The Making and Breaking of Federalism in Iraq

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Abstract

The fall of Saddam Hussein and Iraq's transition to democracy was heavily mediatised due to the important intervention of the West, especially that of the United States. However, nearly fifteen years later, and despite its new constitution establishing a federal structure, peace still does not exist. One could therefore easily conclude that the federal solution has failed in Iraq, and argue that federalism might not be a suitable solution for divided societies.

This paper argues that despite its constitution, Iraq has never experienced federalism in essence. It lays emphasis on the process of building a federal state, the main idea being that the success of federalism depends on the transition process, and not on the federal arrangements as such. Thus, this paper seeks to answer to the following question: How did the making of federalism in Iraq affect its breaking?

Introduction

Iraq officially became a federal Sate on the 15th of October 2005, when the new constitution was accepted by its population. After 35 years of violent dictatorship, the hope was that the constitution would enable the creation of a new federal, peaceful and democratic state. At the time of writing, Iraqi society still faces many challenges. Iraq has been the target of many terrorist attacks and has been fighting extremist groups such as ISIS actively since 2014. In 2016, the Kurds attempted to secede from Iraq by holding a referendum. State institutions are weak and Iraq has been ranked as one of the most corrupt countries of the world[1]. Internally, the different ethnical groups still haven't managed to find an agreement on the management of natural resources and the future of Kirkuk is still uncertain.

Throughout its modern history, the Iraqi population has suffered many violent episodes related to ethnical identity. After the US invaded Iraq in 2003, state institutions had to be rebuilt and a new government had to be established. Because of conflicting interests within the society, a federal option was thought to be an adapted solution to pacify the situation, bring an end to ethnical conflicts and avoid a future civil war. Yet, nearly thirteen years after the adoption of Iraq's new constitution, the federal solution does not seem to have been entirely successful.

The hypothesis underlining this paper is that the process that accompanied Iraq's federal transition is the principle reasons why Iraq's federalism has failed in surpassing ethnic division and in rebuilding the state after Saddam's Hussein dictatorship.

This study is divided in two main parts. The first seeks to explore the making of federalism in Iraq, and is itself split into two parts.

As the federal solution is directly connected to Iraq's internal division and modern history, the first subsection contains a brief history and lays down some basic theoretical concepts linked to federalism in general and to the Iraqi situation in particular. The second subsection discusses the making of federalism in Iraq and focuses on the process and the result of the process, namely the constitution of 2005, which consecrates Iraq's federal nature.

The second part aims at understanding the breaking of federalism in Iraq. Thus, the drafting process leading up to the adoption of Iraq's new constitution will be analysed in more detail. An attempt will be made to identify some of the major flaws in the making and their consequence on the Iraqi constitution. In a second stage, the weaknesses of the constitution as such will be evaluated - the assumption being that the issues regarding the implementation of the constitution are directly linked to the development process and less directly to the agreed power-sharing structure.

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[1] International Transparency, 2016.

A)   The Making of Federalism in Iraq

The preamble of the Iraqi constitution refers to the will of creating a "republican, federal, democratic and pluralistic system"[2]. In order to underline the complexity of Iraq's federal transition, this section is divided in two parts. The first exposes the background in which such a process took place (*infra* 1). Important to note that this part will not just resume the historical and social background that led to the creation of a federal state in Iraq; it aims at laying down some basic theoretical concepts related to federalism in general and to Iraq more specifically. The second will then tackle the actual creation of the Iraqi federation (*infra* 2).

1.   Background

In order to understand the challenges encountered during the whole process of adoption of a new constitution, it is important to comprehend the social, environmental and historical context in which the constitution was developed. Thus, the following part will, first of all, examine the historical background to the adoption of Iraq's new constitution (*infra* 1.1). Secondly, it will try to explain why a federal structure was chosen for Iraq and what kind of challenges were faced (*infra* 1.2).

1.1 Historical input

The Iraqi population is a melting pot of different cultures and civilisations, which throughout Iraq's modern history has led to many conflicts[3]. Iraq is 75%-80% Arab and 15%-20% Kurd[4]. The other minorities, including Turkmens and Assyrians, make up to 5% of the remaining population[5]. Islam is the main religion; about 99% of the Iraqis declare themselves to be Muslims, 60%-65% of them being Shia and 32%-37% Sunni[6]. This ethnic configuration has contributed to various conflicts, especially the ones, which occurred during the Baath Regime, when the country was governed by Saddam Hussein[7].

1.1.1   The Independence from Great Britain and the attempt to create a legitimate central government

Great Britain invaded Iraq in 1914, by 1918 most of the country was under control of the British forces[8]. After the fall of the Ottoman Empire, Iraq became a British Protectorate and consisted of three provinces: Baghdad, Basra and Mosul[9]. The British made an alliance with the Sunnis and promised the Kurds of Iraq they would be allowed to be independent or be granted

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[2]   Cst Preamble.
[3]   Al-Bayan, p. 7 ; NOREE, p. 152.
[4]   Al-Bayan, p. 7.
[5]   Al-Bayan, p. 7.
[6]   Al-Bayan, p. 7.
[7]   Al-Bayan, p. 7.
[8]   TRIPP, pp. 30-32.
[9]   TRIPP, p. 30.

the right to self-determination[10]. This promise was never held[11]. Repression of the Shiite and the Kurds was then used by the Sunnis to maintain political power over them[12].

In 1921, a monarchy was established as a consequence of revolts of the Iraqi population – mainly Shias and Kurds –[13]. However, the new monarch was unpopular with both the Sunni and Shias due to his subordinate position to Great Britain[14], and because he was a Sunni and a non-Iraqi[15]. In 1932, Iraq gained its independency from Great Britain[16]. The Monarchy was overthrown in 1958 and a Republic was established. Despite an initial attempt to unify ethno-sectarian divisions existing in Iraq, the regime ended up cracking down on dissidents and the Kurds didn't obtain the rights they had been negotiating for[17].

The attempts to establish a democratic, legitimate and representative government in Iraq during the monarchy or during the republic never succeeded[18]. As the creation of representative institution implied the handing over of some political power, it was never done. Thus the Shia and the Kurds never accepted the legitimacy of the central government[19], and continued to be excluded from important economical or political positions within the Iraqi State[20].

1.1.2 *The Baathist regime and its impact on the sectarian division of the society*

From 1968, Iraq was under the regime of the Baath Party, which brought Saddam Hussein into power in 1979[21]. Although there had always tensions between the different ethnic groups within Iraq, the situation drastically worsened after 1968[22].

The Baathist Regime was based on an ideological legitimacy of Arab Nationalism[23]. As a result, ethnical groups, which did not belong to the Arab Population were extremely victimized[24]. The emergence of Arab Nationalism had already started in 1932, after Iraq declared its independence[25]. The rise of a strong national identity can be understood as a reaction to the British occupation[26]. Under Saddam Hussein's regime, it slowly became a central element of the political scene[27]. Members of Arab-groups were privileged, which meant the Shia started gaining

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10   ÖZDEN, p. 45.
11   ÖZDEN, p. 45.
12   YESILTAS, p. 41.
13   TRIPP, pp. 39-44.
14   Al-Bayan, p. 9 ; TRIPP, p. 47 f. ; YESILTAS, p. 43.
15   YESILTAS, p. 43.
16   TRIPP, p. 72.
17   Al-Bayan, p. 12.
18   TRAUTNER, p. 715 ; YESILTAS, p. 47.
19   YESILTAS, p. 45.
20   YESILTAS, p. 45.
21   Al-Bayan, p. 11.
22   ÖZDEN, p. 46.
23   YESILTAS, p. 42.
24   YESILTAS, p. 42.
25   YESILTAS, p. 46.
26   YESILTAS, p. 46.
27   YESILTAS, p. 46.

access to the political institutions, whereas the Kurds and other minorities were still excluded, as they did not belong to any Arab group[28]. The division of the society had now become linked to cultural belonging.

