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Research paper

Restricting the Power to Formulate Subnational (Regional) Constitutions in Iraq

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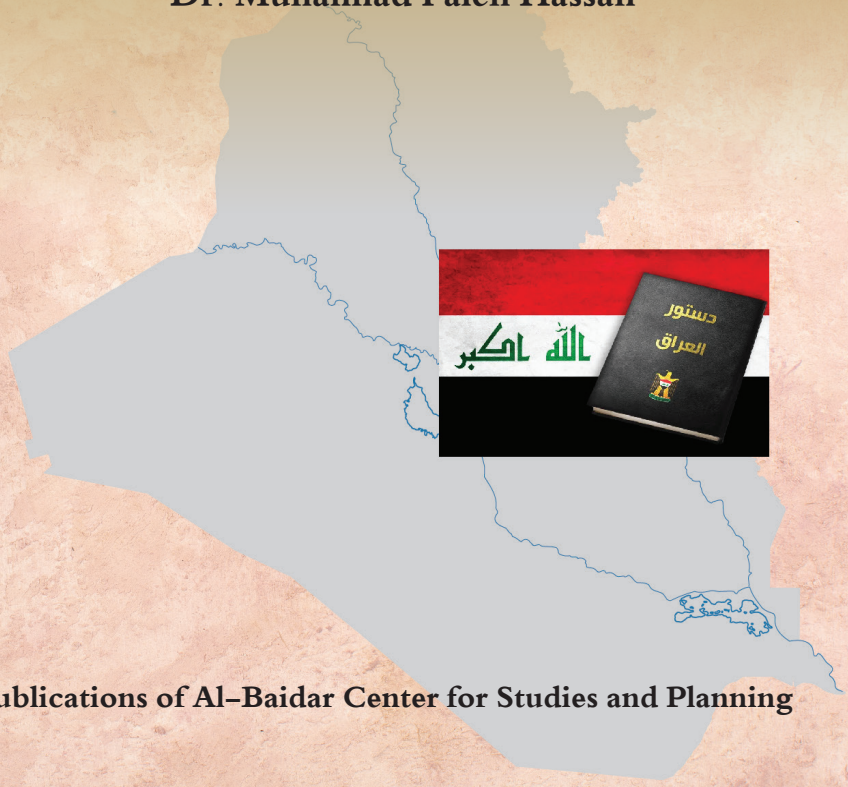

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Abstract

The nature of the federal system has contributed to the formation of distinctive features of its sovereignty. If this system is a constitutional mechanism of governance, it entails a foundational duality that joins federal constitutions with non-federal constitutions (regional constitutions). Thus, the special character of constitutional sovereignty in Iraq's federal system is confirmed: the will of the federal constituent authority supersedes that of the authority tasked with drawing up the regional constitutions, i.e., it restricts them within the bounds set by the federal constitution. This means the federal system is applied as intended by the federal constituent authority. Adopting the federal system has affected the constitutional structure of the state, since the principle of inherent independence for the federal units imposes constitutional duality within the state—a federal constitution governing the exercise of authority at the federal level, and regional constitutions that reflect the constitutional choices of the regions in line with their unique characteristics and interests. This necessitates restricting the powers to draft regional constitutions to ensure their compatibility with the constitutional origins and principles of the federal system. Yet achieving such compatibility remains theoretical unless the constitutional legislator determines specific consequences for cases where compatibility is absent; that is, unless it establishes a constitutional mechanism that rules on potential conflicts between the constitutional product of a regional constitution-making authority and the federal constitution, such that this mechanism serves as the ultimate limit to the power of that authority.

Section 1: The Authority Responsible for Drafting a Regional Constitution

The federal principle requires the organization of political arrangements at the federal level through a federal constitution drafted by a constituent authority representing all parties of the federal system, at least at its establishment. At the same time, the constitutional legislator recognizes for the units composing the federal state their right to organize their political options in a constitutionally special manner, within the general constitutional framework represented by the federal constitution.

The necessity for compatibility of local constitutional options with the federal constitution is connected to the configuration of the authority responsible for implementing those options within an internal constitutional structure. The nature of this authority and the foundational function it performs raises doubts about the possibility and legitimacy, as well as the efficacy, of restricting it.

