates of federalism .....	103
4.3.2	Opponents of federalism .....	106
4.4	The Sunnis and Federalism in Iraq .....	111
4.4.1	Opponents of federalism .....	112
4.4.2	Advocates of federalism .....	115
4.5	Concluding Remarks on the Challenges of Attitude towards Federalism in Iraq .....	120
5	Chapter Five: Constitutional Context of Oil and Gas Management in Iraq .....	123
5.1	Introduction .....	123
5.2	General Background.....	123
5.3	Constitutional Provisions for Oil and Gas Management up to 2005 .....	125
5.4	Constitutional Provisions for Oil and Gas Management in the Current Constitution of 2005.	130
5.5	Constitutional Interpretations of Oil Management .....	132
5.6	Understanding the FG and KRG Interpretations of Articles 111 and 112.....	133
5.6.1	The KRG and FG's Interpretation of Article 111.....	133
5.6.2	The KRG and FG's Interpretation of Article 112.....	137
5.7	Practical Issues of the Disputes.....	144
5.7.1	The Federal Oil and Gas Law .....	144
5.7.2	KRG's Oil Law.....	148
5.7.3	Oil Contracts.....	151
5.7.4	Other Practical Disputes .....	162
5.8	Consequences of the Disputes.....	164
5.9	Conclusion.....	167
6	Chapter Six: The Constitutional Context of Oil and Gas Management in Canadian and Nigerian federalism.....	169
6.1	Introduction .....	169
6.2	Constitutional Context of Oil and Gas Management in Canadian Federation .....	169
6.2.1	Historical background of Canadian Federalism .....	170
6.2.2	The Evolution of Intergovernmental Relations in Canadian Federalism .....	171

6.2.3	The evolution of intergovernmental relations with regard to oil and gas management in Canada .....	180
6.2.4	Financial relations within Canadian federalism .....	189
6.3	Constitutional Context of Oil and Gas Management in Nigerian Federation .....	190
6.3.1	Historical Background of Nigerian Federalism .....	191
6.3.2	The Evolution of Intergovernmental Relations in Nigerian Federalism .....	192
6.3.3	The evolution of Intergovernmental relations (IGR) with regard to oil and gas management in Nigeria .....	195
6.3.4	The Fiscal Federalism in Nigeria and Its Evolution .....	204
6.4	Conclusion .....	205
7	Chapter Seven: Comparative Lessons for Federalism in Iraq .....	208
7.1	Introduction .....	208
7.2	Lessons from Canadian Federalism for Oil Management .....	208
7.3	Lessons from Nigerian Federalism for Oil management .....	216
7.4	Lessons from the comparative cases .....	221
7.5	Rationales of Collaborative Federalism for Iraq. ....	223
7.6	Conclusion .....	240
8	Chapter Eight: Conclusion .....	242
8.1	Recommendations .....	249
9	.....	291
10	Appendices .....	292

# Chapter One

## Introduction

### 1.1 Background and Context

The legal system of Iraq was restructured by a new Constitution in 2005. One of the major changes in the new constitutional design was the adoption of federalism. After intensive deliberations, the major Iraqi political groups agreed on changing Iraq into a federal system. This was considered a significant step towards establishing a decentralized legal system capable of the peaceful resolution of the complex internal political, ethnic, religious and economic issues, including oil and gas management. The main political players, the Shiite, Kurds and the Sunni, generally accepted federalism despite their strong disagreements over its nature, scope, applications, elements, institutions and principles.<sup>1</sup>

One of the main areas of disagreement concerned the authority over oil management within the new federal system. After intensive deliberations and long negotiations, where several proposals were considered, the drafters of the Constitution, representing the different ethnic, religious and political groups of Iraq, finalized two constitutional provisions governing oil management - Articles 111 and 112.<sup>2</sup> These Articles are intended to provide the constitutional framework for defining the authority for managing the current oil fields, exploring future fields, signing oil contracts, and distributing oil revenue.<sup>3</sup> However, the current disputes between the Federal Government (FG) and Kurdistan Regional Government (KRG) over these issues indicate that Iraqi federalism in its current form and context, and Articles 111 and 112 in particular, have not settled the challenging problem of the distribution of power and wealth in Iraq.<sup>4</sup> On the contrary, the ongoing disputes indicate the difficulty of reaching

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<sup>1</sup> Harith Al-Qarawee, 'Redefining a Nation: The Conflict of Identity and Federalism in Iraq' (2010) 2(1) Perspectives on Federalism 32.

<sup>2</sup> Ashley Deeks and Matthew Burton, 'Iraq's Constitution: A Drafting History' (2007) 40(1) Cornell International Law Journal 1. See further the discussion in Chapter 3 below on the constitutional foundations of federalism in Iraq.

<sup>3</sup> Sean Kane, Joost Hiltermann and Raad Alkadiri, 'Iraq's Federalism Quandary' (2012) 118 The National Interest 20.

<sup>4</sup> The Iraqi public budget is highly dependent on oil production. More than 93% of Iraq's total government revenue comes from oil. The country exports around 4,000,000 mbpd and it is the fifth

agreements on the significant matters of wealth and power. The disputes also show that settling challenging questions such as the management of oil and the distribution of powers in a complex federation like Iraq are beyond the capability of the ambiguous constitutional provisions found in Articles 111 and 112.<sup>5</sup>

The thesis is limited to oil and gas management and related disputes between the FG and KRG; it does not consider other natural resources (NR). According to Articles 110, 111, 112, 114, 115 and 121 of the Iraqi Constitution, other NR are left to be managed by the sub-unit authorities. They are not listed under either the exclusive powers or the shared powers of the FG. Therefore, they should be categorized under the heading of residual powers, which exclusively belong to the regions and to the governorates (which are not organized into a region).<sup>6</sup> Consequently, highlighting the importance of these issues, the Constitution separates the management and ownership of oil and gas from that of other natural resources.<sup>7</sup>

An analysis of the relationship between federalism and oil management in Iraq requires an examination of not only the constitutional design of federalism and its legal framework for oil management, but also its broader historical, political, ethnic, religious and economic contexts. Through such comprehensive examination, the challenges of federalism can be better understood and, therefore, different alternatives and approaches towards oil management can be formulated. This thesis aims to develop a framework

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largest in the world in terms of proven crude oil reserves; it has about 143(billion barrels). ‘U.S. Energy Information Administration - EIA - Independent Statistics and Analysis’ (*Factors Affecting Gasoline Prices - Energy Explained, Your Guide To Understanding Energy - Energy Information Administration*) <<https://www.eia.gov/beta/international/analysis.php?iso=IRQ>> accessed November 24, 2018.

<sup>5</sup> It should be noted that there are other Articles in the Constitution which are *indirectly* related to the authority of managing of oil and gas and its related aspects. These include Article 110 (on federal exclusive powers), Article 114 (on powers shared between the FG and the sub-unit governments), Article 115 (on residual powers of the sub-unit governments) and Article 121 (the conflict resolution clause which gives primacy to the regional law over FG law in the case of dispute). See further Chapter 3 below.

<sup>6</sup> See: Article 115 of the Iraqi constitution of 2005.

<sup>7</sup> Although, as Al- Fadhal (one of the constitutional committee members for drafting the Constitution, representing the Kurds), argues, there were attempts during the drafting of the Constitution by some Iraqi factions, especially the Shiite, to regulate all natural resources under the provisions of Article 112. The Kurds rejected that idea and argued for a limitation on the substance of Article 112 to oil and gas only. See: Munther Al Fadhal, *Problems of the Iraqi Constitution* (Aras for printing and publishing-Erbil-Iraq. “Arabic version” 2010) 40.

which enables a comprehensive and contextual examination of federalism and oil management in Iraq.

Equally, federalism and oil management in Iraq, this thesis argues, are highly interrelated and interdependent. The *effectiveness* of the former seems to depend highly on its success in dealing with the conflicts surrounding the latter. The *fate* of federalism in Iraq is also contingent upon its ability to provide for effective oil and gas management, especially between the FG and KRG.<sup>8</sup> Whether, and how, Iraqi federalism and the interpretations given to Articles 111 and 112 can solve oil and gas disputes are two principal inquiries of this thesis.

Part of the answer provided by these inquiries can be found in the political history of Iraq, its constitutional development since its establishment, its internal ethnic and religious conflicts, its current constitutional design, its legal and judicial institutions, and the way relevant constitutional provisions, particularly Articles 111 and 112 are worded and interpreted. The constitutional provisions, as will be explained in the following chapters, are unsurprisingly broad and ambiguous. This has left considerable scope for disputes among legal scholars regarding the competent authority for oil and gas management in Iraq. While some argue in favour of the FG,<sup>9</sup> there are others who think that the Kurdistan Regional Government (KRG) has equal rights and broad authority to manage oil and NR in its jurisdiction.<sup>10</sup> Also, a more general observation about Iraq would indicate that the country does not have effective legal and judicial institutions, and this is particularly so in the case of the institutions which deal with oil management disputes between the FG and KRG. Additionally, the country lacks a political culture conducive to both decentralization and mutual trust. Indeed, overall, the legal and political channels and institutions of collaboration are not yet present to build a proper degree of cooperation among the different levels of the government.

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<sup>8</sup> See: Rex Zedalis, *The Legal Dimensions of Oil and Gas in Iraq: Current Reality and Future Prospects* (Cambridge University Press 2009); Christopher Blanchard, 'Iraq: Oil And Gas Legislation, Revenue Sharing, And US Policy' (Congressional Research Service 2009).

<sup>9</sup> For example, see: Joseph Bell and Cheryl Saunders, 'Constitutional Issues Regarding Federal and Regional Authority in Iraq. Joseph C. Bell, (*Index: Iraqi Economists Network* February 8, 2016) <<http://iraqieconomists.net/en/2014/04/23/constitutional-issues-regarding-federal-and-regional-authority-in-iraq-byjoseph-c-bell/>> accessed November 24, 2018.

<sup>10</sup> For example, see: James Crawford, 'The Authority of the Kurdistan Regional Government over Oil and Gas under the Constitution of Iraq' (*mnr.krg.org* August 26, 2013) <<http://mnr.krg.org/index.php/en/publications/57-the-crawford-opinion>> accessed November 24, 2018.



This thesis will explain why and how those missing pieces are essential for solving the puzzle of oil and gas management in Iraqi federalism. It specifically focuses on the necessity of the institutionalization of intergovernmental relations (IGR) within the federation, particularly between the FG and KRG. The intergovernmental relationship will be discussed in great detail on the basis of Elazar's assumption that 'the essence of federalism is not to be found in a particular set of institutions, but in the institutionalization of particular relationships among the participants in political life....[and hence] a wide variety of political structures can be developed that are consistent with federal principles.'<sup>11</sup>

Accordingly, the significance of the thesis rests on its concentration on building a framework for the analysis of intergovernmental relations in Iraq. For the framework, the thesis, as explained above, draws upon the theory of collaborative federalism. This is a distinct feature of this thesis because most of the existing literature on Iraqi federalism and oil management has only discussed the constitutional and legal dimensions of the oil disputes in Iraq,<sup>12</sup> or the energy policy and national security implications of Iraqi federalism and oil and gas management.<sup>13</sup> Collaboration has not

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<sup>11</sup> Daniel J Elazar, *Exploring Federalism* (University of Alabama Press 2006) 12.

<sup>12</sup> For instance, see: Zedalis, *The Legal Dimensions of Oil and Gas in Iraq* (n 8). This book is one of the most comprehensive books regarding oil and gas industry and its management in Iraq. Starting with historical background; then, it explains the reserves and production, pipelines, refineries, the legal and constitutional provisions in this regards, types of oil contracts signed by both of the governments, revenue sharing, and so on. Even though it is an excellent interpretation and of the constitutional provisions related to oil and gas, it does not provide a detailed analysis to the collaborative model.

<sup>13</sup> For instance, see: Bilal Wahab, 'Iraq and KRG Energy Policies: Actors, Challenges and Opportunities' (The American University of Iraq, Sulaimani, Institute of Regional and International Studies 2015) <<http://auis.edu.krd/iris/publications/iraq-krg-energy-policies-actors-challenges-and-opportunities>> accessed 24 November 2018. The author in his study tried to shed a light on some aspects of the oil and gas management in Iraq, particularly the disputes between the FG and KRG from energy policy perspective rather than from constitutional perspective. It describes the challenges and tensions between the FG and KRG, as well as the main players in such conflict. Also see: Robin M Mills, *Under The Mountains: Kurdish Oil And Regional Politics* (Oxford Institute for Energy Studies 2016). This study very important in terms of describing the oil and gas industry in the Kurdistan region. It explains the historical backgrounds and on-going developments for this industry in the region and the reasons behind the conflict between the FG and KRG. It is a socio-political and geological study. Therefore, the geological difficulties for the oil in Kurdistan may support the opinion that adopts Production-sharing contracts. Thus, the study delves into the contracts signed by the KRG as well, comparing with the federal technical service agreements.

been specifically a key theme for most of the existing literature on Iraqi federalism. This thesis proposes that Iraqi federalism can be better grounded and understood in the theoretical context of collaborative federalism, drawing upon the principles and features of collaborative federalism outlined by Elazar.

Elazar's theory emphasizes the role of collaboration and coordination among different tiers within a federation based on cooperation and bargaining, thereby providing an institutional framework for the division of power between the federal and subnational governments as equal partners.<sup>14</sup> This approach is chosen in the thesis because its major elements are able to contextualize federalism and to find an appropriate model for resolving the disputed issues in the Iraqi constitutional, social and political structures.<sup>15</sup>

Another significant aspect of the thesis is its emphasis on studying Iraqi federalism in a context broader than its constitutional design. The contextual framework aims to reveal the historical roots, political contexts and legal complexities of oil-related disputes in Iraq and attempts to identify and elaborate on the nature, agendas and ambitions of the major socio-political forces and players of federalism in Iraq, especially the Shiite, Sunni, and the Kurds. These ethnic, religious groups and their ambitions are both the sources of the challenges of oil management and the potential forces for overcoming those challenges.<sup>16</sup>

In addition to considering the wider Iraqi context, the thesis considers collaborative federalism in a comparative context, drawing upon the experience of other countries' application of federalism both in general and with regard to oil management. The comparative approach helps us to understand the potential and problems of collaborative federalism within the dynamics of the Iraqi federal system. Building on these propositions and approaches, the thesis considers whether and how resolving oil disputes between the FG and KRG can be achieved through a collaborative model, and

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<sup>14</sup> Daniel Elazar, *Federalism: an Overview*, vol 1 (HSRC Publishers 1995); Daniel Elazar, 'Harmonizing Government Organization with the Political Tradition' (1978) 8 CrossRef Listing of Deleted DOIs 49.

<sup>15</sup> Daniel Elazar, *Federalism and the Way to Peace* (Institute of Intergovernmental Relations Queens University 1994).

<sup>16</sup> See: Reidar Visser, 'Basma Crude The Great Game Of Iraq'S "Southern" Oil' (Norwegian Institute of International Affairs (NUPI) 2007); Philippe Le Billon, 'Oil, Secession And The Future Of Iraqi Federalism' (2015) 22 (1) Middle East Policy 68; RAAD ALKADIRI, 'Oil And The Question Of Federalism In Iraq' (2010) 86 International Affairs 1315.

how power over oil management should be distributed and shared between the federal and regional governments.

## **1.2 Research Questions**

Since the establishment of the modern Iraqi state and to this day, oil and gas have always been important factors behind all social and political events in Iraq. After 2003, these resources played an important role in drafting the Iraqi Constitution and creating a new model of governance, where the state changed from a unitary state to a federal state. Thus, there has been more than one level of government claiming the right to manage oil and gas in the country, creating a conflict between the FG and KRG that has been ongoing since 2007. The legal disputes of oil and gas management between the FG and KRG, the focus of this research, can be better understood by, firstly, examining the contextual foundations and historical background of federalism in Iraq, secondly, analyzing the empirical issues and problems of the development and establishment of federalism in Iraq, and finally, exploring a proper theoretical and comparative framework for problems of oil management in Iraq. It is in this latter dimension that this thesis claims its originality.

Can collaborative federalism be a successful model for solving the outstanding problems between the FG and KRG, particularly regarding oil and gas management and revenue-sharing? This is the central question of this thesis. The answer to this question is a key for the future of constitutional federalism in Iraq. The question will be examined within the framework of collaborative federalism and through addressing the following themes.

First, federalism as an institutional mechanism for distributing, or dividing, power and responsibilities within a state has been implemented in different ways and forms. There is no ideal model of federal structures, since each one has inherent strengths and weaknesses. Even within one federation, federalism may undergo changes according to socio-political and historical conditions. Its flexibility can be adaptable and applicable

in different circumstances.<sup>17</sup> Collaborative federalism is one model that has been adopted and implemented in some federal countries. Therefore, a major pillar of the thesis is its theoretical approach which will help to provide a clear framework for understanding the relationship between federalism and oil and gas management in Iraq and for solving the problems which have arisen in this relationship. The thesis develops its framework through testing the viability and applicability of the theory of collaborative federalism in Iraq. It explores whether and collaborative federalism can provide a solution to managing intergovernmental conflicts in federalism. Therefore, to understand federalism in general and its collaborative model in particular, one should ask what the theory of collaborative federalism is. How can collaborative federalism provide a solution to manage intergovernmental conflicts in federal states?

Understanding the challenges of Iraqi federalism requires a grasp of the contextual foundations and background of Iraq. The Iraqi state was established in 1921 as a constitutional monarchy based on a centralized unitary system. Then in 1958, as a result of a military coup, the form and political system was changed to a republican – but still unitary - one, lasting until 2003. After the invasion of Iraq in 2003, the form of the state was changed from a unitary state to a federal one according to the Transitional Administrative Law 2004, and the permanent Constitution of 2005. Hence, questions about the development of Iraqi federalism and its current design are significant elements of this thesis. Additionally, how the constitutional drafting motivated the governments towards adopting and practicing collaborative federalism is also investigated.

Regarding the empirical issues of federalism, the research outlines the main legal, constitutional and political disagreements about the most controversial problems associated with Iraqi federalism and the new constitutional design that emerged after 2003.<sup>18</sup> A key disagreement has reigned over oil and gas management and,

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<sup>17</sup> Ronald Watts, *Comparing Federal Systems In The 1990S* (McGill-Queen's University Press 1997); Arthur Benz and Jörg Broschek, *Federal Dynamics: Continuity, Change, and the Varieties of Federalism* (Oxford University Press 2014).

<sup>18</sup> After adopting the new constitution in 2004, many controversial issues were raised. The issue of disputed areas between the FG and KRG is a case in point. These areas were subjected to demographic change and Arabization policy by the successive Iraqi governments, particularly by the Baath regime which came to power in 1968 in a coup and ruled the country until its fall by the US in April 2003. These areas include the oil-rich province of Kirkuk, Mosul, Salah al-Din, Diyala and Wasit which are characterized by their ethnic and religious diversity. For example, Arabs, Kurds, Turkmen, Muslims, and Christians live in those areas. Some of these areas are under the control of Baghdad, whereas some others

consequently, revenue sharing between the FG and sub-unit governments, especially the KRG. Since the adoption of the Iraqi federal Constitution, many conflicts have emerged between these two governments on issues such as who has the authority over oil management, the power of signing oil agreements, oil and gas law, type of oil contracts, revenue sharing and so on. More specifically, the thesis addresses questions related to the interpretations of various constitutional provisions, especially Articles 111 and 112. It also addresses questions related to technical, practical and empirical matters that caused controversies and serious conflicts between the KRG and FG since 2005. Hence, relevant questions include: how has oil and gas been managed in the current Constitution between the FG and subunit governments? Why have these conflicts occurred between the FG and the KRG? Why have they not been resolved yet? What are the main challenges facing oil and gas management? What is the relation between the constitutional framework of oil and gas management with the ongoing disputes between the FG and the KRG? How has the constitutional drafting with regard to oil and gas impacted on the disputes between the FG and subunit governments, especially with the KRG?

Additionally, because the substance and frame of federalism are still subject to different interpretations and perceptions by the main political players, it is necessary to investigate why and how the attitudes of the different political groups have changed since adopting federalism in the 2005 Constitution. Some groups' positions towards federalism shifted between support and opposition over time.<sup>19</sup> Thus, it is not surprising that it has not been effective in achieving its inherent purpose. That is why there is only one region in practice, which is the KRG, while the rest of Iraq, practically, is ruled by centralized government. Hence, the sub question here is: how do the main ethnic,

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are under KRG's control. The two parties have been fighting for years over these areas. The issue of the disputed territories has been addressed in article 140 of the constitution. This article is supposed to complete what was stipulated in the Article 58 of the Transitional Administrative Law (TAL) regarding Kirkuk and other disputed areas. The article calls for a three-step process to determine the fate of Kirkuk and other disputed territories which involve 'normalization,' to be followed by a census, and finally a referendum. The FG was supposed to implement the above three stages of article 140 and conduct the referendum by 31st of December 2007. However, this deadline has long passed and the status of the disputed territories has remained as it is. See: Shak Hanish, 'The Kirkuk Problem and Article 140 of The Iraqi Constitution' (2010) 19 (1) Digest of Middle East Studies 15.

<sup>19</sup> More details will be given in the next chapters.

religious and political groups in Iraq perceive the nature and structure of federalism, and how do they perceive the management and regulation of oil and gas resources?

Given the challenges facing Iraq, the research adopts a comparative approach to explore how intergovernmental relations work in other federations and to consider the lessons which can be drawn. It seeks to explain the similarities and differences between Iraqi federalism and others. In each case the key question is; how has the intergovernmental relationship evolved, particularly regarding oil and gas. The study selects two federal states with significant oil endowments: Canada and Nigeria.<sup>20</sup> The reason for choosing these two countries is because they share some features with Iraqi federalism. It is also due to some other missing features in Iraqi federalism that exist in, for instance, Canadian federalism such as the structure, nature and institutions of intergovernmental relations. Nigeria as an oil-dependent state was chosen because of the mismanagement of this resource, which has destabilized this country and led to civil war. The same may happen in Iraq, if Iraqis do not learn from the Nigerian regime's failure to resolve conflicts over natural resources and other issues related to ethnic and religious differences.

Therefore, the thesis seeks to find the lessons that Iraq need to learn from other federal models by avoiding failed experiences such as in Nigeria, and adopting some successful mechanisms in a non-centralized federation like Canada that works based on collaborative federalism. The research also identifies the institutions required for collaboration, and determines the potential difficulties and barriers of collaborative approach in the context of Iraq. Therefore, the main question of the comparative component is: what are the lessons that Iraq need to learn from other federal models regarding oil and gas management, and more specifically with respect to the collaborative federalism?

A further pillar of the research is identifying different alternatives for dispute resolution in Iraq. After the failure of constitutional and legal means, as well as the non-involvement of the judicial authorities in Iraq to resolve the outstanding conflicts

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<sup>20</sup> William Anderson defined intergovernmental relations IGR as 'a term intended to designate an important body of activities or interactions occurring between governmental units of all types and levels within the federal system.' William Anderson, *Intergovernmental Relations in Review* (Greenwood Press 1974) 3. Cited from Deil Wright, 'Intergovernmental Relations: an Analytical Overview' (1974) 416 (1) *The Annals of the American Academy of Political and Social Science* 2.

between the FG and KRG, it is necessary to identify other mechanisms to resolve these disputes. This is ultimately the underlying purpose of collaborative federalism. The relevant question in this regard is: can collaborative approach provide a necessary foundation for collaboration between the FG and KRG to reduce conflict over oil management in Iraq? What kinds of institutions are required for collaboration? Do the required institutions exist in Iraq? What are the potential difficulties and barriers facing the collaborative approach in the context of oil management in Iraq? More specifically, how can collaborative federalism be an effective model for solving the current conflicts between the federal and subnational governments, particularly KRG?

After conducting the above-mentioned examination and analyses, the thesis, then, offers original insights into whether collaborative federalism is a successful model for solving the outstanding problems between the FG and KRG. A thorough examination of the research questions reveals that collaborative federalism, if adopted properly, can be an effective model for solving the existing legal disputes between the federal government and the subunit governments, specifically, with the KRG because it recognizes and appreciates equal partnerships among all tiers within the federation.

### **1.3 Theoretical Framework**

In any research project, after conducting a literature review, identifying the research problem and presenting the main research question, the researcher should find a suitable theoretical framework for the study.<sup>21</sup> It has been argued that ‘[t]heories give researchers different “lenses” through which to look at complicated problems and social issues, focusing researchers’ attention on different aspects of the data and providing a framework within which to conduct their analysis.’<sup>22</sup>

For this study, the theoretical framework is draws upon the theoretical model of collaborative federalism (CF), as articulated by Daniel Elazar.<sup>23</sup> More specifically, it

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<sup>21</sup> Kristina Simion, ‘Qualitative and Quantitative Approaches to Rule of Law Research.’ [2016] SSRN Electronic Journal.

<sup>22</sup> *ibid* 25.

<sup>23</sup> The theoretical framework serves as the basis of any new building, then after that, it can frame the building by other materials such as walls, insulation, flooring and etc. The same applies to research, where the theoretical framework is the basic structure, which contains concepts, models, or theories that structure such study. Based on a theoretical framework, the study problem, research questions, data

uses Elazar's collaborative theory of federalism as its primary approach for examining oil management in Iraqi federalism.<sup>24</sup> Elazar's collaborative theory is adopted because its major elements are capable of contextualizing federalism within the constitutional and socio-political structure of Iraq. In other words, Elazar's ideas can provide a context for understanding the Iraqi case and also to resolve the disputed issues between the FG and KRG. What makes this theory relevant to the Iraqi federalism and its socio-political structure is its reliance on the concept of covenant and its meanings and various forms.<sup>25</sup> Also, in its political form, the notion of 'covenant' refers to the way people freely establish their communities and political systems.<sup>26</sup> This could explain the conferences held before 2003 in and out of Iraq by the various opposition group, which promised the Kurds that Iraq would become a federal entity enabling political freedom for different communities (for example at the Salahaddin's Conference 1992, and the London Conferences in 1993, 1999, and 2002). Then, in 2004, federalism was drafted in its current form in the 2005 Constitution.<sup>27</sup>

There is a clear mismatch between the legal framework outlined in Iraq's federal constitution and the political reality of the country's current predicament. Given this mismatch, exacerbated by a judicial system which is incapable of resolving disputes between the central government and the KRG, there is a need for an analysis which can offer a more effective and practical option. Utilizing Elazar's theory of collaborative federalism appears to provide a viable alternative. As it has been examined in the thesis, collaborative federalism has some critical components which are capable of addressing some of the gaps and discrepancies which exist between the legal provisions and political reality of Iraqi federalism.

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collecting and analyses, and the importance of the study will be identified. See: Vincent Anfara and Norma Mertz, *Theoretical Frameworks in Qualitative Research*(SAGE Publications, Inc 2014).

<sup>24</sup> Elazar, *Exploring Federalism* (n 11)1.

<sup>25</sup> According to the idea of covenant, three elements were emphasized in any of form of federal relationships. These elements are 'partnership between individuals, groups and governments, cooperative relationships that make the partnership real, and negotiation among the partners as the basis for sharing power.' Daniel Elazar, *Federalism: an Overview*, (n14) 1.

<sup>26</sup> Daniel Elazar, 'Federal Models of (Civil) Authority' (1991) 33 (2) *Journal of Church and State* 231.

<sup>27</sup> Elazar stated, a 'constitution involves the implementation of a prior covenant and effectuation or translation of a previous covenant into an actual frame or structure of government.' Daniel Elazar, 'The Political Theory of Covenant: Biblical Origins and Modern Developments' (1980) 10. *Publius: The Journal of Federalism* 3.



This essential thought of the covenant is providing a means for free people to form political communities without sacrificing their basic freedom and with establishing effective governmental institutions operating on both, 'self-rule and shared rule'.<sup>28</sup> Hence, it can be argued that both consent and constitutionalism are fundamental to the theory and practice of federalism.

In the opinion of Elazar, federal systems are characterised by collaborative intergovernmental relationships in which bargaining, negotiated cooperation and real equal partnership are the basis for sharing powers and wealth among several power centres.<sup>29</sup> It is the process by which all or most of the governments are participating collectively as equal partners within a federation to achieve the common goals and solve the outstanding conflicts.<sup>30</sup> Collaborative federalism is used as a foundation because of its flexibility in utilizing non-constitutional mechanisms for solving disputes within a federation. Therefore, this understanding should be adopted by all factions and governments within the Iraqi federation to resolve all the complicated issues and problems, especially with regard to the on-going dispute over the management of oil and gas between the FG and KRG. Not only do the political and social environments need collaborative federalism, but it already has roots in the current Iraqi constitutional provisions related to the management of oil and gas and the distribution of revenues.

This theory, however, may not cover all the features of federalism in general and may not be able to shed a light on all the complex aspects of oil and gas management in Iraqi federalism. Therefore, it must be acknowledged that Elazar's theory, similar to other theories of federalism, is limited and cannot be reasonably expected to be without flaws. Federalism as a concept and as a system is a cloud of complexities and ambiguities.<sup>31</sup> Practically, as Watts and Anderson argue, each federal system has its unique features.<sup>32</sup> Iraq is not an exception. Thus, for filling the potential gaps of Elazar's theory, other approaches to federalism will also be consulted for conceptual clarifications.

Another feature of the theoretical framework is the adoption of the assumption that in almost all federal systems in the world both the federal government and the subunit

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<sup>28</sup> *ibid.*

<sup>29</sup> Elazar, *Federalism: an Overview* (n 14).

<sup>30</sup> Elazar, *Exploring Federalism* (n 11).

<sup>31</sup> AH Birch, 'Approaches to the Study of Federalism' (1966) 14 (1) *Political Studies* 15.

<sup>32</sup> George Anderson, *Federalism: an Introduction* (Oxford University Press 2008); Watts, *Comparing Federal Systems In The 1990S* (n 17).

governments exercise some competencies independently of each other, while there are also concurrent or shared powers, which are supposed to be exercised collaboratively.<sup>33</sup> How these forms of powers can be utilized within a broader framework of decision-making in federalism is another theoretical aspect of this thesis. In other words, the thesis explains how federal and subunit governments can be independent to a degree while working together inter-dependently to achieve the common goals of federalism. The usefulness of this feature for Iraq will be discussed, particularly with respect to decision-making process regarding oil management between KRG and the central government.

One more important theoretical element of the thesis is the distinction between the asymmetrical and symmetrical approaches. This approach focuses on the nature and the extent of the powers enjoyed by the regions or states within a single federal state. It provides better explanations on the type of federalism designed in the Constitution of Iraq in 2005. According to that approach, the federal would mean symmetrical when all States enjoy the same powers equally as in the United States. On the other hand, a federal system would be asymmetrical when some of regions or states enjoy higher or more authorities than the other states. In this system, the distribution of power is not based on equality between different levels of the government in the federation.<sup>34</sup>

## 1.4 Methodology

Both the method and methodology of this thesis have been carefully chosen based on what is required for answering the research questions. Although there is a difference between methodology and method, they are two related concepts. Academically, method refers to of the techniques used to collect information, data and evidence essential as raw materials for any given research. Methodology, on the other hand, is a strategy, approach or compass employed to structure the thesis and answer its questions.<sup>35</sup> While method is a mechanism to collect the research, data, methodology is

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<sup>33</sup> For more details about this approach see: Kenneth Wheare, *Federal Government* (4th ed. London: Oxford University Press 1963).

<sup>34</sup> Charles Tarlton, 'Symmetry and Asymmetry as Elements of Federalism: A Theoretical Speculation' (1965) 27(4) *The Journal of Politics* 861.

<sup>35</sup> Matt Henn, Mark Weinstein and Nick Foard, '*A Critical Introduction to Social Research*' (2nd Edn, Sage 2006) 10.

the approach, roadmap,<sup>36</sup> or the path<sup>37</sup> for undertaking the research. It is important to note that methodology has more theoretical connotations,<sup>38</sup> and a philosophical connection to research.<sup>39</sup> Method, however, focuses on practical procedures, sources used for the study and presentation style.<sup>40</sup> Evidently, there are a number of methodologies used by researchers; however, the methodology of this research is a combination of legal doctrinal, interdisciplinary and comparative methodologies.<sup>41</sup>

Doctrinal legal research, also called black-letter law, can be defined as the approach of asking what the law is in a particular area. The word ‘doctrine’ is derived from the Latin noun ‘doctrina’ which means instruction, knowledge or learning.<sup>42</sup> Through this methodology, the researcher seeks to collect and then analyse a body of case law, together with any relevant legislation, primary sources.<sup>43</sup> This methodology depends on both primary and secondary sources.<sup>44</sup> It has been said: ‘[g]enerally, a doctrinal research involves a critical conceptual analysis of all relevant legislation and case law to reveal a statement of the law relevant to the matter under investigation’.<sup>45</sup> Doctrinal method is considered an analytical approach because the researcher employing this methodology involves in analyzing and examining the collected facts, information, data and evidences to answer specific research questions,<sup>46</sup> and reach “coherent and logical,”<sup>47</sup>

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<sup>36</sup> Kerry E Howell, *An introduction to the philosophy of methodology* (Sage 2012). P preface.

<sup>37</sup> Rob van Gestel, Hans-W. Micklitz & Miguel Poiras Maduro. "Methodology in the new legal world." EUI Working Papers (2012). 1.

<sup>38</sup> *ibid* 2.

<sup>39</sup> Irma J Kroeze, ‘Legal research methodology and the dream of interdisciplinarity’ (2013) 16 (3) Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad 35-65, 37.

<sup>40</sup> *ibid*.

<sup>41</sup> See: Michael McConville and Wing Chui, *Research Methods for Law* (Edinburgh University Press 2017); Kristina Simion (n 21).

<sup>42</sup> See: Terry Hutchinson and Nigel Duncan, ‘Defining and Describing What We Do: Doctrinal Legal Research’ (2012) 17 Deakin Law Review 83, 84.

<sup>43</sup> Mike McConville and Wing Hong Chui (n 41)19.

<sup>44</sup> *ibid* 4.

<sup>45</sup> Terry Hutchinson, ‘Vale Bunny Watson: Law Librarians, Law Libraries, and Legal Research in the Post-Internet Era’ Fall 2014) 106 (4) Law Library Journal (579-592, 584.

<sup>46</sup> Chakravanti Rajagopalachari Kothari, *Research methodology: Methods and techniques* (New Age International 2004) 3.

<sup>47</sup> Ute Heidmann, ‘Épistémologie et pratique de la comparaison différentielle’ in M Burger and C Calme (eds), *Comparer les comparatismes: Perspectives sur l’histoire et les sciences des religions* (Edidit/Archè,

conclusions. Additionally, doctrinal methodology is argumentative in the sense that different interpretations of a legal provision are presented and critically examined through this methodology.<sup>48</sup> It is sometimes argued that doctrinal legal study methodology is normative as it involves normative interpretations and judgements about legal questions.<sup>49</sup>

The methodology of this thesis is partly doctrinal because it identifies, collects, interprets, analyses and examines all the Iraqi legal and constitutional provisions related to oil management and federalism. However, it is not the only principal methodology of this thesis due to its limitations and potential gaps.

Doctrinal methodology has been criticized for its inadequacy,<sup>50</sup> limited applications, descriptiveness and lack of clarity.<sup>51</sup> Furthermore, doctrinal approach may not provide proper theoretical framework for interdisciplinary studies.<sup>52</sup> These reasonable concerns about legal doctrinal approach do not disqualify it to be used in some legal studies.<sup>53</sup> Therefore, it is partly depended on in this research and complemented with other methodologies necessary for a comprehensive examination of oil management in Iraqi management.

The use of interdisciplinary methodology<sup>54</sup> is another approach taken in this research and the scope and context of this thesis hopefully demonstrate the appropriateness of taking an interdisciplinary approach to the question of the distribution of natural

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2006)143 ff. cited in: Geoffrey Samuel, 'Does One Need an Understanding of Methodology in Law before One Can Understand Methodology in Comparative Law?' (2011): 177-208, 180.

<sup>48</sup> Mark Van Hoecke, *Methodologies of Legal Research: What Kind of Method for What Kind of Discipline?* (Hart Publishing Ltd, Oxford 2011) 4.

<sup>49</sup> *ibid*17.

<sup>50</sup> Lydia A. Nkansah and Victor Chimbwanda, 'Interdisciplinary approach to legal scholarship: A blend from the qualitative paradigm' (2016) 3(1) Asian Journal of Legal Education 55-71, 60.

<sup>51</sup> Mark Van Hoecke, *Methodologies of Legal Research*: (n 48)3.

<sup>52</sup> Lydia Nkansah and Victor Chimbwanda (n 50) 60.

<sup>53</sup> Mark Van Hoecke, *Methodologies of Legal Research*: (n 48)3.

<sup>54</sup> There are some differences between multidisciplinary, interdisciplinary and transdisciplinary researches. The first one means 'that scientists from a multiplicity of disciplines look at the same phenomenon/problem.' The second defines 'a single researcher is a disciplinary expert in more than one discipline and he/she uses the methodology of both to address a problem.' The last one is 'where interdisciplinary research results in the establishment of a new discipline.' See: Irma J Kroeze (n39) 50-51.

resources in Iraq.<sup>55</sup> The interdisciplinary approach undertaken in this research can fill the limitations of doctrinal study.<sup>56</sup> Interdisciplinary methodology provides insights, analyses and evidences from a variety of social, political, economic, cultural and historical aspects into the given research inquiry.<sup>57</sup> It is a new approach of studying law in the context of social sciences and humanities such as sociology, political science, and economics.<sup>58</sup> Therefore, the interdisciplinary legal approach can be defined as the process of data collection from other non-legal disciplines, and using them to enhance understanding and application of the law in its social, political and economic context.<sup>59</sup> Its major advantage is its contribution to enriching and broadening the conceptual and theoretical framework of the research by shedding lights on the research question from several of related disciplines.<sup>60</sup> This approach is highly significant for legal studies simply because law is a social artefact. Any consideration of legal issues and problems will always and necessarily require looking at socio-political and economic factors.<sup>61</sup> Social studies, law, economic and political science are not only developed each other, but also somehow integrated.<sup>62</sup> Theories and research tools in political science, for example, have been sometimes used to address legal questions and understand legal systems.<sup>63</sup> Hence, the theoretical work on federalism which is the basis of the analysis is rooted in political science. The reason for taking an interdisciplinary approach and for applying Elazar's theoretical framework lies in the mismatch between what is the 'legal' and the 'political' reality of Iraq. As I explained earlier, in the theoretical section, the discrepancy between the legal provisions in the Iraqi Constitution and the political reality requires this methodology.

Questions about federalism and oil management in Iraq cannot be answered without serious considerations to historical, political, economic, cultural, ethnic and even

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<sup>55</sup> 'The term interdisciplinary is used in this contribution in relation to legal research which incorporates insights from non-legal disciplines'. See: Wendy Schrama, 'How to Carry out Interdisciplinary Legal Research-Some Experiences with an Interdisciplinary Research Method' (2011) (7) Utrecht L. Rev 147.

<sup>56</sup> Lydia Nkansah and Victor Chimbwanda (n 50) 55.

<sup>57</sup> *ibid* 56.

<sup>58</sup> Mike McConville and Wing Hong Chui (n 41) 5.

<sup>59</sup> Lydia Nkansah and Victor Chimbwanda (n 50) 62.

<sup>60</sup> Mike McConville and Wing Hong Chui (n 41) 5.

<sup>61</sup> Irma J Kroeze (n 39) 53.

<sup>62</sup> Andrew D Martin and Morgan LW Hazelton, 'What political science can contribute to the study of law' (2012) 8 (2) Review of Law & Economics 511-529, 515.

<sup>63</sup> *ibid* 515.

religious contexts in which disputes over political-legal authorities and oil management in Iraq was born and continue over a century. The research examines the historical, political, ethnic and economic aspects through which Iraqi federalism, disputes over oil management, and relevant constitutional provisions can be better understood. More importantly, this interdisciplinary research approach provides a clear framework for justifying why collaborative federalism is a viable and effective option for federalism in Iraq.<sup>64</sup> Due to the political nature of collaborative federalism, developed by Elazar, and due to the multi-dimension nature of oil management disputes in Iraq, it is important for this research to employ an interdisciplinary approach for its legal question.

Despite its significance for legal researches, interdisciplinary methodology has also its challenges and limitations. This methodology requires more time, effort, and imagination than research conducted within a single discipline. It can also open a number of indirect complex research questions.<sup>65</sup> This would complicate both the limit of any given research and its theoretical boundaries. Therefore, the interdisciplinary approach is carefully employed in this research to avoid unnecessary complication. The historical, ethnic, cultural, economic and political narratives and analyses presented in this research are all used to shed lights on all aspects of oil management in Iraq so that the rationales for proposing collaborative federalism, as a viable alternative, become more justifiable.

This would help with answering the main research question,<sup>66</sup> without creating other unnecessary inquiries. For instance, the ambiguity of constitutional provisions with regard to the oil and gas in Iraq can be interpreted and understood much better in light of the relevant socio-political and historical contexts.

In addition to doctrinal and interdisciplinary methodologies, the thesis depends on a comparative approach to draw lessons and find effective mechanisms for Iraqi federalism from other federal systems. A comparative legal approach demands a critical examination of laws or legal institutions from different jurisdictions. Some scholars assert that comparative legal research is a mere process to approach legal problems

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<sup>64</sup> 'Using theory from other fields is often referred to as "interdisciplinary research." See: Kristina Simion (n21)25.

<sup>65</sup> Kristina Simion (n21) 25.

<sup>66</sup> Maurice Adams, 'Doing what doesn't come naturally. On the distinctiveness of comparative legal research' In Mark Van Hoecke, *Methodologies of Legal Research*: (n 48).

while others perceive it as a dogmatic science which aims to study laws in different countries in a systematic order to provide answers to legal problems.<sup>67</sup> Despite the differences among the scholars about the comparative legal research, it can generally help to bring new ideas and suitable solutions regarding legal problems. Conducting analytical comparisons between two or more legal systems about a specific issue, such as oil management in federalism, can reveal important lessons whether to adopt or to avoid specific substantive or procedural legal provisions.<sup>68</sup> Constitutions and laws of different countries may provide alternative provisions and rules with different solutions. Therefore, the thesis uses a comparative approach as a method of research rather than as a methodology.<sup>69</sup> It does not focus on the research questions on comparing legal systems; rather, it is using comparative approach as a method of evaluating whether collaborative federalism mechanisms is an effective model to deal with disputes between the FG and SNGs over oil and gas.<sup>70</sup>

This approach is taken with the assumption that comparative legal studies can explore ‘the usefulness of foreign solutions for the needs of domestic or international rule-making’.<sup>71</sup> The aim in taking the comparative approach is to examine whether other federalisms have specific legal lessons for Iraq to solve its internal dispute over oil management.<sup>72</sup> Thus, the implications, applications and challenges of collaborative federalism in Iraq will be analyzed mainly by comparing different federal systems. Although every Federation derives its peculiarities and features from its unique socio-

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<sup>67</sup> See: Khushal Vibhute and Filipos Aynalem, *Legal Research Methods* (Teaching Material 2009).

<sup>68</sup> *ibid.*

<sup>69</sup> Although comparative study is considered to be a ‘method’ in its own right and called ‘the comparative method’, the main method in literature is the ‘functional method’. ‘This method ‘offers one concrete guideline in that it suggests to focus on (common) legal problems and legal solutions in the compared legal systems, rather than on the (diverging) rules and doctrinal frameworks’. Mark Van Hoecke, ‘Methodology of Comparative Legal Research’ [2015] *Law and Method* 1, 8.

<sup>70</sup> The comparative method can contribute to learning and knowledge, evolutionary and taxonomic science, contributing to better understanding of the domestic legal system, harmonization of law, and so on. Mark Van Hoecke, ‘Methodology of Comparative Legal Research’ (n 69) 2.

<sup>71</sup> Konrad Zweigert and Kurt Siehr, ‘Jhering's Influence on the Development of Comparative Legal Method’ (1971) 19 (2) *The American Journal of Comparative Law* 215–231, 220.

<sup>72</sup> Comparative legal study can offer the national legal system ‘suggestions for future developments, providing warnings of possible difficulties, giving an opportunity to stand back from one’s own national system and look at it more critically’. Geoffrey Wilson, ‘Comparative legal scholarship’ In Mike McConville and Wing Hong Chu (n41) 87.

political, economic and historical circumstances, which created a federation, nevertheless, it would be still helpful making this comparison with some relevant models to serve as benchmarks.<sup>73</sup>

For that purpose, the federal and legal systems of Canada and Nigeria will be compared analytically to examine the natural resource-related conflicts, problems, challenges, methods and practical approaches shared by these systems.<sup>74</sup> These two federations have been chosen for the comparison because their constitutional and political systems share some similarities with that of Iraq. It is also due to some other missing features in Iraqi federalism that exist in, for instance, Canadian federalism such as the structure, nature and institutions of intergovernmental relations. These two countries, like Iraq, are oil states and multi-ethnic and multi-linguistic federations, although Nigeria is more ethnically diverse than Canada.

These federations were designed, as in the case of Iraq, as institutional arrangements for accommodating and integrating distinct ethnic identities in a federation based on shared-rule and self-rule. There are heterogeneous societies, uneven distribution of natural resources such as oil and gas within these federations, as well as an unequal desire of subnational units to heed the center.<sup>75</sup> There are independence trends among some components within each country, the Kurds in Iraq, Quebec in Canada, and other minorities in Nigeria. There is a struggle and strong competition between two different approaches: the first trend seeks towards more centralization, while the opposite trend tries to move towards more non-centralization.

In all three federations there have always been tensions, especially regarding the ownership and management of oil and gas. Particularly in Iraq and Nigeria, where the dispute over natural resources and revenues between the federal government and the subnational governments is one of the most difficult challenges facing these federations. Conflicts in these three federations can be characterized as conflicts between different ethnic and social groups. Canadian history, for instance, has been largely defined by the

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<sup>73</sup> See: Larry Kramer, 'Understanding Federalism' (1994) 47 Vand. L. Rev 1485.

<sup>74</sup> It has been argued 'Modern legal comparison is critical in its attitude. The comparatist is not interested in the differences or similarities of various legal orders merely as facts, but in the fitness, the practicability, the justice and the why of legal solutions to given problems.' Knorad Zweigert and Kurt Siehr (n71) 220.

<sup>75</sup> Andrew McDougall, 'Canadian Federalism, Abeyances, and Quebec Sovereignty' (PhD thesis to University of Toronto 2016).



tensions between French and English speaking parts of the country.<sup>76</sup> The same description applies to Nigeria, and even more so, when it comes to civil war.<sup>77</sup>

Despite these similarities, the comparison is between two different examples; one is a successful model and the other one is a failure. Canada is a relatively successful applied model of collaborative federalism in all contentious matters between the federal and subnational governments, including natural resource issues. Specifically, Canada was selected because it is a non-centralized model, and offers flexible mechanisms of CF, which is the central theme in this research. This dynamic mechanism adopted in Canada can be a good example and lesson for the Iraqi federation.

Nigeria, on the other hand, is an example on how federalism can easily fail in delivering its promises. Nigeria has been selected because its centralized federal model and context is close to the nature, context and structure of Iraqi federalism.<sup>78</sup> Despite some differences between Iraq and Nigeria, there are many similarities in addition to the above, which justify this comparison at least for the sake of avoiding what failed Nigerian federalism. The first similarity lies in the process of nation-building and adopting federalism as a model for governance. Both federations were founded in the wake of the occupation of a foreign country. Nigerian federation was created by the Britons while the Iraqi federation is the result of the US invasion and its allies in Iraq in 2003. Another similarity is the absence of a national identity that brings together all Nigerians and Iraqis within one federation. The intergovernmental relations between the federal and subnational governments in these two federations constantly tense. Another issue that both Nigeria and Iraq share is the challenges facing the distribution of oil, natural resources and revenue between the federal government and subnational governments. Oil in these countries has become a factor of instability. What is called the resource curse is another common factor between these two countries.

Therefore, Nigeria was chosen as a failed federation in many ways as an example so that Iraq could avoid what happened there. The Nigerian experience is an unsuccessful

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<sup>76</sup> *ibid.*

<sup>77</sup> Carlo Koos and Jan Pierskalla, 'The Effects of Oil Production and Ethnic Representation on Violent Conflict in Nigeria: A Mixed-Methods Approach' (2016) 28(5) *Terrorism and Political Violence* 888.

<sup>78</sup> 'All societies have some form of 'law' which helps to solve those problems. Legal concept, legal rules and legal procedures may sometimes rather diverge, but still the solutions given to some problems may be similar or even identical. In other words, the legal solution may be the same, notwithstanding the diverging roads used to reach that solution.' Mark Van Hoecke, 'Methodology of Comparative Legal Research' (n 69) 10.

model for containing minorities and marginalized groups and achieving peace between different peoples and nationalities within the country. Thus, we can make it a warning for the new Iraqi federal experience. It has been argued ‘The rocky beginnings of nation building in Iraq suggest that, unless the lessons of Nigeria are heeded, it may come to resemble Nigeria in an additional manner, following it down a troubling path in which religious, economic and social differences serve to pull the country apart.’<sup>79</sup> Therefore, Nigeria was chosen to warn the Iraqis not to follow the steps of Nigeria in dealing with problems they suffer, such as managing natural resources, sectarian, ethnic, and religious differences, and the matter of national identity, etc. Hence, there are many valuable lessons and viable solutions that can be learned from these two systems of Iraq’s problem in oil management, revenue distribution, and other problems between the FG and SGs. Both countries offer answers to disputes over natural resources in federalism. While Canada can be described as a successful example, Nigeria is obviously a failed example. Through this comparison, CF and its effectiveness would be better understood.<sup>80</sup> It is necessary to note that the comparative approach is undertaken with careful consideration of the similarities and differences of the socio-economic and historical, constitutional contexts and the federal systems of the compared countries.<sup>81</sup>

Hence, the thesis aims to provide an answer to oil disputes in Iraqi federalism through the abovementioned three approaches, namely doctrinal, interdisciplinary and comparative. This mix methodology requires a method research responsive to its requirements in terms of data collection, literature review and the use of primary and secondary sources.

With regard to the legal methods used in the data collection, the study has been carried out through the adoption of a library/desktop-based approach. The data has been obtained from various accessible sources. These sources consist of primary data, such as the constitutional articles, relevant legal legislations, the governmental policies and

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<sup>79</sup> Adam M Smith, ‘Fractured federalism: Nigeria's lessons for today's nation builders in Iraq’ *The Round Table* 94, no. 378 (2005) 129, 130.

<sup>80</sup> ‘Comparative research examines two or more cases to highlight differences and similarities between them, leading to a better understanding of social phenomena and their theoretical basis.’ Nicholas Walliman, *Social research methods: The essentials* (Sage, 2006) 204.

<sup>81</sup> Mark Van Hoecke, ‘Methodology of Comparative Legal Research’ (n 69) 6.

procedures, regulations, and legal drafts.<sup>82</sup> It also includes reports on specific conflicts over natural resources and federalism, legal and political documents, and case law related to oil and gas management, federalism and intergovernmental relations in Iraq. Judicial decisions made by judicial bodies in the comparative legal systems have also been considered.

Additionally, the secondary sources have been analytically reviewed including journal articles, relevant scholarly books, conference papers, textbooks, and commentaries.<sup>83</sup> Another secondary source of data was media reports such as newspapers, magazines, TV programs, and other commentaries. In addition, relevant political agreements between federal and subnational governments within the Federation of Iraq, Canada and Nigeria have been reviewed and used as secondary sources.

These primary and secondary sources were searched for and reviewed in three languages, English, Arabic and Kurdish. In general, the thesis is built on the relevant constitutional provisions and legal legislations; nevertheless, it focuses also on the wider context within which the law operates, such as the socio-political dimensions of oil and gas management in this study. This is where the secondary sources have become an invaluable component of the research material necessary for developing the framework and arguments presented in the research.

A final note about the method of this research is, in addition to the above-mentioned methods, an attempt was made to gather data through a face-to-face interview with some MPs and politicians. However, I was not able to interview adequately because those who were supposed to be interviewed did not respond to my request, with the exception of three of them. Therefore, the study benefited in part from interviews with three Kurdish MPs who have played an important role in the oil and gas sector. The questions of the interviews were chosen based on standard academic interview reflecting the question, central theme and legal concerns for which the thesis is dedicated. Their answers were used in chapter five of this thesis.

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<sup>82</sup> “Data that have been observed, experienced or recorded close to the event are the nearest one can get to the truth, and are called primary data.” See: Nicholas Walliman (n 80)51.

<sup>83</sup> “Written sources that interpret or record primary data are called secondary data”. See: Nicholas Walliman (n 80)51

## 1.5 The Significance of the Study

The importance of the thesis emanates from the significance of the issue it addresses. Since 2003, Iraq has gone through many conflicts and disputes over the nature of federalism, the distribution of powers, the management of oil and natural gas and the broader issues related to non-centralization of government at different levels. This thesis is significant because it provides a road map and framework for understanding and tackling those disputes and conflicts mainly on the basis of the principles of CF. This research is important because it reveals the nature of the major controversial issues, and it provides an alternative approach for federalism that is more suitable and effective for the political, economic and legal context of Iraq.

Additionally, the research is significant due to the lack of a conceptual framework and comprehensive understanding of the appropriateness and applicability of CF to the Iraqi federation among the academia and among practitioners. The significance of this study derives from its originality, which lies in the fact that it is the first study, as far as I know, to link the Iraq federal model to the collaborative theory, as a mechanism for resolving its internal disputes and achieving its common aims within the federation.<sup>84</sup> Theoretically, its significance and originality derives from applying the concept of collaborative federalism based on Elazar's theory to the Iraqi case. The thesis tests, for the first time, the applicability and effectiveness of CF in the context of a very complex federalist structure and sensitive political climate such as exists in Iraq today. The viability of any theory partly depends on its ability to overcome empirical and practical challenges. The thesis tries to apply Elazar's theory in the context of a federal system that does not have either a proper rule of law or effective institutions. It tests the viability of Elazar's theory through applying its principle of cooperation and collaboration in the context in which there is very little potential for collaboration. It also questions Elazar's theory whether its non-official approach can replace the official,

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<sup>84</sup> See further: Farah Shakir, 'The Iraqi Federation: Origin, Operation And Significance' (PhD Thesis, University of Kent 2014). This thesis is based on the theory of bargain, and its title is derived from a book of William H. Riker, "Federalism: Origin, Operation, Significance" published in 1964. The author addressed the Iraqi federation from the standpoint of the classic federal theory and practice. She argues that in spite of the deficiency of classic federal theory to explain the new federal models such as in Iraq, the origin of the Iraqi federation is based on "a political bargain among the Kurds and the Shiaa on one side and the Americans on the other." The present thesis offers a different perspective, being grounded in a different theory, which is collaborative federalism.

legal and judicial approaches for oil management disputes. In other words, this thesis examines the scope and limit of effectiveness of Elazar's theory; it reveals whether it is an alternative or simply a complementary approach in addition to the traditional legal-judicial approaches. This research reveals that by assessing the possibility of its application and implementation in Iraq. It does not promise its success; rather, it tests its effectiveness. By assessing CF in such complex context, Elazar's theory will be enriched significantly. Such assessment contributes to the academic discussions about federalism and collaborative federalism. It also reveals the challenges that federalism may face in different contexts.

## **1.6 Structure of the Thesis**

In addition to this introductory chapter, which is chapter one, the thesis consists of seven chapters. The second chapter sets out the theoretical framework, presenting the essential features of collaborative federalism, its principles, institutional foundations and its critiques. Elazar's theory will be the main source of the analyses presented in this chapter.

The third chapter provides an in-depth analysis about the constitutional and legal foundation of Iraqi federalism. It reviews the constitutional and legal roots of decentralization and federalism. The chapter is a narrative on how federalism in Iraq has been adopted, and how its constitutional features, legal roots and political contexts have evolved and developed throughout the last century. The chapter includes a brief historical background of the modern Iraqi political and constitutional system. Then, it discusses the formation and design of the main elements of the current framework of federalism in Iraq. The political deliberations by major political actors after 2003 are presented. Additionally, the processes, debates, disagreements and perspectives present before the drafting of the 2005 Constitution are discussed. Finally, the current structure and nature of federalism as reflected in 2005 Constitution will be carefully outlined which should reveal the points on which disputes have arisen between KRG and the central government. At the end of this chapter, the historical, legal and political bases of the current constitutional federalism in Iraq are clearly summarized.

The fourth chapter further broadens and deepens the analysis by examining the attitude of political, religious and ethnic groups towards federalism in Iraq. It starts with the assumption that federalism in Iraq cannot be properly understood only by reading the

constitutional provisions dedicated to federalism; rather, it can be better assessed and analyzed by revealing the attitudes of the main political, ethnic and religious groups towards federalism and its structure in Iraq. Accordingly, this chapter provides a comprehensive narrative on the attitudes of Shi'ite Arabs, Sunni Arabs, the Kurds and other groups towards federalism. Furthermore, it delves into the historical background and rationales on which each group in Iraq has built, expressed and changed their attitudes towards federalism. The chapter reveals the rationales of each group for standing for or against federalism in the recent history of Iraq. It also explains why the nature, form, structure and even the content of federalism in Iraq are still very controversial among those who have accepted federalism for Iraq. It also indicates how the socio-political and economic considerations have formed different attitudes among Iraqis regarding federalism. Additionally the chapter addresses the difficulty of establishing decentralization in Iraq. It explains why there is only one region, KRG, in Iraq and why different legal and political attempts of further decentralization have been aborted in the last thirteen years.

The fifth chapter addresses oil management in Iraq, its constitutional bases, its difficulties, challenges and disputes, its political context and its technical and legal aspects. The chapter starts with the historical background of oil management in Iraq. Then, it delves into different legal interpretations of the constitutional articles related to oil and natural gas. It specifically provides details on the dispute between the KRG and the FG over oil and gas management, the ownership, its relevant contracts, oil and gas related laws and regulations, distributing oil revenue and future oil explorations.

The sixth chapter provides comparative analyses for understanding the issue and for providing alternative approaches taken by different countries. In this chapter two legal systems, Canada and Nigeria, are examined. Their federal approaches for dealing with the management of natural resources are compared. Their institutions for dealing with the conflicts and disputes are also discussed comparatively. In this chapter, the principles of collaborative federalism and their implication in these two federalisms will be briefly investigated.

Chapter seven is dedicated to the comparative lessons for federalism in Iraq as well as the rationales for adopting CF based on Iraqi constitution and its sociopolitical system Iraq. The similarities and differences between the Canadian and Nigerian systems in terms of oil and gas management with Iraq will be outlined for the purpose of assessing the possibility and effectiveness of establishing collaborative approach in Iraq. This

chapter will provide an alternative federal approach for addressing the controversies and achieving common ends between the FG and the subunit governments, especially KRG. It presents the main principles and features of collaborative federalism as an effective approach for oil management in Iraq. Its limitations will be presented. It develops a thesis based on minimum principles of CF through outlining the requirements of these principles in the context of oil management.

The final chapter of the thesis offers a conclusion summarising the major themes developed in the thesis for oil management in Iraqi federalism together with an assessment of the prospects for - and possible direction of - Iraqi federalism as well as some recommendations for the future, uncertain as this may be.

## Chapter Two: Theoretical Foundation of Collaborative Federalism

### 2.1 Introduction

While nation states take a variety of forms, a common distinction is between those that can be categorized as unitary<sup>85</sup> and those that are federal states. These systems are structurally different. Even those which can generally be listed under one category such as ‘federal’ can be categorized again into different models and forms such as confederation or federation.<sup>86</sup> These differences have been recognised and studied in depth by many scholars. Elazar states, ‘federalism is a genus of which there are several species. Modern federation is the best known species.’<sup>87</sup> Federalism is a system for the distribution and division of political powers, legal authorities, and institutional rights and responsibilities within a political entity. Its adoption in recent centuries has resulted in the development of different forms of federalism with unique structures and characteristics. While the United States of America is considered the oldest example of federalism, Iraq can be considered one of the newest.<sup>88</sup> Because of such plurality and diversity in its forms and structures, some scholars argue that ‘every federation is unique,’<sup>89</sup> and that ‘there is no single pure model of federation.’<sup>90</sup> Thus, federalism is a flexible system and renewable concept that can be applicable in various contexts and circumstances.<sup>91</sup>

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<sup>85</sup> The unitary state model is based on the Westphalian model with some modifications by the democratic revolutionists in the eighteenth century. It is the model in which the central government maximizes its control over lower levels. More details will be given in the following chapters. See: Daniel Elazar, ‘Contrasting Unitary and Federal Systems’ (1997) 18 (3) *International Political Science Review* 237.

<sup>86</sup> Watts argues ‘Confederation is another species of the federal system in which the institutions of shared rule are dependent on the constituent governments, being composed of delegates from the constituent governments and therefore having only an indirect electoral and fiscal base.’ See: Ronald Watts, ‘Federalism, Federal Political Systems, And Federations’ (1998) 1(1) *Annual Review of Political Science* 117, 121.

<sup>87</sup> Elazar, *Federalism: an Overview* (n 14) 6.

<sup>88</sup> Anderson, *Federalism: an Introduction* (n 32).

<sup>89</sup> *Ibid* 7.

<sup>90</sup> Watts, *Comparing Federal Systems In The 1990S* (n 17)1.

<sup>91</sup> See; Frédéric Lépine, ‘A Journey through the History of Federalism’ (2012) 363 *LEurope en Formation* 21.



The diversity of forms that federalism has taken has been reflected in the development of various theories of federalism. After a careful consideration of the potential strengths, weaknesses, challenges, scope of applicability and degree of utility of each theory, this research assumes that Elazar's theory of federalism can be the most appropriate theory for understanding Iraqi federalism and for dealing with controversial issues such as oil and gas management. What makes it very relevant to Iraqi federalism is its dependence on the concept of covenant. The idea of covenant carries with it the elements of the ideas of mutual consent, collaboration, negotiation, compromise reciprocity, bargains, equal status or the equal partnership. It is the most fundamental component of Elazar's theory,<sup>92</sup> yet it is absent from Iraqi federalism as it is currently constituted.

This chapter outlines and discusses the elements and principles of Elazar's theory, particularly the concept of collaborative federalism (CF). It will provide a definition of this concept and explain its principles and institutions. These explanations shall lead to developing a framework for better understanding the disputes over oil management in Iraq.

## 2.2 Conceptions of Covenant

The word "federal" is derived from the Latin word *foedus*, which is closely related to covenant. Rufus Davis suggests that there is a strong connection between covenant and the ideas of cooperation, reciprocity and mutuality.<sup>93</sup> "Foedus" as Elazar argued, is the Latin Vulgate Bible's translation of the Hebrew word 'Abrit.' The latter means covenant or compact.<sup>94</sup> It has been observed that 'the notion that the federal idea is best

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<sup>92</sup> Some theories define federalism within the meaning or applications of the concept of covenant. Bullinger that created a strong concept of the religious covenant in the 1520s and 1530s, Mornay in 1579. In 1603, Althusius used Mornay's incipient federal framework to provide the first systematic, well-developed philosophy of political federalism, which he based on the religious covenant. See: J Wayne Baker, 'Faces of Federalism: From Bullinger to Jefferson' (2000) 30 (4) *CrossRef Listing of Deleted DOIs* 25.

<sup>93</sup> S.Rufus Davis, *The Federal Principle: a Journey through Time in Quest of a Meaning* (University of California Press 1978) 3.

<sup>94</sup> Daniel Elazar, 'Community Self-Government and the Crisis of American Politics' (1971) 81 *Ethics* 91; Daniel Elazar, 'Federalism vs. Decentralization: The Drift from Authenticity' (1976) 6 *Publius: The Journal of Federalism* 9.

established through covenants, compacts, bargains, and other contractual arrangements lies at the heart of Elazar's line of reasoning.'<sup>95</sup>

Elazar defines covenant as 'a morally informed agreement or pact between people or parties having an independent and sufficiently equal status, based upon voluntary consent and established by mutual oaths or promises witnessed by the relevant higher authority.'<sup>96</sup> Essentially, this definition portrays covenant as an obligation through which individuals or groups pursue consensual objectives.<sup>97</sup> The main characteristic of every covenant according to Elazar is that it involves consent and promise, and could either be for a limited time or perpetual.<sup>98</sup> By explaining different aspects and conceptions of covenant, this section reveals the importance of understanding federalism within the concept of covenant. For Elazar,

the term federal, which is originally derived from the Bible, demands a different kind of political relationship, and perhaps in the long run, a different kind of human relationship based on one partnership among individuals, groups, and governments in the pursuit of justice, cooperative relationships that make the partnership real, and negotiation among the partners as the basis for sharing power.<sup>99</sup>

Covenant, Elazar argues, has a theological origin. A covenant in its religious form is initiated as the guidance for understanding the relationship between the God and humanity based on the mutual promises and obligation. Its oldest example, in that sense, was the covenant between God and the tribes of Israelites.<sup>100</sup> It is described in the Bible, the elements of both federation and confederation were part of the common constitution (the Torah of Moses), which was binding on all the followers.<sup>101</sup>

This theological conception of the covenant has faced challenges and criticisms. Michael Burgess, for example, argues that Elazar devoted more than 30 years to prove that federalism as an idea and a thing is the same as the Judeo-Christian covenant. He

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<sup>95</sup> Michael Burgess, *In Search of the Federal Spirit: New Theoretical and Empirical Perspectives in Comparative Federalism* (Oxford University Press 2012)7.

<sup>96</sup> Elazar, 'The Political Theory of Covenant:(n 27) 6.

<sup>97</sup> *ibid.*

<sup>98</sup> *ibid.*

<sup>99</sup> Elazar, 'Community Self-Government and the Crisis of American Politics' (n 94); Elazar, 'Federalism vs. Decentralization...' (n 94).

<sup>100</sup> Elazar, 'The Political Theory of Covenant:(n 27)

<sup>101</sup> *Ibid.*

added that this religious interpretation of federalism is the most ideologically distinct theory among the rest of the federalism theories.<sup>102</sup> Despite the importance of understanding the original theological meaning of covenant, it should not be considered as the only foundation of federalism. To understand the evolution of federalism, it must be put into different theological, political, social, economic and legal contexts in which it has developed.

In its political form, covenant refers to the way people freely establish their communities, political systems and civil society through such morally grounded and sustained compacts.<sup>103</sup> Politically, the idea of covenant carries with it the elements of the ideas of consent and constitutionalism. A covenant precedes a constitution and creates the people or civil society with all its institutions by mutual consent; then this initial process will be followed by adoption of the constitution of government for itself. Thus, Elazar stated, a ‘constitution involves the implementation of a prior covenant and effectuation or translation of a previous covenant into an actual frame or structure of government.’<sup>104</sup> This essential principle of the covenant provides a means for free people to form political communities without sacrificing their basic freedom and with establishing effective governmental institutions operating on both, “self-rule and shared rule”.<sup>105</sup> Hence, it can be argued that both consent and constitutionalism are fundamental to the theory and practice of federalism.

Another conception of covenant is linked to equality. It is a central element of the concept of covenant. This feature emphasizes the equal status of those reaching an agreement in any covenant. This equality can be realized by a contractual means which persuade all members in the new society to be ruled under the authority of the whole, and at the same time ‘each of them preserve some basic liberties, and participate in the joint decision-making processes, and the exercise of power in a cooperative or partner-like way.’<sup>106</sup>

The final element of covenant is its legal conception. Covenant can be legally defined as ‘a binding promise is a straightforward statement of the concept of far-reaching

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<sup>102</sup> Burgess, *In Search of the Federal Spirit...* (n 95).

<sup>103</sup> Elazar, Federal models of (civil) authority (n26).

<sup>104</sup> Elazar, ‘The Political Theory of Covenant :( n 27)11.

<sup>105</sup> *ibid.*

<sup>106</sup> *ibid.*

importance in the relations between individual groups and peoples.’ It is ‘a promise or agreement under consideration, or guarantee between two parties, and the seal or symbol of guarantee is that which distinguishes covenant from a modern contract’<sup>107</sup>

As will be explained in the following section, Elazar’s theological, political, social, historical and legal conceptions of covenant includes almost all the elements of the contemporary understanding and practice of federalism.

## **2.3 Elazar’s Theory of Federalism**

### **2.3.1 General Review**

The starting point in Elazar’s theory is that there are three very important themes in the core of all inner motivations of human beings, which are:

- (1) The pursuit of political justice to achieve the good political order; (2) the search for understanding of the empirical reality of political power and its exercise; and (3) the creation of an appropriate civic environment through civil society and civil community capable of integrating the first two to produce a healthy political life.<sup>108</sup>

Elazar’s theory of federalism is fundamentally designed to achieve those goals. He believes that the covenant is the mechanism for solving or achieving all these aims and inquiries. He powerfully states;

The federal system, like politics itself, must be concerned with questions of both power and justice. Since federalism is something more than a set of institutions and procedures embodied in a frame of government, but, rather, shapes the communal constitution for a society. It must be evaluated by comparing its principles and the realities of its operations.<sup>109</sup>

Elazar suggests that federalism as covenant can be studied in three dimensions.

First, it can be considered as a form of political conceptualization and mode of political expression, which can shape the way in which people look at the world and understand the nature of politics and civil society. Second, it can be perceived as a source of political ideology that shapes the world perspectives of

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<sup>107</sup> *ibid.*

<sup>108</sup> Elazar, ‘The Political Theory of Covenant:(n 27) 3.

<sup>109</sup> Elazar, ‘Community Self-Government and the Crisis of American Politics’ (n 94).

whole communities. Through this point of view, federalism can help defining civil characters and political relationships, and serving as a touchstone for testing the legitimacy of political institutions. Finally, it can be studied as a factor shaping political culture, institutions, and behaviours. This seems to be the most important of all readings. This factor is operationally the most significant dimension of the covenant though it is also the most difficult to measure.<sup>110</sup>

He then starts building his theory through investigating the historical origins of federalism. Elazar examines federalism through ‘the lens of ancient or early modern historical experience and its theological articulation.’<sup>111</sup> He argues ‘federalism is not just a set of arrangements, but an approach of life that informs the entire civil society and establishes the basic character of human relations.’<sup>112</sup> His model of federalism is the matrix form and a network of arenas within arenas which are distinguished by being larger or smaller rather than "higher" or "lower."<sup>113</sup> His structure for federalism is ‘non-centralization, which means the constitutional diffusion and shaping of powers among many centres.’<sup>114</sup> Federalism, he suggests, ‘consists of numerous centres, linked together within a network of dispersed powers, with lines of communication and decision-making that push them to interact.’<sup>115</sup>

One of the other characteristics of his theory is its broad definition of federalism. He defines federalism in its most general sense as ‘the linking of individuals, groups and polities in lasting but limited union in such a way as to provide for the energetic pursuit of common ends while maintaining the respective integrities of all parties.’<sup>116</sup> After his broad conceptualisation, he formulates the shortest, simplest formal definition of federalism. He defines federalism as ‘a constitutionalized power-sharing through

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<sup>110</sup> Elazar, *Federal models of (civil) authority* (n 26).

<sup>111</sup> Glenn Moots, ‘The Covenant Tradition of Federalism: The Pioneering Studies of Daniel J. Elazar. The Ashgate Research Companion to Federalism’ in Ann Ward and Lee Ward (eds), *The Ashgate Research Companion to Federalism* (Ashgate 2009)391, 394.

<sup>112</sup> Elazar, *Exploring Federalism* (n 11).

<sup>113</sup> Elazar, ‘Contrasting Unitary and Federal Systems’ (n 85) 239.

<sup>114</sup> Daniel Elazar, ‘Harmonizing Government Organization ...’(n14)49.

<sup>115</sup> Robert Agranoff, ‘Managing Within the Matrix: Do Collaborative Intergovernmental Relations Exist?’ (2001) 31 *Publius: The Journal of Federalism* 31, 37.

<sup>116</sup> Elazar, *Exploring Federalism* (n 11) 5.

systems that combine *self-rule and shared rule*, including federations, confederations, federacies, and other similar forms of political or organizational relationships.<sup>117</sup>

Reflecting on this definition, Michael Burgess believes that it outlines and contains the complexity of federalism. Thinking of this definition from its empirical and normative implications, it serves to open up numerous pathways of investigation. Moreover, Burgess considers that while Elazar's indication of the *self-rule* reflects a dominant focus on autonomy, separateness, independence, rule-making and the capacity to govern a political community, the concept of *shared rule* refers to the issue of power sharing, intergovernmental relations among all levels of governments within the same community, with the need for national government to work for their common interest.<sup>118</sup> Federalism in that sense is 'a means of organizing power and relationships that flow from it. It looks to the linkage of people and institutions in lasting yet limited union by mutual consent, without the sacrifice of their respective integrities.'<sup>119</sup>

Elazar's concept of federalism is both normative and descriptive. In this regard, scholars argue that the distinction between the normative and descriptive discourse can lead to some logical confusions.<sup>120</sup> King explains this difference. He asserts that, 'while federalism is the normative concept, federation is the descriptive term.'<sup>121</sup> Moreover, Watts argued 'for the sake of clarity three terms should be clearly distinguished: federalism, federal political systems, and federations.'<sup>122</sup> He says 'Federalism is a normative concept while the term federal political systems is the descriptive term referring to the genus of political organization that is marked by the combination of shared rule and self-rule. On the other hand, the term federation refers to a specific species within the genus of federal political systems.'<sup>123</sup>

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<sup>117</sup> Elazar, *Federalism: an Overview* (n 14) 2.