Between 1970 and 1974, the Iraqi government intensified its "Arabization" policy[29]. In order to guarantee an Arabic majority in oil-rich regions, the government began moving Arabs to Kirkuk and giving Arabic names to Kurdish streets, neighbourhoods and schools[30], proving the fact that the existing conflict in Iraq goes beyond ethnical division and is linked to natural resources such as oil[31].

In 1979, many Iraqi-Shia supported the Iranian revolution[32]. As a reaction, the Iraqi government began dividing the Shia population of Iraq and executing some popular Shia figures and some of the Sunnis who had supported the uprising[33]. At the end of the Iran-Iraq War in 1988, the extermination of the resistance movement – supporting Iran – consisted in the most brutal reprisal ever seen in Iraq[34]. Thus, the reaction of the government to every uprising within the Iraqi society was violent and aimed at intensifying the sectarian division of the society even more by willingly developing mistrust, hate and prejudices between the different ethnical groups[35]. The consequences of such brutal and sectarian practices can still be felt within the Iraqi society[36].

It is worth mentioning that Iraqi society has never experienced democracy[37], which could be an issue while trying to implement a federal State. Power has never been shared vertically, as it was concentrated in the hands of one person[38]. It was unevenly distributed within the society– most was given to the Sunni, more specifically according to tribal networks and patronages[39]. Moreover, the Baathist Regime, which lasted 35 years, was extremely violent and brutal[40]. Saddam Hussein's rule can be qualified as a regime in, which « exclusivity, communal mistrust, patronage and the exemplary use of violence were the main elements, woven into a system of dependence on and conformity with the will of a smaller number of men at the centre in the name of social discipline and national destiny »[41]. After such a traumatic experience, it was therefore evident that the rebuilding of trust among the Iraqi population and the creation of a national identity would face many challenges and would take time.

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[28]   YESILTAS, pp. 42 and 46.
[29]   YESILTAS, p. 50.
[30]   YESILTAS, p. 50. – Between 1976 and 1986, about 4'500 Kurdish villages were destroyed in oil rich areas.
[31]   ALKADIRI, p. 1320.
[32]   Al-Bayan, p. 13; TRAUTNER, p. 715.
[33]   Al-Bayan, p. 13; TRAUTNER, p. 715 – This perpetuated the stereotype of Shia being traitors.
[34]   WIMMER, p. 119 – The gassing Halabja has become a symbol for the genocidial character of the Afal campaign.
[35]   Al-Bayan, p. 13.
[36]   ANDERSON / STANSFIELD, p. 221 – The authors use the term "interethnic hatred"; ÖZDEN, p. 19.
[37]   NOREE, p. 188 ; ÖZDEN, p. 46.
[38]   ÖZDEN, p. 46.
[39]   Al-Bayan, p. 15.
[40]   Al-Rachid / Méténier, p. 27.
[41]   TRIPP, p. 187.

1.1.3   The federal debate in Iraq

It was the introduction of a non-fly zone in 1991 and the military invasion of 2003, which enabled the creation of an Iraqi federation[42]. The Kurds were the first to open the federal debate in 1992[43]. As they had acquired a *de facto* independency after the Gulf War of 1991[44], they expressed the wish to create an autonomous Kurdish region[45]. In 2002, various meetings were arranged in Washington, Iraq and London with opposition groups of Iraq[46]. These meetings aimed at discussing the future political organization of the country once Saddam Hussein was defeated. The Opposition groups all seemed to have agreed on a federal solution for Iraq[47].

By the time the US invaded Iraq, no decision had been taken as to whether a territorial or ethnical federalism would be chosen[48]. However, surrounding countries opposed themselves to a federal solution. Turkey felt threatened by the possibility that the Kurds would control Kirkuk and the oil resources, as they feared the Iraqi Kurds would then try to seek a de jure independency[49]. Its foreign minister, Abdullah Gull, declared that Turkey would intervene militarily should the Kurds obtain independency in order to safeguard « Iraq's territorial integrity »[50]. Some minorities in the northern part of Iraq also feared that they would be discriminated against in a Kurdish controlled region, despite the promises made by the Kurdish government[51].

The overlap of ethnical division, unequal access to oil, and the coexistence of several legal systems throughout the country[52] implied a high potential of conflict and complexifies the situation[53]. All these features have had an impact on the development of the federal State and still are the cause of many tensions in Iraq[54].

1.2 Federalism as a tool to solve ethnic conflicts

Emphasis will be laid on the concept of federalism as a political strategy, which could bring peace to a divided society. The main idea is that although federalism can help reconstruct a « destroyed » Nation, it is not a solution in itself but rather a strategy, which can help bringing peace to ethnical division within a State and must be adapted to the context of the Iraqi State.

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[42]   DANILOVICH / OWTRAM, Introduction, p. 3.
[43]   ÖZDEN, p. 49.
[44]   ANDERSON / STANSFIELD, p. 221 ; DANILOVICH, p. 49 ; NOREE, p. 98 ; TRAUTNER, p. 721.
[45]   ÖZDEN, p. 49; NOREE, p. 155.
[46]   ÖZDEN, p. 49.
[47]   BRANCATI, p. 11 – Opposition groups included Sunni, Shia and Kurds.
[48]   ÖZDEN, p. 50.
[49]   BRANCATI, p. 12.
[50]   DANILOVICH / OWTRAM, Introduction, p. 3.
[51]   BRANCATI, p. 12.
[52]   SMITH, p. 135 f.
[53]   ANDERSON, p. 166 ; DANILOVICH / OWTRAM, Introduction, p. 8 ; SMITH, pp. 135 and 138.
[54]   ALKADIRI, p. 1317; JAWAD, pp. 12-14.

All in all, this chapter pursues the aim of laying down theoretical notions, which are necessary to understand the making and breaking of federalism in Iraq.

To this extent, this section is divided as follows: the first part (*infra* 1.2.1) aims at defining the notion of federalism and underlining the nexus between ethnical conflicts and power-sharing arrangements. The second part (*infra* 1.2.2) focuses on the question of the drawing of borders within a federal part and the final part (*infra* 1.2.3) examines the question of decentralization.

1.2.1   The federal solution for Iraq

There is no universal definition of federalism but a wide range of different federations around the world[55]. Despite the lack of a common understanding of the concept[56], scholars have identified various characteristics of a federal State based on a case-to-case review. LIJPHART distinguishes between primary and secondary characteristics, the latter having the purpose of guaranteeing the effectiveness of the former[57]. The primary features of a federal state are a vertical division of powers between the federal unit and subnational units (1), and the allowance of a certain amount of power, or autonomy to these units – decentralization – (2)[58]. To ensure the effectiveness of these two main features, secondary characteristics have been identified; a bicameral legislative with a strong upper chamber representing the subnational units, a written constitution not easily amended and the existence of an independent judiciary power able to protect the constitution[59].

In essence, a federal State is a State in which at least two level of government coexist and have a certain level of autonomy in some areas. Thus, the division of power is not only horizontal but also vertical and the competences of each unit are usually listed in the Constitution[60]. To insure power-sharing, it is important that the subnational units be represented at the federal level and be granted the capacity to participate in some of the spheres[61]. Federalism has been praised as a governing strategy well suited for complex societies, which are constituted of various groups (religious, linguistic, ethnical)[62]. Indeed, it permits unity and diversity to coexist[63]. However, it is important to note that federalism goes above a simple division of powers between entities as it implies a shared power[64], meaning that the different entities are entitled to communicate and coordinate themselves. Hence, this willingness to coexist and to respect

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[55]   KOLLER AND AL., p. 15.
[56]   LAW, p. 90.
[57]   LIJPHART, p. 177 – Refers to DUCHACEK, pp. 188-275: « yardsticks of federalism ».
[58]   LIJPHART, p. 176 f.
[59]   LIJPHART, p. 176 f.
[60]   KOLLER AND AL., p. 15 f.
[61]   ÖZDEN, p. 23.
[62]   KOLLER AND AL., p. 15 f.
[63]   KOLLER AND AL., p. 15 f.
[64]   ANDERSON, p. 160 ; ELAZAR (1987), p. 12.

diversity and plural identities implies that federalism is more than a political concept and could be understood as an ideology[65].