To determine the nature of the authority drafting the regional constitution, it is essential to comprehend the interaction between it and the authority drafting the federal constitution [1]. The (subordinate) character of the relationship between the two authorities implies that the regional constitutional drafting authority is derived—its authority is limited and stems from the federal constitution; it owes its existence to the federal constitution and is thus subject to the restrictions it contains. Accordingly, the regions' right to establish a constitution is limited by the federal constitution [2]. If the relationship is one of subordination, does this mean

1. See in this regard: Asim Khalil and Xavier Philippe: "The State Constitution," Arabic Handbook Accompanying Constitutional Law, First Edition, Arab Organization for Constitutional Law Publications, p. 38, 2021; Ali Najib Hamza: "Federalism and Prospects for Its Application in Iraq," Scientific Journal of Karbala University, Volume 5, Issue 4, 2007, p. 95; Dr. Youssef Goran: "The Constitutional Organization of Plural Societies in Democratic States, Kurdistan Center for Strategic Studies, Sulaymaniyah, 2010 , p.56.
2. See: Yaniv Roznai: Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers, A thesis submitted to the Department of Law of the London School of Economics for the degree of Doctor of Philosophy, London, February 2014., P 89.

the federal constituent authority can—by amending the federal constitution—change regional constitutions or their constitutional scope?

This is theoretically possible through amending the federal constitution. However, the nature of the relationship between regional constitutions and their societies requires, ideally, obtaining their approval for federal constitutional amendments that affect their constitutional scope [3].

Thus, the authority to draft a regional constitution is both a founded and a restricted authority, possessing a constituent right derived from the federal constitution and bound by a foundational duty to conform to the federal constitution.

1. Constituent Authority with a Foundational Right: The authority to draft a regional constitution is a constituent right granted by the federal constitution. The founding right refers to the region's capacity to draft a constitution governing authority within it. Recognition of this right is necessary for legitimizing the process of drafting the regional constitution. If the federal constitution denies regional (founding) independence, the process of drafting regional constitutions becomes constitutionally illegitimate. Therefore, the region's right to draft its constitution is linked to what is permissible by the federal constitution. This right's existence is often related to the pre-federal constitutional situation; if a region had prior constitutional documents, its foundational right remains strong but requires reconciliation between the prior documents and the subsequent federal constitution [4]. If federalism arose without such prior documents, there are two possibilities: either the constitutional legislator recognizes the region's founding right, limited by the necessity to conform to the federal constitution, or neglects

3. See: Cheryl Saunders: The Relationship Between National and Subnational Constitutions, Subnational Constitutional Governance, Pretoria, 1999, P 26

4. See: Patricia Popelier: The need for sub-national constitutions in federal theory and practice The Belgian case, Perspectives on Federalism, Vol. 4, issue 2, 2012. P 44.

this right and instead provides detailed constitutional organization for regional institutions [5].

2. A Restricted Authority Fulfilling a Foundational Duty: The restriction of the authority to draft a regional (subnational) constitution is a necessity imposed by the rules of constitutional legitimacy [6]. Recognizing the region's founding right legitimizes the process of drafting its constitution, but if approached from the angle of the duty to draft a constitution, does the region have discretion in whether to exercise this right?

Though the region's ability to draft its constitution may be described as a founding right, this does not imply complete freedom to draft or abstain from drafting a constitution; rather, it serves as a criterion for the constitutionality of the entire foundational process. Once the federal constitution recognizes this right, the region is obliged to exercise it in line with the restrictions imposed by the federal constitution, whether substantive (content) or formal (procedures). The federal system's nature demands such an obligation—it is a system whose strength stems from accurately organizing authority at both levels, and constitutional duality is essential.

The timing for the region to issue its constitution depends on the federal constitution: if a specific period is set, the region must comply; if not, it is up to the competent constitutional interpretive authority to decide, though it is believed the region must do so within a reasonable period.

5. Michael J. Kelly: The Kurdish Regional Constitution within the Framework of the Iraqi Federal Constitution: A Struggle for Sovereignty, Oil, Ethnic Identity, and the Prospects for a Reverse Supremacy Clause, PENN STATE LAW REVIEW, vol 114, 2010, P 727.

6. See: James A. Gardner: In Search of Sub-National Constitutionalism, 4 Eur. Const. L. Rev 325, University at Buffalo School of Law, 2008., P 9. & Patricia Popelier: op. cit, P 42. & Cheryl Saunders: op. cit, P 26 & Joseph Marko, Robert Forrest Williams and George Alan Tarr : op. cit, P 3.

Section 2: The Function of the Authority Responsible for Drafting the Regional Constitution

The main function is to draft the region's constitution as part of the broader constitutional framework of the Iraqi federal system [7]. This phenomenon has produced a constitutional hierarchy: at the top is the federal constitution, which determines the features of the federal political and constitutional system and regulates the constitutional scope of regions; regional constitutions exist at a lower rank, organizing the exercise of authority at the regional level [8]. The idea of "non-federal constitutions" is thus an inherent part of applying the federal principle correctly [9]. The function of a regional constitution does not differ in essence from that of any other constitution, as it is responsible for establishing and limiting authority within the federal unit, in addition to its role in regulating the relationship between federal and regional authorities. Therefore, any constitution drafted by the regions will likely reflect the distinctive features that allow them to determine their own constitutional and political choices, which express their autonomy in shaping their political destiny [10]. Thus, ethnic and cultural justifications for federalism may lend reasonableness to the justification for the existence of subnational (non-federal) constitutions [11].

