

Application of Federalism in Iraq from the Legal Jurisprudence View Point

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Abstract— The purpose of this paper is to explore the application of federalism in Iraq under constitution of 2005. After the fall of political regime in 2003, Iraq adopted federalism under the Constitution of 2005. The application of federalism in Iraq has caused an argument among supporters, opponents, deniers its application, although it is compatible with a multi-ethnic, religious and national in Iraq. This paper will demonstrate those opinions and arguments supported in order to determine the extent to which appropriate presence of the application of federal system in Iraq under the Constitution of 2005 practiced. This study will be conducted through doctrinal approach; data will be collected through secondary source by examining the contribution scholars in this field. The research will help countries seek to apply a federal system in a way that has similar conditions to Iraq, gaining from the benefit of the Iraqi experience with federalism.

Index Term— Iraq, Federal System, Constitution of 2005, Supporters, Opponents, Deniers.

I. INTRODUCTION

States can be divided into federal or unitary states with respect to formation. Each state is characterized by its own administration system. This system has the responsibility for regulating its internal and external positions [1]. Hence, the term 'federalism' should be clarified.

Federalism can be defined as an agreement between two or more states to initiate a federal state that has international legal features in which the state authorities in the field of international. Relations and some internal powers have these characteristics. The members of federal union enjoy specific advantages and authorities in the local field in connection with a Federal Constitution [2].

First, federalism began in the fifth century [3] in ancient Greek cities in which they were enjoying a great deal of cultural and social development at that time. Moreover, various federations such as Swiss Federalism at the end of the twelfth century, federalism of the low-land in the sixteenth century, and the empire of Charlemagne in the ninth century had emerged [4].

One of the oldest and most important federations in the world is the United States since its federalism has been maintained since 1789. Likewise, since their first implementation, Swiss federation in 1848 and Canadian federation in 1867 have been maintained continuously. After

World War II, federations emerged in West Germany in 1949, in India in 1950, in Malaysia in 1963, in Pakistan in 1971, and in the United Arab Emirates in 1971[5].

Iraq became a federal state under the Law of Administration for the State of Iraq for the Transitional Period after the fall of the political regime in Iraq in 2003 [6]. In addition, federalism was asserted in Constitution of 2005 in Iraq [7].

In Iraq, ethnic and sectarian diversity has adopted and characterized federalism. This particular diversity exists in multiple minorities with assorted religions, ethnicity and nationalism [8].

Federalism gradually develops either as an ideal solution or a calming likely conflict between regions and the central government. It may develop into a first phase that leads to the division of the country.

This study will aim to focus the discussion on the application of federalism in Iraq under the Constitution of 2005. This would go a long way in highlighting the reality of Iraq's federalism and how to develop it.

II. THE LEGAL JURISPRUDENCE VIEWPOINT ABOUT FEDERALISM APPLICATION IN IRAQ

The Iraqi Constitution of 2005 offered details concerning the federalism as the regime. Various trends have been initiated for researchers concerning this issue. In addition, the trends which supported federalism and its application in Iraq had been included. Considering the best solution to the problems of Iraq, another trend disagreed with the implementation of federalism in Iraq. On the other hand, some viewed that they deny the existence of practical implementation of Iraqi federalism.

A. Support the Application of Federalism as a Solution to the Problems of Iraq

Trends that support federalism and its application in Iraq are considered to be the best solution for the problems of Iraq. For example, nearly 40 percent of the present population of the world exists in more than 28 federal republics in a way that makes federalism a global phenomenon. Additionally, it is a political and economic system for the purpose of sharing authority as well as wealth between the centralized authority and the authorities of the regions. It is crucial to indicate that there is a remarkable difference between federalism and partition. States resort to federalism to avoid partition [9].

There has been a constant research for a political system which approves the diversity in a community throughout history. Hence, federalism is the best way to guarantee the rights of all components of society that includes the minorities while at the same time they appease the majority without compromising their rights [10].

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Moreover, federalism has an essential role in enabling regions and governorates to enjoy the freedom to administer their internal affairs away from the interference of others. This actually leads to the elimination of disharmony between the different constituents within a society. As a result, federalism is the most effective method in the treatment of disputes and problems; it eliminates these disputes and problems in a way that leads to strengthen the national unity [11].

As for the context of Iraq, it can be described as ethnic and sectarian diversity in addition to the existence of multiple minorities with religious, linguistic, and cultural diversity. Such diversity needs to be characterized in the light of a government which can positively tackle the issue of federalism. Thus, achieving federalism in Iraq is the only way that ensures national unity. This explains that whenever there is a large amount of autonomy in a government of the regions concerning administering its internal affairs, it can easily lead to national unity and strength. It can also be the way to promote and develop unity. It is based on the target and the way how to apply it [12].