Many scholars see federalism as a solution or remedy to bring stability in divided societies[66]. As it has been explicated by ELAZAR, in cases where a country is confronted with ethnical cleavages, federalism may constitute the only way to achieve « local and world peace »[67]. Indeed, a federal option enables the coexistence of dual identities[68]. It also allows subnational units to organize a part of their existence in accordance with their culture and tradition[69]. Especially in nascent democracies, a vertical division of powers can be seen as a supplementary protection of the population's rights against abusive use of power[70].

HOROWITZ notes, that « skilful division of authority between regions or states and a centre has the potential of resolving conflicts »[71]. These authors believe that federalism can be an efficient solution to avoid secession or inner violence. It is also sometimes argued that federalism will only be successful if linked with an effective democratic system[72].

Nevertheless, other scholars do not believe that federalism is an effective instrument to resolve existing conflicts in societies[73]. The main argument is that instead of consolidating a State, federalism facilities secession[74]. Many of these authors take example of the ex USSR[75].

As it has been pointed out, in States, which have been victims of a civil war related to ethnical divisions, the principal aim is not the political transformation of the ethnical groups but stability within the State[76]. In such situations, federalism is more than a political arrangement of power and consists of a mechanism to solve conflicts and pacify a divided society.

As federalism in Iraq has been understood as a strategy to avoid a future civil war or the division of the country, it seems to fulfil the characteristics of a « holding-together » federalism[77]. However, although there was a strong pressure from the international scene to impose federalism in Iraq[78], the Kurds seemed to have voluntarily committed to federalism[79]. Thus, it can be argued that the Iraqi Federation falls into the category of a « coming-together » federation[80].

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[65] KOLLER AND AL., p. 16.
[66] BERMEO, p. 108 ; DANILOVICH/OWTRAM, Tool, p. 13.; GHAI, pp. 483-483 ; McGARRY / O'LEARY (1993), p. 33.
[67] ELAZAR (1984), p. 3 ff.
[68] DANILOVICH / OWTRAM, Tool, p. 15 ; HABISSO ,p. 5.
[69] KEIL / ANDERSON, p. 1.
[70] SMITH, p. 130.
[71] HOROWITZ, p. 602.
[72] BERMEO, p. 97 ; KOLLER AND AL., p. 16 ; McCULLOCH, p. 4.
[73] BRUBAKER, p. 53 ; GORENBURG, pp. 25 and 265 ; ROEDER, p. 199 ; SNYDER, p. 210.
[74] ANDERSON, p. 162.
[75] ANDERSON, p. 162.
[76] ÖZDEN, p. 38.
[77] DANILOVICH, p. 50 – see STEPAN, pp. 19-34.
[78] DANILOVICH, p. 50.
[79] ANDERSON, p. 168.
[80] ANDERSON, p. 167 ; DANILOVICH / OWTRAM, Tool, p. 21.

Iraq would therefore consist in a holding-together federation regarding the Shiite-Sunni situation but a coming together federation as to the Kurd-Arabic division[81].

Concerning Iraq, most of the scholars admit that a federal system is the only solution to stabilize the country[82]: « it is very clear that, *in the short term*, federalism is necessary for the maintenance of the territorial integrity of Iraq »[83]. (Emphasis added)

However, there are many different types of federations. What matters more than the simple decision to adopt federalism, is the type of federalism, to be adopted[84].

1.2.2   *The drawing of borders along or across ethnical groups*

Two options exist in the drawing up of borders in a newborn federal State. One can follow the ethnical pattern within a State and build ethnical subnational units or one can mix the different ethnical groups within the subnational units. The latter is known as territorial federalism and the former as ethno-federalism[85]. In the case of Iraq, some people wished to follow 18 pre-existing administrative units of Iraq[86], or at least create a territorial federalism[87]. Others suggested the division of Iraq in four regions three ethnical and a mixed region in Baghdad[88].

The decision about the drawing of borders refers to two different views of federalism, and opens a debate between an integrated approach, accommodation, or a consociationalist approach[89]. Integrationists favour a type of federalism, which will abstain from ethnical division, thus going across ethnical belongings[90]. On the other hand, consocionalists divide power within a state based on the existence of these different ethnical belongings[91].

The drawing of internal borders has a strong impact on the political representation and power within a country. In Iraq, the division of the state based on religious groups between Arabic and Kurds would have privileged the Sunnis because they were and still are outnumbered by Shiites[92]. The Kurds have always been in favour of an ethnical-federation, as it would allow them to maintain their gained independency and guarantee them a strong representation at the federal level[93]. As for the Shiites, being a majority within the Iraqi population, they would be most advantaged by a strong centralized system, or by the creation of trans-ethnic re-

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81   DANILOVICH, p. 50 – The author mentions the hybrid nature of Iraq's federalism.
82   BRANCATI, p. 7.
83   ANDERSON, p. 169 ; WIMMER, p. 121.
84   BRANCATI, p. 7.
85   ÖZDEN, p. 25.
86   BRANCATI, p. 17.
87   WIMMER, p. 124.
88   NOREE, p. 161.
89   MCGARRY / O'LEARY (2007), pp. 670 ff.
90   MCGARRY / O'LEARY (2007), pp. 670 and 675 – It may seem somewhat unrealistic to expect such divided societies as Iraq to ignore their ethnical belonging.
91   MCGARRY / O'LEARY (2007), p. 671.
92   BRANCATI, p. 15 ff.
93   BRANCATI, p. 15 ff.

gions[94]. In addition, the existence of an ethno-federal Iraq would mean that neither the Sunnis – the historically privileged group – neither the Shiites – the majority of the population – would control the oil[95].

The federal literature identifies two main risks related to an ethnical-federation, the first being the increase of ethnical tensions and the second being the risk of secession[96]. As summarised in 2004: « many scholars fear that drawing Iraq's regional borders along ethnical or religious lines will increase the likehood of ethnic conflict and secessionism by strengthening ethnic and religious identities in the country »[97]. Indeed, with regards to Iraq's demographic situation, it would have been impossible to create homogeneous regions. Even though the northern part of the country is mostly populated by Kurds, other minorities also cohabit with them, which has the potential of creating tensions between the new majority and new minorities. This matter is referred to as « the problem of minorities within minorities »[98].

Another big issue relates to the potential of secession. This question is also known as the paradox of federalism[99]. The fear is that when a Federation is divided along ethnical borders and when such regions are granted a high level of autonomy (*infra* p. 11), there is a high probability that they will secede from the State. The paradox being that although federalism might at first ease tension between ethnical groups within a State and prevent secession, it also smoothens the path to secession[100]. Hence, it was often said that the real reason why the Kurds were interested in federalism was to later gain their full independency[101].

1.2.3 *Decentralization of power – a strong central state or subnational units with much autonomy*

One of the characteristics of a federal State is the possession of a certain degree of autonomy by the federal State and the subnational units (*supra*, p. 7). To this extent, some of the State competences must be handed over to the regions. Decentralization is one of the means, which enables such a transfer of powers[102].

One of the particularities of Iraq lies in the fact that the Kurds already had a *de facto* independency when negotiating the creation of a federal State (*supra*, p. 6). Some authors have argued, based on the exemple of Nigeria that the prexistence of a *de facto* federation implies the risk of rushing the decentralization process and granting too much autonomy too quickly

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[94] BRANCATI, p. 15 ff.
[95] ANDERSON, p. 166.
[96] BRANCATI, p. 15 ff. ; KEIL / ANDERSON, p. 9.
[97] BRANCATI, p. 16.
[98] KEIL / ANDERSON, p. 6.
[99] DANILOVICH / OWTRAM, Introduction, p. 3.
[100] ANDERSON, p. 162; TIERNEY, p. 283.
[101] ANDERSON, p. 166; BRANCATI, p. 12.
[102] KEIL / ANDERSON, p. 2.

to the subnational units[103]. The existence of a strong central state has been said to be the best solution for Iraq, in order to prevent secessionist tendencies[104].