7. See: Michael Burgess and G. Alan Tarr SUB-NATIONAL CONSTITUTIONS IN FEDERAL SYS- TEMS , Prepared by the Forum of Federations with the support of the Government of Canada.. P 2.& Rosalind Dixon and Adrienne Stone: Constitutional Amendment and Political Constitutionalism: A Philosophical and Comparative Reflection, Melbourne Legal Studies Research Paper No. 703, Melbourne Law School, Philosophical Foundations of Constitutional Law, Oxford University Press, 2016, P 4.

8. See: Joseph Marko, Robert Forrest Williams and George Alan Tarr : Federalism, Subnational Constitutions, and Minority Rights, Greenwood Publishing Group, 2004, P 3.

9. See: Patricia Popelier: The need for sub-national constitutions in federal theory and practice The Belgian case, Perspectives on Federalism, Vol. 4, issue 2, 2012, P 38-39

10. See: Michael Burgess and G. Alan Tarr : op. cit. P 2. & Joseph Marko, Robert Forrest Williams and George Alan Tarr Federalism, Subnational Constitutions, and Minority Rights, Greenwood Publishing Group, 2004, P 2-3

11. See: James A. Gardner: In Search of Sub-National Constitutionalism, 4 Eur. Const. L. Rev 325, Uni- versity at Buffalo School of Law, 2008, P 9-12. & Ronald L. Watts: The Federal Idea and its Contemporary Relevance, Institute of Intergovernmental Relations Queen's University Kingston. Canada, 2007, P 6.

Section 3: Restricting the Power to Draft Regional Constitutions

Recognizing the foundational right of regions was meant to guarantee regional autonomy. However, if this right is unfettered, it may produce opposite results. A founding right compatible with federalism is a limited one—meaning the right to a regional constitution that does not conflict with the essence of the federal system or the federal constitution. Otherwise, unfettered rights would undermine the constitutional structure of the federal state and diminish the federal constitution's guarantee of unity.

The main question: How do federal systems ensure regional units respect the limits of their founding rights? The typical solution is for the federal constitution to exercise some control over regional constitutions. There are two principal forms of restriction:

Denying the Regional Founding Right: The constitutional legislator may resort to denying the regional constituent right to eliminate any potential conflict with the federal constitution. In such a case, the federal constitution regulates the matters that would have been regulated by the subnational (regional) constitution—had it existed—such as the form of government and the organization of regional constitutional institutions, thereby eliminating the entire regional constitutional sphere. Often, countries with a legacy of prior centralization resort to including regional constitutional arrangements within the federal constitution itself, thus negating the need for regional constitutions [12].

1. Limiting the Regional Founding Right: A thorough analysis of the restriction of the authority to draft a regional constitution must begin from the position of the federal constitution regarding the determination of its constitutional scope, which may expand or narrow depending on the extent of discretionary power granted by the federal constitution to the regions in adopting their constitutions

12. See: Michael Burgess and G. Alan Tarr : op. cit, P 6.

[13]. This restriction may be either direct or indirect: In the case of direct restriction, the federal constitution does not deny the regional constituent right but rather acknowledges it in a limited manner. If the federal constitution predates the regional constitution, its delegation to the regions to draft their constitutions comes in a way that narrows the scope of their constitutional choices. However, if the regional constitution predates the federal constitution, the restriction takes the form of urging the regions to amend their constitutions to make them compatible with federal constitutional requirements. The degree of restriction varies according to the values held by the drafter of the federal constitution; the drafter may not only specify the areas in which the units may exercise their powers in drafting their constitutions, but may also impose the methods by which this discretionary power is to be exercised[14]. Indirect restriction is achieved when the federal constitutions stipulate the principle of the supremacy of the federal constitution. Even if this supremacy is not directed specifically at the drafters of the regional constitution, it influences their constitutional choices, so the provisions of the federal constitution prevail in cases of conflict between them, as it is superior to the regional constitutions. The effect of the principle of supremacy of the federal constitution is not limited to its provisions at the time the regional constitution is drafted; rather, the constitutional scope of the regions is constrained by any amendment made to any provision of the federal constitution, if such amendment is carried out according to the prescribed constitutional mechanism [15].

13. See: Robert F. Williams: Teaching and Researching Comparative Subnational Constitutional Law, PENN STATE LAW REVIEW, Vol. 115:4, 2011, P 1112.

14. See: Michael Burgess and G. Alan Tarr : op. cit, P 6. & Robert F. Williams: op. cit, P 1114.

15. See: Michael Burgess and G. Alan Tarr : op. cit, P 6. & Robert F. Williams: op. cit, P 1125.

Section 4: The Effect of Conflicts Between the Federal and Regional Constitutions

The federal system, as a constitutional rule, is superior to any other legal norms in the federal state. This demands a constitutional obligation on the regional authority to ensure the compatibility of its constitution or any amendment with the federal constitution and any subsequent amendments. Thus, any potential conflict should be resolved by recognizing the constitutional status of the regional constitution, considering the federal constitution.