<sup>118</sup> Burgess, *In Search of the Federal Spirit...*(n 95) 5-6.

<sup>119</sup> Elazar, *Federalism: an Overview* (n 14) 6.

<sup>120</sup> Ronald Watts, 'Daniel J. Elazar: Comparative Federalism and Post-Statism' (2000) 30(4) *Publius: The Journal of Federalism* 155.

<sup>121</sup> Preston King, *Federalism and Federation* (Croom Helm 1982) 142-143.

<sup>122</sup> Watts, 'Federalism, Federal Political Systems, And Federations' (n 86) 120.

<sup>123</sup> *ibid* 120-121.

This distinction is significant for understanding Elazar's main principle of federalism. He argued that '(t)he essence of federalism is not to be found in a particular set of institutions, but in the institutionalization of particular relationships among the participants in political life....a wide variety of political structures can be developed that are consistent with federal principles.'<sup>124</sup> Based on the same understanding of federalism, Elazar claims 'nearly 80 per cent of the world's population now lives within polities that are formally federal, and that utilized federal arrangements in some way.'<sup>125</sup> However, despite what Elazar claimed, there are only 28 countries, which their constitutions state that they are federal states or modern federations as classified by Elazar.<sup>126</sup>

Another unique point of Elazar's account of federalism is his emphasis on the issue of relationships among the parties within a state, more than structures in itself, as a key to political justice. He argues that the entire history of the covenant idea in any of its several forms has emphasized the following three elements. The first element is the commitment of real partnership between all the levels of the governments or among several power centres. The second feature is the primacy of bargaining and negotiation among the above power centres. The final element is the cooperative or collaborative

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<sup>124</sup> Elazar, *Exploring Federalism* (n 11) 12.

<sup>125</sup> ELazar sees 'federalism is a genus of which there are several species' such as 'federations, confederations, federacies, and other similar forms of political or organizational relationships.' Therefore Elazar argued, there are polities that formally possess federal constitutions, or as he called them modern federations and confederations as the best-known species of the genus of federalism, examples of the first one are USA, Canada, Germany, etc, and the European Union as an example of a confederation. Also, there are some policies that are not formally federal states but in some way practise and adopt federal arrangement and principles. For examples, China, United Kingdom of Great Britain and Northern Ireland, Netherland, Italy, Lebanon, the Portuguese Republic, etc. Furthermore, there are also Associated States (Cook Islands-New Zealand, San Marino-Italy, Liechtenstein-Switzerland, Monaco-France etc.), Federacies (Faroe Islands and Greenland-Denmark, Aaland Islands-Finland, Jammu and Kashmir-India, Isle of Man and Jersey-the United Kingdom etc.), and Condominiums (Andorra-France and Spain). See: Daniel Elazar, 'Federal Systems of the World: A Handbook of Federal, Confederal and Autonomy Arrangements Introduction' (*jerusalem center for public affairs*) <<http://www.jcpa.org/dje/index-fs.htm>> accessed November 25, 2018; Elazar, 'Federalism An Overview' (n ) 3-6.

<sup>126</sup> These federal countries are; Argentina, Australia, Austria, Belgium, Bosnia and Herzegovina, Brazil, Canada, Comoros, Ethiopia, Federated States of Micronesia, Germany, India, Iraq, Malaysia, Mexico, Nepal, Nigeria, Pakistan, Palau, Russia, Spain, Saint Kitts and Nevis, South Africa, Switzerland, United Arab Emirates, United States, Venezuela.

relationships among the partnerships as a basis for any kind of power-sharing without undermining self-rule.<sup>127</sup> Similarly, Robert B. Hawkins, Jr. states that the basis for dealing with sub-national and local governments by the federal or the national government is the *partnership*. It should take into account all participants as real partners not just as subordinates. It is also suggested ‘negotiation and compromise are far preferable to order and subordination.’<sup>128</sup>

Additionally, Elazar distinguishes procedural federalism from substantive federalism. On the one hand, it provides a remedy to human nature and need for self-rule and social cooperation.<sup>129</sup> This is the substantive component of federalism. This substance emanating from human nature and need for both self-rule and social cooperation is the principal inner foundation of federalism. On the other hand, it is the process of institutionalization of a particular kind of relationship, rather than establishing the particular institutions and authority. Such development of institutions and process can be characterised as the procedural aspect of federalism.<sup>130</sup>

He further observes that almost all federal systems share some elementary features and operational principles such as a written constitution, non-centralization, and a real division and distribution of power.<sup>131</sup> He acknowledged that one of the functions of federalism is the ‘distribution of power among general and constituent governments so that they all share in the system’s decision-making and executing processes.’<sup>132</sup> He further agrees with other theorists on the proposition that ‘federal principles rest on the idea that free men have the ability freely to take part into permanent limited political associations for realizing common goals and protect certain rights while preserving their respective integrity.’<sup>133</sup>

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<sup>127</sup> Elazar, *Federalism: an Overview* (n 14)1-2.

<sup>128</sup> Robert Hawkins, ‘Federal Principles for Government Reorganization’ (1978) 8(2) *Publius: The Journal of Federalism* 133.

<sup>129</sup> Daniel Elazar, ‘The Themes Of A Journal Of Federalism’ (1971) 1(1) *Publius: The Journal of Federalism* 3.

<sup>130</sup> Elazar, *Federalism: an Overview* (n 14) 216.

<sup>131</sup> Elazar, *Exploring Federalism* (n 11).

<sup>132</sup> Elazar, ‘Federalism vs. Decentralization...’(n 94).

<sup>133</sup> Elazar, ‘Community Self-Government and the Crisis of American Politics’ (n 94).



Another feature of his theory is the recognition of the role of culture in establishing federalism. He believes 'true federal systems manifest their federalism in cultural as well as constitutional and structural ways. This culture enables the people to establish interrelated compacts for creating a unitary system for a common purpose while retaining their respective integrities.'<sup>134</sup> Federalism, in this sense, implies a position and an attitude toward social as well as political relationships, which lead to certain kinds of human interaction that emphasizes coordination rather than superior-subordinate relationships, negotiated cooperation and sharing among parties.'<sup>135</sup> This cultural perspective of federalism is realised by other scholars. Burgess, for instance, argues 'federalism is a form of political will designed to forge a particular kind of constitutional bargain based upon elite negotiations and compromises, and secondly a culture of political attitudes, habits, beliefs, and orientations that sustained a mode of behavior appropriate to the maintenance of that bargain'<sup>136</sup>

Therefore, Elazar perceives federalism as a system of many great benefits and great social and political achievements. Although federalism in itself does not provide a magic wand for realizing a best society in terms of stability, peace ending, but it could be a solution for some internal conflicts, such as the diffusion of power between national and subnational governments, whether, the power is political, social, economic or legal.<sup>137</sup>

Furthermore, in matters of ethnicity, sects, distributing natural resources, maintaining cultural identities and sharing power peacefully, federalism can be an effective political system. The rationale behind his trust in federalism comes from the potential capacity of federalism as a system in facilitating an exceptional socio-political process and institutional structure for collective participation in decision making on almost all imaginable public issues.<sup>138</sup>

In summary, the above general overview of Elazar's theory was presented to indicate the significant features of his theory of federalism. As previously indicated, the concept of covenant is the cornerstone of Elazar's total philosophical and political construction.

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<sup>134</sup> Daniel Elazar, 'Urbanism and Federalism: Twin Revolutions of the Modern Era' [1975] *Publius: The Journal of Federalism* 15.

<sup>135</sup> Ibid.

<sup>136</sup> Burgess, *In Search of the Federal Spirit*... (n 95)12.

<sup>137</sup> Elazar, *Federalism: an Overview* (n 14).

<sup>138</sup> Elazar, 'The Themes of A Journal Of Federalism' (n 129).

From this concept, Elazar has developed a comprehensive theory of distinct characteristics for examining the nature, foundation, structure and applications of federalism. After such general overview, it is important to clarify how Elazar builds his theory on the historical origins of power organisations.

### **2.3.2 Origins of Models of Polity**

Regarding the source of models of polity, Elazar suggests there have been at least three models of power organisation. The first one is the hierarchy or pyramid model, which is founded by force or organized as hierarchies, where the power is structured and distributed among different levels through a chain of commands. The most significant organ in this model is the top level, which, is the decision-making centre.<sup>139</sup> The second model is the organic, the centre-periphery model (such as the Westminster parliamentary system<sup>140</sup>). In this kind of polity the power will be distributed according to decisions taken in the centre, which may or may not include significant representation from the peripheries. The third model is the covenantal model, which is constructed through reflection and choice, such as federalism.<sup>141</sup> The origins of this model are to be found in the deliberate coming together of equals to establish a mutually useful governmental framework within which all can function on an equal basis, usually defined by a pact”.<sup>142</sup> In this model, the respective integrities of the partners are protected despite the new polity that resulted from joining all partners together.<sup>143</sup>

While the first and second models are examples of centralization and/or decentralisation, the third model is the federal or matrix system, which is based on non-centralization. The third model has no single centre, but rather, decisions are taken through multiple centres depending mainly on the political bargainings through communications network and operation of the political checks and balances to avoid the concentration of power in one centre, as well as respecting the Constitution as the

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<sup>139</sup> Elazar, ‘Contrasting Unitary and Federal Systems’ (n 85).

<sup>140</sup> *ibid* (n 47).

<sup>141</sup> *Ibid* (n 47).

<sup>142</sup> *Ibid* (n 47).

<sup>143</sup> Elazar, *Federalism: an Overview* (n 14)7.

essential guarantee of their jurisdictions.<sup>144</sup> What, then, is the distinction between decentralisation and non-centralisation?

### **2.3.3 Decentralization and Non-centralization**

#### **2.3.3.1 Decentralization system**

Decentralization is a system in which there is a central authority that has the authority of determining what is to be decentralized. In other words, it is a delegation of authorities by the central government to sub-governments in geographic units.<sup>145</sup> The central government is dominant and can revoke the decentralized jurisdiction of the subunit governments at any time.<sup>146</sup> In the unitary state based on decentralization, the officials in subunit governments do not enjoy a powerful constitutional status which would enable them to be effective and real representatives of the units in any bargaining process with the centre.<sup>147</sup>

In decentralized systems, where power is delegated from top to bottom, the sub-governments' powers are a matter of grace and not a right.<sup>148</sup> The pyramid model leads to one set of notions as to what represents a national allocation of powers, derived from the imagery of levels and based on the concepts of "higher" and "lower."<sup>149</sup> Elazar argued, 'in contemporary social science language, centralization and decentralization are extremes of the same continuum while non-centralization represents another continuum altogether.'<sup>150</sup>

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<sup>144</sup> Alain Gagnon, soeren keil and Seen mueller, *Understanding Federalism and Federation: Essays in Honour of Michael Burgess* (2014), 19 <<https://canterbury.academia.edu/SoerenKeil> > accessed 26 November 2018.

<sup>145</sup> Aaron Wildavsky, 'Federalism Means Inequality' (1985) 22 Society 42.

<sup>146</sup> Alain Gagnon, soeren keil and Seen Mueller (n 144).

<sup>147</sup> Carles Boix and Susan Stokes, *The Oxford Handbook of Comparative Politics*, vol 4 (Oxford University Press 2009) 767.

<sup>148</sup> Elazar, 'Community Self-Government and the Crisis of American Politics' (n 94).

<sup>149</sup> Elazar, 'The Political Theory of Covenant:(n 27) 3.

<sup>150</sup> Elazar, 'Federalism vs. Decentralization...' (n 94) 13.

### 2.3.3.2 *Non-centralization*

Non-centralization is ‘the organizational expression of federalism.’ It refers to the matrix system or a matrix of governments in which ‘there are no higher or lower power centres, but only larger or smaller arenas of political decision-making and action.’<sup>151</sup> ‘It refers to independent centres of power in geographic areas who do (and are expected to) differentiate themselves.’<sup>152</sup>

This system reflects the fundamental distribution of powers among multiple centres across the matrix. Each cell in the matrix represents an independent political actor and an arena for political action. Furthermore, in the matrix model, ‘power shifts in response to changing circumstances.’<sup>153</sup>

In non-centralisation, there is no devolution of powers from a single centre, or from top to bottom. The powers are constitutionally distributed and dispersed among many centres within a federation.<sup>154</sup> Structurally, constituent units are protected by constitutional guarantee from federal interference. Functionally, all these centres share many activities; they all participate in decision-making powers, as the equal partners, based on coordination and negotiated cooperation in order to make the political body work properly.<sup>155</sup> In sum, ‘in this model, a central government is restricted from control or revoking the decentralized jurisdiction of the constituents units.’<sup>156</sup>

Therefore, more than one authoritative body is responsible for the conduct of the government and is capable of exercising its responsibilities. Additionally, ‘there is no central government controlling all the lines of political communication and decision-making process.’<sup>157</sup> Furthermore, ‘the subnational units are not creatures of the federal or national government, but all of them derive their authority directly from the people.’<sup>158</sup>

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<sup>151</sup> Ibid.

<sup>152</sup> Wildavsky, ‘Federalism Means Inequality’ (n 145)43.

<sup>153</sup> Agranoff, ‘Managing Within the Matrix: Do Collaborative Intergovernmental Relations Exist?’(n 115)37.

<sup>154</sup> Elazar, ‘Federalism vs. Decentralization: The Drift from Authenticity’ (n 94).

<sup>155</sup> Elazar, *Federalism: an Overview* (n 14) 39; Elazar, ‘Federalism vs. Decentralization...’(n 94).

<sup>156</sup> Alain Gagnon, soeren keil and Seen mueller (n 144) 25.

<sup>157</sup> Elazar, ‘Federalism vs. Decentralization: The Drift from Authenticity’ (n 94).

<sup>158</sup> *ibid* (57).

The constitutional framework of a federal system based on a non-centralization model must create ‘a matrix of decision-making centres, reflecting the various arenas of a political and governmental organization. For this model to work properly, there must be a degree of interaction among the cells if the system is to work through formal lines of authority and both formal and informal lines of communication crisscrossing them. This interaction is called cooperative or/and collaborative federalism’.<sup>159</sup>

### ***2.3.3.3 Difference between non-centralization and decentralization***

Many writers and scholars use decentralization and federalism interchangeably and consider that federalism is the most developed form of decentralization.<sup>160</sup> Nevertheless, the difference between non-centralization and decentralization is crucial because it reveals the difference between a real federal system and other forms of the distribution of administrative, legal and political powers within an entity. Decentralization represents administrative aspects of federalism rather than the legal and constitutional aspects; it is related to federalism when it is used for policy-making regarding administrative matters. Non-centralization, on the other hand, is a legal and constitutional aspect of federalism.<sup>161</sup> Decentralization means a legitimate monopoly of governmental power by the central government. ‘Non-centralization is the cornerstone of every true federal system because it embodies the constitutional coexistence between all levels of governance, national and subnational governments (SGs), based on constitutionally recognised power-sharing.’<sup>162</sup> If the essence of federalism is indeed

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<sup>159</sup> Elazar, ‘The Political Theory of Covenant :( n 27) 3; Elazar, ‘Community Self-Government and the Crisis of American Politics’ (n94); Elazar, ‘Harmonizing Government Organization with the Political Tradition’(n 14). Elazar, *Federalism: an Overview* (n 14) 39-40.

<sup>160</sup> See: for instance, Wilhelm Hofmeister and Edmund Tayao, *Federalism and Decentralization: Perceptions for Political and Institutional Reforms* (Konrad-Adenauer-Stiftung 2016).

<sup>161</sup> Eghosa Osaghae, ‘A Reassessment of Federalism as a Degree of Decentralization’ (1990) 20 *Publius: The Journal of Federalism* 83.

<sup>162</sup> Daniel Elazar, ‘The Shaping of Intergovernmental Relations in the Twentieth Century’ (1965) 359(1) *The Annals of the American Academy of Political and Social Science* 10.

based on this type of self-rule in addition to shared rule, then, it must rest on varying forms of “contractual non-centralization”.<sup>163</sup>

Finally, the non-centralization model, as a principal feature of federalism, must be complemented with another feature, which is the system of intergovernmental arrangements that leads to joint policy-making and ‘joint decision-making’.<sup>164</sup> This is the core of what is examined in the following section.

## **2.4 Collaborative Federalism (CF)**

Although in most federations the federal government (FG) seems to be more powerful than the SGs, one of the challenges facing most federations is achieving a balance between self-rule and shared-rule between these two strong and directly-elected levels of government.<sup>165</sup> Therefore, to avoid any overlapping of their jurisdictions and in order to avoid any conflict between them, federations need some formal and informal interaction institutions. This section is dedicated to firstly conceptualise collaborative federalism and secondly examine the main assumptions and elements of Elazar’s theory of collaborative federalism, and potential limitations.

### **2.4.1 Conceptualisation of Collaborative Federalism**

The purpose of federalism is to enable all individuals and groups to take part in both self-rule and shared rule within a polity. However, sometimes an overlapping of jurisdictions may arise among different governmental levels, and conflicts may occur over different issues. Scholars, such as Elazar, reflect on this matter and suggest that collaboration and cooperation among different institutions and various levels of government is a key for dealing with problems of conflicts and overlapping competencies.<sup>166</sup> This idea has led to the development of what is called CF. The following points outline its general principles and elements.

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<sup>163</sup> *ibid.*

<sup>164</sup> Ute Wachendorfer-Schmidt (ed), *Federalism and Political Performance* (Routledge 2003) 6.

<sup>165</sup> Carles Boix and Susan Stokes (n 147)754.

<sup>166</sup> Elazar ‘The Shaping of Intergovernmental Relations in the Twentieth Century’(n 162).

**First**, the difference between collaboration and cooperation needs to be highlighted. Often these two concepts have been viewed as synonyms and interchangeable by most scholars. Although there is a similarity between collaboration and cooperation, both of which represent relationships of interdependencies, nevertheless they are different. In particular, with regard the position and the status of SGs within the intergovernmental relationships.<sup>167</sup> CF is usually based on equal partnerships, numerous councils and meetings are co-chaired between both levels of governments while this is not the case for cooperative federalism.<sup>168</sup>

Briefly, in the case of CF, there is a mutual agreement based on equal partnerships while the cooperative is generally based on a hierarchical relationship. However, it must be noted that practically there is a form of hierarchy in almost all federal system. Even in CF there is a form of hierarchy in the distribution of powers, authorities and competencies; nevertheless, that form of hierarchy in CF is very thin and limited because of the vast territory of the authority that is distributed horizontally based on equality and self-rule. In other words, ‘collaborative federalism injects confederalism to the overall structure of the federal system.’<sup>169</sup>

Agranoff and McGuire argue, “Cooperation” refers to working jointly with others to some end, seeking to be helpful rather than to hostile.<sup>170</sup> The relationship in cooperative federalism is more formal and implies some hierarchy among the different orders of government. Also, cooperative federalism, which is about law making, is generally binding.<sup>171</sup>

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<sup>167</sup> Peter Meekison, Hamish Telford and Harvey Iazar (Eds), *Reconsidering the Institutions of Canadian Federalism: the State of the Federation 2002* (the Institute of Intergovernmental Relations, School of Policy Studies, McGill-Queens University Press 2002).

<sup>168</sup> Richard Simeon, ‘Recent Trends in Federalism and Intergovernmental Relations in Canada: Lessons for the UK?’ (2000) 89(354) *The Round Table* 231.

<sup>169</sup> Robert Csehi, ‘International Conference on Comparing Modes of Governance in Canada and the European Union: Social Policy Engagement across Complex Multilevel Systems’ <[http://web.uvic.ca/jmc/events/sep2011-aug2012/2011-10-modes-of-gov/papers/2011-Modes\\_of\\_Gov-Panel\\_C-Robert\\_Csehi.pdf](http://web.uvic.ca/jmc/events/sep2011-aug2012/2011-10-modes-of-gov/papers/2011-Modes_of_Gov-Panel_C-Robert_Csehi.pdf)> accessed November 27, 2018.

<sup>170</sup> Robert Agranoff and Michael McGuire, *Collaborative Public Management: New Strategies for Local Governments* (Georgetown University Press 2003) 4.

<sup>171</sup> Robert Csehi, ‘From legislative Denison to policy coordination-collaborative federalism and the changing character of intergovernmental relation in Canada and the European Union’ (PhD thesis

Another difference is that “collaboration” is informal and implies a heterarchical, or equal partnership among all the governments.<sup>172</sup> CF, which is about policy coordination, is legally nonbinding.<sup>173</sup> CF is often characterized by the principle of codetermination of broad national policies more than either national government or the model of more competitive.<sup>174</sup> Therefore, Cameron argues that ‘the co-determination, collaborative model, involves two or more levels of governments working together as equal authorities.’<sup>175</sup> Thus, the collaborative model is opposite to dual federalism,<sup>176</sup> and different from cooperative federalism.

Whereas cooperative and collaborative federalism are both based on interdependence and coordination, competitive federalism is based on both levels of government being independent and in conflict with one another.<sup>177</sup> Moreover, there are no specific institutions to coordinate and regulate their relations.<sup>178</sup> Seemingly, at least in theory, both levels of government have their own spheres for working independently, without interference from the other side.<sup>179</sup>

**Second,** CF can be simplified through its definitions. In general, McNamara defines collaboration as “an interaction between participants who work together to pursue complex goals based on shared interests and a collective responsibility for

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Submitted to Central European University Department of International Relations and European Studies 2014) 41.

<sup>172</sup> *ibid* 47-48.

<sup>173</sup> These agreements may have binding status in some federations, for example in Spain, Belgium, the United States of America, but they are not binding in Canada and Australia. Despite this non-binding legal nature, it plays an important role in the functioning of these federations. Johanne Poirier, ‘The Functions of Intergovernmental Agreements: Post-Devolution Concordats in a Comparative Perspective’ (2001) Public Law 134, 143.

<sup>174</sup> David Cameron and Richard Simeon, ‘Intergovernmental Relations in Canada: The Emergence of Collaborative Federalism’ (2002) 32(2) *Publius: The Journal of Federalism* 49,49.

<sup>175</sup> *ibid* 49.

<sup>176</sup> Dual federalism means that national and subnational governments operate separately in spheres, in which each is respectively sovereign. In other words, both levels of governments supreme within their own spheres regarding policies and jurisdictions. With no self-governing role for local governments, and it is often described as a layer cake. See, Watts, *Comparing Federal Systems In The 1990S* (n 17) 54.

<sup>177</sup> Martin Painter, ‘Intergovernmental Relations in Canada: An Institutional Analysis’ (1991) 24(2) *Canadian Journal of Political Science* 269.

<sup>178</sup> Peter Meekison, Hamish Telford and Harvey Iazar (Eds), *Reconsidering the Institutions of Canadian Federalism:...* (n 167).

<sup>179</sup> Kenneth Wheare (n33).



interconnected tasks which cannot be accomplished individually.’<sup>180</sup> Additionally, Agranoff and McGuire define the collaborative approach as ‘a concept that describes the process of facilitating and operating in multi-organizational arrangements for solving problems that cannot be achieved, or achieved easily, by single organizations’.<sup>181</sup> Similarly, CF, as defined by Cameron, is:

The process by which national goals are achieved, not by the federal government acting alone or by the federal government shaping provincial (subunits) behaviour through the exercise of its spending power, but by some or all of the provincial governments and the territories acting collectively.<sup>182</sup>

Other scholars define collaborative governance broadly as ‘the processes and structures of public policy decision making and management that engage people constructively across the boundaries of public agencies, levels of government, and/or the public, private and civic spheres in order to carry out a public purpose that could not otherwise be accomplished.’<sup>183</sup> It consists of ‘multi-partner governance, which can include partnerships among the state, the private sector, civil society, and the community, as well as joined-up government and hybrid arrangements such as public-private and private-social partnerships and co-management regimes.’<sup>184</sup>

As implied from those definitions, the role of the FG in the collaborative model appears as a facilitator rather than an overseer of the SGs. Therefore, the participation of subunit governments with federal governments as an equal partnership in the decision-making process and making policies enhances all the governments to accept the decisions that resulted from the negotiations over disputed matter.<sup>185</sup> Another element of CF is that it deals with powers that are not settled constitutionally, but rather an open-ended process,

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<sup>180</sup> Madeleine Mcnamara, ‘Starting to Untangle the Web of Cooperation, Coordination, and Collaboration: A Framework for Public Managers’ (2012) 35(6) *International Journal of Public Administration* 389,391.

<sup>181</sup> Robert Agranoff and Michael McGuire, *Collaborative Public Management* (n 173)4.

<sup>182</sup> David Cameron and Richard Simeon, ‘Intergovernmental Relations in Canada...’ (n 174)54.

<sup>183</sup> Kirk Emerson, Tina Nabatch and Stephen Balogh, ‘An Integrative Framework for Collaborative Governance’ (2012) 22(1) *Journal of Public Administration Research and Theory* 1.

<sup>184</sup> *Ibid.*

<sup>185</sup> Hope Babcock, ‘Dual Regulation, Collaborative Management, or Layered Federalism: Can Cooperative Federalism Models from Other Laws Save Our Public Lands’ (2008) 14 *Hastings W.-Nw. J. Env't'l L. & Pol'y* 449, 204.

which they should be solved through informal means, such as intergovernmental relations,<sup>186</sup> especially by working with all levels of governments collectively.<sup>187</sup>

**Third,** CF can be embodied in two forms within a federation; vertically and horizontally. The first one is between the federal and subunit governments, which is based on premises that recognise all governments' possession of strong fiscal and jurisdictional tools. The second level is between the SGs among themselves and their local governments. This is primarily based on the constitutional idea that there are some matters which exclusively belong to the local governments; therefore, it would be their right to make policy and decide together their means to achieve common goals.<sup>188</sup> Moreover, this collaborative intergovernmental relationship could arise between federal and local governments directly.<sup>189</sup> As a result of this interdependence, an effective policy becomes the subject of and dependent on coordination among various levels of governance

For this purpose, in almost all federations, it is indispensable to establish formal and informal councils, forums, committees and conferences to activate intergovernmental relationships and implement the collaborative rules and procedures. These councils hold meetings frequently for examining the level and scope of collaboration among different levels of governments through first ministers, ministers, officials. They discuss common problems, sharing information for achieving common ends.<sup>190</sup>

#### **2.4.2 Assumptions of Elazar's Theory of Collaborative Federalism**

Collaboration is the foundation of Elazar's theory of federalism. Generally, collaboration, as employed in Elazar's theory, refers to 'policy-making through promotion of dialogue, shared understanding of values, mutual engagement, deliberation, consensus-building and agreements. It is about building commonality,

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<sup>186</sup> Csehi, 'International Conference on Comparing Modes of Governance in Canada and the European Union...' (n169).

<sup>187</sup> David Cameron and Richard Simeon, 'Intergovernmental Relations in Canada...' (n 174)

<sup>188</sup> *ibid* (n 177); Deil Wright(n20) 2.

<sup>189</sup> Nestor Davidson, 'Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty' (2007) 93(4) *Virginia Law Review* 959, 968.

<sup>190</sup> Ronald Watts, 'Intergovernmental Councils in Federations' (Queen's University 2003) working paper 1, 4.

alignment of activities, discussion, and preparedness to compromise.’<sup>191</sup> Furthermore, in a collaborative model partners do not need to give up on their beliefs and agree on everything. What they need is to build an area of mutual understanding and trust, and after doing so, they can move from stage to stage, as a process to realizing shared ends.<sup>192</sup> However, there needs to be a clear commitment to common aims and a degree of collaboration for reaching these aims.<sup>193</sup>

Elazar emphasises intergovernmental relations (IGR) as an indispensable means for establishing collaborative federalism. For Elazar, IGR mainly refers to particular ways and means of operationalizing a system of government.<sup>194</sup> It is a federal-provincial diplomacy.<sup>195</sup> William Anderson defines IGR as ‘an important body of activities or interactions occurring between governmental units of all types and levels within the federal system.’<sup>196</sup> Additionally, IGR may involve informal cooperation, contracts for simple sharing, interchange of personnel, interdependent activities, grants-in-aid, tax offsets, and shared revenues.<sup>197</sup> It refers to the process of cooperation and coordination between two or more governments interactively to develop and execute the public policies and programs.<sup>198</sup> It must be noted that even though IGR is a significant mechanism for federal systems, it is presumably utilised in almost all systems, such as the United Kingdom.<sup>199</sup>

Intergovernmental Relations constitute important mechanisms and channels in all federations for resolving differences arising from the sharing of powers and the overlap

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<sup>191</sup> Robert Csehi, ‘From legislative Denison to policy coordination-collaborative federalism (n174)47-48.

<sup>192</sup> *ibid.*

<sup>193</sup> Don Lenihan, ‘Collaborative Federalism How Labour Mobility And Foreign Qualification Recognition Are Change Canada's Intergovernmental Landscape’ (Public Governance International 2012) publication 6.

<sup>194</sup> Elazar, *Exploring Federalism* (n 11) 16-18.

<sup>195</sup> Richard Simeon, *Federal-Provincial Diplomacy The Making of Recent Policy in Canada* (University of Toronto Press 2006).

<sup>196</sup> Deil Wright (n 20)2.

<sup>197</sup> Elazar ‘The Shaping of Intergovernmental Relations in the Twentieth Century’(n 162).

<sup>198</sup> Csehi, ‘International Conference on Comparing Modes of Governance in Canada and the European Union...’ (n169).

<sup>199</sup> Alan Trench, ‘Intergovernmental Relations: In Search of a Theory’ [2006] *Territory, Democracy and Justice* 224,226.

of these powers and jurisdictions between the federal and subnational governments.<sup>200</sup> As Cameron argues ‘Indeed, intergovernmental relations (IGR) is the workhorse of any federal system; it is the privileged instrument by which the job – whatever the job – gets done. IGR operates at the interface between what the constitution provides and what the practical reality of the country requires.’<sup>201</sup> Iraq is no exception to this principle. Accordingly, there is a need for the appropriate intergovernmental institutional mechanisms to be in place to enable collaborative federalism to operate in Iraq. There are several factors contributing significantly to shaping the structure of intergovernmental relations in federal countries.<sup>202</sup> These factors are certainly different in the federal countries because of the distinct aspects and foundations of each federal system; however, there are similarities among countries, which may provide a basis for learning from each other. For example, Iraq can learn some important lessons from the Canadian experience, especially regarding the need to adopt some models of intergovernmental institutions.

Another feature of Elazar’s theory of CF is its structure in relation to the position and role of the federal government. For Elazar, the federal government does not have a higher status over other SGs, especially with respect to decision making over the federal issues and conflicts. Equal partnership and collaboration, Elazar argues, must replace the hierarchical system. This is an important feature of collaborative federalism that makes it very significant for dealing with issues of federalism in Iraq. One of the main reasons of conflict over oil management in Iraq is the difference between the (KRG) and the FG over the status, position and role of the FG within the federation, especially regarding oil management. Thus, this theory provides a guiding tool to investigate the nature of the conflicts and suggests alternative solutions for the role of the FG without undermining its constitutional power.

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<sup>200</sup> Martin Painter, ‘Intergovernmental Relations in Canada...’ (n 177)2.

<sup>201</sup> David Cameron, ‘The Structures of Intergovernmental Relations’ (2002) 53 *International Social Science Journal* 121,121.

<sup>202</sup> These factors, as David Cameron argues, are ‘demographic and geographical factors, social and cultural factors, historical factors, constitutional and institutional factors, and political factors’. *Ibid* (n 201), 122.

## 2.5 The Rationale for Collaborative Federalism

All theories of federalism - directly or indirectly, implicitly or explicitly - assume that collaboration is a central element of any federal system. It is almost impossible to find a federation which operates without any interaction between the levels of governments. Interactions require a degree of collaborations. Elazar and other scholars have developed the principles of federalism based on that simple, yet significant, rationale. The following point further explains that proposition.

**First**, the inevitability of overlaps and interdependence within any federal system is unavoidable. This is the main rationale for adopting CF. 'It is almost impossible practically for both levels to exercise their powers entirely in isolation from each other.'<sup>203</sup> Jurisdiction can never be distributed so accurately as to avoid overlap between the responsibilities of these levels.<sup>204</sup> Because of that, the activities of each level of government inevitably affect those of the other levels.<sup>205</sup> Each level tries to operate with new matters, which are not explicitly indicated in the federal constitution. Similarly, when there is a provision that holds more than one interpretation, the coordination among different levels of federation becomes necessary.<sup>206</sup> The conflicts between the FG and KRG in Iraq are a clear example of unavoidability of conflicts and overlaps of authority within a federation. Elazar's theory is relevant and useful to understand Iraqi federalism partly because it is built on that assumption of overlap and inevitable conflicts.

**Second**, wherever there is federalism, there are concurrent or shared powers. CF, Elazar asserts, can deal with issues raised because of shared powers. It deals with those issues mainly through constructing mechanisms and institutions for IGR. Again, Iraq is a recent example of the existence of serious issues raised because of shared and concurrent powers. Watts argues;

The inevitability of overlaps and interdependence in the exercise of power by different levels of governments, within federal state, over common or concurrent competences needs existence of processes and establishments to smooth

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<sup>203</sup> Watts, 'Federalism, Federal Political Systems, And Federations' (n 86).

<sup>204</sup> Garth Stevenson, *Federalism in Canada: Selected Readings* (McClelland & Stewart 1989) 386.

<sup>205</sup> *ibid.*

<sup>206</sup> *ibid.*

intergovernmental collaboration for those jurisdictions based on equal partnership among all orders. This has required extensive consultation, cooperation and coordination between different levels of governments.<sup>207</sup>

This is particularly significant for providing a framework for oil management in Iraq as most of its conflicts emanate from concurrent and shared constitutional powers. Moreover, it is observed that ‘overlapping may arise due to the distribution of revenue between two levels of governments in such a way that each of them has exactly enough to perform the tasks assigned to it by the constitution, especially when there is injustice, or unequal distribution of revenue across the country.’<sup>208</sup> Thus, as Watts argues, the IGR and processes within a federal state have a significant role regarding adjustment of financial arrangements.<sup>209</sup>

**Third,** each unit or level of government within any federation tries to maintain the maximum level possible of self-rule. This is something that often causes many problems within any federation. It also causes a fragmented and polarized federal system.<sup>210</sup> Such wicked problems<sup>211</sup> ‘require the attention of multiple agencies working in partnership.’<sup>212</sup> Oil management in Iraq is partly a conflict over self-rule claimed and defended by the KRG against the FG. Elazar realises that problematic hidden ambition within any federalism. Therefore, he articulates his theory to embrace that ambition within a broader framework of collaboration based on equal partnership.

**Fourth,** the difficulty of changing the constitution formally requires less rigid alternatives in the federal system. In this case, political leaders and citizens would look for solutions through the informal adaptation of what had already proved a highly flexible regime, rather than through constitutional change.<sup>213</sup> Thus, CF can be an alternative to the rigid process of constitutional amendments. CF can achieve that through facilitating mechanisms for "Accords," "Declarations," and "Framework

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<sup>207</sup> Watts, *Comparing Federal Systems In The 1990S* (n 17).

<sup>208</sup> Garth Stevenson (n 204)386.

<sup>209</sup> Watts, *Comparing Federal Systems In The 1990S* (n 17).

<sup>210</sup> John Morris and Katrina Miller-Stevens (Eds), *Advancing collaboration theory: Models, typologies, and evidence* (2015 Routledge).

<sup>211</sup> ‘Wicked problems are those problems that defy solutions (or even definitions), and that cannot be addressed satisfactorily by single organizations.’ John Morris and Katrina Miller-Stevens(Ed) (n210) 4.

<sup>212</sup> Megan Mullin and Dorothy Daley, ‘Working with the State: Exploring Interagency Collaboration within a Federalist System’ (2009) 20(4) *Journal of Public Administration Research and Theory* 757,760.

<sup>213</sup> David Cameron and Richard Simeon, ‘Intergovernmental Relations in Canada...’ (n 174)55.

Agreements."<sup>214</sup> Therefore, CF is also called “treaty federalism”, which refers to the negotiation of non-constitutional agreements between the two levels of the governments for the functioning of the federation in cases where it is difficult to change the constitution because of its rigidity.<sup>215</sup>

This is what Iraq needs realistically because its constitution contains ambiguous clauses for oil management within the federation and its amendment is a rigid process.

**Fifth,** Judicial systems and institutions are unable to resolve all disputes, particularly of a political nature, that may arise within federal systems. Despite their significant role in establishing and maintaining federalism, judicial institutions are not the only possible responses to all complex political, economic and legal issues of federalism.<sup>216</sup> This is especially the case in Iraq as it is still in the process of building its judicial institutions and the rule of law. Most of the conflicts are political in nature and require political responses. These responses require political collaboration more than a simple judicial decision. Nevertheless, there is still an important role of the judiciary which is to determine the constitutional boundaries of the context of IGR rather than direct interference in the issues that are operating within IGR.<sup>217</sup> This again indicates why CF can be a proper theory for dealing with oil management in Iraq, which will be given more details in a separate chapter in this thesis.

**Sixth,** federalism is always vulnerable to new issues, problems and conflicts. These issues are expected from federalism because it entails a more ‘dynamic process of cooperation and shared action between two or more levels of government, with increasing interdependence and centrist trends.’<sup>218</sup> This requires a flexible system such as collaborative federalism and a flexible mechanism such as IGR to respond to these unexpected matters.<sup>219</sup> CF, Elazar and other scholars find, can be effective for that purpose because it is efficient,<sup>220</sup> and contains mechanisms for achieving efficiency.<sup>221</sup>

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<sup>214</sup> *ibid* 55.

<sup>215</sup> Julie Simmons, ‘Treaty Federalism: The Canadian Experience’ (Liberal Institute 2008) working paper 5.

<sup>216</sup> Nestor Davidson (n 189)1032.

<sup>217</sup> Alan Trench, ‘Intergovernmental Relations: In Search of a Theory’ (n 199)244-245.

<sup>218</sup> Ranjit S. Sarkaria, cited from Subhash Chander Arora Arora SC, *Current Issues and Trends in Centre-State Relations: a Global View*(Mittal Publications 1991)viii.

<sup>219</sup> Ute Wachendorfer-Schmidt (n 164)9.

<sup>220</sup> Csehi, ‘International Conference on Comparing Modes of Governance in Canada and the European Union...’ (n169).

Moreover, it is more workable practically because it rests on the agreement of all stakeholders.<sup>222</sup>

In addition to these reasons and justifications behind the adoption of CF, Elazar assumes that establishing CF requires the following pre-requisites. **Firstly**, there must be a minimum level of trust among the stakeholders. According to Cameron, ‘successful collaboration depends on high levels of mutual trust among the participants and their internalization of its implicit norms. Instead, there is some indication of considerable cynicism among officials at both levels with respect to the rhetorical promises of collaboration.’<sup>223</sup> When applying this theory to Iraqi oil management, this element may face significant challenge to its application because of the absence of trust among Iraqi groups, especially between KRG and the central government.

**Secondly**, CF requires the existence of the spirit of coordination and collaboration among the stakeholders. This ‘can be manifested in sharing through negotiation, mutual forbearance and self-restraint in the pursuit of goals, and a consideration of the system as well as the substantive consequences of one’s acts.’<sup>224</sup>

**Finally**, CF presupposes a willingness to engage in comprehensive and continuing bargaining among the stakeholders. Bargaining must be an integral and legitimate part of the CF. As Elazar argues, ‘a major part of the politics of federal systems is to maintain the openness of bargaining both in terms of the bargaining itself and access to the bargaining table.’<sup>225</sup>

These assumptions have led Elazar to build his theory of CF. For Elazar, IGR and negotiated coordination among the national or federal and constituent governments regarding the unresolved matters are considered as one of the significant political forms of federalism. Many problems, he argued, can be solved based on the principles of the

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<sup>221</sup> David Cameron and Richard Simeon, ‘Intergovernmental Relations in Canada...’ (n 174)63.

<sup>222</sup> Thomas Gunton and Chad Day, ‘The Theory and Practice of Collaborative Planning in Resource and Environmental Management’ (2003) 31 *Environments: a journal of interdisciplinary studies* 5, 7-8.

<sup>223</sup> David Cameron and Richard Simeon, ‘Intergovernmental Relations in Canada...’ (n 174).

<sup>224</sup> Elazar, *Exploring Federalism* (n 11).

<sup>225</sup> Elazar, *Federalism: an Overview* (n 14) 14.



diffusion and the sharing of power regarding political, social, economic and other collective aspects and concerns.<sup>226</sup>

Furthermore, Elazar developed this approach in a systematic and well-organized way. His emphasis on collaboration comes from his realisation of the political system as a system of distribution and division of power and responsibilities. He assumes that political systems have a problem of dividing the responsibilities of government between general and local authorities. This problem is an important aspect of federalism,<sup>227</sup> and CF is a response to that problem.

## 2.6 Limitations of collaborative federalism

Despite all the above-mentioned assumptions and elements of CF, its applications can face the following challenges and limitations.

Elazar believes that two factors can threaten collaborative system within the matrix. The first is the threat of administrative hierarchies, which in their modern form came with the complexity of societies induced by the industrial revolution and were different from legislative and executive branches. The second is the tendency toward creeping "prefectorial administration" in federal government or an attempt to reify the hierarchy or pyramid. The states and localities remain "in place," and even are given greater administrative or managerial responsibilities, but at the cost of their freedom to function as political entities. "Such prefectorial administration" is inconsistent with the federalist theory of collaborative administration.<sup>228</sup> In the French prefectoral system, which was established by Napoleon, the country is divided into areas and places a prefect to represent the whole government in each area, and he/ she has a great authority over all agents in specialized fields in such area.<sup>229</sup>

Another significant challenge to CF is what is called "the joint decision trap". "This may happen when autonomous, interdependent actors committed to consensus decision-making seek to make decisions. In this process, the time and cost of coordination can

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<sup>226</sup> Elazar, 'The Themes Of A Journal Of Federalism' (n 129).

<sup>227</sup> *ibid* (n 129).

<sup>228</sup> Elazar, *Exploring Federalism* (n 11) 213.

<sup>229</sup> James Fesler, 'French Field Administration: The Beginnings\*' (1962) 5 *Comparative Studies in Society and History* 76, 77.

escalate; solutions may be avoided or simply express the lowest common denominator.<sup>230</sup> ‘The political and institutional concerns of the actors for status and recognition to win credit and avoid blame can dominate the substantive issues themselves.’<sup>231</sup>

Furthermore, CF may not be able to meet the democratic expectations of citizens. It may undermine the democratic accountability because of its undemocratic mechanisms. Clearly, CF may lead to undermining legislative power by making the executive branch the dominant power for dealing federal issues.<sup>232</sup> Hence, it can reduce the accountability and transparency of governments to the public. In short, it has the potential for weakening the democratic legitimacy of the political system.<sup>233</sup> As Cameron rightly observes, ‘these expectations appear to outpace the very limited advances that have been made to democratize the process, and there is nothing in the process of CF that will make this task any easier.’<sup>234</sup>

Similarly, due to the lack of competition among different orders or levels, the collaborative approach may undermine the democratic accountability of all governments to their own electorate.<sup>235</sup> Based on that rationale, Watts argues that the need for a sort of a combination of cooperation and competition among different governments is a significant requirement for avoiding the harmful consequences from conflict in areas of interdependence.<sup>236</sup>

Another challenge to CF is the lack of constitutional and legislative base and its lack of a binding enforcement mechanism.<sup>237</sup> Because it is an informal process, its decisions and mechanisms may face great challenges of legitimacy and validity. This challenge makes collaborative systems “fragile.”<sup>238</sup>

Moreover, it has been criticised as a "cartel of elites," like collusion between collaborating governments, in which national and subnational governments manage the

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<sup>230</sup> David Cameron and Richard Simeon, ‘Intergovernmental Relations in Canada...’ (n 174)66.

<sup>231</sup> Ibid (n177).

<sup>232</sup> ibid.

<sup>233</sup> Ute Wachendorfer-Schmidt (n 164) 81.

<sup>234</sup> David Cameron and Richard Simeon, ‘Intergovernmental Relations in Canada...’ (n 174)66.

<sup>235</sup> Watts, *Comparing Federal Systems In The 1990S* (n 17).

<sup>236</sup> Ibid.

<sup>237</sup> Andrew McDougall, (n 75) 170.

<sup>238</sup> David Cameron and Richard Simeon, ‘Intergovernmental Relations in Canada...’ (n 174).

system in order to serve their interests, and empire-building ambitions.<sup>239</sup> “The danger,” some argue, ‘is that some of the primary virtues of a federal system- such as innovation, experimentation, variety, and competition- will be lost in an over-zealous search for harmonization, consistency, and agreement.’<sup>240</sup>

Those challenges indicate that the application of CF, similar to all other theories of federalism, can face significant limitations. It cannot have general and efficient applications in all political systems without serious challenges. Elazar himself does not claim that his theory of federalism is flawless. However, despite all the critics it faces, collaborative federalism as conceptualised by Elazar can be the base for understanding the nature, rationale and foundation of federalism, and can be employed as a theoretical tool to examine the challenges of various forms of constitutional federalism including that of Iraq. His theory has been adopted in this research because of its applicable and relevant feature of the problems of constitutional federalism in Iraq.

However, it must still be acknowledged that there are other theories of federalism that may contain useful theoretical tools for examining federalism in Iraq. These theories include sociological theory,<sup>241</sup> constitutional theory,<sup>242</sup> Bargain theory,<sup>243</sup> Asymmetry and symmetry theory,<sup>244</sup> political and ideological theory,<sup>245</sup> and economic theory.<sup>246</sup>

Despite the differences between all theories and federal systems that exist, there are however some universal features common with these regimes. A federal system usually requires the presence of at least two levels of sovereign governments; the federal and the subunit governments. Each of the levels has a kind of independence at work and in the provision of services in the proceedings, without referring to each other. Another important issue is that the existence of written Constitution guarantees the powers of

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<sup>239</sup> Martin Painter, ‘Intergovernmental Relations in Canada...’ (n 177)2.

<sup>240</sup> David Cameron and Richard Simeon, ‘Intergovernmental Relations in Canada...’ (n 174).

<sup>241</sup> See: William Livingston, ‘A Note on the Nature of Federalism’ (1952) 67(1) Political Science Quarterly 81, 84-85.

<sup>242</sup> Kenneth Wheare (n33).

<sup>243</sup> William Riker, *The Development of American Federalism* (Kluwer Academic Publishers 1987)6-20.

<sup>244</sup> Charles Tarlton (n 34).

<sup>245</sup> Daniel Weinstock, ‘Towards a Normative Theory of Federalism’ (2001) 53(167) International Social Science Journal 75.

<sup>246</sup> Robin Boadway and Anwar Shah, *Fiscal Federalism Principles and Practices of Multiorder Governance* (Cambridge University Press 2009).

these governments.<sup>247</sup> It is however important to stress that there is no universal or general principle that describes accurately the size of the powers and authorities to be enjoyed by the different levels within the federal state. What is familiar is that regions or units in some federal systems have less power than their counterparts in other regimes.<sup>248</sup> What appears most common is that each of these levels must concede to another for some competencies or functions and authorities.<sup>249</sup> Also the existence of an independent judicial authority to adjudicate in the conflicts between the governments is another requirement for any successful federal system.

Hence, this thesis focuses on the Elazar's theory, which I refer to as the collaborative theory or CF. This theory will be brought into discussion in order to reveal the nature of the relationship between the FG and the SGs particularly the KRG in Iraq, especially with respect to the distribution of powers over oil management.

## **2.7 Natural Resources Management in Collaborative Federalism**

The existence of natural resources in a federal country often leads to disputes over its management and the distribution of their revenue. The issues are mostly centred around whether a centralised or non-centralised system prevails?<sup>250</sup>

The distribution of competencies between the FG and the SGs over the NR, particularly oil and gas, differs from one state to another according to the circumstances inherent in each union. These conditions may include political, economic, or social realities as well as the historical determination of property rights and legal considerations which govern the principle of participation in the term of the competencies. As Watts indicates, 'there is no single model of federalism or of federal financial arrangements that is universally

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<sup>247</sup> Richard Bird and François Vaillancourt, *Perspectives on Fiscal Federalism* (World Bank 2006)70.

<sup>248</sup> John McGarry and Brendan ÓLeary, 'Federation as a Method of Ethnic Conflict Regulation' in Sid Noel (Ed.), *From Power Sharing to Democracy: Post-Conflict Institutions in Ethnically Divided Societies* (McGill-Queen's University Press 2005) 263.

<sup>249</sup> Productivity Commission, *Productive Reform in a Federal System* (Roundtable Proceedings Canberra, 27–28 October 2005, Productivity Commission, Australia 2006)25-26.

<sup>250</sup> Fidel Perez-Sebastian and Ohad Raveh, 'Natural Resources, Decentralization, and Risk Sharing: Can Resource Booms Unify Nations?' (2016) 121 *Journal of Development Economics* 38.

applicable everywhere.<sup>251</sup> Nevertheless, in most cases, these revenues are dealt with in either an extremely centralized or a decentralized way.<sup>252</sup> For that purpose, federal systems offer a variety of constitutional solutions regarding the level of the governments involved with respect to ownership of natural resources and their revenues. Nevertheless, almost all federal systems require a degree of collaboration among the different levels of governments within a federation.

Such collaboration is particularly important for managing NR because these resources play a significant role in establishing federalism in terms of stability, progress, and economic development. At the forefront of these resources, oil and gas have their priorities because they generate significant income with relatively little cost. Mostly, it is observed that federal countries that depend on NR face major challenges and problems regarding the legal, political and economic management of these resources as well as what is called the issue of ‘resource curse’.<sup>253</sup> Usually, these resources are existing unevenly within a federation, where they are located in certain parts while lacking in other parts. Therefore, conflict between the federal and SGs occurs, or even among the subunit governments themselves, over controlling these resources, and over sharing the revenue.<sup>254</sup> This presents another essential point regarding NR in federal systems, which is the issue of managing and revenue sharing between federal and subunit governments.<sup>255</sup>

This is a crucial point because the financial resources (a) play a major role in determining the relative political and economic impact and influence of the different

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<sup>251</sup> Ronald Watts, ‘Comparative Research and Fiscal Federalism’ [2003] 13(4) *Regional and Federal Studies* 1.

<sup>252</sup> George Anderson, *Fiscal Federalism: a Comparative Introduction* (Oxford University Press 2010)42.

<sup>253</sup> The resource curse is the term used to describe a failer of resource-rich countries fail to benefit from their natural resources and may become poorer than resource-poor countries and even worse in terms of their performance. Resource Curse can be embodied in different dimensions. It slows economic growth, stimulates conflicts associated with violence, and creates authoritarian regimes. See: Richard Auty, *Sustaining development in mineral economies: the resource curse thesis*, (Routledge, 2002); Macartan Humphreys and effrey Sachs, *Escaping the Resource Curse* (Columbia University Press 2007) xi; Christa N. Brunnschweiler, Erwin H. Bulte, Natural resources and violent conflict: resource abundance, dependence, and the onset of civil wars, *Oxford Economic Papers*, Volume 61, Issue 4, October 2009, Pages 651–674

<sup>254</sup> Anderson, *Fiscal Federalism: a Comparative Introduction* (n 252)42.

<sup>255</sup> Nuria Boschand José Durán Maria, *Fiscal Federalism and Political Decentralization: Lessons from Spain, Germany and Canada* (Edward Elgar 2008).

governments within the polity, (b) they are a major means for facilitating flexibility and adjustment, and (c) these resources shape public attitudes about the costs and benefits of the activities of different governments.<sup>256</sup> Watts also maintains that understanding intergovernmental financial relations needs knowledge of the political context within which they happen since it is often the result of political compromises.<sup>257</sup> He added, in the dynamics of federal and IGR, it is highly important to take into account the broader social and political context within which these financial relations operate.<sup>258</sup>

Therefore, regarding NR management and revenue sharing, many principles, models and mechanisms have been adopted in federal systems. In this regard, scholars express their views from different perspectives. Some argue that federal systems should focus on the issue of the community. Which political unit of a country constitutes the community? If the answer is that the FG represents the whole community, all the resources, including the revenue, must belong to the country as a whole, and the FG has the right to control over these resources alone wherever they exist, and the reverse is true<sup>259</sup> On the other hand, Boadway and Shah argue that when the federalism is constituted based on “coming together” from previously independent jurisdiction states, the ownership of public property and NR rights that they already enjoyed, would be retained for them. Consequently, the revenues of the ownership of NR revert to sub-units’ governments alongside the responsibility for managing development.<sup>260</sup>

Regarding the system of revenue sharing, George Anderson suggests there are two contradictory principles in this area, namely, the principle of “equity” and the principle of the “derivation.” The first principle concentrates on revenue sharing on a large scale, regardless of any consideration regarding the ownership, the location and who produce oil, while the second principle focuses on preserving part or all of the income for the benefit of producing regions, or for the areas where the NR are found.<sup>261</sup> Accordingly, the principle of “derivation” is related to the principle of the legitimacy of the

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<sup>256</sup> Anderson, *Fiscal Federalism: a Comparative Introduction* (n 252).

<sup>257</sup> Watts, ‘Comparative Research and Fiscal Federalism’ (n 251).

<sup>258</sup> *ibid* (n 251).

<sup>259</sup> Richard Simeon, ‘Natural Resource Revenues and Canadian Federalism: A Survey of the Issues’ (1980) 6 *Canadian Public Policy / Analyse de Politiques* 182,185.

<sup>260</sup> Robin Boadway and Anwar Shah, *Fiscal Federalism Principles and Practices of Multiorder Governance* (n 246)212.

<sup>261</sup> Anderson, *Fiscal Federalism: a Comparative Introduction* (n 252)56.

ownership of the resources, whether the owner is the constituent units as in Canada, or a FG as in Nigeria.<sup>262</sup>

Despite the constitutional distribution of powers between the FG and SGs over NR including oil and gas, there are still serious disputes and conflicts over oil management and revenue sharing. The reasons may include constitutional ambiguity such as in Iraq, overlapping of the jurisdictions among different government levels within a federation, and the constitutional deficiencies that do not cover every matter related to natural resource in this regards. In addition, the traditional hierarchical governmental institutions may be unable to deal with contemporary problems arising from natural resources management (NRM).<sup>263</sup> Such potential sources of conflict make the collaborative approach inevitable for managing natural resources in Iraq.

Additionally, collaboration becomes indispensable in the case of common fields between more than one region, province or state. The fields of oil and gas may extend for tens of miles and passing other regions' boundaries. Conflicts or competition among these powers may arise as everyone tries to extract as much of the resource as possible.<sup>264</sup>

Furthermore, collaborative model is an important mechanism for overcoming the internal tensions over NR by realizing a balance between the ideas that see natural resources as a national heritage and those who claim that it should be the property of the SGs. This seems to be a common ground and starting point for reaching a balance between the two primary goals of the federal system, namely a self-rule and shared rule.<sup>265</sup> This is only possible with a system of collaboration that deals with the issue in a very broad social, economic and political framework.

CF may consider creating 'a joint federal, multi-state institution for the sole purpose of developing consensus-based plans that will be used by the various jurisdictions to manage federally designated natural resources.'<sup>266</sup> This approach can accommodate the

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<sup>262</sup> *ibid* (n 252)50; See Article 109 of the Constitution of Canada.

<sup>263</sup> Jennifer Bellamy, 'Adaptive Governance: the Challenge for Regional Natural Resource Management,' in John Wanna and Jennifer Bellamy (Eds) *Federalism and Regionalism in Australia New Approaches, New Institutions?*(The Australian National University 2007) 95.

<sup>264</sup> Nicholas Haysom and Sean Kane, *Negotiating Natural Resources for Peace: Ownership, Control and Wealth-Sharing*(HD Centre for Humanitarian Dialogue 2009)17.

<sup>265</sup> Larry Kramer (n 73).

<sup>266</sup> Hope Babcock (n 185).

interests of all stakeholders in a federation. It achieves that mainly through addressing the unclear and disputed issues through providing procedural foundation and institutional system for solving the disputed responsibilities and authorities.<sup>267</sup> This approach is also capable of satisfying the ambitions of SGs, as well as the FG, regarding their share of the resources.<sup>268</sup> There are successful examples in that regard such as Canada,<sup>269</sup> USA,<sup>270</sup> and Australia.<sup>271</sup>

In addition to IGR and institutions, the collaborative approach may solve conflicts resulting from overlapping jurisdictions related to oil and gas management through political negotiations between national and sub-national governments. Although the judicial system and the courts can play a significant role in resolving some conflicts, they may not be as efficient as political and other governmental institutions.<sup>272</sup> This is an advantage, more than a challenge, especially for Iraq, because judicial mechanisms have not been effective. Hence, reaching solutions based on collaboration through negotiated cooperation among all levels of governments is more possible and effective. A significant element of CF is that it considers that broader social, economic and political context of financial relations, more than the rigid legal, constitutional context.

There are many motivations that make CF more relevant and effective for oil management in Iraq and for resolving any other conflict within the federations. For instance, there are constitutional provisions setting the foundation for collaborative federalism, such as the concurrent or the shared powers in the articles 112,113, and 114.<sup>273</sup> In addition, the political and social structure of Iraq requires a principle of consensus rather than the rule of the majority. Furthermore, Iraq is a parliamentary federal system based on the fusion of executive and legislative powers, which makes the

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<sup>267</sup> Jennifer Bellamy (n 263).

<sup>268</sup> Ibid (n263).

<sup>269</sup> Robert Cairns, 'Natural Resources and Canadian Federalism: Decentralization, Recurring Conflict, and Resolution' (1992) 22(1) *Publius: The Journal of Federalism* 55.

<sup>270</sup> Micheal Pretes, 'Conflict And Cooperation: The Alaska Permanent Fund, The Alberta Heritage Fund And Federalism' (1988) 18(1) *American Review of Canadian Studies* 39, 43.

<sup>271</sup> Marcus Haward, 'The Australian Offshore Constitutional Settlement' (1989) 13(4) *Marine Policy* 334.

<sup>272</sup> Marsha Chandler, 'Constitutional Change and Public Policy: The Impact of the Resource Amendment (Section 92A)' (1986) 19(1) *Canadian Journal of Political Science* 103, 121.

<sup>273</sup> More details will be given in the next chapters.



executive branch the most powerful authority.<sup>274</sup> Also, Iraqi federalism is a highly non-centralized federal system with a weak regional representation in the federal institutions. In addition, the constitution is very rigid to amend. These issues set a supportive foundation for dealing with the conflicts of oil management in Iraq through establishing most of the elements and principles of collaborative federalism as outlined throughout this section of theoretical foundation. Hence, adopting a new model, whether it is “collaborative federalism”, or as some call it "collaborative management" or "consensus-based model",<sup>275</sup> appears to be a viable option for Iraq.

## 2.8 Conclusion

Federalism has many types and forms reflecting different philosophical foundations and purposes. CF is one of the forms adopted and practised in many countries. The essence of this model, which underpins an understanding of Elazar’s theory for federalism, is collaboration. This chapter outlined its features and principles as understood by Elazar. Analyzing different dimensions of Elazar’s theory of CF indicates that this model can be a suitable theory for understanding Iraqi federalism and dealing with its issue of oil management between the FG and the KRG.

To investigate the validity of CF in Iraq, the rationale behind this presumption becomes more obvious and convincing once the background, political context and constitutional design of Iraqi federalism is examined in the next chapter.

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<sup>274</sup> In the parliamentary federations, both levels of governments, the national and subnational governments, have their own prime ministers, and the members of the cabinets are chosen from among the members of their own legislature and they are constantly and collectively accountable to it. See: Ronald Watts, *Executive Federalism: a Comparative Analysis* (V 26 Institute of Intergovernmental Relations, Queens University 1989).

<sup>275</sup> Hope Babcock (n 185).

## **Chapter Three: The Constitutional Foundations of Federalism in Iraq**

### **3.1 Introduction**

This chapter is dedicated to examining the historical development, political context and constitutional structure of Iraqi federalism as a foundation for understanding the challenges currently facing Iraqi federalism, especially the challenges of oil management. The chapter aims to reveal different aspects of the distribution of powers between various levels of the federation. The importance of this chapter, therefore, comes from its analysis of the way Iraqi political actors have understood the distribution, division and share of powers, particularly regarding oil management, and its assessment of the scope for developing collaborative federalism (CF) in the country.<sup>276</sup> In sum, this chapter attempts to answer the following questions: How did federalism emerge in Iraq and why? And how did the constitutional drafting process motivate different levels of governments within the Iraqi federation to adopt and practice CF with the aim of solving problems and achieving common goals?

### **3.2 General Background on Iraqi Legal System**

The story of Iraq, as a modern state, began at the end of the First World War. What is now called Iraq was previously part of the Ottoman Empire from 1534 until 1918.<sup>277</sup> The administrative divisions under the Ottoman rule for so-called today Iraq passed through different stages.<sup>278</sup> However, it can be said Iraq was generally divided into three semi-autonomous provinces (wilayat in Arabic, and vilayet in Turkish): Baghdad,

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<sup>276</sup> For instance, in federations whereby power is distributed based on a shared power or concurrent model, the necessity of collaborative and cooperative is inevitable. See: Watts, *Comparing Federal Systems In The 1990S* (n 17)34.

<sup>277</sup> They took over Mosul in c.1516–17, and Baghdad in 1534, then Basra between 1538 n 1546. See: Gökhan Çetinsaya, *Ottoman Administration of Iraq: 1890-1908* (Routledge 2006).

<sup>278</sup> The Ottoman rule of Iraq was marked by many wars and battles with its Safavid neighbors accompanied with invasions and occupation of parts of its areas for some time by the latter. See: Gökhan Çetinsaya. (n 277).

Basra, and Mosul.<sup>279</sup> After the breakdown of the Ottoman Empire and following the occupation of the region by the British Army (1914 - 1918), these three wilayats were put under the British Occupation and Mandate. Later, the modern Iraq was established as an independent country in 1921.<sup>280</sup>

Since its establishment in 1921, Iraq has witnessed many political, religious and ethnic tensions, wars, invasions and international interventions. One of the main reasons for these events and changes is the political and constitutional system of Iraq and its complex and diverse social composition, comprising different racial, ethnic and religious groups.<sup>281</sup>

When the British colonial authority created Iraq and formed its political system in 1921 as a constitutional monarchy based on a centralized system, it disregarded the will of the Shiite and Kurds (whether intentionally or unintentionally).<sup>282</sup> This disregard has triggered political conflicts among Iraqi socio-political groups.<sup>283</sup> Apparently, the Kurds issue was the most significant case of these internal conflicts.

The Kurdish issue started with the breakdown of the Ottoman Empire, where Kurds constituted the majority in Mosul wilayat. Once the empire collapsed, the Kurds in their own areas, similar to the Arabs and Turks, tried to achieve self-determination. They sought the autonomy which they were promised by the Treaty of Sèvres on August 1920. However, they were denied this right by the powerful states such as Britain and also by Turkey.<sup>284</sup>

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<sup>279</sup> For more details see: Gökhan Çetinsaya (n277).

<sup>280</sup> Saad Jawad, 'The Iraqi Constitution: Structural Flaws and Political Implications' ( LSE Research Online 2013) working paper.

<sup>281</sup> David Fieldhouse, *Western Imperialism in the Middle East, 1914-1958* (Oxford University Press 2009).

<sup>282</sup> See: Fāḍil Ḥusayn, *The Mosul Problem: a Study in Anglo-Iraqi-Turkish Diplomacy and Public Opinion* (1952); Lady Gertrude Bell(editor), *The Letters of Gertrude Bell*, vol 2 (Ernest Benn limited 1927) 597-598.

<sup>283</sup> For more details see: Robert Olson, *The Emergence of Kurdish Nationalism and the Sheikh Said Rebellion: 1880-1925* (Univ of Texas Press 1989).

<sup>284</sup> It is worth mentioning that there were many treaties related to the Kurdish issue in recent history. For instance, 'Peace Treaty of Sèvres' concluded by the Allies with the Ottoman Empire in Paris in August 1920 AD. This treaty has devoted the process of internationalization of the Kurdish issue formally according to the articles 62, 63, 64. Although the Ottoman Empire tried repeatedly to describe the Kurdish issue as the issue of internal state can be solved. It stipulates the achievement of a solution to the

The Kurds in Iraq have never wanted to be ruled by Baghdad.<sup>285</sup> But the policy and interest of the British and the Iraqi state in Baghdad required making Kurdistan part of modern Iraq.<sup>286</sup> Thus, they were prevented from becoming independent.

On the 24<sup>th</sup> December 1922, Britain and the Iraqi government announced a statement to grant the Kurds a degree of autonomy in their areas, within the boundaries of Iraq.<sup>287</sup> However, because of the hardening of the position of both sides, Kurdish and Iraqi, during the talks, the project failed. As a result, the relationship between the British and the Kurds, led by Sheikh Mahmoud, strained and the war broke out again. Therefore the British and the Baghdad government resorted to force to suppress all the revolts of the Kurds against them.<sup>288</sup>

Despite the Kurdish demands for the establishment of an independent state in the Mosul wilayat, modern Turkey was demanding the annexation of Mosul, while Britain was striving to annex Mosul to the new Iraqi state. Therefore, the so-called Mosul problem emerged between the Turkish, British and, later, the Iraqi governments.<sup>289</sup> The conflict

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Kurdish problem in stages, and then getting their independence. However, the treaty did not see the light due to the rise of "Mustafa Atatürk" who described it as a death sentence on Turkey. Then, the 'Treaty of Lausanne' was signed in 1924'. Kurds considered this Treaty against their future as it shattered the hopes for independence. See: Peter Sluglett, *Britain In Iraq- Contriving King and Country* (London, I. B.Tauris & Co Ltd 2007)77-92; 'Peace Treaty of Sèvres' (*World War I Document Archive*) <[https://wwi.lib.byu.edu/index.php/Peace\\_Treaty\\_of\\_Sèvres](https://wwi.lib.byu.edu/index.php/Peace_Treaty_of_Sèvres)> accessed December 21, 2018. And 'Treaty of Lausanne' (*World War I Document Archive*) <[https://wwi.lib.byu.edu/index.php/Treaty\\_of\\_Lausanne](https://wwi.lib.byu.edu/index.php/Treaty_of_Lausanne)> accessed December 21, 2018.

<sup>285</sup> For more details see: Fāḍil Ḥusayn(282); Hala Fattah and Frank Caso, *A Brief History of Iraq* (Checkmark Books 2009).

<sup>286</sup> See: Peter Sluglett, (n284)79.

<sup>287</sup> Ibid.

<sup>288</sup> It seems that this project was a political move by the British to contain the Turkish threats to Kurdistan, and that the Iraqi government agreed under the pressure of the British. See: Othman Ali, *The Contemporary Kurdish Movement (1833-1946), Historical and Documentary Study* (Al-Tafsir Library for Publishing and Advertising - Erbil, Edition: 3<sup>rd</sup>, Arabic Version 2011).

<sup>289</sup> The guarantee of local administration for the Kurds was also confirmed in The League Commission report on 17 July 1925, when it confirmed that Mosul should be part of Iraq. Nevertheless, all those promises were not implemented. See: Peter Sluglett (n284)81.

began after the Armistice of Mudros on 30 October 1918 and was ended by a League of Nations resolution of 16 December 1925 which annexed Mosul to Iraq.<sup>290</sup>

The economic interests of the British Mandate and other powers played an obvious role in disregarding the Kurds' claim for self-determination. Oil was certainly a key factor because there were indications of huge oil reserves under Mosul wilayat, specifically in the Kurdish region of Kirkuk city.<sup>291</sup> As Sluglett argues;

The oil of Mosul, the location of the northern frontier of Iraq, and the financial problems and difficulties of the Iraqi government, formed the chief preoccupations of Anglo-Iraqi relations during the two years which followed the ratification of the treaty by the Constituent Assembly in June 1924. These three issues are closely interconnected, though each has its own history and background. Exploitation of Iraqi oil by any or all of the Allied powers required that Mosul should remain part of Iraq, and ensuring that Iraq would be able to defend its territory involved straining the meagre financial and strategic resources of the Iraqi government to the utmost, emphasising yet again its heavy dependence on Britain.<sup>292</sup>

Another reason behind making the Mosul Wilayat part of the new Iraq was to achieve a balance between the Sunni and the Shiite Arabs. The majority of the Kurds are Sunni, therefore together with the Arab Sunni make a half of the population of Iraq, which the

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<sup>290</sup> Despite Turkish opposition, Britain on 6 August 1924 succeeded in internationalizing the issue, a border problem between Turkey and Iraq. Therefore, On September 30, 1924, the League of Nations decided to set up an international investigative committee on the dispute over Mosul. On 25th September, the commission issued its report and decided to annex Mosul to Iraq. Turkey rejected the report's outcome. Therefore, on 19 September 1925, the Council requested the Permanent Court of International Justice to present its opinion. The court's opinion was in line with the report. On 16 December 1925, the League of Nations, based on the report and the court's opinion, decided to annex Mosul to Iraq. Then, in the trilateral Frontier Treaty signed between Turkey, Britain, and Iraq on June 5, 1926, Turkey agreed to the committee's resolution to keep Mosul within Iraq. In return, Iraq agreed to give Turkey 10% of the royalty on Mosul region's petrol for 25 years. On March 15, 1927, Turkey announced its official recognition of the Iraqi state. See: Quincy Wright, 'The Mosul Dispute' (1926) 20(3) *The American Journal of International Law* 453; Lady Gertrude Bell (n279)555-560; Fāḍil Ḥusayn (n282).

<sup>291</sup> Liam Anderson and Gareth Stansfield, *The Future of Iraq: Dictatorship, Democracy, or Division* (Palgrave Macmillan 2004)163; Abdulrazaq al hasany, *Iraq's Modern Political History* (V 1, 7<sup>th</sup> ed, Alrafidain, lebanon, bariut, Arabic version 2008).

<sup>292</sup> Peter Sluglett (n284)65.

rest are the Shiite Arab.<sup>293</sup> However, by putting the power into the hands of the Sunni Arab minority, the British authority created another major political problem for Iraq, namely excluding the Shiites from political power.<sup>294</sup> Forcing the Shiites, which constitute the majority of Iraqi population, to live under the rule of a Sunni authority would not achieve anything other than political instability.

After the establishment of Iraq, its first constitution was designed in 1925.<sup>295</sup> The first seed of decentralization in Iraq can be found in this constitution. Part VII of the constitution, which consisted of four articles, was basically intended to introduce a decentralized administrative system for administering the provinces. Article (109) stated that the establishment of administrative regions would be by a special law, thus Act No 58 of 1927 was issued.<sup>296</sup> Nevertheless, practically, the councils of the units were merely consultative bodies. They had no real decentralized power, neither financially nor administratively. The system was later replaced by The Law of Administration of Alwiya (provinces) No. 16 of 1945, which gave the units a legal personality and adopted a form of decentralized administration.

Moreover, Article (111) specified that municipal affairs in Iraq would be administered by municipal councils under a special law.<sup>297</sup> Pursuant to this provision, the Law No. 84 of 1931, which was called the "Law of Administration for the Municipalities." was issued.<sup>298</sup> Later, the law of administration of villages' No. 16 of 1957 was passed, which

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<sup>293</sup> Peter Sluglett (n284)75.

<sup>294</sup> King Faisal asked the British authority to annex Kurdistan to the modern Iraqi state in order to ensure the predominance of Sunnis on Shiites in the Constituent Assembly. See: Peter Sluglett (n284) 79.

<sup>295</sup> This constitution was drafted in 1921-1923 by a committee of British political officers, benefited from the models of some countries such as Australia, New Zealand, which was given to after that to an Iraqi committee to study it, then it was approved in 1925 as a permanent constitution was called al-Qanoon al-Asasi al-Iraqi (The Basic Law of the Iraqi State). The working based on this constitution lasted until the military coup against the monarchy in 1958. See: Saad Jawad (n 280).

<sup>296</sup> See: The Law of Administration of Alwiya (provinces) No. 58 of 1927 (Arabic Version), (*Iraqi Legal Database*) <<http://www.iraqlid.iq/LoadLawBook.aspx?page=1&SC=&BookID=357>> accessed December 21, 2018.

<sup>297</sup> See: 'Constitution of the Kingdom of Iraq' (*Global Justice Project: Iraq » Archive » Gertrude Bell's 1920 Review of the Civil Administration of Mesopotamia*) <<http://gjpi.org/wp-content/uploads/iraqiconst19250321.htm>> accessed December 21, 2018.

<sup>298</sup> This law available in Arabic version at: (*Iraqi Legal Database*) <<http://www.iraqlid.iq/LoadLawBook.aspx?SC=200920054851167>> accessed December 21, 2018.

granted a village a legal personality, and stipulated rules on the formation of village councils,<sup>299</sup> and the issuance of the law of Municipal Administration No. 165 of 1964.