However, whether it be for effective reasons, such as the size of the country[105] or because of the risk of secession, others believe in a strong decentralization. It has been argued that the Kurdish region should be allocated an autonomous statute within the Iraqi federation similar to the one granted to the Aland Islands in Finland[106]. Thus, the best solution for Iraq would be to establish an asymmetrical federalism, granting a very high level of independency to the Kurds but not to other ethnical minorities or groups[107].

Concerning the risk of increasing the sectarian division and of secession, it seems that the real danger is not necessarily linked to the ethnical division of a country but more to the way in which political parties are organized. The real threat would exist when strong identity based parties dominate the political scene[108]. The sharing of power should therefore ensure the inclusion of all the principle groups or segment of the population[109].

All in all, one can see that although federalism has often been praised as a solution to rebuild a State, which has faced ethnical-related violence or to appease secessionist aspirations, there is no unanimity as whether it functions on a long term basis, or on how to implement it. The latter will of course depend on the context. However it is important to note that despite the existence of a broad consensus between the experts, there seems to be no other suitable option. As Lawrence ANDERSON puts it: « There is a strong argument to be made that federalism is a bad choice for Iraq, but it seems pretty clear that it is the best among the bad choices available »[110].

2. The Iraqi Constitution

« The origins and formation of the federations provides the key to a contextual understanding of contemporary stresses and strains »[111].

In order to understand federalism in Iraq, it is important to first discuss the process, which led to the making of the Constitution. This interim period begins with the creation of the Coalition

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[103] SMITH, p. 137.
[104] SMITH, p. 141.
[105] NOREE, p. 153.
[106] ANDERSON / STANSFIELD, p. 230.
[107] ANDERSON / STANSFIELD, p. 230.
[108] BRANCATI, p. 16.
[109] MCCULLOCH, p. 6 – This understanding of Power-Sharing is known as consociationalism. It implies the existence of a government where all major groups are represented in a proportional way with an overrepresentation of minorities. Minorities are also granted a veto right and a certain autonomy (MCCULLOCH, pp. 12-16). The concept is related to the work of A. LIJPHART, J., MCGARRY B. and O'LEARY. However, some scholars do not believe in consociationalism in divided societies, mainly because conciliatory feelings do not exist in divided places and favour a centripetal model (MCCULLOCH, p. 20 ; see HOROWITZ and REILLY).
[110] ANDERSON, p. 170.
[111] BURGESS, p. 279.

Provisional Authority (CPA) and the adoption of the Transitional Administrative Law (TAL) in 2003 and ends in 2005, when the Iraqi population accepted the constitution. The first part of this paper will therefore focus on the process of creating a new constitution (*infra* 2.1). Subsequently, it will be question of the Constitution in itself as the result of the creation process (*infra* 2.2).

2.1 Constitution drafting process

As we have seen in the previous section, many proposals existed and exist about the way to organize Iraq's federation. However, less attention has been paid to the process preceding the adoption of the new constitution[112]. This process should not be underestimated[113], as it has the potential to transform a society provided that it is properly organized and is given sufficient attention and resources[114].

In order to obtain a full understanding of the constitution making process in Iraq, this first subsection shortly summarizes the most important events and their chronological order (*infra* 2.1.1). Special attention will then be given to the TAL (*infra* 2.1.2) and to the final Draft (*infra* 2.1.3).

2.1.1   Chronology of events

The constitutional process is understood as the period between the fall of Saddam Hussein at the end of April 2003[115] and the adoption of the Constitution through a popular referendum on the 15th of October 2005. Shortly after the US and its allies had overthrown Saddam Hussein, they appointed a Coalition Provisional Authority (CPA)[116]. Paul Bremer[117] was placed at the head of the CPA and was given full powers by President Bush[118]. On the 13th of July 2003[119], he appointed the members of the Iraqi Governing Council (ICG) based on ethno-sectarian lines[120]. Throughout all of Iraq's modern history, this seems to be the first time that the ethnical identities were prioritized over national identity at an institutional level[121]. It has been argued that by doing so, Paul Bremer contributed to the sectarian division within the Iraqi society[122]. Thus, the CPA seemed to have a very simplistic vision of the Iraqi society, reducing the conflicts within the State to ethnical division[123]. In 2003, it attempted to start drafting the future Constitu-

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[112]   BRAHIMI, p. I ; USIP, p. 2.
[113]   USIP, p. 2.
[114]   USIP, p. 2.
[115]   KAIKOBAD, p. 253.
[116]   KAIKOBAD, p. 253.
[117]   PFIFFNER, p. 76 f.: Paul Bremer was the US representative in Iraq. President Bush decided on a last minute basis to put him in charge of Iraq, despite the fact that he had never been in Iraq before and never worked on the field.
[118]   ARATO, p. 15 ; TRIPP, p. 282.
[119]   KAIKOBAD, p. 254.
[120]   Al-Bayan, p. 16.
[121]   Al-Bayan, p. 16 ; JAWAD, p. 8.
[122]   MCGARRY / O'LEARY (2007), p. 672 ; ÖZDEN, p. 98 ; YILDIZ, p. 122.
[123]   Al-Bayan, p. 16 ; JAWAD, p. 5.

tion of Iraq[124]. However, due to the eager demands from the Shia community, the CPA set up a timetable in the Transitional Administrative Law (TAL), which scheduled constituent elections[125].

The mandate to organize the elections was given to the Interim National Council[126]. This Council had replaced the ICG on the 9th of June 2004[127]. The newly formed Interim Government also followed ethnical division. Ayad Allawi[128] was appointed at its head. He appointed two Vice Presidents – Kurd and Shia –, and the role of head of state was given to a Sunni[129]. Because the context of the negotiations was very tensed and violent[130], Allawi tried to reduce the violence and mobilized Kurds and Shia troops on the ground[131]. However, this resulted in the Sunnis feeling persecuted, which increased tensions. They finally withdrew the Sunni Iraqi Islamic Party from the Interim Government and boycotted the elections of January 2005[132]. Despite the Sunni-boycott, the National Assembly was elected on the 31 of January 2005 and given the mandate to write the new Constitution[133].The International Community approved each one of these steps[134].

2.1.2 *The Transitional Administrative Law*

The CPA began drafting a fundamental law in January 2004, which was adopted on the 8th of March 2004[135]. It was done in a very secretive environment[136]. The TAL aimed at regulating the situation in Iraq before the new government entered into force and at establishing a timetable for the constitutional process[137]. This law stated that Iraq was a republican, federal, democratic and pluralistic State and set the premise that Iraq's federalism would be based on a territorial division of the country and not ethnical[138].

Worth noting is that the drawing up of this « interim constitution » forced the different groups present in Iraq to negotiate[139]. The Kurds insisted on the creation of a federal State and the Shia expressed their will to base Iraqi law on the Sharia. Interestingly, the Sunnis were brought to unify their position, which had never happened before, as there had never been a Sunni

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[124] USIP, p. 2.
[125] JAWAD, p. 10 – Quotes Fatwa of Ayatollah Al-Sistani in June 2003 « Those forces (coalition or CPA) had no authority to write a constitution for Iraq » ; USIP, p. 2.
[126] TRIPP, p. 286.
[127] Al-Bayan, p. 16 ; TRIPP, p. 277.
[128] Ayad Allawi (Shia) was designed prime minister of the IGC.
[129] Al-Bayan, p. 16 ; TRIPP, p. 293.
[130] TRIPP, p. 286.
[131] Al-Bayan, p. 16.
[132] Al-Bayan, p. 17 ; TRIPP, p. 294 f.
[133] USIP, p. 3.
[134] KAIKOBAD, p. 252 ff. ; Resolution 1500, Resolution 1511, Resolution 1546.
[135] TRIPP, p. 286 ; USIP, p. 2.
[136] PAPAGIANNI, p. 750.
[137] USIP, p. 2.
[138] TRIPP, p. 286.
[139] TRIPP, p. 286.

community as such in Iraq[140]. However, it seems that each one of the groups mainly focused on their own interests, which parasited the process[141].

