



Institut für Föderalismus
Institut du Fédéralisme
Institute of Federalism

IFF Working Paper Online No 31

The Iraqi Oil and Gas Dispute between Baghdad and Erbil

A Commentary on the Iraqi Federal Supreme Court Judgment of 15 February 2022

DAAN SMEEKENS & SOEREN KEIL

June 2022

Citation: Smeekens, D. & Keil, S., The Iraqi Oil and Gas Dispute between Baghdad and Erbil – A Commentary on the Iraqi Federal Supreme Court Judgment of 15 February 2022, IFF Working Paper Online No 31, Fribourg, June 2022.
<https://doi.org/10.51363/unifr.diff.2022.31>

University of Fribourg
Institute of Federalism
Av. Beauregard 1
CH-1700 Fribourg

Phone +41 (0) 26 300 81 25

www.federalism.ch



UNIVERSITÉ DE FRIBOURG FACULTÉ DE DROIT
UNIVERSITÄT FREIBURG RECHTSWISSENSCHAFTLICHE FAKULTÄT

The IFF Working Paper Online series and other publications of the Institute of Federalism, Fribourg are available on the IFF website www.unifr.ch/federalism/en/research/.

© IFF, 2022

Institute of Federalism, University of Fribourg

Avenue Beauregard 1


1700 Fribourg

Switzerland

federalism@unifr.ch



This work is published under a Creative Commons Attribution 4.0 International License (CC BY 4.0): <https://creativecommons.org/licenses/by/4.0>.

Authors: Daan Smeekens  & Soeren Keil 

The papers are published in the name of the author. Her/his view does not necessarily reflect the view of the Institute of Federalism.

DOI: <https://doi.org/10.51363/unifr.diff.2022.31>

ISSN: 2813-5261 (Online)

Abstract.....	3
A) Introduction	3
B) Political context	4
C) Constitutional soundness of the FSC judgment.....	5
D) Exercising shared rule in federations.....	9
E) Conclusion and policy recommendations.....	11
References	14

Abstract

In a judgment of 15 February 2022, the Federal Supreme Court of Iraq decided to repeal the 2007 Oil and Gas Law of the Kurdistan Regional Government on constitutional grounds. The judgment can be regarded as politicized, and has enormous implications for the autonomy of the Kurdish Region and the federal discourse in Iraq. This commentary assesses the soundness of the Federal Supreme Court's judgment through critically evaluating the arguments against the Iraqi Constitution. It comes to conclude that the judgment has been a misinterpretation of the constitutional provisions that prescribe shared powers between the central and regional governments over oil and gas. These issues are an indirect consequence of the ambiguity and non-implementation of many constitutional provisions. Relatedly, this commentary provides some recommendations for a future cooperation between Erbil and Baghdad.

Keywords

Iraq, Kurdistan, KRG, constitution, competences

A) Introduction

In their judgment *The Federal Minister of Oil & Mr Ali Shadad Fares (member of the Council of the Basrah Governorate) v The Minister of Natural Resources of the Kurdistan Region & the President of the Parliament of Kurdistan*, issued on 15 February 2022, the Federal Supreme Court of Iraq (FSC) ruled that the Kurdistan Regional Government Oil and Gas Law No. (22) of 2007 is unconstitutional and repealed; that the Kurdistan Regional Government (KRG) must hand over all oil production from their fields to the federal government, more specifically the Federal Ministry of Oil; that the KRG must allow audits over all their oil contracts regarding export and sale of oil and gas in order to determine its financial due to the Federal Government; and that the Federal Minister of Oil has the right to annul all such existing oil contracts regarding oil exploration, extraction, export and sale between the KRG and third parties.

The Kurdistan Regional Government had issued a statement on the same day, in which it condemned the judgment, stating that “*This decision by the Federal Supreme Court is unjust, unconstitutional, and violates the rights and constitutional authorities of the Kurdistan Region.*”¹ The

¹ Kurdistan Regional Government, “KRG Statement on Tuesday’s Ruling of the Iraqi Federal Supreme Court”, 15 February 2022, available at <https://gov.krd/english/news-and-announcements/posts/2022/february/kg-state-ment-on-tuesday-s-ruling-of-the-iraqi-federal-supreme-court/> (accessed 25 February 2022).

KRG does not accept the decision, suggesting they would have to forfeit their constitutional rights if they want to abide by it – something it is not planning to do. This response is unsurprising, as oil export generates the vast majority of the region's budget.²

This commentary on the judgment will briefly outline the broader (political) context of the FSC ruling, as well as discuss the constitutional issues that are asserted by the Court and the opposing parties. It will then discuss how shared rule is often implemented in federations, in order to finally provide some policy recommendations.

