

INFLUENCES OF AMBIGUITY OF CONSTITUTIONAL PROVISIONS ON THE ADMINISTRATIVE SYSTEM OF IRAQ

SABAH AL-BAWI*

When the organizers of the University of Pennsylvania's Conference on the Rule of Law in Iraq and Afghanistan asked me to present on one of the most important challenges facing Iraq during the coming decade, I chose to examine the ambiguity of the provisions of Iraq's Constitution that relate to Iraq's administrative system. The ambiguity in these provisions is one of the most complicated problems facing Iraq, and it is rooted in the fervent discussions between new Iraqi politicians and leaders about the shape that the Republic of Iraq should adopt: the simple or the federal shape.

Although the Iraqi Constitution has adopted a binary system with a federal authority when it comes to the relations with the Kurdistan region, and a decentralized administration when it comes to the relation between the central government and the governorates that are not incorporated into a region, the Constitution's unclear provisions have caused several types of conflicts in different fields. In this present brief, I will focus on two examples to prove the influence of the ambiguous provisions on the administrative system of Iraq.

1. FIRST EXAMPLE: THE AMBIGUOUS DECENTRALIZED ADMINISTRATION

Decentralization simply means that recognized local interests will be run by elected commissions that should cooperate with the central government and submit to the central government's super-

* Consultant of Deputy Speaker of Iraqi Parliament; Honorary Consultant at *International Research and Exchange Organization (IREX)*; Former Legal Expert & Head Division of Legal Studies and Legislative Drafting, Research Directorate at Iraqi Parliament; Former professor at Salahaddin University College of Rights; Former private attorney; Ph.D. 2005, Al-Nahrain University, Baghdad; Diploma for International Protection of Human Rights 2008, Polish University of Science, Poznan Centre of Human Rights; M.A. 1999, Al-Nahrain University, Baghdad; B.A. 1997, Al-Nahrain University, Baghdad.

vision when fulfilling their missions. The elected commission runs the local interests according to laws that are passed by the central legislative authority. Any contrary resolutions adopted by the local commissions that conflict with the central authority's laws or resolutions are voidable.

But when we analyze the decentralized administration that has been adopted by the Iraqi Constitution, we find a special and unknown type of decentralization that could be described as closer to confederacy than to decentralization. According to Article 122, Section 5 of the Iraqi Constitution,¹ the elected commissions that run the local interests of the governorates are not compelled to cooperate with the central executive power continuously or to submit to any type of supervision or control by the capitol. Moreover, according to Article 2, Section 1 of the Law of Governorates Law,³ the provincial councils have a legislative authority that legislates in undetermined fields, while other federal authorities have determined fields to practice its specializations in. The local legislative authority supersedes the federal legislative authority when it comes to shared powers between the federal authority, the governorates, and with regard to the un-exclusive powers of the federal government according to Article 115 of the Constitution. This is known to be strange in a decentralized system. The surprise here is that the provincial councils are not compelled to obey the enactments of the central legislative power. Even more surprising is that, according to Article 115 of the Iraqi Constitution itself, in the case of a dispute or conflict between federal and local laws about powers shared between them, priority shall be given to the law of the governorate, and not to the federal law. Moreover, Article 110 enumerates powers that are exclusively held by the federal government, but Article 123 permits the federal government to delegate even its exclusive powers to the governorates according to a law should be issued later.

In addition, the Constitution is ambiguous about the mechanisms for defining and exercising the broad powers granted to the governorates that are not incorporated into a region. Article 122, Section 2 of the Constitution stipulates, "governorates that are not incorporated in a region shall be granted broad administrative and

¹ Article 122, Section 5, Doustour Joumhourait al-Iraq [The Constitution of the Republic of Iraq] of 2005.

² Article 2, Section 1, Law of Governorates Law No. 21 of 2008 (Iraq).

financial authorities to enable them to manage their affairs in accordance with the principle of decentralized administration, and this shall be regulated by law." However, neither the provision of the Constitution did define the meaning of the broad authorities it grants, nor did the aforementioned law of the governorates.

This unclear system of administration has created several challenges for the governorates and for the federal government. The constitutional and legal provisions raise the governorates to the sky, but the lack of a mechanism for defining their authority throws them to the earth. This situation has created conflicts between the two levels of government: governorates cling to the provisions granting them broad authorities, and the federal government clings to the provisions establishing a decentralized system with ambiguous mechanisms for distributing power. This conflict has obstructed the goals of national development, weakened the people's trust in their elected provincial councils, increased resentment as a result of poor services provided by disabled local commissions, and created a spirit of hostility between the provincial councils and central ministries.

2. SECOND EXAMPLE: THE AMBIGUITY OF CONSTITUTIONAL PROVISIONS FOR MANAGING REGIONAL OIL AND GAS

A constitutional provision has created one of the most complicated problems between the federal government and local governments of governorates and regions. Article 112, Section 1 of the Constitution stipulates, "the federal government, with the producing governorates and regional governments, shall undertake the management of oil and gas extracted from present fields" This provision has created a fiercely antagonistic relationship between the federal and regional governments, especially the regional government of Kurdistan. Article 112, Section 1 only gives central government just guidelines for undertaking the management of oil and gas extracted from current fields, but it does not provide it any specializations for exploitation or any other use. The provision also only applies to present fields, not future ones. Furthermore, the provision only applies to oil and gas already extracted, and not to oil and gas still in the bottom of the earth.

The regional government of Kurdistan clings to a narrow interpretation of the provision, explaining that the federal government should cooperate with the local governments to manage the extracted oil and gas from the present fields in 2005 only. They argue

that according to Article 112, the exploitation of oil and gas not yet extracted from present and future fields should be controlled by the regional governments. The federal government asserts that it has the authority to control exploitation, citing Article 111 of the Constitution, which states, "Oil and gas are owned by all the people of Iraq in all the regions and governorates."

Although there is a national consensus that the Constitution should be changed, amending the ambiguous Iraqi Constitution is the largest challenge, since it is one of the most inflexible constitutions in the world. It is our social problem, not our social contract, as Jean-Jacques *Rousseau* (June 28, 1712–July 2, 1778) supposes.