Oversight of the constitutionality of regional constitutions is essential in any federal system, being a principal component of federal supremacy. This operates on three assumptions: First, the federal constitution is the supreme legal instrument. The federal constitution is a law that has been enacted at the highest level in the hierarchy and holds the supreme legal authority within the federal system. For this reason, the constitutions of the regions must conform to it. Secondly, the federal constitution often precedes regional constitutions both temporally and logically. In addition to being a law of lower rank, the regional constitution is also a subsequently enacted law; therefore, the federal constitution needs to have legal priority over it. Otherwise, to argue the contrary would mean that the federal constitution could be amended by a regional constitution. Thirdly, the federal constitution is binding even on those regions whose representatives voted against it, that is, regions whose parliaments or citizens did not ratify it. Accordingly, their constitutions are subject to review for constitutionality, and any provisions that conflict with the federal constitution must be nullified. Regional constitutions derive their legitimacy from the federal constitution, and since they derive their legitimacy from a higher legal authority, it is necessary to restrict them. This restriction constitutes the criteria by which the validity of the regional

constitution is judged [16].

Despite the criticisms directed at the principle of the constitutionality of regional constitutions for its alleged conflict with the principle of the regions' autonomy, it has represented a practical solution to a complex problem. If the federal constitution grants the regions a degree of autonomy that includes the right to establish their own constitutional systems, such autonomy remains restricted by the requirement to observe the minimum standards set by the federal constitution, assuming the application of the principle of the primacy of the federal system. If the drafters of the regional constitution regulate the exercise of political authority in the region in a manner that is nearly independent of the federal constitution, it is nonetheless necessary to ensure the effective application of the federal constitutional rule that requires consistency with the federal constitution. This is the only way to guarantee the proper functioning of the federal legal system[17]. Suppose the federal constitution is the foundation for all authorities in the federal state. In that case, its supremacy extends not only over these authorities themselves, but also over acts issued by them. Thus, it is impermissible for the regions to include in their constitutions any provision that contravenes their rules; otherwise, the constitutionality of such provisions is nullified. Conversely, if the regional constitutions are consistent with the federal constitution, they may, in that case, be considered as elements of the federal constitutional bloc [18] .

16. See: Dr Marko Stankovic: op. cit, P 78. & James A. Gardner: op. cit, P 9

17. See: Dr Marko Stanković: op. cit, P 79. & James A. Gardner: op. cit, P 10.

18. See in this regard: Dr. Muhammad Bakr Hussein, «The Federal Union Between Theory and Practice,» Culture Publishing House Press, Cairo, 1977, p. 266.

Section 5: Restricting Regional Constitution-Making Power in Iraq

The Iraqi constitutional legislator recognized the right of regions (only) to draw up their constitutions but restricted this right in several ways. Close examination of relevant constitutional provisions reveals the limits and extent of this right and its restrictions:

1. The General Principle in Restricting the Constituent Rights of the Regions: The general principle regarding the restriction of the authority to draft a regional constitution is outlined in Article (120) of the Constitution, within Chapter Five, which regulates the authorities of the regions. This article states: "The region shall draft a constitution for itself, specifying the structure of the regional authorities, their powers, and the mechanisms for exercising those powers, provided that it does not conflict with this Constitution." The general principle of restriction is deduced from the phrase "provided that it does not conflict with this Constitution." An attempt to interpret this text—or at the very least, its final phrase—yields two possible interpretations: one is a narrow interpretation, and the other is a broad interpretation, which we will discuss in turn.

2. The scope of the constituent right of the regions: The phrase "provided that it does not conflict with this Constitution" found at the end of Article (120) above bears two possible interpretations. The first interpretation adopts a narrow approach to this phrase, meaning that the only restriction is that the regional constitution must not contravene the federal constitution concerning the principles specific to the federal system. That is, the region is not permitted to violate the principles of the federal system, especially concerning the distribution of powers between the federal authority and the authorities of the regions, by including in its constitution provisions that grant the region certain powers that, according to the federal constitution, are vested in the federal authorities. This is based on the

understanding that "non-conflict" was mentioned in the context of the federal constitution's regulation of one of the principles of the federal system, namely, the relationship between the two elements of constitutional duality—the federal constitution and the regional constitution.