B) Political context

Discussing the political context surrounding the recent judgment is of importance, as its timing suggests that the ruling may be politicized. INSIGHT Iraq, who spoke to legal experts about the ruling, affirms there is a common acceptance that the timing of the judgment is at least suspicious.³ At the time of writing, Iraq is in the middle of forming a new government after its parliamentary election of October 2021. Muqtada al-Sadr – Shiite leader of the winning party after the elections – is expected to form a coalition together with Sunnis and Kurds, effectively excluding pro-Iran Shiite factions.⁴ At the same time, the Chief Justice of the FSC is Iranian-minded, and can therefore be expected to oppose political developments that may limit the influence of Teheran in Iraq. It raises the question whether a Teheran wind led the way to the judgment,⁵ not least because it unexpectedly joined two cases with rather distinct claims, one of which was already filed in 2012 and shelved since 2019.⁶

The ruling was received with no criticism from anyone outside the Kurdistan Region. Whereas Sadr condemned the timing of the judgment – referring to its delaying effect on the government-making process in Iraq – he did not oppose the ruling in itself.⁷ This lack of criticism can be explained through the general opposition of non-Kurdish actors to the large degree of autonomy the Kurdistan Region has achieved. Although the Iraqi Constitution prescribes a federal system to govern its politics,⁸ it does not effectively implement a federalist agenda, and many relevant actors remain opposed to it.⁹ This has led to Iraq consisting of one semi-autonomous region of

² INSIGHT Iraq, "Q&A: Federal Supreme Court ruling on KRG oil and gas sector", 22 February 2022, available at <https://insightiraq.com/articles/qa-federal-supreme-court-ruling-on-kr-g-oil-and-gas-sector/> (accessed 28 February 2022), 5.

³ *Id.*, at 2.

⁴ *Id.*, at 1-2; RASHEED, A. and DAVISON, J., "Iraqi cleric's push to sideline Iran-backed factions risks clash" for swissinfo.ch, 14 January 2022, available at <https://www.swissinfo.ch/eng/iraqi-cleric-s-push-to-sideline-iran-backed-factions-risks-clash/47262212> (accessed 28 February 2022).

⁵ INSIGHT Iraq, *id.*, at 3; WAHAB, B., "The Death of Oil Federalism? Implications of a New Iraqi Court Ruling" for The Washington Institute for Near East Policy, 18 February 2022, available at <https://washingtoninstitute.org/policy-analysis/death-oil-federalism-implications-new-iraqi-court-ruling> (accessed 28 February 2022).

⁶ INSIGHT Iraq, *id.*, at 3.

⁷ *Id.*, at 3; The New Arab, "The Iraq Report: Judicial rulings dash dreams of Sadr, Kurds", 1 March 2022, available at <https://english.alaraby.co.uk/analysis/iraq-report-judicial-rulings-dash-dreams-sadr-kurds> (accessed 7 March 2022).

⁸ Arts. 1 and 116 of the Iraqi Constitution.

⁹ BELSER, E. M., "A Failure of State Transformation Rather than a Failure of Federalism? The Case of Iraq", *Ethnopolitics* (2020), vol. 19 (4), (383) 384 and 397.

Kurdistan, and a barely decentralized “rest”.¹⁰ Whereas the KRG vies for increasingly more autonomy, the other parts of Iraq are mainly opposed to a further decentralization of the state. This is because, firstly, the federal constitution was not established after a shared political will or compromise, but rather imposed by foreign forces (i.e. the USA) and the Shia elite.¹¹ Secondly, the situation in which Kurdistan is the only federal region in the country, renders it an outsider, causing the rest to question why the Kurdistan Region enjoys a level of autonomy that they do not.¹² Thus, the KRG is often perceived as an entity that only takes from Iraq’s wealth, but does not contribute to it.¹³ A ruling that would force the Kurdistan Region to centralize oil production is therefore welcomed by a variety of actors both internally and internationally.

C) Constitutional soundness of the FSC judgment

Regardless of whether the judgment is generally supported or not, it was delivered by Iraq’s highest court, making it final and binding upon all parties. It is worthwhile to assess its legal soundness, as it has enormous implications for the Kurdistan Region’s economic viability. Moreover, this judgment has made KRG actors worrisome about their own autonomy, as it paves the way for a more centralized constitutional interpretation.