Despite those attempts that embodied the popular participation in a limited way in the councils of the local administration, the administrative system of Iraq during the Monarchy period was not decentralized, but rather, it was structured in a centralized manner.<sup>300</sup> Even though there was a legal framework for administrative decentralization in Iraq, supported by a number of legal acts, that framework did not lead to the establishment of a real and effective decentralized administrative system in Iraq mainly because of the strong tendency towards centralization by the monarchy.

After the political system of Iraq changed from constitutional monarchy to a republic following a military coup in 1958, most of the previous laws were changed or amended. A new interim constitution in 1958 ended the relatively democratic system in Iraq by abolishing the parliamentary system,<sup>301</sup> dissolving the powers of the former prime minister, and giving all the powers to the president.<sup>302</sup> This dictatorship lasted in different forms until the US invasion in 2003. Throughout that period, the political and even administrative systems in Iraq were totally transformed to a strict centralized form. This can be observed by examining the constitutions and legal provisions issued in that period.

Similarly, in the interim constitution of 1964, there were no major changes in the centralized administrative system. Then, with the arrival of the Arab Baath Party to the power by a coup in 1968, almost all authorities and powers were highly and strictly confined to the central authority. After the issuance of the interim constitution of 1970, a kind of political and administrative change occurred in Iraq with the adoption of a decentralization model.<sup>303</sup> The constitution stated ‘the Iraqi People are composed of two

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<sup>299</sup> This law available in Arabic version at: (*Iraqi Legal Database*) <<http://www.iraqlid.iq/LoadLawBook.aspx?SC=290320061440096>> accessed December 21, 2018.

<sup>300</sup> See: Mohamed AL-Hamawandi, *The Federalism and democracy for Iraq -the political and legal study* (Erbil, Dar Aras for printing and publishing, Arabic version 2002) 107.

<sup>301</sup> Article 21 of the 1958 constitution stated ‘The Ministerial Council has the legislative authority to approve authority council.’

<sup>302</sup> Ibrahim Al-Marashi, ‘Iraq’s Constitutional Debate’ (2005) 9(3) Middle East Review of International Affairs 139.

<sup>303</sup> Although, the article 8/B, confirmed on the issue of decentralization model of the country, they did not contribute to creating a real decentralized system of administration in the country. The constitution 1970

principal nations: the Arab Nation and the Kurdish Nation,' and it acknowledged that the Kurdish language is an official language in the Kurdish areas.<sup>304</sup> That acknowledgment was a significant achievement for the Kurds and it was one of the important constitutional documents that recognized the right of the Kurds.

Moreover, there were some more attempts by the Baath regime to decentralize the administrative system by issuing the Province's Law (No. 159 of 1969),<sup>305</sup> which remained in force till 2003,<sup>306</sup> and Local People's Councils Act No. 25 of 1995.<sup>307</sup> Nevertheless, these laws were just a formality on paper, and did not change anything in the strictly centralized system.<sup>308</sup>

Therefore, the political, legal and administrative systems in Iraq have strictly been centralized since its establishment until 2003. The central government was controlling all channels of decision making by the executive leadership in Baghdad.<sup>309</sup> This centralized system did not create a legal framework for solving the internal political and ethnic problems, especially the Kurds' demand for a degree of self-governance.

Since the creation of Iraq, the Kurds have never stopped struggling and fighting for their political self-determination.<sup>310</sup> This is one of the issues that the previous governments

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is available at: University of Utah, 'Global Justice Project: Iraq' (*Global Justice Project: Iraq » Archive » Gertrude Bell's 1920 Review of the Civil Administration of Mesopotamia*) <<http://gipi.org/library/primary/iraqi-constitution/>> accessed December 21, 2018.

<sup>304</sup> See: Article 5/ b and c from the constitution 1970. *ibid*.

<sup>305</sup> This Law in Arabic version is available online at: 'Iraqi Local Governance Law Library' <<http://www.iraq-lg-law.org/en/node/1503>> accessed December 21, 2018; Also see: Al-Hamawandi (n 300) 107.

<sup>306</sup> It was mentioned in the justifying reasons for this law, adopts the principles of decentralized management, aims to develop administrative systems, achieving a democratic system and deepen the concepts of popular sovereignty, which are based on public participation in power through local councils.

<sup>307</sup> The law available in Arabic version online at: (*Iraqi Legal Database*) <<http://www.iraqlid.iq/LoadLawBook.aspx?page=1&SC=211120052130637&BookID=5721>> accessed December 21, 2018.

<sup>308</sup> See: Michael Knights and Eamon McCarthy, 'Provincial Politics in Iraq: Fragmentation or New Awakening?' [2008] (81) Washington Institute for Near East Policy, Policy Focus 7.

<sup>309</sup> *ibid*.

<sup>310</sup> The Kurdish conflict began in Iraq with the beginning of British occupation. The first armed confrontation between the Kurds and the British forces and their allies took place in 1919. Then, after the establishment of the modern Iraqi state, the conflict and revolutions against the successive Iraqi



and the Baath party had to deal with immediately after they took power. In 1963, the Ba'athist regime promoted the so-called decentralization law, which was supposed to grant the Kurds a kind of autonomy to manage their own affairs in large parts of the Kurdistan Region. The project was aimed at dividing Iraq into six provinces, including one in the north, consisting of Erbil, Sulaymaniyah and Dohuk. The project made Kirkuk the oil-rich city outside the Kurdish self-administration. The project disappeared and was not implemented on the ground where the parties did not reach any agreement.<sup>311</sup> Three years later, on June 29, 1966, former Prime Minister Abdul Rahman al-Bazaz tried to put forward another project for decentralization in Iraq and the improvement of democracy at the national level, but the project failed as its predecessor due to the opposition of Arab nationalists within the military establishment. As a result, the fighting between the Kurds and the Iraqi government began again, until negotiations resumed in the early 1970s.<sup>312</sup>

As a consequence of the 11<sup>th</sup> of March 1970 Agreement, the Baath Party took an apparently significant legal step to satisfy the Kurds by the issuance of the Autonomy Law for the Kurdistan Region No. 33 of 1974.<sup>313</sup> This was the first legal recognition of the existence of the Kurdish Autonomous Region (KAR). The law created an assembly of the region comprising two councils, a Legislative Council and an Executive Council. In fact, that system was only a formal procedure, as the power remained in the hands of the central authority because the central government controlled and managed the administrative organization in Kurdistan. Almost all of the representatives were

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governments continued more than once and for intermittent periods. For example, 1927-1932, 1942-1945, 1961-1970, 1974-1975.

<sup>311</sup> The Kurds led by Mullah Mustafa Barzani submitted a request to the Iraqi government demanding a form of federal government, but indirectly, by presenting some of its characteristics without mentioning it explicitly. They asked for the immediate recognition of their autonomy, and demarcation the borders of Iraq's Kurdistan in a way that makes the oil rich-city of Kirkuk part of Kurdistan. Also, giving them two-thirds of the proceeds of oil extracted from the wells in Kurdistan. Moreover, representing the Kurds in the national government according to their proportion of the total population of Iraq...etc. However, the government did not respond to these demands. See: Maḥmūd Durrah, *The Kurdish issue and Arab nationalism in the battle of Iraq* (Beirut, Dar al-Tali'ah Publications 1963).

<sup>312</sup> Maḥmūd Durrah (n311).

<sup>313</sup> This law available in Arabic version online at: (*Iraqi Legal Database*) <<http://www.iraqlid.iq/LoadLawBook.aspx?page=1&SC=&BookID=30072>> accessed December 21, 2014; also see: 'Iraq and Kurdish Autonomy' [1974] MERIP Reports 26.

associated with the central authority and had to be loyal members and followers of the Baath party.<sup>314</sup>

This law which supposedly gave administrative autonomy to the Kurds was the only practical step towards establishing a decentralised system in Iraq. However, it was not effective as the central government had created the assemblies in Kurdistan only to pretend that the Kurds had autonomy. Consequently, because the mentioned law did not meet the Kurdish national aspirations, the fighting between the Iraqi government and the Kurdish national liberation movement resumed in March 1974. The confrontations and conflicts ended after the Algeria Convention in March 1975 between Iran and Iraq under the mediation of Algeria. One of its provisions was to stop Iran from helping the Kurds, and then the Kurdish revolution was eliminated, until it was resumed once again in the 1980s, once again led by the Patriotic Union of Kurdistan until 1991. Hence, this centralized system remained strong throughout Iraq, including Kurdish areas, until 1991.<sup>315</sup>

In March 1991, the Kurds took advantage of Iraq's defeat in the second Gulf War and stood against the regime. This popular uprising led to the liberation of the majority of Kurdistan.<sup>316</sup> As a result of the military repression of that uprising, Millions of Kurds fled to the Turkish and Iranian borders.<sup>317</sup> As a result of this tragedy, the international

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<sup>314</sup> March Agreement or statement of 11 March 1970, is the agreement was signed between the Iraqi government and the Kurdish leader Mullah Mustafa Barzani. Accordingly, the central government had to grant autonomy to the Iraqi Kurds. Nonetheless, it did not reach a definitive solution to the many issues, in particular, the issue of Kirkuk, the Oil rich city and the other oil areas such as Khanaqin, Mount Sinjar. Then worsened the relationship between the two parties due to the above reasons, particularly the issue of Kirkuk's Oil. Therefore, the Iraqi government on March 1974 declared autonomy for the Kurds unilaterally, without the consent of the Kurds, who considered the new agreement is far from agreements in 1970, where it did not consider the city of Kirkuk and other oil areas within the areas of the autonomy for the Kurds. See: Liam Anderson and Gareth Stansfield, *The Future of Iraq: Dictatorship, Democracy, or Division* (n291)75-77; Phebe Marr, *The Modern History of Iraq* (3<sup>rd</sup> Ed, Westview Press 2012); the law of Autonomy 1974, *ibid* (n272).

<sup>315</sup> See: Fred Assassard, *The Kurdish Issue after the Iraqi State Administration Law* (Kurdistan Centre for Strategic Studies, Arabic version 2004).

<sup>316</sup> See: Carol Mcqueen, *Humanitarian Intervention and Safety Zones: Iraq, Bosnia and Rwanda* (Palgrave Macmillan 2016); Phebe Marr (n314).

<sup>317</sup> In conjunction with the Kurdish uprising, there was another uprising in the south of Iraq by the Shiite, and they managed to liberate many of the provinces, but it seems that the international community did not treat that uprising as it did with the Kurds, and it was failed.

community intervened and created a “safe haven” and “no-fly zone” to protect the Kurds. The intervention came under the Resolution 688, which was issued on 5 April 1991, by the Security Council of the United Nations.<sup>318</sup> The failure of negotiations between the Kurds and the Iraqi government pushed the latter in October 1991, to withdraw all its administrative offices from Kurdistan.<sup>319</sup> As a result, an election took place in Kurdistan for the first time in 1992, establishing the first Kurdistan Parliament and the establishment of a coalition government between the Kurdistan Democratic Party (KDP) and the Patriotic Union of Kurdistan (PUK). In addition, according to Resolution 22, the Parliament of Kurdistan (KP) unilaterally declared that the relation between the KRG with the central government would be based on federal principles. Thereafter, the Kurds ruled themselves for 12 years until 2003; the region was semi-independent during that period,<sup>320</sup> and it continued as such even after the occupation of Iraq in 2003.<sup>321</sup> Even though the federalism declaration of 1992 by the Kurds was never recognized by the central government in Baghdad before 2003,<sup>322</sup> it was a landmark declaration through which federalism was introduced to Iraq and welcomed by the Iraqi opposition groups in Salahaddin’s Conference in 1992,<sup>323</sup> and London Conferences in 1993, 1999 and 2002. In the 2002 London conference, federalism was adopted by most of the participants as a basis for the future system of government in Iraq.<sup>324</sup>

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<sup>318</sup> See: Peter Malanczuk, ‘Kurdish Crisis and Allied Intervention in the Aftermath of the Second Gulf War’, (1991) 114 (2) *The. Eur. J. Int’l L.*

<sup>319</sup> See: Carol Mcqueen (n316).

<sup>320</sup> For details on how Kurdistan Region was governed during that period, see: Mahir Aziz, *The Kurds of Iraq Nationalism and Identity in Iraqi Kurdistan* (IB Tauris 2014); Michael Gunter, ‘The KDP-PUK Conflict in Northern Iraq’ (1996) 50(2) *The Middle East Journal* 224.

<sup>321</sup> Eric Davis, ‘History Matters: Past as Prologue in Building Democracy in Iraq’ (2005) 49 *Orbis* 229; Al-Hamawandi (n 300) 88; Also Soner Cagaptay, ‘The Future of the Iraqi Kurds’ [2008] Washington, DC: Washington Institute for Near East Policy <<https://www.washingtoninstitute.org/policy-analysis/view/the-future-of-the-iraqi-kurds>> accessed November 29, 2018.

<sup>322</sup> Article 117: First of the 2005 constitution: states ‘This Constitution, upon coming into force, shall recognize the region of Kurdistan, along with its existing authorities, as a federal region.’

<sup>323</sup> Salahaddin is a sub-district near Erbil, where the conference was held in.

<sup>324</sup> The 2002 London conference was very important due to its comprehensiveness, where included the main Iraqi factions, the Kurds, Sunnis and Shiites, Turkmen, Assyrians. This conference included about 300 participants, from more than 50 political parties, movements, religious and tribal figures from different sects and religions. At this last conference, federalism was one of the main principles that was adopted by most of the participants as a basis for the system of government in Iraq. For more details, see: Chris Toensing, ‘U.S. Support for the Iraqi Opposition – FPIF’ (*Foreign Policy In Focus* May 13, 2013)

Apparently, the history of centralization taught a significant lesson to the Iraqi groups. The lesson was that stability cannot be achieved in Iraq without an effective decentralized political and administrative system in which each political, religious and ethnic group would have an opportunity for self-government and participation in exercising power as equal partners.

### **3.3 Development of Federalism and decentralization after 2003**

The legal system of Iraq changed after 2003. The first change started with the Transitional Administrative Law (TAL) in 2004,<sup>325</sup> issued by the Coalition Provisional Authority (CPA) and the Iraqi Governing Council (IGC).<sup>326</sup> This document was the first constitution to emphasize federalism as a new model of governance in Iraq.<sup>327</sup> The TAL consisted of a preamble and nine sections comprising 62 articles. Article four addressed the form of the state and the type of political system, as well as the distribution of powers between the federal government (FG), subnational governments (SGs), regions and governorates.<sup>328</sup> It confirmed that federalism and decentralization is a new system

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<[https://fpif.org/us\\_support\\_for\\_the\\_iraqi\\_opposition/](https://fpif.org/us_support_for_the_iraqi_opposition/)> accessed November 29, 2018; Munther Al Fadhal (n 7) 40.

<sup>325</sup> It is also called the Law of Administration for the State of Iraq for the Transitional Period. Adopted on: 8 March 2004 by the Coalition Provisional Authority (CPA) and approved by all the members of the (IGC) on March 8, 2004. It came into effect on June 28, 2004, and remained effective until the issuance of the Iraqi constitution in 2005 and the formation of the government whereby. It is worth mention, this law was written in the English language by Feisal Istrabadi, the Iraqi lawyer and former diplomat who was born in Virginia, in the United States of America in 1962, and Noah R. Feldman, the Professor of Law at Harvard Law School. Then it was translated to the Arabic, that is why it was marred some linguistic flaws and legal drafting. For more details about the (CPA) see: James Dobbins and others, *Occupying Iraq: A History of the Coalition Provisional Authority* (The RAND Corporation 2009); Saad Jawad (n 280).

<sup>326</sup> The Iraqi Governing Council (IGC) established On July 13, 2003 by CPA led by Paul Bremer, the Civil Governor of Iraq, it was made up based on sect and ethnic backgrounds, which included 25 members, appointed among various religious and ethnic communities; Shiite Arab, Sunnie Arabs, Kurds and other minorities. CPA remained effective until June 28, 2004, through handover the authority to the Iraqi provisional government. See: Paul Bremer, *My Year In Iraq: the Struggle to Build a Future of Hope* (SIMON & SCHUSTER 2006).

<sup>327</sup> It is worth noting that the TAL faced the issue of legitimacy, as it was issued by the unelected Council. See: Munther Al Fadhal (n 7) 40.

<sup>328</sup> Article 4 stated: "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,

for the distribution of powers between three levels of governments.<sup>329</sup> Moreover, the article referred to the nature of federalism in Iraq, stating that federalism must be based on a regional or geographical basis rather than ethnic or sectarian bases.

Additionally, TAL admitted the current status of the Kurdistan Regional Government (KRG) and the right of other provinces to establish new federal regions.<sup>330</sup> Clearly, these constituted significant changes and a very ambitious structure for decentralization in a country which never had such a system.

A more significant step was the Coalition Provisional Authority's (CPA) order No. 71 on the 6<sup>th</sup> April 2004, which reconfirmed these constitutional provisions and required practical steps towards the establishment of local governments based on the decentralized administration model.<sup>331</sup> This order enshrined the principle of decentralization of governing power embodied in the TAL.<sup>332</sup> However, the order was

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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.”

<sup>329</sup> In this thesis, the terms sub national governments, subunit governments, subnational units, constituent units or constituent governments will be used as a generic term for those governments which are the constituent members of a federation. On the other hand, federal, national, central government, will be used interchangeably in this thesis, which indicates to the federal authorities that are formed by the constituent units (sub-national governments) and represents the entire federation.

<sup>330</sup> Article 53 states ‘The Kurdistan Regional Government is recognized as the official government of the territories that were administered by the that government on 19 March 2003 in the governorates of Dohuk, Arbil, Sulaimaniya, Kirkuk, Diyala and Neneveh. The term “Kurdistan Regional Government” shall refer to the Kurdistan National Assembly, the Kurdistan Council of Ministers, and the regional judicial authority in the Kurdistan region’.

<sup>331</sup> This order enacted by the Managing Director of the Coalition Provisional Authority, according to the TAL See: Coalition Provisional Authority. Order Number ( 71 ) . Local Governmental Powers . CPA / ORD / 6 APR 2004 / 71.

<sup>332</sup> It has been stated in the Section 1 Purpose “This Order describes the authorities and responsibilities of the governorate, municipal and local levels of government. It implements the principle of decentralization of governing power embodied in the TAL. By appropriately empowering government bodies at the governorate, municipal and local levels, the Order is designed to improve the delivery of public services to the Iraqi people and make the Iraqi government more responsive to their needs. This Order encourages the exercise of local authority by local officials in every region and governorate; recognizes the Kurdistan Regional Government; and shall have no effect on the administration of the territories under that government’s jurisdiction on 19 March 2003 in the governorates of Dohuk, Arbil, Sulaimaniya, Kirkuk, Diyala and Ninevah.” See: CPA/ORD 71/ 6APR 2004, Local Governmental Powers. Available at: (*The*

not uniformly implemented and did not achieve all its aims. In addition to the political challenges, there were some other technical issues that created problems in implementing the order. For example, the order failed to secure sufficient revenues for the subnational governments in a way that would allow them to pursue the economic development for those entities.<sup>333</sup> Moreover, there was an absence of qualified cadres in the governorates to perform the duties of the local administration in line with the new trend of decentralization.

It can be argued, throughout this transitional period, that the drafters of the interim constitution and the Order 71 had many motivations and reasons for adopting federalism as a new model of governance. The philosophical foundation was clearly a reaction to what had happened to Iraq by the former regimes because of the centralised nature of the dictatorial regime under the governance of the Baath Party. The drafters clarified their vision in the Article 52 of TAL, by dividing decision-making across many governments within the country, instead of concentrating all the authority in Baghdad.<sup>334</sup>

### 3.4 Federalism in the Iraqi Constitution

The constitution of 2005 adopted federalism as a fundamental feature of the legal and political system in Iraq.<sup>335</sup> Both federalism and the decentralization models were

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*Coalition Provisional Authority*) <<https://govinfo.library.unt.edu/cpa-iraq/regulations/>> accessed December 29, 2018.

<sup>333</sup> Michael Knights and Eamon McCarthy (n 308).

<sup>334</sup> Article 52 stated “the design of the federal system in Iraq shall be established in such a way as to prevent the concentration of power in the federal government that allowed the continuation of decades of tyranny and oppression under the previous regime. This system shall encourage the exercise of local authority by local officials in every region and governorate, thereby creating a united Iraq in which every citizen actively participates in governmental affairs, secure in his rights and free of domination.”

<sup>335</sup> This constitution was prepared by a constitutional committee, which started its function on May 13, 2005, in order to draft a constitution in a maximum period 15 of August 2005. The constitution was displayed on the public for a referendum on 15/10/2005. It was approved by 78 percent. After that referendum, it was approved by the Parliament on 7th of December 2005; then, it became effective on 20/05/2006. For more details about the process of preparation this constitution see: Phebe Marr (n314); Saad Jawad (n 280); Ibrahim Al-Marashi (n 302); John Anderson, ‘Sunnis Failed to Defeat Iraq Constitution; Arab Minority Came Close With High Turnout; New Car Bombings Kill 18’ *The*

confirmed and adopted in a number of the articles in the constitution.<sup>336</sup> The first article of the constitution states ‘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.’ Article 116 emphasises that ‘the federal system in the Republic of Iraq is made up of a decentralized capital, regions, and governorates, as well as local administrations.’

In addition, articles 117, 119 and 120 in the constitution emphasise the federal nature of the system. Article 117 specifically recognizes and confirms the federal status of the Kurdistan region as a special status, and other regions in the future. It states ‘First: this Constitution, upon coming into force, shall recognize the region of Kurdistan, along with its existing authorities, as a federal region. Second: This Constitution shall affirm new regions established in accordance with its provisions.’

In general, the constitution reflected the aspirations of some Iraqi groups for federalism and a decentralized legal system. A brief examination of the division and distribution of powers and the federal institutions will further explain those aspirations.

### **3.5 The Constitutional Institutions of the Iraqi Federation**

This section will explore the potential positive aspects of the Constitutional provisions and the practical shortcomings of how they have been applied. In particular it focuses on the main federal authorities: legislative, executive and the judicial.

Despite the notable difference of the Second Chamber in federations; in terms of composition, mechanism of selection of members, their powers, etc., the existence of a bicameral legislature is the hallmark of federalism.<sup>337</sup> Regarding its legislative institutions, the Iraqi constitution, as with most federal systems in the world,<sup>338</sup> adopted

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*Washington Post* (October 26, 2005) <[http://www.highbeam.com/doc/1P2-85835.html?refid=easy\\_hf](http://www.highbeam.com/doc/1P2-85835.html?refid=easy_hf)> accessed November 29, 2018.

<sup>336</sup> This constitution is available online at: [http://www.iraqinationality.gov.iq/attach/iraqi\\_constitution.pdf](http://www.iraqinationality.gov.iq/attach/iraqi_constitution.pdf). Accessed on 03/12/2013.

<sup>337</sup> Lori Thorlakson, ‘Comparing Federal Institutions: Power and Representation in Six Federations’ (2003) 26(2) *West European Politics* 1.

<sup>338</sup> Micheal Burgess, *Comparative Federalism: Theory and Practice* (Routledge 2006).

the Bicameral Legislature,<sup>339</sup> comprising the Council of Representatives (CoR) and the Federation Council (FC).<sup>340</sup>

Article 49 states ‘First: The Council of Representatives shall consist of a number of members, at a ratio of one seat per 100,000 Iraqi persons representing the entire Iraqi people. They shall be elected through a direct secret general ballot. The representation of all components of the people shall be upheld in it.’ The electoral term of this Council of Representatives shall be four calendar years.<sup>341</sup> According to the Article 61, this chamber exercises the following competencies: enacting federal laws, monitoring the performance of the executive authority, electing the President of the Republic, the ratification of international treaties. Moreover, it approves the appointment of the President and members of the Federal Court of Cassation, the Chief Public Prosecutor, and the President of Judicial Oversight Commission, ambassadors and those with other special grades, based on a proposal from the Council of Ministers.

With regard to the Federation Council, in most federal systems, the upper chamber grants the right to the sub national governments to be represented as equal members, regardless of their size, populations or even the importance of a unit. In other words, the upper chamber is a constitutional guarantee given to the sub-national units’ interests, especially the minorities, in order to participate in the federal power with the majority communities. The second chamber can be an intergovernmental relations institution. This is the case in the Bundesrat in Germany, where it has a significant role in coordination and cooperation between federal and regional governments.<sup>342</sup>

Lijphart argues, ‘two conditions have to be fulfilled if this minority representation is to be meaningful: the second chamber has to be elected on a different basis than the first chamber, and it must have significant power, ideally as much power as the first

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<sup>339</sup> The first council that is called the upper council represents the interests’ constituent units of the federation, whether called region, state, province and so on based on equal number for each unit. Whereas the lower chamber represents the whole people regardless their regions and the representatives are elected by the people according to the electoral laws for each federation. See: Burgess, *Comparative Federalism: Theory and Practice*(n338).

<sup>340</sup> See Article (48)

<sup>341</sup> See Article 56/First.

<sup>342</sup> Stephen Silvia, ‘Reform Gridlock and the Role of the Bundesrat in German Politics’ (1999) 22(2) West European Politics 167.



chamber.’<sup>343</sup> Although the powers of the two councils are differentiated according to each constitution, nevertheless, they have the same importance and constitutional status in most federations.<sup>344</sup> There is, however, an inherent defect in the legislative arrangements of the Iraqi federal system. Despite the political and legal importance of these two bodies for any federation, the Iraqi federal constitution 2005, has given little emphasis to the existence and importance of the upper council (FC). It appears that this provision is only a symbolic statement regarding the FC. While the Constitution explained all the issues related to the CoR in detail, it allocated only one Article to the FC. This is evident in Article 65:

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. A law, enacted by a two-thirds majority of the members of the Council of Representatives, shall regulate the formation of the Federation Council, its membership conditions, its competencies, and all that is connected with it.

Clearly, the article does not provide details regarding the FC, such as its powers, duties, and the procedures of its composition. Ignoring these essential issues about the FC can be considered a constitutional gap. In this respect Brown argues ‘It is absolutely extraordinary for the Council of the Union—an independent chamber of parliament—to be formed by a law written by the other house. In essence, this gives one chamber of parliament absolute authority over the other. This is presumably an effect of the hurried drafting process.’<sup>345</sup>

It is worth mentioning that, so far, the lower chamber has not passed any law regarding the establishment of the FC. However, establishing this chamber would be one of the

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<sup>343</sup> Arend Lijphart, ‘Non-Majoritarian Democracy: A Comparison of Federal and Consociational Theories’ (1985) 15(2) *Publius: The Journal of Federalism* 3,9.

<sup>344</sup> However, some federal constitutions give the upper chamber, in some matters, more powers than the lower chamber, such as the US Constitution, regarding ratification some of the Presidential acts. On the other hand, some federal constitutions may make the lower chamber in a stronger position than the upper chamber, as in the German Constitution of 1949, which gave the House of Representatives more legislative powers than the Council of States.

<sup>345</sup> Nathan Brown, ‘The Final Draft of the Iraqi Constitution: Analysis and Commentary’ (2005) 16 *Carnegie Endowment for International Peace*, 9 <<https://carnegieendowment.org/2005/09/13/final-draft-of-iraqi-constitution-analysis-and-commentary-pub-17423>> accessed November 29, 2018,.

most important features of federalism in Iraq as it would facilitate a constitutional framework and mechanism for equal participation by all governorates and regions in exercising the legislative power which may have national aspects. It would also create a framework for real and effective participation in decision-making process by all governorates and regions equally.

Therefore, leaving the fate of the FC to be organized by a law enacted by the CoR is unusual in the constitutional structure of federal countries. This strange feature in Iraqi constitution has made the upper chamber subordinate to the authority of the lower chamber because it is possible and easy for the lower council to change the structure, composition, and the function of the upper chamber any time by enacting a law.

Hence, it can be argued, the subordination of the FC to the CoR in Iraq has somehow deprived constituent units of the federation, especially the regions or the governorates that are dominated by the minority communities, from the right to be represented in the federal legislative power as an equal partner with the other units. If it had been established, the second chamber could have served as an efficient way of defending regional interests in the context of the federal polity.<sup>346</sup> In its absence, executive federalism could serve as an alternative mechanism of representation by the sub national units for day-to-day political bargaining.<sup>347</sup> This means that to settle any dispute between the FG and SGs, the adoption of CF, which is one of the forms of executive federalism, is required.

Obviously, the Iraqi legislative power is working based on a weak bicameral legislature structure. There is currently only one chamber; thus, it is effectively a unicameral legislature. There are still some serious challenges regarding the legislature branch of federalism in Iraq. One chamber has not yet been established. Even when it is established, many questions will be raised in the future regarding the relations between these two chambers and the distribution of power between them.

With regard to executive authority, in countries based on parliamentary systems, such as in Iraq, since there is no separation of legislative and executive powers, the executive

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<sup>346</sup> Scott Greer, *Territory, Democracy and Justice: Regionalism and Federalism in Western Democracies* (Palgrave Macmillan 2006).

<sup>347</sup> *ibid.*

federalism is the prominent practical model.<sup>348</sup> Regarding the structure of the executive powers and institutions, the constitution has established a parliamentary system in which the executive power is fused with the legislative authority. In these types of federations, the prime ministers and the ministers have a significant authority in IGR within a federation. In this regards, Watts defines it as ‘the process of intergovernmental negotiation that are dominated by the executives of the different governments within the federal system.’<sup>349</sup> Hence, it could be said that executive federalism refers to the relations between executives, such as first ministers, in federal Parliamentary Systems to cooperate regarding the matters of common interest.<sup>350</sup>

Due to the unstable political situation in Iraq, which has also negatively impacted on the governance system, it is reasonable to accept that ‘Iraq possesses a federal constitution, although it is not by any means a fully federal country yet.’<sup>351</sup> It is not a well-developed federalism because of its challenges and barriers. It is not surprising that Cameron describes the Iraqi federalism as ‘incomplete; much constitutional work remains to be done’.<sup>352</sup> Nevertheless, it seems, there have been some aspects of executive federalism operating between the FG and KRG, particularly, regarding oil and gas management and its related issues, such as revenue sharing.<sup>353</sup> It seems this model will be a prominent feature in the Iraqi federation as long as there is no second chamber.

The constitution vests the executive power in the President and the Council of Ministers, who are accountable to the federal parliament. These two branches are considered as the poles of the executive authority.<sup>354</sup> Since the powers of the president are mostly symbolic, the Council of Ministers has been given most of the actual executive powers. The council consists of the prime minister, who is nominated by the president of the republic from the largest block in the CoR. The Prime Minister is the

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<sup>348</sup> Michael Pagano and Robert Leonardi, *Dynamics of Federalism in National and Supranational Political Systems* (Palgrave Macmillan 2007).

<sup>349</sup> Ronald Watts, *Executive Federalism: a Comparative Analysis* (n 274)3.

<sup>350</sup> Alan Trench, *Intergovernmental Relations in Canada: Lessons for the UK?* (UCL, the Constitution Unit 2003).

<sup>351</sup> David Cameron, ‘The Paradox of Federalism: Some Practical Reflections’ (2009) 19(2) *Regional & Federal Studies* 309.

<sup>352</sup> *ibid.*

<sup>353</sup> More details will be given in the next chapters.

<sup>354</sup> Article 66 states, “The federal executive power shall consist of the President of the Republic and the Council of Ministers and shall exercise its powers in accordance with the Constitution and the law.”

direct executive authority responsible for the general policy, through the Council of Ministers. Then, the members of the Council of Ministers are named by the prime minister within a period not exceeding thirty days from the date of his designation. Some of the powers of this council, according to the Article 80, are planning and executing the general policy and general plans of the State, proposing bills, issuing instructions and decisions for the purpose of implementing the law, preparing the draft of the general budget, negotiating and signing international agreements.

Due to the duplication of the executive power in Iraqi federation, the federal executive power (Baghdad) is responsible for enforcing and executing the laws enacted by the federal parliament while the executive powers of the regions and governorates are responsible for managing and enforcing the laws enacted by their own parliaments as well as by the federal parliament. Practically, this only applies to KRG as it is currently the only region. Therefore, at both levels, the executive branches are so powerful because they get their powers from their political parties, where the prime ministers and the ministers are nominated by the parties in parliament. It is worth noting that, although the Iraqi system is parliamentary, the executive authority, the Prime Minister with the President, has the right to dissolve the Council of Representatives.<sup>355</sup> However, these two presidents never exercised this power, because the political system in Iraq is based on a consensual democracy.

Since 2003 a kind of consociational democracy has been adopted by the Iraqi political factions, as an informal arrangement for allocating the key posts. The president is usually of Kurdish ethnicity, the prime minister is Shiite and the Speaker of Parliament is Sunni. Therefore, the country has been ruled jointly since 2003. This has proven to be suitable for such a divided society as Iraq; it also has characteristics of consociationalism. Lijphart argues ‘Consociational Democracy can be defined in terms of two primary attributes—grand coalition (power sharing) and segmental autonomy—and two secondary characteristics—proportionality and minority veto.’<sup>356</sup> He added that eight characteristics are keys for identifying consociationalism. These characteristics are ‘(1) executive power sharing, (2) balanced executive-legislative relations, (3) strong bicameralism, (4) multi-party system, (5) multi-dimensional party system, (6) proportional representation, (7) federalism and decentralization, and (8) a written

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<sup>355</sup> See (Art.64, no.1).

<sup>356</sup> Arend Lijphart, ‘Non-Majoritarian Democracy...’ (n 343)4.

constitution and minority veto.<sup>357</sup> Despite the instability of the political situation, it seems that Iraq relatively has fulfilled most of these conditions and elements for adopting consociational democracy.

After briefly presenting the general structure of both legislative and executive powers in the constitution, it is also necessary to indicate how the judicial system is designed in the constitution and whether it has the potential for achieving the aspirations of federalism and decentralization. The Constitution of Iraq dedicates chapter three to the judicial authority. According to the Article 89, ‘the federal judicial power is comprised of the Higher Juridical Council, the Federal Supreme Court, the Federal Court of Cassation, the Public Prosecution Department, the Judiciary Oversight Commission, and other federal courts that are regulated in accordance with the law.’<sup>358</sup>

Because of the pluralistic reality of the federal systems, there is some duplication of the laws. Because of such possible duplication in federalism, it is very important to set a proper and effective system of the constitutional judiciary for ensuring the implementation of the federal constitution.<sup>359</sup> Apart from Switzerland, which depends on a legislative referendum to adjudicate any dispute over jurisdictions between different governments in the federation, other federations rely on the courts to interpret the constitution and to adjudicate any dispute related to it.<sup>360</sup> This supreme institution has the last word in the subject of the constitutionality of any law in the interpretation of the constitutional rules, and in the adjudication of any disputes that may occur between the various levels of authority, such as between national government and subnational, or provincial governments, or sub-central administrative levels.<sup>361</sup> “The Federal Supreme Court” has been designed mainly for that crucial judicial function on the federal level.<sup>362</sup>

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<sup>357</sup> Ibid 3.

<sup>358</sup> For more details about judicial system in Iraq see: Medhat Mahmoud, *JUDICIAL SYSTEM IN IRAQ, A Review of the Legislation Regulating Judicial Affairs in IRAQ* (2004). [http://gipi.org/wp-content/uploads/2009/01/mahmood\\_2004.pdf](http://gipi.org/wp-content/uploads/2009/01/mahmood_2004.pdf). Accessed on 29<sup>th</sup> of November 2018.

<sup>359</sup> Ronald Watts, ‘Comparative conclusions.’ *Distribution of Powers and Responsibilities in Federal Countries*’ (2006) 322.

<sup>360</sup> Watts, ‘Federalism, Federal Political Systems, And Federations’ (n 86).

<sup>361</sup> Ronald Watts, ‘Comparative Conclusions...’(n359); Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*(Yale University Press 2012).

<sup>362</sup> Constitution of Iraq 2005, Article 93.

The Federal Supreme Court (FSC) consists of 9 judges and experts in Islamic jurisprudence. Its competencies, as outlined in Article 93, include: overseeing the constitutionality of laws and regulations in effect; interpreting the provisions of the Constitution; settling matters that arise from the application of the laws, decisions, regulations, instructions, and procedures issued by the federal authority; ratifying the final results of the general elections for membership in the CoR; settling disputes that arise between the federal government and the governments of the regions and governorates, municipalities, and local administrations; settling disputes that arise between the governments of the regions and governments of the governorates; settling competency disputes between the federal judiciary and the judicial institutions of the regions and governorates that are not organized in a region; and settling competency disputes between judicial institutions of the regions or the governorates not organized in a region (GNOR). With these competencies, the court can play a significant role for the judicial disputes between different levels of the federation.

It is necessary to mention that the structure of the court and its procedural matters have been left to be regulated by a law. Such law has not been enacted yet by the parliament. Therefore, the Court still exercises its competencies under the provisions of the Article 44 of the TAL, and the law of the FSC No 30 of 2005, which was enacted for implementing Article 44.<sup>363</sup> Another potential challenge for the court in the future is related to choosing the members of the court. The second clause of Article 92 states that the court should include experts of Islamic jurisprudence. Who are these experts from Islamic jurisprudence? Are they Sunni or Shiite? Will the interpretation of the Islamic jurisprudence be based on the Sunni doctrine or Shiite doctrine? These questions will raise significant issues and disputes in the future. Certainly, they would impact the structure of federalism and its institutions.

It seems that leaving all procedural and even substantive aspects of the court to be decided by the parliament is problematic. It would have been better if the constitution itself had determined the way of selecting its members and its function based on high objective standards through consensus among the main components of the federation, in the way that gives a satisfaction to the SGs. If the FSC and its members are not trusted by all political groups and regional governments, the Court may not be able to play a

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<sup>363</sup> This law is available in Arabic version online at: 'Iraqi Local Governance Law Library' <<http://www.iraq-lg-law.org/en/node/467>> accessed December 21, 2018.

decisive role in settling disputes about federalism. Therefore, the independence of the court might require the proportional representation of the federation components in the membership of the Court.

These challenges have made it hard for the FSC to play a decisive and effective role in resolving the disputes over oil management between the KRG and the FG. In addition, the political nature of the disputes has further disabled the Court from playing its judicial role. Therefore, all these reasons necessitate resorting to and adopting collaborative federalism as a flexible mechanism based on negotiations and compromises between the stakeholders as equal partners. Consequently, collaborative institutions can be more effective than judicial institutions with respect to settling any controversial issue of a political nature.

Reflecting on the abovementioned descriptions of the constitutional structure and institutions of the legislative, executive and judicial branches, it can be concluded that the constitution includes significant provisions for achieving the aspirations of federalism and decentralization in Iraq. However, the effectiveness of these provisions remain conditional on the way different Iraqi political groups interpret and develop the conceptions, principles, and mechanisms of federalism in dealing with the disputes. In addition, the complete implementation of the constitutional provisions, for instance, establishing the second chamber, is an essential condition for effective federalism in Iraq.

### **3.6 Distribution of Powers in Iraqi Federalism**

The distribution of powers between federal and subnational governments is a central issue for any federal system. Generally, federal countries try to deal with the distribution of powers through one of the following ways: the constitution determines the exclusive federal powers while the residual powers remain for the subnational authorities,<sup>364</sup> or the constitution determines the exclusive powers of the subnational authorities while the residual powers remain for the federal authority.<sup>365</sup> Some

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<sup>364</sup> For instance, the United States, Australia, Austria, Germany, Argentina (section Section 121).

<sup>365</sup> For instance Canada in Articles (91, 92).

constitutions expressly determine the powers of both levels in two different lists.<sup>366</sup> There is also a so-called shared list, which includes the powers that are shared between federal and sub-national governments within federations.<sup>367</sup> The shared power list should come with one of the methods mentioned above.<sup>368</sup>

The approach taken by each country depends on many issues including the social composition, political history, cultural structure, demographic and international factors and even the essential legal purpose of the federalism. All these factors will determine the degree of the power that each level of government will enjoy within a federation.<sup>369</sup> For instance, in a homogeneous society, the federal government will be given more power than subunit governments, while in heterogeneous societies the opposite is true.<sup>370</sup> Moreover, the way in which a federation was created plays a significant role in this regards. For instance, in federations created based on the principle of “holding together”,<sup>371</sup> the federal government preserves more powers for itself. On the other hand, in federations based on the principle of “coming together”,<sup>372</sup> the subnational governments might be more powerful than the national government.<sup>373</sup>

The Iraqi federation can be described as being based on both the “holding together” and “coming together” approaches. On the one hand, it is holding together because Iraq, formally according to the international law and constitutional law until 2003, was a single unitary state with accepted boundaries. Therefore, the process of federalism will not be more than a re-drawing of the distribution of political authority in a pre-existing state. On the other hand, it is “coming together” because on the ground Kurdistan was a de facto independent entity from 1991 to 2003. Hence, this means at least from the Kurdish perspective, the Iraqi federalism is strongly based on a process of “coming together” between two independent political units. Federalism for the Kurds, it is argued;

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<sup>366</sup> For instance, Canada, where the federal and provincial parliament has the right to enact laws in matters stated in articles 94A and 95.

<sup>367</sup> Such as in the United States, Canada, Switzerland, and Australia.

<sup>368</sup> Such as in the United States, Canada, Switzerland, Australia, German and Iraq.

<sup>369</sup> Watts, *comparing federal systems in the 1990s* (n 17) 31.

<sup>370</sup> *ibid* (n 19).

<sup>371</sup> Such as Belgium and Spain.

<sup>372</sup> Such as United States, Switzerland, Australia.

<sup>373</sup> Watts, *comparing federal systems in the 1990s* (n 17); Arthur Benz and Jörg Broschek(n 17).



Can be viewed as a compact or bargain with a specific set of terms, set out in the constitution that is currently being drawn up. If the terms set out in the new constitution are violated, one available remedy is withdrawal because the autonomous political institutions already in place in the Kurdish region.<sup>374</sup>

This fact has been confirmed in many occasions by the Kurdish politicians.<sup>375</sup> Such a view was articulated by the former Kurdish representative in Washington and the current Deputy of the Prime Minister:

We feel that the Kurds made a concession to be part of Iraq. Not only to be part of Iraq but to actually help lead Iraq, to help reconstruct Iraq politically, economically and through its security services. But this has to come with the understanding that there is a region called the Region of Kurdistan, and it is an administrative region with its own parliament, with its own original government, with its own security forces, and it's conceivable to think that this could be resolved and have a new system of administration in the north. So the concept of federalism is something that—it is not a new concept. It is actually discussed in the first Iraqi opposition conference in the early '90s, something that all of the players who are sitting around the table today had agreed to in the past.<sup>376</sup>

Therefore, it can be argued that the nature of Iraqi federalism can be considered as both coming together and holding together, depending on the perspectives used for examining its nature. Since the Kurds see the process as “coming together”, therefore the KRG is supposed to be more powerful than the FG. The constitutional drafting history reveals that the Kurdish negotiators succeeded in limiting the role of FG and increasing powers for the regions extensively.<sup>377</sup> However, Gunter argues, ‘the 2005

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<sup>374</sup> Lawrence Anderson, ‘Theorizing Federalism in Iraq’ (2007) 17(2) *Regional & Federal Studies* 159, 167-168.

<sup>375</sup> Lawrence Anderson (n 374).

<sup>376</sup> Federal News Service (2005), Council on Foreign Relations Meeting with Qubad Talabani, Washington Representative of the Patriotic Union of Kurdistan. 9 May (accessed 22 July 2005 from Lexus Nexus). Available online: <http://www.cfr.org/iraq/iraqs-political-transition/p8090>. Accessed on: 28/10/2015.

<sup>377</sup> Ashley Deeks and Matthew Burton(n2).

constitution that guaranteed real federalism and thus semi independence for the KRG was now challenged as having been imposed at a moment of weakness.<sup>378</sup>

This can be further evidenced by examining the distribution of powers in the current constitution. The constitution of Iraq adopts two principles for the distribution of powers between federal and subnational levels. It determines the exclusive competences of the FG, while leaving all the residual powers to the regions and provinces which are not organized in a region. Then, it determines also the shared competencies or the concurrent powers between the national and subnational governments.

For preventing tyranny and dictatorship in the FG and encouraging SGs to work according to the interests of its citizens, the constitution prevented the concentration of power at the central government. This is set out clearly in the constitution, through granting it the limited exclusive powers that are stipulated by the article 110 and giving the rest of the powers to the sub national government.<sup>379</sup> This seems to be a supportive constitutional feature in Iraqi federalism for creating a decentralized system of governance. It is certainly in the interests of all political groups, especially minorities, to limit the authority of the central government by a constitutional provision.

The constitution has also recognized the importance of sharing powers over certain issues between the FG and the regions. Therefore, it outlines specific matters for the concurrent powers or shared powers. In other words, neither the FG nor the SGs comprising the federation are able to enact law for regulating certain issues on their

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<sup>378</sup> Michael Gunter, 'Arab-Kurdish Relations and the Future of Iraq' (2011) 32(9) Third World Quarterly 1623.

<sup>379</sup> Article 110 states: 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.

own; instead it can only be made through the involvement of both of them acting together collaboratively.<sup>380</sup> Article 114 includes the list of matters under concurrent or shared powers.<sup>381</sup> More importantly, according to Article 112, oil and gas management is generally under the shared powers, at least with respect to the current fields, with some particularity, because this article comes directly after the powers of the federal government.<sup>382</sup>

Certainly, due to the overlap between the power of the FG and SGs, disputes arise over shared powers which need to be solved. The Iraqi constitution states that when there is a dispute over competencies on shared powers or relevant laws, the supremacy will be for the laws of the subnational authority.<sup>383</sup> This constitutional approach, however, is more complicated in reality than it appears.

After indicating the exclusive powers of the FG and the shared powers between national and subnational governments, the Constitution leaves all the remaining authorities to the sub national governments. Article 115 states:

All powers not stipulated in the exclusive powers of the federal government belong to the authorities of the regions and governorates that are not organized in a region. With regard to other powers shared between the federal government and the regional government, priority shall be given to the law of the regions and governorates not organized in a region in case of dispute.

Apparently, according to this article, the subunit authorities are more powerful than the FG, given that the latter's powers are limited to those issues exclusively listed in the

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<sup>380</sup> Watts, *comparing federal systems in the 1990s* (n 17)34.

<sup>381</sup> Article (114) states. "The following competencies shall be shared between the federal authorities and regional authorities: 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.

<sup>382</sup> More details will be given to this topic in separate chapter.

<sup>383</sup> See: Article (121 / II)

Article 110 while the former are granted the rest of the powers. Moreover, the Constitution confirms the supremacy of the laws of the SGs over the laws of the FG in any case of dispute regarding shared powers. This is in sharp contrast to almost all the other constitutions of federal countries which give supremacy to the national laws of the FG, not those of the subnational government.<sup>384</sup> This reflects the desire and the efforts of the Kurds negotiators during the constitutional negotiations in 2005.

Moreover, article 121 in the section five, from chapter one, titled ‘Powers of the Regions’’, outlines the rights of the regions for exercising the legislative and executive powers. It grants the regions a right or authority to amend federal law in case of any contradiction between the central and regional governments with respect to issues which are not exclusive for the FG. It also entitles the regions to a fair share in the revenue.<sup>385</sup>

In summary, this structure for distributing powers reflects the compromises and bargains that were made at the time of drafting the constitution to take account of the demands of different ethnic, religious and social groups. It reflected the fear of the emergence of a strong central government in Baghdad which might marginalize SGs in the future. It was a political bargain among different fractions, especially between the Kurds and Shiite Arabs for self-rule and shared rule, for maintaining the unity of Iraq and realizing minorities’ aspirations by giving them self-rule.

This structure of the distribution of powers has led Brown to argue, ‘such provisions may cause Iraq to lurch in a Confederal direction, especially if the Federal Supreme Court emerges as a powerful body even mildly friendly to the regions.’<sup>386</sup> This is especially accurate for the Kurds. They tried to make the federation as decentralized as

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<sup>384</sup> As Ronald watts argued, the only exception here is Canada, and only in the old age pensions, which belong to the concurrent power, the supremacy is for the provincial law in any conflict with the federal law. Watts, *Comparing Federal Systems In The 1990s* (n 17)34.

<sup>385</sup> Article 121 states that : ‘First: The regional powers shall have the right to exercise executive, legislative, and judicial powers in accordance with this Constitution, except for those authorities stipulated in the exclusive authorities of the federal government. Second: In case of a 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. Third: Regions and governorates shall be allocated 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. Fourth: .... Fifth: ...

<sup>386</sup> Nathan Brown (n345)13.

possible. As a result of their efforts, they even secured some extraordinary constitutional powers for the KRG.<sup>387</sup>

### **3.7 The Constitutional and Legal Framework of the Sub-National units**

Article 116 of the constitution states ‘the federal system in the Republic of Iraq is made up of a decentralized capital, regions, and governorates, as well as local administrations.’ Accordingly, the Iraqi federalism distributes powers over three levels, namely, the federal, regional, governorate and local administrative levels.

The constitution has broadly outlined the formation, boundaries and competencies of those levels. The federal level is generally represented in the institutions of the central government in Baghdad and their branches and representatives throughout Iraq.<sup>388</sup> The second one is the regional level or regions,<sup>389</sup> and the third one is the governorates not organized in a region.<sup>390</sup> In addition to these three levels, there are the Local Administrators.<sup>391</sup> It seems that this is not considered to be a constitutional level such as the three levels mentioned above. The constitution does not mention anything about their competencies. Therefore, their jurisdictions are left to laws to be issued by the Federal Parliament.

Regarding the formation of a federal region, the constitution sets out clearly the mechanisms and procedural requirements for this purpose. The constitution in the Article 119 gives a right to each governorate, or group of governorates, to form a region based on a request to be voted on in a referendum, presented through either ‘a request by one-third of the council members of each governorate intending to form a region,’ or

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<sup>387</sup> For more details see: David Ghanim, *Iraq's dysfunctional democracy*. (USA: ABC-CLIO 2011)161-179.

<sup>388</sup> This level already has been explained in the previous section.

<sup>389</sup> See: Articles (116-121).

<sup>390</sup> See: Articles (122- 123).

<sup>391</sup> Article 125 confirmed on the administrative, political, cultural, and educational rights of the ethnic and religious minorities.

‘a request by one-tenth of the voters in each of the governorates intending to form a region.’<sup>392</sup>

Moreover, Article 118 of the constitution states ‘the Council of Representatives shall enact, in a period not to exceed six months from the date of its first session, a law that defines the executive procedures to form regions, by a simple majority of the members present.’ To give effect to these constitutional provisions, the Parliament enacted the Law of executive procedures to form regions No. 13 of 2008. Its first Article states ‘A region consists of one governorate or more.’<sup>393</sup> Article 2 emphasized the same mechanisms for formation a new region as provided for in the Article 119 of the constitution. In addition, the law clarified the matter of joining an already existing region.<sup>394</sup>

After completing those steps, the request must be submitted to the Council of Ministers, within a period not exceeding one week. Then the Council of Ministers must order the Electoral Commission within a period not exceeding 15 days, from the day of submission of the application, to organize referendum within the province that tend to form a region or join an existing region within a period not exceeding three months.<sup>395</sup>

The constitution has provided the regions with a wide range of political, legal, administrative and financial authorities and powers. According to the Article 120 the regions have the right to adopt a constitution. In addition, Article 121 stipulates numerous competencies, such as exercising legislative, executive and judiciary powers over the jurisdictions of the regions, except for those are listed in the Article 110,<sup>396</sup> and receiving a sufficient and fair share of federal revenue for performing their responsibilities.<sup>397</sup> The rules also set out the terms for a region’s participation in

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<sup>392</sup> The exception is Baghdad. Where, the Article 124 states that Baghdad remains the capital city of the country and it must not become part of any territory or region.

<sup>393</sup> The Law Available online at: ‘Iraqi Local Governance Law Library’ <<http://www.iraq-lg-law.org/en/content/executive-procedures-regarding-formation-region>> accessed September 21, 2015.

<sup>394</sup> Article 2/third states ‘In the case where a governorate wishes to join a region, a third of the governorate council members should submit a request accompanied by the approval of a third of the regions legislative council members.’

<sup>395</sup> See: Article 3 of the Law No.13.

<sup>396</sup> Article 21/First

<sup>397</sup> Article 21/Third

diplomatic missions for certain issues<sup>398</sup> as well as the right to establish internal security forces for the region such as police, security forces, and guards of the region.<sup>399</sup> In addition, it has the right to exercise all the residual powers according to the article 115, shared competencies in Article 114<sup>400</sup> and Article 113.<sup>401</sup> Finally, the producing regional governments also share with the FG the powers of managing oil and gas that have been mentioned in the article 112.<sup>402</sup> Furthermore, the participation of the regions and governorates in the federal bodies stipulated by the Constitution in Articles 105<sup>403</sup> and 106,<sup>404</sup> which is an important guarantee for the subnational governments to obtain their rights in a fair manner in many areas, most notably financial rights.

The third level of authority in the Iraqi federation involves the governorates which are not organized in a region (GNOR). Each governorate consists of a number of districts, sub-districts, and villages.<sup>405</sup> These governorates are headed by an elected governor.<sup>406</sup> The Law of the governorates not Associated in a Region No. 21 of 2008 provides the legal framework of the formations, institutions and competencies of governorates.<sup>407</sup>

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<sup>398</sup> Article 21/Fourth

<sup>399</sup> Article 21/Fifth

<sup>400</sup> These competencies have been explained in the previous section.

<sup>401</sup> These shared competencies are; antiquities, archaeological sites, cultural buildings, manuscripts, and coins.

<sup>402</sup> This Article will be given more details in a separate chapter in this thesis.

<sup>403</sup> Article 105 states ‘A public commission shall be established to guarantee the rights of the regions and provinces that are not organized in a region to ensure their fair participation in managing the various state federal institutions, missions, fellowships, delegations, and regional and international conferences. The commission shall be comprised of representatives of the federal government and representatives of the regions and provinces that are not organized in a region, and shall be regulated by a law.’

<sup>404</sup> Article 106 states ‘A public commission shall be established by a law to audit and appropriate federal revenues. The commission shall be comprised of experts from the federal government, the regions, the provinces, and its representatives, and shall assume the following responsibilities:

- (1) To verify the fair distribution of grants, aid, and international loans pursuant to the entitlement of the regions and provinces that are not organized in a region.
- (2) To verify the ideal use and division of the federal financial resources.
- (3) To guarantee transparency and justice in appropriating funds to the governments of the regions and provinces that are not organized in a region in accordance with the established percentages.’

<sup>405</sup> See: Article 122.

<sup>406</sup> See: article 122/second and third.

<sup>407</sup> Three amendments were made to this law. The first amendment was in February 2010, which was an attempt to reduce the powers and rights of the provinces in the interest of the federal authorities contrary

According to the Articles 121 and 122 of the constitution and the law No. 21 of 2008, the governorates have a range of administrative, financial and even semi-legislative powers which include issuing local legislations as long as these laws do not conflict with the Constitution;<sup>408</sup> receiving a sufficient and fair share of federal revenue;<sup>409</sup> taking part in the diplomatic missions, for certain matters;<sup>410</sup> enjoying a degree of financial independence without being subject to any the federal supervision;<sup>411</sup> Moreover, in addition to the shared competencies with the federal government,<sup>412</sup> the governorates enjoy the residual powers that are not stipulated in the exclusive powers of the FG.<sup>413</sup> Finally, the oil and gas-producing governorate governments also share with the federal government the powers of managing oil and gas.<sup>414</sup>

From the above mentioned explanations, three points can be observed. First, the constitution provides a wide range of powers to regions and governorates that are not organized in a region within the federation. The structure is highly non-centralized according to the constitution. Second, the governorates which are not regions, but administrative units, enjoy almost similar powers and authorities to those given to the regions. This is important because it allows a decentralized administration not only in the regions, but also in the other administrative units such as governorates. Therefore, it is not surprising that Cameron describes the Iraqi federalism as ‘incomplete; unclear in places; decentralist in its formal structure; asymmetrical and, by design,

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to the Constitution. Then in June 2013 was issued the second amendment, which corrected some of the constitutional violations that occurred through the first amendment on the powers of the provinces. The third amendment was issued in January 2018, which also reduced the powers of the provinces for the federal authorities. The law available online at: ‘Iraqi Local Governance Law Library’ <<http://www.iraq-lg-law.org/en/content/provinces-not-associated-region-no-21-2008>> accessed December 21, 2015. It is worth mentioning, this law amended by Law No. 15 of 2010 and Law No. 19 of 2013.

<sup>408</sup> Article 2 from the law of No. 21 of 2008 states Article 2

‘First: The Provincial Council is the highest legislative and oversight authority operating within the administrative boundaries of the Province, and has the right to issue local legislations within the provincial boundaries in a way that enable it to run its own affairs in accordance with the principle of decentralized administration and in a way that does not contradict the Constitution and Federal laws...’

<sup>409</sup> See the text of the Article 21/Third, above.

<sup>410</sup> See the text of the Article 21/Fourth, above.

<sup>411</sup> Article 122/Fifth

<sup>412</sup> Article 113 and 114.

<sup>413</sup> See the text of the Article 115 above.

<sup>414</sup> See: Article 112.



evolutionary.<sup>415</sup> Finally, the sub-national units, regions and even governorates to some extent enjoy not only administrative competencies, but more importantly political and legal authority to a great degree. This has led some academics to argue that the constitution has confused what is administrative and what is political regarding the powers of the subnational governments. Granting the governorates legislative powers makes them akin to the political units rather than just administrative units.<sup>416</sup>

Interestingly, the constitution, in many respects, does not distinguish between the powers of the regions based on federalism, and the powers of the governorates based on administrative decentralization.<sup>417</sup> For instance, according to the article 115, both levels of governments enjoy the residual powers that are not stipulated in the exclusive powers of the FG, as well as their laws have the supremacy in case of any contradiction with federal laws regarding the shared powers.<sup>418</sup> As a result, there have been many attempts by some Sunni and Shiite Arabs to amend the articles 112, 115, 121 and 140 in order to strengthen the central authority and limit the powers of the Kurdistan Region.<sup>419</sup>

Certainly, what has been explained above was the case constitutionally, where these constitutional provisions are not completely supported and not practically respected. For instance, despite the constitutional confirmation of the right to create new regions, the Prime Minister of the FG and the Shiite alliance have rejected many Sunnis' proposals for establishing new federal regions.<sup>420</sup> Moreover, despite the constitutional affirmation of the decentralized model, in practice, the intergovernmental relationship between the FG and the governorates has remained centralized. Where the governorates practically depend on the FG in terms of financial resources and applying laws enacted by the Parliament and so on. Therefore, once the system starts to follow these constitutional

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<sup>415</sup> David Cameron, 'Making Federalism Work in Iraq' in Markus Bouillon, David Malone and Ben Rowswell (Eds), *Iraq: Preventing a new generation of conflict*. Lynne Rienner Publishers(2007)153, 156.

<sup>416</sup> See: Abdul Jabbar Ahmed, *Federalism and Decentralization in Iraq* (Friedrich Ebert Stiftung, Office of Jordan and Iraq, Arabic version 2013); Ghazi Faisal Mahdi, 'The Federal System and The Administrative Decentralization in The Constitution of the Republic of Iraq for The Year 2005' Arabic version, (*Journal of Legislation and Judiciary*) <[http://www.tqmag.net/body.asp?field=news\\_arabic&id=4](http://www.tqmag.net/body.asp?field=news_arabic&id=4)> accessed June 21, 2016.

<sup>417</sup> Article 122 /Second states, Governorates that are not incorporated in a region shall be ..... to manage their affairs in accordance with the principle of decentralized administration ...

<sup>418</sup> See: the text of the Article 115 above.

<sup>419</sup> See: Munther Al Fadhal (n 7) 251.

<sup>420</sup> More details will be given in the next chapter.

provisions, certainly many technical issues will arise regarding the possibility of exercising political powers by the governorates. This is what prompted Cameron to observe that ‘Iraq possesses a federal constitution, although it is not by any means a fully federal country yet.’<sup>421</sup>

### **3.8 Evaluation of the Constitution, the Federal and the Decentralized Model Conclusion**

In principle, the Iraqi federation has the essential requirements to be considered a federal system. First, it possesses a rigid written constitution covering more than one level of authority, federal, regional and governorate governments. Constitutionally, although in reality the country is still unicameral, it works based on a bicameral legislature for representing the constituent units, and it has an independent federal judiciary for resolving disputes over federalism.

Nevertheless, despite its promising and ambitious features regarding federalism, the current constitution has created many problems and dilemmas. Instead of solving the problems, it has somehow contributed to the continuation of the chaotic conditions in Iraq. It lacks sophistication and integration because it was not drafted carefully, having been prepared in only two months. Also, there has always been the lack of unanimity among the Iraqis regarding the constitution, as it was boycotted by the Sunnis. Additionally, regional and other external countries intervened improperly in the process of drafting the constitution, notably the USA.<sup>422</sup>

The current federal structure does not seem to be sustainable. There is only one federal region in Iraq: Kurdistan. Aside from Kurdistan, the rest of Iraqi governorates, which are 15 including Baghdad, are governed by the central government based on the decentralised system, following the provisions of the Constitution. Cameron rightly argues:

The 2005 constitution does not, in reality, “create federalism”; it sets the federal process in motion, a process which, it is assumed, will lead to a functioning

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<sup>421</sup> Cameron, ‘The Paradox of Federalism:...( n348).

<sup>422</sup> Saad Jawad (n280)3; Robert Looney, ‘Economic Consequences of the New Iraqi Constitution’(2006)Gulf Research Centre 365. <<https://calhoun.nps.edu/handle/10945/40676>> accessed November 30, 2018.

federal system. Iraq is not in fact a federal country yet: Kurdistan existed before the 2005 federal constitution and it exists today; no other federal regions exist; none of the major federal institutions is up and running. Thus, Iraq's constitution has a range of alternative, potential federal futures embedded within it.<sup>423</sup>

There is, moreover, still a strong tendency of centralization which has caused an escalation in conflicts and problems between some subnational governments and the FG.<sup>424</sup> This has led many governorates, especially among the Sunnis to consider creating their own federal regions on the lines of the Kurdistan Region to avoid the authoritarian policy of the FG that is defined by partisan and sectarian motives.<sup>425</sup> This clear failure to achieve the real federalism and decentralization may lead to the partition of the country into small entities based on sectarian and ethnic differences.<sup>426</sup> Therefore, the future of Iraq is not clear, especially in the absence of security and political stability and regional and international interventions in Iraqi affairs. It may either lead to a highly centralized country, except for the status of the KRG, with endless internal problems or become two or three smaller countries.<sup>427</sup>

In addition, there is an ambiguity surrounding many major matters including the exact distribution of powers, especially between the KRG and the FG. These issues include oil and gas management, revenue sharing, disputed areas, and IGR between the FG and SGs. Furthermore, it has left many constitutional issues, such as the establishment of the FSC, to be dealt with by the parliament. These issues can easily undermine the

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<sup>423</sup> Cameron, 'Making Federalism Work in Iraq' (n415)154.

<sup>424</sup> Through the study of The Law of the governorates not Associated in a Region No. 21 of 2008 and its amendments, we found that there are many articles that contradict the constitutional provisions in this regards. This law reduces the power of the governorates in enacting laws in matters that are not under the exclusive jurisdiction of the federal authorities in accordance with Article 110, and also financially, they are still mainly dependent on what they get from the federal budget based on the proportion of the population of each province. Moreover, the implementation of governorates' plans and projects in various areas depends entirely on the federal ministries concerned. Therefore, we see that this law has limited the powers granted by the Constitution to the governorates not organized in a region, and make the relationship between these governorates and the federal government a central relationship and subordination in financial and legal matters. See: (n268).

<sup>425</sup> More details will be given to thos topic in the next chapter.

<sup>426</sup> Michael Knights and Eamon McCarthy (n 308).

<sup>427</sup> *ibid.*

effectiveness of the constitution and the importance of having the written constitution and hindering the process of federalism on the ground.

The failure of the Federal Parliament to pass laws on the formation of some important federal bodies that could be important mechanisms in promoting collaboration and cooperation within the Union is another reason for the absence of a CF. The Parliament yet has not enacted laws with respect to many federal bodies, which are clearly confirmed in the constitution such as Article 105 regarding ‘Federation Council, Commission to guarantee the rights of the regions and provinces that are not organized in a region’, and Article 106 regarding ‘A public commission to audit and appropriate federal revenues.’<sup>428</sup>

### **3.9 Conclusion**

In this chapter, it was explained how modern Iraq started as a centralized unitary state based on a monarchy in 1921, changed to the republic in 1958 and adopted federalism in 2004 by the CPA, subsequently embodied in the 2005 constitution. Federalism was a radical change in the model of governance in Iraq. Its constitutional structure was hastily designed, after hard deliberations by the main political groups before. The historical background, contextual realities and constitutional framework of federalism in Iraq reveals that without proper collaboration among the main political groups, federalism is doomed to fail. Thus, despite all the challenges, the adoption of federalism based on collaboration and coordination among different tiers within the federation seems to be an alternative way for the distribution of powers in Iraq and resolving disputes.

The Iraqi federalism is a kind of coming-together federation with regard to the Kurdistan Region, built on the bases of bargaining and negotiating between the Kurds and the Arabs. Therefore, to maintain this federation, bargaining and cooperation must continue among stakeholders as equal partners. The Constitution has granted the Kurds a form of asymmetrical status by recognizing their autonomy they have enjoyed since 1991. Hence, even with the establishment of new regions in the future, Kurdistan should be treated on the basis of such an asymmetric federalism model.

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<sup>428</sup> For more details about these Commissions see footnote 369, 370 in page 79.

In addition to all these defects and constitutional gaps mentioned above, there are other socio-political and cultural problems hindering the development of federalism in Iraq. This can be further understood by explaining the socio political dimensions of federalism in Iraq, which will be addressed in the next chapter in this thesis.

## **Chapter Four: The Attitude of Political, Religious and Ethnic Groups towards Federalism in Iraq**

### **4.1 Introduction**

As discussed in previous chapters, the current Constitution of Iraq affirms the country's federal status. However, the nature of this federalism is still subject to different interpretations and different attitudes among various political, religious and ethnic groups in Iraq. Since 1991, especially after the establishment of the Kurdistan Region as a federal region, federalism has been a central issue among the main political groups. It was discussed and initially agreed upon by the Iraqi opposition groups during the meetings of the opposition both inside and outside Iraq.<sup>429</sup> However, after overthrowing the Baath Regime, federalism became a contentious constitutional matter. Even after accepting federalism in principle, the nature, structure and framework of federalism remain debatable and highly controversial.

The Kurds have always supported federalism, and this issue has never been controversial. It is their fundamental right as an alternative to full independence on their land, they say. On the other hand, unlike the Kurds, who made federalism a condition for their participation in the new political system that emerged after 2003, most of the Sunnis were among the strongest opponents of federalism, and boycotted the entire political process because of the adoption of this system in Iraq's 2004 draft constitution. However, this strict position changed later, and especially after 2010, most of them today, if not all of them, are demanding the federalism of the Sunni cities, as we will explain in detail.

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<sup>429</sup> In many Iraqi opposition conferences, which were held outside and inside Iraq, federalism was discussed and confirmed by most of the Iraqi sects and groups. For instance, Beirut conference on March 1991, Vienna conference on 16-19 June 1992, Saladin conference in Erbil on October 27/October 1992 and London conference on 3-4 April 1993. Moreover, New York conference on 30 October 1999 and finally London conference in 2002. In all those conferences, the oppositions agreed on the issue of federalism, especially for the Kurds. They decided that the political and administrative relations between Baghdad and KRG would be based on federal system. See: Robert Rabil, 'The Iraqi Opposition's Evolution: From Conflict to Unity'(2002) 6(4)Middle East Review of International Affairs, 1-17; Khalil Osman, *Sectarianism in Iraq: the Making of State and Nation since 1920* (Routledge 2015).

With regard to the Shiite groups, they have not settled on a single stance on adopting federalism as a political system for Iraq. Many of them supported it when they were out of Iraq during their opposition to Saddam Hussein. However, some seem to have changed their position after 2003, and have refused to adopt such a system, as we will explain later.

In addition, there are other minorities such as Turkmen, Assyrians, Chaldeans, and Yazidis living in Iraq. Because they do not have a strong influence in the political decision-making, with the exception of Turkmen, they are divided between Arabs and Kurds with regard to federalism and other issues. For example, the Assyrians in many occasions and conferences have called for establishing Assyrian autonomy in Assyrian lands, which are located between the upper river and the Tigris River, as a part of the Iraqi federalism.<sup>430</sup> With regard to Turkmen, they generally refuse any form of federalism.<sup>431</sup> During the rule of Paul Bremer, the representative of the Turkmen in the Iraqi Governing Council said that if the Kurds insisted on the issue of federalism, which leads to breaking away from Iraq, they would announce the Turkmenistan of Iraq.<sup>432</sup> Apparently, Turkey plays a significant role in directing most of the Turkmen groups in Iraq. Thus, their attitude regarding federalism is somehow shaped by the strategy of Turkey in the region, especially towards the Kurds.<sup>433</sup>

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<sup>430</sup> See: 'The Final Statement Issued by the Popular Congress of the Chaldean Syriac Assyrian II (Soraya)' Arabic version (*Ankawa* December 6, 2009) <<http://www.ankawa.com/forum/index.php?topic=370217.0>> accessed October 22, 2014.

<sup>431</sup> David Phillips, *Losing Iraq: inside the Post-war Reconstruction Fiasco* (Basic Books 2006).

<sup>432</sup> Their concern is the future of the city of Kirkuk, where they consider it a Turkmen city, which has become one of the most serious problems in Iraq among all of its components, particularly between Kurds and Turkmen. See: Maad Fayad, 'Turkmen Representative in the Iraqi Governing Council Threatens to Announce the Turkmenistan of Iraq in Exchange for Iraqi Kurdistan. Arabic version (*Iraqi Turkmen Journal*) <[http://www.turkmen.nl/b\\_man3.html](http://www.turkmen.nl/b_man3.html)> accessed November 22, 2014.

<sup>433</sup> It is worth mentioning, Turkey always has stood against any step that refers to any kind of autonomy for the Kurds, because this issue would provoke the Kurds in Turkey as well. They have tried to make Mosul, Kirkuk, and the oil areas outside the control of KRG. For this, in 2003 when the USA decided to invade Iraq, Turkey got a promise from US that, they will not allow the Kurds to control of Kirkuk and Mosul. Thus, the former Turkey's foreign minister, Abdullah Gul, in 2003, indicated that Turkey would intervene militarily to prevent the Kurds from taking over the oil city of Kirkuk. Also for defending the Turkmen, and for fighting the Kurdistan Workers Party (PKK). Nevertheless, nowadays, Turkey has eased its pressure against KRG. This is because of the enormous wealth of oil and gas in Kurdistan, which gives benefits for Turkey, either directly through the oil pipeline across their borders, and import

Simply put, federalism cannot be a magic tool for satisfying all the Iraqi groups with their conflicting desires and purposes. This can be further understood by observing the changes which have occurred in the attitude of different groups over the past three decades.

Hence, understanding the effectiveness and future of federalism requires a proper understanding of the attitudes of the main groups in Iraq towards federalism. For that purpose, this chapter discusses the attitudes of the Kurds, the Shiite, and the Sunni towards federalism. In addition to explaining the attitudes of the major political players, it also provides analyses on why there is only one federal region on the ground, the Kurdistan Region, and why the intergovernmental relationship between the FG and the rest of the governorates continues to be practically based on centralized system. The chapter also addresses how the socio-political and economic factors contributed to raising different attitudes among Iraqis regarding federalism? To what extent have these circumstances hindered the creation of new regions and the establishment of a decentralization model?

After presenting the attitudes of the main Iraqi groups, the Kurds, the Shiite and the Sunnis, this chapter concludes that even though federalism has a place in the constitution, it suffers from serious challenges including the lack of the minimum political consensus which is an essential requirement for federalism in a deeply divided sectarian society such as Iraq.

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oil and gas to fill its needs, or indirectly through the trade between the Kurdistan and Turkey. Where, hundreds of Turkish companies are operating in Kurdistan in various fields, such as construction, roads, bridges, oil and other firms. Thus, Turkey gets the lion's share of investment in Kurdistan. See: Carole O'Leary, 'The Kurds of Iraq: recent history, future prospects' (2002) 6(4) Middle East Review of International Affairs 17; Liam Anderson and Gareth Stansfield, *Crisis in Kirkuk The Ethnopolitics of Conflict and Compromise* (University of Pennsylvania Press 2011); Bill Park, 'Iraq's Kurds and Turkey: Challenges for US Policy' (2004) 34(3) Parameters 18; Hussein Sirriyeh, 'Iraq and the Region Since the War of 2003' 9(1) *Civil Wars* 106; Yossef Bodansky, *Secret History of the Iraq War* (Harper Collins 2009).



## 4.2 The Kurds and Federalism in Iraq

The Kurds are the strongest supporters of federalism in Iraq. For the Kurds, federalism is a socio-political and economic vision that cannot be discarded.<sup>434</sup> Since the establishment of Iraq in 1921, the quest for self-governance has always been a principal political demand in the Kurds' struggle with the previous regimes of Iraq, which has had lasting effects on the Iraqi political and administrative system. The Kurds' aspiration always has been towards establishing their own independent state, which they had been denied because of the British colonial interests, particularly regarding oil, at the beginning of the twentieth-century and after the fall of the Ottoman Empire.<sup>435</sup> Therefore, they see it as a minimum expression of their national and political rights.