The Iraqi society needs to adopt federalism as a strategic option which is crucial to construct a state which includes all constituents of the society of Iraq. Furthermore, confidence in the relations among the constituents interconnected to each other shall be supported in a way that makes it a state that has an effective role and position at the regional and international levels [13]. This helps in implementing Iraqi federalism.

The implementation of federalism in Iraq requires the removal of fears regarding the essence of the federal system. To achieve this implementation, constructing legal institutions and a secure state as well as reorganizing the army and police on a national basis shall be conducted since the power of the state and its internal and external sovereignty are subject to its military strength in order to prevent any foreign interference from the internal situation. Additionally, a mechanism for implementing the federalism and the formation of the regions shall be developed. Besides, sufficient guarantees shall be granted in order to prevent the country from the division [14].

B. Disagreement with the Application of Federalism in Iraq

The change in the formation of the Iraqi state occurred after 2003 from a unitary state to a federal state is possibly influence the nature of the political system and the distribution of constitutional powers. In Iraq, the political situation is oscillating between developing a unified state as it was in the past and the division of Iraq; it is impossible to establish a unified state as the Iraqi people disagree with this option. Hence, there is no application for federalism based on democracy as well as full separation of powers [15].

Thus, a reason for dividing Iraq and weakening the centralized authority might be the issue of federalism in Iraq. The beginning of federalism would open the door to foreign interventions in Iraq such as intervention in regional affairs. It is important to note that federalism has been used as a pretext for defending the regional interests related to those powers in the centralized authority affairs [16].

In addition, Iraq lacks some important federal factors.

These factors include the application of the principles of citizenship and its relation with equal rights for all citizens regardless of their affiliations. Similarly, there is a lack of effective federal agencies that deal with the affairs of defense, foreign policy and security within the framework of noticeable constitutional formulation. Due to this formulation, it identifies nature and form of the relationship at the local and federal levels [17].

As stipulated by the constitution, federalism would disclose the future of Iraq with respect to the dangers of partition in the presence of foreign interferences that support ethnicity and sectarianism. It could lead to the division or separation in Iraq into sectarian mini-states. To maintain the future of Iraq as a whole, a prevention of any separatist tendencies to any ethnic or sectarian group is required. Thus, there is also a need to attain equality as well as the provision of public freedoms under exhaustive security control; it is impermissible to have armed forces or militias affiliated to political parties in the country. It is also impermissible to have foreign forces that intervene in the affairs of Iraq lest it has the risk of the dissolution of its unity [18].

C. Deny the Existence of Practical Implementation of Federalism in Iraq

Although the Iraqi Constitution has provided for federalism, there is practically no region that implements the federalism in Iraq except Kurdistan. Furthermore, Kurdistan region has been established since 1991 when it conceptualized the opportunity to construct democratic institutions in addition to legislative, executive and judicial authorities compared to the previous period. This region continues to build institutions and assert freedoms and rights compared to the rest of Iraqi governorates which were under the control of the centralization imposed by the previous political regime [19].

In Iraq, important aspects of federalism were not however achieved. For example, Federation Council, being the second Council in the parliament, has not been activated. In addition, it has failed to activate the role of the Federal Supreme Court [20].

Due to the variation of powers between the federal government and the regions, Iraq is in a state of chaos. As yet, regions exceeded the centralized government with respect to the identification and application of powers [21]. Hence, the international experiences of federalism implemented in other nations should be studied to benefit and avoid their mistakes. In this way, the federal system emulated by Arab societies should be initiated.

Further, the application of federalism should not require a certain class, sect or a party in Iraq. On the contrary, applying federalism should be a demand for all the people since it is regarded as a movement towards practicing democracy as well as moving the past centralization experienced for decades [22].

III. CONCLUSION

Federalism applied in Iraq faces a number of challenges and difficulties since Iraq for decades was a unitary state and applied a centralized system. Therefore, there are several

opinions and views concerning implementing federalism in Iraq. Large numbers of views encourage and consider federalism as the best solution to the problems confronted by Iraq. On the other hand, others think federalism leads to Iraq partition in addition to those who deny the existence of practical implementation of federalism in Iraq at present. Federalism in Iraq did not stem from the will and need of the Iraqi people. However, it emerged as a result of a consensus of the opposition political parties with US sponsorship when they were outside Iraq. Thus, many constitutional provisions, related to the federal authorities and the distribution of powers, are marred by shortages and lack of clarity which in turn correctly affects the implementation of the federalism in Iraq. In order to preserve the security and stability of the country, federalism should be correctly and highly implemented.