The Iraqi Constitution prescribes three distinct levels of competences. Article 110 lists the competences exclusive to the federal government, article 114 lists the competences shared between the federal and regional authorities, while article 115 provides that all residual powers belong to the regional and governorate level. Even regarding the shared competences, article 115 reads that laws of the regions shall have supremacy over national laws in case of dispute – a textbook example of a confederal power-sharing mechanism. Oil and gas are neither listed under article 110, nor article 114. In fact, article 110 only reserves a minimal set of powers to the federal authorities, while the concurrent powers are more far-reaching.¹⁴ The exclusive competences have been based on article 25 of the Transitional State Administration Law (TAL), which still included oil and gas as an exclusively federal competence. The Constitution did not list it under the exclusive powers of the federal government anymore, whereas it substantively copied other paragraphs of article 25 TAL. This would suggest that the power over oil and gas was purposely removed from the exclusively federal competences, and that the Constitution should be interpreted as such.

The absence of oil and gas management powers in both the exclusively federal, and the shared powers would imply that oil is an exclusive power of the regions, as stipulated in article 115. However, there is a lot of ambiguity regarding this issue, presumably as it was too complicated to sort out at the time the Constitution was written.¹⁵ Articles 111 and 112 of the Constitution

¹⁰ Id., at 384.

¹¹ Id., at 384; SHAKIR, F., *The Iraqi Federation – Origin, Operation and Significance*, Routledge, 2017, 165.

¹² INSIGHT Iraq, *supra* n. 2, 4.

¹³ Id., at 4.

¹⁴ BELSER, E. M., *supra* n. 9, 392.

¹⁵ Id., at 389-390; SHAKIR, F., *supra* n. 11, 34; WATTS, R. L., *Comparing Federal Systems – Third Edition*, McGill-Queen’s University Press, 2008, 61; DANILOVICH, A., “New horizons: Iraqi federalism” in A. DANILOVICH (ed.), *Iraqi Kurdistan in Middle Eastern Politics*, Routledge, 2017, (35) 45.

deal specifically with oil and gas. They are included under Section 4 of the Constitution (powers of the federal government) but not listed as such.

Firstly, article 111 reads that *“Oil and gas are owned by all the people of Iraq in all the regions and governorates.”* The FSC relied significantly on this provision to support equal distribution of oil revenue over the whole of Iraq, as well as more transparency on the exact amount of the revenue and how it is distributed. However, it must be stressed that article 111 is decidedly vague and broadly construed to such an extent that through its ambivalence, it becomes impossible to derive specific rights from it. Moreover, the provision is unenforceable as it does not prescribe any action that could implement it. As a result of this constitutional ambivalence, Baghdad and the KRG continuously disagree over the interpretation of these articles.¹⁶ Only a constitutional change, or a consensually agreed upon Iraqi Oil Law can be expected to bring clarification.

Secondly, article 112 of the Iraqi Constitution is divided into two paragraphs. It reads:

“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.”

This provision again employs vague terms, allowing excessive room for interpretation. What does it mean by *present fields*? Does this refer to fields that have been producing oil since the time the Constitution came into effect, or is it sufficient that explorations were ongoing at the time, in order to be considered a present field? From the use of the words *“producing”* and *“extracted from”*, it seems present fields can only include those fields which already produced oil at the time the Constitution took effect.¹⁷ If this is true, article 112/First cannot apply to the oil fields in the Kurdistan Region, as no oil was extracted from the fields at the time.¹⁸ This means the federal and the regional government were constitutionally bound to cooperate on the

Nonetheless, in their work for *The Future of Kurdistan in Iraq*, Eklund, O’Leary and Williams already suggested before the permanent Iraqi Constitution came into being, that it should define and resolve the issue of ownership over natural resources in an unequivocal manner. The Iraqi Constitution was adopted later that same year, but clearly did not resolve the issues. (See EKLUND, K., O’LEARY, B. and WILLIAMS, P. R., “Negotiating a Federation in Iraq” in B. O’LEARY, J. MCGARRY and K. SALIH (eds.), *The Future of Kurdistan in Iraq*, University of Pennsylvania Press, 2005, (116) 128.)

¹⁶ DANILOVICH, L., id., at 46.

¹⁷ CRAWFORD, J., “The Authority of the Kurdistan Regional Government over Oil and Gas under the Constitution of Iraq”, *Oil, Gas & Energy Law* (2008), vol. 3, (1) 6.

¹⁸ Id., at 6, 11 and 13; INSIGHT Iraq, *supra* n. 2, 6.

policies to develop oil wealth (cf. article 112/Second), suggesting it is a shared competence. Even for shared competences, the abovementioned supremacy rule prescribes that regional laws take precedence over national laws in case of dispute.¹⁹ Where no cooperation took place between the two levels of government, article 115 provides that it is in the power of the regions to legislate on oil, as it is not listed as an exclusively federal competence. Thus, the KRG was well within its rights to adopt a law managing its oil (i.e. the Oil and Gas Law of 2007), on the condition that it was also willing to support the drafting of a central Iraqi Oil Law in good faith at the same time – as has been the case (*infra*).