As for the second interpretation, it expands the meaning of "non-conflict with the federal constitution"—that is, the regional constitution must conform with the federal constitution in all its details, whether related to the federal system or to other principles. In other words, the regional constitution should replicate (adopt) the principles of the federal constitution, considering that these principles represent the minimum required content for the regional constitution. We believe that the second interpretation is closer to logic and more in line with the general practice in federal systems, for the following reasons:

1- This interpretation necessitates establishing the characteristics of the state's political system in the regional constitution, so that the system is republican, parliamentary, and democratic, as stated in Article (1) of the Constitution. Article (1) of the Constitution defined the characteristics of the political system when it stated: "The Republic of Iraq is one independent federal state with full sovereignty; its system of government is republican, representative, parliamentary, and democratic, and this Constitution is a guarantor of Iraq's unity." This means that these principles must govern the political system applied at both the federal and the regional levels. The text did not specify that these principles apply only to the federal authorities, but rather defined the characteristics of the political system implemented in (the Republic of Iraq), and, according to the Constitution's definition, the Republic of Iraq is a federal state, which means that the term "the Republic of Iraq" covers the components of the federal state, i.e., both the federal authority and the authorities of the regions. The regional constitution must not

diminish the scope of rights and freedoms outlined in the second chapter of the federal constitution, as any reduction of these rights means the existence of a conflict with the federal constitution, i.e., a violation of the restriction placed by Article (120) above. This interpretation is consistent with the prevailing view in federal systems, especially the principle of constitutional conformity (compatibility) between the federal constitution and the regional constitution.

2- Indeed, the phrase ("provided that it does not conflict with this Constitution") was mentioned after defining the content of the regional constitution, which might seem, at first glance, to support the narrow interpretation of this phrase, on the basis that the wording of the text suggests that the federal constitutional legislator's specification of the content of the regional constitution is at the same time a specification for the scope of the restriction contained in Article (120). Thus, "non-conflict" with the federal constitution is limited to three aspects: the structure of the regional authorities, their powers, and the mechanisms for exercising those powers. Upon closer examination, these aspects pertain to the nature of the system of government in the region, for the system of government is nothing other than (the structure of the authorities of the system, their powers, and the mechanisms for exercising those powers). Therefore, the system of government in the region must not conflict with the federal constitution, and since the federal constitution is the reference for the legitimacy of the regional constitutions, and is the guarantor of Iraq's unity according to Article (1), and since it specifies the characteristics of the system of government in Article (1)—that the system must be (republican, representative, parliamentary, and democratic)—this supports the broader interpretation of non-conflict. Moreover, careful analysis of Article (120) of the Constitution and deconstruction of its linguistic structures reveals that the phrase ("provided that it does not conflict with this Constitution") relates to the entire regional constitution and that the scope of incompatibility is not limited to

the three aforementioned aspects (the structure of the regional authorities, their powers, and the mechanisms for exercising those powers). The essence of the text and the legislator's intention is (the region shall draft a constitution for itself, ..., if it does not conflict with this Constitution). Had the legislator intended to confine the scope of incompatibility to the three aspects above, the text would have been phrased differently, such as ("provided that this does not conflict with this Constitution").

3- Furthermore, Article (13) of the Constitution can be invoked to interpret the phrase ("provided that it does not conflict with this Constitution"). Clause (First) of Article (13) refers to the general principle of supremacy of the federal constitution, as the Constitution considers itself the supreme and highest law in the state, then specifies the regional scope of the principle of supremacy, which is that the federal constitution is binding throughout the entire state without exception. Clause (Second) of the same article then defines the effect of the supremacy of the federal constitution, namely, the invalidity of any text found in regional constitutions that conflicts with it, as this clause states: "No law may be enacted that contradicts this Constitution, and any text in regional constitutions or any other legal text that contradicts it shall be void." If we carefully examine and combine the phrase ("contradicts it") found at the end of Clause Two of Article (13) and the phrase ("provided that it does not conflict with this Constitution") found in Article (120) of the Constitution, we arrive at a decisive result, which is the obligation of the regional constitution to the federal constitution in the broad sense of this obligation, because in both texts the legislator referred to non-conflict with the federal constitution, meaning the entire constitution, not part of it—except for the principles, due to their nature, that are regulated in the federal constitution for purposes that are not appropriate to be applied in the regional constitution, such as transitional provisions or rules regulating the competencies

of federal authorities in their capacity as such.