However, it can be argued that, in practice, the idea of adopting the federal system in Iraq dates back to the early 1990s when the Iraqi opposition parties at their conferences, whether inside Iraq or in exile, agreed on the possibility of establishing a federal state in Iraq after the fall of Saddam's government. At the time, Iraq's Kurdistan was liberated from the former regime by Security Council resolutions which contributed to the stability and security of the region. This situation has made the Kurds cling to the federal option to ensure their rights constitutionally and practically, in a way that protects them from subordination to any central authority. Hence, the Kurdistan parliament in 1992 unilaterally declared federalism as a constitutional mechanism to regulate the relationship between the Kurds and Baghdad.<sup>436</sup>

The Kurds believe that most of the crises in Iraq, whether internal or external, are due to the political and administrative structure, principally the concentration of power in the centre, the lack of constitutional institutions and the absence of the rule of law. Therefore, they argue that the solution for Iraq is a federal system for the distribution of powers between the centre and the regions based on equal partnership, respect for human rights and the equitable distribution of wealth. Such a system is the only

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<sup>434</sup> See: Dawn Brancati, 'Can Federalism Stabilize Iraq?' (2004) 27(2) *The Washington Quarterly* 5; Carole O'Leary(n 433).

<sup>435</sup> More details on this subject are provided in chapter three.

<sup>436</sup> More details on this subject are provided in chapter three.

guarantee to protect the national unity of all Iraqis, especially between the Kurds and the Arabs.<sup>437</sup>

Federalism for the Kurds was the condition for their participation in rebuilding Iraq again after 2003.<sup>438</sup> Therefore, the participation of the Kurds in the new Iraq mainly depends on adopting a federalism which gives them broad powers in their internal affairs away from the centre.<sup>439</sup> At the same time, it gives them the right to participate in the decision-making process and exercise power in the federal institutions.

It can be said that all Kurds, regardless of their differences, are united in supporting federalism, even if they are divided on other issues. All of them prefer the ethnic and geographical federalism in the framework of the current Kurdistan Region with the inclusion of the disputed areas in this region. This type of federalism allows them to protect their ethnic identity and political unity regarding political, cultural, and social issues. Moreover, it is perceived as bringing them closer to their ultimate goal of independence.<sup>440</sup> However, in practice, the independence of Kurdistan at this time is

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<sup>437</sup> See: KRG Cabinet, 'President of Kurdistan Region Announces Conference on Federalism in Erbil' (*Kurdistan Regional Government* October 7, 2007) <<http://cabinet.gov.krd/a/d.aspx?s=010000&l=12&a=20561&r=223>> accessed December 12, 2015.

<sup>438</sup> It is worth mentioning, during the Iraqi elections in January 2005, an informal referendum was conducted in the Kurdistan region, whether people would prefer Kurdistan to become an independent state or a part of Iraq. The participants showed support for independence. While the referendum is a personal initiative, many of the young government officials believe that the old generation of Kurdish leaders offering too many concessions in order to unify Iraq. In the referendum conducted by the Kurdistan government, more than 90% of young Kurds hope to the independence of Kurdistan, which means that this generation is worth, does not want to be part of Iraq. Thus, the federalism for the Kurds in Iraq is the most basic rights they deserve. The total number of Kurdistan voters participating in the referendum was 1,998,061 people. - 1,973,412 people voted for independence. While 19,650 voted for Kurdistan to remain as part of Iraq. See: Kurdmedia, '98 Per cent of the People of South Kurdistan Vote for Independence' (*Indybay* September 2005) <<https://www.indybay.org/newsitems/2005/02/09/17205061.php>> accessed December 22, 2018.

<sup>439</sup> Harith Al-Qarawee, *Redefining a Nation...*(n1); Liam Anderson and Gareth Stansfield, 'The Implications of Elections for Federalism in Iraq: Toward a Five-Region Model' (2005) 35(3) *Publius: The Journal of Federalism* 359; Michael Gunter, 'The Permanent and New Realities Facing the Kurdistan Regional Government: Options and Prospects' (2008) 28 *Journal of Muslim Minority Affairs* 237.

<sup>440</sup> Michael Gunter, *The Kurds Ascending the Evolving Solution to the Kurdish Problem in Iraq and Turkey* (Palgrave Macmillan 2011).

almost impossible because of international, regional and internal challenges.<sup>441</sup> This was confirmed by the independence referendum on 25 September 2017. Although more than 90 percent of the votes were pro-independence, implementing the result has failed because of challenges mentioned.

In short, because of such previous monopoly of the power by the central government, federalism for them is a non-negotiable demand. As a result, the Kurds were able to secure the inclusion of federalism in the current Iraqi constitution, since federalism was more an issue for the Kurds than for other groups.<sup>442</sup>

### **4.3 The Shiites and Federalism in Iraq**

The Shiites in Iraq are not represented by a single political player. There are a few main political players representing the Shiite identity and they have differing attitudes towards the nature and structure of federalism. However, many of them accepted federalism as a constitutional system of Iraq for a period of time. Prior to 2003, during the meetings of the Iraqi opposition, the majority of the representatives of the Shiites approved federalism in principle, and they recognized Kurdistan as a federal region. Among the Shiites accepting federalism were the Islamic Supreme Council and the Islamic Dawa Party.<sup>443</sup>

Since 2003, while some of the Shiite groups have changed their attitudes, others have remained in favour of federalism. During the reconstruction of Iraq immediately after the removal of Baath regime, some Shiite groups tried to establish federalism in the south of Iraq.

The federalism that was raised by the Shiite after 2003 was based on a sectarian foundation.<sup>444</sup> Additionally, the secular groups prefer the administrative federalism or

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<sup>441</sup> It has been argued that 'at this point in time Iraqi Kurdistan has little chance to achieve sovereignty because of lingering internal disunity and the unfavourable international recognition regime.' See: Alex Danilovich, 'Federalism, Self-Determination and International Recognition Regime: Iraqi Kurdistan at a Crossroads' (2017) working paper.1, 3.

<sup>442</sup> Paul Bremer (n 326); Nemir Kirdar, *Saving Iraq: rebuilding a broken nation* (Hachette UK 2009)123.

<sup>443</sup> Al-Dawa Party is a Shiite Islamic party established in 1957 in Iraq by Mohammad Baqir al-Sadr. Kanan Makiya, 'A model for post-Saddam Iraq' (2003) 14(3) *Journal of Democracy* 5.

<sup>444</sup> Michael Gunter, 'The Permanent and New Realities (n 439); Carole O'Leary, (n 433).

federal-based governorates, as a means of managing the issues of distribution of authorities between the centre and the regions.<sup>445</sup> This has been supported by some Shiite Islamic groups sometimes, such as the Sadrist movement.<sup>446</sup>

Therefore, it can be argued that the Shiite's attitude to federalism after 2003 has been divided. On the one hand there are those who support the federalism, such as the Islamic Supreme Council of Iraq (ISCI), and al Fadila party, as well as some politicians, such as the Judge Wael Abdul Latif and others. On the other hand, there are groups which stand against federalism, such as the Islamic Dawa Party, which changed its attitude after 2003, and the Sadrists movement.<sup>447</sup>

#### **4.3.1 Advocates of federalism**

There have been two main projects by some of the Shiite parties and figures to create a federal region in the south of Iraq. The first one is the Federal Region of the Centre and the South (Iqlim al-Wasat wa al-Janub), and the second one is the Region of Basra.

The idea of creating a region comprising nine governorates, predominantly Shiite in the south of Iraq, with Najaf as the capital, was triggered and presented during the constitutional negotiations by the former leader Abdul Aziz-Hakim, the leader of the ISCI.<sup>448</sup> Then in 2006, the proposal was presented again by the same leader.<sup>449</sup>

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<sup>445</sup> For example: Iraqi National Accord Movement, led by Iyad Allawi, the first prime minister in the transitional government, and Arab Socialist Movement lead by Abdel Elah Amin El Nasrawi, and the Iraqi Communist Party lead by Hamid Majid Musa.

<sup>446</sup> Muna Hamdi Hikmat, 'Federalism, the dialectic of rejection and acceptance' (2012) 21 The International and Political Journal-Al-Mustansyriah University, Arabic version 100. <<https://www.iasj.net/iasj?func=article&aId=50935>> accessed October 21, 2017.

<sup>447</sup> This movement like many other Shiite parties has changed its position with regard to federalism in many occasions.

<sup>448</sup> It is a Shiite resistance group formed in Iran in 1982 against the Iraqi regime. This party is supported very strongly by Iran; establishing ethno sectarian federalism was their desire at the beginning, to make a strong Shiite area, while less control by the centre. The party's name was the Supreme Council for the Islamic Revolution in Iraq (SCIRI). In June 2007, the party changed its name to the Islamic Supreme Council of Iraq, ISCI. See: Harith Al-Qarawee, *Redefining a Nation...*(n1); Ashley Deeks and Matthew Burton(n2).

Although the request of (SCIRI, now ISCI) did not seem inconsistent with the articles of the constitution, it was refused for several reasons, which will be addressed in the next section.

The second federal project was the region of Al-Basra, which was initiated by some Shiite figures and political parties.<sup>450</sup> In 2005, the Fadila party called for the establishment of Al-Basra region, especially when they succeeded in the provincial election in January 2005.<sup>451</sup> The region included another two governorates, which were Nasiriya and Maysan, as well as Basra. This initiative was also aborted mainly by some other Shiite groups claiming that it was not the right time and that there are serious difficulties and barriers for administering the region.<sup>452</sup> Then in 2009, the former governor of Basra Wail Abd-al-Latif with Fadila party tried again to create the region of Basra, which included only the governorate of Basra. He collected signatures from

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<sup>449</sup> For more details see: James Baker, Lawrence Eagleburger and Lee Hamilton, *The Iraq Study Group Report* (Random House Inc 2006)14; Reidar Visser, 'Basra Crude The Great Game Of Iraq'S "Southern" Oil'(n16).

<sup>450</sup> It is worth mention, Basra wilayat (included the southern regions of modern Iraq) was one of the leading cities demanded for federalism and self-governance in the modern history of Iraq. Where, during the 1920s, there was separatist movement in Basra called to autonomy for their city, led by some merchants from different sects and religions such as Sunni, Christian and Jewish merchants. On June 13, 1920, a delegation consisted from some of nobles and important figures, presented a signed petition by 4500 person, containing 23 paragraphs, to the Percy Cox, the British ruler in Baghdad. Asking him to create an independent political administration system in Basra, so called "The states of Basra and Iraq united". That model was very akin to what KRG enjoy nowadays according on Iraqi constitution. The high officials British in Baghdad emphatically rejected this petition. See: Reidar Visser, *Basra, the failed Gulf state: Separatism and nationalism in southern Iraq* (LIT Verlag Münster 2005); Al-Hasani, Abdul Razzaq (1925) History of Iraqi Ministries, Part I, p. 96-98. (Arabic Version).

<sup>451</sup> It is worth mentioning, the Fadila Party has volatile views, were not consistent and clear, it was one of the most enthusiastic of the Basra region, to demand decentralization and strong opposition to a federal south, and finally, it did not support the law of formation of regions No. 13 for the year 2008.

<sup>452</sup> Reidar Visser, 'Basra Crude The Great Game Of Iraq'S "Southern" Oil'(n16); Reidar Visser, 'The Sadrists of Basra and the Far South of Iraq. The Most Unpredictable Political Force in the Gulf's Oil-Belt Region?' vol 734 (2008) working paper; Khalid Elewi Al-Ardawi, *The administration of governance in Iraq: a strategic vision towards building a system of valid government* (Al-Furat Centre for Development and Strategic Studies-Iraq, Arabic version 2012) 90.

citizens to set up a referendum for establishing a federal state, but the attempt failed and did not get the votes needed for the establishment of that federalism.<sup>453</sup>

This complex balance of power has been realised even by the politicians in Basra who once wanted to establish federal region. In 2010 and 2011, 16 out of the total 35 members of the Provincial Council of Basra submitted a formal request to both the Council of Ministers and Iraqi Council of Representatives demanding the establishment of a federal Basra. However, these members later withdrew their demand. The Judge and the politician Wael Abdul Latif indicated that the withdrawal is based on the fear of losing their positions and their political future in the next election. Thus, they do not want to oppose their leaders in Baghdad.<sup>454</sup>

Several arguments have been advanced for supporting federalism among the advocates. The following is a brief summary of these arguments.

Firstly, according to the ISCI, federalism does not mean the fragmentation of the country, but is rather a solution for some of its problems, being a system which has been adopted in strong and stable countries. Additionally, it does not contradict with the Islamic system of governance. He has stated that those who have accepted the Kurdistan region should accept the federalism in the South as well: federalism would create a political balance that serves the stability of the country.<sup>455</sup>

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<sup>453</sup> The proposal to convert Basra governorate to federal region got signing of 35 thousand people, or 2%, while the required ratio according to the law is, signature of 150 thousand citizens, which accounted for 10%, and this is could not be achieved. See: Wael Abdul Latif, 'The Initiator of the Project «Basra Region»: We will not compromise. And we will turn all Iraqi Provinces into Federal Regions.' *The Middle East* (January 10, 2009). <<http://www.aawsat.com/details.asp?section=4&issueno=11001&article=502304&search=%DD%ED%CF%D1%C7%E1%ED%C9%20%C7%E1%DA%D1%C7%DE&state=true#.UtG4DfRdV2A>> accessed January 11, 2014; Reidar Visser, 'Debating Devolution in Iraq' *Middle East Report Online*. 2008 March, 10

<sup>454</sup> Waheed Ghanim, 'Basra Postpones Bid for Independence' (*Niqash*) <<http://www.niqash.org/en/articles/politics/2984/basra-postpones-bid-for-independence.htm>> accessed December 1, 2018.

<sup>455</sup> Nasser al Nahir 'Federalism in Iraq: Is It Something Justified or Deferred Splitting' (*Al-Akhbar* 2006) Arabic version <<https://www.al-akhbar.com/International/207434>> accessed December 22, 2018.

Moreover, some proponents argue that federalism can be an effective way of achieving security, especially in the Shiite area. They argue that establishing a federal region in the south would protect the Shiite from the attacks of anti-Shiite terrorist groups.<sup>456</sup>

Additionally, federalism is also supported as a way of preventing marginalization. A prominent advocate for federalism in Basra said that Basra governorate has been deprived of its real right: the city does not get what it deserves from public revenue even though it has made a significant contribution to the public budget of Iraq.<sup>457</sup> Furthermore, for some, it is considered an effective mechanism for development. Jawed Al-Bzone, an MP, has argued that the establishment of the Basra region would help in the process of the city's development and reconstruction.<sup>458</sup>

By contrast, others, such as the movement of "Master of Martyrs", believe that the goal of the region is the integration and economic cooperation between those governorates, especially in terms of natural resources.<sup>459</sup> In addition to these Islamic forces, liberal forces, such as the Iraqi National Congress Party, supported the establishment of the southern region along the lines of the Kurdistan Region, claiming that it is the best formula for coexistence among the different groups that make up Iraqi society.<sup>460</sup>

### 4.3.2 Opponents of federalism

All those projects were rejected by many other Shiite groups and parties, including the Al-Dawa party led by the former Prime Minister Nuri al-Maliki, the Sadrist movement led by Muqtada al-Sadr,<sup>461</sup> and the Fadhila party,<sup>462</sup> for a variety of reasons.

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<sup>456</sup> Reidar Visser, 'Basra Crude The Great Game Of Iraq's "Southern" Oil' (n16).

<sup>457</sup> See: Al-Fayhaa channel, *Space of Freedom, Mohammed al – Tai, Federalism and the establishment of regions* (November 19, 2011) Arabic version <<http://www.youtube.com/watch?v=LjJ30pjs4CM>> accessed January 30, 2014.

<sup>458</sup> Alsumaria Nawa, 'Al-Bazouni Threatens to Declare Basra a Province in Case of 'Excesses' of the Centre.' (*Alsumaria* November 3, 2013) Arabic version <<https://www.alsumaria.tv/mobile/news/85460/iraq-news>> accessed December 22, 2018.

<sup>459</sup> Muna Hamdi Hikmat (n 446).

<sup>460</sup> *ibid.*

<sup>461</sup> The Sadrist Movement is a Shiite Islamic movement led by Muqtada al-Sadr, emerged after 2003. They were always opponents of federalism from the beginning, even beyond that, they opposed international intervention in Iraq, and fought battles against the international forces. For more details, see:

Firstly, they think that the time for the formation of federalism in Iraq has not yet come: the country needs a period of security, economic and political stability in Iraq. Then, every governorate, whether alone or with the others, has the right to form their federal region under the Iraqi constitution. Until then, however, the internal and external challenges require consistency and unity between governorates and the FG.<sup>463</sup>

Secondly, the groups of Shiites who have rejected federalism realized that they are the majority in Iraq, and the bridle of the rule will be in their hands according to the mechanisms of democracy. They will get a majority of electoral votes and, consequently, they will dominate the channels of the decision-making process within the federal institutions. Therefore, the desire for control over the administration and the rule of most of Iraq has become their goals, rather than a particular area of southern Iraq.

As for the Islamic Dawa Party, the establishment of a new region would hinder its efforts to amend the Constitution in favour of a more centralized system.<sup>464</sup> Its leader, Al-Maliki, wanted to retain a strong government at the centre by weakening the regions. This became very apparent particularly after he became the prime minister and cemented his power in different state institutions, especially the military, security and

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M Cochrane 'The Fragmentation of the Sadrist Movement' (2009) Iraq Report 12 Institute for the Study of War.

<sup>462</sup> Al Fadila Party is a Shiite party, based on religious ideology and they follow the Shiite cleric Ayatollah Sheikh Yaqoubi. It had a mass base in Basra and some southern cities. This party was controlling of all the sectors of oil or oil departments in Basra. It stood against the region of the centre and the south, which was called for by the Supreme Islamic Council, and the reason, as they claim that they against any sectarian region. Moreover, they warned so called 'scheme for the establishment of southern federal region (nine provinces), the Najaf its political capital and be Abdul Aziz al-Hakim or his son Ammar, head of the province to keep the southerners as slaves have', adding "that the Fadila supporters stand against this scheme firmly even if this led to the shedding their blood". See: The official website of al Fadila party. Editor, 'Mawaqif Lihizb Alfadilat Al'iislamii' (*hizb alfadilat al'iislamii fire madinat alsdr*) <<http://alfhadela.blogspot.com/>> accessed December 1, 2018; al Fadila party (2008).

<sup>463</sup> See: Visser, 'The Sadrists of Basra and the Far South of Iraq...' (n452).

<sup>464</sup> Waheed Ghanim, 'Kurdistan of the South? Basra Takes Further Steps Toward Independence Inside Iraq' (*Niqash*) <<http://www.niqash.org/en/articles/politics/3629/Kurdistan-of-the-South-Basra-Takes-Further-Steps-Toward-Independence-Inside-Iraq.htm>> accessed December 22, 2018.



judicial institutions.<sup>465</sup> He strongly expressed his opposition to the federalism on many occasions such as during his election campaigns.<sup>466</sup>

Fourthly, the concerns of some Shiite parties from federalism lies in their experience and problems with the KRG, which is almost beyond the control of the central government. Therefore, the centrally-oriented parties are afraid to lose total control of the other governorates if they become federal regions,<sup>467</sup> particularly, when it comes to the issue of oil and gas management.<sup>468</sup>

Furthermore, some reject federalism because they may not have followers or a popular base in a particular governorate. For example, Sadr's movement rejected the Basra federal region because most of their followers are in Baghdad, which is outside any federal arrangement under the constitution, being the capital of Iraq. Therefore making Basra a federal region does not serve their interests.<sup>469</sup>

Moreover, the competition among the Shiite parties in Basra is about controlling oil. According to a report issued by the Institute of War and Peace, reporting on September 7, 2007, the Sadrists were controlling the port of Abu Flus, the main centre for the export of crude oil, which is sold in the black market. By contrast, the Al Fadila Party were dominating the port of Abu al khaseb, as the party also controlled the main outlets for the export of oil.<sup>470</sup> This fear of losing power over the regions, rich in oil, has

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<sup>465</sup> Phebe Marr (n314)326.

<sup>466</sup> Toby Dodge, 'Iraq's Road Back to Dictatorship'(2012) 54(3) Survival Global Politics and Strategy 147.

<sup>467</sup> Harith Al-Qarawee, Redefining a Nation... (n1).

<sup>468</sup> For instance, Ninevah Governor Atheel Nujaifi said 'We should get the benefits of the Kurdish region's experience in energy investment and also follow the same constitutional and legal path the region followed in drawing its energy policy.' He added that 'neither the central government nor the oil ministry have the right to stop him from developing the energy resources of the province, especially in light of Baghdad's obstinacy. Nineveh and Kurdistan even appear ready to cooperate on exploration in territory they both claim, something that seems unthinkable in Baghdad's relations with local authorities.' See: David Romano, 'Baghdad's Short-sighted Oil Policy' (Rudaw) <<http://www.rudaw.net/english/opinion/311020131>> accessed December 1, 2018; Saleem Al-Wazzan, 'Basra Wants to Be Like Kurdistan, But Maybe Not Right Now' (*Niqash*) <<http://www.niqash.org/en/articles/politics/5760/Basra-Wants-to-Be-Like-Kurdistan-But-Maybe-Not-Right-Now.htm>> accessed December 24, 2018.

<sup>469</sup> Riedar Visser, 'The western imposition of sectarianism on Iraqi politics' (2007) 15(2/1) The Arab Studies Journal 83.

<sup>470</sup> See: Reidar Visser, 'Basra Crude The Great Game Of Iraq'S "Southern" Oil'(n16).

existed in the minds of those in control of the central government regardless of their sectarian identity. This explains why the Shiite groups who govern the central government are standing against the southern Shiites' proposal for federalism. For instance, Al Dawa party rejected federalism projects for the south on previous occasions.<sup>471</sup> The same is true for the ISCI: although it supported the idea of federalism, it opposed the proposal for the Basra region. The ISCI believed that such federal region in Basra would reduce its influence in the Shiite south and eliminate the opportunity to establish a Southern federal region.<sup>472</sup>

It should be noted that opponents of federalism have changed their position many times. The reason that drives the Shiite groups, especially the Dawa Party, for approving or rejecting federalism is more about power rather than belief. When federalism is for the benefit of their rivals or opponents, they rejected it and stood against it. Conversely, when their powers are weak in the centre, they agree upon it and support it. They want to dominate and rule part of Iraq if they cannot dominate all of Iraq. For example, the main reason for rejecting or accepting the establishment of the Basra region, the-oil rich city, among the Shiite parties is the political control over the provincial council and oil.<sup>473</sup> The same is true for the Sadrists movement. On many occasions, the Sadrists stood firmly against any attempt for federalism; however, whenever they feel that their central authority has been weakened, they threaten the government by calling for an independent region in the south.<sup>474</sup> It happened during the rule of Ayad Allawi, the

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<sup>471</sup> Reidar Visser, 'Iraq Federalism Bill Adopted Amid Protests and Joint Shiite-Sunni Boycott' (*Historiae.org*2006) <<http://historiae.org/devolution.asp>> accessed December 23, 2018.

<sup>472</sup> See: Jassim Dakhil, 'Tribal Sources for « Middle East Newspaper»: the Supreme Council Are Active against the «Federal» Basra' *Al Sharq Al Awsat*<<http://archive.aawsat.com/details.asp?section=4&article=495541&issueno=10949#.XCAVrfZ2vIX>> accessed December 23, 2018; Waheed Ghanim, 'Basra Postpones Bid for Independence' (n454).

<sup>473</sup> Harith Hasan Al-Qarawee, 'Iraq's Sectarian Crisis: A Legacy of Exclusion' (*Carnegie Endowment for International Peace* April 23, 2014) <<http://carnegieendowment.org/sada/?fa=55372>> accessed December 23, 2018; Rend Al-Rahim Francke, *Political progress in Iraq during the surge* (United States Institute of Peace 'USIP' 2007); Waheed Ghanim, 'Basra Postpones Bid for Independence' (n 454).

<sup>474</sup> See: Abdul Hadi Ali, 'Federalism in Iraq, and the Sunni-Shiite Conflict in Iraq' (*Al Rased*2011) <[http://www.alrased.net/main/articles.aspx?selected\\_article\\_no=3550](http://www.alrased.net/main/articles.aspx?selected_article_no=3550)> accessed December 23, 2018; Visser, 'The Sadrists of Basra and the Far South of Iraq (n452).

former Prime Minister, when they were in a war against government forces in Najaf in 2004.<sup>475</sup>

It is important to mention that at the beginning of the occupation, Iran wanted a Shiite federal region or entities in the south. However, when most of the country came under the Shiite rule, and Iran developed a prominent role in Iraq as one of the key regional players, it changed its mind regarding the Shiite region and no longer encouraged that option. Therefore, currently, Iran supports the Shiite parties to stand against federalism in Iraq. Moreover, Iran has a multi-ethnic society and there is a risk that any Iraqi system of federalism or autonomy would influence the country's minorities, such as Kurds, Arab and others.<sup>476</sup> Therefore, most of the powerful Shiite groups share that Iranian vision for centralising power, as long as the Shiites form the majority in every election taking place in Iraq. Hence, they have remained reluctant to accept any federal region for the south governorates because they realise that granting federalism to south Iraq would significantly weaken the power of the central government over one of the richest regions in terms of oil reserves.<sup>477</sup>

In summary, it can be observed that the Shiite groups are not united on the issue of federalism. Their attitude towards federalism has changed for many reasons, such as its position as holder of power in the central government. The more power a group has in the centre, the firmer they stand against proposals for federalism, and vice versa. Similarly, each group is reluctant to accept or reject federalist proposals because it seems to be a pressure card used differently as the power game requires. Thus, the acceptance or rejection of any federal proposal by the different Shiite groups mainly depends on the effects of such federalist proposals on the balance of power between the Shiite groups themselves, on the one hand, and between the Shiites collectively and both the Kurds and the Sunnis, on the other hand. Hence, all those attempts for establishing Basra federal region have failed because of the complexity of the power equation in Iraq.<sup>478</sup>

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<sup>475</sup> See: Al-Sheikh, S. R., and Sky, E, 'Iraq since 2003: Perspectives on a Divided Society' (2011) 53(4) *Survival* 119-142; Phebe Marr (n314) 277.

<sup>476</sup> See: James Baker, Lawrence Eagleburger and Lee Hamilton(n449)52.

<sup>477</sup> Matthew Saayman, 'Federalism, Trust, and the Problem of Sectarianism in Iraq' (*uO Research*2013) <<https://ruor.uottawa.ca/handle/10393/26097>> accessed December 1, 2018.

<sup>478</sup> For more details see: Reidar Visser, 'Basra Crude The Great Game Of Iraq'S "Southern" Oil'(n16).

Nevertheless, there is still a strong support for establishing federal governorates in the south from some Shiite figures and groups. The Basra Governorate Council Sabah al-Bazoni and the MP Jawad al Bazoni in several occasions pointed out such intention. They say the idea of establishing regions has been guaranteed by the Iraqi constitution, but the fragile security and political circumstances in the country have postponed the announcement of a Basra region. Al-Bazoni emphasized that ‘the idea is deferred and will not be cancelled, because it is a constitutional right, especially in such an oil-rich province, it helps its citizens to benefit from their wealth better.’<sup>479</sup> Similarly, the Judge Wael Abdul Latif still believes in the idea of the region of Basra and is working continuously to achieve this goal.<sup>480</sup>

#### **4.4 The Sunnis and Federalism in Iraq**

The Sunni’s initial position on federalism was a total rejection before 2003 and also during the drafting of the current constitution in 2005.<sup>481</sup> Furthermore, they refused to take part in the political process after 2003, regarding all the decisions, projects and products of the occupation as invalid and illegitimate. Federalism for them entailed the dismantling of the Iraqi state<sup>482</sup> and a step towards secession.<sup>483</sup> It is worth mentioning that when the current constitution in 2005 was voted on in the public referendum, the

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<sup>479</sup> See: Saleem Al-Wazzan, ‘Basra Wants to Be Like Kurdistan, But Maybe Not Right Now’(n 468).

<sup>480</sup> See: Waheed Ghanim, ‘Kurdistan of the South? Basra Takes Further Steps Toward Independence Inside Iraq’ (n 464)

<sup>481</sup> See: Munther Al Fadhal (n 7) 88.

<sup>482</sup> After three years of dissatisfaction, disapproval and sometimes boycotting of the political process in Iraq that resulted from the invasion after 2003, the position of the Sunni groups has relatively been evolved regarding some matters. Where in 2006 many of Sunni elites such as politicians, legal profession, nationalists, academics and clergy announced their new constitution attitude towards the whole political process, called the “February Position 2006.” this announcement contained eight points. The most important point related to this chapter was the federalism and oil issues. Where the point 2 stated that the implementation of federalism should be delayed. The provisions of the constitution that would create federal regions outside the Kurdistan Region should be suspended and reviewed after the lapse of one electoral cycle. Moreover, the point 3 stated, ‘Natural resources should be nationally owned. The central government should be authorized in the constitution to manage and distribute natural resources, including oil.’ For more details see: Jonathan Morrow ‘Weak Viability: ‘The Iraqi Federal State and the Constitutional Amendment Process’, (2006) 31 United States Institute of Peace 9.

<sup>483</sup> Harith Al-Qarawee (n 1).

majority of voters in the Sunni governorates, such as al-Anbar and Saladin, voted against the constitution partly because it guaranteed the principle of federalism.<sup>484</sup> Nevertheless, some Sunni groups and politicians have changed their attitude and started to call for federalism to achieve their political goals and to adapt to the new complexities of political life. Therefore, even among the Sunnis, there are different attitudes regarding federalism, with some of them supporting it, while others reject it. Hence, their attitude is not very different from that of the Shiites. But in contrast to the Shiites, many of them have changed their attitude to become supporters of federalism, as we will see in the following two sections.

#### 4.4.1 Opponents of federalism

The opponents of the federalism currently are some nationalists, who are still under the influence of the mentality of the former regime. Surprisingly, the opponents include some Sunni religious scholars and groups such as the Association of Muslim Scholars (AMS),<sup>485</sup> and some figures among the Iraqi Islamic Party (IIP).<sup>486</sup> In addition, some academics, politicians and tribal leaders support the central authority because of the benefits and positions which they obtained from the government.<sup>487</sup>

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<sup>484</sup> James Baker, Lawrence Eagleburger and Lee Hamilton (n449)18.

<sup>485</sup> In Arabic is (Hayat Al-Ulama Al-Muslimin), which is a group of Iraqi Sunni religious leaders in Iraq, formed on the April 14, 2003. This group is one of the strongest opponents of the federalism. Therefore, the Association of Muslims Scholars has refused on several occasions the issue of federalism categorically, since the beginning and yet. Where, the Shaikh Harith al-Dhari has announced at many occasions their rejection of this project. See: 'Statement No. 319 on the Subject of Federalism' (*Hayat Al-Ulama Al-Muslimin fi al-Iraq* 2006) <<http://iraq-amsi.net/ar/search.php?action=result&id=1924&start=30&page=2>> accessed December 24, 2018.

<sup>486</sup> This party is one of the Sunni Islamic political parties in Iraq founded in April 26, 1960; it emerged from the Muslim Brotherhood in Iraq. This party has confirmed its rejection of the federalism on several occasions, although some of their leaders declared the contrary. See: Graham Fuller, *Islamist Politics in Iraq after Saddam Hussein* (US Institute of Peace 2003).

<sup>487</sup> Mustafa Habib, 'Will They Finally Ask for Their Own Semi-Autonomous Region?' (Niqash) <<http://www.niqash.org/en/articles/politics/3296/will-they-finally-ask-for-their-own-semi-autonomous-region.htm>> accessed December 1, 2018; Shwan Zulal, 'Centralism or Federalism?' (Niqash) <<http://www.niqash.org/en/articles/politics/2978/centralism-or-federalism.htm>> accessed December 1, 2018; Oday Mahdi, 'Dulaimi Calls for a Sunni Province' (Niqash)

Initially, the prevailing tendency among the Sunni Arabs has been in favour of centralism. They have grown up under a severely centralized system, which was effective in strengthening the spirit of nationalism in Iraq.<sup>488</sup> The slogan of the former regime was the one Arab nation; therefore, it was easy for them to reject federalism immediately.

Moreover, federalism is seen as a project for dividing the country.<sup>489</sup> It is the beginning of the partition of the unity of Iraq. Some of them still consider that it is part of the Zionist colonial project to redraw the geographic and political map of the Arab region through the formation of weak ethnic and sectarian entities.<sup>490</sup> Those who see federalism in this way have the fate of federalism of Yugoslavia, the former Soviet Union, and Czechoslovakia in mind.<sup>491</sup> However, supporters of federalism respond to that argument by arguing that seeing federalism as a road to division is unrealistic because the international community and countries in the region reject this idea.<sup>492</sup>

In addition, some argue,<sup>493</sup> federalism is an Iranian agenda in Iraq, a sectarian project aimed at dividing Iraq on sectarian lines.<sup>494</sup> This is especially the case when it comes to

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<<http://www.niqash.org/en/articles/politics/2775/Dulaimi-calls-for-a-Sunni-province.htm>> accessed December 1, 2018; Ali A, 'the federalism in Iraq and the Sunni-Shiite conflict' (September 3rd 2011) 100 the observer, a monthly electronic magazine. Available online at: <<http://www.alrased.net/main/>> accessed on 01/01/2014. (Arabic version).

<sup>488</sup> Harith Al-Qarawee(n1).

<sup>489</sup> Nemir Kirdar (n442)140.

<sup>490</sup> See: Harith Al-Dhree, 'The Statement of Sheikh. Harith Al-Dhari, during a Meeting of the Iraqi Community in Qatar about a Plot Division, in 20/1/2011' (*Hayat Al-Ulama Al-Muslimin fi al Iraq*2011) <<http://iraq-amsi.net/ar/search.php?action=result&id=1922&start=300&page=11>> accessed December 24, 2018.

<sup>491</sup> Their rejection of federalism became tougher when a proposal was presented by the US Senator (later vice president) Joseph Biden to the Senate on 26 September 2007, explicitly calling for the division of Iraq into three regions the Sunni, the Shiite and the Kurds as a political solution or a political settlement for the country. The proposal was adopted as a non-binding resolution 1535, approved by 75 members and opposed by 23, a two-thirds majority of its members. See: Helene Cooper, 'Biden Plan for 'Soft Partition' of Iraq Gains Momentum' The New York Times (July 30, 2007) <<https://www.nytimes.com/2007/07/30/world/americas/30iht-letter.1.6894357.html>> accessed October 23, 2017.

<sup>492</sup> Taha Al-Dulaimi, 'The Summary of Federalist or Political Decentralization to Save The Unity of Iraq and Fairness for Multi Iraqi Components' Arabic Version (*Shabakat Al-Difah Anil Sunna*2011) <<http://www.dd-sunnah.net/forum/showthread.php?t=157723>> accessed December 24, 2014.

<sup>493</sup> For instance, the Association of Muslims Scholars (AMS, or Hayat al-Ulama al-Muslimin).

proposals regarding the federal regions in the south of Iraq. For example, the head of the Iraqi Front for National Dialogue, Saleh al-Mutlaq argued that federalism would be the beginning of the division of Iraq, a dangerous scheme aimed at dividing Iraq into weak entities.<sup>495</sup>

Moreover, the formation of federal regions in some areas of Iraq may lead to the adoption of policies that would not respect the diversity of religious and ethnic groups, particularly given the internal and external unstable conditions. Furthermore, they claim that Iraqi institutions are still in the process of formation; therefore, the institutions are still too weak for the consolidation of real federalism based on the rule of law and respect for human rights.

Additionally, federalism raises the problem of conflicts over disputed territories between the governorates. The formation of the regions in the absence of an accurate determination of the administrative boundaries among governorates would create problems, and perhaps lead to civil war between these provinces. This is especially the case with the disputed areas between KRG and the central government, such as Kirkuk city and other areas. Therefore, for a country like Iraq, drawing clear lines between various groups is almost impossible because of the social fabric and family relations among Iraqis. In addition, it poses a great danger because it raises the possibility of displacement and expulsion of individuals and families from their homes, particularly, for the Sunni citizens in the governorates of Basra, Baghdad, Babylon and others.<sup>496</sup>

A further argument against federalism is made by some Sunni opponents on the grounds that there is a religious fatwa (opinion) issued by some Islamic scholars which makes federalism a haram mechanism (religiously prohibited) for governance. They reject all the products of the occupation, regardless of their advantages.<sup>497</sup>

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<sup>494</sup> This argument was correct at the beginning of the American occupation of Iraq, at present the whole country is under the influences of Iran.

<sup>495</sup> Jonathan Morrow, 'Iraq's (2005) Constitutional Process ii' (2005) Special Report 155, United States Institute of Peace.

<sup>496</sup> Harith Al-Dhree, 'Federalism Is a Division, and Division Is Federalism' Arabic version (*Hayat Al-Ulama Al-Muslimin fi al-Iraq* 2007) <<http://iraq-amsi.net/ar/search.php?action=result&id=1923&start=120&page=5>> accessed December 24, 2018.

<sup>497</sup> See: Akram Abdel Razak Al-Mashhadani, 'Federalism... between Supporters and Opponents' Arabic Version (*AZZAMAN* May 27, 2013) <<https://www.azzaman.com/الأظمنة-الفيديرالية-بين-المؤيدين-والم>> accessed December 24, 2018; Abdul Karim Zidan, 'Federalism Is Invalid, and It Is Division of the Land of Iraq'

Furthermore, they argue that federalism leads to a dispersion of Iraqi wealth, such as oil, to the local authorities in federal regions. Most of the oil is concentrated in the south, in the Shiite areas, and in the Kurdistan region.<sup>498</sup> Therefore, the Sunnis understandably think that their region would become a poor and economically weaker region compared to the other regions of Iraq.<sup>499</sup> Thus, the distribution of oil and natural resources would be problematic under this current constitution, particularly given the political and social tensions which exist in Iraq.<sup>500</sup> Therefore, they are insisting on the equitable distribution of oil revenue to all regions of Iraq. That is why they opposed the 2005 constitution because it allocated a wide authority to the regions and governorate in oil management.<sup>501</sup> Nevertheless, the supporters rejected this justification. They claim that the Sunni areas also have natural resources (such as oil, gas and fresh water) which they could use to develop their region.<sup>502</sup>

In sum, there are socio-political, economic, and historical reasons that make some Sunni groups stand against any step towards federalism. However, the shortage of oil and gas in the Sunni areas is one of the most important reasons for their opposition.

#### 4.4.2 Advocates of federalism

Since 2010, however, there has been a change in the attitudes of many groups and Sunni leaders. There are many political, religious, tribal and academic figures, who support federalism for their governorates and have sought to establish federal regions similar to the Kurdistan Region. For instance, Tariq al Hashimi the former Iraqi Vice President,

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(*Hayat Al-Ulama Al-Muslimin fi al Iraq*2007) <<http://iraq-amsi.net/ar/search.php?action=result&id=1924&start=120&page=5>> accessed December 24, 2018.

<sup>498</sup> It is worth mentioning, there is huge amounts of natural gas in the west of Iraq, Sunni area, called Akkas gas field in the western province of Anbar. Also, according to geologists and oil experts, the Western Sahara the, region that has not been relatively explored, may contain billions barrels of recoverable oil.

<sup>499</sup> Harith Al-Qarawee(n 1); Visser, 'The western imposition of sectarianism on Iraqi politics'(n469); Liam Anderson and Gareth Stansfield, 'Avoiding Ethnic Conflict in Iraq: Some Lessons from the Åland Islands' (2010) 9(2) *Ethnopolitics* 219.

<sup>500</sup> Matthew Saayman(n477).

<sup>501</sup> Christopher Blanchard(n8).

<sup>502</sup> See: Taha Al-Dulaimi (n492).



Adnan al-Dulaimi, Mohammad Ahmad Rashid, one of the prominent religious figures in Iraq, Taha Al-Dulaimi, the architect of the Sunni federalism project. Osama al-Nujaifi, Vice-President of the Republic of Iraq. In addition, the idea is supported by many of the provincial council members in the Saladin, Diyala, Ninawa and Anbar provinces, along with many citizens in these governorates.

In October 2011, the Council of Saladin's governorate, a mainly Sunni city and the city of the former Iraqi President Saddam Hussein, presented a request to the Council of Ministers to set up the federal region of Saladin.<sup>503</sup> The aim of the request, which was supported by Osama al-Nujaifi, the former Speaker of Parliament and the current vice president,<sup>504</sup> was to reduce the effects of persecution and abuse of power.

Further demands for federalism have been made by other Sunni governorates such as Diyala. On 12 December 2011, a majority of the members of Diyala provincial council voted for declaring the governorate as a federal region, politically, administratively and economically.<sup>505</sup>

These demands have increased, after the vigils and demonstrations of the Sunni in 2013, which led to violations of basic human rights for protestors in some cities by the Iraqi security forces. In a broader level among the Sunnis, people in other governorates such as Anbar have called to the federalism as a solution to their problems. This was announced by the former Vice President Tariq Al-Hashmi. He stated, 'People demanding the creation of federal regions because they are unwilling to accept further

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<sup>503</sup> In 2011 the majority of Council's members of Saladin governorate, 25 members out of 28, declared their province as an administrative and economic region within a federal Iraq, and called on the federal government to take the constitutional and legal procedures to do so. See: Khalid Elewi Al-Ardawi (n 452) 90; Reidar Visser, 'In Salahaddin, a Confused Federalism Bid' (*Iraq and Gulf Analysis* October 27, 2011) <<https://gulfanalysis.wordpress.com/2011/10/27/in-salahhadin-a-confused-federalism-bid/>> accessed December 24, 2018.

<sup>504</sup> See: Bahadin Yousef, 'Spectre of Iraqi Federalism Frightens pro-Federal Kurdish' (Niqash) <<http://www.niqash.org/en/articles/politics/2970/spectre-of-iraqi-federalism-frightens-pro-federal-kurdish.htm>> accessed December 1, 2018.

<sup>505</sup> See: The statement of the Diyala provincial council regarding the formation of the region of Diyala. Dyala TV, 'Declaration of Diyala Region' (December 12, 2011) <<https://www.youtube.com/watch?v=kabQ3AGPB8A>> accessed December 25, 2018.

injustice, a wide-scaled corruption and bad management from the central government. Also interference from FG into provinces' affairs.'<sup>506</sup>

Despite the constitutionality of all the above-mentioned requests to create new federal regions in Iraq, the Prime Minister and the Shiite alliance rejected all such projects. They argued that it was an attempt by Baathists to find a safe haven in that region and that it was a sectarian project as the majority of the population in this city were Sunni.<sup>507</sup> Nuri Al-Maliki Always stressed that the timing of such choices was very important for federalism and the present time was not appropriate. It should be in the stable and calm circumstances of national unity. He pointed out that creating new federal regions at this time and in these governorates lead the country to a sectarian crisis and threaten the unity and sovereignty of Iraq and turn into a disaster.'<sup>508</sup> He said 'The worst of this division is the smell of sectarian division.'<sup>509</sup> Similarly, it is not surprising to see also that some Sunnis from Al-Iraqiya also rejected establishing federalism in the Sunni regions.<sup>510</sup>

It is worth mentioning, the demands of the Sunni cities, especially Anbar turned into wide demonstrations. The central government responded to the demands by sending military forces and using force to repel the people's uprising in early 2014. This violent

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<sup>506</sup> See: Mustafa Habib, 'US Withdrawal 'Nothing to Worry about' (*Niqash* December 13, 2011) <<http://www.niqash.org/en/articles/politics/2953/US-withdrawal-'nothing-to-worry-about'.htm>> accessed December 25, 2018.

<sup>507</sup> See: The statements of the Iraqi List, against Maliki's attitude regarding the request of the council of Salahaddin province to form a federal region. 'Iraqi: Al-Maliki's Speech and Azza Al-Duri about Salahuddin as If They Are from One School of Thought.' *Attaakhi* (November 14, 2011) <<http://www.altaakhipress.com/viewart.php?art=4835>> accessed December 24, 2018; Afaq TV, 'A Report on the Rejection of the Salah Al -Din Region, *Special Report* (October 31, 2011) <<https://www.youtube.com/watch?v=QrIKMR63c0s>> accessed December 24, 2018.

<sup>508</sup> <https://www.youtube.com/watch?v=-GXBpjKTq0>, "Prime Minister Nuri Al-Maliki," *قناة الفيحاء الفضائية* *Al Fayhaa TV* (October 31, 2011).

<sup>509</sup> Dan Morse and Asaad Majeed, 'Iraq Prime Minister Al-Maliki Challenges Restive Provinces' *The Washington Post* (December 24, 2011) <[https://www.washingtonpost.com/world/middle\\_east/iraq-premier-nouri-al-maliki-chides-restive-provinces/2011/12/24/gIQAzegYFP\\_story.html?utm\\_term=.e587e83eabf9](https://www.washingtonpost.com/world/middle_east/iraq-premier-nouri-al-maliki-chides-restive-provinces/2011/12/24/gIQAzegYFP_story.html?utm_term=.e587e83eabf9)> accessed December 25, 2018.

<sup>510</sup> Al-Iraqiyya List is an Iraqi political coalition formed to take part in the 2010 parliamentary election formed from the different Sunni political groups with some Shiite figures, led by the secular Shia politician Ayad Allawi. See: Kholoud Ramzi, 'Iraq Election 2010 Results Round-Up' (*Niqash* March 30, 2010) <<http://www.niqash.org/en/articles/politics/2643/>> accessed December 25, 2018.

response by the government led Iraq into a new phase of violence. People in the Sunni areas lost trust in the central government and the government also lost effective control over the people. Then, the Sunni militias took advantage of the situation and started to fight aggressively with the military. Consequently, the Islamic State (ISIS) controlled Mosul, Anbar and some other parts of Iraq.<sup>511</sup>

There are many reasons and motivations that have led Arab Sunni to change their mind and to support federalism, as follows:

First, the growing sectarian policies of Prime Minister, Nuri al-Maliki, towards the Sunni Arabs. This was embodied through the random arrests against many Sunnis under the pretext of belonging to the Arab Baath Party, and the dismissing of many of the professors and academics at the University of Tikrit.<sup>512</sup> Due to the emergence of sectarian tensions between the Shiite and Sunni Arabs, the political process of rebuilding Iraq based on the rule of law has failed. Therefore, federalism can mitigate the direct contact between the Sunnis and Shiites. The objective of federalism for the Sunni supporters is to preserve the existence of the identity of the Sunni Arabs. They are afraid of the assimilation policy practised by the Shiite sect. Therefore, federalism prevents systematic persecutions, especially murder, assassination, detention, and torture against them. All these problems were confirmed by al-Nujaifi when he visited Washington in June 2011, when he said: ‘there is a frustration among the Sunni in Iraq, and if not treated quickly enough, the Sunni would think of secession, or at least establishing a region for them’. He added that the Iraq Sunnis felt marginalised and that they had become second-class citizens.’<sup>513</sup> It is worth mentioning that Al-Nujaifi was one of the strongest opponents of the idea of federalism in Iraq before 2010.

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<sup>511</sup> On June 9, 2014, ISIS attacked and controlled Mosul, the second largest city in Iraq. Then, they controlled a few other cities and towns in the Sunni areas including Anbar, Saladin governorates, and some districts belong to the governorates of Kirkuk and Diyala. The city of Mosul and the most of other cities remained under their control until they have been liberated by the Iraqi armies and coalition forces recently. Hence, this may have been prevented if the central government had a positive response to the requests for establishing federal regions in the Sunni area.

<sup>512</sup> See: Alis Fordham, ‘Tikrit (Salah Al-Din) Complaining of Marginalization... And Find Its Salvation in Federal’ *The Middle East Newspaper* (March 17, 2012) Arabic Version <<http://archive.aawsat.com/details.asp?section=4&issueno=12163&article=668429&feature=#.XCFciPZ2vIV>> accessed December 24, 2018.

<sup>513</sup> See: Thomson Reuters Foundation, ‘Iraq Sunni Politician Talks of Secession, Angers Allies’ (news.trust.org) <<http://news.trust.org/item/20110629211900-5dt1i/>> accessed December 1, 2018.

Secondly, lack of services and concentration of powers in the central government.<sup>514</sup> Federalism is a method for preventing injustice in the distribution of power and resources in Iraq. For major Sunni leaders, federalism is a way to prevent injustice against the Sunni Arab. It may be an effective way for the Sunnis to govern themselves in their areas and share power with the Shiite in the central government.<sup>515</sup>

Moreover, federalism can strengthen the unity of Iraq through allowing self-governance in the regions and power-sharing in the centre. In addition, the Sunni community is a minority compared with the size of the Shiite community in Iraq. Federalism can be used as a means or a mechanism to prevent the rule of the majority.<sup>516</sup>

Also, the relative success of Kurdistan region in many aspects - political, economic and security has attracted the attention of most of the groups of Iraq. It is a unique form of self-rule in Iraq. They started to compare their situation with the Kurds in the Kurdistan region. The Sunni Arabs look forward to replicating this experience to their region by creating a region, particularly after the Kurdistan region has become a haven and shelter for large segments of Sunni Arabs who are eager to live in safety and stability.<sup>517</sup>

Nevertheless, all those justifications have not convinced all the Sunnis to accept federalism. There are still a few Sunnis leaders who still reject federalism. Hence, based on the above discussions, it can be concluded that there are both supporters and opponents of federalism among the Sunnis. Till this moment, the Sunni groups could not create any federal region in their areas.

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<sup>514</sup> Joel Wing, 'Push To Make Iraq's Diyala Province An Autonomous Region Fades' (*Kurd Net - Ekurd.net Daily News* 12AD) <<https://ekurd.net/mismas/articles/misc2011/12/kurdsiniraq146.htm>> accessed December 25, 2011.

<sup>515</sup> <https://www.youtube.com/watch?v=rJFMz5eyZiQ>, "Federalism (Territories) Is It a Division or Sharing," Taha al-Dulaimi, *Wisal TV* (June 26, 2013); Renad Mansour, 'The Sunni Predicament in Iraq' (Carnegie Endowment for International Peace 2016); "مصحح-انشاء اقليم للسنة العرب في العراق يذكي مخاوف خلافات" (Corrector - the establishment of a Sunni Arab region in Iraq, fuelling fears of sectarian differences) (*Reuters* November 8, 2011) <<https://ara.reuters.com/article/idARAHUS83027820111108>> accessed May 31, 2019.

<sup>516</sup> Ibid.

<sup>517</sup> Mustafa Habib, 'Will They Finally Ask for Their Own Semi-Autonomous Region?' (n 587).

#### **4.5 Concluding Remarks on the Challenges of Attitude towards Federalism in Iraq**

After explaining the attitudes of different groups towards federalism in Iraq, it becomes obvious that federalism in Iraq has faced serious challenges and barriers. These challenges include the following:

First, there is no national consensus on federalism in Iraq. Main political, religious and ethnic groups in Iraq do not agree on the necessity, effectiveness, nature and structure of federalism. In other words, adopting federalism in Iraq had different, even conflicting, political, ethnic and religious bases.

Therefore, federalism in Iraq has turned to be the subject of conflict and diversion rather than conversion and cooperation among the Iraqis. These divided attitudes towards federalism have had negative impact on federalism in general and CF in particular. Such a model of federalism that requires equal partnerships among all levels of governments within one federation it is incomprehensible and is not easy to agree on by the various Iraqis, except for the Kurds. Most still view federalism as a system leading to the dismantling of the state. For them, Baghdad must always have the leading role and be the strongest authority within the federation.

Also, the lack of trust among political players makes it difficult, if not impossible to agree on self- governance and power-sharing without fear of abuse and corruption. This is especially so with regard to a model such as CF, where trust is an essential pillar for the success of any internal agreement among governments.

Moreover, there is a lack of a culture conducive towards federalism among Iraqis. This makes them vulnerable to political exploitation by anti-federalist groups and makes them wary of the issue of federalism because they see it as a means to the division of Iraq as propagated by opponents of the federal idea. Such propaganda is generated to show that the idea of federalism is a means to the partition of Iraq and means based on sectarian and ethnic criteria. What makes such a claim credible is the Iraqis people's lack of a federalism culture and a lack of a proper understanding of it.

In addition, there is a lack of national identity among different Iraqi components. Iraq is an artificial state created by the British colonialism; there is no one Iraqi nation. Instead, there are local identities such as ethnic, sectarian

and religious identities. Regional and local identities are stronger than any national identity. This reality was expressed at the beginning of the establishment of modern Iraq by King Faisal I: ‘There is nothing in Iraq called Iraqi people, based on United Iraqi identity, rather than, there are Iraqi peoples, groups of different people have their own identity.’<sup>518</sup> This issue became more acute after 2003, and reappeared on the ground as one of the greatest challenges that hinder the pursuit of Iraqi unity. As some argued, ‘the essence of federalism resides in regional loyalties being placed side by side and being supervised by a sense of national solidarity.’<sup>519</sup> In addition, Dicey argued, ‘federalism results from a particular psychology among different communities within a given space, who desire a union without desiring total unity.’<sup>520</sup> Simply, in the absence of national identity in Iraq, federalism always remains a fragile system of governance. However, federalism is the middle option between partition and a unitary state that is unstable and unacceptable by the Kurds, for example.

Furthermore, the external interferences, especially by the neighbouring countries such as Iran and Turkey have had a significant effect on shaping the attitude of Iraqi groups on federalism. This is also a serious challenge because the attitude of some political players reflects the interests of the neighbouring countries instead of reflecting the needs and interests of the people of Iraq.

Besides, a successful federalism in Iraq requires more than two regions to form the federation, not only the KRG. As some scholars argue, federations that comprise only two or a few units usually tend to be unstable and difficult to be managed, while federations which include many component units may tend toward more centralism and be weaker with respect to intergovernmental relations.<sup>521</sup> The reality also proved this argument such as in the case of Czechoslovakia, for example.<sup>522</sup>

The question of security is also a challenge hindering the process of federalism. It is difficult to establish federalism in the absence of stability, security and order. Iraq is

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<sup>518</sup> Hanna Batatu, *The Old Social Classes and the Revolutionary Movements of Iraq: a Study of Iraqs Old Landed and Commercial Classes and of Its Communists, Bathists, and Free Officers*(ACLS History E-Book Project 2005).

<sup>519</sup> Andre-Louis Sanguin, ‘Territorial Aspects of Federalism: A Geography Yet to Be Made’ (1983) 99(2) *Scottish Geographical Magazine* 66, 67.

<sup>520</sup> Albert Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Fund, Inc 1982).

<sup>521</sup> Anderson, *Fiscal Federalism: a Comparative Introduction* (n 252).

<sup>522</sup> On January 1, 1993, it was divided into two independent states; the Czech Republic and Slovakia.

now in a brutal civil war and surrounded by a highly complex international conflicts and regional wars. Terrorism, violence, civil conflicts and war have altogether destroyed all the principal components of statehood in Iraq. In these situations, the political players gradually lose their trust in the effectiveness of federalism. Thus, they may change their attitude to another way of defending themselves and surviving, such as calling for a confederation or even full independence.

In addition, the lack of the rule of law has created an irreparable gap in which different political players can easily accept, reject federalism or simply change their attitudes. This has hindered the implementation of the constitutional provisions related to federalism. With regard to the minorities, as mentioned earlier, they do not have a strong influence in the political landscape of Iraq, except, the Turkmen, where they reject federalism.

Furthermore, the conflict among Iraqi factions, especially between FG and the KRG is about the economic political and administrative system of the country. It is between those who support a centralized model of federalism and those who are working for more non-centralization model, with each position having implications for the management of oil and gas revenues. It is between the majority of Shiite political parties, sometimes supported by Sunni Arabs in the case of oil, and the minority of the Kurds.

Indeed, in the context of Iraq's complex socio-political system and the current sectarian and ethnic conflicts over power and resources, oil has played a major role in the debate over federalism. The oil-rich regions or governorates tried to create their own region in order to be financially semi-independent from the federal government and for running their regions by themselves. For anti-federalists, however, oil was a reason for rejecting federalism. They believe that due to lack of oil and natural resources in their areas, they will be marginalized and thus they will remain as poor regions.

Hence, in light of the complexity of Iraq's socio-political system, taking into account the existence of natural resources such as oil and gas in some cities, and its lack in other cities, it seems reasonable to argue that federalism based on the collaborative model is an indispensable system. Therefore, the next chapter in this thesis will be dedicated to the issue of oil and gas management in Iraq and the related areas of legal and constitutional dispute.

## **Chapter Five: Constitutional Context of Oil and Gas Management in Iraq**

### **5.1 Introduction**

This chapter provides a critical, analytical review of Iraqi constitutional provisions on the management of oil and gas. It examines all the relevant constitutional provisions from 1925 until now with the purpose of analysing the differences among these constitutions in dealing with oil and gas issues. It starts with an overview of the historical background of oil management in Iraqi constitutions. This is covered in two stages, namely the period from the discovery of oil until 2005, with the main focus on the pre-2003 era. The second stage covers the period around the drafting of the current Iraqi constitution of 2005. After the historical background, it examines both the current constitutional context of oil management and different aspects of the current legal disputes over oil management. This analysis clarifies the nature of the constitutional issues over oil management that have caused disagreements and even disputes between the FG and the regions, especially the KRG. The chapter reflects the broader struggle between the FG and the KRG regarding distributing powers about one of the most important resources in Iraq. It reflects the long struggle between the centralization trend and non-centralized trend with regard to this resource.

### **5.2 General Background**

The history of oil dates back thousands of years. It has been argued that Ardericca, not far from Babylon in Modern-day Iraq, is the site of the first recorded leak of oil from the ground.<sup>523</sup> The ancient Greek historian Plutarch called those oil fields, which existed near Kirkuk ‘the eternal fires.’<sup>524</sup> The operation of drilling for oil commenced with the advent of the German experts’ mission and with the search for oil in both Mosul and Baghdad wilayats in 1871. It was followed by another oil exploration mission in

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<sup>523</sup> ‘Oil & Gas: History’ (*The View from the Mountain* March 14, 2013) <<https://grandemotte.wordpress.com/peak-oil-4-exploration-history/>> accessed December 25, 2018.

<sup>524</sup> Zedalis, *The Legal Dimensions of Oil and Gas in Iraq* (n 8) 3.



1901.<sup>525</sup> At the end of the mission, the explorers presented a report, confirming the existence of oil in Iraq. Based on that important exploration, the German mission asked the Ottoman Sultan for official permission for the extraction of petroleum in Iraq.<sup>526</sup> Oil exploration operations developed more with the Baghdad Railway Concession signed in 1903 between the Germany and the Ottoman Empire, which had encompassed rights over minerals, including oil, in the 20 kilometres on either side of the track.<sup>527</sup> In 1912, the Turkish Petroleum Company (TPC), which was a group of British, Dutch and German Companies, obtained permission for exploration of oil in Iraq, specifically in Baghdad and Mosul wilayats.<sup>528</sup>

After the First World War, France took Germany's share in the TPC. Great Britain agreed to give 25% of the oil to France according to the San Remo treaty in 1920. Three years after the establishment of Iraq, the TPC returned in 1923 and asked the Iraqi government to grant it a concession in Baghdad and Mosul areas. After two years of negotiations, the Iraqi government accepted the request of the TPC. The agreement was signed on 14 March 1925. However, oil prospecting operations in Mosul were delayed until it was annexed to Iraq under the resolution adopted by League of Nations on 16 December 1925.<sup>529</sup> Thus, actual oil exploration operations began in April 1927, two

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<sup>525</sup> Ayad Wali, 'Geographical history of exploration and drilling for oil in Iraq' (2013) 1(2) Journal of Remote Sensing and GIS.

<sup>526</sup> During the Ottoman rule, many rival countries had made bids to get oil concessions between 1900 and 1914. See: Peter Sluglett (n284)67.

<sup>527</sup> *ibid* 3.

<sup>528</sup> In 1911, African & Eastern Concessions Ltd was formed as a result of collaboration between the British controlled National Bank of Turkey with Deutsche Bank. Its aim was seeking oil and gas concessions in the Ottoman Empire, specifically in area what is called now Iraq. In 1912, the company changed its name to the Turkish Petroleum Company (TPC). The concession was divided as 50% for the National Bank of Turkey, which had been sold later to the Anglo-Persian Oil Company (APOC), 22.5% for each of Deutsche Bank (which transferred later to Francais de Petroles (CFP), Total now) and Royal Dutch Shell, and 5% for the oil entrepreneur Calouste Gulbenkian. Later, mid-1920s, the US got its share from the concession through the Near Eastern Development Company, at present Exxon, which changed the shares of the stakeholders in TPC as 23.75% for each of the British, the Dutch, the French, and the US, and 5% remaining for Gulbenkian. Then later, in 1929 this company renamed to the Iraq Petroleum Company (IPC). See: Peter Sluglett (n284); Zedalis, *The Legal Dimensions of Oil and Gas in Iraq* (n 8); Ravir Kanwar, 'States, Firms, and Oil: British Policy, 1939-54' (PhD thesis, University of Warwick 2000).

<sup>529</sup> More details in the previous chapter.

years after the agreement. On 15 October 1927, a huge amount of oil was discovered in Baba Gurgur, near Kirkuk.<sup>530</sup> However, the commercial production of oil did not commence until 1934.<sup>531</sup>

### 5.3 Constitutional Provisions for Oil and Gas Management up to 2005

Since its discovery in 1927, oil has played a significant political, economic and societal role in the construction of modern Iraq. It has been the main motivation behind most of the major events that have happened in Iraq since its establishment in 1921.

The Basic Law of Iraq was the first constitution of Iraq written during British colonial rule and entered into force on March 21, 1925. This constitution did not allocate any special Article for oil; instead it included an article about natural resources in general, Article 94, in chapter six regarding financial matters.<sup>532</sup>

It could be argued that much of the original rights to oil were allocated and regulated through international agreements among colonial and allied countries, prior to the first Iraqi constitution on March 1925.<sup>533</sup> For instance, the concession agreement concluded on 14 March 1925 between the Iraqi government and the TPC, which was ratified by the Iraqi parliament in June 1926, was signed seven days before the promulgation of the first Iraqi constitution.<sup>534</sup> According to the agreement, the TPC was given a right or

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<sup>530</sup> For more details see: Daniel Yergin, *The prize: The epic quest for oil, money & power* (Simon and Schuster UK 2011); Peter Sluglett (n284)74.

<sup>531</sup> David Fieldhouse (n 281).

<sup>532</sup> Article 94 stated. 'No monopoly or concession shall be granted for dealing with or using any of the natural resources of the land, nor for any public service, nor shall the State revenues be farmed out, except in accordance with law, provided that where the period relating to them exceeds three years, they must in each case be the subject of a special law.' See: 'Constitution of the Kingdom of Iraq' (n 294).

<sup>533</sup> 'The two most enduring economic consequences of Britain's intervention in Iraqi affairs were first that Iraqi imports, at least until 1958, came mainly from Britain and secondly that Iraq's oil resources were controlled by a British dominated company until the company was nationalised in 1972.'; Peter Sluglett (n284)75.

<sup>534</sup> On 24 March 1931, the agreement was modified in favour of the oil company. Accordingly, the concession include all the land located in the provinces of Baghdad and Mosul, which is bordered by the eastern bank of the Tigris River, except oil company franchise area (Khanaqin). Then in 1932, Mosul Petroleum Company (MPC) was established and given a concession for 75 years. It included land located in the states of western Baghdad, Mosul and the Tigris River north of latitude 33. Furthermore, in 1938,

authority to invest in Iraqi petroleum for 75 years with the exception of the province of Basra and the area of Khanaqin. In return, in order to get a significant voice over oil management and production issues, Iraq demanded a 20% ownership in the TPC, but the demand was rejected. Nevertheless, the Iraqi government got some of what it demanded during the negotiations, making gold the basis for its royalties rather than sterling. Also, a sliding scale for royalties was agreed, which meant that more production of oil would bring a higher percentage of royalties.<sup>535</sup>

According to Article 94 of constitution, any concession relating to natural resources which exceeds three years must be the subject of a special law. Hence, the agreement provoked a storm of protest in the official and popular circles and it was denounced as unfair regarding the rights of the Iraqi people. However, there were many reasons why the government agreed to the agreement, notably the fear that Mosul would be annexed to Turkey if the government rejected the agreement, as well as financial difficulties and problems faced by the Iraqi government.<sup>536</sup>

It is worth noting that, during this time, the IPC were in charge of oil management and its related issues. Iraq was receiving only a small portion of revenue from those companies - less than 1% of the value of extracted oil. After long negotiations between the Iraqi government and the three main IPC, during which the government threatened to end the companies' concessions if they refused the Iraqi demand for increasing its share, an agreement was signed on the 3<sup>rd</sup> February 1952. This agreement increased the Iraqi share by giving the government 50% of the profits of companies. Iraq received its share through an amount of crude oil for domestic consumption and transferring the rest to a cash payment.<sup>537</sup>

After the revolution of July 14, the 1958 interim constitution did not contain any article or phrase relating to oil and gas, or even any clause to deal with natural resources.<sup>538</sup> In spite of this, the new regime gave special attention to the issues of oil, where for the

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Basra Petroleum Company (BPC) was established and given a concession for 75 years. It included all the territory of Iraq, which was not covered by concessions previously mentioned. Those companies were affiliated and subordinated to the IPC.

<sup>535</sup> Phebe Marr (n314).

<sup>536</sup> See: Peter Sluglett (n284)74; Phebe Marr (n314).

<sup>537</sup> Hala Fattah and Frank Caso (n282).

<sup>538</sup> See: '1958InterimConstitution' <[http://confinder.richmond.edu/admin/docs/1958\\_Interim\\_Constitution\\_.\\_English\\_.PDF](http://confinder.richmond.edu/admin/docs/1958_Interim_Constitution_._English_.PDF)> accessed December 2, 2018.

first time a dedicated ministry for oil was established in 1959. Moreover, three years after the 1958 revolution, the oil nationalization process, which was a turning point in oil and gas management in Iraq, was announced. The first steps were taken by issuing law No 80 of 1961 (Law of the Appointment of Investment Areas for Oil Companies) which identified the areas that had been given as a concession for IPC and nationalized nonproducing and unexploited fields. This process gradually increased Iraqi control over oil management and limited the control of other countries and foreign oil companies over the oil fields. Accordingly, the Iraqi government recovered about 99.5% of the total area that was given based on the concession agreement to the three IOCs. Subsequently, Law No. 11 of 1964 established the Iraq National Oil Company (INOC), and authorized it to work in the oil industry in any stage in the recovered areas which was 99.5% of the lands.

Regarding the interim constitution of 1964, natural resources were mentioned in the second section, titled the 'basic components of society'. According to Article 9, 'the wealth of natural resources and its forces, all are the property of the State, and the State ensures the proper exploitation of it.'<sup>539</sup> This provision was transferred to the interim constitution of 1968, in the article 14.<sup>540</sup> In the interim Constitution of the 16<sup>th</sup> of July 1970, which remained in effect until April 9, 2003, Article 13/ section two confirmed that 'National resources and principal instruments of production are the property of the nation. The central authority of the republic of Iraq shall invest them directly in accordance with the requirements of the general planning for the national economy.'<sup>541</sup>

It seems that the above articles reflected the Iraqi's ambition to nationalize the oil sector, a goal which was reflected in an official decree issued almost a decade before. Those constitutions focused on the central government as the sole authority responsible for investing and managing all matters regarding natural resources, including oil and gas. Apparently, the focusing on centralizing power over natural resources, particularly in the 1970 constitution, came during the negotiation between the central government and Kurdish movement on issues of autonomy for the Kurds in Kurdistan. During that

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<sup>539</sup> See: 'Iraq's Constitution 1964, Arabic version' (Zaid AlAli Iraqs Constitution Comments) <<https://zaidalali.com/resources/constitution-of-iraq/>> accessed December 2, 2018.

<sup>540</sup> See: the constitution 1968 (Arabic version) *ibid* (n494).

<sup>541</sup> Constitution of Iraq 1970 (Arabic version).

time, there was a controversial debate on governing Kirkuk<sup>542</sup> and other areas which produce oil.<sup>543</sup>

Three years after adopting that constitution Iraq achieved its ambition for total control over its natural resources. The complete nationalization of oil was achieved and announced in 1975 after the nationalization of the Basra Oil Company. As a result of the nationalization of oil, the foreign companies lost all their oil shares to the Iraqi government.<sup>544</sup> The nationalization of Oil was obviously a direct result of the principle of sovereignty. This principle was emphasized and stressed by some decisions issued by the General Assembly of the UN, such as the decisions No. 626/21 (1952), No.1515 (1960) and No. 1803 (1962).<sup>545</sup> In line with this principle, in 1967 the Law No. 97 was issued, which prohibits the exploitation of Iraq's territory through concessions to oil companies.

Since the discovery of oil in 1927 until the establishment of the INOC, on February 8, 1964, foreign companies, the concessionaires, were responsible for everything related to the oil sector, especially with regard to oil extraction operations. Once it was established, the INOC became the main unit responsible for oil and gas management issues and it effectively started working in the extraction, exploration, development, export and marketing operations in 1968. INOC was run by an independent Directors Board, with its own laws and budget, independent from the state public budget. Its functions and its works had been overseen directly by the Follow-up Committee for Oil and implementation of the conventions since 1968 until 1979 when it became associated with the oil minister as chairman of its board. On April 1987, the INOC was abolished and merged with the Oil Ministry by the Baath regime. Thereafter, responsibility for

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<sup>542</sup> This governorate is one of the richest oil cities in Iraq after Basra governorate; also it is one of the disputed areas between the KRG and the FG, as well as the Turkmen ethnic group over its identity.

<sup>543</sup> For more details go back to the previous chapters.

<sup>544</sup> For more details about this topic see: Phebe Marr (n314).

<sup>545</sup> This principle stated that all Member States in the exercise of their right freely to use and exploit their natural wealth and resources wherever deemed desirable by them for their own progress and economic development, to have due regard, consistently with their sovereignty..... For more details about these decisions and principles see: Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge University Press 1997).

the industry was given to the Ministry of Oil and Gas in Baghdad, a role it continues to play.<sup>546</sup>

Before moving to the Post-2003 period, it is worth noting that the draft constitution of 1991,<sup>547</sup> for the first time, specifically mentioned oil and gas. It also emphasised a new aspect which had not been mentioned in the previous constitutions – the Iraqi people's ownership of those resources.<sup>548</sup>

In the period since the overthrow of the regime in 2003, two constitutions have been adopted. The first one is the Transitional Administrative Law (TAL),<sup>549</sup> and the second is the current permanent constitution 2005. The most important article in (TAL) regarding oil and gas management was the Article (25-E) in section three. This article, for the first time, indicated that subnational governments would be involved in the management of natural resources.<sup>550</sup> However, according to this article, all natural resource including oil and gas issues are the exclusive power of FG, and the SGs had only an advisory role in this respect. Thus, it seems that this article gives the federal government more powers than the current constitution with regard to natural resources, as we will see. It did not even distinguish between oil, gas and other natural resources, in contrast to the current constitution. This change was made even though the TAL,

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<sup>546</sup> See: The former Iraq's oil minister, Essam Al-Chalabi, 'Future of Iraq,' *Iraq's oil industry and oil policy* (Center for Unity Studies 2005).

<sup>547</sup> It remained a draft and was not adopted.

<sup>548</sup> Article 29 stated that: 'Natural wealth belongs to the people, The State invests them under the requirements of the public interest, and the central authority holds exclusively invest basic natural resources such as oil, gas, and minerals, a direct investment.' This project constitution available online (Arabic version) at: 'Iraq: Draft Constitution of 1990' (*Constitution Net*) <<http://www.constitutionnet.org/vl/item/lrq-mshrw-ldstwr-lm-1990>> accessed December 2, 2018.

<sup>549</sup> For further details see chapter three.

<sup>550</sup> The article stated, the Iraqi Transitional Government shall have exclusive competence in the following matters... (E) Managing the natural resources of Iraq, which belongs to **all the people of all the regions and governorates of Iraq**, in **consultation with the governments of the regions** and the administrations of the governorates, and distributing the revenues resulting from their sale through the national budget in an equitable manner proportional to the distribution of population throughout the country, and with due regard for areas that were unjustly deprived of these revenues by the previous regime, for dealing with their situations in a positive way, for their needs, and for the degree of development of the different areas of the country. See: This law or 'the Interim constitution'. See: 'Iraq's Constitution 1964, Arabic version' (Zaid AlAli Iraqs Constitution Comments) <<https://zaidalali.com/resources/constitution-of-iraq/>> accessed December 2, 2018.

which was issued by the CPA, set out the main principles of the 2005 constitution, including the distribution of powers between the FG and subnational governments. At that time, the oil industry was severely damaged by the war, yet oil exports resumed shortly after the occupation in 2003. The laws and regulations governing this period are the same as those applied before 2003 and were unchanged by the CPA.

It is also worth noting that, prior to the establishment of modern Iraq in 2003, there was one level of government: the country was a unitary state. Therefore, there was no scope for disputes between national and local authorities. The central government in Baghdad was the only government dealing with all issues related to oil and gas.