Some have identified the TAL as being an interim Constitution[142] because of the fact that it contains a set of fundamental principles and human rights guarantees[143]. The TAL explicitly referred to the importance of the constitutional drafting process: « The TAL unequivocally signalled that a constitution on its own would not be sufficient. Also necessary would be a participatory, transparent and well-ordered drafting process: a process that would display the virtues of democracy that the constitutional text itself was expected to embody »[144].

Thus, for a constitutional process to be successful, it must be supported by a broad national agreement[145]. Two elements have been identified as being crucial to the existence of a broad national agreement, namely: the existence of a framework, which details the future steps that will be taken[146] and a list of fundamental principles aiming at guiding the Nation throughout the drafting phase[147]. Regarding the content of the law, it is clear that it does not fulfil the two elements identified as necessary for the success of a constitutional process.

In the case if Iraq, both element were contained it the same document[148]. As a mater of facts, the TAL contained no precise details about the constitutional process[149], and despite listing a set of fundamental principle, it does not provide control mechanism to check whether these principles have been respected by the Draft. Indeed, although art. 44 TAL institutes a Federal Supreme Court for Iraq, it does not grant it the competence to control whether the constitutional draft respects the fundamental principles set in the TAL[150].

2.1.3   The final draft

The Elections of the National Assembly, in January 2005, were the first free elections since the fall of Saddam Hussein[151]. The United Iraqi Alliance – which was constituted of the Shia al-Da'wa party and the SCIRI parties won the majority of votes. They were followed by the Democratic Patriotic Alliance of Kurdistan – which reunited the PUK and the KDP. As the Sunni called for a boycott of the elections during the Allawi government (*infra*, p. 20), they were clearly underrepresented at the National Assembly[152]. As a result, the drafting process mainly focused

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[140]   TRIPP, p. 286.
[141]   JAWAD, p. 11.
[142]   ARATO, p. 63 ; TRIPP, p. 286.
[143]   USIP, p. 4.
[144]   MORROW, p. 4.
[145]   USIP, p. 3.
[146]   GINSBURG / ELKINS / BLOUNT, p. 204.
[147]   USIP, p. 3.
[148]   PAPAGIANNI, p. 749.
[149]   MORROW, p. 4 ; USIP, p. 4.
[150]   MORROW, p. 6.
[151]   ÖZDEN, p. 100.
[152]   Al-Bayan, p. 17 ; ARUTO, p. 212.

on the interests of the Kurds and Shia[153]. This led to big divisions within the Sunni community and the increase of violence in Iraqi society[154].

The main issue at stake during the writing of the constitution was the relationship between the central government and the federal entities[155]. The Kurds wanted the sub-national units to be granted powers, which went above the powers of the central government. The Sunni, on the other hand, were negotiating for an assymetric solution; a strong central State, which would only grant a large amount of autonomy to the Kurdish part of Iraq[156].

Other issues were related to the identity of the Iraqi State: the role of Islam, the categorisation of Kirkuk as a mixed province or as a part of the Kurdish federal entity, the sharing of revenues throughout the country and application of the de-Baathification politic[157].

Starting from the 8th of August 2005, the negotiations meetings were held exclusively between Shia and Kurds party leaders. Despite demanding the right to attend, Sunnis were very rarely part of these informal meetings[158]. « Indeed, the Iraqi constitutional process was remarkable in a way in which members of the Assembly, though legally charged with responsibility for writing the draft, were not involved »[159].

However, the Sunnis were not the only ones who were *de facto* excluded of the drafting. As a matter of facts, despite the fact that other minority groups had been included in the Constitutional Committee, the provision which was supposed to recognize their identity in the future constitution was removed, without even consulting the minority groups[160].

Although the National Assembly was elected in January 2005, the Special Committee, in charge of the writing, was only formed in the middle of June. All in all the final draft had to be written in two months in order to respect the delay imposed by the TAL[161]. Although, the referendum was set for October the 15th, important changes continued to be made to the final draft, this until the 12th of October 2005[162]. The strict delay implied that there was also very little time to consult the Iraqi population on the constitution draft[163]. Most Iraqi had never even seen the final draft, when they were asked to vote on it because no version was made public[164]. On top

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[153] Al-Bayan, p. 17.
[154] Al-Bayan, p. 17 ; TRIPP, p. 297 f.
[155] JAWAD, p. 12.
[156] JAWAD, p. 12.
[157] JAWAD, p. 12 f.
[158] MORROW, p. 9.
[159] MORROW, p. 15.
[160] MORROW, p. 17 – Other minorities include: Turkmens, Chaldeans, Assyrians, Syriacs, Aremenians, Shabak, Yazidis and the Mandean Sabeans.
[161] JAWAD, p. 9 ; MORROW, p. 9 – Deadline for the final draft was set for the 15th of August 2005.
[162] ARATO, p. 241.
[163] GHAI / COTTREL, p. 2 ; JAWAD, p. 11 ; MORROW, p. 19.
[164] JAWAD, p. 11.

of that, many issues have not been covered during the negotiations, namely the exploitation of oil and gas, the broad federal system or the fragility of the centre[165].

2.2 Result of the process

Despite the many objections, the drafting process resulted in the adoption of a new Constitution for Iraq and in its transition to a federal State. Art. 1 of the Iraqi constitution declares 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 ».

The Constitution provides for a horizontal division of powers[166] and for the existence of Checks and Balances[167] (*infra* 2.2.1). It also guarantees a vertical division of power between a decentralized capital, regions, governorates and local administrations[168] (*infra* 2.2.2).

2.2.1   The vertical division of powers

Kurdistan is the only region, which is explicitly recognized by the Iraqi Constitution[169]. Iraq consists of two parts, the federal Kurdistan region and « the main Iraq »[170] reuniting fifteen administrative units, known as governorates[171]. However, the constitution foresees the option for provinces to decide through a referendum whether they want to become an independent province or not[172], with the exception of the capital[173]. The federalization process of provinces is detailed in a « Federalism Law », enacted by the Parliament in 2006[174].

Provinces are understood to be administrative units, federalism expressing itself in the form of a decentralized administration[175]. It is up to the provinces to decide whether they wish to constitute a region or not. They are free to choose to create regions based on their common ethnical identity if they wish. Hence, although the creation of a new region is not based on an ethnical division of the society, the provinces may converge along ethnical borders[176]. The regions must enact their own constitution and cannot contradict the federal constitution[177].

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[165]   GHAI / COTTREL, p. 1 ; JAWAD, p. 11.
[166]   Art. 47 Cst.
[167]   ÖZDEN, p. 133.
[168]   Art. 116 Cst ; ÖZDEN, p. 131.
[169]   Art. 117 Cst ; ÖZDEN, p. 134.
[170]   DANILOVICH, p. 50.
[171]   DANILOVICH, p. 50.
[172]   ÖZDEN, p. 134.
[173]   DANILOVICH, p. 50.
[174]   DANILOVICH, p. 50 f.
[175]   ÖZDEN, p. 136.
[176]   ÖZDEN, p. 136.
[177]   Art. 120 ; ÖZDEN, p. 134.

Thus, they are granted legislative, executive and judiciary powers within their own entity and a right to participate at the federal unit[178].