4- The constitutional legislator has restricted the regional constitution by limiting the function of the region as a political entity, as Clause (First) of Article (121) of the Constitution granted the region the right to exercise legislative, executive, and judicial powers by this Constitution, except for matters that are within the exclusive competence of the federal authorities. Scrutiny of this text reveals the scope of this restriction from two aspects: first, the regional constitution must adopt the principle of separation of powers, as the text divided the authority of the region among legislative, executive, and judicial powers, and since the exercise of these powers is per the provisions of the federal constitution, and Article (47) of the Constitution has organized the relationship among the federal legislative, executive, and judicial authorities according to the principle of separation of powers, the regional constitutions are obliged to apply this text as one of the provisions of the federal constitution referred to in Clause (First) of Article (121) of the Constitution ("the regional authorities shall have the right to exercise legislative, executive, and judicial powers in accordance with this Constitution, ..."). The effect of the restriction thus extends to principles beyond the narrow interpretation (the structure of the regional authorities, their powers, and the mechanisms for exercising those powers). Second, the exercise of legislative, executive, and judicial powers by the region finds its ultimate limits in the exclusive competences of the federal authority, as the last phrase of Clause (First) of Article (121) states ("...except for those authorities stipulated as being the exclusive competence of the federal authorities in this Constitution"). Since Article (110) of the Constitution has defined the exclusive competences of the federal authority, the regional constitution is obliged to this broad interpretation of the phrase ("provided that it does not conflict with this Constitution").

The Federal Supreme Court in Iraq had the opportunity to examine this matter, where it considered a lawsuit filed against the Speaker of the federal House of Representatives and the regional parliament, the President of the Republic, and the President of the region, obliging the region to implement the provisions of Article (120) of the Constitution which requires the region to draft its constitution provided that it does not conflict with the federal constitution. However, the court dismissed this lawsuit for substantive and procedural reasons: the procedural reasons were the lack of standing of the parties in the House of Representatives and the lack of jurisdiction of the court over the lawsuit as it is outside its jurisdiction set forth in Article (93) of the Constitution, which did not include the resolution of matters related to obliging regions to draft their constitutions. The substantive reasons were the absence of interest according to Article (6/Second) of the court's internal system and Article (6) of the Civil Procedure Law, and the absence of harm. Also, the rights of the people are regulated by the Iraqi Constitution, and the regional constitution has nothing to do with that, in addition to the fact that the competences of the federal and regional authorities are regulated by the federal constitution. Accordingly, the court decided ("... and that the region is free to issue its constitution in accordance with the nature of its political circumstances, as Article (120) of the Constitution did not specify the period within which the constitution should be drafted, and the deliberate omission of this period stems from the fact that the Constitution is primarily a political document rather than a legal one, meaning that the political parties should agree on its mechanisms, content, and timing and that this should be done through the effective legal channels in the region and under the umbrella of the federal constitution, ensuring the participation of all groups in the drafting of its articles, as a reflection of the needs and demands of Kurdish society...") [19]. For this position of the court, we have some observations at least regarding the substantive reasons, which can be

19. See Federal Supreme Court Ruling No. 81/Federal/2022.

summarized as follows:

1- The court's conclusion that there is no actual harm is questionable from several perspectives. What is meant by the harm that did not occur? What are the tools for establishing its occurrence? Is there ever a greater harm than the lack of consistency in the form of the state? The federal theory necessitates recognition of constitutional duality—not as a freedom or discretionary power but as a fundamental axiom. Therefore, the lack of regulation of the exercise of political power in the region is an actual harm, and this harm is compounded in the Iraqi federal system, which is based on the existence of only a single region, giving Iraqi federalism a "bipolar" character. So how do we understand the regulation and restriction of the exercise of political power at the federal level but not at the regional level? Would this not disturb the balance of the relationship between the two parties? Is this not a manifest harm and a structural defect that must be rectified? Constitutional texts are meant to be applied, and every failure to apply a constitutional text is itself a harm, regardless of the arguments made to justify noncompliance and regardless of the effects that result therefrom.

2- It is true that Article (120) of the Constitution did not specify a time limit for the drafting of the regional constitution, but that does not mean granting the region an indefinite freedom to draft or not draft its constitution according to its ("political circumstances"), as the court expressed it. Rather, the correct view is that the Constitution's silence as to the specification of this period indicates that it should be done within a reasonable period as required by the initial experience of the federal system, and that the passage of more than seventeen years is a reasonable period in the Kurdistan Region, considering that political circumstances have stabilized. If we add the period of self-rule enjoyed by the region, the period approaches half a century of experience in autonomy. Would

this period not be reasonable? Has the appropriate political circumstance not yet materialized for drafting the region's constitution?

3- How can we make the realization of a key principle of the federal system conditional upon the idea of political consensus? If we rely on consensus, we enter a vicious circle. Who are the parties to this consensus? When is this consensus achieved? What are its mechanisms? Consensus is a relative political term, so how can I condition the achievement of a fixed constitutional legal value upon the realization of a changeable political value? The constitution is not merely a political document as the court sees it, but rather a legal formulation of a political idea. The issue is not a question of favoring either the political or the legal character of constitutional texts, as the legal character is fixed and cannot be denied, but is employed to regulate the political idea. The roles of politics and law in the constitution are complementary, and it is inappropriate to favor one over the other and adapt the constitutional rules to whichever is preferred. What we understand of the court's position is that it suspended the drafting of the constitution upon political consensus as an indispensable political condition. However, do not the multiple attempts to draft the constitution prove the existence of such a consensus? The logic of the Federal Supreme Court means that Article (120) of the Constitution cannot be implemented unless political consensus is achieved in the region. That is, if this consensus occurs, it becomes obligatory that the regional constitution be drafted. Are not repeated attempts to draft the constitution evidence of this consensus having occurred? Otherwise, if there were no consensus, why would these attempts be repeated to the point that some have reached advanced stages and concluded with the drafting of their texts, needing only the final step of public referendum for approval? Welcoming the logic of the Federal Supreme Court would demonstrate that consensus has indeed been achieved through repeated attempts at drafting the constitution, especially considering that such consensus is necessary