In addition, even if one would apply article 112/First, it would still grant the KRG the right to adopt its Oil and Gas Law. This is where the plaintiff errs in its claims. Whereas they stated that the task of distributing the proceeds of oil is exclusively federal, the provision actually must be interpreted to mean that *only* if the federal government distributes its revenues fairly and proportionately, it can assume power over oil management (see use of the words “*provided that*”). Still, it is a concurrent power together with the regional government. This is in line with the defendant’s arguments. The KRG only started exporting oil after the federal government stopped paying the entitlements of the Kurdistan Region (since February 2014). Refraining from distributing oil revenues in a fair manner means that the federal government resigned its shared power over management of oil and gas, inferred from the words “*provided that*” in article 112/First. The same causality as was used above for article 112/Second, must then be used for article 112/First, meaning that regional law has supremacy over national law in case of disputes. The plaintiff also relies on the FSC Judgment No. 08/Federal/2012 to claim that the joint management over oil is currently suspended, seeing that no federal law has been passed yet to regulate the shared management. However, the KRG indicated that it had tried to regulate common oil management by law, as is mandatory under article 112/First. Yet, the federal government’s refusal to implement the draft central oil and gas law – which was mutually agreed upon – has caused issues over oil and gas to linger on. Therefore, the absence of a federal law only means, as evidenced by article 115, that the oil competence lies with the KRG, as it is not listed as one of the exclusive competences of the federal government under article 110 of the Constitution. Consequently, it appears that the federal government’s own disinclination has made it possible for the KRG to act unilaterally.

All of the above arguments suggest that the KRG had the constitutional power to legislate on oil and gas. Should there have been any specific provisions in the Oil and Gas Law that were deemed unconstitutional, the Court should have referred to those articles specifically, including its arguments as to why they are perceived as unconstitutional, rather than annulling the entire law.²⁰ By targeting the complete Kurdish Oil and Gas Law, the FSC acted disproportionately, effectively taking away the region’s right to adopt laws on oil and gas, which was granted to it by the Iraqi

¹⁹ Interestingly, article 115 could have referred to article 114 to grant supremacy to the regional governments regarding shared competences, as article 114 lists those concurrent powers exhaustively. Yet, article 115 reads that “*With regard to other powers shared between the federal government and the regional government, ...*” (emphasis added), thereby suggesting there are other powers shared between the different levels of government, besides the shared competences of article 114. These other shared powers include oil and gas under articles 111 and 112 of the Constitution.

²⁰ INSIGHT Iraq, *supra* n. 2, 6.

Constitution.²¹ As a consequence, the decision to mandate the KRG to hand over all oil production from their fields to the federal government has no constitutional basis.

In his formal *Legal Opinion on The Authority of the Kurdistan Regional Government over Oil and Gas under the Constitution of Iraq*,²² James Crawford came to these same conclusions. As there were no “present fields” where oil was extracted in Kurdistan at the time the Constitution took effect, not article 112/First, but article 112/Second (in conjunction with article 115) is relevant. Where no strategic policies to the development of oil resources are agreed upon between the federal and the regional government, the KRG was well within its rights to proceed with their own oil policies, including adopting its 2007 Oil and Gas Law.²³ Indeed, as Crawford noted, article 112/Second does not give any competence over oil management of non-present fields to the federal government, “*Nor does it stipulate that no contracts are to be concluded for the management by a region of present or future fields until the strategic policies are agreed.*”²⁴

In our opinion, the main reservation for the Iraqi government would have been the oil deal negotiated between the KRG and Turkey. However, the FSC ruling surprisingly does not substantially cover article 110/First, which states that “*negotiating, signing, and ratifying international treaties and agreements*” is a competence exclusive to the federal government. Article 110/First therefore suggests that the KRG did not have the power to sign any oil deal with Turkey.²⁵ Admittedly, the agreement was not signed between governments, but between public and private energy companies.²⁶ It is unsure whether such private international contracts actually fall under “international treaties and agreements”. Yet, one could argue that a deal between a Kurdish oil field company and a Turkish-backed private company, is an agreement to which article 110/First applies. The federal government had a case – besides only objecting to building the oil and gas pipeline between Turkey and Kurdistan –²⁷ to demand of the KRG to renegotiate the agreement in order to comply with the Constitution. On the other hand, it cannot be expected of Turkey to consider the Iraqi Constitution before signing any agreement with Iraqi actors. The issue over who has the competence to sign international agreements is a purely internal one. Moreover, implementation of the deal has been ongoing for nearly ten years. In analogy with articles 27 and 46 of the Vienna Convention on the Law of Treaties, provisions of internal law can be no argument to justify the nullification of the agreement. Therefore, the Iraqi Ministry of Oil cannot unilaterally annul the contract.