Some of the competences are exclusively attributed to the federal level and others are shared between the different units[179]. Interestingly, in case of disagreement between a region and the federal State in a matter for which the federal state is not exclusively competent, the regional power has the right to amend the application of the national legislation within that region[180]. This highlights the strong decentralization of Iraq's federalism, especially if we take into account the fact that not many competences are exclusively attributed to the central government[181].

As for the constitution, it can be amended, but only if a majority of the population agrees to do so through a referendum, and if 2/3 of the Parliament support the changes. The ratification by the President is necessary for amendments concerning other matters than Fundamental Principles or Rights and Liberties (Section 1 and 2). The constitution also forsees a special protection of the regions, as their power can only be diminished with approval of the regional parliament and support of a majority of the regional population[182].

Hence, it seems that the primary characteristics of a federal state are given, namely the existence of a two-level government and the existence of a decentralization of powers (*supra*, p. 7). In addition, these features are guaranteed in the constitution, which is not easily amended[183].

2.2.2   *The horizontal division of powers*

Iraq defines itself as a parliamentary system. This implies that the executive branch of power is accountable to the legislative and the powers of the executive a shared in a « cabinet », thus not exercised by a single person[184]. The Council of Representatives elects the presidency council[185].

Hence, the federal executive is composed of a President and a two vice-president, each representing one of the major ethnical groups in Iraq. However since 2010, the executive power as such has been solely assumed by one individual. This means the President can approve bills of the Parliament without approval of his council[186].

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178   ÖZDEN, p. 134.
179   Art. 114 Cst ; ROMANO, p. 194.
180   Art. 115 and 120 II Cst ; ÖZDEN, p. 136.
181   ROMANO, p. 195.
182   BROWN, Commentary to Art. 122 ; SAMARAWEERA, p. 2 f.
183   Art. 126 Cst ; BROWN, Commentary to Art. 122; JAWAD, p. 19 f.
184   GHAI / COTTREL, p. 13 f.
185   Art. 70 Cst ; DANILOVICH, p. 52.
186   DANILOVICH, p. 53.

The federal Legislative is constituted of two Chambers; the Council of Representative – lower Chamber – and the federal Council – upper Chamber –[187]. The former aims to represent the entire Iraqi population at a ration of one seat per 100'000 Iraqi persons[188] and the latter is intended represent the different regions in Iraq[189].

The Iraqi Constitution allocates strong powers to the Supreme Court. Indeed, in addition to the typical competences of a constitutional Court, it has the power to review a federal law adopted by the Parliament, which could seem unusual for a parliamentary system, usually characterized by the supremacy of the Legislative power[190]. However, judicial review of the Executive and Legistalive power is a common feature in federations[191]. Federalism being understood as a *constitutional* arrangement, which divides power between different entities, the respect of the constitution is vital[192]. Thus, the Federal Court in Germany –also known as a parliamentary system – has the power to review laws, which are inconsistent with the *Grundgesetz*[193].

It can be concluded that the Iraqi constitution contains the most important features of a federal State, as identified at the beginning of this paper (*supra*, p. 8). Not only does the constitution guarantee a division of powers between the central state and the regions, but it also guarantees a high amount of decentralization. As for the secondary characteristics, it can be noted that the constitution provides for a bicameral Parliament, the Executive reflects a consocionalist representation and the Federal Supreme Court of Justice is competent to insure the respect of the constitution. Moreover, the constitution is not easily amendable. Therefore, Iraq possesses a formally federal constitution[194]. The following part will therefore seek to understand how these federal guarantees have been implemented in practice and if it can be concluded that Iraq is not only formally federal but also effectively.

B)   The Breaking of Federalism in Iraq

After having reviewed the principle steps in the creation of the Iraqi Federation, this second part aims at questioning its flaws. The term « breaking » implies that federalism in Iraq once existed and « stopped » functioning. Thus, this section seeks to understand why and how federalism has failed in Iraq. The answer will be discussed from two different angles. First, the process of federalism, described in section A will be analysed (*infra* 1). The hypothesis being that the process in which a constitution is drafted will incontestably affect its success[195]. Subsequently, the failure of Iraq's federalism will be analysed in relation to the power-sharing

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[187] DANILOVICH, p. 52 ; GHAI / COTTREL, p. 15.
[188] Art. 49 Cst.
[189] DANILOVICH, p. 52.
[190] DANILOVICH, p. 53.
[191] ARONI / KINCAID, p. 3.
[192] ARONI / KINCAID, p. 4; judicial review can be described as weak, when it can be overriden by the Legislative power, such a characterisitc often appears in Brittish Commonwealth countries, see ARONI / KINCAID, pp. 9-10.
[193] BENZ, p. 204
[194] LIJPHART, p. 177.
[195] BRAHIMI, p. 1.

arrangements chosen (*infra* 2). Hence, the second part will focus more on the result of the negotiations in relation to diverse federal theories.

1. Issues related to the constitutional process

As we have seen, in order for a constitutional process to be successful, major importance should be laid on the national agreement, implying the existence of an interim constitution, which details the process and guarantees a set of fundamental principles (*supra*, p. 14). However, these are not the only pre-requisites necessary to a successful transition to a federal State. Ideally, the process should reflect the values it aims to establish. Thus, various matters have been identified throughout this research, which affected the constitution process. These are; legitimacy issues (*infra* 1.1), lack of time (*infra* 1.2) and the intervention of the West (*infra* 1.3).

1.1 Legitimacy issues

Many events had an influence on the legitimacy of the constitution of 2005. A special attention will be given to the lack of consultation and information of the Iraqi population throughout the process (*infra* 1.1.1) and to the Sunni boycott of the elections of the national assembly in 2005 (*infra* 1.1.2).

1.1.1 No consultation or information of the population

Inclusion of the population in the constitutional process is a key element to insure a legitimate process and a legitimate result. This is extremely important, not only on behalf of the fundamental nature of a constitution in itself, because it has the potential of healing a vulnerable society[196]. Empowerment of local actors is seen as the only way to rebuild trust in an ethnical divided society and is indispensable to the success of a constitutional transition. It can therefore not be neglected[197]. For a national dialogue to emerge, the population has to be given the tools they need to enable them to participate[198]. Thus the ability to be part of a process implies an educational process to enable a certain understanding of the situation (1) and the existence of mechanisms that would make an effective participation possible (2).

Inclusion of the population itself in the drafting process would have given vulnerable groups of the population a sense of ownership and recognition within the new constitution[199]. Moreover, inclusion could have overcome the fact that many Iraqis felt the TAL and the composition of

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[196] GINSBURG / ELKINS / BLOUNT, p. 206.
[197] WEBER, p. V ; USIP, p. 7.
[198] USIP, p. 8 f.
[199] USIP, pp. 7 and 10.

the Constitutional Committee had been imposed by the US and a small elite without reference to the public need[200].

Yet, there has been an attempt to include the Iraqi population, for example by distributing questionnaires. However, these were never consulted by the constitutional Committee[201].

The population was not only excluded from the drafting debate, but there was no information or education given to them as to why the adoption of a federal system would be a good idea for Iraq[202]. For example, South Africa, Albania, Eritrea and Rwanda carefully explained the importance of a new constitution for their country and the role of the population in the whole process[203]. This sharing of information could have been done through the use of media, the organization of debates, or village meetings.

As ought implies can, depending of the level of violence or the amount of resources a state may be more or less able of including the different segments of the population in the debate[204]. Indeed, the inclusion can be more complicated when the constitutional process occurs in a violent context, as it has in Iraq or Somalia[205]. « Every meeting of the Committee, the National Assembly, and the Leadership Council took place behind the blast walls, barbed wire, and gun turrets of Baghdad's International Zone (…) The opportunity for Iraqis to communicate, either formally or informally, with their constituent representatives was practically nil »[206]. With regards to the context, one must also note that constitutional transitions that occur under foreign occupation tend to be less legitimate, as the population might be tempted to acquiesce to provisions they do not wish only to see the foreign forces leave[207].