REFERENCES

- [1] Canaan Nawaf, Constitutional and Political System of United Arab Emirates, University Office-Ethraa for Publication and Distribution, pp. 92.
- [2] Jonathan Rodden, "Comparative Federalism and Decentralization: On Meaning and Measurement," *Comparative Politics*, (2004), 489.
- [3] Ursula K. Hicks, *Federalism, Failure and Success, A Comparative Study*, The Macmillan Press Ltd, London, 1978, p 15.
- [4] Amjad Zine El Abidine Tama, "Future of Federal System in Iraq-Study International Experiences," *AL Mustansiriya of Arab and International Studies*, no. 47 (2014): 5.
- [5] Raad Kassem Saleh, "Power Systems in Federal Government and Democracy-Australia A Model," *AL Mustansiriya of Arab and International Studies*, no. 35 (2011): 42.
- [6] Article 4 of Law of Administration for the State of Iraq for the Transitional Period 2004: "The system of government in Iraq is a republic, unification (federal), democratic, pluralistic, and the division of authorities is among the federal government, regional governments, governorates, municipalities, and local administrations. The National federal system is based on the geographical and historical facts and the separation of powers, that it is not based on origin, race, ethnicity, or creed".
- [7] Article 1 of Iraqi Constitution 2005: "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".
- [8] Thomas Christin and Simon Hug, "Federalism, the Geographic Location of Groups, and Conflict," *Conflict Management and Peace Science* 29, no. 1 (2012): 94.
- [9] Maitham Enidi Ali Al-Abadi, "Iraqi Federal and Partition A Community," *Al-Aalem Iraqi Newspaper*, Available: <http://www.alaalem.com/index.php?aa=news&id22=18154> (accessed March 1, 2015).
- [10] Hekr A. Kareem Findi, "Federalism in Iraq between Motives and Data," *Journal Afak Sperez*, (April 2008): 10, Available: <http://www.spirez.org/afaq/3/4.pdf> (accessed December 17, 2014).
- [11] Akram Hossam, Marwa Waheed and Shadi Abdel Wahab, "The Federalism and Regions Solution to the Crisis or A Step Towards Partition," *Baghdad Center for Training, Consulting and Media7* (January 2012): 22, Available: <http://www.baghdadcenter.net/print-88.html> (accessed January 31, 2015).
- [12] Yasser Khaled Abd Barakat, "Federalism in Iraq Style to Guarantee National Unity," *Future Center for Studies and Research*. Available: <http://mcsr.net/articals/008.html> (accessed February 19, 2015).
- [13] IKhalid Alioui Al-Aeradawi, "Federal, Consensual Democracy and Iraqi Reality," *Euphrates Journal* Available: <http://fcds.com/mag/issue-7-3.html> (accessed February 10, 2015).
- [14] Reda Abdel Jabbar Al-Shammari and Iyad Abed Al- Dairi, "Possibility of Applied Federalism in Iraq," *Journal Qadisiya in Arts and Educational Science* 8, no. 4 (2009): 127.
- [15] Hana Abbas Kazim, "Federalism in Iraq, Reality and Prospects," *Journal of Misan Researches*, no. 14 (2011): 313; Mohammed Daham Kurdi, "The Future of Iraqi State between the Federal and Division," *Anbar Journal of Legal and Political Science*, no. 8 (2013): 296-297.

- [16] Ali Abbas Murad, "Federal Regional and Problems Applied it in Iraq," *Journal of Political Science*, no. 36 (2008): 180.
- [17] Hussein Tawfiq Ibrahim, *Future of System and State in Iraq and its Implications for Security and Stability in the Gulf*, United Arab Emirates: The Gulf Research Centre, 2005, 45.
- [18] [Qahtan Ahmed Sulaiman Al-Hamdani, "Federal in Iraq between the Constitution and Practical Application," *Journal of the Arab future*, no. 360 (February 2009): 46.
- [19] Nawzad Abdul Aziz, "Federalism and the Leading Experience in Kurdistan," *Conference of Iraq lawyers*, (December 2004), 5; Athmaar Kazem Al-Rubaie, "The German Federalism and the Proposed Federal Project in Iraq-A Comparative Study," *Journal of International Studies*, no. 40 (2009): 146.
- [20] David Cameron, "The Federalism Success in Iraq," *Iraq: Preventing a New Generation of Conflict*, ed. David M. Malone, Markus E. Bouillon and Ben Rowswell, *Forum of Federations*, Available: <http://www.forumfed.org/pubs/iraqfed-dc-ara.pdf> (accessed February 2, 2015).
- [21] Sayar Al-Gemayel, "The Political System in Iraq: A Comparison between Iraqi and Canadian Federalism", Available: http://www.sayaraljamil.com/Arabic/viewarticle.php?id=iraqi_matter_s-20091110-1756m (accessed March 7, 2015).
- [22] Mona Hamdy Hikmat, "Federal between Rejection and Acceptance," *Journal of Political and International*, no. 21 (2012): 134-136.



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