#### **5.4 Constitutional Provisions for Oil and Gas Management in the Current Constitution of 2005.**

The Constitution constructs a legal foundation and a framework for oil and gas management through two main Articles - 111 and 112 - in section four, which is dedicated to the powers of the federal government. Article 111 states ‘oil and gas are owned by all the people of Iraq in all the regions and governorates.’ Therefore, this article clearly and directly states who the owner of oil and gas in Iraq is. It gives all the Iraqi people this right, regardless of their religion, nationality, ethnicity, and regardless of their regions. This Constitution is considered as the first Iraqi text to constitutionalize this right.

Additionally, Article 112 states:

First: 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, specifying an allotment for a specified period for the damaged regions which were unjustly deprived of them by the former regime, and the regions that were damaged afterwards in a way that ensures balanced development in different areas of the country, and this shall be regulated by a law. Second: The federal government, *with the producing regional and governorate governments*, shall *together formulate* the necessary *strategic policies* to develop the oil and gas wealth in a

way that achieves the *highest benefit* to the Iraqi people using the most *advanced techniques* of the *market principles* and *encouraging investment*.

On the face of it, Article 112 requires collaboration between the federal government (FG) and the producing governorates and regional governments for managing oil and gas, and their revenues. All these goals which are set out in this article need laws to be issued by the legislative authority. Therefore, enacting legislative provisions is essential for implementing articles 111 and 112. However, implementing legal provisions have not been enacted yet due to political disagreements and disputes among Iraqi groups on the management of oil and gas, especially between the FG and KRG.

Additionally, there are other important articles indirectly related to the authority of managing different aspects of oil and gas. These Articles are numbered 110, 114, 115 and 121. Article 110, clearly states a number of exclusive competencies and authorities of the FG<sup>551</sup> while Article 114 outlines the shared competencies, which must be exercised collaboratively between the federal authorities and subnational authorities.<sup>552</sup> Article 115 grants the rest of the powers, not stipulated in the exclusive powers of the federal government, to the regions, and governorates, and gives them priority in any dispute.<sup>553</sup> Finally, Article 121 grants the regions the authority to amend the federal law in case of any contradiction between the federal and regional governments in matters not covered by Article 110.<sup>554</sup>

These articles have caused disagreements and disputes in the context of oil management between the FG and KRG. For instance, on the basis of the Article 115, KRG has exercised many competences regarding oil and gas because as KRG argues, this article gives the regions as well as the governorates the residual competencies which are not mentioned in the Article 110. It also gives priority to their laws if there is any disagreement with the FG's laws regarding the shared competencies.

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<sup>551</sup> The most important competencies stated in this article regarding out thesis are; formulating foreign sovereign economic and trade policy, in section first. Also, regulating commercial policy across regional and governorate boundaries in Iraq, section second. More arguments regarding these powers will be given later in this chapter.

<sup>552</sup> For more details, see Chapter three.

<sup>553</sup> For the text refer to Chapter three.

<sup>554</sup> For further details and the text of the Article 121, refer to chapter three.



While these provisions set out the general structure of the competencies over oil management, they lack a degree of clarity which has been left to the legislative body to enact laws in this regards. Details, requirements and boundaries of these provisions and their interpretations are the main sources of controversies and disputes between the FG and KRG.<sup>555</sup> The following sections will discuss the issues arising from these provisions and their interpretations.

## 5.5 Constitutional Interpretations of Oil Management

There is a dispute between the FG and KRG over oil management with both sides relying on the constitutional provisions to justify their competencies over oil management. It seems that the disagreements are rooted in the constitutional ambiguity, as well as the inconsistent interests of the FG and the KRG. The difference is between a centralized interpretation upheld by the FG and a non-centralized interpretation envisaged by the KRG and perhaps some governorates.<sup>556</sup> The absence of the rule of law and an active and competent Federal Supreme Court to tackle the issues has contributed to the persistence of the controversy. KRG always asserts its right to do almost everything regarding oil and gas issues, especially in relation to future fields. Interestingly, KRG depends on its interpretation of the constitution for its claim over managing current oil fields within its territory and for its authority to explore future

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<sup>555</sup>Despite some disputes have happened between the FG and some oil and gas-producing governorates. For instance, the dispute between the FG and Anbar provincial council regarding Akkas gas field, and the conflicts between the FG and Anbar provincial council with respect to the Investment on the Southern Gas Company by Shell without consultation or participation of local government. However, in this context, the crucial dispute is the conflict between the FG and the KRG. Thus, the thesis focuses mostly on oil and gas management between the FG and the KRG.

<sup>556</sup> It is worth mentioning, the decentralization model had been discussed before the invasion of Iraq, and it was recommended and emphasized by the US Department of State, the Oil and Energy Working Group in 2003, in its formal policy recommendations for Iraq's post-Saddam Hussein oil policy. This working group included Iraqi advisers in different sectors, such as the humanitarian, oil, financial and political. They concluded that 'there is broad agreement that the focus of Iraq's oil policy needs to be decentralization of the industry if it is to resolve the economic impoverishment of the country'. See: Farrah Hassen, 'Future of Iraq Project Working Group Recommendations' Project' (The National Security Archive September 1, 2006) <<https://nsarchive2.gwu.edu/NSAEBB/NSAEBB198/>> accessed December 4, 2018.

fields.<sup>557</sup> On the other hand, the FG claims that the constitution has given it the authority to manage (in coordination with the regions) oil fields, especially future fields. This dispute has arisen in many respects such as the right of signing oil contracts with International Oil Companies (IOCs), exporting oil and gas, the distribution of oil revenue, and the law of oil and gas. What follows is an examination of the different constitutional interpretations and disputes arising over the articles of the constitutions designed to tackle oil management between the FG and KRG.

## **5.6 Understanding the FG and KRG Interpretations of Articles 111 and 112**

### **5.6.1 The KRG and FG's Interpretation of Article 111**

Article 111 states 'Oil and gas are owned by all the people of Iraq in all the regions and governorates.' KRG argues that the phrase "in all the regions and governorates" can be best understood to mean that the people of regions and governorates are the owners of oil and gas located within their territories. In other words, this article implies that the regions at least have authority to manage their oil and gas. This interpretation is based on an assumption regarding the rights of the people in the regions and the governorates to these resources.<sup>558</sup> For KRG, this interpretation of article 111 can be extended to include giving a share of the revenues from producing fields to the regions and governorates.<sup>559</sup> Nevertheless, it seems that this understanding of the Article 111 by the KRG is incompatible with the workable meaning of some constitutional provisions and with the existence of a FG capable of exercising its function as a representative for all the factions and groups in the country (for instance in the application of Article 112, regarding oil and gas revenue distribution). Also, it is incompatible with the Article 106, regarding the establishment of a public commission at the federal level to audit and

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<sup>557</sup> Most of the KRG oil and gas fields categorized under so-called future fields. Further details will be provided in this chapter.

<sup>558</sup> See: KRG cabinet, 'Oil and Gas Rights of Regions and Governorates' (Kurdistan Regional Government June 13, 2006) <<http://cabinet.gov.krd/a/d.aspx?s=010000&l=12&a=18704>> accessed December 2, 2018.

<sup>559</sup> The Article 3/first, of the Oil and Gas Law of The Kurdistan Region – Iraq, states 'Petroleum in the Region is owned in a manner consistent with Article 111 of the Federal Constitution. The Regional Government is entitled to a share from the revenues from producing fields, consistent with the share of all Iraqi people, in accordance with this law and Article 112 of the Federal Constitution.'

appropriate federal revenues which mainly come from oil. Alternatively, it might mean that all people of Iraq, regardless of their location, are the owners of oil and gas. Furthermore, in Article 111, there is no distinction between oil and gas extracted from present fields or future fields, as we see in Article 112.

This understanding of article 111 has shaped part of KRG's oil law. According to the law, the real owner of oil and gas in the region is the KRG, not the federal institutions which are supposed to represent all Iraqis.<sup>560</sup> KRG supports its argument partly by relying on the analysis of those who exclude FG from exclusive ownership or management authority over oil. There are those who assert that article 111 'does not state that the oil and gas belongs either to the federal Ministry of Oil or the illegal and unaccountable monopoly of the state oil marketing organization (SOMO), which was created by Saddam Hussein.'<sup>561</sup> Furthermore, it has been argued that 'nowhere does the Constitution state that either the management or export of oil and gas from Iraq are the exclusive preserve of the federal authorities.'<sup>562</sup>

To better understand KRG's position, it must be stressed that KRG does not claim that the revenues of current and future oil fields in the region should not be shared with other regions or the FG. Rather, its claim is simply about the authority to manage the oil fields. Thus, it is mainly about the authority over petroleum operations management, not the revenue. KRG does not dispute the principle that the oil revenue is for all Iraqis.<sup>563</sup> This can be illustrated by KRG's announcement that export of oil would be 'at least 250,000 barrels of oil per day, raising more than \$8 billion for Iraq's treasury.'<sup>564</sup>

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<sup>560</sup> More details of this law will be given latter in this chapter.

<sup>561</sup> See: KRG Cabinet, 'Statement On Oil & Gas Policy by the Kurdistan Regional Government' (Kurdistan Regional Government January 17, 2013) <<http://cabinet.gov.krd/a/d.aspx?l=12&a=46337>> accessed December 2, 2018.

<sup>562</sup> *ibid* (n516).

<sup>563</sup> Article (3): 'The Regional Government is entitled to a share from the revenues obtained from fields producing after 15 August 2005 in accordance with the provisions of this law.' Also in the same vein, Article 9/ states, 'The Ministry shall: First: encourage public and private sector investment in Petroleum Operations to ensure efficient management of the Petroleum resources of the Region to provide maximum timely returns to the *people of the Region and Iraq*.'

<sup>564</sup> Ashti Hawrami, 'The Kurds Don't Wish to Tear Iraq Apart' (RealClearWorld April 14, 2013) <[https://www.realclearworld.com/articles/2013/04/14/a\\_decentralized\\_oil\\_policy\\_is\\_key\\_to\\_iraq\\_unity.html](https://www.realclearworld.com/articles/2013/04/14/a_decentralized_oil_policy_is_key_to_iraq_unity.html)> accessed December 2, 2018.

Similarly, the KRG Minister of Natural Resources confirms ‘the oil export today is for the benefit of all of Iraq. Everyone will share that benefit... Needless to say, we also need to share the oil wealth, throughout the country. Certainly, revenue distribution will bind us all together and all Iraqis will be able to unite around that.’ He adds ‘Article 111 states that oil and gas belongs to all Iraqis. We are committed to Article-111.’<sup>565</sup> Therefore, KRG accepts that oil revenue must be shared. In addition, the KRG’s Prime Minister, Barzani, reaffirms that when he states ‘under the Constitution, the export and marketing of Iraq’s oil or gas from Iraq is not the monopoly of any single entity provided that the revenues are shared fairly among its people.’<sup>566</sup> He also states that ‘the new Oil Law is not only good for people in the Kurdistan Region; it is good for all Iraqi people. Consistent with the Iraq Constitution, this Law requires us to share revenue with the FG and other Regions in Iraq just as other regions of Iraq will share their revenues with us.’<sup>567</sup>

However, the approaches are subject to change. For example, the KR’s draft constitution differentiates between the revenue that comes from the present fields and the revenue that comes from the future fields.<sup>568</sup> According to that draft, only the revenue from the present field must be distributed fairly in accordance with the principles specified in Article 112 of the Federal Constitution.<sup>569</sup>

Hence, it could be argued, there is ambiguity between the KRG’s statement, and what its laws have confirmed on it in this regards, such as its constitution and its oil and gas law. Articles 115 and 121 could be interpreted to give the regional laws superiority over

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<sup>565</sup> Ashti Hawrami, ‘Commencement of Oil Export Ceremony Erbil, Kurdistan Region – Iraq’ (Kurdistan Regional Government June 1, 2009) <<http://cabinet.gov.krd/p/page.aspx?l=12&s=060000&r=400&p=305>> accessed December 2, 2018.

<sup>566</sup> KRG Cabinet, ‘Prime Minister Barzani’s Speech at CWC Oil and Gas Conference’ (Kurdistan Regional Government December 4, 2012) <<http://cabinet.gov.krd/a/d.aspx?a=46030&l=12>> accessed December 2, 2018.

<sup>567</sup> KRG Cabinet, ‘Statement by PM Barzani: Kurdistan Region Oil and Gas Law’ (Kurdistan Regional Government August 6, 2007) <<http://cabinet.gov.krd/a/d.aspx?s=010000&l=12&a=19508>> accessed December 2, 2018.

<sup>568</sup> Although this constitution has not been approved yet, it is still a merely draft, as explained in details before, in the previous chapter.

<sup>569</sup> Article 74/ seven states ‘Form a joint administration with the Federal Government to manage the oil and gas extracted from [fields in] Kurdistan and put into commercial production before August 15, 2005. Revenues received from these fields must be distributed fairly in accordance with the principles specified in Article 112 of the Federal Constitution, and with the oil and gas laws of the Kurdistan Region...’

the federal laws concerning oil and gas laws in any contradiction between them, considering them as concurrent competencies. However, addressing oil and gas separately in two articles located between the federal exclusive powers and the concurrent powers could indicate that the constitutional drafters did not intend to regulate oil and gas in the same way that they regulate the concurrent competencies in Article 114.<sup>570</sup> It has been argued that the negotiators tried to address oil and gas within provisions on exclusive and concurrent competencies in earlier drafts, but, after negotiations and compromises, they decided to address them separately in article 111 and 112. The same thing could be true with article 121.<sup>571</sup>

Conversely, the FG rejects the KRG's interpretation of the Article 111. A plain, clear and logical interpretation of article 111, the FG argues, is that these resources are for all Iraqis. The article should be read as stating that oil and gas in Iraq belong to all regions and governorates and to all people of Iraq regardless of where they reside, whether within the producing regions or not. Thus, the authority to control and manage oil and to exercise sovereignty rests with the federal parliament, as the representative of all the Iraqis.<sup>572</sup>

The FG's perspective has been supported by some international legal experts. Joseph Bell and Cheryl Saunders, for instance, support the FG's attitude. They assert that article 111 states that all oil and gas in the current and future fields in all regions and governorates are owned by all the people of Iraq collectively, wherever they reside. According to their analysis, 'article 111 gives all citizens of Iraq, wherever resident, an undivided interest in all of the oil and gas resources of the country.' It does not give the ownership to any state, particular group or political region. They also indicate that because the Iraqi people collectively are the owners of oil and gas, therefore, according to Article 49, the only political entity that directly represents all the people of Iraq is the Iraqi Council of Representatives. This institution, they conclude, has the power to manage oil and gas.<sup>573</sup>

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<sup>570</sup> Ashley Deeks and Matthew Burton(n2).

<sup>571</sup> *ibid* (n2).

<sup>572</sup> See: 'Iraq's Petroleum Law: Problematic Issues & Its Fate, By Tariq Shafiq\*' (*Index: Iraqi Economists Network* February 8, 2016) <<http://iraqieconomists.net/en/2013/04/05/iraqs-petroleum-law-problematic-issues-its-fate-by-tariq-shafiq/>> accessed December 2, 2018.

<sup>573</sup> See: Joseph Bell and Cheryl Saunders(n9).

Therefore, the language of Article 111 shows that there is a difference between ownership and management. It refers to the equality, whereby all Iraqis are the owners of oil and gas, regardless of which government has the constitutional power to manage it. All Iraqis must benefit from oil and gas revenues, regardless of where oil and gas are located.<sup>574</sup>

Nevertheless, it is important to emphasize that regardless of what the constitution may refer to for the FG and KRG, eventually both sides need to reach an agreement on the meaning, application, and reference of Article 111, and overcome such problems. Such a resolution will be reached either through collaborative institutions or by giving the task of interpretation to a decisive judicial institution.

### 5.6.2 The KRG and FG's Interpretation of Article 112

Article 112 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 revenue* in *a fair manner* in proportion to the population distribution in all parts of the country, specifying an allotment for a specified period for the *damaged regions* which were unjustly deprived of them by the former regime, and the regions that were damaged afterward, in a way that ensures balanced development in different areas of the country, and this shall be regulated by a *law*. Second: The *federal government*, *with* the *producing regional* and *governorate* governments, shall *together formulate* the necessary *strategic policies* to develop the oil and gas wealth in a way that achieves the highest benefit to the Iraqi people using the most advanced techniques of the *market principles* and encouraging *investment*.<sup>575</sup>

This article is one of the most controversial provisions of the current constitution. It contains many phrases and concepts that invite different interpretations. Legal disputes

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<sup>574</sup> Zedalis, *The Legal Dimensions of Oil and Gas in Iraq* (n 8).

<sup>575</sup> According to this Article, non-oil producing governorates cannot be involved in the management of oil and gas, nor in drawing strategic policies to develop this wealth. While, according to the Article 11, Oil and gas are owned by all the people of Iraq, thus all the governorates should be allowed to take part in the decision-making process in this regards.

between KRG and FG are mainly focused on the different interpretations given to the phrases of *together with, management, producing fields* and *present fields* by both sides. For example, the term “present field” has proven to be very problematic as it has triggered disputes about whether they should be managed through the same principles and institutions that manage future fields or not. Additionally, its conceptual and practical boundaries have raised issues such as whether present fields include only the discovered fields or whether it can be extended to the fields that are under exploration. Similarly, there is a dispute whether it refers to the producing fields only or it also embraces the nonproducing fields.<sup>576</sup> Article 112 does not expressly identify and determine who and what institutions exactly have the right and authority to manage the oil fields and sign oil contracts. Even if there is a reference to shared authority between the FG, regions, and governorates, the mechanisms and principles of such shared authority have not been clearly expressed in the article.

Based on Article 112, KRG argues that all the future fields belong to the regional jurisdictions. This has always been the position and interpretation of KRG regarding future fields.<sup>577</sup> Because the article emphasised only the *producing or present fields* without mentioning the future fields, KRG argues, future fields are outside the jurisdiction of FG. KRG uses article 115 to support that whatever is not expressively mentioned in the constitution as authorities of FG can be exercised by the regions and other governorates. Management of future fields is not under the competences of the exclusive power of the FG, and not under the shared power. Thus, it belongs to the exclusive jurisdiction of the regional and governorates governments.

Accordingly, KRG asserts that only the producing fields, before 15 August 2005,<sup>578</sup> should be under the shared competency and management of the KRG and FG. This means the authority to control and manage the fields explored and/or discovered after

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<sup>576</sup> Nonproducing fields are the Potential future producing fields or not yet exploited.

<sup>577</sup> Article (1)/16 states ‘Future Field: 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.’

<sup>578</sup> In this day that the constitution project was completed by the Constitutional Committee, then it was submitted to the public referendum on 15 October 2005.

enacting the constitution in 15 August 2005 belong to the exclusive powers of the KRG, and it is not within shared jurisdictions.<sup>579</sup>

This perspective has been supported by James R. Crawford.<sup>580</sup> He points out that ‘the Constitution of Iraq does not give exclusive authority over oil and gas to the FG. Article 112 of the Constitution only gives a qualified right to the FG to ‘undertake the management of oil and gas extracted from present fields.’ He further claims that even this is not an exclusive or unconditional right; this right, he asserts, needs to be exercised ‘with the producing governorates and regional governments.’

Thus, even managing current producing oil fields is not an exclusive power for the FG, but one which must be managed under two conditions. The first condition is to manage the fields with cooperation and coordination with the regions; and the second condition is that the distribution of the revenues of current producing fields needs to be based on fair distribution as it is regulated by law (though there is at present no legislative basis for such distribution). KRG often raises these two conditions regarding the authority of FG over current fields and stresses the exclusion of the FG from managing what are called future fields. However, KRG agrees on the principle of “strategic oil policy” which is basically the idea that all oil fields in Iraq need to be managed within the general strategic oil policy that also needs to be constructed and decided by FG and KRG collaboratively.<sup>581</sup> KRG put this understanding into its oil and gas law. Its third article states ‘the Regional Government shall, *together with the Federal Government, jointly* manage Petroleum Operations related to *producing fields* according to the provisions of Article 112(1) of the Federal Constitution.’<sup>582</sup> Obviously, it implies that the future fields belong to the exclusive KRG’s power.

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<sup>579</sup> The producing fields according to KRG’s law means the current fields, which according to the article (1)/ 16, a Current Field is: ‘A Petroleum Field that has been in Commercial Production prior to 15 August 2005.’

<sup>580</sup> The KRG requested a formal independent legal opinion from the professor of international law, through Clifford Chance, a multinational legal firm regarding its competence regarding oil and gas matters under the current Iraqi constitution 2005. Hence, this legal opinion was given by the professor on 29th January 2008, based on a request was sent by the prime minister of the KRG. James Crawford (n10).

<sup>581</sup> *ibid* (n10).

<sup>582</sup> The same understanding has been confirmed again in the Article 18, which states, ‘The Regional Government, consistent with the conditions stated in Article 19 of this Law, shall: First: agree with the Federal Government in the joint management of oil and gas extracted from Current Fields in the Region;’



KRG sometimes raises a more controversial issue over the relevant applicable law with respect to oil and gas. KRG's understanding in this regard is that the regional laws have primacy over the federal laws for oil and gas issues in the current producing fields. KRG's argument is based on the idea that oil and gas are not listed under the exclusive powers of the federal government.<sup>583</sup> Crawford supports such understanding. He argues, 'a key point is that the priority provision in Article 115 applies to '[all] powers not stipulated in the exclusive powers of the federal government'. Because oil and gas development is not an exclusive federal power, thus, article 115 applies to it.'<sup>584</sup>

Certainly, FG has not accepted KRG's interpretations of article 112. The FG's interpretation can be characterised as a centralised approach. This approach is clearly expressed by the former federal oil minister Abdul Karim Luaibi who stated that 'there is a need to manage the oil industry with some centralization especially as far as planning for production and marketing is concerned.' He then added that 'there are basic principles that will never be subject to compromise. The first is that all oil sector plans and contracts approvals have to be done centrally; and the second is that all marketing has to be done centrally. For me personally, those two points are a red line'<sup>585</sup> His rationale is that these two articles are located under Section Four which deals with the Powers of the FG. This should indicate why none of the SGs can have authority or right to manage and sign any contracts unilaterally without approval of the FG.<sup>586</sup> This approach has been the foundation of FG's understanding towards almost all matters related to oil and gas including the issues related to differentiating between current producing and future oil fields.<sup>587</sup>

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Also Article 19/ three states: 'The Regional Government and the Federal Government must jointly manage Current Fields...;'

<sup>583</sup> See: KRG Cabinet, 'Statement On Oil & Gas Policy by the Kurdistan Regional Government' (n 558)

<sup>584</sup> James Crawford (n10).

<sup>585</sup> See: 'Iraqi Oil Minister: the Signing of Contracts and Marketing is Red Line' (<http://www.akhbaar.org> December 9, 2011) <<http://www.akhbaar.org/home/2011/12/120334.html>> accessed December 25, 2018.

<sup>586</sup> *ibid.*

<sup>587</sup> This central trend has been confirmed on numerous occasions by federal officials and representatives. For instance, the Prime Minister's statement in Basra on 18/02/2012 (Oil is a wealth for all Iraqis, and the signing of contracts related to oil and gas is given only to the Ministry of Oil, no governorate has been granted this right). The Ministry of Oil also refused in late April 2011 a Canadian company contract with Salahaddin governorate Council. See: Fouad Al-Ameer, *Novelties in the Iraqi oil Issue* (Dar Al-Ghad-Baghdad, Arabic version, 2012)

Another rationale used by FG is that since the location of oil fields takes no consideration of surface boundaries, and because there are tens of fields crossing governorates' boundaries, FG must be the competent authority to manage them. Because the fields are distributed unevenly throughout the country, FG needs to have the competence over managing it. This is what guarantees fairness in revenue distribution.<sup>588</sup> Furthermore, such uneven distribution of oil fields in the country may raise tensions and more fragmentation within the country if the FG is not authorised to manage the oil fields as representative of the whole nation. This approach, FG argues, eradicates obstacles to the optimal management of oil and gas.<sup>589</sup>

This political, economic and rather practical approach of FG has also been supported by legal opinions of some scholars. Joseph C. Bell and Cheryl Saunders argue that the expression “*this*” shall be regulated by a law” in the end of the Article 112 must cover both the management and allocation of oil revenue. They claim ‘In the English translation the antecedent to “this” is not specific, but since the section is divided into a compound sentence, with the second sentence providing for regulation by a law, the “*this*” would on the better reading cover both management and allocation.’<sup>590</sup> He basically believes that FG has the lead authority to legislate for both managing oil fields and allocation of its revenues. This indicates that the constitution does not require an equal partnership between the FG and the RG for oil management. Rather, the FG and its laws should be the leading authority. He concludes that ‘whatever the form of collaboration between the governmental units, the final action is to be determined by the federal Council of Representatives.’<sup>591</sup> Nevertheless, Zedalis argues,<sup>592</sup> the FG’s leading role regarding the oil and gas management and development policy, which has been emphasized above, is not absolute, but it is conditional. The FG leading role cannot

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<sup>588</sup> Tariq Shafiq, ‘Iraq Petroleum Law Re-Visited’ working paper <[https://csis-prod.s3.amazonaws.com/s3fs-public/legacy\\_files/files/attachments/070612\\_shafiq\\_presentation.pdf](https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/attachments/070612_shafiq_presentation.pdf)> accessed December 26, 2018.

<sup>589</sup> *ibid.*

<sup>590</sup> See: Joseph Bell and Cheryl Saunders(n9).

<sup>591</sup> *ibid.*

<sup>592</sup> Professor Rex Zedalist is a law specialist with regard to international energy resources and international trade and investment matters. He worked at the University of Tulsa, and has many publications on Iraqis oil management and related conflicts.

neglect the subnational government's role that has been constitutionally allocated with respect to oil and gas.<sup>593</sup>

Regarding the superiority of laws of oil and gas, Bell and Saunders argue that Article 115 of the constitution does not grant the regions and governorates power to modify or nullify federal legislation based on article 112. They point out that 'this construction, however, would make Article 112 a nullity and thus cannot stand.' With respect to the Article 121 they argue this article should only be applied on the shared competencies in article 114, and cannot be applied on Article 112.<sup>594</sup> They think 'to hold otherwise would again make Article 112 a nullity, not only nullifying the federal authority but also the rights of the other producing governorates and regions to participate in the policy formation provided for by Article 112.'<sup>595</sup>

On the other hand, Zedalis argues that the superiority of the subnational governments' laws, according to the Article 115, in the event of a conflict with FG would include the oil and gas laws, as long as these competences are shared, and not only restricted with the Article 114. Although the constitutional place of the Article 112, situated between the Article 110 regarding the federal exclusive powers and the Article 114 with respect to the shared powers, indicates that it is different from the article 114, functionally Article 112 is equivalent to article 114 in terms of the superiority of subnational governments' laws in any conflict with FG's law, as long as it is exercised collaboratively between all three levels of governments.<sup>596</sup>

It seems that the FG's interpretation to this article is based on mere logic, not according to its constitutional language. By contrast, the KRG's interpretation is often based on pure constitutional language.

Even though there are some clarifying and illuminating arguments in Bell's and Saunders legal opinions, as there are in Crawford's opinion, they may not represent what the constitution actually refers to, nor may they represent the original meaning or intention behind the structure of article 112. Therefore, due to the vagueness of constitutional articles related to oil and gas, which can be interpreted widely by the

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<sup>593</sup> Zedalis, *The Legal Dimensions of Oil and Gas in Iraq* (n 8).

<sup>594</sup> Article 121 covers jurisdictions of regional governments, which grants regions the right to amend any national law, outside Article 115, if there is a contradiction with their laws. For further details refer to previous chapters.

<sup>595</sup> Zedalis, *The Legal Dimensions of Oil and Gas in Iraq* (n 8).

<sup>596</sup> *ibid* (n 8).

stakeholders in a way to serve their understanding, and in the absence of the decisive decision by the federal court, it would not be easy to offer a definitive conclusion regarding these articles. Therefore, all of the above mentioned interpretations for oil and gas related articles may be relatively true. Nevertheless, they are not mandatory, as long as they are not decided by the Federal Supreme Court, which has sole jurisdiction in interpreting those articles in the event of any disagreement on them.

There is a question whether the collaborative management among those governments is restricted only to the present fields or covers the future fields as well. As Zedalis argues, ‘the use of the term “its” in the phrase “its revenues” must mean revenues of the federal government.’<sup>597</sup> Therefore, it can be argued, the revenue that has been mentioned in Article 112 includes all revenue that comes from oil and gas, without any distinction between revenue coming from present fields or future fields, as long as oil and gas is owned by all people of Iraq. Hence, in all circumstances, the revenue that comes from oil and gas must be distributed among all governments in a fair manner according to the above articles. The power of distribution of the revenue must be given to an independent federal institution which represents all the Iraqi factions, specifically the producing regions and governorates.

One of the most appropriate understandings to read Article 112 properly, as a matter of legal interpretation, seems to be the examination of the deliberations which took place amongst the drafters of the article before its adoption in the constitution in 2005. This can provide some legal key and clues to construct a more plausible legal opinion on the controversial issues raised in article 111 and 112. Finalizing the closer meaning behind those articles should be determined by the federal court.

There is no doubt that the Kurds during the constitutional negotiations, especially regarding oil and gas matters, secured substantial powers. They were able to reduce the federal exclusive competencies in their favour. As some argue<sup>598</sup> ‘In the area of oil and gas, the Kurds were able to secure almost exactly what they set out to achieve, and arguably expanded their authority beyond what the TAL provided concerning natural resource.’<sup>599</sup> For example, the terms “*present fields*, or *current fields* and the idea of *the*

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<sup>597</sup> Ibid (n8)40.

<sup>598</sup> Ashley S. Deeks was one of the former Legal Adviser and Deputy Legal Adviser at the U. S. Embassy in Iraq from June until December 2005.

<sup>599</sup> Ashley Deeks and Matthew Burton (n2)53.

*partnership in oil management*” were added by the Kurds.<sup>600</sup> The Kurdish proposal was the popular ownership of oil and gas extracted from “*current fields*, based on *equal partnership* management between the FG and the subnational governments.”<sup>601</sup> This means that the Kurds succeeded in differentiating between the so-called current fields and future fields. By excluding future oil and gas fields of joint management with the FG, and considering them as the residual powers, which should belong to the subnational authorities in accordance with Article 115.<sup>602</sup> Nevertheless, these terms, as has been argued, are inherently ambiguous; they could be interpreted more expansively to encompass fields identified by seismic surveys, whether or not exploration has begun.<sup>603</sup>

## 5.7 Practical Issues of the Disputes

The FG and KRG have disputes and disagreements about the authority to manage oil and gas fields, the laws enacted by both levels of government regarding oil, the contracts, the revenue distribution and the level of cooperation and collaboration required for tackling these controversial issues. What follows is an examination of the current legislations and regulations to explain the nature and extent of these disagreements.

### 5.7.1 The Federal Oil and Gas Law

Since the beginning of 2007, the FG and the federal legislative authorities have been trying to set the legal framework for the exploitation and management of oil and gas.<sup>604</sup>

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<sup>600</sup> The Shiite wanted to include the term “in consultation with” in order to grant the FG to be the ultimate decision maker, regardless the opinion of the subnational authorities. See: *ibid* (n2).

<sup>601</sup> Ashley Deeks and Matthew Burton (n2).

<sup>602</sup> Although, as some argue, a real Kurdish desire was, the July 28 Kurdish proposals, which granted the subnational authorities the ownership and controlling of all natural resources and the authority to distribute revenues, in return, allocating 35% to the FG. See: Ashley Deeks and Matthew Burton(n2).

<sup>603</sup> Ashley Deeks and Matthew Burton (n2)55.

<sup>604</sup> There are currently many laws and regulations in place for Oil and gas issues, for example; The Law of the Iraq National Oil Company of 2018; Law of Organization of the Ministry of Oil No. (101) of 1976 and its amendments; The Preservation of Hydrocarbon Resources Law No. 84 of 1985; The law against

Drafting legislation on this issue has proved to be a very difficult task for the Iraqi parliament. The first draft of the federal Oil and Gas Law was officially presented by the Council of Ministers to the Parliament on July 4, 2007. Because of the various political differences among the Iraqi factions, the draft did not pass in the parliament.<sup>605</sup> Later, after some amendments, another draft was presented again to the Council of Representatives by its Energy Committee on 17th August 2011; this amended draft was also rejected by the majority in the parliament.<sup>606</sup>

The KRG opposed the legislation. One reason for the KRG's opposition was that the content of the law was changed substantively by the federal cabinet's legal committee.<sup>607</sup> It has been argued that the content is not in line with the draft that was agreed between the FG and the KRG in February 2007. The draft was supposed to be the basis for many sub-laws governing the sector. They agreed to present all the relevant laws as a package in the parliament, including the draft hydrocarbon law itself, annexes

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the smuggling of oil and its derivatives No. 41 of 2008 and its instructions; The Iraqi Revolutionary Command Council Order No. 1075 of 1976 regarding authority to negotiate and sign petroleum contracts; Revolutionary Command Council Order No. 167 of 1985 regarding oil pipelines; and Protection of the Environment Law No. 27 of 2009.

<sup>605</sup> There were two drafts of oil and gas law; the first is called the draft of 15/1/2007 and the second one is called the draft of 15/2/2007 which includes four annexes. The FG and the KRG agreed on the second draft. In late February 2007, the federal Cabinet announced that it sent the draft to the State Consultative Council for review and repairing the legal language, and then it was sent to the House of Representatives for approval. The drafts are available online at: KRG Cabinet, 'KRG Publishes Draft Federal Oil and Gas Law of Iraq in English and Arabic' (Kurdistan Regional Government March 9, 2007) <<http://cabinet.gov.krd/a/d.aspx?s=010000&l=12&asn=&a=16644&r=223>> accessed December 3, 2018.

<sup>606</sup> It is worth mentioning there were two drafts submitted again; one by the Energy Committee in the House of Representatives and the second by Energy Committee in the federal cabinet. The first was supported by the KRG and it was in its favor while the second in favor of the FG. Both failed, and the parliament was unable to enact the law. See: Yanal Failat, 'The Iraqi Federal Oil and Gas Law 2011: Exploration, Exploitation and Expropriation' (2013) 4 International Energy Law Review; Fouad Al-Ameer, *Novelties in the Iraqi oil Issue* (n 587) 48; The 'English Translation of Draft Oil and Gas Law' (Iraq Business News October 5, 2011) <<http://www.iraq-businessnews.com/2011/10/05/english-translation-of-draft-oil-and-gas-law/>> accessed December 4, 2018.

<sup>607</sup> KRG Cabinet, 'KRG Requires Clarity from Iraqi Cabinet on Text of Draft Oil Law' (Kurdistan Regional Government July 3, 2007) <<http://cabinet.gov.krd/a/d.aspx?s=010000&l=12&a=18833>> accessed December 4, 2018.

to the law, the Iraqi National Oil Company (INOC), the revenue sharing law, and the law of the federal oil ministry.<sup>608</sup>

Furthermore, the KRG was not satisfied with the Annexes that gave the INOC the power to manage undeveloped fields, even though these were supposed to be under the management of subnational governments according to Article 112. Annex 1 and 2 give 93% of Iraq's proven petroleum reserves to the INOC, while in accordance with Annex 3, only the marginal and non-commercial fields were given to the subnational governments to use for inward investments. This means that the draft excluded the regions and governorates from controlling and managing their oil and gas. According to the KRG, the draft powers were a constitutional breach of the rights of regions with respect to the current fields mentioned in Article 112.<sup>609</sup> The KRG argued that granting all these huge powers to the INOC, as envisaged in the law, would mean a return to the centralized model with respect to oil and gas management.<sup>610</sup>

Moreover, by giving huge privileges to the INOC, the KRG argued that Annexes would deter foreign investment in the oil and gas sectors, undermining the goal of maximizing oil revenue for Iraqis. Therefore the proposals contradicted the essence of the Article 112, which confirmed the use of the most advanced techniques of the market principles and encouraging investment to achieve the highest benefit to the Iraqi people. Hence, KRG argued, these Annexes were unconstitutional, against the Iraqis interests, and in conflict with the 15 February's draft Oil and Gas Law which was designed to open the

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<sup>608</sup> *ibid* (n561).

<sup>609</sup> KRG Cabinet, 'Prime Minister Salih's Statement on Oil and Gas Laws Following Federal Finance Minister's Visit' (Kurdistan Regional Government April 11, 2011) <<http://cabinet.gov.krd/a/d.aspx?a=39548&l=12&s=010000>> accessed December 4, 2018.

<sup>610</sup> Annex 1, exclusively allocated 36 active and producing fields actually to the INOC, only two of them are new fields. Annex 2, which is about the discovered and undeveloped fields, which are 27 fields, assigned to the INOC, only one of them is counted as a new field. Annex 3, is about the discovered, undeveloped fields which are outside the INOC's control, they are 28 fields in number. Annex 4, determining the exploration blocks within the country, as well as boosting the levels of proven reserves. This Annex concludes 69 blocks, covering a huge surface area. See: KRG Cabinet, 'Statement from Minister of Natural Resources Kurdistan Regional Government – Iraq' (Kurdistan Regional Government April 27, 2007) <<http://cabinet.gov.krd/p/page.aspx?l=12&s=060000&r=400&p=305>> accessed December 4, 2018.

door to private foreign investments on the basis of production sharing agreements PSC.<sup>611</sup>

Hence, it can be argued that the 15 February's draft law and its Annexes, after its change by the Federal Cabinet, increased the power of the FG's institutions, such as the INOC, Federal Oil and Gas Council (FOGC), and Ministry of Oil (MoO), at the expense of the role of the subnational authorities.<sup>612</sup> As some claimed, 'The Oil and Gas Law goes beyond the Constitution in terms of the powers it vests in FG. The law implies that the regions have ceded some of the constitutionally permitted powers to the FG in order to maximise return to everyone.'<sup>613</sup> It gives the FOGC the authority to draft the models of the contracts, implying that the regional models such as the production sharing contracts (PSCs) initiated by the KRG with IOCs would not be acceptable. If adopted, it would have given the FG the ultimate authority for controlling and supervising all operations in the sector. The draft was clearly reflecting a centralised approach based on article 111 by asserting that oil belongs to all Iraqis. Thus, the supremacy must be for

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<sup>611</sup> MPs and politicians from the federal level also stood against the first draft because of the PSC which was included by the KRG. Ibid (n564).

<sup>612</sup> The Federal Oil and Gas Council (FOGC) was supposed to be the most important body with respect oil and gas sector in Iraq. This non-elected body was an attempt to accommodate all oil and gas-producing governments. It is headed by the Prime Minister and included Ministry of Oil, Minister of Finance, Minister of Planning, Governor of the Central Bank of Iraq. Also hydrocarbon experts, nonbinding "Panel of Independent Experts" constituted of Iraqi and foreign advisors. In sum, it was supposed to represent the essential components and factions of the Iraqi society. The establishment of FOGC was confirmed in all OGL drafts; the February 2007 draft, July 2007 draft, and the 2011 drafts. However, these drafts dealt with the FOGC in different ways. This institution was given a huge powers and responsibilities. For instance, determining oil and gas sector policies and plans, including exploration, development, and transportation. Also, reviewing all the contracts that signed whether by the FG or the KRG, the ultimate say would be given to this body regarding those contracts and the future model contracts. This body has been the most debatable matter among the Iraqi factions, especially between the FG and the KRG. The federal government tried to strengthen the power of the Ministry of Oil and the Council of Ministers at the expense of the power of regional and governorates governments while the regional governments tried to make the FOGC the most powerful body in oil and gas policy. See: Article (5) of The Federal Oil & Gas Draft Law, which was the Council of Ministers on 25th August 2011; The draft of 2007 (in 559); The draft law of 2011 (n560); 'Iraq Oil Almanac an Open Oil Reference Guide' (Open Oil) <<http://openoil.net/wp/wp-content/uploads/2012/08/Iraq-Oil-Almanac-English-PDF.pdf>> accessed December 4, 2018.

<sup>613</sup> Yahia Said, 'Iraq Hydrocarbons Legal Framework' (2007) publication <[https://resourcegovernance.org/sites/default/files/RWI\\_YahiaSaid\\_HydrocarbonFramework\\_071707.pdf](https://resourcegovernance.org/sites/default/files/RWI_YahiaSaid_HydrocarbonFramework_071707.pdf)> accessed December 26, 2018.



the federal institutions, and all the subnational laws and regulations must be compatible with the federal legislations.

Nevertheless, according to the draft, the subnational governments still have the right to negotiate and initiate contracts for exploration in the territories which are not close to the current producing fields.<sup>614</sup> According to article 15 of the draft, any contracts with IOC or any other private sector must be negotiated and signed by the Ministry of Oil, INOC or the regional governments through a process of clear, transparent and competitive bidding.

The above mentioned factors are the main reasons why the KRG rejected the draft. Therefore, the federal parliament failed to enact the oil and gas law.<sup>615</sup> As AlGhadhban<sup>616</sup> argues ‘The two sides, the FG and the KRG, lost interest with time in legislating the oil and gas law despite the public statements to the contrary. The KRG’s lack of interest in the law is because they object to a strong federal control and a strong INOC as well, fearing a return to centralism.’<sup>617</sup>

### **5.7.2 KRG’s Oil Law**

Because of the failure of the federal parliament to enact the law before 31/5/2007 in accordance with a Memorandum of Understanding between the FG and KRG,<sup>618</sup> on

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<sup>614</sup> See the law.

<sup>615</sup> The draft also drew strong opposition for different reasons, centred in central and southern Iraq. Started with oil experts, trade unions, individuals, the Sadrist movement, some of the Iraqi List leaders, some politicians, religious and MPs figures.

<sup>616</sup> Thamir alGhadhban, a former Iraqi Minister of Oil and Chairman of the Advisory Commission at the Prime Minister’s office.

<sup>617</sup> Ruba Husari ‘Thamir Al-Ghadhban « Iraq Oil Forum’ (News and Interviews on Iraqi Oil March 2, 2010) <<http://www.iraqoilforum.com/?p=1784>> accessed December 4, 2018.

<sup>618</sup> A Memorandum of Understanding dated 26 February 2007, between the FG and KRG to resolve disputes related to oil law and oil contracts. It confirmed on presenting the draft law of 15/02/2007 (with the four annexes) to the House of Representatives in March 2007 and to be approved by the House of Representatives before the end of May 2007. What brings consideration of this memorandum is the paragraph saying that if the law is not passed in the House of Representatives within this period, there will be a meeting between the Prime Ministers of the FG and KRG to discuss ways to achieve this within a month and find a solution. The solution can be either an extension beyond 31/5/2007 or, ‘the parties - the FG and KRG - have the right to conclude development and production oil contracts in accordance with the Constitution, the draft oil and gas law and the general principles of the standards of contract

June 29, 2007, the Kurdish Parliament drafted its own oil and gas law which entered into force on 9 August in same year. The draft law was enacted, unsurprisingly, on the basis of the KRG's interpretation of the constitutional articles, specifically articles 121 and 115.

These two articles, arguably, give the subnational units the residual powers, and they grant their laws supremacy over any federal law in any contradiction case. Enacting the law based on these articles means that oil and gas do not belong to the exclusive federal jurisdiction, as confirmed by the Article 110. Therefore, according to the KRG's oil and gas law, the FG is prohibited from carrying out any activity in the area of oil and gas in the region. Any unilateral activity shall have no effects towards the region unless approved by the competent authority in the region.<sup>619</sup> Thus, according to the law, the real owner of oil and gas in the region is the KRG, not the federal institutions which are supposed to represent all Iraqis.

After its enactment, the law was immediately criticised and even rejected by FG on the grounds that it was unconstitutional. It was argued that the law breached the constitutional exclusive federal powers, for instance by offering tax exemptions according to the (Art. 40). Moreover, it contradicted the federal Financial Resources Law regarding revenue collection by initiating a different system.<sup>620</sup> In addition, it has been argued, due to the absence of a new federal law on oil and gas so far, the laws that regulate this sector in Iraq are still the laws enacted by the former Iraqi regime, for example Law No: (84) of 1985. They have still prevailed, valid and enforced, and have not been cancelled, whether by the federal Supreme Court or by "Bremer orders",<sup>621</sup> or

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models.' None of the above was achieved. Therefore, the KRG unilaterally signed the contracts. See: Fouad Al-Ameer, *Novelties in the Iraqi oil Issue* (n 587) 48.

<sup>619</sup> The Article 2/second, of the Oil and Gas Law of The Kurdistan Region – Iraq, states “Pursuant to Article 115 and paragraphs (1) and (2) of Article 121 of the Federal Constitution, no federal legislation, and no agreement, contract, memorandum of understanding or other federal instrument that relates to Petroleum Operations shall have application except with the express agreement of the relevant authority of the Region.”

<sup>620</sup> Yahia Said (n 613).

<sup>621</sup> From 2003, until the handover of power to the Iraqis on 28 June 2004, One hundred orders by the The Coalition Provisional Authority (CPA) led by Paul Bremer were issued. ‘These orders are binding instructions or directives to the Iraqi people that create penal consequences or have a direct bearing on the way Iraqis are regulated, including changes to Iraqi law.’ According to The CPA regulation number 1, section 2, all laws in force in Iraq as of April 16, 2003 shall continue to apply in Iraq, unless suspended or replaced by the CPA or superseded by legislation issued by democratic institutions of Iraq. See: ‘CPA

the authorities that followed. These laws authorize the MoO and the Federal Council of Ministers exclusively the right to dispose of all matters relating to oil and gas.<sup>622</sup>

The KRG has rejected the FG's arguments and asserted its right to issue the law, by presenting a legal opinion which argued that the Kurdistan Region Oil and Gas Law was consistent with the Constitution of Iraq and was effective for governing the development of oil and gas in Kurdistan.<sup>623</sup> In the continued absence of agreement pursuant to Article (112/second) on the "necessary strategic policies", the KRG would be entitled to manage its oil and gas resources, and should do so openly in a manner which gives effect to the principle set out that Article.<sup>624</sup> Additionally, the opinion challenged the FG's perspective by asserting that

The KRG Oil and Gas Law is drafted with careful attention to the Constitution of Iraq. Assuming its due enactment according to the regional procedures, the KRG Law is effective to govern the development of oil and gas in the Kurdistan Region. If, as I am instructed, there are no "*present fields*" in that region for the purpose of Article 112, first, there is no requirement for *joint management* of post- extraction oil and gas from such fields. In the continuing absence of agreement pursuant to Article 112, Second, on the "necessary strategic policies", the KRG is entitled to manage its oil and gas resources, and should do so openly in a manner which gives effect to the principles set out in that Article.<sup>625</sup>

This is still the current firm position of KRG in dealing with oil issues with Iraq. This KRG law indicates how deep the disagreement is and how difficult it is to resolve the issues through legal and judicial mechanisms in a system where judicial authorities have not been empowered to play their decisive role. Again, a resolution of this conflict requires steps to develop federalism in Iraq towards a more executive approach so that collaboration can be built to fill the existing legal and judicial gap regarding executive cooperation between KRG and FG.

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Official Documents' (The Coalition Provisional Authority) <<https://govinfo.library.unt.edu/cpa-iraq/regulations/#Orders>> accessed December 4, 2018.

<sup>622</sup> Fouad Al-Ameer, *Novelties in the Iraqi oil Issue* (n 587).

<sup>623</sup> James Crawford (n10).

<sup>624</sup> *ibid* (n10).

<sup>625</sup> *ibid*(n10).

### 5.7.3 Oil Contracts

Oil contracts are among the most controversial issues. Who has the power to negotiate, sign and implement the contracts is a major disagreement between the KRG and FG. Generally, most of the FG's contracts take the form of technical service contracts (TSC), while most of the KRGs' oil contracts are production sharing Contracts (PSCs).<sup>626</sup> The dispute started when the KRG began to sign contracts unilaterally with the IOCs.<sup>627</sup> Since 2006, the KRG has signed around 50 PSCs with different oil companies unilaterally without the approval of the FG. The KRG asked the FG to pay the financial dues to those companies for expenses set out in the contracts. The FG has refused to pay for contracts that have been signed without its approval and without its knowledge.<sup>628</sup>

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<sup>626</sup> In the PSCs, the IOCs spend their money in all exploration and producing operations, in return they get an amount of oil called (cost oil), as well as sharing the profits (Profit oil) with a government, the owner of the resources. While based on the (TSC) the international oil companies IOC operate for the national company as a contractor, which means they have to bear all the financial risks and all the costs in their activities in upstream in return for this they receive a fixed reward fee per barrel. The service contract is for short-term, extending for a period of nine years or less, compared with twenty or thirty years in the PSCs. In the service contracts, it may not be a strong motivation for companies to reduce long-term costs, because the field falls under government control. While in PSCs, which have a long-term, contractor (the companies) shall have better overall performance of the field and the value of much of the government is greater. According to service contracts, the utility of the company will be short-term, where the recovery of costs and benefits offset by a contractor end with the delivery date expires. They also lack the incentive to use the new technology, private or hire the best people because of the fixed fee and the short duration of the contract or grant back down a few features in exchange for high performance. While the interest earned by the company in the long production sharing contracts linked with the age of the field. See: Nakhle, C (2008) Iraq's Oil Future: Finding the Right Framework. Surrey Energy Economics Centre, University of Surrey October 2008.

<sup>627</sup> It is worth mentioning that the PSCs was highly recommended and emphasized by the US Department of State, Oil and Energy Working Group in 2003, in its formal policy recommendations for Iraq's post-Saddam Hussein oil policy. See: Farrah Hassen (n 556).

<sup>628</sup> It is worth mentioning, Production Sharing contract or agreement (PSC or PSA) is not something new in Iraq. After 1991 and during the economic sanction imposed by the international community, Saddam's regime was trying to use oil as a political weapon, by using this type of contract with some IOCs. Serious negotiations with a number of IOCs had been begun targeting, mainly, putting pressure on the governments of those companies to break the siege imposed on Iraq. For instance, with Total, Chinese companies led by CNPC Company in 1997 and with Russian Lukoil Company in 1997. All those attempts failed, it became clear to the Iraqi government that its efforts have not achieved, any political

The FG has always challenged the constitutionality of KRG's contracts on the following grounds. First, the KRG or any subnational government has no power to sign any contract about oil and gas unilaterally because oil is a national resource owned by all Iraqis. Thus, contracts of oil need to be under the direction of FG. All successive Iraqi governments, since 2003 to date, assert that the FG and the Federal Oil Ministry are the only entities that have the constitutional and legal powers in the conclusion of contracts and agreements relating to the development and investment of oil and gas wealth.<sup>629</sup> Hence, the FG claims, all these contracts are illegal because they are in breach of the 2005 Constitution.<sup>630</sup>

Second, FG argues that KRG's contracts constitute a privatization of Iraqi oil, granting significant privileges and very high profits to IOCs, which would harm the national economy of Iraq which mainly depends on oil revenue.<sup>631</sup> Third, the KRG violated the constitution, through the unilateral management of oil and gas in so-called the disputed areas. It signed several contracts with IOCs in these areas. For instance, the contract with ExxonMobil is in the areas called Alqosh, and Bashiqa.<sup>632</sup> These areas officially

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breakthrough and remained all these contracts and agreements already frozen without achieving any work. The majority of well-known companies refrained from participating due to the fear of imposing penalties. After failing those efforts, Iraq cancelled the contract with the Russian company Lukoil in December 2002, before starting the war in 2003. See: Essam Al-Chalabi (n 546).

<sup>629</sup> See: Iraqi Oil Minister: the Signing of Contracts and Marketing 'Red Line'(n 540); Marshall S, 'Iraq Deals 'a Legal Minefield' (*Upstream Online Latest oil and gas news* October 6, 2016) <<https://www.upstreamonline.com/epaper/1019739/iraq-deals-a-legal-minefield>> accessed December 27, 2018.

<sup>630</sup> Anthea Pitt, 'Baghdad Official Slams 'Invalid' Kurd Deals' (*Upstream Online | Latest oil and gas news* November 25, 2007) <<https://www.upstreamonline.com/live/1035106/baghdad-official-slams-invalid-kurd-deals>> accessed December 27, 2018; Michael Kavanagh, 'Iraq Bans Chevron over Kurdistan Deal' *Financial Times* (July 24, 2012) <<https://www.ft.com/content/570981f2-d5a4-11e1-af40-00144feabdc0>> accessed December 27, 2018.

<sup>631</sup> See: The statement of the federal oil ministry available at: Alsumaria.TV, 'Oil Ministry Cancels the Qualification of Chevron American Contract with the Kurdistan Region.' Arabic Version (*Alsumaria* July 24, 2012) <<https://www.alsumaria.tv/news/60368/alsumaria-news/ar>> accessed December 27, 2018.

<sup>632</sup> In November 2011, Exxon Mobil was first major international oil firm to sign petroleum contracts with the KRG, for developing six blocks located in the disputed areas between the KRG and the FG. This provoked the FG to threaten the firm, by expelling it from a contract in southern Iraq. See: Dow Jones Newswires and Hassan Hafidh, 'ExxonMobil Sets December for Bids for Iraq Contract Stake' (*RIGZONE Empowering People in Oil and Gas* November 8, 2012) <[https://www.rigzone.com/news/oil\\_gas/a/121969/exxonmobil\\_sets\\_december\\_for\\_bids\\_for\\_iraq\\_contract\\_stake/](https://www.rigzone.com/news/oil_gas/a/121969/exxonmobil_sets_december_for_bids_for_iraq_contract_stake/)> accessed December 27, 2018.

still belong to Mosul Governorate. Also the contract with Hunt Company is in an area officially part of Mosul. Similarly, there are contracts on the fields belonging to Kirkuk Governorate. Because these areas are officially called the disputed areas, KRG should not have the power to manage their fields even though the areas are practically ruled by the KRG.<sup>633</sup>

Finally, the FG raises another legal point which is formulated by Joseph C. Bell and Cheryl Saunders. they denies the KRG's argument regarding the validity of the contracts according to article 141 which includes the contracts signed by KRG since 1992 and prior to the adoption of the Constitution. On the basis of that article, they argue that these contracts must not be in contravention of the constitution. Since the contracts derogate the federal and regional governments' authorities in the Article 112, the contracts are invalid. This is particularly the case where such contracts relate to matters falling under the exclusive authority of the federal authority according to the Article 110, for instance, foreign sovereign economic and trade policy).<sup>634</sup>

In response to the FG's challenges and rejections, KRG presents the following arguments. First, it reiterates its interpretation of article 112 of the constitution, claiming that the contracts are for discovering new oil fields and for exploring future fields. Therefore, KRG is constitutionally entitled to exercise exclusive power for signing contracts with respect to future explorations of oil. The KRG frequently reiterates 'under the Constitution, all nonproducing fields (at the time of its writing) fall under the sole power of the regions and governorates and therefore contracts were signed between the KRG and the IOCs.'<sup>635</sup>

Second, KRG argues that the contracts are signed on the basis of KRG's oil and gas law. Because there is no national legislation or FG law regarding oil management, KRG has asserted that its law has given authority to KRG and because the law is constitutional, in KRG's perspective, the contracts are constitutional.<sup>636</sup>

Third, KRG argues there is a memorandum between the KRG and FG signed in 26/02/2007 which allows KRG to sign oil contracts in case of a failure to approve the

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<sup>633</sup> Fouad Al-Ameer, *Novelties in the Iraqi oil Issue* (n587).

<sup>634</sup> See: Joseph Bell and Cheryl Saunders(n9).

<sup>635</sup> See: KRG Cabinet, 'Statement On Oil & Gas Policy by the Kurdistan Regional Government' (n 558).

<sup>636</sup> *ibid.*

federal oil and gas law before May 2007.<sup>637</sup> Accordingly, the KRG argues that any law related to the article 112 of the constitution, must be agreed upon by the producing governorates and the regions. If they do not reach any agreement in this regards, the regions and the governorates have the right to enacting their own laws, which will have superiority over the federal law according to the Article 115.<sup>638</sup> This understanding has been put in article 74 (8<sup>th</sup> clause) of the constitutional draft of the KRG.<sup>639</sup>

Whether such agreement by the KRG and FG can replace more formal and constitutional measures, institutions and provisions is debatable. However, this seems to be an effective mechanism for solving the disputes in Iraq. This is at least what KRG attempts to establish. James Crawford argues;

Regarding the contracts entered into by the Kurdistan Region authorities for oil and gas development since 1992, if and to the extent that their provisions are not inconsistent with the Constitution, I see no reason to question their validity or legal effect. In particular, and pending agreement between the KRG and federal authorities on strategic policies, the authority of the KRG to authorise the conclusion and implementation of such contracts is, in my opinion, unqualified. When such policies are agreed, they will need to take account of existing legal commitments binding at that time.<sup>640</sup>

Furthermore, in this regard, Zedalis argues, by analysing the articles 112,110, 114, 115, 121 all together as a package, there are several reasons for concluding that the subnational governments such as the KRG have the jurisdiction to sign oil and gas development agreements with IOCs. He added that since there is no reference in the Article 110 giving the FG the power over oil and gas, there is nothing to restrict the subnational governments to exercising this competence. Hence, oil and gas development agreements that have been concluded by the KRG with IOCs have many reasons to be considered constitutionally authorized.<sup>641</sup>

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<sup>637</sup> Fouad Al-Ameer, *Novelties in the Iraqi oil Issue* (n 587)48.

<sup>638</sup> See: KRG cabinet, 'Oil and Gas Rights of Regions and Governorates' (n 555)

<sup>639</sup> Article 74/Eighth states "Work jointly with the Federal Government to formulate the strategic policies necessary to develop oil and gas resources. All matters related to the Region's resources must meet with the approval of the Parliament of Kurdistan."

<sup>640</sup> James Crawford (n10)14.

<sup>641</sup> Zedalis, *The Legal Dimensions of Oil and Gas in Iraq* (n 8).

Fourth, regarding the contracts that were signed before the 2005 constitution, the KRG argues that all those contracts have a constitutional basis under article 141.<sup>642</sup> This article validates those contracts and their continuation.<sup>643</sup>

Fifth, another practical reason is put forward by KRG which is the difficulty and impracticability of cancelling the contracts already signed by KRG. Because most of the contracts are long-term contracts, 25-30 years, it is impractical to consider their cancellation. Since the IOCs have spent substantial amounts of money for exploration and development; it is not easy to be cancelled and compensated by the KRG or the FG.<sup>644</sup> Also, IOCs' such as ExxonMobil see that signing PSC with the KRG is legal and does not violate the Iraqi constitution. Alan Jeffers, a spokesman for Exxon, "said the company followed "all laws and regulations" in pursuing the Iraqi Kurdistan deal".<sup>645</sup>

Sixth, KRG believes that 'the Production Sharing Contracts in the Kurdistan Region have been a great success for Iraq. They have meant that an estimated 45 billion barrels of oil and 36 tcm of gas can be added to Iraq's total reserve figures.'<sup>646</sup>

Seven, the KRG has contended that this model of contract has been supported by the international expert on petroleum fiscal regimes for being a successful economic model for oil management. Pedro van Meurs argues 'the Production Sharing Contract model currently applied by the KRG (KRG-PSCs) is immensely better for Iraq's national interests than the Risk Service Contracts (EDP-RSCs) that have been proposed by the Ministry of Oil (MoO) in Baghdad'. He added

There is therefore, no doubt that applying the EDP-RSC (A risk service contract for exploration, development and production) concept [proposed by the MOO], to the KR would be disastrous for Iraq from the point of view of the

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<sup>642</sup> Article 141 states, "Legislation enacted in the region of Kurdistan since 1992 shall remain in force, and decisions issued by the government of the region of Kurdistan, including court decisions and contracts, shall be considered valid unless they are amended or annulled pursuant to the laws of the region of Kurdistan by the competent entity in the region, provided that they do not contradict with the Constitution."

<sup>643</sup> KRG Cabinet, 'Statement on Oil & Gas Policy by the Kurdistan Regional Government' (n588).

<sup>644</sup> Christopher B Strong, *The Oil and Gas Law Review* (7<sup>th</sup> Ed, Law Business Research Ltd 2018)195.

<sup>645</sup> Missy Ryan and Steven Mufson, 'How Exxon, under Rex Tillerson, Won Iraqi Oil Fields and Nearly Lost Iraq' *The Washington Post* (January 9, 2017) <[https://www.washingtonpost.com/world/national-security/how-exxon-under-rex-tillerson-won-iraqi-oil-fields-and-nearly-lost-iraq/2017/01/09/5f6efa28-d40c-11e6-9cb0-54ab630851e8\\_story.html?utm\\_term=.760479a42e18](https://www.washingtonpost.com/world/national-security/how-exxon-under-rex-tillerson-won-iraqi-oil-fields-and-nearly-lost-iraq/2017/01/09/5f6efa28-d40c-11e6-9cb0-54ab630851e8_story.html?utm_term=.760479a42e18)> accessed December 5, 2018.

<sup>646</sup> See: KRG Cabinet, 'Statement On Oil & Gas Policy by the Kurdistan Regional Government' (n588).



maximization of the value of government revenues from oil and gas, compared to the current ongoing implementation of the KRG-PSC's.<sup>647</sup>

His rationale is:

The KRG-PSC strongly aligns the interests of the investor and the government in terms of exploration objectives. The investor has a strong interest in finding large and low cost fields and so does the government. The investors will undertake every effort to find the largest and most profitable fields.<sup>648</sup>

Finally, another more hidden reason for KRG to deal with its oil and gas unilaterally is related to its ambition for economic independence, which could eventually lead to political independence. This has always motivated KRG to manage its oil and gas unilaterally. This is obviously not a legal justification as much as it is the economic and political aspect of oil disputes between KRG and FG.<sup>649</sup> Therefore, it is expected that the disputes may not be settled easily because both sides need to control oil to avoid being used against their political and economic agendas. Recently, KRG has criticised the FG for its contract with BP in the disputed city of Kirkuk, arguing that the contract is unconstitutional because the fields in Kirkuk are the "present fields;" therefore, according to the constitution, they must be managed collaboratively between the FG and the governorate.<sup>650</sup>

The abovementioned points are KRG's constitutional, legal, administrative and economic rationales used for justifying the oil contracts signed by KRG for oil fields before 2005, as well as future oil explorations after 2005. Whatever the legitimacy and credibility of these arguments, however, the extent to which the KRG has been able to live up to them in terms of its own conduct is questionable. Just as with the FG, the actions of the KRG in practice have fallen short.

It is worth noting that there is no evidence whether and to what extent these contracts have been successful in achieving the goals and ambitions of the people of Kurdistan

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<sup>647</sup> KRG Cabinet, 'International Expert Finds KRG Oil Contracts 'in the National Interests', 'Far Superior' for Iraq than Model Contract Proposed by Baghdad Federal Oil Ministry' (Kurdistan Regional Government June 30, 2008) <<http://cabinet.gov.krd/a/d.aspx?l=12&s=010000&r=223&a=24710>> accessed December 5, 2018.

<sup>648</sup> *ibid.*

<sup>649</sup> KRG Cabinet, 'Prime Minister Barzani's Speech at CWC Oil and Gas Conference' (n 563).

<sup>650</sup> See: KRG Cabinet, 'Statement On Oil & Gas Policy by the Kurdistan Regional Government'(n588).

and the rest of Iraq in their strategic oil policy. On the contrary, it appears that some of these PSCs were not much economically beneficial for Kurdistan, as in the case of the development of Taq Taq field, based on PSC with Addax Petroleum and Genel Energy where there were expectations of substantial reserves of very light oil. This was considered the most valuable discovery in the northern oil fields since the discovery of the Kirkuk field. Three wells were drilled in the late 1970s, and found light oil, although it was not drilled deep enough to reach the correct formations. The reserve was estimated at that time as containing 360 million barrels, but a lot of geologists who were sure that the reserve could be up to 10 times that figure. Hence, some argue, granting the IOCs 15% share, in a ready oil field with very high-quality, without any risk or fatigue by IOCs, is considered too generous for the company.<sup>651</sup> In contrast, Genel Energy Company in its report issued in March 2017, showed that the production capacity of this field was downgraded from 36000 bpd (end of 2016) to 19000 bpd. Not only this, but the estimated reserve was also revised downward from 172 MMbbls, by the end of 2015, to 61 MMbbls by the end of 2016.<sup>652</sup>

Practically, the KRG in its oil strategy has failed to provide enough revenue for its people in terms of full and regular salaries. The KRG has admitted on many occasions that the region has a debt of around 20 billion dollars and faces an ongoing financial crisis.<sup>653</sup>

Given the lack of accountability, transparency, and institutionalization in the sector of oil and gas in Kurdistan, there is no accurate information on the oil and gas industry and its revenue.<sup>654</sup> There is a huge corruption in the oil and gas sector, facilitated by a lack

<sup>651</sup> See: Fouad Al-Ameer, *Notes About The New In Oil and Gas Contracts Signed by The Kurdistan Regional Government, and The Regional Oil Policy* (Arabic version 2013).

<sup>652</sup> See: Genel Energy, 'TAQ TAQ' (Genel Energy) <<https://www.genelenergy.com/operations/kri-production/taq-taq/>> accessed December 5, 2018.

<sup>653</sup> 'Finance Minister in Iraqi Kurdistan Summoned for Hearing before Parliament' (*Kurd Net - Ekurd.net Daily News* October 8, 2015) <<https://ekurd.net/kurdistan-finance-minister-hearing-2015-10-07>> accessed December 28, 2018.

<sup>654</sup> Face to face Interview with Sherko Jawdat Mustafa, head of The committee of Industry, and Natural Resources in Kurdistan Parliament, 'The Dispute over Oil and Gas management between the FG and KRG' (Sulaimanya May 13, 2016) personal; Also it has been stated by the vice-president of Kurdistan Region and PUK First Deputy Kosrat Rasul that Ambiguity of oil matter is the main cause for all problems in Kurdistan. See: Rudaw TV, 'Kosrat Rasul Ali Talks to Rudaw' (January 16, 2017) <<http://www.rudaw.net/sorani/kurdistan/160120172?keyword=کۆسرهت رهسۆل>> accessed December 28, 2018.

of transparency regarding the KRG's use of the oil and gas revenues. There is real control over oil and gas sector by the two dominant parties in the region, as confirmed on several occasions by opposition parties in Kurdistan. All contracts have been signed and finalized by the ministry of natural resource (MoNR), without the supervision of the Kurdistan parliament.<sup>655</sup> The Minister of Natural Resource Ashti Hawrami has been accused of taking kickbacks from oil deals. He reportedly received 12 armoured sports utility vehicles from an oil and gas company, based in the United Arab Emirates, a week before their contract entered into effect. Also, in October 2008, Hawrami worked as the middleman in a deal involving the Norwegian oil company DNO, the seller of 43 million shares to the Turkey's Genel Energy.<sup>656</sup>

In addition, it has been argued by the chairman of the finance committee in the Kurdistan parliament, that the data that has been revealed by the ministry of natural resources in the region is false and does not match the actual oil incomes of the region. The revenue that comes from oil and gas and collected by the KRG is more than enough to pay the salaries of employees in the region.<sup>657</sup> Hence, as Erin Banco argue, 'The money made in Iraqi Kurdistan's oil industry never trickled down, largely because of the corruption of Kurdish officials, a reality well-known to the Americans working with them.'<sup>658</sup>

Furthermore, since July 2014, the KRG has started selling oil from the Kirkuk areas, the disputed oil-rich city, specifically from the Bai Hassan fields and the Avana dome, as

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<sup>655</sup> For instance, regarding the 50-year energy deal in Jun 2014 between the KRG and Turkish government regarding oil and gas and its relevant matters, such as exporting Kurdish oil, without any approval by the Iraq's central government. The opposition MPs in the Kurdistan Parliament argue that they do not know anything about its details. Although, the prime minister and the natural resource minister have been asked by the MPs to provide more details, but they did not, due to security justifications as they claim. See: MEE and agencies, 'Turkey and Iraq's Kurds Agree a 50-Year Energy Deal' (Middle East Eye June 6, 2014) <<https://www.middleeasteye.net/news/turkey-and-iraqs-kurds-agree-50-year-energy-deal-112046143>> accessed December 5, 2018.

<sup>656</sup> This case has been revealed by the emails between Hawrami and a top executive of the company. See: Erin Banco, 'The Curse of Oil in Iraqi Kurdistan – GlobalPost Investigations' (GlobalPost Investigations January 17, 2017) <<https://gpinvestigations.pri.org/the-curse-of-oil-in-iraqi-kurdistan-1c9a9a18efd1>> accessed December 5, 2018.

<sup>657</sup> Payam TV, *Dr. Izzat Sabir Talks to Payam TV* (September 3, 2017) <<https://www.youtube.com/watch?v=z4tM42-IhV0>> accessed December 28, 2018.

<sup>658</sup> For more details about corruption in oil sector in Kurdistan see: Erin Banco (n653).

well as Khurmala in Makhmour district.<sup>659</sup> All these fields are categorized as present fields.<sup>660</sup> It has been argued that billions of dollars of oil revenue from those fields have been appropriated by the main two Kurdish parties. Even people of Kirkuk have not benefited from their oil revenue; instead, what they receive is environmental pollution only.<sup>661</sup>

In addition, most of the local oil companies are owned by persons close to the two ruling parties. For instance, Kar Group Company is close to the Kurdistan Democratic Party (KDP), and Nokan Group Company which is controlled by the Patriotic Union of Kurdistan (PUK). The aim of those firms is to generate huge profits for their political parties and they have contributed in creating a massive corruption across Kurdistan.<sup>662</sup> Some of these companies such as Meer Soma, a “subsidiary” of the Nokan Group, has been accused by smuggling oil from areas controlled by Islamic State of Iraq and Syria (ISIS).<sup>663</sup>

Moreover, due to the political and legal problems mentioned before, and in order to attract international customers, KRG sells its oil at a 9% discount compared to oil of similar quality from other countries.<sup>664</sup> This is another challenge facing the optimal use

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<sup>659</sup> The unilateral selling of Oil in these fields by the KRG was ended on 16th of October 2017, when the Iraqi army and the Shiite militia seized the city of Kirkuk and other disputed areas.

<sup>660</sup> In 11 July 2014, the KRG's Oil Protection Forces took over the oil fields in the city of Kirkuk, as well as Makhmour's oil fields after defeating the Iraqi army by the ISIS. The KRG argued that its action was to secure the oil fields from sabotage. See: 'KRG Statement on Recent Events at Oil Facilities and Infrastructure in Makhmour District' (mnr.krg.org July 11, 2014) <<http://mnr.krg.org/index.php/en/press-releases/394-kr-g-statement-on-recent-events-at-oil-facilities-and-infrastructure-in-makhmour-district>> accessed December 5, 2018.

<sup>661</sup> See: MP, Ali Hama Salih, TV programme in NRT TV on 13/11/2016. Online at: <http://www.nrttv.com/Details.aspx?Jimare=53956#link>.

<sup>662</sup> See: Mufid Abdulla, “Nokan Group and the PUK Business Empire” (The Kurdistan Tribune May 26, 2012) <<http://kurdistantribune.com/nokan-group-puk-business-empire/>> accessed December 5, 2018; <http://payam.tv/dreje-y-hewal.aspx?id=14167&LinkID=1>, ‘Ali Hama Salih, Press Conference in Sulaymaniyah Governorate,’ Payam TV (November 13, 2016).

<sup>663</sup> Nafeez Ahmed, ‘UK, US Turn Blind Eye to Islamic State Oil Sales’ (Middle East Eye July 13, 2015) <<https://www.middleeasteye.net/columns/uk-us-turn-blind-eye-islamic-state-oil-sales-553879014>> accessed December 5, 2018.

<sup>664</sup> Face to face interview with Ali Hama Salih, member of the committee of industry, and natural resources in Kurdistan Parliament since 2013 ‘The Dispute over the Management of Oil and Gas between the Federal Government and KRG.’ (April 20, 2016) personal; Walid Khoudouri, ‘Kurdistan Region

of oil and gas for the sake of development in Kurdistan and Iraq. Furthermore, the KRG has used different techniques for getting cash. For instance, an email, sent on 19 March 2016 and revealed by WikiLeaks, stated that the KRG's natural resources minister Ashti Hawrami, for getting cash, proposed a plan to the Turkish energy Minister for selling a part of KRG's share of the oil fields' divisions for \$5 billion.<sup>665</sup> Also, the KRG has borrowed money from some international companies, such as Glencore, then repaying the debt in monthly instalments through giving crude oil to these companies which is worth much more than the owed loan, and with high interests.<sup>666</sup>

In terms of its status regarding its contracts with foreign firms, the KRG has also failed to perform effectively. For instance, the legal dispute between the KRG represented by the natural resource ministry and DANA Gas firm based in United Arab Emirates, with its partners Crescent Petroleum, OMV of Austria and Hungary's MOL, over contractual disputes for work at the Khor Mor gas field. The KRG lost this legal case in favour of the company and London Court of International Arbitration ordered KRG to pay \$2 billion dollars as compensation.<sup>667</sup>

Despite the arguments made by the FG against the KEG, claiming that its oil and gas contracts were illegal and violated the constitution, the FG is not a good example in the oil and gas sector. The FG, through the ministry of oil, signed several oil contracts and licensing rounds, without a valid legal basis, because the new constitution does not give the ministry of oil this power. More importantly, the ministry acted unilaterally in this regards, without any cooperation or consultation with the producing governorates. However, all those contracts failed to increase the production. This trend has been

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Challenges Baghdad with Oil Exports' (Al-Monitor April 11, 2018) <<https://www.al-monitor.com/pulse/business/2014/07/turkey-kurdistan-oil-kr-g.html>> accessed November 14, 2016.