Nevertheless, more effort should have been invested with regards to the importance of inclusion in ethnical divided societies. Although the lack of transparency did not prevent the acceptation of the final draft by the Iraqi population, comparative studies have shown that it often impacts the success of democracies on a long time scale in a newly formed state[208].

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[200] USIP, p. 7.
[201] BRANDT AND AL., p. 130 and 141 – Moreover, these questionnaires were nearly only given to Shia areas of Iraq. Illiterate citizen were also excluded from the questionnaire and no special intent to reach women was made. Hence, even if they had been taken into account by the constitution drafters, they would not have been representative of the Iraqi population as a whole.
[202] USIP, p. 7.
[203] USIP, p. 8.
[204] BRANDT AND AL p. 342.
[205] BRANDT AND AL., p. 171 ; MORROW, p. 18 ; USIP, p. 6.
[206] MORROW, p. 18.
[207] GINSBURG / ELKINS / BLOUNT, p. 208.
[208] USIP, p. 6 – see Cambodia for instance.

1.1.2   The controversial referendum and the Sunni boycott

As underlined in the previous section, one of the most important principles while drafting a new constitution is the inclusion of all main groups of the society and of the population in the discussion[209].

In the case of Iraq, the Sunnis boycotted the elections of the National Assembly, and were subject to an intimidation campaign by the insurgents[210]. Out of the 275 members of the National Assembly, only seventeen Sunni-Arabs were elected[211]. The boycott was a reaction to the feeling of the Sunnis that only the Shia and Kurds were taken into account[212]. The boycott was also related to the influence the US had on the whole process (*infra*, p. 24). The Sunni felt that because the election took place under the supervision of the coalition and occupation of foreign forces, it was most likely to be « faked »[213].

As a result, 96.96 % of the voters from Anbar and 81.75 % of the voters from Saladdhin[214] refused the constitutional draft, meaning that most of the Sunni Arabs never recognized the 2005 constitution[215]. The confrontation between the enthusiasm of the population to exercise rights they had been denied for years and the observation that once called in to vote, they mainly voted along ethnical-sectarian loyalties has been referred to as « electoral schizophrenia »[216].

However, it is important to underline that, when asked to vote, most of the population hadn't seen the final draft[217]. Thus the acceptation of the referendum was not dictated by its content and could only be dictated by the identification of Iraqis to the political parties in favour or against it. In a divided society like Iraq, such identification indubitably passes through ethnical identity, the referendum ending up being a one-issue matter and having a polarizing effect[218].

Hence, as regards to the importance of including every important section of a population in the constitutional processes, it shall be noted that in the case of Iraq, the Sunnis were barely represented or included in the drafting process. All in all, one could say that the referendum had the opposite effect that it aimed at ensuring. Although a referendum can be seen as an instrument to insure inclusion and democracy, in the case of Iraq, it seems to have contributed to the maintenance of ethnical division within the society[219].

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[209]   Al-Bayan, p. 42 ; UNDP, p. 5
[210]   MORROW, p. 6.
[211]   MORROW, p. 6.
[212]   JAWAD, pp. 9 and 13 f. ; PAPAGIANNI, p. 748.
[213]   MORROW, p. 5 f.
[214]   Anbar and Salahaddin are Sunni dominated provinces.
[215]   MORROW, p. 3.
[216]   DAWISHA, p. 879.
[217]   JAWAD, p. 22.
[218]   BRANDT AND AL., p. 301 f.
[219]   BRANDT AND AL., p. 302 ff.

1.2   *Lack of time*

The setting of deadlines is a delicate matter, as they can limit public participation if too short or on the contrary extend the process in an unnecessary way[220].

Iraq's transitional National Assembly refused to extend the deadline for the constitutional process, as provided in art. 61(F) of the TAL[221].

It can be argued that a time extension would have been fruitless because of the lack of communication between the principle actors, or that the stages of the process were in any case not clear enough[222]. Nonetheless, this paper posits that a time extension might have had the ability to fix some of the flaws of the whole process, especially the constitution's lack of legitimacy.

As a matter of facts, the refusal to extend the delay is often referred to as a mistake[223]; the process of writing a new constitution being of a fundamental importance it seems therefore logical that it shall take more than two effective months of negotiations[224]. The above-mentioned refusal seems to have been the consequence of pressure resulting from the United States[225]. All in all, there seems to have been an opposition between two inconsistent objectives; the wish of the CPA to be effective on the one hand and the necessity of respecting a legitimate process, which implied empowerment of local actors and rebuilding trust[226].

During the months of June and July, the position of the Arabs groups regarding the transition to federalism was already more moderate that it had been until then[227]. The Sunnis' initial fear was that they would be stuck between two main oil producing regions – Kurdistan in the North and « Shiastan »[228] in the South –, which would affect the country's integrity. Nevertheless, they seemed to have been opening to the idea of federalism as it could imply a self-governed Sunni-Arab area[229]. One could therefore assume that given more time, it would have been possible to hammer out a federal solution acceptable by the three major groups. The possibility of Sunni-Arab members wilfully adopting a federal model could have eased many of the tensions that resulted from the adoption of the constitution by making them feel their own interests – and not the US interests – had also been taken into account[230].

An important matter, which could also have been solved by the allowance of longer negotiations, is the education/access to information of the population. There seems to have been a

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220   BRANDT AND AL., p. 23 ; GINSBURG / ELKINS / BLOUNT, pp. 209 f.
221   MORROW, p. 10.
222   MORROW, p. 8 f.
223   MORROW, p. 1.
224   JAWAD, p. 9.
225   MORROW, p. 10.
226   ARATO, p. 18 ; BRANDT AND AL., p. 74.
227   MORROW, p. 11.
228   MORROW, p. 11.
229   MORROW, p. 11 f.
230   MURROW, pp. 8 and 14 ; PAPAGIANNI, p. 748.

misunderstanding of the concept of federalism; an amalgam having been made between the question of Kurdish independency and federalism[231]. The initiation of a dialogue between the Iraqi population and the negotiators could have helped people grasp the concept of federalism better as a state-organizing theory applied in many different States throughout the world and not limited to the Kurds wish to maintain a certain autonomy over their region. Indeed, trust has been said to be one of the most important matter in a society, which faced intern ethnical divisions[232]. The rebuilding of trust between the various stakeholders and the construction of a national identity takes time.

1.3 *Intervention of the West*

As the final element to hinder the success of the federalism process in Iraq, it is important to discuss western intervention – as it is one of the factors, which characterize Iraq's transition to federalism[233]. The question whether democratic principles can be implemented through a foreign invasion is difficult to answer. The liberators of the old regime quickly turn into occupiers and their legitimacy will always be questioned[234]. This section will be subdivided in two parts; the consequences of the de-Baathification laws (*infra* 1.3.1) and the impact of other political interests on the whole afore-mentioned process (*infra* 1.3.2).

1.3.1 *De-Baathification process*

Regarding Iraq's situation after 2003, it is important to note that this whole process of drafting the new constitution would unfold under occupation of foreign forces, who proclaimed their intentions to democratize Iraq's society[235]. In the eyes of the Americans, this implied a strict de-Baathification policy[236], which aimed at removing all officials from the government ministries and banning all members of the former Baath Party from being part of Iraq's new government as well as the dismantlement of the national army[237]. Hence, in addition to the transition to a federal system, the whole state structure needed to be rebuilt[238].