²¹ Id., at 6.

²² CRAWFORD, J., *supra* n. 17.

²³ Id., at 13.

²⁴ Id., at 7.

²⁵ See also GALBRAITH, P. W., “Kurdistan in a Federal Iraq” in B. O’LEARY, J. MCGARRY and K. SALIH (eds.), *The Future of Kurdistan in Iraq*, University of Pennsylvania Press, 2005, (268) 278: “*Even if Kurdistan wins the final arguments over ownership of petroleum, Kurdistan cannot export petroleum (the only way to generate revenues) in significant quantities without the consent of the Baghdad authorities.*”

²⁶ TOL, G., “Untangling the Turkey-KRG Energy Partnership: Looking Beyond Economic Drivers” in S. AYDIN-DÜZGİT, D. HUBER, M. MÜFTÜLER-BAÇ and others (eds.), *Global Turkey in Europe II – Energy, Migration, Civil Society and Citizenship Issues in Turkey-EU Relations*, Edizioni Nuova Cultura, 2014, (69) 76.

²⁷ GUNES, C., *The Kurds in a New Middle East – The Changing Geopolitics of a Regional Conflict*, Palgrave Macmillan, 2019, 34.

Conversely, the FSC argued their case based on article 110/Third, stating that the KRG violated this provision by organizing commercial relations with neighboring countries regarding oil. Article 110/Third states that the federal government has the exclusive power to draw up the national budget. The argument goes that because of articles 111 and 112 of the Constitution, the federal government would have the right to income from oil and gas, which would subsequently be included in the national budget. Because the KRG unilaterally exported oil out of Iraq, this revenue was not available to the central government, which would make it impossible to draw up the national budget. However, as argued above, this is false. The federal government only has a concurrent power over oil and gas. In the absence of cooperation on the matter, the KRG can proceed with its oil development policies. Since the federal government did not have the right to income from oil and gas, the regional government also has not infringed upon the exclusive federal authority of drawing up the national budget of the state.

Moreover, article 110/Third is, yet again, a dubiously ambivalent and interpretable provision. The exclusive authority of the federal government goes as far as “*formulating fiscal and customs policy*”. It does not mention *execution* of this fiscal policy (whereas it does explicitly grant executive powers in article 110/Second, which suggests executive powers were left purposely out of article 110/Third), nor does it specify where the tax revenue or the volume of the state budget can come from. Constitutions should provide in detail which level of government can levy which taxes. When referring back to articles 112 and 115, it becomes clear that formulating fiscal policy does not equal the right over oil revenue. Furthermore, this must also be linked to article 121/Third, which provides that “*regions and governorates shall be allocated an equitable share of the national revenues*”. This could mean that the regional government has the right to an equitable share of national revenues, without being allowed to levy its own income. However, if *executing* the fiscal policy is not an exclusive federal power, it must be a competence of the regional government. This is corroborated by articles 115 and 121/First, which both provide that residual (executive) powers lie with the regional government. Therefore, article 121/Third must be interpreted as a form of fiscal equalization: the regions are entitled to an equitable share of national revenue – related to their needs – in addition to the income they have raised themselves. Article 110/Third, therefore, merely creates a common economic sphere in the whole of Iraq, while article 121/First leaves the details and implementation to the KRG. Consequently, the FSC is making a gross constitutional error by saying that the KRG failed “*to observe the exclusive powers of the federal authorities regarding oil and gas*”. The federal authorities do not have any exclusive powers over oil and gas income.

D) Exercising shared rule in federations

The Iraqi Constitution explicitly prescribes a system of shared rule in its article 114, yet articles 111 and 112 must also be interpreted to constitute shared powers. The competences of oil and gas are shared powers between the central and the regional governments, as must be interpreted from the wording of articles 111 and 112, and because they are not listed under the exclusive competences of the federal government in article 110. However, this shared rule is not defined in the Constitution, which renders its exercise ambiguous and uncertain. It is relevant to venture into the topic of shared rule, and look at other federations that apply models of

shared rule in their political systems, to see which models could be considered as power-sharing mechanisms for oil and gas in Iraq.