at the pre-final approval stage, i.e., at the stage of drafting its texts and during the associated negotiations and settlements among the parties whose consensus the court stipulated. Thus, the conclusion of the drafting phase constitutes proof of the realization of political consensus among the relevant parties, as the Federal Supreme Court itself indicated ("... referring to the many attempts of the regional parliament to draft a regional constitution project, including decision No. 5 dated 8/9/2005, following which the project was approved on 24/7/2009, and another legislative attempt to draft the Kurdistan Region Constitution according to Law No. 4 of 2005, the law for preparing the draft Constitution of Kurdistan Iraq for referendum, but the project was not completed due to political developments and the expiration of the parliament's term...")

4- The linguistic formulation of Article (120) of the Constitution obliges the region to draft a constitution specifying the structure of its authorities, their powers, and the mechanisms for exercising those powers. Thus, the region is obliged to draft its constitution regardless of its political circumstances, albeit within a reasonable period. Had the constitutional legislator intended to grant the regions such freedom, the text would have been formulated differently to express this grant, such as stating, for example, "The regions may draft their constitutions, specifying the structure of their authorities and powers ... etc." However, since the text was worded as it is, there is no justification for granting the region a freedom it does not possess.

5- The argument that the federal constitution regulates the rights of the people and the competences of the federal and regional authorities, and therefore there is no justification for obligating the region to draft its constitution, is untenable. Its logic would imply that there is no need for a regional constitution at all since the constitution already regulates these matters. So, what is the point in the federal

constitutional legislator obligating the content of the regional constitution, as Article (120) indicates that this constitution shall specify its authorities, powers, and mechanisms for exercising those powers? Thus, this text becomes meaningless on the basis that the federal constitution has already regulated the structure of the regional authorities and their powers in Articles (114, 115, 121), so how does this logic hold up?

We have three elements from which we can conclude the inaccuracy of the court's position: the first is if the federal constitution regulates a matter, there is no need for the regional constitution to regulate it (rights and powers); the second is that the federal constitution did regulate rights, powers, and the structure of the regional authorities, hence no need for a regional constitution; the third is that the constitutional legislator obliged the region in Article (120) to specify the structure of the regional authorities, their powers, and the mechanisms for exercising those powers, and since the federal constitution regulated these matters, and this regulation, according to the first element, obviates the need for the regional constitution, the conflict between the texts of the constitution regulating these matters and Article (120) which mandated the content of the regional constitution becomes inevitable. Thus, the court's logic opposes the general character typical of federal constitutions, which must leave a constitutional sphere for the regional constitutions to fill, according to the constitutional compatibility principle, and allow the units to express their unique local constitutional choices. This logic undermines the very essence of constitutional duality and the function of non-federal constitutions and aligns with constitutional systems that denied the founding right to constituent units. However, since the legislator recognized this right, there is no justification to restrict or negate this constitutional obligation by suspending it on grounds external to the constitutional document itself.

6- As for the claim that this lawsuit is outside the jurisdiction of the court, this is debatable. The constitutional obligation to draft the regional constitution is well-established under Article (120) of the Constitution; thus, the failure to draft a constitution is marked by constitutional violation. Since constitutional texts support each other, Article (13) of the Constitution has established that the federal constitution is, firstly, the supreme and highest law in Iraq, binding in all its parts and without exception. Secondly, it is impermissible to enact any law in violation thereof, and any provision in the regional constitutions or any other legal text in violation thereof is void. If the constitutional legislator has specified nullity as the penalty for violation of the federal constitution, who determines this nullity? It is the body assigned by the constitution to safeguard the supremacy of the federal constitution, namely, the body charged with constitutional review—in this case, the Federal Supreme Court. Since the region's abstention from applying Article (120) constitutes a violation of the constitution, and the court is charged with safeguarding the constitution from violations, it is therefore competent to hear such cases. The court should thus have accepted the lawsuit and considered it. Furthermore, the court's argument that Article (120) does not specify a timeframe for drafting the regional constitution would be better addressed by interpreting this according to the standard of a reasonable period. Otherwise, it is illogical to suspend a constitutional obligation concerning a fundamental principle upon the will of local politics.