<sup>665</sup> This 5 billion, as was stated by the minister, is for covering the loans that have been paid to the KRG by the Turkish government, and other outstanding payments. See: 'Strictly Private and Confidential 19th March 2016' (WikiLeaks) <<https://wikileaks.org/berats-box/emailid/30563>> accessed January 30, 2017.

<sup>666</sup> See: Dimtry Zhdannikov, 'Exclusive: Glencore Seeks \$550 Million to Raise Stakes in Kurdish...' (Reuters November 18, 2016) <<https://www.reuters.com/article/us-glencore-oil-kurdistan-exclusive/exclusive-glencore-seeks-550-million-to-raise-stakes-in-kurdish-oil-game-idUSKBN13D1O7>> accessed December 5, 2018.

<sup>667</sup> According to a contract signed in 2007 between KRG and DANA Gas, The latter was granted a deal to invest for 25 years to develop the Khor Mor and Chemchamal gas fields. Then later a dispute was raised over the deal, which presented in front of London Court of International Arbitration in October 2013 and was decided on November 27. See: DANAGAS, 'Annual Reports 2015' (Pages - INVESTORS2015) <<http://www.danagas.com/en-us/investors/annual-reports>> accessed December 9, 2017.

criticised even by the MPs and politicians at the federal level. It has been argued that, given doubts regarding the legitimacy of those contracts, they need to be revised and approved by the CoR on behalf of the Iraqi people. The only institution represents the whole people of Iraq is the CoR and this body must legitimize those contracts rather than the ministry of oil. Also it has been argued that these Oil licensing rounds signed by former oil minister Hussein al-Shahristani with IOCs is a sale of the wealth of Iraq for a period of thirty years to come. These contracts which are signed by the MoO have led to higher oil production costs and reducing the government's share.<sup>668</sup>

With regard to corruption in the FG, huge bribes were channelled to Iraqi government officials by the Unaoil Company on behalf of its clients to help earn billions of dollars' worth of government contracts. In addition, embezzlement by a few people in power is another type of corruption in Iraq, causing the country to lose a huge amount of money.<sup>669</sup> Furthermore, the former head of the Commission of Integrity, Musa Faraj, confirmed that in just five years, 2003-2009, Iraq lost \$ 250 billion due to corruption and mismanagement; 80 billion were in the oil sector because of theft and organized smuggling of oil by gangs backed by parties and militias in southern Iraq. Oil smuggling operations in Iraq were manifested in two ways, either openly by the ruling parties and their militias, or by making holes in the oil pipes, installing pumps and loading in ships or tankers destined for oil transport and then selling it.<sup>670</sup> This is also was confirmed by a former member of the Integrity Committee in the Iraqi parliament, Ardalan Nouredine, where he said that the value of smuggling of crude oil and its derivatives from Iraq amounted to 90 billion dollars in 5 years.<sup>671</sup>

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<sup>668</sup> See: Wael Abdul Latif, 'Judge Wael Abdul Latif: Iraq Is Facing a Major Disaster in 2016 ... And the Rounds of Oil Licensing Leads Iraq to the Unknown!!' (*Kitabat Fil Mezan* November 27, 2015) <<https://www.kitabat.info/subject.php?id=70726>> accessed December 28, 2018; 'A Parliamentarian Criticizing the Ministry of Oil after the High Cost of Barrel Production to 23 Dollars' (*Al Mirbad* December 13, 2015) <<http://www.almirbad.com/news/view.aspx?cdate=13122015&id=33bc1e02-404c-4dbd-bbee-527128b35b1e>> accessed December 28, 2018.

<sup>669</sup> 'The Bribe Factory: Exposing Oil Corruption in Iraq' (The Age) <<https://www.theage.com.au/interactive/2016/the-bribe-factory/day-1/iraq-feature.html>> accessed October 16, 2016.

<sup>670</sup> Musa Faraj, *Corruption in Iraq, a ruin of the example and the chaos of governance* (Noor Publishing, Arabic Version 2017).

<sup>671</sup> "النزاهة البرلمانية: قيمة تهريب النفط الخام ومشتقاته من العراق بلغت 90 بليون دولار في 5 أعوام" (*rudaw.net* October 25, 2017) <<http://www.rudaw.net/arabic/business/251020171>> accessed May 15, 2019

In short, regardless of the arguments made by the FG and KRG on the legal status of the oil and gas contracts, it can be argued that the performance of the two governments in the management of the natural resource is weak and has not contributed to improving the Iraqi economy so far. Also, it should be noted that there is no specific constitutional article precisely referring to these contracts, nor is there any decision by the FSC resolved this dispute. What they say is their interpretation of the constitution in this regard. Therefore, the ongoing conflicts have not yet been resolved, but are worsening day by day. Hence, the only way to reach a solution is through a political bargain between these two governments, which is not an ideal solution, but an alternative to end the continuing disputes. They have to manage and deal with oil and gas contracts based on the collaborative model.

#### **5.7.4 Other Practical Disputes**

Another contentious issue is exporting and marketing oil and gas. The dispute has escalated and intensified since KRG started to export oil unilaterally via a newly constructed pipeline that directly connects KR's oil with the existing Iraqi-Turkish pipeline in Turkey.<sup>672</sup> The Kurdish pipeline lies within the KRG's official boundaries, and it is linked to an independent new metering station built by the KRG. This new pipeline is distinct from the current Iraqi-controlled station at the Turkish border. This new pipeline is fully controlled by the KRG without intervention and monitoring from the FG.<sup>673</sup>

This unilateral action by the KRG was a response to what it claimed was financial discrimination by the FG. In this regard, Ashty Hawramy, the minister of natural resources, argued 'Effectively, we have been financially discriminated against for a long

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<sup>672</sup> Even before this project, there was exporting of oil to Turkey and Iran through oil tanker trucks. See: 'Oil Tank Trucks Make over 5,300 Trips Daily, Iraqi Kurdistan Says' (Kurd Net - Ekurd.net Daily News November 16, 2015) <<https://ekurd.net/oil-tank-trucks-kurdistan-2015-11-16>> accessed October 5, 2017.

<sup>673</sup> Denise Natali, 'How Independent Is the Iraqi-Kurdish Pipeline to Turkey?' (Al-Monitor April 11, 2018) <<https://www.al-monitor.com/pulse/originals/2013/11/iraqi-kurdish-pipeline-turkey-oil-policy-export.html>> accessed December 5, 2018.

time. By early 2014, when we did not receive the budget, we decided we need to start thinking about independent oil sales.<sup>674</sup>

On the other hand, the FG argues that the federal Ministry of Oil (MoO), represented by State Organization of Marketing Oil (SOMO), is the only company with exclusive authority to export the Iraqi oil and gas. Thus, what KRG does is not constitutional unless it is authorised and directed by FG. The official response of the FG regarding KRG's pipeline, issued by the former oil minister Abdul Kareem Luaibi, stated 'All companies...were notified not to deal with the (Kurdish) region to buy any quantity of oil which is considered as smuggled.' He added that the government in Baghdad will take legal action against Ankara and would blacklist any companies dealing with oil piped to Turkey from Kurdistan region, without permission from Baghdad, which has sole rights to manage energy resources.<sup>675</sup> Therefore, for the FG any shipment of oil from the KRG without its consent is considered illegal and smuggling. The FG's position is apparently based on article 110 because exporting oil involves international treaties between two countries.<sup>676</sup> This attitude is supported by some advisors in natural resources, such as Bell & Saunders, in an opinion that links Article 112 with exclusive powers in the Article 110 which grants authority to FG with respect to "formulating foreign sovereign economic and trade policy," and "regulating commercial policy across regional and governorate boundaries in Iraq." They infer that all the shared competencies, including those mentioned in Article 112, is confined by Article 110. Their basic approach is that the FG has the exclusive power to formulate policies regarding international trade and investment, even inter regional trade and investment, which crossing national, regional or governorate boundaries.<sup>677</sup> It is thus impossible to export oil and gas without the consent of the federal authorities, which have jurisdiction under Article 110.<sup>678</sup> This means that exporting of oil and gas, whether across regional

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<sup>674</sup> Dmitry Zhdannikov, 'Exclusive: How Kurdistan Bypassed Baghdad and Sold Oil on Global...' (Reuters January 4, 2015) <<https://www.reuters.com/article/us-iraq-kurdistan-oil-idUSKCN0T61HH20151117>> accessed December 5, 2017.

<sup>675</sup> See: Ahmed Rasheed, 'Iraq to Punish Turkey, Kurds over 'Smuggled' Oil – Minister' (Reuters January 17, 2014) <<https://uk.reuters.com/article/uk-iraq-oil-kurdistan/iraq-to-punish-turkey-kurds-over-smuggled-oil-minister-idUKBREA0G0WA20140117>> accessed December 6, 2018.

<sup>676</sup> Ruba Husari (n617).

<sup>677</sup> See: Joseph Bell and Cheryl Saunders (n9).

<sup>678</sup> Rex Zedalis, 'The Role Provincial Governmental Units Can Play Regarding Oil And Gas Development Agreements In The Kurdish North: Allocation Of Iraqi Constitutional Power' (2013) 6 The Journal of World Energy Law & Business 314, 338-339.



and governorate boundaries or crossing international borders, belong to the exclusive power of the FG.

Furthermore, the Federal Supreme Court, in its latest decisions No (66) on 23/01/2019, confirmed on this situation indirectly. When the FSC issued a constitutional ruling on the appeals contained in articles in the law of the INOC (Iraqi National Oil Company) No. (4) Of 2018. It ruled unconstitutional many of the articles and paragraphs in this law. Including, paragraph (III and V) of Article (4) in relation to the oil marketing process, due to its contradiction to Article (112) of the Constitution. The court ruled that this is the duty of the MoO and the associated company (SOMO). Although this decision was not taken against KRG, it could be a constitutional interpretation of Article 112 regarding the oil marketing process.<sup>679</sup>

## 5.8 Consequences of the Disputes

Most of the disputed issues over oil management and revenue sharing between FG and KRG have remained unsolved so far. There are serious legal, political and economic disagreements between the KRG and FG. This has continued for more than twelve years. As a result, the tension has deepened between two sides and the prospects are not promising.

Because KRG has continued with its contracts and even exported oil, the FG has threatened several times to take legal actions and other necessary measures to stop KRG and the companies that support KRG's actions. For instance, the FG has threatened to black-list the IOCs that signed contracts with KRG and asked them to cancel their

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<sup>679</sup> This law grants exclusive jurisdiction to the INOC over all matters related to the Oil and gas sector within the Iraqi borders at the expense of the authority of the subnational governments. It gives the INOC exclusive responsibility for exploration, exploitation, marketing and exporting Oil and gas and even signing contracts with IOCs. The law was challenged in the Federal Supreme Court by the President of the Council of Maysan Governorate, Iraq Finance Minister, Governor of the Central Bank of Iraq, oil experts. The FSC ruled that all articles and paragraphs that reduce the powers of subnational jurisdictions are unconstitutional. See: the FSC decision: "الحكم بعدم دستورية مواد في قانون شركة النفط الوطنية" (*Federal Superem Court-Iraq* January 23, 2019) <<https://www.iraqfsc.iq/news.4253/>> accessed May 15, 2019.

signed deals with KRG or pull out completely from work in the areas under Baghdad Control. The companies include Exxon<sup>680</sup> Mobil, Gazprom,<sup>681</sup> Total<sup>682</sup> and Chevron.<sup>683</sup>

Similarly, the FG has warned of legal action against all the foreign firms buying oil from the KRG. The Minister of oil threatened that the foreign firms, especially the Turkish firms<sup>684</sup>, have facilitated this smuggling, and this will undermine our relationship with these countries. The FG insists it has the sole right to export Iraqi crude and says contracts between Kurdish authorities and foreign energy firms without its expressed consent are illegal.<sup>685</sup> The FG has also asked the Paris-based International Chamber of Commerce to order Turkey and its state-owned pipeline company to ‘cease all unauthorised transport, storage and loading of crude oil.’ Iraq also was once seeking financial damage of about \$250 million.<sup>686</sup>

The last drastic measure taken by the FG was cutting the KRG’s share of the federal budget. Eventually, the FG stopped giving 17% of annual public budget allocated to the KRG as a countermeasure against KRG’s contracts and unilateral export of oil through Turkey. The former deputy prime minister for energy affairs and the former oil minister said ‘No Iraqi would accept that they-KRG- take 17% of Iraq’s revenue from crude produced outside of Kurdistan and at the same time all of the revenue of the crude

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<sup>680</sup> Andrew Kramer, ‘Iraq Criticizes Exxon Mobil on Kurdistan Oil Pursuits’ The New York Times (November 12, 2011) <<https://www.nytimes.com/2011/11/13/world/middleeast/iraq-criticizes-exxonmobil-on-kurdistan-oil-pursuits.html>> accessed December 6, 2018.

<sup>681</sup> Reuters, ‘UPDATE 1-Iraq Warns Russia's Gazprom over Kurdistan Oil Deals’ (Reuters November 9, 2012) <<https://uk.reuters.com/article/energy-iraq-gazprom/update-1-iraq-warns-russias-gazprom-over-kurdistan-oil-deals-idUKL5E8M94HF20121109>> accessed December 6, 2018.

<sup>682</sup> ‘UPDATE 1-Iraq Warns Total over Kurdistan Deals’ (Reuters February 12, 2012) <<https://uk.reuters.com/article/iraq-energy-total-idUKL5E8DC3JG20120212>> accessed December 8, 2016.

<sup>683</sup> Ahmed Rasheed, ‘Iraq Blacklists Chevron for Kurdish Oil Deals’ (Reuters July 24, 2012) <<https://www.reuters.com/article/us-iraq-chevron/iraq-blacklists-chevron-for-kurdish-oil-deals-idUSBRE86N12A20120724>> accessed December 6, 2018.

<sup>684</sup> There is a Pipeline Tariff Agreement between the FG and Turkish government in 2010 for 25 years (with a 10-year possible extension), which confirm that any fluid inside the Iraqi-Turkish pipeline belong to the Iraqi government, which means by the FG, including the KRG's crude oil, once entering to this pipeline to Ceyhan port. See: Denise Natali(n673).

<sup>685</sup> AFP, ‘Turkey 'Driven by Greed' in Kurd Oil Row: Iraq Deputy PM’ (Gulf News June 1, 2014) <<https://gulfnews.com/business/energy/turkey-driven-by-greed-in-kurd-oil-row-iraq-deputy-pm-1.1341882>> accessed December 6, 2018.

<sup>686</sup> *ibid.*

produced in Kurdistan.’<sup>687</sup> This measure has had a significant impact on people and KRG, especially after the drop in oil prices, where the KRG has not been able to pay the salaries of the employees in the region regularly since the beginning of the Crisis. Economic projects have also been crippled, which created a political and social crisis in the region.<sup>688</sup>

From the preceding analysis of the relevant constitutional provisions, it can be concluded that, taking Articles 110, 111, 112, 114, 115 and 121 together as a package, the subnational authorities have the right to exercise their constitutional competencies over oil and gas matters in different forms, whether unilaterally or collaboratively with the FG. Unilaterally, according to the Article 112, they can conclude oil agreements with IOCs or any other operations before the extraction of oil and gas, as long as they relate to the future fields. Therefore, the KRG’s oil contracts are considered to be constitutionally lawful. Unilaterally, they can deal with future fields, in most of the oil industry stages. Regarding the FG, it has the leading role collaboratively with the subnational authorities to manage oil and gas from present fields. Nevertheless, this role is conditional and not absolute, it is restricted to managing oil and gas extracted from present fields, collaboratively with subnational authorities and not unilaterally, as well as setting strategic policies to develop Iraq’s oil and gas resources.

Article 112, in terms of the sequence, comes after Article 110 (the exclusive powers of the federal authorities) and before Article 114 (the shared powers between the FG and SGs. This may give Article 112 a different legal status. However, in practice, it can be said that the subject of Article 112 is still a kind of shared powers. This means that in any conflict between the laws of FG and the sub-national authorities with regard to the management and formulating strategic policies, the supremacy of the laws of the sub-national authorities will be claimed by the latter.

There is no doubt that the first section of Article 112 differentiates between the present fields and the future fields, in favour of the SGs, while the second section, regarding formulating strategic policy, which does not make such a distinction, can be interpreted in the favour of the FG. Article 110, specifically section three, is in the favour of the FG, while article 115 and 121 can be interpreted in favour of the SGs. Furthermore, the

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<sup>687</sup> *ibid.*

<sup>688</sup> The crisis has not yet been solved, and it is worsening day by day, especially after 16 October 2017, when Iraqi army and Shiite militias seized Kirkuk and its oil fields.

export is one of the issues that the sub-national authorities cannot do without the consent of the federal authorities. Because the FG has the exclusive power, according to the Article 110, over formulating foreign sovereign economic and trade policy, and regulating commercial policy across regional and governorate boundaries. In addition to the 'shared power' over managing customs, in accordance with Article 114. Also, practically the FG needs the consent of the KRG to use its own pipeline to export any oil or Gas to turkey. Where the main oil and gas pipeline between Turkey and Iraq is currently owned by the KRG and the Russian company Rose naft.

Hence, a comprehensive reading of the constitutional provisions relating to oil and gas, prove that these articles are Interdependent and inextricably linked in which cannot be interpreted without reference to the relevant articles. Selecting specific articles and interpret it separately is incompatible with legal logic. The nature of the drafting of these articles does not help the stakeholders to reach an agreement without negotiations and adopting a collaborative model of federalism.

## **5.9 Conclusion**

This chapter examined the constitutional context of oil and gas since the establishment of Iraq. In particular, the focus was on the post-2003 period following the collapse of the Ba'ath regime and the agreement on the 2005 constitution. It was in this period that disputes over oil and gas management and its related issues began during the drafting of the constitution and continued to escalate to this moment.

Historically, Iraqi constitutional provisions have expressed different positions regarding oil according to the political and economic circumstances in which those constitutions have been adopted. Not all previous constitutions allocated a specific article to the issue of oil as the Iraqi Constitution of 2005 did. It was always part of natural resources or national resources, without dedicating any specific article.

The Constitution of 2005 is the first constitution that confirms that all Iraqi people own Oil and Gas in all regions and governorates. The constitution followed a series of changes and developments in the Iraqi economic and political landscape. These changes have tremendously impacted on the operational and institutional nature of the Iraqi oil industry. This constitution attempts, though not very clearly, to respond to the changes and demands of the new era in which Iraq was going through after 2005.

It seems that the relevant constitutional articles with oil and gas, whether directly such as Articles 111 and 112, or indirectly, such as Articles 110,115 and 121, are not satisfactorily clear and explicit in tackling oil issues between FG and the regions, particularly KRG. There is more than one interpretation of the requirements and boundaries of each article and some of their phrases and terms. The interpretations reveal a range of disagreements over a wide range of issues that include the authority over oil management, the meaning of current oil producing fields, the framework of future fields, the boundaries of oil laws, the right to sign oil contracts, the legal capacity to export oil and construct oil pipelines, the requirement of fair distribution of oil revenues, the mechanisms and principles of cooperation, the settlement of incompatibility between FG and KRG legal provisions with each other and with the constitution.

The KRG believes that since it has the supremacy and the leading role in oil and gas issues, in any contradiction between the laws of KR and the FG, the KR's law will prevail. On the other hand, the FG insists on its centralized trend and its leadership role in this regards. Interestingly, both sides depend on the constitution and both sides provide different, and sometimes contradictory, justifications of their interpretation of the Articles 111 and 112, as well as the relevant articles of the constitution. The disputes seem to continue in the absence of the role of Federal Supreme Court. No decision has yet been taken in this regard by this court, except for the decision on the issue of Oil export. Dealing with this dispute is a major challenge to Iraqi federalism. The most effective approach for solving the dispute seems to be the adoption of collaborative federalism, through negotiated cooperation and compromising among the FG and the SGs. This should be done in a way that allows both sides together to develop plans and policies for oil management without being bound by the conflicted constitutional interpretations that have proved to be ineffective for solving the disputes. To find more conciliatory solutions and to avoid bad experiences of federal countries in the management of oil and gas, the next chapter is dedicated to the study of two federations that have NR. The first is Canada, which has adopted CF as a mechanism to solve its internal problems on several occasions and various times. The second one is the Nigerian federation, which relies heavily on oil, and has internal conflicts with the oil-producing regions.

## **Chapter Six: The Constitutional Context of Oil and Gas Management in Canadian and Nigerian federalism**

### **6.1 Introduction**

This chapter is a comparative analysis of the evolution, context and forms of federalism in Canada and Nigeria. Its purpose is to investigate how intergovernmental relations (IGR) function within Canadian and Nigerian federalism, especially with regard to oil and gas management.

Canadian federalism is chosen for a comparison here because one of its key features is closely connected to the missing element in the Iraqi federalism. That feature is the structure, nature and institutions of IGR, which is directly related to the policy-making process regarding many common concerns, including oil and gas, between national and SGs. Therefore, the Canadian model and its development can be an important case for studying federalism and the IGR in Iraq.

Nigeria is chosen because some of its features are closely connected to the existing elements in Iraqi federalism. Those features are related to the central structure of the federal system and the foundation of its economic foundation; In addition to being centralised in nature, both Iraqi and Nigerian federalisms are oil-dependent forms of federation.

These presuppositions about Canadian and Nigerian federalisms will be examined in the following two sections.

### **6.2 Constitutional Context of Oil and Gas Management in Canadian Federation**

Among all the complex elements of Canadian Federalism, this section focuses on examining the historical background of this federation, the IGR and development of CF, the reasons that produced this form of federalism, and its general characteristics. In addition, it highlights some examples of collaborative institutions and mechanisms, and its application to - and implications for- the management of oil and gas.

### 6.2.1 Historical background of Canadian Federalism

The history of establishing Canadian federation goes back to the adoption of the Constitution of 1867 (the British North America Act) by the British Parliament.<sup>689</sup> It was founded on four British colonies, Ontario, Quebec, Nova Scotia and New Brunswick.<sup>690</sup> Subsequently, Manitoba in 1870, British Columbia in 1871, Prince Edward Island in 1873, Saskatchewan and Alberta in 1905, and Newfoundland in 1949 joined the Confederation.<sup>691</sup> The current map of Canadian federation finalized in 1999 after the separation of the Territory of Nunavut from the Northwest Territories.<sup>692</sup>

In 1931, Canada became almost fully independent from the United Kingdom after the UK Parliament ceased making legislation unilaterally on matters related to Canada.<sup>693</sup> However, the legal and constitutional ties to the UK persisted until the patriating of the Canadian Constitution in 1982.<sup>694</sup>

Canada is considered the first country combining both federalism and a parliamentary system.<sup>695</sup> It combines the “Westminster model” of government to form a strong central government, with federal structures and its principles to protect the regional identities. On this basis, sovereignty and powers are divided between national and subnational governments.<sup>696</sup> In the parliamentary system “the executive branch is “fused with” and “dependent upon” the legislative branch”: there is no clear line between the function of

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<sup>689</sup> Legislative Services Branch, ‘Constitution Acts, 1867 to 1982’ (Justice Laws Website December 3, 2018) <<https://laws-lois.justice.gc.ca/eng/Const/index.html>> accessed December 6, 2018.

<sup>690</sup> See section (II union, Declaration of Union) from the constitution acts 1867 to 1982 (ibid).

<sup>691</sup> Ann Griffiths, *Handbook of Federal Countries*, 2005 (McGill-Queen's Press-MQUP 2005)107.

<sup>692</sup> While the power and authority of the provinces were directly established and derived from the Constitution Act 1982, the FG delegates the power and authority of the three territories.

<sup>693</sup> Alan Trench, *Intergovernmental Relations in Canada*... (n350).

<sup>694</sup> See: Senate, ‘A Glimpse Inside the Archives of the Senate of Canada’ (Senate of Canada) <<https://sencanada.ca/en/about/brochure/parliamentary-treasures/home-e>> accessed December 28, 2014.

<sup>695</sup> Ronald Watts, *Executive Federalism: a Comparative Analysis* (n 274).

<sup>696</sup> Jenna Bednar, William Eskridge and John Ferejohn, ‘A Political Theory of Federalism’ in John Ferejohn, Jack N Rakove and Jonathan Riley (eds), *Constitutional Culture and Democratic Rule* (Cambridge University Press 2001).

these two branches of authorities.<sup>697</sup> Its structure was somewhat asymmetrical, given that this initial federal model recognized Quebec as a distinct linguistic, legal and social entity.<sup>698</sup>

The power between the federal and subnational authority, according to the Constitution Acts, 1867 to 1982, is distributed under three main categories which are; (1) The exclusive and the residual legislative powers of Parliament of Canada,<sup>699</sup> (2) The exclusive powers of Provincial Legislatures,<sup>700</sup> and (3) The concurrent or shared powers outlined in articles 92A(2)<sup>701</sup> 94A<sup>702</sup> and 95.<sup>703</sup>

### **6.2.2 The Evolution of Intergovernmental Relations in Canadian Federalism**

It is interesting to observe that although Canadian federalism started as a centralised model in 1867, it has gradually become more decentralised.<sup>704</sup> This change occurred due to a number of political, social, economic, legal and constitutional factors.

Obviously, the combination of federalism with a parliamentary system limited the ability of federal institutions to accommodate and represent regional and minority interests within the country.<sup>705</sup> This model paved the way for further decentralization by weakening the central authority and giving the provinces legitimacy to follow their own legislative options more aggressively.<sup>706</sup>

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<sup>697</sup>Jay Makarenko 'Parliamentary Government in Canada: Basic Organization and Practices' (Mapleleafweb) <<https://www.mapleleafweb.com/features/parliamentary-government-canada-basic-organization-and-practices.html>> accessed December 7, 2018.

<sup>698</sup>Michael Burgess, 'Constitutional Reform in Canada and the 1992 Referendum' (1993) 46(3) Parliamentary Affairs 363,364.

<sup>699</sup> See: Article 91 and 92 (10) in Annex A.

<sup>700</sup> See: Article 92, 92(A) and 93 in Annex A.

<sup>701</sup> With respect to legislating to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy...

<sup>702</sup> With respect to the old age pensions. See: Annex A (3).

<sup>703</sup> With respect to the agriculture and immigration, see: Annex A (3).

<sup>704</sup>David Cameron and Richard Simeon, 'Intergovernmental Relations in Canada...' (n 174)16.

<sup>705</sup> Ronald Watts, 'Canadian Federalism in the 1990s: Once More in Question' (1991) 21(3) Publius: The Journal of Federalism 169,170.

<sup>706</sup>Thomas Hueglinand Alan Fenna, *Comparative federalism: A systematic inquiry* (University of Toronto Press 2006).



Moreover, decisions of the Privy Council until 1949 played a major role in transforming federalism from a central to a decentralized form. This was through its interpretations of the constitutional provisions in many cases and areas,<sup>707</sup> in favour of extending the authority of SGs at the expense of federal authorities.<sup>708</sup> Therefore, some scholars argue, ‘the Privy Council served as the shield for the provincial governments who lacked any internal structural protection from encroachment of the federal government into their jurisdictions.’<sup>709</sup>

Additionally, the regional structure of its economy and the large geographical size of Canada contributed to greater decentralization.<sup>710</sup> Moreover, the nationalist movement in Quebec, especially post- World War II encouraged Québec to move towards further decentralization. As a result, the other provinces also benefited from this experience.<sup>711</sup> The constitutional distribution of powers, by explicitly determining the exclusive provincial powers and the shared power, has also led to greater decentralization.<sup>712</sup> Finally, some argue that globalization has also weakened the power of the centre at the expense of strengthening the power of the provinces.<sup>713</sup>

These factors have not only resulted in moving Canadian federalism from a centralised to a decentralised character, but have also led to significant changes in the IGR between the federal and SGs. These changes can be observed throughout different phases.

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<sup>707</sup> Such as trade and commerce, and in the area of “peace, order and good government of Canada”. Alan Cairns, ‘The Judicial Committee and Its Critics’ (1971) 4(3) Canadian Journal of Political Science 301.

<sup>708</sup> Although the Supreme Court of Canada was established in 1875, it did not function as a Supreme Court of Appeal until 1949. Before this year, the Committee of the Privy Council in London was the supreme and final court for any disputes between federal and provincial governments regarding division-of-powers. See: Katherine Swinton, ‘Federalism under Fire: The Role of the Supreme Court of Canada’ (1992) 55 Law and Contemporary Problems 121.

<sup>709</sup> Jenna Bednar, William Eskridge and John Ferejohn (n696)24.

<sup>710</sup> Burgess, ‘Constitutional Reform in Canada and the 1992 Referendum’(n698)364.

<sup>711</sup> David Cameron and Richard Simeon, ‘Intergovernmental Relations in Canada...’ (n 174).

<sup>712</sup> Burgess, ‘Constitutional Reform in Canada and the 1992 Referendum’(n698)364.

<sup>713</sup> Thomas Courchene, ‘Glocalization: The regional/international interface’(1995) 18(1) Canadian Journal of Regional Science,1.

The first period is described as “classical or competitive federalism.” It prevailed between 1896 and 1939- except during the First World War. In this period, the two levels of government worked in relative separation.<sup>714</sup>

The second period is called “cooperative federalism” which began after World War II until the 1960s.<sup>715</sup> The economic misery caused by the depression that incapacitated several provincial governments and widened the economic disparities among them led some provinces to feel that regional economic disparities are a problem of the whole federal system, and the FG must make an effort to resolve it.<sup>716</sup> Thus, an equalization or shared cost programme was adopted by the governments for ‘redistributing money from “have “to “have not” provinces’.<sup>717</sup> This idea was also a response to the financial decentralization in the federal system. Due to the different financial resources for the provinces, the abilities of the provinces to provide public goods and services at given tax rates vary.<sup>718</sup> In this era, federal spending power grew, which served as a mechanism to push governments to work together, but based on a hierarchical relationship, where the FG had a leading role.<sup>719</sup> Hence, as Burgess argues, ‘the increasing role of the FG in the economy and in the provision of social services in Canada laid the basis for conflict, consensus and co-operation in federal-provincial relations.’<sup>720</sup>

Then, in 1970s and early 1980s, the relationship turned again into a so-called “competitive federalism”. This period witnessed many federal-provincial conflicts,

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<sup>714</sup> See: Julie Simmons and Peter Graefe, ‘Assessing the Collaboration That Was “Collaborative Federalism” 1996-2006’ (2013) 7(1) Canadian Political Science Review 25, 25-26.

<sup>715</sup> Alain Noël, *Power and Purpose in Intergovernmental Relations* (Institute for Research on Public Policy 2001).

<sup>716</sup> Jennifer Smith, *The Meaning of Provincial Equality in Canadian Federalism* (Institute of Intergovernmental Relations, Queens University 1998)7.

<sup>717</sup> The idea of “equalization” was emphasized in the subsection 36(2) of the Constitution Act 1982 in Annex A/1, which states ‘Parliament and the government of Canada are committed to the principle of making Equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.’

<sup>718</sup> See: Tom McIntosh, ‘Intergovernmental Relations, Social Policy and Federal Transfers after Romanow’ (2004) 47(1) Canadian Public Administration/Administration publique du Canada 27,43.

<sup>719</sup> Spending power is the power of federal parliament to enact laws for making payments to people, institutions, or subnational governments, encroaching on areas of provincial jurisdiction. See: Hamish Telford, The federal spending power in Canada: Nation-building or Nation-destroying? (2003) 33(1)Publius: The Journal of Federalism 23.

<sup>720</sup> Burgess, ‘Constitutional Reform in Canada and the 1992 Referendum’(n698)365.

whether between the FG and nationalists in Quebec or over the revenue sharing, particularly after the expansion of the petroleum sector in Alberta.<sup>721</sup> The fourth stage includes the period from the mid-1980s and early 1990s to the present, characterised by collaborative federalism.<sup>722</sup> This transformation has produced a form of federalism that can be described and examined as an executive federalism regarding decision-making process, based on collaboration among all levels of governments within the country as an equal partnership.<sup>723</sup> It is ‘the process by which national goals are achieved, not by the FG acting alone or by the FG shaping provincial behaviour through the exercise of its spending power, but by some or all of the 11 governments and the territories acting collectively.’<sup>724</sup> This model increased the decentralization of the constituent units, by granting them more autonomy in their realm of jurisdiction.<sup>725</sup>

Furthermore, since Canadian political actors have realized that the fundamental constitutional change was probably out of reach, they have had to adopt flexible and informal agreements or non-constitutional means as an effective option within IGR for dealing with the problems and issues related to the distribution of power.<sup>726</sup> As Cameron argued, ‘This was a major impetus for the move toward a more collaborative model.’<sup>727</sup> This reality became apparent, especially after many failed attempts to change the constitution. The Meech Lake Constitutional Accord (1987) was designed to grant a sort of recognition regarding some matters of Quebec, or a different status within the country, but the accord was defeated in 1990 by the English Canadians against Quebec, for the equality of provinces.<sup>728</sup>

In addition, Canadian federalism can be characterised as a highly decentralized federal and parliamentary system with weak provincial representation in the federal institutions. It is also an electoral system that emphasises regional differences and a form of

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<sup>721</sup> Simmons, ‘Treaty Federalism: The Canadian Experience’ (n175) 6.

<sup>722</sup> Julie Simmons and Peter Graefe (n714); Alain Noël (n715).

<sup>723</sup> Ronald Watts, *Executive Federalism: a Comparative Analysis* (n 274).

<sup>724</sup> David Cameron and Richard Simeon, ‘Intergovernmental Relations in Canada...’ (n 174) 54.

<sup>725</sup> Simmons, ‘Treaty Federalism: The Canadian Experience’ (n175) 6.

<sup>726</sup> Alan Trench, *Intergovernmental Relations in Canada...* (n350).

<sup>727</sup> David Cameron and Richard Simeon, ‘Intergovernmental Relations in Canada...’ (n 174) 53.

<sup>728</sup> Richard Simeon, ‘Recent Trends in Federalism and Intergovernmental Relations in Canada...’ (n168).

executive dominance in both levels.<sup>729</sup> Although the federal legislature is bicameral, the Senate is like the UK's House of Lords, is appointed by the FG, often, from the same party of the prime minister.<sup>730</sup> Because of its formative nature, the Senate acts as a partisan political body to serve the interests of the ruling federal party. Thus, the Senate has less legitimacy than the House of Commons, and it cannot be considered as the real protector of the interests of regional governments, despite its regional nature.<sup>731</sup>

All these characteristics and failed attempts to amend the constitution have prompted politicians to seek another solution to make their federation more viable and more stable. The collaborative approach that includes informal and non-constitutional mechanisms for power-sharing and resolving conflicts between the FG and the provinces was the alternative.<sup>732</sup> According to this approach, the role of the executive branch in both governments prevailed with respect to sharing power and managing conflicts. Therefore, within intergovernmental relations executive federalism emerged as a diplomatic mechanism between federal and provincial governments at the level of first ministers, cabinet ministers, and appointed officials, with little involvement of legislatures, parties, or citizens.<sup>733</sup> As Beyme argues, "executive interstate negotiations prevail over the legal decisions of national institutions in Canada."<sup>734</sup>

Consequently, the Canadian federalism has developed into a model that requires interdependence, coordination and negotiated cooperation between both levels of government as equal partners for realizing mutual interests and solving outstanding conflicts via intergovernmental accords.<sup>735</sup> These tools proved to be more effective and

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<sup>729</sup> Robin Boadway and Ronald Watts, 'Fiscal Federalism In Canada, The USA, And Germany' (2004) working paper.

<sup>730</sup> Meg Russell, 'An Appointed Upper House: Lessons from Canada' (The Constitution Unit, Department of Political Science, UCL: London, UK 1998) report.

<sup>731</sup> Katherine Swinton (n708)130.

<sup>732</sup> David Cameron and Richard Simeon, 'Intergovernmental Relations in Canada...' (n 174)52.

<sup>733</sup> Alain Gagnon, 'Executive Federalism and The Exercise of Democracy in Canada' in Michael Burgess and Alain Gagnon (Eds), *Federal Democracies* (1<sup>st</sup> Ed, Routledge, Taylor & Francis Group 2010)232, 235; Martin Papillon and Richard Simeon, 'The Weakest Link? First Minister Conferences in Canadian Intergovernmental Relations'113, in Peter Meekison, Hamish Telford, and Harvey Lazar (editors), *Reconsidering the Institutions of Canadian Federalism* (n167).

<sup>734</sup> Klaus Von Beyme, 'Asymmetric federalism between globalization and regionalization'(2005) 12(3) Journal of European Public Policy, 432, 441.

<sup>735</sup> Robin Boadway and Ronald Watts, 'Fiscal Federalism In Canada, The USA, And Germany' (n 729).

flexible than proposals for constitutional amendments or the rigid language of constitutional articles enforced by the courts.<sup>736</sup> Therefore, Canada is considered to be one of the most, flexible, adaptable, durable and non-centralized collaborative federal systems.<sup>737</sup> Nevertheless, it must be stressed that the FG still plays an essential role in governance at all levels, because the FG possesses greater material and financial resources.<sup>738</sup>

Attempts to categorize the evolution of Canadian federalism into different periods are open to challenge.<sup>739</sup> This is because at any time in Canadian history some features of the above-mentioned federalism types are likely to be present.<sup>740</sup> In this regard, Simmons and Graefe argue, 'If we take a simple understanding of "collaboration" as parties working together to a joint end, presumably, other periods of federalism would also count as collaborative on this score.'<sup>741</sup> Therefore, it can be said, there is no pure type of federalism, but the dominant characteristic determines the prevailing model. The key difference between this model and the previous models is that it is based on an equal partnership rather than hierarchy and is characterised by negotiation and coordination between both levels of governments.<sup>742</sup> Nevertheless, regardless of different labels, it seems that in all periods executive federalism is clearly a permanent feature and a defining characteristic of Canadian federalism.<sup>743</sup>

With regard to the scope of the collaborative model, it can be said that it extends to all mutual concerns and every matter common to different levels of government within the federation. Its scope covers the internal trade,<sup>744</sup> energy policy, pension policy,<sup>745</sup>

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<sup>736</sup>David Cameron and Richard Simeon, 'Intergovernmental Relations in Canada...' (n 174)55.

<sup>737</sup>Jean Chrétien, 'Address by Jean Chrétien' (1999) 29(4) *Publius* 11,13.

<sup>738</sup>Alan Trench, *Intergovernmental Relations in Canada...*(n350).

<sup>739</sup>Peter Meekison, Hamish Telford and Harvey Iazar (Eds), *Reconsidering the Institutions of Canadian Federalism...* (n 167).

<sup>740</sup>Peter Meekison, Harvey Lazar, and Hamish Telford (Eds), *The institutions of executive federalism: Myths and realities* (Institute of Intergovernmental Relations, School of Policy Studies, Queen's University 2003).

<sup>741</sup>Julie Simmons and Peter Graefe (n665) 27.

<sup>742</sup>*ibid* 25.

<sup>743</sup>David Cameron and Richard Simeon, 'Intergovernmental Relations in Canada...' (n 174)49.

<sup>744</sup>For example, the agreement of 1995 on Internal Trade which signed by all 10 Provinces. See: Alan Trench, *Intergovernmental Relations in Canada...*(n350).

<sup>745</sup>According to the article (94A), a pension issue is shared jurisdiction. Nevertheless, for a better management, the Canada Pension Plan Investment Board in 1997 was created. This institution is run

agriculture, immigration, environmental issues,<sup>746</sup> and child benefit.<sup>747</sup> As a result, collaboration has become an indispensable approach. Watts argues, ‘now as federations move into the twenty-first century, the interdependence inherent within all federal systems is being further extended and complicated by its widened scope increasingly embracing the international and municipal spheres as well.’<sup>748</sup> Collaboration can be vertical between the federal, provinces, and territorial governments (FPT), and horizontal between provincial and territorial governments (PT).<sup>749</sup>

Therefore, to activate IGR and implement the collaborative rules and procedures many formal and informal councils, forums, committees and conferences have been established in Canada. They meet through first ministers, ministers, officials to discuss common problems, sharing information for achieving common ends.<sup>750</sup> A brief explanation of these institutions may illustrate some aspects of the way these mechanisms contribute to form federalism in Canada.

One of the earliest vertical mechanisms of IGR is the First Ministers Conference (FMC). It originated in 1906 as a means for a meeting of the provincial and territorial premiers and the Prime Minister. It was renamed to First Ministers’ Meeting in 1990.<sup>751</sup> The meetings are held annually at the request of the Federal Prime Minister and his leadership in Ottawa.<sup>752</sup> However, they have become less regular and non-institutionalized since 1993, especially in the wake of the Meech Lake and Charlottetown failures.<sup>753</sup> These conferences developed many federal-provincial

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collaboratively by the federal and provincial ministers of finance for making any recommendations to the federal cabinet regarding the appointment of directors. See: (*Canada Pension Plan Investment Board to Issue Green Bonds*) <<http://www.cppib.com/en/who-we-are/our-history/>> accessed December 28, 2018.

<sup>746</sup> For example, the environmental accord in 1996, which was negotiated by the Canadian Council of Ministers of the Environment. See: Alan Trench, *Intergovernmental Relations in Canada...* (n350).

<sup>747</sup> The National Child Benefit accord in 1998, between federal and provincial governments regarding the child poverty. See: Richard Simeon, ‘Recent Trends in Federalism and Intergovernmental Relations in Canada...’ (n168).

<sup>748</sup> Ronald Watts, ‘Intergovernmental Councils in Federations’ (n190)3.

<sup>749</sup> David Cameron and Richard Simeon, ‘Intergovernmental Relations in Canada...’ (n 174)54-55.

<sup>750</sup> Ronald Watts, ‘Intergovernmental Councils in Federations’ (n190)4.

<sup>751</sup> Christofer Alcantara, ‘Ideas, Executive Federalism and Institutional Change: Explaining Territorial Inclusion in Canadian First Ministers’ Conferences’ (2013) 46(1) *Canadian Journal of Political Science* 27.

<sup>752</sup> Martin Painter, ‘Intergovernmental Relations in Canada...’ (n 177).

<sup>753</sup> Martin Papillon and Richard Simeon, ‘The Weakest Link? First Minister Conferences in Canadian Intergovernmental Relations’ (n733); Alan Trench, *Intergovernmental Relations in Canada...* (n350).

mechanisms as collaborative methods for dealing with numerous common concern issues, including oil and gas, national energy policy, the state economy, and so forth. Regarding oil and gas, these conferences have proposed and established many provisions and procedures, on the supply, use, management, pricing and revenue allocation of oil and other NR.<sup>754</sup>

Another mechanism is the Annual Premiers Conference (APC). The idea of this regional horizontal forum goes back to a first meeting hosted by Quebec and was chaired by the Premier of Ontario in December 1960.<sup>755</sup> Since then, it has been held regularly and annually chaired by the premiers on a rotating basis, to discuss common issues that need collaborative solutions.<sup>756</sup> Such regularity might be the reason that the APC has recently become stronger and more active than the FMC. This forum has played a major role in increasing the powers of the western provinces with respect to oil and gas and its revenues at the expense of the FG. In Regina, in 1978 the premiers in the APC discussed the provinces' control over the management of natural resources and energy. All ten provinces agreed that constitutional change should increase the provincial jurisdiction with regard to their natural resources.<sup>757</sup>

Moreover, the Ministerial Council is another institution that has played a key role in the development of intergovernmental relations in various areas such as social policy reform, forestry, transportation, education, and the environment.<sup>758</sup> One of the effective agencies is the Council of Ministers of Environment (CCME), which consist of all the governments in the ministerial levels. They meet annually to discuss and address national environmental matters that have a national dimension and need collaborative efforts by numerous governments.<sup>759</sup>

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<sup>754</sup>Martin Papillon and Richard Simeon, 'The Weakest Link? First Minister Conferences in Canadian Intergovernmental Relations' (n733)58.

<sup>755</sup> See: 'Premiers' conferences 1887 – 2002' (Canadian intergovernmental conference secretariat (cics) publication <[http://www.scics.gc.ca/CMFiles/premiers\\_report\\_e.pdf](http://www.scics.gc.ca/CMFiles/premiers_report_e.pdf)> accessed December 7, 2018.

<sup>756</sup>Peter Meekison, Hamish Telford and Harvey Iazar (Eds), *Reconsidering the Institutions of Canadian Federalism*:... (n 167)16.

<sup>757</sup>Robert Cairns, Marsha Chandler, and William Moull, 'The Resource Amendment (Section 92A) and the Political Economy of Canadian Federalism' (1985) 23(2) Osgoode Hall LJ 253.

<sup>758</sup>David Cameron and Richard Simeon, 'Intergovernmental Relations in Canada...' (n 174)61-62.

<sup>759</sup> See: "CCME" (Canadian Council of Ministers of the Environment) <<https://www.ccme.ca/>> accessed December 7, 2018.

In addition, there is "Council of Federation" (COF), established in 2003 by the APC, proposed by the Quebec Liberal Party as a forum for intergovernmental collaboration regarding social and economic issues.<sup>760</sup> This political forum consists of premiers of all provincial and territorial governments and it is supported by a small secretariat. They work and coordinate together as a unified front on common issues to reach a clear vision to deal with the FG.<sup>761</sup> Usually, they meet once or twice a year alternately among premiers and all decisions are taken through negotiations and consensus. This council is horizontal, like the APC, in terms of issues under exclusive provincial jurisdiction while it is vertical in relation to the federal-provincial relation. The FG is not a member, and it does not have a regular representative in this institution.<sup>762</sup>

Another horizontal Collaborative forum is the Western Premiers' Conference (WPC), established by the western provinces of Alberta, British Columbia, Manitoba, Saskatchewan and the three territorial governments, meeting annually in rotation. The first conference for this forum was held in 1973.<sup>763</sup> One of the important declarations resulted from WPC is that all the western governments should manage and control their own natural resources.<sup>764</sup> However, it is worth noting that despite their diverse functions and aims, these forums and meetings have one principal purpose, namely to facilitate and improve collaboration, cooperation, and partnership among different level of governments in Canada.<sup>765</sup> Also, they all share one characteristic, which is, all of them are non-constitutional, non-formal institutions. Because they do not have legislative power, their decisions and agreements are not legally binding for the governments. The

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<sup>760</sup> Jay Makarenko, 'Council of the Federation' (The Canadian Maple Leaf Flag | Mapleleafweb.com July 1, 2006) <<https://www.mapleleafweb.com/features/council-federation.html>> accessed December 7, 2018.

<sup>761</sup> 'What Is the Council of the Federation, and Why Should I Care?' (The Mowat Centre 2014) <<http://mowatcentre.ca/what-is-the-council-of-the-federation-and-why-should-i-care/>> accessed December 7, 2018.

<sup>762</sup> *ibid.*

<sup>763</sup> See: 'Government Information' (Government of Manitoba) <<https://www.gov.mb.ca/government/>> accessed December 7, 2018; 'Intergovernmental Relations' (Alberta.ca) <<https://www.alberta.ca/intergovernmental-relations.aspx>> accessed December 7, 2018.

<sup>764</sup> See: *ibid* (760); (Canadian intergovernmental conference secretariat) <<http://www.scics.ca/en/>> accessed December 7, 2018.

<sup>765</sup> Jay Makarenko, 'Council of the Federation' (n760).



principle that rules the decision-making process is unanimity and participation, which is optional rather than obligatory.<sup>766</sup>

In general, to facilitate necessary processes and procedures for a proper and effective distribution of power, the collaborative approach is followed and practiced in different areas and levels within Canadian federalism. The above-mentioned intergovernmental institutions and agencies, both vertical and horizontal, have played a significant role in both establishing and strengthening the necessary foundation and framework of CF in Canada.

### **6.2.3 The evolution of intergovernmental relations with regard to oil and gas management in Canada**

Canada is the sixth-largest oil producer and fifth-largest natural gas producer in the world. It is ranked as having the third-largest proven oil reserve in the world, possessing an estimated at 171.0 billion barrels; 166.3 billion barrels of oil sands in Alberta and 4.7 billion barrels in conventional, offshore, and tight oil formations. In addition to 1,225 trillion cubic feet (Tcf) of natural gas.<sup>767</sup>

In Canada, as in other federations, the management of NR is among the major issues of federalism. Since adopting any form of federalism would ultimately shape the framework for managing NR, the implications of CF on the management of NR can be easily observed. To examine these implications, one needs to begin with the constitutional provisions on NR and energy policy, as well as the evolution of IGR in this regard.

There are several constitutional provisions which establish the main framework for NR management and related policies. These articles include Article 91, which outline the federal legislative powers, particularly the second clause, on the regulation of trade and commerce, including issues relating to natural resources.<sup>768</sup> Additionally, the most important Article in this regard was Article 109, which grants the provinces the ownership rights of all the lands within their borders, including royalty rights. It asserts

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<sup>766</sup>Richard Simeon, 'Recent Trends in Federalism and Intergovernmental Relations in Canada...' (n168).

<sup>767</sup> See: 'Natural Resources Canada' (Natural Resources Canada December 6, 2018) <<https://www.nrcan.gc.ca/home>> accessed December 8, 2018.

<sup>768</sup> See: Annex A.

that the provinces are the owners of the lands, mines, minerals, and royalties. Hence, land and its non-renewable NR belong to the exclusive provincial jurisdiction.<sup>769</sup> Thus, article 109, as Cairns argues, is ‘the intention of fathers of Confederation to dedicate natural resources as main financial sources for the provinces.’<sup>770</sup>

Furthermore, the negotiations over the 1982 constitutional amendment resulted in some changes to the general management of NR. Article (92A) determines the power of both levels of legislative authority over respecting non-renewable natural resources, forestry resources and electrical energy. This article increased the concurrent jurisdiction between federal and provincial powers in areas that used to be under the federal exclusivity. Thus, the provincial governments have been granted the legislative authority in the spheres of non-renewable natural resources. Nevertheless, this amendment does not reduce the authority of the FG to make policy for the resources industries as an aspect of the national interest.<sup>771</sup> With respect to these shared matters in the Article 92A, in any conflict between the laws of the Parliament and a law of a province, the supremacy will be with the latter.<sup>772</sup>

Natural resources are essential pillars for the financial independence of some provinces, such as Alberta. As such, the provinces play an essential role in controlling and managing these resources, which includes enacting laws (legislation and regulation) with respect to the management, exploration, development, intra-provincial energy trade and commerce and royalties.<sup>773</sup> On the other hand, the FG has a jurisdiction over interprovincial trade,<sup>774</sup> international trade and commerce- including foreign investment), taxation, international treaty making, fisheries and energy development offshore and on frontier lands.<sup>775</sup>

These constitutional provisions have not addressed all issues, however. Problems, conflicts, and concerns can always arise in interpreting these articles, especially in

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<sup>769</sup> All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, See: Article 109 in Annex (A/2)

<sup>770</sup> Robert Cairns, ‘Natural Resources and Canadian Federalism...’ (n 269) 57-58.

<sup>771</sup> *ibid.*

<sup>772</sup> See: Article 92A/3.

<sup>773</sup> See: Articles 92A in Annex A/3

<sup>774</sup> Article (92A) (section 3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.

<sup>775</sup> Article (91) (section 2) The Regulation of Trade and Commerce.

determining the rights, authorities, and responsibilities of the FG and provinces. Solving these problems and conflicts has required an effective mechanism for collaboration and cooperation. Whether Canada has been successful in establishing such mechanisms is a crucial point for assessing the effectiveness of Canadian federalism in this respect.

From 1867-1930, Canada was dependent on coal production in the west of the country. At that time, the FG binding the country via energy ties to ensure that the coal producers support the consuming provinces in the east while respecting the right of provinces to develop their energy resources on the basis of coordination with FG.<sup>776</sup> There was cooperation among all the governments to build national energy policies. Therefore, this period was called “nationalist cooperative energy federalism.”<sup>777</sup>

In 1930 oil and gas were discovered in Turner Valley, Leduc and Redwater, Alberta, in 1930, 1947 and 1948 respectively.<sup>778</sup> The Natural Resources Act of 1930 was issued by the federal parliament, whereby, all provinces were given more rights regarding natural resource in terms of energy management and resources development including public ownership.<sup>779</sup> Also, the FG worked to develop the industry through infrastructure development and exports. Therefore, federal Pipelines Act enacted in 1949 granted the FG the authority over interprovincial and international oil and gas pipelines. The National Energy Board (NEB) was also established by Ottawa in 1959 for regulating interprovincial and international energy flows and infrastructure. Hence, due to the growth of oil and gas production in that period and in order to encourage the growth of the domestic petroleum industry, the political interests at both levels required more cooperation for further infrastructure development and exports. Thus, this period can be categorised as the period of collaboration between federal and provincial governments

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<sup>776</sup> Monica Gattinger, ‘A National Energy Strategy for Canada: Golden Age or Golden Cage of Energy Federalism?’<sup>39</sup>, in Loleen Berdahl, André Juneau, and Carolyn Hughes Tuohy (Eds), *Canada: The State of the Federation, 2012: Regions, Resources, and Resiliency* (McGill-Queen's Press-MQUP 2015)46.

<sup>777</sup> *ibid.*

<sup>778</sup> Robert Bott, *Evolution of Canadas Oil and Gas Industry* (Canadian Centre for Energy Information 2004).

<sup>779</sup> This act issued based on an agreement between the provinces of Manitoba, Saskatchewan, Alberta, and British Columbia and the FG. Accordingly, the control over crown lands and natural resources was transferred from the federal to the provincial governments. See: Frank Tough, ‘The Forgotten Constitution: The Natural Resources Transfer Agreements and Indian Livelihood Rights, ca. 1925-1933’(2003) 41(999) Alta. L. Rev.

as equal partners for realising common ends in the energy sphere based on negotiation.<sup>780</sup>

From 1960s to 1980s some constitutional amendments were introduced which gave the provinces the jurisdiction to impose indirect taxes on their natural resource.<sup>781</sup> Even though this period is called competitive federalism, many problems resulting from this competitive process were solved by a collaborative approach, based on negotiated cooperation between oil producing provinces and the federal government with non-producing provinces.

The disputes over NR increased in Canada between the FG and the western oil-and-gas producing provinces during the energy crises of the 1970s and early 1980s. Therefore, Feehan argues ‘The oil crisis of 1973 is often cited as the starting point for problems concerning the treatment of natural resource revenues in Equalization formulas.’<sup>782</sup> Some insisted that the management authority should belong to the provincial governments while the trade authority must be within the power of the FG.<sup>783</sup> Due to the overlapping nature of the managing and trading responsibilities, there have often been conflicts and challenges. Resolving these challenges and conflicts required collaboration in light of the constitutional framework.<sup>784</sup>

One of the most important cases with regard to the CF in the field of oil and gas is the oil pricing negotiations in the 1970s between Alberta as the major producing province and the FG with the consuming provinces.<sup>785</sup> This conflict associated with the political and economic developments during that period as crude oil prices began rising globally, especially after 1973 with the Arab-Israeli war.<sup>786</sup> Consequently, the producing provinces gained a significant portion of the royalty through the changing in the royalty rates, hence, their income became far in excess of normal requirements, while other

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<sup>780</sup>Monica Gattinger (n773)46-47.

<sup>781</sup>ibid(n727) 48.

<sup>782</sup>James Feehan, ‘Equalization and the Provinces’ Natural Resource Revenues: Partial Equalization Can Work Better’ in Harvey Lazar (Eds), *Canadian Fiscal Arrangements: What Works, What Might Work Better*, 185, 187.

<sup>783</sup>William Moull, ‘Natural Resources: The Other Crisis in Canadian Federalism’ (1980) 18(1) Osgoode Hall LJ, 11.

<sup>784</sup>Robert Cairns, ‘Natural Resources and Canadian Federalism...’(n 269).

<sup>785</sup>Martin Painter, ‘Intergovernmental Relations in Canada...’ (n 177)276.

<sup>786</sup>ibid.

provinces faced large deficits.<sup>787</sup> This crisis distorted the federal equalisation program due to the huge revenues gained by Alberta.<sup>788</sup>

This crisis made the FG and the non-producing oil governments worried about the efficiency of the interregional adjustment process, which provides the basis for unparalleled economic expansion in the west, especially in Alberta.<sup>789</sup> When Alberta threatened to cut off gas exports to the east provinces, Ontario declared in 1973 that it would challenge Alberta constitutionally.<sup>790</sup> The crisis had economic and political aspects between the FG, which has always tried to make the economic status stronger for the whole country, and the SGs that have always tried to maintain and expand their own economic position.<sup>791</sup>

When the First Ministers' Conference was held in 1975 to discuss this issue, Ontario and its allies rejected the proposed price rise. This changed the nature of the negotiation process, shifting from multilateral negotiations among all stakeholders to the bilateral negotiations between Alberta and the FG.<sup>792</sup> The negotiations and bargaining between Alberta and FG focused on distributing the revenue arising from price rises between these two governments.<sup>793</sup>

The outcome of negotiations in 1974-1975 was a procedural agreement on pricing, revenue sharing, and the export tax. It gave the FG the right to receive a substantial amount of revenue, through several export taxes, then distributing them to the provinces on the basis of equalization program.<sup>794</sup> On the other hand, Alberta and the other western provinces succeeded to get higher petroleum prices for investment in the field of exploration and development activity for both conventional and non-conventional sources.<sup>795</sup> In addition, the export tax on oil and gas by FG, which was reducing the

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<sup>787</sup>Kenneth Norrie, 'Energy, Canadian Federalism, and the West' (1984) 14(1) *Publius: The Journal of Federalism* 79.

<sup>788</sup> Micheal Pretes (n 270).

<sup>789</sup> Kenneth Norrie (n 787).

<sup>790</sup> Monica Gattinger (n 773) 48.

<sup>791</sup> Kenneth Norrie (n 787).

<sup>792</sup> Martin Painter, 'Intergovernmental Relations in Canada...' (n 177).

<sup>793</sup> *ibid.*

<sup>794</sup> Micheal Pretes (n 270).

<sup>795</sup> William Moull (n 783) 3.

portion of revenue for the producing provinces, was gradually withdrawn to the advantage of these provinces.<sup>796</sup>

As a reaction to that crisis, the federal government unilaterally established the so-called the National Energy Programme (NEP) on October 28, 1980. The program was an attempt to expand the authority of the federal government at the expense of the powers of oil and gas producing provinces. It had three significant aims: to make Canada independent from oil imports; to increase the opportunity for Canadian participation in the petroleum industry; and to maintain fairness regarding energy costs and benefits for all Canadians through revenue-sharing arrangements and sufficient pricing.<sup>797</sup>

The program was rejected by the oil and gas producing provinces, especially Alberta. They considered it as an intervention by the FG in their internal affairs, and they saw it as a threat to their constitutional jurisdiction and their economic development. For these provinces, it had a negative impact in the issue of managing and raising revenue from their oil and gas resources.<sup>798</sup>

Therefore, a kind of political and judicial interaction arose between the governments over interpretations of federal and provincial jurisdiction in the energy field.<sup>799</sup> Consequently, on September 1981, an agreement for a stable energy policy was signed between the Prime Minister of the FG and the Premier of Alberta, for five years, until December 31, 1986. Accordingly, the conflict that resulted from the National Energy Program (NEP) between producing oil and gas provinces and the FG was ended. The agreement amended the energy pricing, revenue sharing regulation; it also eliminates the export tax on Alberta oil by the FG.<sup>800</sup> The accord granted both levels of government a kind of privileges, Alberta got its right for protecting its jurisdiction over natural resources, while the FG expanded its authority and got some privileges regarding management.<sup>801</sup>

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<sup>796</sup>William Moull(n783).

<sup>797</sup>Patrick James and Robert Michelin, 'The Canadian National Energy Program and Its Aftermath: Perspectives on an Era of Confrontation' (1989) 19(1) *American Review of Canadian Studies* 59.

<sup>798</sup>*ibid*(n748).

<sup>799</sup>Monica Gattinger(n773)43-44..

<sup>800</sup>Helliwell, J. F., MacGregor, M. E., &Plourde, A. (1983) The national energy program meets falling world oil prices. *Canadian Public Policy/Analyse de Politiques*, 284-296.

<sup>801</sup>Patrick James and Robert Michelin(n797).

A year later, the Federal Supreme Court supported the provincial governments by eliminating the rights of the FG to tax provincially owned oil and gas wells.<sup>802</sup> Hence, the provinces became stronger and more independent in the field of developing the energy policy. On the other hand, Ottawa became less powerful; its role has become more focused on the regulation of energy infrastructure crossing provincial boundaries.

Thus, this new arrangement was considered as a political agreement between federal and provincial governments based on collaborative mechanisms. As Norrie argued, ‘no formal sharing device had been devised, but an informal procedure had arisen.’<sup>803</sup> Hence, it can be argued that the collaborative approach in Canada has operated effectively in dealing with the conflicts that have arisen over oil and gas, which helped to develop the oil industry in many provinces such as Alberta.<sup>804</sup>

Another development in collaboration happened with respect to the offshore petroleum and frontier lands is the Nova Scotia Accord of 1982 (revised in 1986) and the 1985 Atlantic Accord between the FG and Newfoundland based on collaboration. This agreement led to the establishment of a joint Offshore Petroleum Board to co-manage regulatory authority and royalties and to restrict using the power unilaterally by any order of government regarding this case.<sup>805</sup> This is another example of the role of the collaborative model based on negotiations, characterized by flexible bilateral deals regarding common issues among the stakeholders. This example indicates that for realizing common ends for the national and sub-national governments, the eventual judicial decisions is not enough, but still collaboration based on negotiation among stakeholders is a necessary mechanism.

Additionally, a new national approach has been developed in this field in 2007. The provincial premiers in the Council of the Federation put a plan for the development of what they called a ‘shared vision’ for energy. Therefore, Canadian stakeholders again practiced a national collaborative model as an effective approach for more development in energy policy.<sup>806</sup>

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<sup>802</sup>‘National Energy Program’ (The Canadian Encyclopaedia) <<https://www.thecanadianencyclopedia.ca/en/article/national-energy-program>> accessed December 8, 2018.

<sup>803</sup>Kenneth Norrie (n 787)85.

<sup>804</sup>Robert Cairns, ‘Natural Resources and Canadian Federalism...’(n 269).

<sup>805</sup>Monica Gattinger(n773)43-44.

<sup>806</sup>Ibid 10.

Furthermore, the council of the federation (COF), agreed to establish a working group in 2012 to coordinate with provincial and territorial ministers of energy in order to formulate a shared strategic vision for energy in Canada.<sup>807</sup> They have worked together collaboratively under a renewed Council of the Federation: Some of their main missions and functions regarding energy can be summarised in the following points.

(A) Seeking intergovernmental collaboration on areas of mutual interest involving energy resources. (B) Cooperating with other governments and key stakeholders. (C) Promoting environmentally, and socially responsible energy development, transportation systems and enabling technologies to support conservation, efficiency and effectiveness in the use of energy resources. (D) Ensuring a secure supply of energy for all Canadians equally.<sup>808</sup>

Furthermore, it can be observed that the environmental necessities in energy policy have also played a crucial role in compelling national and sub-national governments to collaborate in the energy sphere. Based on the distribution of jurisdictions, the FG has the jurisdiction regarding the trans-boundary environmental impacts, while the provincial governments have the jurisdiction over the conservation of energy resources within their boundaries, as well as intra-provincial environmental impacts of energy. Both the FG and provinces have realized that collaboration is a major key that can open the solutions arise from practical political conflicts and constitutional interpretations regarding the authority over various aspects of natural resources. This was well expressed by the Premier of Alberta in 2011:

...Federal and provincial governments must demonstrate their willingness to pursue flexible solutions..... True partnership requires openness and readiness to act together to further Canada's aims. We need to put old antagonisms behind us. The complexity of the challenges we face demands no less. No one province can achieve success alone... if people put their differences aside and work towards a common goal and vision, results can be achieved. A truly national vision for energy that we can take to the rest of the world requires us to set our sights high. We can achieve this... We are proud to join with Ontario in making

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<sup>807</sup> See: 'Government of Yukon' (Government of Yukon) <<http://www.gov.yk.ca/news/eco.html>> accessed December 8, 2018.

<sup>808</sup> 'Canadian Energy Strategy Progress Report to the Council of the Federation July 2013' publication <<http://www.canadapremiers.ca/publications-en/>> accessed December 8, 2018.



this country strong. We rise together, or we fall together. There is no other way.<sup>809</sup>

This call for collaboration seems to reflect the real need for Canadian federalism, especially in the field of NR. Historically, the provinces producing oil and gas tried to keep their power over natural resources. Constitutionally, they have the jurisdiction over their NR, making a region such as Alberta one of the richest provinces on the basis of high revenues from oil and gas.<sup>810</sup> These resources and their revenues have played a significant role in directing the economic development and in contributing to the national economic policy. These have been achieved by exporting oil and gas among regions and through taxation. Accordingly, a kind of balance can be observed between the federal and provincial governments regarding management, trade, and taxation and revenue-raising powers.<sup>811</sup> Such balance has been achieved because of the development of certain intergovernmental institutions and mechanisms that facilitated a significant degree of horizontal and vertical collaboration between the provinces and the FG.

Despite that relative balance in Canadian federalism, it has its own challenges. The most difficult challenge seems to be based on the legal foundation of the mechanisms of CF and the legal status of these provisions. Cameron argues that many of these federal provincial agreements, which have been signed based on collaborative intergovernmental relationships, are not considered formal accords even though they might be adopted in federal and provincial legislation in the future.<sup>812</sup> However, in general, there is little parliamentary debate or scrutiny over these agreements, and often are not endorsed by legislative authorities.<sup>813</sup> Even if an intergovernmental agreement is submitted to Parliament for approval, its role will be limited; any substantive change on the agreement may end the consensus among the governments on the agreement.<sup>814</sup>

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<sup>809</sup> Alison Redford, “We Rise Together or We Fall Together” (*Policy Options*2012) <<http://policyoptions.irpp.org/fr/magazines/sustainable-energy/we-rise-together-or-we-fall-together/>> accessed December 28, 2018.

<sup>810</sup>C, Rangarajan and D.K.Srivastava, ‘Fiscal transfers in Canada: Drawing comparisons and lessons’(2004) 39(19) *Economic and Political Weekly* 1897, 1897.

<sup>811</sup>Robert Cairns, ‘Natural Resources and Canadian Federalism...’(n 269).

<sup>812</sup>David Cameron and Richard Simeon, ‘Intergovernmental Relations in Canada...’ (n 174)61-62.

<sup>813</sup> Johanne Poirier (n 176) 8.

<sup>814</sup> Nigel Bankes, ‘Co-Operative Federalism: Third Parties and Intergovernmental Agreements and Arrangements in Canada and Australia’ (1991) 29(4) *Alberta Law Review* 792, 796.

Accordingly, the agreements do not have any binding legal force in front of judicial institutions.<sup>815</sup> This is also confirmed by the Federal Supreme Court. Therefore, these agreements do not seem to have any legal force based on the Canadian constitution.<sup>816</sup> The mechanisms, methods, procedures and processes of collaborative federalism may be challenged and overridden based on constitutional provisions. Thus, some political institutions, including an agreement among major political actors, must support adopting collaborative federalism. Nevertheless, despite the non-binding nature of these agreements, legally speaking, there are more than a thousand agreements between the federal and provincial governments currently in force in Canada.<sup>817</sup>

#### **6.2.4 Financial relations within Canadian federalism**

Although the Canadian fiscal system is more non-centralized than any other federation, SGs continue to rely on the federal government's revenue to finance their expenditure.<sup>818</sup> The Canadian financial relations have evolved through constitutional and non-constitutional processes. There are two main revenue sources for the provinces by the FG. Firstly, the revenues that are transferred from the FG under the system of equalisation grants, which is constitutionally guaranteed, and secondly the Canada Health and Social Transfer (CHST) established in 1996-1997.<sup>819</sup> The CHST can be worked through two ways, as an amount of cash or through what is called Tax points. The latter refers to the process when the FG hands over part of the tax take from taxpayers in a Province, according to the amount the Province levies.<sup>820</sup>

In addition, the provinces have their own internal revenue collection sources. Both levels of government have the right to access all tax bases, and impose various taxes; for instance, direct tax, taxes on personal and corporate income and taxes on sales.<sup>821</sup>

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<sup>815</sup> David Cameron and Richard Simeon, 'Intergovernmental Relations in Canada...' (n 174) 61-62.

<sup>816</sup> *ibid* 61-62.

<sup>817</sup> Johanne Poirier (n 176) 8.

<sup>818</sup> Robin Boadway and Ronald L. Watts, *Fiscal federalism in Canada, the USA, and Germany*, Institute of Intergovernmental Relations, 2005.

<sup>819</sup> This provides the grants that are paid by the FG to the provinces for supporting the health care, education and other social services. See: Alan Trench, *Intergovernmental Relations in Canada...*(n350).

<sup>820</sup> *ibid* (n311).

<sup>821</sup> Alan Trench, *Intergovernmental Relations in Canada...*(n350).

More than that, the provinces can impose some taxes that are not even available to the federal government.<sup>822</sup> This indicates that the financial relations between provinces and the FG are also decentralised.

Hence, it can be concluded that Canadian federation has historically changed from highly centralized to highly decentralized and from cooperative to the competitive then to the collaborative federalism. Currently, Canadian federalism can be defined as a decentralised collaborative federalism. Nevertheless, as it has been mentioned before, it is difficult to draw a sharp line between all the stages of intergovernmental relations in Canadian federation. This also applies to its management of the natural resources. Therefore, the collaborative approach was an expected outcome of the general structure of the legal and political system in Canada, providing an alternative to the difficult mission of formal constitutional change, and an effective response to the economic problems. Both the FG and the provinces have realised the necessity of collaboration to address the challenges, conflicts and problems of federalism, especially those arising from overlapping jurisdictions. Moreover, CF, which is based on the principle of equal partnership between the FG and the provinces, appears to be the most effective mechanism for solving the challenges of managing NR in Canadian federalism.

Consequently, Accords, Declarations, or Framework Agreements were used as effective collaborative tools for addressing the issues related to various aspects of power and authority within the federation.

### **6.3 Constitutional Context of Oil and Gas Management in Nigerian Federation**

This section clarifies how the IGR operate within Nigerian federalism and how the country's system of oil management has evolved. For that purpose, the chapter examines the structure of Nigerian federalism and its historical background, the gradual development of its IGR, and its implications for oil and gas management.

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<sup>822</sup>Robin Boadway and Ronald L. Watts, *Fiscal federalism in Canada, the USA, and Germany*, (n 818).

### 6.3.1 Historical Background of Nigerian Federalism

Nigeria is a diverse and multicultural society. It consists of 250 ethnic groups speaking more than 250 indigenous languages. Three main ethnic groups are Hausa-Fulani, Yoruba and Ibo. There are also two main religions, Islam and Christianity. While the Muslims dominate the north, the Christians dominate the South.<sup>823</sup>

What is now called Nigeria was created by British colonialism over the course of the second half of the 19<sup>th</sup> century through a mix of territorial expansion and administrative reforms and by amalgamating the Southern Nigeria Protectorate and Northern Nigeria Protectorate in 1914 as the Colony and Protectorate of Nigeria. Later in 1939, it was reorganized into three ethnically separate administrative regions, the East dominated by the Ibos, the West dominated by the Yoruba and the North dominated by the Hausa-Fulani's.<sup>824</sup> This set the foundation of federalism in Nigeria. Over the post-war period, a series of constitutional conferences refined the federal structure of the country as it moved towards independence in 1960 (with full independence as a republic in 1963)<sup>825</sup>. These regions represented different ethnic-linguistic, religious, cultural, racial and tribal groups.<sup>826</sup>

Currently, Nigerian federalism consists of three levels of governments, the federal government (FG), 36 states, the Federal Capital Territory (FCT) with a near status of a state, 774 local governments and 6 development units in the FCT.<sup>827</sup> This structure was the outcome of a process of constitutional change and political debate following independence and was the result of at least three interrelated factors. First, the political, social, historical and geographical factors played a decisive role in adopting and accepting federalism in Nigeria.<sup>828</sup> Second, economic and administrative factors were

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<sup>823</sup>Rotimi Suberu, 'Federalism in Africa: the Nigerian experience in comparative perspective' (2009) 8(1)*Ethnopolitics*67.

<sup>824</sup> Chibuike U. Uche and Ogonnaya C. Uche, 'Oil and the Politics of Revenue Allocation in Nigeria' (2004) working paper 54, Leiden, The Netherlands: African Studies Centre.

<sup>825</sup>Adele Bamgbose, 'Intergovernmental Relations and Political Opposition in Nigeria's Fourth Republic'(2008) 1(1)*Ozean Journal of Social Sciences*75.