One way to exercise concurrent powers in practice, is through a system of dual federalism. In those systems, the federal and the regional governments have clearly delineated powers, which they perform independently from each other.²⁸ The United States is an example of a dual federalist system of shared powers: both the federal (through the US Congress) and the regional government can, for example, raise income taxes separately. A second possible option for sharing competences is through cooperative federalism. In such systems, the distinctions between the competences are not so clear and may overlap considerably. Therefore, cooperation across the different levels of government is necessary for a coherent execution of policies. John Kincaid defines cooperative federalism as entailing “*the willingness of the federal government to negotiate and bargain with state and local officials over the formulation of federal policy and the implementation of federal policies by states and localities.*”²⁹ Literature often refers to Germany when it discusses this system, where the *Bundesrat* acts as a forum to negotiate and cooperate between the federal level and the regional (*Länder*) level of government.³⁰ Indeed, cooperative federalism generally manifests itself through the existence of a Second Chamber, where shared powers are negotiated and agreed upon by the different levels of government. A third mechanism of power-sharing in federations exists in the articulation of residual powers and concurrent governance rules in the absence of central laws or regulations. Constitutions can refer to the level of government that has the competence to act on issues that are not dealt with by the other level(s). In the US, for instance, states can decide unilaterally on certain policies like same-sex marriage, where the federal authorities have not yet regulated upon. Additionally, states can unilaterally counteract federal laws by implementing their own policies, either in areas that fall under parallel powers (where states and the federal government both act), or in areas where states are allowed to go beyond the provisions in federal laws. Through these possibilities, regional governments decide on abortion rules, climate change, drug regulations, and other such policies within their respective territories, even where federal laws already provide for (different) provisions.

Applied to the shared competences over oil and gas in the Iraqi case, certain issues in the existing power-sharing arrangements come to the fore. Firstly, it appears a system of dual federalism cannot work to share competences over oil and gas. The federal and the regional government cannot both decide on policies and management independently over the same oil produced in the Kurdistan Region. Instead, any decisions over specific oil fields and produced oil should emerge from cooperative federalist structures: from joint negotiations and settlements between the federal and the regional government. In fact, the Iraqi Constitution includes this

²⁸ KINCAID, J., “The Eclipse of Dual Federalism by One-Way Cooperative Federalism”, *Arizona State Law Journal* (2017), vol. 49 (3), (1061) 1062.

²⁹ KINCAID, J., “The Three Shades of American Federalism” for 50 Shades of Federalism, 2019, available at <http://50shadesoffederalism.com/case-studies/the-three-shades-of-american-federalism/> (accessed 14 March 2022).

³⁰ STURM, R., “Cooperative Federalism and the Dominant Role of Consensus in German Federalism” for 50 Shades of Federalism, 2018, available at <http://50shadesoffederalism.com/case-studies/cooperative-federalism-dominant-role-consensus-german-federalism/> (accessed 14 March 2022).

mechanism of cooperative federalism. Article 65 of the Constitution reads that a Federation Council shall be established, which will include representatives from the regional level of government. This Federation Council, together with the Council of Representatives, constitutes the federal legislative power.³¹ Indeed, the Federation Council would effectively serve as the above-mentioned Second Chamber, in which negotiations would take place on the shared competences, including those of oil and gas. Regrettably, article 65 was never implemented, nor has there been a law enacted to regulate the formation of the Federation Council. This is unsurprising, as such a law must be passed by the Council of Representatives, who have no incentive to limit their own power by making it shared with a Federation Council. Therefore, the lack of a Second Chamber is the result of an inherently flawed procedure.

Besides the issue of the Second Chamber, there is also the discussion on who has the power to act in the absence of mutually agreed or central laws and regulations. The KRG argues that Iraq follows a similar model as the US, where the Kurdistan Region can act unilaterally when there is no concurrent action taken. The FSC disagrees, stating that the Constitution must be read as meaning that the central government can develop oil and gas policies unilaterally. From the arguments under Chapter C, the Iraqi Constitution must be interpreted to grant regions the power to proceed on shared competencies when the federal government has not acted. This stems from article 115 of the Constitution, which, as mentioned, grants all residual powers and supremacy in case of dispute to the regions and governorates. Moreover, the spirit of the Constitution as a whole – granting extensive competencies to the regions, and only limited powers to the central government – can only lead to the same conclusion. Again, the Constitution prescribes cooperation on oil and gas, which should be the primary goal. However, until such cooperative strategies are in place, and because they stem from the central government's disinclination to implement them, the KRG can proceed with its policies unilaterally.

E) Conclusion and policy recommendations

Considering the broader political context surrounding the recent FSC judgment, there are reasons to criticize its timing. Some go as far as condemning the Court to enter into political discussions by delivering their ruling. Nonetheless, our main concern lies with its constitutional soundness.