Section 6: The Scope of the Federal Supreme Court's Jurisdiction to Review Regional Constitutions

Comparative constitutions differ in their organization or application of the idea of constitutional conflict depending on the relationship between the federal and regional constitutions. The Iraqi constitution did not explicitly assign to the Federal Supreme Court the competence to review the constitutionality of regional constitutions, but it is possible to infer this competence based on Article (13) of the Constitution, which provided for the nullity of any provision of regional constitutions that contradicts the federal constitution. Who, then, decides the penalty of nullity? The authority is the Federal Supreme Court, as it is the body mandated with ensuring the supremacy of the federal constitution, firstly, and, secondly, reviewing the constitutionality of the regional constitutions. There is no dispute that Article (13) of the Constitution establishes the federal constitution as the highest law and that regional constitutions are of a lower status; thus, the question of conformity of the regional constitution to the federal constitution is a dispute between a lower and a higher text. This view is reinforced by Article (120) of the Constitution, which required the regional constitution's compliance with the federal constitution. The competence of the court can also be inferred from other constitutional provisions, not just Article (93), as Article (13) forms the constitutional basis for constitutional review not only of laws but also of anything included within the scope of this article, including state and regional constitutions and laws across the country. On the other hand, the question of the conformity of the regional constitution with the federal constitution can be understood as a dispute between the federal authority and the regional authority, thus falling within the court's jurisdiction as per Clause (Fourth) of Article (93) of the Constitution.

Conclusion

First: Findings

1- It cannot be said that a federal system is truly federal unless it fulfills its main constituent elements and distinctive criteria that distinguish it from other systems governing the structure of states. The establishment of an actual federal system capable of achieving its objectives and reflecting the will of the federal constitutional legislator requires the adoption of the principles of duality and pluralism.

2- The federal principle requires constitutional duality in the federal state, that is, the existence of a federal constitution governing the exercise of authority at the federal level, including the creation of federal institutions, specification of their powers, and establishment of constitutional mechanisms for resolving disputes that may arise between parts of the federal system, in addition to determining the scope of the (non-federal constituent right), i.e., the extent to which the regions can draft their constitutions.

3- Regions must be recognized the right to draft their constitutions reflecting local values and interests and to organize their exercise of power, provided there is no conflict with the federal constitution. The principle of constitutional duality has produced the principle of pluralism, which achieves its effect in the sphere of exercising power.

4- The value of the Iraqi federal constitution lies in its being the instrument for the creation of the federal system in Iraq and for achieving the principle of power-sharing on which this system is based. It, together with the regional constitutions (if adopted), constitutes the comprehensive framework governing the constitutional system in Iraq. Accordingly, their constitutional values are not

equivalent; therefore, the will of the constitutional legislator was directed toward establishing the supremacy of the federal constitution over all authority placed therein.

5- The will of the Iraqi constitutional legislator considered the federal system a fundamental constitutional principle upon which the entity of the federal state is based. As a result, the constitutional sovereignty of the federal system was established, considering it a constitutional rule that possesses the attributes of the federal constitution, foremost among which is the principle of constitutional supremacy, from the perspective that the constitutional rules of the federal system serve as criteria governing the constitutionality of regional constitutions.

6- Restricting the authority to draft the regional constitution aims to reinforce the value of the federal constitution and preserve the constitutional sovereignty of the federal system through the adoption of advanced constitutional mechanisms for constitutional oversight consistent with the federal principle. This is accomplished by restricting the authority to draft the regional constitution through the principle of constitutional supremacy of the federal system, applying the concept of constitutional conflict between federal and regional constitutions, and nullifying any provision found therein that is proven to contradict the federal constitution.

Second: Recommendations

1- Add a provision to the Constitution of the Republic of Iraq that prohibits the formation of regions on ethnic, religious, or sectarian grounds, while guaranteeing the rights of minorities and components by obligating the authority responsible for drafting the regional constitution to include provisions in their constitutions that ensure the right of these minorities to participate in exercising authority within the region and to be represented in its constitutional institutions, in a manner that achieves democratic principles and does not conflict with the federal constitution.

2- Amend the Constitution of the Republic of Iraq by adding a provision that makes the oversight of the Federal Supreme Court mandatory overdraft regional constitutions, due to its role in maintaining the coherence of the constitutional structure of the federal system. This shall be done by requiring the competent authority responsible for drafting the regional constitution to submit it to the Federal Supreme Court to examine its compatibility with the federal constitution before presenting this draft to a general referendum in the region.

3- Oblige the regions to draft their constitutions within a reasonable period, to be determined by the constitutional legislator.

4- The Iraqi constitutional legislator should be more specific in restricting the authority to draft regional constitutions, so that this restriction extends to require full compatibility with the entirety of the federal constitution, not only with the provisions regulating the federal system.

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