<sup>826</sup>Adam Anyebe, 'Federalism as a Panacea for Cultural Diversity in Nigeria' (2015)15 (3-C) *Global Journal of Human Social Science Research* 15.

<sup>827</sup>See: Articles (2/2), and (3/1, 6) of the Nigeria's Constitution of 1999.

<sup>828</sup>Samuel Ugoh and Wilfred Ukpere, 'Policy of the Federal Character Principle and Conflict Management in Nigerian Federalism' (2012) 6(23) *African Journal of Business Management*, 6771.

substantial reasons behind creating Nigerian federation.<sup>829</sup> The British merged the Northern and Southern Nigeria to reduce their support to the Northern Nigeria by using surpluses from Southern Nigeria.<sup>830</sup> Third, the federal system was adopted as an inevitable choice by the British colonialism for dealing with many conflicts among Nigerian people.<sup>831</sup> Despite the plausibility of these three reasons behind Nigerian federalism, it is often argued, ‘federalism in Nigeria, like most of the postcolonial plural societies, was introduced as an instrument of divide and rule than as a mechanism for promoting unity-in-diversity.’<sup>832</sup>

### 6.3.2 The Evolution of Intergovernmental Relations in Nigerian Federalism

Prior to independence, Nigeria adopted a “true federalism” based on ‘shared rule,’ ‘self-rule’, and equal partnerships between the federal and the sub-national governments.<sup>833</sup> It was based on a decentralization model, especially in terms of fiscal autonomy. The sub-national governments were autonomous entities, working independently, both politically and financially, without any hindrance from the FG. Additionally, the system made arrangements for managing revenues which guaranteed that the regions would have enough resources.<sup>834</sup>

That initial non-centralised federal system was gradually altered to a centralized model, especially during the military governments which ruled the country for many decades and the civil war which the country experienced between 1966 and 1970.<sup>835</sup> A new stage

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<sup>829</sup>Chibuikwe U. Uche and Ogbonnaya C. Uche(n824); Osarhieme Benson Osadolor, ‘The Development of the Federal Idea and the federal framework, 1914-1960’ in Kunle Amuwo (Eds), *Federalism and Political Restructuring in Nigeria* (Spectrum Books 1998).

<sup>830</sup>Chibuikwe U. Uche and Ogbonnaya C. Uche(n824).

<sup>831</sup>Nathaniel Umukoro, ‘Democracy and Inequality in Nigeria’(2014) 30(1) *Journal of Developing Societies* 1; Eyene Okpanachi and Ali Garba, ‘Federalism and Constitutional Change in Nigeria’ (2010) 7(1) *Federal Governance*.

<sup>832</sup>Eme Okechukwu, A.O.Onyishi, and Sam Chijioke Ugwu, ‘Preserving Federalism, Local Autonomy in a Resource Dependent Rural State: A Case of Nigeria’(2011) 1(3) *Kuwait Chapter of Arabian Journal of Business and Management Review* 56.

<sup>833</sup>Itse Sagay, ‘Nigeria: Federalism, the Constitution and Resource Control’ (2001) working paper <<http://catalog.ihsn.org/index.php/citations/48240>> accessed December 9, 2018.

<sup>834</sup>*ibid.*

<sup>835</sup>Eyene Okpanachi and Ali Garba(n831).

of the Nigerian political life started after the military rulers seized power and abolished the first republic and its constitution on January 15, 1966. The FG succeeded in demolishing the separatist movement in Biafran, eliminating its government and ending the civil war in 1970.<sup>836</sup> Consequently, as the precautionary measures against any future separatist tendencies, the FG took some actions to limit the financial autonomy for the states and to weaken their political status by preventing any attempts towards secession from the federation.<sup>837</sup>

This situation continued under the military rule throughout 39 years from 1966 to 1999, except the period between 1979 and 1983 when the power returned to the people. Therefore, Nigeria has become a more centralised federal system. This alteration was structured through three constitutions, which are the 1979, 1989 and the current 1999 constitutions.<sup>838</sup>

This has also changed the IGR, towards an increasingly hierarchical form based on subordination.<sup>839</sup> The states were treated as local governments without any effective executive authority.<sup>840</sup> This framework was continuously followed by the military rulers. Their excuse was that it was needed to strengthen unity within the country. This paradigm has not changed even after the return of democratic government in 1999.

Nigeria is no longer a truly federal country based on the principles of shared rule and self-rule. There is no real participation in the decision-making process by the sub-national governments, even on matters related to their states.<sup>841</sup> Despite aspirations of some political actors for more decentralization in the intergovernmental relationships, the system has remained highly centralised.<sup>842</sup>

According to the 1999 Constitution, the distribution of powers among the three levels is structured on three bases. The exclusive powers, which belong to the FG, consist of 68

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<sup>836</sup>Cyril Obi, 'Nigeria's Niger Delta: Understanding the complex drivers of violent oil-related conflict' (2009) 34(2)Africa Development.

<sup>837</sup>Adam Anyebe(n826).

<sup>838</sup>Eyene Okpanachi and Ali Garba(n831).

<sup>839</sup>Nathaniel Umukoro(n831).

<sup>840</sup>Adam Anyebe(n826).

<sup>841</sup>Martin Ifeanyi Okeke, Eme Okechukwu Innocent, 'Issue of Fiscal Federalism and National Development in Nigeria during Obasanjo Administration' (2013) 3(10) Journal of Educational and Social Research 109.

<sup>842</sup>Eyene Okpanachi and Ali Garba(n831).

jurisdictions and cover important issues such as the mines and minerals, including oil fields, oil mining, geological surveys and natural gas.<sup>843</sup> The second base is the concurrent powers, which related to 12 issues, jointly exercised by both the federal and the state governments.<sup>844</sup> Finally, the residual powers, which include all powers not subject to the previous two rules, are exercised by the states or local governments.<sup>845</sup>

Regarding the three branches of power, the federal legislative power consists of two branches, which are the House of Representatives consisting of 360 members and the Senate, which consists of 109 members, elected from the 36 states.<sup>846</sup> In terms of the executive branch, Nigeria is a presidential system. The people directly elect the president, then s/he appoints a minister to head the cabinet; the cabinet must include at least one member of each of the 36 states subject to approval by the Senate.<sup>847</sup> Finally, the judicial branch is represented by the Supreme Court, the highest court in the federation, the Court of Appeal, the High Courts, and other trial courts such as the Magistrates, Customary, and Sharia etc. Additionally, there is an independent executive body called the National Judicial Council.<sup>848</sup>

Generally, the measures and approaches of political participation at the federal level have not facilitated the development of an effective framework for sharing power between the states and the FG. This cannot be easily changed partly due to the difficulty of constitutional amendments.

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<sup>843</sup> The current federal constitution in the (Second Schedule), part one, refers to the federal exclusive legislative List that consists of 68 responsibilities, point 39 from the list refers to oil and other mines. See: Constitution of Federal Republic of Nigeria 1999. See: Annex B, Constitution of Federal Republic of Nigeria 1999.

<sup>844</sup> See: Annex (B) (Second Schedule) part two, Constitution of Federal Republic of Nigeria 1999.

<sup>845</sup> There is no Article in the Nigerian constitution of 1999, which explicitly states who is the competent authority with respect to the residual powers. However, the Constitutional Court confirmed that this issue is within its jurisdiction to determine who is the competent authority and, in many of its decisions, has confirmed that the States have jurisdiction over residual matters. See: Jirinwayo Jude Odinkonigbo and Nduka Ikeyi, 'Is the power of a state to impose sales tax in Nigeria fettered by the imposition of value added tax by the federal government?' (2015) 41(4) Commonwealth Law Bulletin 577-596.

<sup>846</sup> Constitution of Federal Republic of Nigeria 1999 CAP. C23 L.F.N. 2004. Chapter V, The Legislature, National Assembly.

<sup>847</sup> Constitution of Federal Republic of Nigeria 1999 CAP. C23 L.F.N. 2004. Chapter VI The Federal Executive.

<sup>848</sup> Constitution of Federal Republic of Nigeria 1999 CAP. C23 L.F.N. 2004. Chapter VII, the Judicature.

It is worth noting here that the power of constitutional amendment is given to the National Assembly.<sup>849</sup> For any constitutional amendment, a two-thirds majority of votes in the two houses of the National Assembly must be secured. It also requires the approval of the sub-national legislatures by issuing a resolution passed by two-thirds of all the 36 states in the federation. Furthermore, amending some matters, such as the federal structure and the procedures of amending the Constitution need the approval of the votes of not less than four-fifths majority of all the members of each House, and resolution of the House of Assembly that requires two-third of all States.<sup>850</sup>

The difficulty in amending the constitution has led some Nigerians to realise the necessity of non-constitutional mechanisms for regulating IGR, based on collaborative political agreement among the stakeholders within the federation. These mechanisms require consensus and reconciliation among all stakeholders, especially those who are not satisfied with the constitutional structure for intergovernmental relations related to the management of natural resources.<sup>851</sup> In this regard, Okpanachi and Garba concluded, mega constitutional amendment is so difficult, especially regarding reform federalism structure, in such a deeply divided societies. Hence, the informal and non-constitutional adaptations in the footsteps of the Canadian experience, which will not be smooth sailing for Nigeria, based on the consensus among all stakeholders can be a practical alternative to a mega-constitutional change.<sup>852</sup>

### **6.3.3 The evolution of Intergovernmental relations (IGR) with regard to oil and gas management in Nigeria**

Nigeria is the largest country in Africa for oil and natural gas. It is ranked eighth in the world for oil and gas, possessing an estimated 37-40 billion barrels of proven oil reserves and some 185 trillion cubic feet of proven natural gas.<sup>853</sup>

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<sup>849</sup> Worth mentioning, unlike Iraq, Canada and other federations, there is only one constitution in Nigeria, which is the federal constitution; the subnational units do not have their own constitution. L Dele Jinadu, 'The Constitutional Situation of the Nigerian States' (1982) 12 CrossRef Listing of Deleted DOIs 155.

<sup>850</sup> See: section (9) from the 1999 constitution of Nigeria.

<sup>851</sup> Peter Russell, 'The politics of mega-constitutional change: Lessons from Canada' in Bertus De Villiers (Eds), *Evaluating Federal Systems* (Juta 1994).

<sup>852</sup> Eyene Okpanachi and Ali Garba (n831).

<sup>853</sup> Nigeria attended the Organisation of Petroleum Exporting Countries (OPEC) Conference as an observer member 1964, becoming a full member in 1971. See: 'Nigeria facts and figures' (OPEC) <[https://www.opec.org/opec\\_web/en/about\\_us/167.htm](https://www.opec.org/opec_web/en/about_us/167.htm)> accessed December 6, 2014.



Before independence, the British colonial authorities issued many legislation concerning natural resources and the mining industry. This began with the Mineral Oil Ordinance of 1906, 1907, 1914 and then the amendments 1916 and 1925, 1948, 1950 and 1958. All these legislations, virtually, had granted land ownership with the exclusive control and exploitation of underground minerals and oil to the British Crown.<sup>854</sup> Over the period between 1938 and 1969, colonial and post-colonial governments granted oil concessions to foreign companies.<sup>855</sup> At that time, the role of Nigerian government was limited only to the collection of rents and taxes.<sup>856</sup>

After independence, the 1963 Constitution confirmed that the legislative power with respect to the mines and minerals, including issues of oil and natural gas, belonged exclusively to the Federal Parliament. Nevertheless, the ownership right was preserved for the SGs.<sup>857</sup>

Significant changes took place during the era of nationalization which started with the Petroleum Decree No. 51 of 1969,<sup>858</sup> which repealed all the above-mentioned legislations. The Decree granted the FG authority to transfer ‘the entire ownership and control of all petroleum under or upon any lands on Nigeria.’<sup>859</sup> It stripped the states of any right regarding the ownership and control of oil and gas resources within their borders.<sup>860</sup>

In another move to expand the federal power over NR, the Offshore Oil Revenue Decree No.9 of 1971 was issued. This decree transferred the rents and royalties from offshore petroleum wells from the states to the FG. It vested the FG with all offshore oil

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<sup>854</sup>Itse Sagay(n833); AOY Raji and T. S. Abejide. "The British mining and oil regulations in colonial Nigeria c. 1914-1960s: an assessment." *Singaporean Journal of Business, Economics and Management Studies* 51, no. 1447 (2014): 1-14.

<sup>855</sup> The Anglo-Dutch Consortium, Shell D’Arcy (later Shell-BP), which was granted a concession throughout the entire Nigerian mainland, discovered a commercial amount of oil in eastern Nigeria in 1956. Oil exports began in 1960 and became a major source of Nigerian revenue thereafter. See: ‘Nigeria facts and figures’(n802).

<sup>856</sup>Cyril Obi, ‘Oil and development in Africa: some lessons from the oil factor in Nigeria for the Sudan’ in Luke Patey (Edr), *Oil Development in Africa Lessons for Sudan after the Comprehensive Peace Agreement* (Danish Institute for International Studies 2007)9.

<sup>857</sup> Constitution of the Federal Republic of Nigeria 1963, The Schedule, Part 1, Item 25.

<sup>858</sup> Now Petroleum Act (2004).

<sup>859</sup>See: Section (1) from the Act.

<sup>860</sup>Cyril Obi, ‘Oil and development in Africa...’(n856).

revenues and the ownership of the territorial waters and the continental shelf as well as decreasing the derivation principle from 50% to 30%.<sup>861</sup> Furthermore, the Exclusive Economic Zone Act 1978 also granted the FG the exclusive rights regarding the exploitation of natural resources of the sea-bed, the subsoil and super adjacent waters of the Exclusive Economic Zone.<sup>862</sup>

A further move to consolidate federal power followed with the Land Use Act of 1978 which stripped the right of Communities to own communal land within their states, and transferred ownership and the right to use the lands for oil exploration and its industries to the FG exclusively. Before this enactment, although the mining right was limited exclusively to the FG, the ownership of the land belonged to the communities in these areas under the customary rules. The communities in the Niger delta directly dealt with the oil companies regarding oil exploration and exploitation, compensations of the land acquisition and other related processes.<sup>863</sup> These rights and privileges were stripped from the people of the states after enacting the Land Use Act in 1978. It abolished the transfer fees and rents paid by oil companies to landowners, and they began to pay them to the FG or the officials and stakeholders.<sup>864</sup> Moreover, the law precluded the court's jurisdiction to adjudicate matters relating to compensation cases in accordance with this law. The law was rejected by the oil-producing states in the Niger Delta Region.<sup>865</sup>

In April 1971, the Nigerian National Oil Corporation (NNOC) was established to explore and prospect for oil. In 1977, by incorporating the Ministry of Petroleum Resources and the NNOC, the Nigerian National Petroleum Corporation (NNPC) was established. Thus, the government became an important and a powerful player in oil and

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<sup>861</sup>The 1963 Constitution adopted the derivation principle; accordingly, it granted any region 50% of the revenue that comes from any minerals extracted in that Region as well as from any mining rents taken from that region. This arrangement changed after the ownership of the oil and other natural resources was transferred from the regions to the FG in the section 1 of the Petroleum Act 1969, This was re-emphasized in the section 40 (3) of the 1979 Constitution, and Section 162 (2), in the current Constitution of 1999; Paul S. Orogun 'Resource control, revenue allocation and petroleum politics in Nigeria: the Niger Delta question' (2010) 75(5) *GeoJournal* 459.

<sup>862</sup>Crosdel Emuedo and Michael Abam 'Oil, land alienation and impoverishment in the Niger Delta, Nigeria'(2015) 3(2) *European Journal of Research in Social Sciences*.

<sup>863</sup>*ibid*(n862).

<sup>864</sup>*ibid*(n862).

<sup>865</sup>Cyril Obi, 'Nigeria's Niger Delta...' (n836).

gas management.<sup>866</sup> Due to the unexpected decline in global oil prices in 1977 and 1981, and its consequences for Nigeria, the so-called era of “de-indigenisation” emerged. In this period, the FG retreated in its previous position in oil industry nationalisation and reduced its participation in this field. In other words, it was a period of privatisation during which foreign and domestic investors from the private sector entered the industry, bringing about an increase in oil production.<sup>867</sup> However, this change did not lead to a decentralised system of oil and gas management in Nigerian federalism. The government soon strengthened its centralisation ambition through the Territorial Waters Act (1990) and the Exclusive Economic Zone Act (1990), which granted the entire ownership and control of oil revenue in the territorial waters and exclusive zone to the FG.<sup>868</sup>

Hence, the Constitution of 1999 and the above mentioned legislation, such as the Petroleum Act 1969, vested the FG with the exclusive right over oil and other minerals, not just in terms of the legislative jurisdiction, but also in relation to the ownership, control and management. This trend reflected the period that followed the civil war, which was the period for structuring a centralised form of federalism and stripping the subnational governments from any right over their sources, even the right of land ownership.<sup>869</sup>

Therefore, it can be said, the laws that manage and govern the oil and natural gas and other minerals are enacted in the favour of the FG and the oil companies rather than the oil producing communities that bear their implications.<sup>870</sup> As a result, Oil has become a major issue of conflict and tension between the Delta Region and the FG.<sup>871</sup> It has

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<sup>866</sup> Mamman Alhaji Lawan, ‘The Paradox of Underdevelopment amidst Oil in Nigeria: a Socio-Legal Explanation’ (thesis in University of Warwick 2008).

<sup>867</sup> Cyril Obi, ‘Oil and development in Africa...’(n856).

<sup>868</sup> Paul S. Orogun((n861).

<sup>869</sup> The Section 44(3) of the 1999 Constitution, states ‘Notwithstanding the foregoing provisions of this section, the entire property in and control of all minerals, mineral oils and natural gas in under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.’

<sup>870</sup> Samuel C. Ugoh ‘Oil Politics and the Crisis of Development in the Niger Delta’ (2010) 10(1) Global Journal of Management and Business Research.

<sup>871</sup> There were conflicts between different regions in Nigeria even before oil exploration. However, following the discovery of oil reserves in some regions, especially the Delta region, the nature of these conflicts changed. See: Paul S. Orogun((n861).

escalated more since the military intervention that changed the federal structure of the country.<sup>872</sup> This change converted the intergovernmental relations from a highly non-centralized system, in which each level depends on its own sources for revenue, to a highly centralized system, in which the central government controls and manages natural resources and their revenues.<sup>873</sup>

Although, the region produces about 2 million barrels of crude oil, almost 90% of the entire revenue of the federation,<sup>874</sup> this revenue is managed and controlled by the FG without giving fair consideration to the demands and needs of the Region. However, the constitution partially adopts a derivation principle by granting at least 13% of oil, gas and minerals revenue to the states in which these resources are located.<sup>875</sup>

Despite the return to democratic rule, the centralized federalism model continued and has had implications for the management of oil and gas and the country's political stability.<sup>876</sup>

As a result, serious conflicts have occurred between the FG and the nine oil-producing states over the management and control over NR and the distribution of revenues. The crises have had different protagonists and different dimensions. It is between traditional rulers, politicians, oil company executives and businessmen, human rights activists the radical group, workers, journalists and the peasantry.<sup>877</sup> Nevertheless, the main two protagonists in this crisis are the communities of the ethnic minority of oil producing states on the one side, and the FG with the non-oil producing governments on the other.

The communities in the oil-producing states feel that they have been marginalized by global oil companies and the three dominant ethnic groups; Hausa, Ibo and Yoruba. Since independence, the ethnic majorities have monopolized the Nigerian political landscape, including the socioeconomic aspects, and the control of oil through their

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<sup>872</sup>Femi Omotoso, 'Nigerian fiscal federalism and revenue allocation formula for sustainable development in Niger Delta'(2010) 5(3) *The Social Sciences* 246.

<sup>873</sup>Martin Ifeanyi Okeke, Eme Okechukwu Innocent(n841).

<sup>874</sup>Samuel C. Ugoh(n870).

<sup>875</sup>See: Section 162 (2) of Constitution of the Federal Republic of Nigeria 1999. <<http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm>> accessed December 9, 2018.

<sup>876</sup>Daniel Egiegba Agbiboa, 'Federalism and Group-Based Inequalities in Nigeria' (2017) working paper in Global centre for pluralism.<<https://www.pluralism.ca/press-release/federalism-group-based-inequalities-nigeria/>> accessed December 9, 2018

<sup>877</sup>Samuel C. Ugoh(n870).

dominance of the federal institutions.<sup>878</sup> Despite the huge amount of oil extracted from the Niger delta region, it is still under-developed, and people live under poverty and suffer from marginalization.<sup>879</sup> Therefore, there is a feeling of injustice and inequality from the communities in the region against the FG and the oil companies.<sup>880</sup>

Thus, the core of the conflict is that the oil producing states insist on controlling their resources or at least increasing their share of the revenue based on derivation principle. On the other hand, the FG and the non-oil producing states insist on the principles of equality and the size of population for allocating revenue. They claim that the oil and natural gas do not solely belong to oil producing states.<sup>881</sup> In addition, the global oil companies have become involved in the local conflicts within the Niger delta region through funding their supporters, the pro-company groups.<sup>882</sup>

Furthermore, there are negative implications of the oil industry in the area, especially on the environment. The environmental degradation because of pollution of air and drinking water, degradation and contamination of farmland has had significant impacts on the life and well-being of many people in the region.<sup>883</sup> There are many players involved in this case, whether the Niger Delta youth and community leaders in the local level, oil company and NNPC employees, members of the Nigerian military, as well as the regional states.<sup>884</sup>

Finally, corruption at both the federal and state levels has aggravated the structural problems in oil management and development.<sup>885</sup> These factors have led some communities in the regions to utilise different methods for financial autonomy, effective

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<sup>878</sup>Dare Arowolo 'Nigeria's Federalism and the Agitation for Resource Control in the Niger-Delta Region' (2011) 2(7) OIDA International Journal of Sustainable Development 83; Samuel Ugoh and Wilfred Ukpere(n828).

<sup>879</sup>Paul S. Orogun((n861); Dare Arowolo(n878).

<sup>880</sup>Ezekiel Oladele Adeoti and Imuoh Austen, 'Internal Factors on Resource Control Saga in the Nigeria Delta and Their Impact'(2015) 1(1)American Research Journal of History and Culture 25.

<sup>881</sup>Samuel C. Ugoh(n870).

<sup>882</sup> Moreover, some external actors also play negative roles because of their interests in the conflicts over oil and natural gas in Niger Delta region. For instance, private security companies, international traders and companies, mercenaries, arms suppliers, and some African powers have all indirectly involved in the conflict. See: Paul S. Orogun (n861).

<sup>883</sup> Adediran Daniel Ikuomola, 'Initiatives of Oil Producing Communities and the Dynamics of Conflict and Peace Building in the Niger Delta' (2013) 4(1) Journal of Conflictology 34.

<sup>884</sup> Judith Burdin Asuni, 'Blood Oil in the Niger Delta' (2009) 229 special report, Washington, DC: United States Institute of Peace.

<sup>885</sup> Adediran Daniel Ikuomola (n883).

political participation in managing natural resources and for a decentralised form of federalism. The methods include creating interest groups, pressure groups, associations, environmental agencies, human rights organizations such as Ethnic Minority Rights Organization of Nigeria (EMIRON), Association of Minority Oil States (AMOS) and even armed groups.<sup>886</sup>

All these factors and reasons have led to the escalation of conflicts, divisions, and clashes within the communities. They have played a directive role in the politics of the region regarding oil management and created a fragile economic and political condition.<sup>887</sup>

Consequently, the so-called Resource Control (RC) emerged among natural resource-producing states, such as the Niger Delta Region. The term is as an expression of the right of communities to control of their NR, especially oil and gas.<sup>888</sup> It refers to the fiscal autonomy of each region to control their resources, which was exercised under the provisions of the constitutions of 1958, 1960 and 1963.<sup>889</sup> It was the practice of what is called the true federalism, which gives the sub-national governments the exclusive right to control their NR within their borders.<sup>890</sup>

Based on RC, the states claim the right of exercising power over oil management and its related taxation process by themselves rather than by the FG.<sup>891</sup> They have tried to address the issue through constitutional change. For example, in the National Political Reform Conference (NPRC) in 2005, held for creating a national consensus on a new constitution,<sup>892</sup> the delegates of oil-producing states submitted a number of requests, one of them was, 'every state shall own and control resources located in its territory'.<sup>893</sup> However, the Conference failed to resolve the critical issues, including the demand of

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<sup>886</sup>Cyril Obi, 'Nigeria's Niger Delta...' (n836).

<sup>887</sup>ibid.

<sup>888</sup> Ayo Adesopo and A.S. Asaju, 'Natural resource distribution, agitation for resource control right and the practice of federalism in Nigeria' (2004) 15(4) *Journal of human Ecology* 277, 281.

<sup>889</sup>Ezekiel Oladele Adeoti and Imuoh Austen (n880).

<sup>890</sup>Steve Azaiki, *Oil, Politics and Blood: the Niger Delta Story* (Y-Books 2006) 296.

<sup>891</sup>Rotimi Suberu (n823).

<sup>892</sup>Dare Arowolo (n878) 86.

<sup>893</sup>Samuel C. Ugoh (n870).

delegates of Niger Delta region for the control of 25% and 50% of revenue from oil and gas.<sup>894</sup>

Despite the absence of the real political will and determination for solving the conflicts between the regions and the FG over oil management and the demands of the regions, there have been some attempts and initiatives for dealing with the issue based on multi-level institutions. Some examples are the Niger Delta Basin Development Board in 1965, the Niger Delta Development Board, the Niger Delta Development Commission in 2000, the Oil Mineral Producing Area Development Commission in 1992, and Association of Mineral Oil States.<sup>895</sup> Nevertheless, it must be noted that the essential purpose of these institutions and agencies was not to tackle the legal and political aspects of oil management, but rather to improve the technical and administrative aspects of managing the dedicated portion of oil revenues to the states.<sup>896</sup> Therefore, they cannot be considered effective intergovernmental measures and institutions for dealing with conflicts over the management of natural resources and revenues based on agreements between the FG and the Niger delta region.<sup>897</sup>

It is important to note that even though the country's Supreme Court should adjudicate disputes between the FG and states governments, its role has been weak and ineffective because it depends to a large extent on the whims of the political executive. This has hindered the role of judicial power to become the highest institution for adjudication in Nigeria. For instance, during Obasanjo's rule,<sup>898</sup> the decisions of Supreme Court were undermined because they were disregarded by the executive power.<sup>899</sup>

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<sup>894</sup>S. R. Akinola and Ayo Adesopo, 'Derivation principle dilemma and national (dis) unity in Nigeria: A polycentric planning perspective on the Niger Delta' (2011) 4(5) *Journal of Sustainable Development* 251.

<sup>895</sup>Ezekiel Oladele Adeoti and Imuoh Austen(n880).

<sup>896</sup>John Bray, 'Attracting reputable companies to risky environments: Petroleum and mining companies' in Ian Bannon and Paul Collier (Eds), *Natural Resources and Violent Conflict: Options and Actions* (World Bank 2003) 287; Kate Higgins, 'Regional Inequality and the Niger Delta' (2007) 5 *Overseas development institute*.

<sup>897</sup>Kimiebi Imomotimi Ebienfa and Isaac Kumokou 'Oil Economy and the Revenue Allocation Debacle in Nigeria'(2014) 1(1) *AFRREV IJAH: An International Journal of Arts and Humanities* 1.

<sup>898</sup>Olusegun Obasanjo a former Nigerian president, from 1999 to 2007. He oversaw the first democratic handover of power and administrative reforms in Nigeria.

<sup>899</sup>Rotimi Suberu(n823).

Nevertheless, it is worth mentioning that the court has adjudicated some cases regarding the conflicts between the FG and oil producing states. For instance, the states filed a claim over their rights regarding oil and natural resources found within the Continental Shelf of Nigeria, in the onshore-offshore near their states. Both sides claimed that the resources in these areas belong to their jurisdictions. Therefore, the states claimed that they deserve the 13% based on the derivation principle according to the subsection (2) of section 162 of the 1999 Constitution. The FG rejected this claim and insisted that these resources are not derivable from any state within the Federation. After filing the dispute to the Supreme Court in April 2002, the Court decided in favour of the FG.<sup>900</sup> Thus, it seems that the effectiveness of the role and decisions of the Supreme Court are highly dependent on the will, ambitions and interests of those who represent the FG and its centralised system of governance.

Apparently, the FG's approach to federalism refuses to resolve disputes related to the management of NR through establishing effective measures and institutions of intergovernmental relations. If the FG is not able to impose its centralised policy over the states through a law or a favourable judicial decision, it resorts to violence. Violent response has been frequently used to deal with the demands of Niger Delta region throughout the last five decades. For example, the military forces wiped out Odi village and its inhabitants on November 4, 1999.<sup>901</sup> Evidently, while the regions still struggle for real decentralisation and better IGR, the FG continues to defend its centralised approach in dealing with intergovernmental issues, especially oil management.

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<sup>900</sup> 'The seaward boundary of a littoral states within the Federal Republic of Nigeria for the purpose of calculating the amount of revenue derived from that State pursuant to the provision of section 162(2) of the 1999 Constitution of the Federal Republic of Nigeria, is -- the low-water mark or the seaward limit of the inland waters within the State"... They are all part and parcel of the sovereign independent State of Nigeria. None of them can exercise any control beyond the landmass of their respective States. They cannot claim that revenue accruing from mineral resources offshore belongs to any of them. Whatever revenue accrues from drilling off-shore belongs to the whole Federation of Nigeria based on section 162 of the 1999 Constitution, their claims that they are entitled to not less than 13% of the total revenue accruing from off-shore drilling must therefore fail and same is hereby refused and dismissed' Cited from: Oludayo Amokaye, 'Sovereignty and Jurisdiction Over Offshore Natural Resources in a Federal State: a Case Study of Nigeria' (2006)1581404 SSRN 64. (p 64 reference 91)

<sup>901</sup> 'The Destruction of Odi and Rape in Choba | December 22, 1999' (Human Rights Watch December 22, 1999) <<https://www.hrw.org/report/1999/12/22/destruction-odi-and-rape-choba/december-22-1999#>> accessed December 10, 2018.



#### **6.3.4 The Fiscal Federalism in Nigeria and Its Evolution**

The current fiscal federalism in Nigeria is highly centralised. The FG has the exclusive jurisdiction over collecting, managing and redistributing the revenue sources it levies and collects the taxes and revenues from different sources, such as oil and gas, rents, profits, and royalties, and then it redistributes them according to the current Revenue Allocation Act, which is based on a 1993 military decree.<sup>902</sup> According to the Act, the FG maintains 56%, the states receive 24%, and 20% is allocated to the local governments. Additionally, the oil and other natural resource producing states receive at least 13% based on derivation principle.<sup>903</sup> This additional percentage is to address the adverse environmental, social, economic and impacts of oil exploration and exploitation. This concession has always been criticised by the non-oil producing states in the north. On several occasions, such as 2014 National Conference, they called for a reduction to five percent and should be limited only to the onshore.<sup>904</sup>

Therefore, the subnational governments have no financial autonomy. They have to depend on the FG grants for performing their basic tasks, and they do not have the right to collect revenue from their internal resources within their borders.<sup>905</sup> This model of fiscal federalism and revenue allocation has always been a contentious case between the regions and the FG since its independence. It has created an inconsistent and ineffective economic, political and legal structure in Nigeria and its regions. It might be argued that such centralized fiscal federalism is simply a necessary approach to achieve a fair distribution of revenue, horizontally and vertically. It allows FG to participate in the macroeconomic stabilization and inter-regional economic equalization which leads to national unity.<sup>906</sup> However, this argument fails to recognise the weaknesses of centralised fiscal federalism such as its unsustainable economic dependence on natural resources,<sup>907</sup> its disregard of the demands and rights of the producing states,<sup>908</sup> and its

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<sup>902</sup>Femi Omotoso(n872).

<sup>903</sup> See Article (162/2) in Annex (B).

<sup>904</sup>Z. Adangor, 'The Principle of Derivation and the Search for Distributive Justice in the Niger Delta Region of Nigeria: The Journey So Far' (2015) 41 *Journal of Law, Policy and Globalization* 115.

<sup>905</sup>Martin Ifeanyi Okeke, Eme Okechukwu Innocent (n841).

<sup>906</sup>Rotimi Suberu(n823).

<sup>907</sup>ibid.

<sup>908</sup>Martin Ifeanyi Okeke, Eme Okechukwu Innocent (n841).

risks of giving broad economic power to the FG.<sup>909</sup> This model has failed to bring prosperity, unity and peace in Nigeria.<sup>910</sup>

A more practical and effective approach would require the reconstruction of intergovernmental relations based on shared rule, collaboration, self-rule, decentralization and the financial independence of all the states.<sup>911</sup> This would bring the consensus and national agreement necessary for securing peace, stability, development and economic prosperity in Nigeria.<sup>912</sup> However, although the country is now a democracy, albeit a flawed one, because of the political structures, along with deep socio-political divisions, this task cannot be easily accomplished.<sup>913</sup>

## 6.4 Conclusion

This chapter was dedicated to studying federalism in Canada and Nigeria and its treatment of oil and gas management. As was explained throughout the chapter, both federalisms have their distinct historical, political, economic and legal contexts. Even though federations were initially founded by the colonial British power, they diverged into two different forms and structures of federalism. Even though Canada started as a centralised form of federation, it has gradually become a decentralised federation. Nigerian federalism, on the other hand, was initially founded on decentralised terms and features but has moved towards a centralised system.

These two products of federation were the result of two political processes, two legal systems and two approaches to dealing with the distribution of power and wealth horizontally and vertically.

The decentralised form of federalism in Canada is the result of the methods and mechanisms taken by Canada to deal with internal ethnic issues and to tackle the distribution of power over natural resources in the federation. Nigeria, on the other hand, ended up with its current centralised federalism due to its central approach in dealing with the conflicts between various levels of government.

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<sup>909</sup>Rotimi Suberu(n823).

<sup>910</sup>ibid.

<sup>911</sup>Dare Arowolo(n878).

<sup>912</sup>Samuel C. Ugoh(n870).

<sup>913</sup>Eyene Okpanachi and Ali Garba(n831).

In Canada, the principles of collaboration, shared-rule, self-rule, reciprocity, mutual partnership, equal status have generally been the guiding principles for agreements between the central government and the provinces. Additionally, establishing certain intergovernmental institutions, as alternatives to strict constitutional or judicial institutions, for solving the conflicts over managing and distributing the revenues of oil and gas has been a key element of the evolvement of the Canadian federalism. Similar principles of collaboration and intergovernmental mechanisms have not been part of the historical evolvement of federalism in Nigeria. Alternatively, Nigeria has employed the principles of subordination, hierarchy, dominance and control whether through its rigid legal provisions or if necessary through force and violence. Thus, it is not surprising that intergovernmental relations and collaborative mechanisms and institutions have not been developed for dealing with conflicts between the FG and states in Nigeria.

In Canadian federalism, the ownership and management of non-renewable natural resources, including oil and gas are vested in the provinces. Each province is the owner of its own land and the NR within its constitutionally defined borders. On the other hand, the FG owns all the NR in its offshore exclusive economic zone, which is outside of the territory of the provinces. Also, the FG is responsible for policy-making and regulation of energy infrastructure crossing provincial boundaries. The FG has a jurisdiction over interprovincial and international trade and commerce with respect to natural resources, taxation, and energy development offshore and on frontier lands. Similar structure has not been followed in Nigeria. Although the states were initially the owners of the land and the natural resources, the federal authorities gradually stripped this right of the states through laws issued at different times. Currently, the FG is the only owner and has exclusive right with regards to all natural resources in the entire federation.

In addition, with respect to the fiscal federalism, the Canadian financial relationship is based on a non-centralized model. The provinces enjoy financial autonomy by having their own financial resources represented by NR and other sources that provide revenue. Also, the FG contributes to redistributing the revenue under equalization and other programs. The framework of fiscal federalism in Nigeria is different. It is based on the centralized model. In Nigeria the SGs do not enjoy financial independence. They depend on revenue coming from the FG. This model has caused many problems between the oil-producing states and the FG, which led to the political instability of the federation.

Furthermore, while disputes over NR in Canada are dealt with by the courts or political bargaining based on collaborative mechanisms, in Nigeria, disputes over oil and gas or other federal issues are not solved by independent, impartial courts, nor do they dealt with by less formal alternatives because of the absence of IGR. The violence in Niger Delta is the result of the absence of effective judicial and non-judicial institutions for dealing with the conflicts over NR and other issues.

Finally, one of the common points between Canada and Nigeria is that they are both multi-ethnic federations. The sustainability of these kinds of federations is dependent on minimising and managing ethnic conflicts.<sup>914</sup> Conflict management in these two federations has been dealt with in two different ways.<sup>915</sup> In Canada, collaborative mechanisms were instruments to solve problems and preserve the federation without leading to civil war. On the other hand, the opposite is the case in Nigeria, where federal authorities resorted to force and repression to solve problems, which led to the outbreak of civil war within the union. Thus, it can be said that federalism does not always achieve lasting peace without the necessary safeguards, including the establishment of intergovernmental institutions for solving conflicts based on equity, negotiation and collaboration. How to develop such safeguards is a crucial question for Iraqi federalism. A potential answer for that question can be found in comparative federalism. The brief comparative narrative presented in this chapter regarding both Canadian and Nigerian federalisms has unearthed some significant lessons for Iraqi federalism.

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<sup>914</sup>Watts, 'Federalism, Federal Political Systems, And Federations' (n 86).

<sup>915</sup>Klaus Von Beyme(n734).

## **Chapter Seven: Comparative Lessons for Federalism in Iraq**

### **7.1 Introduction**

After examining Canadian and Nigerian federalism in the previous chapter, a number of lessons can be outlined for federalism in Iraq. This chapter pulls together the findings from the experiences of Canada and Nigeria on the one hand and the historical, political and legal circumstances within Iraq itself on the other. It does so as a way of both identifying the lessons from other countries for the development of a system of CF and highlighting the need for, and difficulties facing, the establishment of such a system in Iraq. Thus, the key questions in this chapter are twofold. Firstly, do the Canadian and Nigerian models provide useful lessons for Iraq in terms of achieving stability and resolving the conflicts between national and subnational governments? Secondly, what does Iraq's own constitutional and socio-political context imply for the development of a collaborative model in the country? To answer these questions the chapter is organised in three sections. The first two draw out the lessons from the Canadian and Nigerian experiences of federalism for the development of CF in Iraq. It then considers the importance of developing such a system in Iraq. The section discusses the general advantages of such a system and their potential for the oil sector in particular before highlighting the difficulties in bringing this about.

### **7.2 Lessons from Canadian Federalism for Oil Management**

As explained in the previous chapter, Canada has taken relatively successful steps towards the establishment of institutions necessary for managing IGR. These institutions have played a crucial role in resolving disputes and achieving common objectives within the federation, including disputes over oil management. The lesson for Iraq is to take important steps towards establishing some similar intergovernmental institutions, taking into account the constitutional, social and political context of Iraq. Iraqi federalism seems to lack these institutions for better cooperation and coordination between the FG and the SGs, especially with the KRG. This section attempts to answer the question: why is the Canadian experience important for Iraq? This requires first to

study the most important points of similarity and difference between these two countries.

The first major similarity is that both countries are nationally heterogeneous. The case of Quebec in Canada is generally similar to the case of Kurdistan in Iraq. Both French people in Quebec and the Kurds in Kurdistan are considering themselves as distinct nations; they have their own culture, language, and specific demographic region. More importantly, they both have ambitions of self-determination or at least a strong non-centralised form of federalism. In Quebec, both groups, the federalists and separatists, perceive the whole Quebec as their own national homeland including areas in which the francophone is not dominant such as Ontario, New Brunswick.<sup>916</sup>

Second, both systems seem to be based on non-centralization partially emanating from the conflict between the people in the regions and the FG. The motive for large-scale Non-centralization in Canada has been and still is ethnic pluralism.<sup>917</sup> Quebec has always called for independence or separation from the majority of English-speaking cities. The same is true of the Kurds in Iraq, since federalism and non-centralization are the result of the Kurdish conflict with successive Iraqi governments since the establishment of the modern Iraqi state in 1921. Third, oil and gas in both countries located in some regions and provinces, not in the territory of the FG. In addition, in both countries the FG has constitutional jurisdiction over some aspects of the management of NR and the redistribution of their revenues.

Fourth, the nature of power sharing and non-centralization in Canada is based on the agreement and negotiation among politicians, or on the political deals among the elite, rather than on rigid constitutional institutions. To some extent, a similar situation can be observed in Iraq. The political elite in Iraq, usually behind closed doors, negotiate and decide what should be discussed in the parliament, especially, regarding the important

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<sup>916</sup>John McGarry, 'Canadian Lesson for Iraq', in Brendan O'Leary, John McGarry and Khaled Salih (eds), *The Future of Kurdistan and Iraq* (Philadelphia: U. of Pennsylvania Press, March 2005), 92-115.

<sup>917</sup> Except for Ontario, which support a strong central model of federalism. See: Robert Andrew Young, 'The secession of Quebec and the future of Canada' (McGill-Queen's Press-MQUP, 1998).

matters such as disputes on oil management and its revenue.<sup>918</sup> However, it should be said that the role of the FG in Canada unlike Iraq is very limited on oil and gas.<sup>919</sup>

Fifth, amending the constitution is very difficult in both countries because of the amendment terms and conditions in the constitution itself. Therefore, adopting informal or non-constitutional mechanisms for dealing with disputes and conflicts has had observable success in Canada, and may achieve similar success in of Iraq.

Sixth, both countries are based on the parliamentary system, and thus, the executive authority in both central and regional levels is the dominant power. Their intergovernmental relations depend on the negotiation and bargaining between both levels. This has worked in Canada, and it may work in Iraq, too. An example for Iraq, are attempts to reach an agreement between the KRG and Baghdad regarding the oil and gas dispute since December 2014. However, all these attempts did not succeed fully.

Finally, it is worth mentioning that the role of the judicial system regarding disputed issues which have a political nature may not be the most effective option in federalism. Since the court is based on the all-or-nothing type of decision, it is an option which is eschewed by all players. They perceive it as a contradiction to the spirit of cooperation and negotiation which characterises intergovernmental relations. It is an option which may be used in exceptional circumstances; when the disputed case reaches a dead end, despite the use of means of negotiation and cooperation to resolve it.<sup>920</sup> This reality has been realised in both Canada in some matters and Iraq.<sup>921</sup> As a result, other institutions have been developed based on cooperation and mutual agreement between all the levels of the federation. This is what has happened in Iraq regarding oil management between federal and KRG. The court has not been involved in the disputes on oil management.

These similarities suggest that it may be possible to apply Canadian-type solutions in Iraq given some sources of similarity, particularly with regard to NR managing. Canada has already developed mechanisms through intergovernmental institutions for managing NR between the FG and provinces.

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<sup>918</sup> Some examples about these types of political agreements on oil and its revenue between the FG and KRG were presented in chapter five.

<sup>919</sup> As explained in chapter six, these resources are owned by the provinces, and thus fall within their exclusive powers.

<sup>920</sup> Robert Cairns, Marsha Chandler, and William Moull(n757).

<sup>921</sup> However, courts remain an effective mechanism for resolving disputes in Canada rather than in Iraq.

However, while the two countries share certain characteristics, there are also profound differences between the two countries. Understanding these differences is central to identifying the challenges of adopting some elements of Canadian federalism in Iraq.

First, while Canada has a relatively robust democratic system of governance and a democratic culture among the people, Iraq, and the Iraqis still lack elements of a real democratic system of governance. Although elections are held in Iraq every four years, many aspects and features of democracy are missing from the legal and political system.<sup>922</sup> The existence of some non-democratic unions, like the (Union of Soviet Socialist Republics) USSR, led some scholars to say it had the appearance of a federal country; it was described as “pseudo-federations.”<sup>923</sup> Therefore, Watts argues that ‘fully democratic processes are a fundamental prerequisite to an effective federation.’<sup>924</sup> This is a big issue because in any form of federalism, a degree of democratic principles and democratic culture is needed to resolve disputes that arise between different levels of governments. These principles are already in place in Canada, but still missing in Iraq.<sup>925</sup>

Second, the CF has been gradually, and carefully, developed and adopted in Canada. There is a basic agreement among the major Canadian political actors and both federal and provincial institutions on the necessity and effectiveness of the collaborative approach. The attitude and spirit of cooperation between major political players and the people in Canada are different from that of Iraq. This has had a great impact on the application and positive outcome of the approach in Canada. As a cultural element and as the outcome of the rule of law, the attitude of cooperation in Canada is much stronger than that of Iraq. There seems to be no real trust between the major political players in Iraq.

Third, notwithstanding the contribution of the federal transfers via equalization programme and the spending power, the SGs and the provinces have their own fiscal autonomy. Generally, they depend on 80% of their own revenues for getting their

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<sup>922</sup> This problem was the cause of the failure of some of the world’s federations, for examples USSR and Czechoslovakia. Ronald Watts, ‘Models of federal power sharing’ (2001) 53(167) *International Social Science Journal* 23, 10.

<sup>923</sup> Wilhelm Hofmeister and Edmund Tayao(n160)7.

<sup>924</sup> Ronald Watts, ‘Models of federal power sharing’(n922)10.

<sup>925</sup>“The federal and state governments are in fact but different agents and trustees of the people, instituted with different powers, and designated for different purposes.” See: Alexander Hamilton and others, *The Federalist*, vol 43 (Hackett Publishing Company 2005)243.



budget, and the rest they get it from the FG.<sup>926</sup> This is different in Iraq because the governorates or the regions heavily depend on the public budget in Baghdad. In other words there is a transfer of general revenues rather than from NR revenues specifically (as should be the case in Iraq). Also worth noting that while NR are important in Canadian economy and government revenue they are relatively much smaller than in Iraq. This is due to most of Canada being much less dependent on oil and gas for government revenue than in Iraq. Therefore distribution of revenues is less contentious, although it is still sometimes problematic.

Fourth, the shape of federalism in these two countries is different. Canada is one of the oldest federations in the world and is a fully fledged federation with every part of the country established as a province or some other unit whereas Iraq is one of the latest federations, and still in the path of evolution, with only KRG exercising the possibilities of federalism. The other difference is the security situation that has accompanied the occupation of Iraq. Since 2003, Iraq has not experienced security stability and this has impacted negatively on political and economic stability as well. All of this has its consequences in our assessment of federalism in Iraq and in the IGR within the federation.

Fifth, the distribution of the powers and competencies between the FG and subnational units is also different. For example, if there is a contradiction between the laws of the FG and those of the provinces over concurrent or shared powers, the former will prevail in Canada; however, the opposite outcome is expected in Iraq.

Finally, there are a number of other important differences between Iraq and Canada. While there are many problems in the Canadian political system, including weaknesses in its administrative and judicial systems, these issues are less challenging than the problems facing Iraq. The latter include the absence of the effective constitutional institutions and the principles of the rule of law, the ineffectiveness of the judicial system, the existence of powerful religious institutions in the structure of political system and the government, and the existence of deep-rooted violent sectarian, ethnic and religious conflicts. It is important to bear in mind these differences when considering the establishment of intergovernmental institutions for CF in Iraq.

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<sup>926</sup> Robin Boadway, 'Fiscal Federalism: A Canadian Perspective' (2017) publication <<http://www.wpz-fgn.com/forschung/research-frontier/>> accessed December 10, 2018.

These differences mean that transplanting models which work in Canada into the Iraqi context may face considerable challenges. Although the collaborative approach based on intergovernmental institutions has been relatively successful in solving disputes between the FG and the provinces in Canada, similar success in Iraq would depend on some important conditions.

There are institutional and political difficulties that make the process of implementing a collaborative approach in Iraq challenging. The barriers include mistrust among political actors, deep racial and sectarian conflicts, instability, the absence of the rule of law and ineffectiveness of legal and constitutional provisions. As Watts argues ‘The degree to which federations have been effective has depended upon the degree to which there has been a wide degree of public acceptance of the need to respect constitutional norms and structures and the rule of law.’<sup>927</sup>

In addition, the interests of the major powers and the regional states, especially with respect to Iran and Turkey, are influential and present strongly in all aspects of Iraqi federalism. For example, Turkey and Iran are opposed to the emergence of a more financially independent Kurdistan Region. Such opposition has become more significant since the referendum for independence on 25 September 2017. The reason is clear; financial independence could spur the Kurds toward independence, prompting the remaining Kurds in Iran and Turkey to pursue the same goal. The aftermath of the referendum is clear evidence on the role of regional politics on the political process and federalism in Iraq.

Notwithstanding these challenges, the CF seems to be the best available option. If this approach does not solve the disputes, no other approaches seem to be available in such a challenging context where almost everything requires and depends on political agreement among major political actors and institutions. In other words, a similar political will and an institutional foundation is needed in Iraq for the development of a collaborative approach.

Moreover, the equal status of both the FG and provinces in Canada as a pillar of collaborative federalism is also required in Iraq. This equality principle can serve as a great foundation for federalism in Iraq especially as a way of building an effective collaborative approach between the FG and KRG because Kurdistan would not accept less than equal legal, political and economic status with the FG. Recognizing and

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<sup>927</sup>Ronald Watts, ‘Models of federal power sharing’ (n922)10.

accepting such equality would be an essential condition for the CF. However, since the referendum on September 25, 2017 relations between the FG and KRG have become tense. The referendum led to a series of events, culminating in a military confrontation between Erbil and Baghdad on October 16, 2017. The Iraqi military forces with the support of the Shiite militia took over the oil city of Kirkuk and other disputed areas which were under the control of 'Kurdish Peshmerga'<sup>928</sup> since June 2014. This caused a significant change in political and economic situations of the region. For example, the region lost many of the oil fields, which were managed and exploited by the two dominant Kurdish parties, in those areas. As a result, the FG has become politically, militarily and economically stronger than ever. Due to that circumstance, KRG began to waive many of its demands and constitutional powers in favour of the FG. Thus, it can be said, the issue of equal status between them depends on the amount of power on the ground, rather than constitutional arrangements.

Furthermore, Canadians have struggled with Quebec's demand for 'special status.'<sup>929</sup> Other provinces and the FG have not accepted collaborative federalism based on asymmetry. If equality of the provinces is an element of the Canadian collaborative approach, this element may also need a central place in Iraq. Asymmetry for the sake of Kurdistan may not be a sustainable option in the long term for Iraqi federalism. If other governorates such as Basra and Mosul became federal regions, would FG deal with these states as equal states to Kurdistan legally, politically, constitutionally and economically? Thus, in order to establish a strong CF, Iraq needs to decide whether its federalism is based on asymmetry- special status of Kurdistan- or equal status of all current and future federal states and regions. Dealing with the consequences of either option would not be without challenges. However, lessons can be learned from what Canadians have achieved and what they have risked when they rejected asymmetry and accepted equality among all provinces.

Another challenge is that natural resources, especially oil and gas, are linked to the issue of identity in Iraq, especially for the Kurds, while in Canada the issue of identity for

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<sup>928</sup> Peshmerga is the armed forces of the Kurdistan Region of Iraq and is responsible for security and defence in the region. However, according to the Iraqi constitution is part of the Iraqi Defence Foundation. See: Article 121/5 of the Constitution.

<sup>929</sup> It is worth mentioning that Canada has a kind of de facto special status or a non-constitutional asymmetrical status. See: Richard Simeon, 'Recent Trends in Federalism and Intergovernmental Relations in Canada...' (n168).

Quebec is not related to these resources. Oil and gas are not concentrated in Québec but are located in the western regions. Kurds in order to maintain their national identity in Kurdistan, which has a quasi-independent entity, focus on and emphasize their right to manage the natural resources in the region. Therefore, to achieve some kind of balance between the right of the region and the ability of the FG to distribute revenues fairly between the oil and gas producing and other provinces that lack these sources, there is an urgent need to adopt federal mechanisms of cooperation between these governments.

Additionally, another key element in the Canadian CF is its executive federalism. This would have a perfect implication for Iraq because federalism in Iraq, especially in its relations with Kurdistan, is also mainly based on executive powers. In other words, the disputed issues between FG and KRG have always been dealt with through negotiations and bargaining between senior executives of both governments. Maintaining this approach is another condition for implementing CF in Iraq. In both countries, there is a weakness of regional representation at the federal level. For instance, the House of Senate in Canada, the second chamber where regions are represented, is weak. This is even more the case in Iraq: the second chamber has not yet been established, with its fate to be determined by the first chamber, and even if it is established, it is likely to be weak.<sup>930</sup> This has led to the dominance of the executive authority, rather than the legislative authority, in both countries.

Likewise, collaborative agreements concluded between oil and gas producing provinces with FG have solved many of the problems that have occurred in Canada regarding oil prices, taxation, trade, and infrastructure and so on. All these agreements can be good examples from which lessons can be drawn from the Iraqi federalism.<sup>931</sup>

As was explained in the previous chapter, in Canada the ownership and the management of NR belong to the provinces as does the power of imposing some kinds of taxes. The federal authority, on the other hand, has the power of interprovincial and international trade. Achieving a proper balance of power requires cooperation between oil and gas producing provinces and the FG in a manner that promotes decentralization of administration while recognizing the legitimacy of the interests of both governmental systems.<sup>932</sup> As it has been argued, ‘resource management affects resource trade, and

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<sup>930</sup>See: Articles (48), and (65) in the constitution.

<sup>931</sup> Further details in the previous chapter.

<sup>932</sup>Robert Cairns, ‘Natural Resources and Canadian Federalism...’ (n 269)56.

trade policy affects resource management.<sup>933</sup> Both of them are interdependent and belong to concurrent powers, which need a coordinated approach on the basis of collaborative negotiation mechanisms.<sup>934</sup> A similar approach could be adopted for the oil and gas management in Iraq. As was explained in chapter five, according to the article 112 the subnational governments have the management right over oil and gas collaboratively with FG, and according to article 110 the trade and commercial issue is the exclusive power of the FG.

Due to the broad application of the Canadian collaborative approach, it is important for Iraq to be ready to extend the collaborative approach beyond natural resources. Such extension can add flexibility to the process of negotiations and bargaining among states, regions and the FG. Agreements on natural resources-related issues may be reached easier or more quickly if the issue of natural resources becomes part of a broader package of issues to be resolved among states and the FG. The broader the issues, the bigger the package, the more alternatives of agreements may be available.

Finally, another significant implication of Canadian federalism for Iraq may be its institutional features such as clarity in the roles, responsibilities and accountabilities of the executive branches at both the central and provincial levels. This would ultimately lead to transparency that is a missing piece of governance in Iraq. Adopting a collaborative approach in Iraq would ultimately require the clarification of the roles, responsibilities and accountabilities of those who play a decisive role in institutionalizing federalism in Iraq. This can produce a level of transparency in governance, which is necessary for the effective operation of federalism, especially in managing NR in both levels of government in Iraq.

### **7.3 Lessons from Nigerian Federalism for Oil management**

Although federalism is supposed to be a political and legal mechanism for accommodating contested matters among different tiers or diverse groups within the country, the Nigerian federation was characterised by strong competition among the various tiers of governments rather than a collaborative relationship. As Bamgbose concluded in his study, IGR within the Nigerian federation have been very complicated.

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<sup>933</sup> Robert Cairns, 'Natural Resources and Canadian Federalism...' (n 269).

<sup>934</sup> *ibid.*

‘The complexity and the problematic nature of such relations began to increase in Nigeria’s polity following the gradual increase of the federating units and the local governments at one level and the varieties of interests that cut across the various units.’<sup>935</sup>

Before outlining the learned lessons, it is necessary to point out the similarities and differences between federalism in Nigeria and Iraq. Both countries have some similarities and differences in terms of their political structure, history of ethnic conflicts, economic system and natural resources, federal system, and legal problems in managing NR.

In terms of similarities, both countries were created by the British colonialism. Modern Iraq was established as a unitary system by merging three former semi-independent Ottoman wilayats; Mosul, Baghdad, and Basra. The same thing with Nigeria was made by amalgamation of three independent colonial regions. Britain wanted to create a nation in each of these two countries through unity among diverse ethnic groups, but it seems they failed. Thus, both of the countries can be called artificial states.

It is therefore possible to say that federalism in both countries was created during the colonial or occupation period, whether under British colonialism in Nigeria or under US occupation in Iraq.<sup>936</sup> Federalism has never been an agreed-upon issue among all components within Iraq, and the same for Nigeria, but it was adopted as a result of political and military conditions created by international powers. Therefore, it lacks absolute free will for some components to live under such a system. For the Kurds, their ambition has always been to live in an independent state, and the same could apply to some groups in Nigeria, but because of internal and international circumstances and even regional as in the case of Iraq, federalism was the indispensable alternative. Nigeria’s civil war in the 1960s, about Biafra’s attempt to become independent, and the recent referendum in Iraqi Kurdistan is evidence of this reality.

A more fundamental similarity is that in both countries there is a lack of shared national identity within the country.<sup>937</sup> Ethnic, sectarian and religious conflicts are challenging

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<sup>935</sup> Adele Bamgbose(n825).

<sup>936</sup> Adam Smith (n79).

<sup>937</sup> Olabanji Akinola, ‘The 22nd World Congress of the International Political Science Association (IPSA) Madrid, Spain, 8-12 July, 2012,’ *Constructing National Identity in Modern Nigeria: A Deliberative Democracy Approach*.

obstacles to the achievement of federalism and political stability. The governments in both countries have not succeeded in creating a national identity. Also, in both countries, the constitution, legal system and judiciary have been unable to solve the disputes over the management of natural resources and the distribution of the revenue. Injustice in distributing revenue and power, corruption, underdevelopment, violence, history of persecution of minorities, discrimination, and mistrust among political players are among the challenging characteristics of the federal system in both countries.

In both countries there have been on-going disputes over oil management between the FG and the oil producing regions or states: Iraq with the KRG and Nigeria with the Niger Delta region. Since both countries are ethno federations, ethnicity in both countries has played a major role in the political dynamic of controlling NR. The Kurds in Iraq have been trying to guarantee their own financial independent through controlling oil and gas in their region. A similar situation has prevailed with regard to the minorities in the Niger Delta Region: they have sought to increase their powers over their NR through so-called resource control. Therefore, it can be said, both Iraq and Nigeria suffer from what is called “resource curse.”<sup>938</sup> Oil and gas in most developing countries like Iraq and Nigeria have created authoritarian governments, civil or internal wars, conflicts, poverty, corruption, and instability.<sup>939</sup> Additionally, Oil theft, also known as illegal bunkering, is one of the most complex problems in Nigeria. The same can be said about Iraq.<sup>940</sup>

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<sup>938</sup> It was explained in chapter I.

<sup>939</sup> The essence of the ‘resource curse’ hypothesis is that ‘abundance in natural resources, particularly oil, encourages especially civil war. Natural resources provide both motive and opportunity for conflict and create indirect institutional and economic causes of instability’. Matthias Basedau and Jann Lay, ‘Resource curse or rentier peace? The ambiguous effects of oil wealth and oil dependence on violent conflict, *Journal of peace research* 46, no. 6 (2009): 757-776, 757.

<sup>940</sup> It is stealing of oil from pipeline that pumps and moves through the regions. See: Odalonu Happy Boris, ‘The Upsurge of Oil Theft and Illegal Bunkering in the Niger Delta Region of Nigeria: Is There a Way Out?’ (2015) 6(3S2) *Mediterranean Journal of Social Sciences* 563; Ugwuanyi argues, ‘Oil theft, also known as illegal bunkering, is the act of hacking into pipelines to steal crude, which is later refined or sold abroad.’ See: Emeka Ugwuanyi, ‘Oil theft: Endless Search, for Solution’ *The Nation*, March 26, (2013) 17. In addition, Asuni argues Oil theft or illegal bunkering ‘is an illicit trade that involves the theft of crude oil and its derivative products through a variety of mechanisms.’ Judith Burdin Asuni, ‘Blood Oil in the Niger Delta...(n881).

In both countries, the FG has been in conflict with oil-producing governments and sought a more centralized model in the federal context. Nigeria was initially non-centralized, after the Biafra war for independence, IGR had changed to become more centralized. In Iraq intergovernmental relations between the FG and SGs have always been centralized, with the exception of the KRG, which has become non-centralized on a large scale since 1991.

Moreover, the Nigerian federalism is similar to the Iraqi one in terms of the way it originated. Nigerian federation took the form of “coming together” by forcing three independent colonial regions to create a new state on the basis of the federal system. However, some argue that Nigerian federalism can best be described as a form of “holding together”; three regions were governed by a decentralized system and later converted into a federation consisting of three regional governments.<sup>941</sup> Both these perspectives could be true and reflect two different stages of the Nigerian political and legal system. The first perspective represents the pre-independence period, while the second perspective reflects the post-independence period. A similar analysis can be used for describing the historical background of federalism in Iraq. Before 2003, regardless of what happened after 1991 with respect to KR, Iraq was constitutionally a unitary state, and therefore could be described as a federation founded on the basis of “holding together”. On the other hand, taking into account the semi-independent status of KR from 1991 to 2003, Iraq could be considered a federation founded on a “coming together” basis.<sup>942</sup>

Furthermore, both countries lack effective intergovernmental institutions to deal with disputed issues, which are of a political nature, that arise in federations between Federal and subnational governments. This, in turn, has adversely affected the political, economic and social stability of both countries. Additionally, the flawed nature of democracy, whereby the democratic culture among citizens is weak and exploited by political parties, as well as the weakness of the rule of law is another similarity between Iraq and Nigeria.

Before delving into the lessons, some differences must also be noted between these two federations. The Nigerian political system is a presidential system of government, the

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<sup>941</sup>Dagwom Yohanna Dang, ‘Revenue Allocation and Economic Development in Nigeria’ (2013) 3(3) SAGE Open 215824401350560; Dare Arowolo (n878).

<sup>942</sup> For further details, see chapter three.



President is both the head of State and head of the Government, and he is elected directly by the citizens. Each state must be represented in the federal cabinet by at least one member. While the system in Iraq is parliamentary, with duplication of executive authority, represented by the president of the republic and the prime minister, both of them are elected from parliament. Moreover, the Nigerian Legislative Authority consists of two chambers; the House of Representatives and the Senate while the Iraqi legislative authority is still lacked the second chamber.

Based on those similarities, and without disregarding the differences, the following lessons from Nigerian federalism can be outlined for Iraq.

Because of the failure to grant the states true self-rule, some scholars have described Nigerian federation as a failed federalism.<sup>943</sup> The same thing seems to be happening in Iraq. Despite the broad non-centralization provided by the constitution to the governorates and regions, the reality is quite the opposite. The relationship between Baghdad and the governorates is still working on a strong central basis. Therefore, to avoid such a drawback, the federal authorities should enforce the Constitution as it is, especially with regard to the authorities of the governorates are not organized in a region, as well as not to override the authorities of the KRG.

Moreover, the intergovernmental fiscal relations in Nigeria are characterized by dependency; where SGs are fully dependant on revenues provided by FG.<sup>944</sup> Therefore, it has been argued that ‘Most of the problems that the Nigerian federation faces are due to the failure to find a balanced approach to revenue sharing’.<sup>945</sup> Similarly, Iraq has partially adopted such a fiscal approach in dealing with the governorates and KRG. This should be avoided by giving the governorates a kind of financial independence that enables them to perform their duties independently without full reliance on the FG. This can be achieved, for example, by giving the SGs powers to levy certain types of taxes. More importantly, make oil-producing governments real partners in all oil policy decisions. In addition to the allocation of a fair share of revenue of them according to the principle of derivations in a way that meets their needs and compensates for what the Oil industry causes to the environment and public health of their cities. Oil-

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<sup>943</sup>Alex Danilovich and Francis Owtram, ‘Federalism as a Tool to Manage Conflicts and Associated Risks’ in Alex Danilovič, *Iraqi Federalism and the Kurds: Learning to Live Together* (Ashgate 2014)13, 25-59.

<sup>944</sup>Martin Ifeanyi Okeke, Eme Okechukwu Innocent (n841).

<sup>945</sup>Alex Danilovich and Francis Owtram (n943)32.

producing governorates in Iraq suffer from a lack of services and poor infrastructure, although they are the main revenue source for the Iraqi budget. Therefore, justice requires the adoption of the principle of derivation for oil-producing governorates, taking into account the political and economic context of Iraq. This is the most important positive lesson that Iraq can learn from Nigerian federation, in addition to avoiding its flaws.

Furthermore, Iraq should not repeat Nigeria's unsustainable approach in building its economic system. Natural resources should be considered as one source of revenue and as one pillar of the economic system of the country, not the only foundation. A sustainable economic system should be based on different pillars. Industrial, agricultural, technological and other elements of modern economic system should be considered for building a strong foundation for the economic system in Iraq. Otherwise, the conflicts over oil revenue remain unsolvable.<sup>946</sup>

Finally, it can be concluded that there is an urgent need in both Iraq and Nigeria to establish some intergovernmental institutions, which could provide an important mechanism for settling disputes of a political nature between the federal and subnational governments, as well as to achieve the common objectives of stakeholders within the federation. Oil and gas disputes, in such weak states in terms of the independence of the constitutional institutions and the rule of law, can only be settled through such mechanisms.

#### **7.4 Lessons from the comparative cases**

The comparative examination of Canadian and Nigerian federalisms has highlighted an important lesson for Iraq: federalism in Iraq needs a comprehensive reconstruction based on a collaborative approach on the basis of effective intergovernmental institutions capable of addressing contentious issues such as the management of NR, including oil and gas.

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<sup>946</sup> It has been argued that dependence on natural resources such as oil is 'more likely to trigger power struggles over the control of the central state, or if concentrated in certain regions ('point' and 'distant'), secessionist uprisings'. Matthias Basedau and Jann Lay, 'Resource curse or rentier peace?... (n 939) 759-760.

In spite the fact that each form of federalism is unique, that every model of federalism has to deal with unique structural and practical issues and that the future of any federation depends on its institutional foundation for dealing with its conflicts, Iraqi federalism can learn lessons from the success of Canadian system in establishing a solid foundation of federalism, and can learn lessons from the failure of Nigerian model in dealing with the internal conflicts over oil management. Similarly, Iraqi federalism finds its development in identifying its unique features and adopting conflict resolution approaches accordingly.

The brief account of Canadian and Nigerian federalism further solidified the proposition that CF is an indispensable approach for Iraq. More specifically, the example of Canadian federalism revealed not only the significance of CF for Iraq, but also the general principles, basic guidelines and frameworks required for establishing CF. It indicated how CF can be articulated, what intergovernmental institutions are crucial and which context is needed for its success. Nigerian federalism, on the other hand, highlighted significant lessons regarding the challenges facing CF, particularly with regard to conflicts over oil management. This is particularly important for Iraq as oil management has been in the centre of the conflicts between the KRG and FG. Financial non-centralization is an important pillar of any successful federal entity, and in order to not be described as a failed federalism, as in Nigeria, the non-centralization is a prerequisite for any successful CF.

The Canadian model answered two important questions, namely, whether CF is a viable or effective approach or not, and how this model of federation can be established and strengthened based on the distinct features of any given legal system. The Nigerian example, on the other hand, uncovered the challenges of applying the principles of CF on oil management as a federal issue, outlined the challenges of establishing collaborative institutions for resolving conflicts over oil management in the absence of a real democracy and the rule of law.

Now, a significant question needs to be answered. Can the general principles, mechanisms and institutions of CF, as they were gradually established in Canada, be robustly developed in Iraq? In other words, are there rationales for the effective adoption of the principles, mechanisms and institutions of CF in Iraq? If so, can it be a viable approach for resolving conflicts over oil management in spite of the significant challenges?

## 7.5 Rationales of Collaborative Federalism for Iraq.

There are many compelling reasons to suggest that the CF is an indispensable approach for Iraqi federalism. Without this approach, it would be difficult for federalism to achieve its ultimate goals. This section discusses that assumption through the following themes.

Collaborative federalism can be an effective mechanism for strengthening a federation in a parliamentary system. Most parliamentary federations are typified as executive federalism.<sup>947</sup> Because Iraq is organised on the principles of parliamentary federalism, based on fusion of executive and legislative powers, the executive power in both levels of governments is the dominant power that can easily weaken the legislative authority. This happens by compelling the legislatures to 'legislate within the parameters of agreements reached by the executive in camera.'<sup>948</sup> As Watts argues, "the executive federalism is a logical dynamic resulting from the marriage of federal and parliamentary institutions."<sup>949</sup> He concludes, as long as a federation is a combination of parliamentary and federal institutions, 'executive federalism' will not be eliminated.<sup>950</sup>

In a parliamentary system such as Iraqi federalism in which both executive and legislative authorities are interdependent, CF is vital mechanism at different levels of government, particularly with regard of overlapping jurisdictions. This mutual interdependence is embodied in the main role played by the key political parties in both parliament and governments in both national and subnational levels. Without a form of agreement among the main political parties controlling the Parliament, it would be highly difficult to reach decisions on disputed matters. For example, the FG and KRG have always tried to address their disputed issues through political bargaining and negotiations between senior executives of these two governments, such as the prime ministers. Maintaining this approach is another condition for implementing CF in Iraq. Canada is a clear example on the effectiveness of this approach.

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<sup>947</sup>Ronald Watts, 'Models of federal power sharing'(n922) 10.

<sup>948</sup>Chidinma Bernadine Thompson, 'Making Federalism through Law: Regulating Socio-Economic Challenges of Energy Development, a Case Study of Albertas Oil Sands and the Regional Municipality of Wood Buffalo' (thesis2013) 74.

<sup>949</sup>Ronald Watts, *Executive Federalism: a Comparative Analysis* (n 274)1.

<sup>950</sup> ibid abstract.

The structure of the federal legislative branch also necessitates the application of a collaborative approach for the federation. Constitutionally, Iraqi federalism can be characterised as a highly non-centralized federal and parliamentary system with a weak regional representative in the federal institutions. This is an inherent defect in the legislative arrangements of the Iraqi federal system. Principally, the legislative authority in most federal systems in the world consists of two chambers or councils, which is called bicameral legislative system.<sup>951</sup> Despite the legal and political importance of the second chamber the (Federation Council), it has not yet been established in Iraq.<sup>952</sup> This potentially leads to a system in which the regions and the governorates that are not organized in a region are not properly represented in the parliament. Consequently, due to the lack of the second chamber, which represents the regional interests, they would not have an effective role in making laws in the federal parliament. Therefore, the failure to establish the Council of Federation in Iraq has complicated the IGR within the federation. These councils usually serve as a representative body for subnational governments, and they serve as a safety valve against the CoR so as not to become a dictatorship in the hands of the majority at the expense of minorities' rights. Given these circumstances, it is important that there is another mechanism in place to compensate for that defect in representation. Adopting CF may be an alternative for a second chamber, which provides a stronger participation and better representation in federal decision-making process.

CF can also resolve some of the problems presented by the country's rigid constitutional provisions with respect to amendments. Such rigidity requires more collaboration among Iraqi political players in responding to the ever-changing demands of different Iraqi groups. In a country where major social and political groups are not satisfied with the status quo and the constitution is relatively rigid with respect to amendments, collaboration would be a pragmatic or alternative response to circumvent this difficulty. Apparently, a fundamental constitutional change is highly unlikely to be achieved. This is because of the terms and conditions regarding amendments in the constitution itself. Moreover, even partial constitutional changes, especially regarding the powers of the SGs, are almost impossible to adopt.

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<sup>951</sup>Burgess, *Comparative Federalism: Theory and Practice* (n338).

<sup>952</sup> For more details, see Chapter III of this thesis.

According to its provisions, the Iraqi constitution can be amended in two ways. The first is stipulated in Article (126)<sup>953</sup>, which is the general rule for any amendment. The second way is outlined in Article (142)<sup>954</sup>, which is a transitional and exceptional rule. Article 142 was designated for a specific purpose, namely persuading the Sunni Arab to participate in the political process. However, this article has not yet been applied.

How can these two constitutional provisions be understood and applied was a question raised by the House of Representatives and later submitted to the Federal Supreme Court for its interpretation. In its ruling (No. 54 / Federal / 2017) issued on (5/22/2017), the Court states the application of Article (142) must be prior to the application of the

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<sup>953</sup> Article 126 states: First: The President of the Republic and the Council of the Ministers collectively, or one-fifth of the Council of Representatives members, may propose to amend the Constitution. Second: The fundamental principles mentioned in Section One and the rights and liberties mentioned in Section Two of the Constitution 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, and the ratification by the President of the Republic within seven days. Third: Other articles not stipulated in clause “Second” of this Article may not be amended, except with the approval of two-thirds of the members of the Council of Representatives, the approval of the people in a general referendum, and the ratification by the President of the Republic within seven days. Fourth: 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. Fifth: A- An amendment is considered ratified by the President of the Republic after the expiration of the period stipulated in clauses “Second” and ‘Third” of this Article, in case he does not ratify it. B- An amendment shall enter into force on the date of its publication in the Official Gazette.