As the Federal Supreme Court is Iraq's highest court, against which no appeal is possible anymore,³² it is all the more important for the FSC to substantiate its judgments in a comprehensive and transparent manner. It should have argued exactly which provisions of the Oil and Gas Law are deemed unconstitutional, and why this is the case. The same goes for the oil deals between the KRG and Turkey. What we are left with, is a vague and undefined judgment which impacts the Kurdish Region greatly, and has huge implications for the federal agenda in Iraq. In our opinion, the judgment is a misinterpretation of the Constitution. The KRG did not act outside its competences when adopting its Oil and Gas Law, and has the power to proceed oil policies. The

³¹ Art. 48 of the Iraqi Constitution.

³² As provided in article 94 of the Iraqi Constitution, and article 17 of the FSC's Rules of Procedure. The Rules of Procedure prescribe no option of appealing an FSC ruling, even for procedural errors.

broad powers granted to them by articles 112 and 115, together with the limited set of exclusive powers for the federal government in article 110 of the Constitution, cannot be explained in any other way. The spirit of the Iraqi Constitution is clearly one of decentralization, while this judgment only stimulates centralization.

As hinted upon above, the Iraqi Council of Representatives should enact a law which regulates the formation, membership conditions and competencies of the Federation Council. This should be done as soon as possible, in line with its obligations under article 65 of the Constitution, so that a Second Chamber will be established as a forum for cooperation on the concurrent powers.

To proceed swiftly with a view to the future, Erbil and Baghdad would do well to enter into mediation in order to cooperate better on their concurrent powers over oil and gas. One possibility would be to invite an impartial third party to lead, coordinate, facilitate, or even just promote mediation. Two examples of such parties with a history of mediation are the European Union (EU) and Switzerland. The EU – or more specifically, the European External Action Service – offers to (co-)lead, coordinate, facilitate, promote and support mediation to prevent conflicts all over the world.³³ Switzerland, too, world renowned for its mediation services, offers mediation, conciliation and arbitration services.³⁴ In fact, its foreign policy strategy 2020-2023 includes a specific focus on the MENA region in order to promote stability and improve prosperity.³⁵ At request, the two parties can freely designate mediators, the applicable law, the language of the proceedings, and location of the mediation. Through such a procedure, a solution can be found which is acceptable for both the Iraqi central government and the KRG. Mediation is non-binding, and can go at any speed the parties would prefer.

Secondly, a constitutional amendment should once and for all unequivocally clarify where oil and gas competences lie, and do away with the repeatedly broad and ambiguous wordings in, amongst others, articles 111 and 112. The best option would be to include articles regarding oil and gas under article 114, which lists the shared competences. Besides addressing the more pressing oil issues in Iraq, mediators could also provide recommendations on how to draw up constitutional provisions which are unambiguous and clear enough to be enforceable before courts, and to prevent any further dispute. Mediation might also open the door to a further discussion on a badly needed Iraqi Oil Law, which addresses the issues raised above. In short, if the federal government in Iraq and the regional government in Kurdistan cannot implement a

³³ For more information on the EU's role as a peace mediator and conflict prevention actor, see EEAS, "Conflict Prevention, Peace building and Mediation", 12 March 2021, available at https://eeas.europa.eu/topics/security-defence-crisis-response/426/conflict-prevention-peace-building-and-mediation_en (accessed 11 March 2022); Council of the European Union, "Concept on EU Peace Mediation", 11 December 2020, available at <https://eeas.europa.eu/sites/default/files/st13951.en20.pdf> (accessed 11 March 2022).

³⁴ For more information on Switzerland's role as a mediator through the Federal Department of Foreign Affairs and swisspeace, see Federal Department of Foreign Affairs FDFA, "Mediation", available at <https://eda.admin.ch/eda/en/fdfa/foreign-policy/human-rights/peace/switzerland-s-good-offices/facilitation-and-mediation.html> (accessed 11 March 2022); swisspeace, "Mediation", available at <https://www.swisspeace.ch/topics/mediation/> (accessed 11 March 2022).

³⁵ Federal Department of Foreign Affairs FDFA, "Switzerland's foreign policy strategy for 2020–23", 29 January 2020, available at <https://www.eda.admin.ch/eda/en/home/fdfa/publikationen/alle-publikationen.html/content/publikationen/en/eda/schweizer-aussenpolitik/Aussenpolitische-Strategie-2020-2023.html> (accessed 11 March 2022), 26-27.

form of cooperative federalism when dealing with shared powers, mediation could prove to deliver a much-needed solution.

References

- BELSER, E. M., "A Failure of State Transformation Rather than a Failure of Federalism? The Case of Iraq", *Ethnopolitics* (2020), vol. 19 (4), 383-401.
- CRAWFORD, J., "The Authority of the Kurdistan Regional Government over Oil and Gas under the Constitution of Iraq", *Oil, Gas & Energy Law* (2008), vol. 3, 1-13.
- DANILOVICH, A., "New horizons: Iraqi federalism" in A. DANILOVICH (ed.), *Iraqi Kurdistan in Middle Eastern Politics*, Routledge, 2017, 35-56.
- EKLUND, K., O'LEARY, B. and WILLIAMS, P. R., "Negotiating a Federation in Iraq" in B. O'LEARY, J. MCGARRY and K. SALIH (eds.), *The Future of Kurdistan in Iraq*, University of Pennsylvania Press, 2005, 116-142.
- Federal Department of Foreign Affairs FDFA, "Switzerland's foreign policy strategy for 2020–23", 29 January 2020, available at <https://www.eda.admin.ch/eda/en/home/fdfa/publikationen/alle-publikationen.html/content/publikationen/en/eda/schweizer-aussenpolitik/Aussenpolitische-Strategie-2020-2023.html> (accessed 11 March 2022).
- GALBRAITH, P. W., "Kurdistan in a Federal Iraq" in B. O'LEARY, J. MCGARRY and K. SALIH (eds.), *The Future of Kurdistan in Iraq*, University of Pennsylvania Press, 2005, 268-281.
- GUNES, C., *The Kurds in a New Middle East – The Changing Geopolitics of a Regional Conflict*, Palgrave Macmillan, 2019.
- INSIGHT Iraq, "Q&A: Federal Supreme Court ruling on KRG oil and gas sector", 22 February 2022, available at <https://insightiraq.com/articles/qa-federal-supreme-court-ruling-on-kr-g-oil-and-gas-sector/> (accessed 28 February 2022).
- KINCAID, J., "The Eclipse of Dual Federalism by One-Way Cooperative Federalism", *Arizona State Law Journal* (2017), vol. 49 (3), 1061-1090.
- KINCAID, J., "The Three Shades of American Federalism" for 50 Shades of Federalism, 2019, available at <http://50shadesoffederalism.com/case-studies/the-three-shades-of-american-federalism/> (accessed 14 March 2022).
- Kurdistan Regional Government, "KRG Statement on Tuesday's Ruling of the Iraqi Federal Supreme Court", 15 February 2022, available at gov.krd/english/news-and-announcements/posts/2022/february/kr-g-statement-on-tuesday-s-ruling-of-the-iraqi-federal-supreme-court/ (accessed 25 February 2022).
- RASHEED, A. and DAVISON, J., "Iraqi cleric's push to sideline Iran-backed factions risks clash" for swissinfo.ch, 14 January 2022, available at <https://www.swissinfo.ch/eng/iraqi-cleric-s-push-to-sideline-iran-backed-factions-risks-clash/47262212> (accessed 28 February 2022).
- SHAKIR, F., *The Iraqi Federation – Origin, Operation and Significance*, Routledge, 2017.
- STURM, R., "Cooperative Federalism and the Dominant Role of Consensus in German Federalism" for 50 Shades of Federalism, 2018, available at <http://50shadesoffederalism.com/case-studies/cooperative-federalism-dominant-role-consensus-german-federalism/> (accessed 14 March 2022).

- The New Arab, “The Iraq Report: Judicial rulings dash dreams of Sadr, Kurds”, 1 March 2022, available at <https://english.alaraby.co.uk/analysis/iraq-report-judicial-rulings-dash-dreams-sadr-kurds> (accessed 7 March 2022).
- TOL, G., “Untangling the Turkey-KRG Energy Partnership: Looking Beyond Economic Drivers” in S. AYDIN-DÜZGİT, D. HUBER, M. MÜFTÜLER-BAÇ and others (eds.), *Global Turkey in Europe II – Energy, Migration, Civil Society and Citizenship Issues in Turkey-EU Relations*, Edizioni Nuova Cultura, 2014, 69-80.
- WAHAB, B., “The Death of Oil Federalism? Implications of a New Iraqi Court Ruling” for The Washington Institute for Near East Policy, 18 February 2022, available at <https://washingtoninstitute.org/policy-analysis/death-oil-federalism-implications-new-iraqi-court-ruling> (accessed 28 February 2022).
- WATTS, R. L., *Comparing Federal Systems – Third Edition*, McGill-Queen’s University Press, 2008.