<sup>954</sup> Article 142, which falls under the Transitional Provisions in Chapter two, states: ‘First: The Council of Representatives shall form at the beginning of its work a committee from its members representing the principal components of the Iraqi society with the mission of presenting to the Council of Representatives, within a period not to exceed four months, a report that contains recommendations of the necessary amendments that could be made to the Constitution, and the committee shall be dissolved after a decision is made regarding its proposals. Second: The proposed amendments shall be presented to the Council of Representatives all at once for a vote upon them, and shall be deemed approved with the agreement of the absolute majority of the members of the Council. Third: The articles amended by the Council of Representatives pursuant to item “Second” of this Article shall be presented to the people for voting on them in a referendum within a period not exceeding two months from the date of their approval by the Council of Representatives. Fourth: The referendum on the amended Articles shall be successful if approved by the majority of the voters, and if not rejected by two-thirds of the voters in three or more governorates. Fifth: Article 126 of the Constitution (concerning amending the Constitution) shall be suspended, and shall return into force after the amendments stipulated in this Article have been decided upon’.

mechanism mentioned in Article (126). Accordingly, the only constitutional amendment mechanism must be based on Article 142. This is obviously challenging, but after overcoming this challenge, Article 126 will be the only mechanism for any future constitutional amendment, which will not be without challenges either.

Therefore, carrying out any constitutional amendment, whether according to the first or second mechanism, is not an easy matter, if not impossible. A comparison between the above constitutional provisions and the reality of the Iraqi socio-political system reveals the difficulty of making any constitutional amendments regarding the powers of the regions. The required approval by the majority is not realistically achievable in the regions and nationwide. This reality has become apparent especially after many failed attempts to amend the constitution. KRG, for example, insists on the full exercise of its rights and authorities outlined in the constitution. It has been argued by Ashty Hawrami, the minister of natural resources in the KRGs, 'the rights of the regions and governorates are clear "in the constitution" and cannot be modified in any way to enhance the powers of federal authorities.'<sup>955</sup> This has been confirmed when on 25th of September 2006 a committee was created for reviewing the constitution, which started its function on 15th of November by presenting a report proposing some amendments related to the federal power as well as the articles related to oil and gas. The proposal was rejected by the Kurds.<sup>956</sup>

Alternatively, the stakeholders could opt for a flexible and informal mechanism for dealing with the problems and issues related to the division and distribution of powers.<sup>957</sup> CF, therefore, can be one, if not the only, way forward. This informal and non-constitutional mechanism based on cooperation can contribute significantly to the effectiveness of federalism in responding to the demands of various Iraqi groups.<sup>958</sup> Such a political approach offers bargaining solutions among stakeholders beyond rigid and non-compromising constitutional provisions that are interpreted by each party in its favor. Hence, CF mechanisms are inevitable to resolve differences between different governments and to achieve common goals within Iraqi federation.

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<sup>955</sup> See: KRG cabinet, 'Oil and Gas Rights of Regions and Governorates' (n 555).

<sup>956</sup> James Crawford (n10).

<sup>957</sup> Alan Trench, *Intergovernmental Relations in Canada...* (n350).

<sup>958</sup> David Cameron and Richard Simeon, 'Intergovernmental Relations in Canada...' (n 174)52.

The model of power distribution among different levels of government is another compelling rationale for adopting CF in Iraq. Alongside the federal exclusive powers and the residual powers for the subnational governments, the essential character of the division of jurisdictions in the Iraqi constitution is concurrence or shared powers. There are many areas or powers that are shared between the federal and subnational authorities rather than being exclusive for a specific level. The constitution, in Articles 114 and 113, affirms these shared powers.<sup>959</sup> Furthermore, the issue of oil and gas management, which is the most important case within Iraqi federation, also belongs to the shared power provisions according to the Article 112.<sup>960</sup> Therefore, the more concurrent and shared powers are in a Constitution, the easier it will be to use non-constitutional means such as intergovernmental collaboration to manage them and solve the problems related to them through informal means such as political agreements.<sup>961</sup>

Consequently, the Iraqi constitution is somehow a resilient document with respect to the shared or concurrent powers. It does not include many legal restraints on IGR for the purpose of exercising the concurrent powers. As Simone argues, “constitutions that contain gaps and “silences” may be easier to adapt informally than those that spell out powers in great detail”.<sup>962</sup> Thus, all the above-mentioned constitutional articles, which are characterized as ambiguous and have different interpretations, in addition to articles on shared or concurrent powers, is a major incentive for adopting CF in different areas, especially with regard to oil and gas management.

This is an important constitutional element especially in the absence of any legal requirements on the types and structures of the mechanisms that need to be adopted for exercising the concurrent heads of powers. Hence, there is a significant degree of flexibility for developing collaborative mechanisms by the regions or states and the FG. As long as both levels of governments possess the jurisdictional competence and the administrative capabilities, especially the FG and KRG, they can develop mechanisms for intergovernmental relations. This proves to be an indispensable approach for solving the current problems between the FG and KRG about oil management. In general, because the shared powers cannot be regulated and managed except through

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<sup>959</sup> For further details in chapter three.

<sup>960</sup> More details will be given to this issue in different section in this chapter.

<sup>961</sup> Richard Simeon, ‘Adaptability and change in federations’ (2001) 53(167) *International Social Science Journal* 145.

<sup>962</sup> *ibid* 148.



collaborative mechanisms, based on negotiation as equal partnerships, the collaborative approach appears to be a viable option. This approach has the potential for preventing further conflicts and finding solutions for the existing disputes.

Economic considerations might also be an important justification for developing CF. This model can address the fundamental economic issues associated with the allocation of the revenues of natural resources, in particular the question of fair distribution. This is particularly relevant for Iraq as its natural resources are located in specific regions. Clearly, whenever the regional economic disparities become a problem for the whole federation, the FG and regions must make an effort to resolve it based on cooperation and collaboration between rich and poor governorates.<sup>963</sup> Hence, the economic equality based on economic equalization among different tiers should be a major concern for the whole federation.<sup>964</sup> This applies on Iraq especially with respect to oil management. It can alleviate the fears of oil-and-gas-poor provinces from federalism by involving them in decision-making with an economic dimension. Similar involvement may also be embraced through equalization program for achieving economic balance. This has had a relative success in Canada.

CF can also contribute to strengthening the pillars of consociational democracy and the rule of law in Iraq. Undoubtedly, federalism may not function, nor may it survive in the absence of effective judicial institutions, true constitutionalism and the rule of law. This scenario is present in Iraq now. More fundamentally, in a federation based on diversity and heterogeneity, the concept of participation in the decision-making process puts all the constituent units of the federation at the same level. There is no senior and junior. This means the classical democracy is no longer workable properly, but the consensual democracy would be more practicable. This consensual model of democracy is dominant in Iraq in practice.

In such a model, collaboration among different levels of governments becomes necessary in the sense that the majority-based decision making process cannot be efficient and workable. In this regard Arend Lijphart argues, 'If we add a few characteristics to the concept of federalism, we arrive at the concept of consociationalism. Similarly, consociationalism plus some additional attributes spells

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<sup>963</sup>Jennifer Smith (n716)7.

<sup>964</sup>ibid.

federalism.<sup>965</sup> There are some differences between federalism in general and consociationalism. It can be said that federalism is both structures and processes of government, while consociationalism is only a process for power-sharing embodied through the party system. Another difference is consociationalism is only a means related to the character of a regime while federalism is form and regime of a polity and it is both; means and end.<sup>966</sup>

Nevertheless, what matters is the similarity and link between CF and this kind of democracy. The main similarities are that both rely on informal mechanisms and measures that make them flexible systems to respond to cultural, social and political changes within a federation. Therefore, the key converging point between the concept of federalism, particularly CF, and the Consociationalism is the rejection of majoritarian democracy.<sup>967</sup> Both of them are political and social phenomena based on compound Majoritarianism rather than simple Majoritarianism, and both of them emphasize collective action rather than unilateral action. They aim to achieve the diversity and unity as well as to accommodate democratic complexity. Therefore, they do not associate with the so-called unitary system; neither centralization nor decentralization, but only with non-centralization, which according to Elazar refers to a collaborative federalism. Therefore, as Elazar argues, ‘Consociational regimes tend to be longer lived when they function within federal polities.’<sup>968</sup>

Another important characteristic of Consociationalism is the existence of the second chamber in parliament.<sup>969</sup> Therefore, the absence or weakness of the Upper Council, which prevent concentration of power into the hands of the majority in a unicameral legislature, has a significant impact on the effectiveness of the Consociationalism democracy in Iraq. The alternative to the second chamber is collaborative federalism, which may also help the success of the Consociational democracy in place since 2003. Coexistence among different ethnic, religious and cultural communities in Iraq, regardless of the majority and minority criteria, requires a collaborative federalism. Without a form of collaboration established through the agreements of leaders of

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<sup>965</sup> Arend Lijphart, ‘Non-Majoritarian Democracy...’ (n 343)3-4.

<sup>966</sup> Daniel Elazar, ‘Federalism and consociational regimes’ (1985) 15(2) *Publius: The Journal of Federalism* 17,30.

<sup>967</sup> Arend Lijphart, ‘Non-Majoritarian Democracy...’ (n 343)3-4.

<sup>968</sup> Elazar, ‘Federalism and consociational regimes’ (n966)30.

<sup>969</sup> Arend Lijphart, ‘Non-Majoritarian Democracy...’ (n 343)8.

different ethnic and sect groups, federalism remains unrealistic and it is, therefore, doomed to failure.<sup>970</sup>

As Colino argues, ‘given the need for survival of the union and of the founding communities, cultural affirmation is among the primary values of this system, followed by autonomy, balance of powers, cooperation, and finally harmonization.’<sup>971</sup> The Iraqi society tends to be formed based on the autonomy of the units and cultural affirmation for the three main factions, which requires consensus, cooperation and harmonization based on equality among different levels of government within the federation. All these are characteristics of CF.

CF might also help to address the inherent dispute in the country’s constitution with respect to the balance of powers among different level of governments. The Constitution grants enormous powers to the SGs that may eventually weaken the power of the FG if applied on the ground.<sup>972</sup> Reflecting on this aspect, Cameron argues, under the constitutional provisions ‘There is now little or no inherent power in the centre at all, in part because there is no real centre. Any new Iraqi government will hold only such power as regional interests permit it to assume. The new constitution of Iraq reflects this reality.’<sup>973</sup> He also indicates, ‘Regional interests are so powerful that Iraq must be thought of as a confederation- a collection of loosely affiliated states in a political union- not the federation that Iraq’s constitution declares the country to be.’<sup>974</sup> Hence, the role of the FG will not be more than coordination among different levels of subnational governments. This may lead to a number of disputes over the distribution of powers unless a system of collaboration is established to reach a political agreement according to which the prime ministers and ministers of both levels of government set a legislative agenda about a disputed matter. Then by enforcing their political agreements in the Parliament, they can pass the bills. This is how CF works.

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<sup>970</sup>Arthur Benz and Jörg Broschek(n 17)58.

<sup>971</sup>ibid (n19).

<sup>972</sup>Although, as has been explained before, on the practice the intergovernmental relationships between the FG and the subnational governments is centralized, at best it is decentralized, with the exception of the KRG which is based on a kind of non-centralization at some point. This relationship differed depending on the circumstances and the power possessed by the other party.

<sup>973</sup>David Cameron and Richard Simeon, ‘Intergovernmental Relations in Canada...’ (n 174)

<sup>974</sup> ibid.

This is especially the case for considering the equal status of both the federal and subnational governorates, especially KRG, as a pillar of CF in Iraq. This equality principle can serve as a great foundation of federalism in Iraq especially for building an effective CF between the FG and Kurdistan. For the KRG, making a policy and regulation with respect to a matter through intergovernmental consensus is better than unilateral action by the FG. The equal partnership is also confirmed by Elazar in his conception of federalism as a covenant. Based on this idea, to achieve common goals and resolve their conflicts, all covenants between humans or between their entities, including federal entities within federations based on a non-centralized model, should be based on equal partnership.<sup>975</sup>

CF can also be an alternative to a rigid judicial approach or to a weak judicial system. In the absence of effective judicial authority, collaborative approach can provide a political, but not necessarily judicial, alternative. Despite the constitutional emphasis on the independence of the judicial authority and its supremacy, especially the FSC there is no significant role of this court. The FSC in Iraq is evidently non-neutral political organ issuing political decisions.<sup>976</sup>

In general, because courts are based on the all-or-nothing type of decision, it is an option eschewed by all players; they see that it is incompatible with cooperation and negotiation in the IGR. In federations characterized by diversity, non-constitutional political means are used to resolve disputes between different levels of government; courts are the last option, and it may come after the failure of non-judicial means.<sup>977</sup> Therefore, the judicial system may not be the most effective and best option for disputes of political nature within the federal IGR. It is an option which may be used in exceptional circumstances when cooperation and negotiation do not deliver a satisfactory outcome. This reality has been realised in Iraq since 2005, where the governments, especially the FG and KRG, in Iraq have not resorted to the Supreme Federal Court to resolve their conflicts only in rare cases. As a result, other institution should be developed based on collaboration and mutual agreement among all the levels of the federal government.<sup>978</sup> Hence, major political institutions need to realize that

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<sup>975</sup> For further details see chapter two.

<sup>976</sup> Further details in previous chapter.

<sup>977</sup> Richard Simeon, 'Adaptability and change in federations' (n961).

<sup>978</sup> Nevertheless, there is a decision taken by the Federal Supreme Court in favour of the FG, against the Wasit Provincial Council's Resolution No 666, which included the non-approval of the council to export

collaboration and negotiation is a better option than judicial approach for dealing with the issues related to the management of natural resources.<sup>979</sup>

However, the adoption of inter-governmental relations mechanisms does not mean that the judiciary and the courts are permanently abandoned. It has been argued that ‘(f)ederalism is both shaped by and shapes the judicial system.’<sup>980</sup> The judicial institutions are crucial for both strengthening collaborative federalism and protecting the rule of law as prerequisites for a system in which federalism can play its role in the distribution of powers and resources. In addition, it has been argued that ‘(a) federal system ordinarily requires a written constitution, and a written constitution requires interpretation, usually, though not always exclusively, by judges’.<sup>981</sup> This is confirmed by the Iraqi constitution in Article 93/2. Another important function of the Federal Court is judicial review. It has the jurisdiction to oversee the constitutionality of laws passed by the legislature that affect the entire federation. Here in this purely legal matter, the political parties and the constituent governments of the federation cannot dispense with the court’s function and play this role. This is confirmed by most of federal constitutions, including the Iraqi constitution, as we have shown previously.<sup>982</sup> Additionally, there must be a fully functioning judiciary for the protection of human rights and to ensure respect and enforcement of the rule of law in this regards. Overall, therefore, the intergovernmental institutions cannot and should not replace the judicial channels exist to protect the rule of law, the constitutional rights, and access to justice for the citizens, persons and institutions.

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oil and gas beyond the boundaries of the province, by extending pipelines from fields in the province to other provinces if it finds reasons require it. Where the Court issued on 05.02.2012 a decision to cancel that resolution and said; the Council by taking this resolution exceeded its competencies under the Constitution and the law of organization of the Ministry of Oil No. 101 of 1971 and the law of governorates not organized in a region, number (21) for the year 2008. See: the Iraqi ministry of oil and gas, the legal department. (Arabic version). (/) <<http://www.moo.oil.gov.iq/Legal-Dir-website/Legal-Dir-website/activities-legal.html>> accessed December 11, 2018.

<sup>979</sup> Martin Papillon and Richard Simeon, ‘The Weakest Link? First Minister Conferences in Canadian Intergovernmental Relations’(n733).

<sup>980</sup> Nicholas Aroney and John Kincaid, Introduction: Courts in federal countries, in *Courts in Federal Countries: Federalists or Unitarists* (2017 May 15) 14.

<sup>981</sup> Ibid 6-7.

<sup>982</sup> Article 93 states ‘The Federal Supreme Court shall have jurisdiction over the following: First: Overseeing the constitutionality of laws and regulations in effect. Second: Interpreting the provisions of the Constitution.

Another implication of the Iraqi constitution is that the constitutional framework regarding oil and gas management requires collaboration between both levels of government. One of the fundamental challenges of federalism in Iraq is the management of oil and gas between the FG and the KRG. In the Constitution, articles 111 and 112 are designed for oil and gas management. Article 111 addresses the issue of oil and gas ownership. It gives all Iraqi people the ownership right, regardless of their religion, nationality, ethnicity, and regardless of their regions. This constitution is considered as the first Iraqi constitution, which constitutionalized this right. Article 112 deals with the management of these two sources, between the FG and the producing governments, in addition to the formulation of strategic policies in this regard, with emphasis on the fair distribution of revenues derived from them. Therefore, it seems that the constitutional provisions directly imply that the relationship between federalism and management of oil and gas is reciprocal rather than being unidirectional in character.

As it has been explained in chapter five, the articles (111 and 112) have not addressed all issues regarding oil management.<sup>983</sup> There are still many unresolved technical and legal issues. Problems, conflicts and concerns can always arise in interpreting these constitutional articles, especially in determining the rights, authorities, responsibilities and powers of the FG, on the one hand, and of the SGs on the other hand. Nevertheless, any interpretation of these articles, especially article 112, would easily accept that collaboration is a fundamental principle established for oil management in the article.<sup>984</sup>

Such a collaborative interpretation of article 112 seems to be generally accepted by the main players despite their disagreements on the details. Seemingly, both levels of governments, the federal and the KRG on many occasions have already realized that collaboration rather than confrontation is a major key that can open the solutions arise from practical political conflicts and constitutional interpretations regarding the authority over various aspects of oil and gas management. This is repeatedly expressed by the leaders, politicians and the ministers in many occasions. For instance, the former Iraqi President Jalal al Talabani, on the occasion of the export of crude Oil for the first time from Kurdistan region on 2 June 2009, asserted on the necessity of cooperation between Kurds and Arabs. He said, 'We must stress on tolerance between Arabs and

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<sup>983</sup> For further details in chapter five.

<sup>984</sup> Robert Cairns, 'Natural Resources and Canadian Federalism...' (n 269).

Kurds – we have had a sense of brotherhood and this will remain.’ He added, ‘This is an historic event, not only for the Kurdish people but for all Iraqis.’<sup>985</sup> Moreover, the former KRG’s Prime Minister, and the current Iraqi president, Barham Salih has asserted, ‘the KRG believes that close *cooperation* on oil and gas strategy and export policies is vital to the security and well-being of the people of Iraq.’<sup>986</sup> Additionally, the current KRG’s Prime Minister Nechirvan Barzani has also confirmed ‘that Iraq needs to develop an oil and gas policy based on *cooperation* with the (KRG), not confrontation, and urged the FG to pass an oil and gas law as soon as possible, as well as a revenue-sharing law.’<sup>987</sup> Barzani also asserts, ‘We believe that oil policies should be based on *cooperation and coordination*, not confrontation.’<sup>988</sup> In addition, KRG frequently states, ‘the country will only thrive on a diet of *cooperation and coordination*, not on confrontation. That is what the basic law of the land, the Constitution, demands.’<sup>989</sup>

Similar assertions have been confirmed in a meeting between Barzani and the Iraqi Parliament’s Oil and Gas Committee on 9 February 2015. He stated;

KRG’s commitment to the agreement reached with the Federal Government of Iraq, hoping to reach a full agreement with Iraqi Prime Minister Haider Al-Abadi on settling all the outstanding issues between the two sides. The Prime Minister urged that the Iraqi Parliament’s Oil and Gas Committee to play a role as a third party, monitoring the implementation of the agreement. KRG is willing to cooperate and coordinate with the Committee in any manner that it deems appropriate.<sup>990</sup>

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<sup>985</sup> ‘Kurdistan Region Celebrates Historic Achievement with First Crude Oil Export’ (*Kurdistan Regional Government* June 2, 2009) <<http://cabinet.gov.krd/a/d.aspx?s=010000&l=12&r=223&a=29807>> accessed December 11, 2018.

<sup>986</sup> ‘Prime Minister Salih’s Statement on Oil and Gas Laws Following Federal Finance Minister’s Visit’ (n 606).

<sup>987</sup> KRG Cabinet, ‘Oil and Gas Conference Opens in Erbil, ‘Exploration Capital of the World’’ (*Kurdistan Regional Government* December 4, 2012) <<http://cabinet.gov.krd/a/d.aspx?a=46031&l=12>> accessed March 11, 2016.

<sup>988</sup> ‘Prime Minister Barzani’s Speech at CWC Oil and Gas Conference’ (n 563).

<sup>989</sup> ‘Statement on Oil & Gas Policy by the Kurdistan Regional Government’ (n 558).

<sup>990</sup> ‘PM Barzani Meets Iraqi Parliament’s Oil and Gas Committee’ (*Kurdistan Regional Government* February 9, 2015) <<http://cabinet.gov.krd/a/d.aspx?s=040000&l=12&a=52946>> accessed December 11, 2018.

Furthermore, Barzani states, 'in terms of revenue sharing, I believe this will bring the government in Baghdad and the KRG closer to resolving outstanding issues in the oil and gas area...It is now time for Baghdad to move forward with greater effort in regard to *cooperation* with the Kurdistan Region.'<sup>991</sup> He also emphasises, 'Kurdistan needs to be *an equal partner to Baghdad* and wants Iraq to be a country at peace with itself, removed from the centralised system that still courses through the country.'

Additionally, this statement has been also emphasised in many occasions by Ashti Hawrami, the minister of Natural Resources in KRG. He once stated, 'Given the country's troubled history of authoritarian rule, we believe a decentralized oil policy and the sharing of power and wealth is essential to Iraq's unity. The tragic lessons of the past teach us that Iraq cannot be governed by force, only through *cooperation and consensus*.'<sup>992</sup> He also expressed 'we always prefer *consensus and co-operation* to confrontation. That is what Iraq needs after years of instability and war.'<sup>993</sup>

Similar realization and appreciation of collaboration has been expressed by some of the senior officials of the FG. The Head and members of the Iraqi Parliamentary Oil and Gas Committee have expressed their willingness for greater *cooperation and coordination* with their KRG counterparts.<sup>994</sup> Also, the Ministry of oil in the federal government declared its intention in many occasions to work with KRG based on cooperation for solving the outstanding issues regarding oil and gas. Last year, he committed 'to solve these critical issues especially in such circumstances that demands honesty and accuracy in all the information as well as the *cooperation* between everyone to achieve the public benefit.'<sup>995</sup>

Finally, the financial relationship is another issue that has been practiced on the basis of bargaining. The intergovernmental political bargaining between the FG and KRG has become a dominant feature in the dynamics of intergovernmental financial relations.

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<sup>991</sup> 'Launch of Kurdistan Region Oil & Gas Yearbook 2009' (*Kurdistan Regional Government* July 20, 2009) <<http://cabinet.gov.krd/a/d.aspx?a=30619&l=12&r=223&s=010000>> accessed December 11, 2018.

<sup>992</sup> 'Dr Ashti Hawrami: The Kurds Don't Wish to Tear Iraq Apart' (n564).

<sup>993</sup> Interview with Ashti Hawrami, 'Polishing the Diamond' (2013) other <[http://mnr.krg.org/images/pdfs/TOGY\\_KRG\\_2013\\_interview\\_Minister\\_\\_Ashti\\_Hawrami\\_page\\_32.pdf](http://mnr.krg.org/images/pdfs/TOGY_KRG_2013_interview_Minister__Ashti_Hawrami_page_32.pdf)> accessed December 11, 2018.

<sup>994</sup> 'PM Barzani Meets Iraqi Parliament's Oil and Gas Committee' (n985).

<sup>995</sup> Rudaw, 'Erbil, Baghdad Ready to 'Reorganize' Cooperation on Oil, Electricity' (*Rudaw* July 12, 2017) <<http://www.rudaw.net/english/kurdistan/120720171>> accessed December 28, 2018.



Since 2003, the public budget law is enacted through negotiation and bargaining between both orders of governments. This practice, however, was not disregarded in budget Act 2018; the law was enacted without engaging in genuine negotiation with the Kurds.

The abovementioned rationales provide strong justifications for the necessity of CF based on intergovernmental institutions in Iraq. In particular, those rationales provide an appealing case for the CF in dealing with the conflicts between FG and KRG over oil management.

However, despite this general consensus on collaboration, FG and KRG have not come to any significant agreement on the structure, nature, and methods of collaboration for oil management. This indicates that a mere realization about the necessity of collaboration will not produce much result without constant endeavours for establishing institutions of collaboration with effective structure based on realistic considerations.

Additionally, the success of collaborative federalism starts with identifying, then overcoming, the challenges of federalism in Iraq. All forms of federalism including collaborative federalism face challenges, as well as shortcomings that were mentioned before in the second chapter. There are institutional, socio-political, cultural, religious and structural difficulties that make the process of implementing federalism in general and particularly the collaborative approach in Iraq challenging.

There have been several initiatives, even agreements, between FG and KRG on issues related to oil and gas and the distribution of revenues. For example, the agreements in early 2011, in September 2012, and finally in 2015. However, these agreements have not had any results as both sides have failed to take practical steps about the deliverables of the agreements. For instance, according to an agreed on (2 December 2014), FG must allocate 17% of the revenue to the KRG and grant 1.2 trillion dinars to the Peshmerga forces and allocate a proportion of the budget to the Ministry of Defence. In return, the KRG must deliver 250,000 bpd (barrels per day) of oil from the region, in addition to Iraq's export of 300,000 bpd of Kirkuk oil. Neither side delivered the promises undertaken in the agreement. The failed agreements and aborted initiatives are indicative of the challenges facing Iraqi federalism for dealing with oil management.

However, the budget Act of 2019 was adopted unanimously by all MPs within the federal parliament, including the Kurds. A mechanism was agreed upon, in which the FG to pay the salaries of the regions' employees, in addition to its share of the public

budget. In return, the KRG is committed to export at least (250,000) BOPD produced from its fields to be marketed through SOMO and to hand over the revenues to the State Treasury exclusively.<sup>996</sup>

Lack of trust is among the most challenging issues. There seems to be a lack of trust among the major political players in Iraq, the national and SGs, especially with KRG. This is a major problem in Iraq because in the absence of the rule of law, if there is no trust and no real spirit of cooperation, it is very challenging to establish effective federal institutions and develop intergovernmental institutions. Mutual faith and trust among different groups within a federation and the spirit of tolerance and compromise are one of the most important pillars for the success of any federation.<sup>997</sup> Trust does not mean taking common positions and consensus in every small and large issue; on the contrary, it assumes there is no clear consensus on some disputed issues. In a country that lacks a rich legal culture and where political and constitutional relations and the interests of groups and parties are subjected to drastic changes, the adoption of an informal flexible mechanism such as collaborative federalism has great difficulty in achieving positive results.<sup>998</sup> At the same time, Cameron & Simeon argue ‘successful collaboration depends on high levels of mutual trust among the participants and on their internalization of its implicit norms.’<sup>999</sup>

Political and legal culture is another difficulty. There is lack of a federalist culture among the Iraqis and even among the politicians. As has been argued, ‘Federalism is in decline because it cannot be sustained without the underlying support of political culture.’<sup>1000</sup> Iraqis lived under a dictatorial regime in a highly centralized system until 2003. Most Arab politicians and political parties, whether Sunni or Shiites, believe that the last word about the oil and gas issues, for example, should belong to the FG. They look at federalism from the perspective of the FG's supremacy over the subnational governments in most matters. Thus, the idea of federalism on the basis of a non-centralized model has not been understandable and acceptable among many Arabs in Iraq.

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<sup>996</sup> See: the law of the public budget NO (1) 2019, Published in the Iraqi Gazette issue (4529).

<sup>997</sup> Ronald Watts, ‘Models of federal power sharing’(n922)10.

<sup>998</sup> Tinatin Khidasheli, ‘Federalism and Consociationalism. Prospects for Georgian State Reform’ in Natella Akaba, Bruno Coppieters and David Darchiashvili (Eds), *Federal Practice: Exploring Alternatives for Georgia and Abkhazia*(VUB University Press 2000)195.

<sup>999</sup> David Cameron and Richard Simeon, ‘Intergovernmental Relations in Canada...’ (n 174)65.

<sup>1000</sup> Wildavsky, ‘Federalism Means Inequality’ (n 145) 42.

Moreover, in terms of revenue and the expenditure policy, Iraqi governorates, and even the KRG relatively, heavily depend on the public budget in Baghdad. The governorates do not have their own fiscal autonomy, with the exception of the KRG. This causes major problems for collaboration due to the imbalance of power created by that feature of Iraqi federalism. Furthermore, another obstacle is the existence of powerful religious institutions inside the political system and within the government, the existence of deep-rooted violent sectarian, ethnic and religious conflicts. The reality shows that collaborative federalism in general and particularly with regards to oil and gas is not easy to be implemented in light of the challenges mentioned earlier. It offers some advancement over the dominant federal model between the FG and the governorates, and the dual federalism which is based on competitive model between the FG and the KRG. This model could enhance the SNGs' roles and lead to a lessening of federal tensions as well as provide a greater opportunity for rational oil management and more inclusive decision-making, by involving all tiers within the federation based on equal partnerships through negotiated cooperation.

In spite of the severity of some of those challenges, there are ways to overcome most of them. The steps are certainly rested in democratizing the political culture in Iraq. Moreover, initiating a broad covenant on basic national interests and principles among the Iraqis can contribute significantly to create a general and minimum frame of nationhood necessary for federalism.<sup>1001</sup>

It is highly important to tackle these issues first even before the constitutional arrangements. Although trust and shared values cannot easily be created, and political cultures cannot directly be changed, the above values might be created through the peace process. Negotiations, compromise, and discussions can turn this hostility into equal partnerships on common interests, as well as reviving trust between different ingredients. After that is achieved, collaborative federalism can be an effective mechanism to solve the outstanding dispute within Iraqi federation.<sup>1002</sup> Nevertheless, it is a feeling of confidence among stakeholders within a federation that they have to work together in good faith.<sup>1003</sup>

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<sup>1001</sup>Murad Abbas and Radhi Jassam, 'The Problems of Rebuilding a State in Iraq 2003-2015' (2015) 5(4) Open Journal of Political Science 247.

<sup>1002</sup>David Cameron and Richard Simeon, 'Intergovernmental Relations in Canada...' (n 174)315.

<sup>1003</sup>Can Erk and Alain Gagnon, 'Constitutional ambiguity and federal trust: Codification of federalism in Canada, Spain and Belgium' (2000) 10(1) Regional & Federal Studies 92, 94.

Establishing effective mechanisms for collaboration will also help to overcome some of the challenges. Canada's success in establishing mechanisms and institutions of intergovernmental relationships has provided federal systems with an invaluable lesson regarding the importance of intergovernmental institutions in federalism. Iraq can certainly depend on such institutions as an effective mechanism for dispute resolution between the FG and KRG. Regular meetings between the highest representatives of different levels of government within the federation, such as Ministerial Councils, annual or quarterly Ministerial Conferences, and seasonal oil ministerial conferences. There is also scope for regular forums, whether annually or quarterly, regarding various disputed matters (in areas such natural resources, environmental protection and the distribution of revenues), conferences, annual reports, consultation, and so on. These mechanisms together with essential intergovernmental institutions will create a practical framework for achieving some of the aspirations of collaborative federalism in Iraq. Iraq can achieve much from these mechanisms, specifically for the disputes between FG and KRG over oil management.

The immediate outcome of establishing intergovernmental institutions would be more collaboration and a better foundation for building mutual trust between KRG and the FG. As Cameron argues 'Sometimes these bodies tackle problems all are encountering in their common fields of responsibility.'<sup>1004</sup> With regard to the issue of oil and gas in Iraqi federalism, oil ministers and representatives of governorates that are not organized in a region could form permanent committees or annual or periodic conferences. These forums and regular meetings could be used to discuss and solve disputed matters and achieve common goals, which cannot be achieved without working together as equal partners and on the basis of negotiation and bargaining. This can be done by concluding formal intergovernmental agreements between the parties involved. While these agreements would not have binding legal authority, however, they would have the moral and political influence that may lead to stronger partnerships and collaborations among the FG and the subnational governments.

In addition, the federal authorities must activate the role of official intergovernmental institutions explicitly stipulated in the Iraqi constitution. This can be achieved by enacting laws by the parliament in relation to Articles 105<sup>1005</sup>, and 106.<sup>1006</sup> These two

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<sup>1004</sup> David Cameron, 'The Structures of Intergovernmental Relations'...(n201)

<sup>1005</sup> A public commission shall be established to guarantee the rights of the regions and governorates that are not organized in a region to ensure their fair participation in managing the various state federal institutions, missions, fellowships, delegations, and regional and international conferences. The

articles call for the formation of two important official bodies, which constitute significant mechanisms for intergovernmental relations between the federal government and the regions and governorates that are not organized in a region. The formation of these two commissions would foster intergovernmental collaboration, especially with respect to the issues assigned to them, such as federal fiscal relations, as defined in Article 106. For example, the commission stipulated in Article 106 could provide mechanisms and arrangements to coordinate all matters related to federal revenues and distribute it fairly between federal and subnational authorities. This commission, if created, would constitute one of the most important bodies in the federal arrangements due to the tendency of financial issues to control intergovernmental relations in most federations. Furthermore, establishing the Federation Council (the Upper Chamber) by enacting the law by the Council of Representative would facilitate a better legislative framework for federalism in Iraq. This constitutes the second pillar of the Iraqi legislative authority, as well as being a true representative of subnational governments in the federal legislative authority. Additionally, other informal contacts could also be valuable. Communications via phone, fax, use of e-mail and unstructured encounters among politicians, ministers and officials can also be considered among the means of intergovernmental relations that help in sustaining the effective conduct of federal affairs.<sup>1007</sup>

## 7.6 Conclusion

After drawing lessons from two federal experiences; Canada and Nigeria, in light of the relevant articles of the Iraqi constitution, especially with regard to the management of oil, we found that CF is a mechanism which should be adopted in Iraq.

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commission shall be comprised of representatives of the federal government and representatives of the regions and governorates that are not organized in a region, and shall be regulated by a law.

<sup>1006</sup> A public commission shall be established by a law to audit and appropriate federal revenues. The commission shall be comprised of experts from the federal government, the regions, the governorates, and its representatives, and shall assume the following responsibilities: First: To verify the fair distribution of grants, aid, and international loans pursuant to the entitlement of the regions and governorates that are not organized in a region. Second: To verify the ideal use and division of the federal financial resources. Third: To guarantee transparency and justice in appropriating funds to the governments of the regions and governorates that are not organized in a region in accordance with the established percentages.

<sup>1007</sup> David Cameron, 'The Structures of Intergovernmental Relations' (n 201).

In the chapter, it was argued that the combination of Iraq's political framework, social composition, constitutional design, and legislative, executive and judicial characteristics requires a strong non-centralised system based on CF capable of establishing and maintaining intergovernmental institutions. This is a significant step towards resolving oil management issues between FG and KRG. As explained in the chapter, there are significant challenges facing any initiative for non-centralization of power in Iraq. However, CF is an alternative approach to overcome some of these challenges and to solve problems arising from those challenges, including disputes over oil management.

## **Chapter Eight: Conclusion**

Federalism in Iraq has been a challenging legal and political question. After more than thirteen years since its constitutional adoption, it has generated more questions than answers to the already unstable political system of Iraq. The questions raised in the last thirteen years are serious matters related not only to the way federalism has struggled to become more than a constitutional aspiration, but to the way it could become an effective constitutional solution to the contentious issues of sovereignty, unity, national identity, ethnic and religious disputes, economic development and the distribution of powers. Each of these matters has remained problematic and unresolved since Iraq started a new era in 2003.

Many who betted on the effectiveness of federalism were not expecting that after almost fifteen years since the 2005 Constitution was agreed, Iraq would still be in a state of turmoil and crisis regarding almost all legal and political issues and the questions of power between the federal government and the regions, especially the KRG, would still be unanswered, significantly and adversely affecting the lives of the Iraqi people. Arguably federalism is one of the many factors contributing to the continuation of legal and political problems in Iraq. While it may not be accurate to suggest that federalism has contributed to political failure in Iraq, it is not difficult to observe that federalism has not succeeded in delivering its constitutional promises. The current dispute between the FG and KRG over Oil management is a clear indicator of the ineffectiveness of the current form of federalism in the last thirteen years.

The initial idea of this thesis was born after observing that Iraqi federalism needs a model that meets the aspirations of all components of Iraq but especially for Kurds who have an ambition of independence. The thesis intended to find an effective pathway through examining the theoretical and practical aspects of Iraqi federalism, particularly with respect to the ownership and management of oil and gas. As part of such an examination, it has explored the socio-political and constitutional systems of Iraq. Even though the pathway suggested for the direction of Iraqi federalism can be employed for all issues affected by federalism, it has been particularly developed to provide a constitutional framework for oil and gas management between the federal and sub-national governments.

The thesis was mainly dedicated to introducing the concept of CF, explaining its principles, examining its critics, comparing its practical applications in other countries and most importantly justifying its potential for success in Iraq. The latter was conducted after a thorough examination of the historical background, legal development, political composition and constitutional context of non-centralization, federalism and oil management in Iraq.

The primary question of the thesis was to ask why and how CF could be a key for solving major legal and political issues, especially the distribution of powers and NR, in Iraq. The thesis started with defining federalism and conceptualising CF based on Daniel Elazar's theory around the concept, foundation and context of collaboration. This opened a broad window to shed light on the gaps and structure of federalism in Iraq, finding that it was the best theory to understand and interpret Iraqi federalism among all other theory. It was explained how Elazar's key concepts of negotiated cooperation, coordination, and bargaining can lead to an effective system of dispute resolution among different tiers of governments within a federation. The second chapter elaborated on that theme through presenting the applicability of Elazar's conceptions of collaboration, mutual agreement and equal status on the disputes exist between different levels of government in Iraq.

The case of CF for Iraq was further developed by delving into the historical development, legal foundation and general context of non-centralization in Iraq. The thesis argued that modern Iraq started in 1921 as a monarchy based on a unitary state, the latter continuing throughout the republican period until the adoption of federalism by the Coalition Provisional Authority in 2004. This change triggered significant disagreements among the Iraqi political and ethnic groups, especially after federal principles were incorporated into the Constitution in 2005. It was also indicated that the sudden change in the legal system at the time of reviving historical ethnic and religious conflicts triggered many disputes. This became apparent in issues related to the authorities of different levels of government over the management and distribution of natural resources. The argument concluded in that chapter was that due to the weak historical presence of non-centralization in Iraq and because of the deep ethnic and religious conflicts, CF based on mutual status among contentious groups seems to be the most practical and workable approach for solving disputes of federal nature including the distribution and management of NR.



The third chapter also elaborated on the possibility of building a strong CF within the current constitutional arrangements. This is mainly because of the non-centralization aspirations and principles embodied in the 2005 Constitution. It grants broad powers to the regions and governorates, giving them a superior legal position over the federal authorities in case of conflicts between the laws of the federal authorities and those of the regions or provinces.

After highlighting the rationale for CF, chapter four was dedicated to examine the rocky road in front of federalism in Iraq because of the social and political map in Iraq. It was explained how the major three groups; the Arab Shiite, Arab Sunni and Kurds have taken different and conflicting perceptions on federalism and the distribution of powers and natural resources in Iraq. This became apparent from the initial deliberations for drafting the Constitution in 2004. Despite reaching an agreement on the constitutional principles of federalism, these groups have not been able to build a federal system practically capable of resolving the disputes. Some Arabs, especially among the Sunni Arabs, and other ethnic minorities such as Turkmen have been very reluctant and cautious about federalism. Even many of Shiites are still against federalism.

The fourth chapter sought to shed a light on how different groups within Iraq reacted to federalism initially and how they changed their attitudes on the basis of their interests. Attitudes of rejection and reluctance have been dominant among the Sunni and some Shiite groups. On the other hand, the Kurds and some Shiite Arabs have embraced and defended federalism despite their different interpretations of the constitutional articles dedicated to power distribution and oil and gas management. It was also explained why the direction of federalism and its adoption can change very loosely among the groups because of their interests. In the last decade, the Sunnis and Shiites have changed their attitudes a number of times. Certainly, oil and gas have been and still are the main drivers behind the changes of perception and reactions to federalism. Fear, self-defence, external interference and reactions to instability have all played a role in forming the understanding of each group of federalism from time to time. As indicated in the fourth chapter, fear of marginalization, centralizations, persecution, economic disadvantage and disunity have all impacted on how the Shiites, Sunni and Kurds perceive federalism and interpret the relevant constitutional articles. They all seem to have reasonable concerns about the newly born federalism in Iraq and its implications.

Because oil and gas management is at the heart of each group's fear, uncertainty and concerns about federalism, the fifth chapter addressed that issue. It is the most illuminating case to be studied regarding the development of federalism in Iraq. The chapter presented the historical roots, factors, and implications of the dispute between KRG and FG over oil and gas management. The constitutional basis of these disputes is the ambiguity of the constitutional provisions found in Articles 111 and 112, and their overlap with other constitutional articles that have an indirect relation to the regulation and management of oil and gas. The study showed that the Federal Supreme Court has not taken a clear position regarding the interpretation of these articles because the conflicted parties did not resort to it. It was also found that the articles directly dedicated to manage the issues of oil and gas came after the exclusive competence of the federal authority and before the shared competencies. This means that they have a special status but is closer to the shared authorities. Therefore, collaborative federalism, the thesis suggests, may be able to fill the gap created by constitutional ambiguity and lack of political consensus on the management of natural resources. This may lead to measures to facilitate the joint management of oil and gas between the FG and oil and gas-producing governments as equal partners.

To learn how federal systems work with regard to Oil management and related disputes and draw lessons for Iraq, the Canadian and Nigerian experiments were studied. Chapter six was devoted to the study and comparison of these two federal models with that of Iraq. The differences and similarities were outlined to draw certain conclusions on how collaborative federalism can facilitate an effective system and build institutions of collaboration capable of resolving disputes over oil and gas management. Canadian federalism was chosen for two main reasons. First, it has a significant similarity with Iraq; they both have a distinct ethnic group with self-determination aspiration. Quebec in Canada and Kurdistan in Iraq represent similar issues within federalism. Second, Canada is a relatively successful model of collaborative federalism. Nigerian, on the other hand, was compared to Iraq also because of two reasons. First, there is a strong foundation and context of centralization; this same issue relates to Iraq in practice. Second, Nigerian has failed to establish collaborative institutions for resolving disputes over natural resources.

Chapter seven created the triangle of comparison between these three models of federalism by comparing the similarities, differences and lessons learned from each model that can be applied or avoided in Iraq. It also attempted to link the previous

chapters by providing a comprehensive list of rationales and justifications for the adoption of CF in Iraq. The rationales included historical, economic, ethnic, political and constitutional considerations. The chapter examined the necessity of collaborative federalism based on Elazar's theory in light of the Iraqi constitutional provisions and lessons learned from the two federal states that have been studied in chapter six. It was, then, concluded that the alternative model of resolving intergovernmental conflicts, especially between the FG and KRG, is the collaborative model. This model can preserve the underlying principles of Iraqi federalism by minimising the control of the FG, and encouraging the sub-national governments to work with the FG as equal partners through political bargaining. It has been argued that in the absence of an independent judiciary authority; acceptable by all political parties, the ambiguity of the constitutional provisions, shared powers between FG and SGs, and the heterogeneous society, CF seems to be an indispensable approach to deal with conflicts and achieving common goals.

However, it can be argued, the same factors and reasons that require the adoption of CF in Iraq, are at the same time challenges to the federal system and, indeed, to the political system of the country as a whole.

After studying the historical background, analysing the constitutional and legal provisions related to the Iraqi federal system and oil and gas management in its political and social dimensions, in light of collaborative federalism theory, compared to Canadian and Nigerian systems, the following conclusions are drawn:

First, Iraq has paid a heavy price because of its highly centralized past. A centralised model of federalism is unlikely to provide a proper system for peace, democracy, the rule of law, stability, justice and development in a heterogeneous country with a history of ethnic conflicts and persecution. Thus, the most effective form seems to be a non-centralised form of federalism. Countries similar to Iraq and Nigeria need a non-centralised form of federalism to build a proper system for peaceful resolution of disputes.

Second, federalism in both Iraq and Nigeria has been adopted as a solution for unity among different ethnic groups who have strong aspirations for self-determination. If federalism fails to satisfy the minimum needs and aspirations of the ethnic groups within the country, the fate of the whole country may lie in disintegration or civil war.

This unfortunate fate awaits Iraq if it does not reconstruct its federal system based on collaboration based on equal status.

Third, Canadian federalism can be a mirror for reflecting on required institutions of collaboration in Iraq. In dealing with the KRG, the FG of Iraq should avoid repeating the fatal mistakes made by the Nigerian federal government in dealing with Niger Delta region. An indispensable way to avoid repeating Nigerian mistakes is the embracement of the principles of shared rule, self-rule, financial autonomy, equal partnership. This is how Canada manages to meet the demands of Quebec.

Fourth, law, policies and contracts related to NR require careful consideration as matters of national security, integrity, and sovereignty. Nigeria is a prime example of how indifference, corruption, and exploitation can lead IOCs to take advantage of this issue in their favour. The FG and KRG should deal with this issue responsibly.

Fifth, accountability, transparency, integrity, trust and principles of justice are very fundamental for building a cohesive CF supported by institutions of cooperation for oil management in Iraq. Evidently, these principal foundations have not been strengthened between KRG and FG. The FG of Iraq should formulate effective mechanisms, approaches and measures based on clear principles of justice in both distributing power over oil management and distributing revenue of oil among the KRG and other oil producing regions, the FG and other regions. This is necessary not only to establish justice, but also to avoid any feeling of marginalisation by the regions. For example, people in Kurdistan, and other oil producing governorates such as Basra, Kirkuk, feel that they deserve more than what they receive from the FG from their own NR. Inequality and injustice can be reduced if proper intergovernmental institutions and measures are put in place based on consensus and mutual agreement.

Sixth, with regard to oil and gas management, the current Iraqi Constitution of 2005 only sets out a general framework. It does not clearly define, which government has the upper hand in this regard, the federal or subnational government? However, these articles left the technical details to be regulated by acts of parliament based on the agreement of all groups. Failing to reach agreement on enacting the implementing laws of oil and gas management has left many disputes unsolved. So far, such legislation has not been enacted. Similarly, other laws related to the structure of the Iraqi federal, for example, the law of the formation of the Federation Council, the law of the Federal Supreme Court, the law of the distribution of revenues have yet to be enacted.

Therefore, the enactment of these laws must be accelerated by the Federal Parliament in a manner that maintains a balance between federal and sub-national government authorities.

Seventh, CF based on intergovernmental institutions has been suggested for developing Iraqi federalism not with the purpose of replacing the judicial or legal institutions and agencies. The thesis does not seek to totally deny the importance of the judicial institution which is embedded by the Federal Supreme Court in Iraq, but the vagueness of the relevant constitutional articles and the complexity of the socio-political aspects in Iraq require complementary mechanisms, beyond the formal judicial and legal bodies. CF is a hybrid system including features of both federalism and con-federalism. The thesis focused on building institutions for collaborations to create flexible channels for dispute resolution over oil and gas disputes between the KRG and FG.

Finally, federalism in Iraq is surrounded by complex challenges. There are three challenges, in particular, which intensify the risks facing federalism in Iraq. The first challenge is the strong presence of the political elite. It is well known that the elite that came to power after the overthrow of the Baath regime in 2003 is considered one of the most corrupt elites that have ruled Iraq since the establishment of the Iraqi state in 1921. Most of these political elite are incompetent to run a country characterized by ethnic and national pluralism. Their only concern was, and still is, to remain in power and serve their parties and families as well as their patronage networks. Most of these elites are not supportive of federalism and the various mechanisms for the distribution of powers in federal states. It did not spread federalism culture among the Iraqi people. On the contrary, many in the elite did not believe in federalism as a principle and a necessary mechanism for ruling such a multi-ethnic state like Iraq after 2003.

Since 2003, the elite's power has been secured by unprecedented levels of corruption. Although the Iraqi treasury received more than a thousand billion dollars since 2003, the Iraqi people are still suffering from the absence of the most basic services, such as electricity, clean water, hospitals, roads, bridges, and educational institutions that meet the aspirations of the Iraqis.

The elite are not real representatives of the Iraqi people who elected them. The Shiite elites do not represent the rights and aspiration of the Shiites, as they represent the interests of their parties and those close to them such as the armed groups, and some of them became representatives of the interests of the agendas of other countries such as Iran. The same description is also accurate for the Sunni and Kurdish political elites.

The second challenging aspect of federalism is the Constitution, especially its ambiguity with respect to the distribution of power and natural resources management between the FG and KRG. There is ambiguity and overlap in the articles related to the exclusive powers of the federal authority with common powers as well as the remaining powers of the powers of subnational governments. This ambiguity and overlap is the result of the hasty process in drafting the constitution, which in turn was reflected in the continuing problems and conflict between the FG and KRG on many issues, including oil and gas. Additionally, not all Iraqis accept the constitution as their own. The majority of Sunnis and some Kurds have serious concerns about the way their rights and interests have been addressed in the constitution. Under such perspective towards the constitution, it is difficult to advance federalism as a main element of the constitution.

The final challenge is related to the recreation of Iraq as a result of the American invasion. The invasion and its consequences have rendered Iraq vulnerable to corruption, war, civil war, terrorism, instability, poverty, unemployment, and many problems. As explained before, the oil privatization and the decentralization model in oil management were among the goals of the United States of America and its allies. Federalism has been perceived as a mechanism to achieve that goal for the USA. Under such perception, it is a challenging task to convince all Iraqis to support federalism. Without such support from the grass-root level to the top, federalism continues to suffer under the heavy hands of the corrupt political elites and the brutal consequences of the USA's invasion.

## **8.1 Recommendations**

It is suggested here that legislative and administrative decisions and policy drafting require different sets of IGR in Iraq, based on negotiated cooperation, particularly in the field of oil and gas. CF can be a roadmap for facilitating such deliberation through intergovernmental institutions. The following recommendations outline the roadmap of developing CF in Iraq.

First, Iraqi federalism needs to establish intergovernmental institutions of collaboration to facilitate political agreement. This is an indispensable mechanism for dispute resolution over oil management between the KRG and FG. Although political agreements are not binding legally, they depend on the trust among the stakeholders

(governments) within a federation. They are effective because of not being bound by rigid legal and judicial substantive and procedural requirements. Another reason that makes intergovernmental arrangements of CF indispensable for Iraq is the absence of an effective FSC to make the final decision regarding the interpretations of ambiguous constitutional articles about oil and gas disputes.

Second, non-centralization is yet to be embedded in the legal and political system in Iraq. Without a well-established culture of non-centralization, federalism, even in its well-structured collaborative model, cannot stand firm against unexpected changes and events in Iraq and its surrounding region. Instability, the absence of the rule of law, regional interferences, aggressive internal conflicts, and deep-rooted religious and ethnic animosity can quickly turn the whole system upside down. Non-centralization is an effective safeguard for protecting legal system in general, and federal principles in particular, from unexpected changes in the political landscape in Iraq. There are many ways to lead the system in Iraq towards non-centralization. The most significant method appears to be the application of all constitutional principles requiring equal partnership between the federal and SGs as the first pillar of creating foundations of federalism.

Third, FG and KRG should not enjoy absolute control over all aspects of oil and gas management. Exploration, making contracts with oil companies, the distribution of the revenues and all other related matters need to be distributed between the KRG and FG based on principles of justice. The best mechanism for that might be the distribution of powers within a framework of checks and balance in which each level of government has the authority to limit the powers of the others. This will eventually lead to a more collaborative approach of federalism. Then, practically, the FG would need to involve the oil and gas producing governments as real partners in any decision-making process with respect to oil and gas issues. Regarding the formulation of the necessary strategic policies to develop the oil and gas wealth, the FG, with the producing regional and governorate governments, would also need to participate as equal partners.

These three recommendations of (1) establishing intergovernmental institutions, (2) following the constitutional roadmap of Non-centralization and (3) creating a system of checking and balancing for oil and gas management could contribute to the development of collaborative federalism in Iraq. However, realistically, it should be born in mind that the problems which Iraq faces are precisely the factors that prevent the development of solutions to those problems, including oil and gas disputes.

Despite the limitation of conducting this research, as outlined in the first chapter, the dissertation has examined different complex aspects of federalism in Iraq and the possibility of directing it towards a more collaborative model. It must be mentioned that, Iraq and the region in general are much more complicated than what has been presented here. Any prophesy about the political and legal system in Iraq is likely to be overtaken by unexpected changes. Therefore, the thesis does not provide predictions; rather, it outlines a roadmap necessary for taking Iraqi federalism towards an effective model of collaboration as an essential approach for dispute resolution.

Finally, what determines the roadmap of federalism in Iraq cannot be limited to the aspirations of the themes presented in this research. There are other macro and micro political, legal, social, cultural, economic and environmental factors that would certainly play significant roles on the future direction and destination of federalism in Iraq. Thus, the main theme of this thesis about the necessity of collaborative approach should be presented, considered and applied in the context of those factors.



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## **Appendices**

### **Appendix A: Selected Articles of the Canadian Constitution Act 1867 to 1982**

#### **1- Legislative Authority of Parliament of Canada**

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

1. Repealed. (44)

1A. The Public Debt and Property. (45)

2. The Regulation of Trade and Commerce.

2A. Unemployment insurance. (46)

3. The raising of Money by any Mode or System of Taxation.

4. The borrowing of Money on the Public Credit.

5. Postal Service.

6. The Census and Statistics.

7. Militia, Military and Naval Service, and Defence.

8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.

9. Beacons, Buoys, Lighthouses, and Sable Island.

10. Navigation and Shipping.

11. Quarantine and the Establishment and Maintenance of Marine Hospitals.

12. Sea Coast and Inland Fisheries.

13. Ferries between a Province and any British or Foreign Country or between Two Provinces.

14. Currency and Coinage.
15. Banking, Incorporation of Banks, and the Issue of Paper Money.
16. Savings Banks.
17. Weights and Measures.
18. Bills of Exchange and Promissory Notes.
19. Interest.
20. Legal Tender.
21. Bankruptcy and Insolvency.
22. Patents of Invention and Discovery.
23. Copyrights.
24. Indians, and Lands reserved for the Indians.
25. Naturalization and Aliens.
26. Marriage and Divorce.
27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
28. The Establishment, Maintenance, and Management of Penitentiaries.
29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.<sup>1008</sup>

Article 92 (10) states “Local Works and Undertakings other than such as are of the following Classes:

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<sup>1008</sup> Legislative authority has been conferred on Parliament by other Acts.

(a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:

(b) Lines of Steam Ships between the Province and any British or Foreign Country:

(c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

## **2- Exclusive Powers of Provincial Legislatures**

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

1. Repealed.<sup>1009</sup>

2. Direct Taxation within the Province in order to the raising of Revenue for Provincial Purposes.

3. The borrowing of Money on the sole Credit of the Province.

4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.

5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.

6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.

7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.

8. Municipal Institutions in the Province.

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<sup>1009</sup> Class 1 was repealed by the Constitution Act, 1982. As enacted, it read as follows:

1. The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant Governor.

Section 45 of the Constitution Act, 1982 now authorizes legislatures to make laws amending the constitution of the province. Sections 38, 41, 42 and 43 of that Act authorize legislative assemblies to give their approval by resolution to certain other amendments to the Constitution of Canada.

9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.

10. Local Works and Undertakings other than such as are of the following Classes:

(a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:

(b) Lines of Steam Ships between the Province and any British or Foreign Country:

(c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

11. The Incorporation of Companies with Provincial Objects.

12. The Solemnization of Marriage in the Province.

13. Property and Civil Rights in the Province.

14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

16. Generally all Matters of a merely local or private Nature in the Province.

## **NON-RENEWABLE NATURAL RESOURCES, FORESTRY RESOURCES AND ELECTRICAL ENERGY**

Laws respecting non-renewable natural resources, forestry resources and electrical energy

92A. (1) In each province, the legislature may exclusively make laws in relation to (a) exploration for non-renewable natural resources in the province; (b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production

therefrom; and (c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

### **Export from provinces of resources**

(2) In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.

### **Authority of Parliament**

(3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.

### **Taxation of resources**

(4) In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of (a) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and (b) sites and facilities in the province for the generation of electrical energy and the production therefrom, whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.

### **“Primary production”**

(5) The expression “primary production” has the meaning assigned by the Sixth Schedule.

### **Existing powers or rights**

(6) Nothing in subsections (1) to (5) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of this section.<sup>1010</sup>

### **Legislation respecting Education**

93. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:

(1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union;

(2) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec;

(3) Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education;

(4) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section.<sup>1011</sup>

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<sup>1010</sup> Added by section 50 of the Constitution Act, 1982.

<sup>1011</sup> Alternative provisions have been enacted for four provinces. For further details.

### **3. Concurrent/Shared Powers**

#### **Old Age Pensions**

Legislation respecting old age pensions and supplementary benefits

94A. The Parliament of Canada may make laws in relation to old age pensions and supplementary benefits, including survivors' and disability benefits irrespective of age, but no such law shall affect the operation of any law present or future of a provincial legislature in relation to any such matter.<sup>1012</sup>

#### **Agriculture and Immigration**

Concurrent Powers of Legislation respecting Agriculture, etc.

95. In each Province the Legislature may make Laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from Time to Time make Laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces; and any Law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada.

### **Appendix B: - Selected Articles from the Constitution of the Federal Republic of Nigeria 1999**

- Constitution of the Federal Republic of Nigeria 1999

Section 44(3) of the 1999 Constitution states: 'Notwithstanding the foregoing provisions of this section, the entire property in and control of all minerals, mineral oils and natural gas in under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.'

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<sup>1012</sup> Amended by the Constitution Act, 1964, 12-13 Eliz. II, c. 73 (U.K.). As originally enacted by the British North America Act, 1951, 14-15 Geo. VI, c. 32 (U.K.), which was repealed by the Constitution Act, 1982, section 94A read as follows: 94A. It is hereby declared that the Parliament of Canada may from time to time make laws in relation to old age pensions in Canada, but no law made by the Parliament of Canada in relation to old age pensions shall affect the operation of any law present or future of a Provincial Legislature in relation to old age pensions.

162. (1) The Federation shall maintain a special account to be called 'the Federation Account' into which shall be paid all revenues collected by the Government of the Federation, except the proceeds from the personal income tax of the personnel of the armed forces of the Federation, the Nigeria Police Force, the Ministry or department of government charged with responsibility for Foreign Affairs and the residents of the Federal Capital Territory, Abuja.

(2) The President, upon the receipt of advice from the Revenue Mobilisation Allocation and Fiscal Commission, shall table before the National Assembly proposals for revenue allocation from the Federation Account, and in determining the formula, the National Assembly shall take into account, the allocation principles especially those of population, equality of States, internal revenue generation, land mass, terrain as well as population density;

Provided that the principle of derivation shall be constantly reflected in any approved formula as being not less than thirteen per cent of the revenue accruing to the Federation Account directly from any natural resources.

(3) Any amount standing to the credit of the Federation Account shall be distributed among the Federal and State Governments and the Local Government Councils in each State on such terms and in such manner as may be prescribed by the National Assembly.

(4) Any amount standing to the credit of the States in the Federation Account shall be distributed among the States on such terms and in such manner as may be prescribed by the National Assembly.

(5) The amount standing to the credit of Local Government Councils in the Federation Account shall also be allocated to the State for the benefit of their Local Government Councils on such terms and in such manner as may be prescribed by the National Assembly.

(6) Each State shall maintain a special account to be called "State Joint Local Government Account" into which shall be paid all allocations to the Local Government Councils of the State from the Federation Account and from the Government of the State.



(7) Each State shall pay to Local Government Councils in its area of jurisdiction such proportion of its total revenue on such terms and in such manner as may be prescribed by the National Assembly.

(8) The amount standing to the credit of Local Government Councils of a State shall be distributed among the Local Government Councils of that State on such terms and in such manner as may be prescribed by the House of Assembly of the State.

(9) Any amount standing to the credit of the judiciary in the Federation Account shall be paid directly to the National Judicial Councils for disbursement to the heads of courts established for the Federation and the States under section 6 of this Constitution.

(10) For the purpose of subsection (1) of this section, "revenue" means any income or return accruing to or derived by the Government of the Federation from any source and includes -

(a) Any receipt, however described, arising from the operation of any law;

(b) Any return, however described, arising from or in respect of any property held by the Government of the Federation;

(c) Any return by way of interest on loans and dividends in respect of shares or interest held by the Government of the Federation in any company or statutory body.

Constitution of the Federal Republic of Nigeria 1999, Section 162 (2), states “(2) The President, upon the receipt of advice from the Revenue Mobilisation Allocation and Fiscal Commission, shall table before the National Assembly proposals for revenue allocation from the Federation Account, and in determining the formula, the National Assembly shall take into account, the allocation principles especially those of population, equality of States, internal revenue generation, land mass, terrain as well as population density; Provided that the principle of derivation shall be constantly reflected in any approved formula as being not less than thirteen per cent of the revenue accruing to the Federation Account directly from any natural resources.”

Available online at: <http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm>.

## **Schedule II: Legislative Powers**

### **Part I: Exclusive Legislative List Item**

1. Accounts of the Government of the Federation, and of offices, courts, and authorities thereof, including audit of those accounts.
2. Arms, ammunition and explosives.
3. Aviation, including airports, safety of aircraft and carriage of passengers and goods by air.
4. Awards of national titles of honour, decorations and other dignities.
5. Bankruptcy and insolvency.
6. Banks, banking, bills of exchange and promissory notes.
7. Borrowing of moneys within or outside Nigeria for the purposes of the Federation or of any State.
8. Census, including the establishment and maintenance of machinery for continuous and universal registration of births and deaths throughout Nigeria.
9. Citizenship, naturalisation and aliens.
10. Commercial and industrial monopolies, combines and trusts.
11. Construction, alteration and maintenance of such roads as may be declared by the National Assembly to be Federal trunk roads.
12. Control of capital issues.
13. Copyright.
14. Creation of States.
15. Currency, coinage and legal tender.
16. Customs and excise duties.
17. Defence.
18. Deportation of persons who are not citizens of Nigeria.
19. Designation of securities in which trust funds may be invested.
20. Diplomatic, consular and trade representation.
21. Drugs and poisons.

22. Election to the offices of President and Vice-President or Governor and Deputy Governor and any other office to which a person may be elected under this Constitution, excluding election to a local government council or any office in such council.
23. Evidence.
24. Exchange control.
25. Export duties.
26. External affairs.
27. Extradition.
28. Fingerprints identification and criminal records.
29. Fishing and fisheries other than fishing and fisheries in rivers, lakes, waterways, ponds and other inland waters within Nigeria.
30. Immigration into and emigration from Nigeria.
31. Implementation of treaties relating to matters on this list.
32. Incorporation, regulation and winding up of bodies corporate, other than co-operative societies, local government councils and bodies corporate established directly by any Law enacted by a House of Assembly of a State.
33. Insurance.
34. Labour, including trade unions, industrial relations; conditions, safety and welfare of labour; industrial disputes; prescribing a national minimum wage for the Federation or any part thereof; and industrial arbitration.
35. Legal proceedings between Governments of States or between the Government of the Federation and Government of any State or any other authority or person.
36. Maritime shipping and navigation, including
  - a. shipping and navigation on tidal waters;
  - b. shipping and navigation on the River Niger and its affluents and on any such other inland waterway as may be designated by the National Assembly to be an international waterway or to be an inter-State waterway;
  - c. lighthouses, lightships, beacons and other provisions for the safety of shipping and navigation;

d. such ports as may be declared by the National Assembly to be Federal ports (including the constitution and powers of port authorities for Federal ports).

37. Meteorology.

38. Military (Army, Navy and Air Force) including any other branch of the armed forces of the Federation.

39. Mines and minerals, including oil fields, oil mining, geological surveys and natural gas.

40. National parks being such areas in a State as may, with the consent of the Government of that State, be designated by the National Assembly as national parks.

41. Nuclear energy.

42. Passports and visas.

43. Patents, trademarks, trade or business names, industrial designs and merchandise marks.

44. Pensions, gratuities and other-like benefit payable out of the Consolidated Revenue Fund or any other public funds of the Federation.

45. Police and other government security services established by law.

46. Posts, telegraphs and telephones.

47. Powers of the National Assembly, and the privileges and immunities of its members.

48. Prisons.

49. Professional occupations as may be designated by the National Assembly.

50. Public debt of the Federation.

51. Public holidays.

52. Public relations of the Federation.

53. Public service of the Federation including the settlement of disputes between the Federation and officers of such service.

54. Quarantine.

55. Railways.

56. Regulations of political parties.

57. Service and execution in a State of the civil and criminal processes, judgements, decrees, orders and other decisions of any court of law outside Nigeria or any court of law in Nigeria other than a court of law established by the House of Assembly of that State.

58. Stamp duties.

59. Taxation of incomes, profits and capital gains, except as otherwise prescribed by this Constitution.

60. The establishment and regulation of authorities for the Federation or any part thereof  
a. to promote and enforce the observance of the Fundamental Objectives and Directive Principles contained in this Constitution;

b. to identify, collect, preserve or generally look after ancient and historical monuments and records and archaeological sites and remains declared by the National Assembly to be of national significance or national importance;

c. to administer museums and libraries other than museums and libraries established by the Government of a state;

d. to regulate tourist traffic; and

e. to prescribe minimum standards of education at all levels.

61. The formation, annulment and dissolution of marriages other than marriages under Islamic law and Customary law including matrimonial causes relating thereto.

62. Trade and commerce, and in particular- a. trade and commerce between Nigeria and other countries including import of commodities into and export of commodities from Nigeria, and trade and commerce between the states; b. establishment of a purchasing authority with power to acquire for export or sale in world markets such agricultural produce as may be designated by the National Assembly; c. inspection of produce to be exported from Nigeria and the enforcement of grades and standards of quality in respect of produce so inspected; d. establishment of a body to prescribe and enforce standards of goods and commodities offered for sale; e. control of the prices of goods and commodities designated by the National Assembly as essential goods or commodities; and f. registration of business names.

63. Traffic on Federal trunk roads.

64. Water from such sources as may be declared by the National Assembly to be sources affecting more than one state.

65. Weights and measures.

66. Wireless, broadcasting and television other than broadcasting and television provided by the Government of a state; allocation of wave-lengths for wireless, broadcasting and television transmission.

67. Any other matter with respect to which the National Assembly has power to make laws in accordance with the provisions of this Constitution.

68. Any matter incidental or supplementary to any matter mentioned elsewhere in this list.

## **Part II: Concurrent Legislative List Extent of Federal and**

### **State Legislative Powers**

#### **Extent of Federal and State Legislative Powers**

1. Subject to the provisions of this Constitution, the National Assembly may by an Act make provisions for a. the division of public revenue- i. between the Federation and the States; ii. among the States of the Federation; iii. between the States and local government councils; iv. among the local government councils in the States; and b. grants or loans from and the imposition of charges upon the Consolidated Revenue Fund or any other public funds of the Federation or for the imposition of charges upon the revenue and assets of the Federation for any purpose notwithstanding that it relates to a matter with respect to which the National Assembly is not empowered to make laws.

2. Subject to the provisions of this Constitution, any House of Assembly may make provisions for grants or loans from and the imposition of charges upon any of the public funds of that State or the imposition of charges upon the revenue and assets of that State for any purpose notwithstanding that it relates to a matter with respect to which the National Assembly is empowered to make laws.

3. The National Assembly may make laws for the Federation or any part thereof with respect to such antiquities and monuments as may, with the consent of the State in which such antiquities and monuments are located, be designated by the National

Assembly as National Antiquities or National Monuments but nothing in this paragraph shall preclude a House of Assembly from making Laws for the State or any part thereof with respect to antiquities and monuments not so designated in accordance with the foregoing provisions.

4. The National Assembly may make laws for the Federation or any part thereof with respect to the archives and public records of the Federation.

5. A House of Assembly may, subject to paragraph 4 hereof, make laws for that State or any part thereof with respect to archives and public records of the Government of the State.

6. Nothing in paragraphs 4 and 5 hereof shall be construed as enabling any laws to be made which do not preserve the archives and records which are in existence at the date of commencement of this Constitution, and which are kept by authorities empowered to do so in any part of the Federation.

7. In the exercise of its powers to impose any tax or duty on a. capital gains, incomes or profits or persons other than companies; and b. documents or transactions by way of stamp duties, the National Assembly may, subject to such conditions as it may prescribe, provide that the collection of any such tax or duty or the administration of the law imposing it shall be carried out by the Government of a State or other authority of a State.

8. Where an Act of the National Assembly provides for the collection of tax or duty on capital gains, incomes or profit or the administration of any law by an authority of a State in accordance with paragraph 7 hereof, it shall regulate the liability of persons to such tax or duty in such manner as to ensure that such tax or duty is not levied on the same person by more than one State.

9. A House of Assembly may, subject to such conditions as it may prescribe, make provisions for the collection of any tax, fee or rate or for the administration of the Law providing for such collection by a local government council.

10. Where a Law of a House of Assembly provides for the collection of tax, fee or rate or for the administration of such Law by a local government council in accordance with the provisions hereof it shall regulate the liability of persons to the tax, fee or rate in such manner as to ensure that such tax, fee or rate is not levied on the same person in respect of the same liability by more than one local government council.

11. The National Assembly may make laws for the Federation with respect to the registration of voters and the procedure regulating elections to a local government council.

12. Nothing in paragraph 11 hereof shall preclude a House of Assembly from making laws with respect to election to a local government council in addition to but not inconsistent with any law made by the National Assembly.

13. The National Assembly may make laws for the Federation or any part thereof with respect to a. electricity and the establishment of electric power stations; b. the generation and transmission of electricity in or to any part of the Federation and from one State to another State; c. the regulation of the right of any person or authority to dam up or otherwise interfere with the flow of water from sources in any part of the Federation; d. the participation of the Federation in any arrangement with another country for the generation, transmission and distribution of electricity for any area partly within and partly outside the Federation; f. the regulation of the right of any person or authority to use, work or operate any plant, apparatus, equipment or work designed for the supply or use of electrical energy.

14. A House of Assembly may make laws for the State with respect to a. electricity and the establishment in that State of electric power stations; b. the generation, transmission and distribution of electricity to areas not covered by a national grid system within that State; and c. the establishment within that State of any authority for the promotion and management of electric power stations established by the State.

15. In the foregoing provisions of this item, unless the context otherwise requires, the following expressions have the meanings respectively assigned to them- • “distribution” means the supply of electricity from a sub- station to the ultimate consumer; • “management” includes maintenance, repairs or replacement; • “power station” means an assembly of plant or equipment for the creation or generation of electrical energy; and • “transmission” means the supply of electricity from a power station to a sub-station or from one sub-station to another sub-station, and the reference to a “sub-station” herein is a reference to an assembly of plant, machinery or equipment for distribution of electricity.

16. The National Assembly may make laws for the establishment of an authority



with power to carry out censorship of cinematograph films and to prohibit or restrict the exhibition of such films; and nothing herein shall a. preclude a House of Assembly from making provision for a similar authority for that State; or b. authorise the exhibition of a cinematograph film in a State without the sanction of the authority established by the Law of that State for the censorship of such films.

17. The National Assembly may make laws for the Federation or any part thereof with respect to a. the health, safety and welfare of persons employed to work in factories, offices or other premises or in inter-State transportation and commerce including the training, supervision and qualification of such persons; b. the regulation of ownership and control of business enterprises throughout the Federation for the purpose of promoting, encouraging or facilitating such ownership and control by citizens of Nigeria; c. the establishment of research centres for agricultural studies; and d. the establishment of institutions and bodies for the promotion or financing of industrial, commercial or agricultural projects.

18. Subject to the provisions of this Constitution, a House of Assembly may make Laws for that State with respect to industrial, commercial or agricultural development of the State.

19. Nothing in the foregoing paragraphs of this item shall be construed as precluding a House of Assembly from making Laws with respect to any of the matters referred to in the foregoing paragraphs.

20. For the purposes of the foregoing paragraphs of this item, the word “agricultural” includes fishery.

21. The National Assembly may make laws to regulate or co- ordinate scientific and technological research throughout the Federation.

22. Nothing herein shall prelude a House of Assembly from establishing or making provisions for an institution or other arrangement for the purpose of scientific and technological research.

23. The National Assembly may make laws for the Federation or any part thereof with respect to statistics so far as the subject matter relates to a. any matter upon which the National Assembly has power to make laws; and b. the organisation of co-ordinated scheme of statistics for the Federation or any part thereof on any matter whether or not it has power to make laws with respect thereto.

24. A House of Assembly may make Laws for the State with respect to statistics and on any matter other than that referred to in paragraph 23(a) of this item.

25. The National Assembly may make laws for the Federation or any part thereof with respect to trigonometrical, cadastral and topographical surveys.

26. A House of Assembly may, subject to paragraph 25 hereof, make laws for that State or any part thereof with respect to trigonometrical, cadastral and topographical surveys.

27. The National Assembly shall have power to make laws for the Federation or any part thereof with respect to university education, technological education or such professional education as may from time to time be designated by the National Assembly.

28. The power conferred on the National Assembly under paragraph

27 of this item shall include power to establish an institution for the purposes of university, post-primary, technological or professional education.

29. Subject as herein provided, a House of Assembly shall have power to make laws for the state with respect to the establishment of an institution for purposes of university, technological or professional education.

30. Nothing in the foregoing paragraphs of this item shall be construed so as to limit the powers of a House of Assembly to make laws for the State with respect to technical, vocational, post- primary, primary or other forms of education, including the establishment of institutions for the pursuit of such education.