This process has been heavily criticized[239] as it led to the creation of a very high level of unemployment[240], the loss of most of Iraq's working class[241] and the accentuation of the sectarian division of Iraq[242]. On top of that the lack of transparency in the way the process was imple-

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[231] MORROW, p. 12.
[232] BRANDT AND AL., p. 68.
[233] PAPAGIANNI, p. 747.
[234] ARUTO, pp. 9-15.
[235] ÖZDEN p. 51 ; TRIPP, p. 283.
[236] TRIPP, p. 282 f.
[237] PFIFFNER, p. 76 ; TRIPP, p. 282.
[238] ARATO, p. 145 ; MUNSON, p. 164.
[239] FERGUSON, p. 147 f. ; PFIFFNER, p. 79 ff. ; ZEREN, p. 57.
[240] PFIFFNER, p. 79 f.
[241] PFIFFNER, p. 79 – As an example, PFIFFNER mentions that a third of the staff of the Health Ministry was forced out.
[242] ZEREN, pp. 57 and 66.

mented seemed in contradiction with the will of building a new State based on the principle of democracy and transparency[243].

Moreover, the de-Baathification process was felt as a policy targeting mainly Sunni-Members, and ended up with their marginalization and exclusion from Iraqi society[244]. This exclusion has been said to be « an obstacle in the road for reconciliation »[245]. The Sunni members had already mentioned the incompatibility of the de-Baathification laws with a democratic system during the negotiations for the draft of a new constitution[246].

All in all, the inclusion or exclusion of ex Baath-members underlines a controversial issue while negotiating a new constitution. How can the true followers of Saddam Hussein be distinguished from those who are not, in situations where belonging to the Party was a *sine qua non* condition to maintain ones profession and avoid being excluded[247].

Although, the inclusion of the population may seem evident, the notion of « people » is not. The population of a State often consists of various groups, who all have their own interest at heart, and it can be difficult to determine to what extent, one wishes to include them all[248]. Especially controversial is the inclusion of violent groups in post-conflictual situations. The question of accountability or amnesty for past violations is a sensitive issue when rebuilding a State[249]. As the former group in power often had a leading position within the society, it is sometimes feared that they will be more interested in maintaining their privileged position, which could skew the constitutional process[250]. However, this argument is not necessarily decisive, as it is usual that each group will seek to ensure their own interest, especially in a divided society where trust is lacking. The aim of federalism is precisely to permit diversity to coexist. Moreover, assimilating all Sunnis to members of the Baath Party, and all members of the Baath Party to Saddam Hussein's supporters is a pitfall, which should have been avoided, as it will only reinforce the sectarian division[251].

Lastly, one must not forget that Paul Bremer's draconian policies led to the necessity of reconstituting most of the State's institution. Thus, the question of whether the implementation of a democratic State is even possible in an « inexistent » State is heavily discussed among experts[252]. In any case, it is clear that the reconstruction of the state's institutions amounted to an additional challenge for Iraqi society. It is important to bear in mind that such policies of

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[243] ZEREN, p. 71 ff.
[244] ZEREN, p. 66.
[245] ZEREN, p. 66 – Quotes Prime Minister, Nouri Al-Maliki.
[246] JAWAD, p. 13.
[247] PFIFFER, p. 79.
[248] BRANDT AND AL., p. 84.
[249] BRANDT AND AL., p. 85.
[250] BRANDT AND AL., p. 85.
[251] ZEREN, p. 66.
[252] ARATO, pp. 56 and 263 ; DAWISHA, p. 862 ; MUNSON, p. 164.

marginalization combined with a fragile State can lead to the birth of extremism movements, such as ISIS in Iraq[253].

1.3.2 Political interests at stake

As we have seen (*supra*, pp. 12-13), the TAL, the CPA and the IGC were all created by the US or under their close supervision[254]. All in all, foreign occupation forces had a big influence on Iraq's constitutional process[255]. The quality of the leadership and the decision-making often has significant influence on the success or failure of transition[256]. Despite the democratic justification of the intervention, many have identified other political interests at stake for the US government[257]: « The transitional phase was dominated by the concerns of the United States, and the TAL was in part a document negotiated between the Iraqis and the United States, touching matters of special economic and political interest to the latter »[258].

It seems that one of the objectives of the United States was to guarantee private (American) investors an access to the oil industry[259], this in order to help the country's economical development. Many laws made by the CPA were seen as facilitating American Investment in the country, especially in the oil business[260]. Thus, the oil revenue earned by Iraq during the time the CPA seems to have disappeared[261]. Besides, although the CPA had been allocated funds by the US and the international community, it used Iraq's oil revenue instead[262]. During that time, many contracts were concluded with American investors and very few with Iraqi investors[263].

Such politics were heavily criticized within the Iraqi society and many felt that the old system of rewards based on political connections and relations had been re-established[264]. Many of the Iraqis who first welcomed the US intervention felt betrayed and those who were more sceptical from the beginning were strengthened in their belief that the real aim of the intervention was to get access to the oil[265].

Another interest at stake at the time being was the necessity for the US to gain public support for its mission in Iraq. As, the presidential elections were coming closer, the argument of having democratized Iraq would surely assure the winning of some more votes[266]. Thus the re-

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[253] HOWARD, p. 108; ZEREN, p. 58 – Quotes Spiegel Online, 18th of April 2015.
[254] BRANDT AND AL., p. 39 and 75 ; JAWAD, p. 8.
[255] PAPAGIANNI, p. 747.
[256] BRANDT AND AL., p. 322.
[257] JAWAD, p. 9.
[258] BRANDT AND AL., p. 75.
[259] TRIPP, p. 289.
[260] TRIPP, p. 289 f.
[261] TRIPP, p. 290.
[262] TRIPP, p. 290.
[263] TRIPP, p. 290.
[264] TRIPP, p. 291.
[265] TRIPP, p. 289 ff.
[266] BRANDT AND AL., p. 323.

spect for the timetable set in the TAL clearly advantaged the US government more than the Iraqi population[267].

Thus, it seems evident that such a complex operation as the transition to a federal system can only function, if the people involved in it, are honest about their intentions. The willingness to create a federal state as a condition to a successful result is not only a prerequisite for the population[268] but also for the « experts » monitoring and influencing the whole process[269].

2.   Issues related to the power-sharring arrangements

As already mentioned, Iraq's 2005 constitution contains the most important features of a federal State (*supra*, p. 18). One could therefore conclude that Iraq is a federal state. Nonetheless, federalism is not limited to the formal creation of a federal state but has to be implemented for it to be effective. Thus, this part will explore some of the constitution's controversial provisions, in order to assess whether the content and implementation of the constitution has had an effect on the breaking of federalism in Iraq and to what extent. For this purpose, the following section will be divided in two subsections, one reviewing the consequences of some of the constitutions most ambiguous clauses (*infra* 2.1) and another focusing on the Kurdish Independence Referendum of 2017 (*infra* 2.2).

2.1   *The unclearness of the constitution and the multiple sunset-clauses*

Iraq's constitution was written in a very short time period. As a result, many questions remain open in their practical implementation. This section aims to analyse three of them. The first part refers to the art. 61, which postponed the creation of the Parliament's second Chamber (*infra* 2.1.1). The second part focuses on the division of competences between the regions and the central State (*infra* 2.1.2) and the last part discusses the issue of Kirkuk (*infra* 2.1.3).

2.1.1   *The upper Chamber that never was*

Art. 48 to 65 of the Iraqi constitution focus on the Legislative Power. The constitution and powers of the Council of Representatives have been discussed quite broadly. It seeks to represent the whole population of Iraq at a ratio of one seat per 100'000 Iraqi persons[270]. Yet, only one article is devoted to the second Chamber, the Federation Council, which is supposed to guarantee a representation of the Regions at the federal level. There is no description of its function and its creation is left to the competence of the Council of Representatives[271]. Therefore it is impossible to say if the Federation Council was meant to have a veto power or not[272],

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267   JAWAD, p. 22.
268   KOLLER AND AL., p. 16
269   GINSBURG / ELKINS / BLOUNT, p. 214.
270   Art. 49 Cst.
271   Art. 61 Cst.
272   HELLER, p. 250.

or whether it would be symmetrical or asymmetrical[273], or even incongruent[274]. The inclusion of a second Chamber seems to have been a last minute decision[275]. As for now, no law has been made and therefore the second Chamber has never been created[276]. However, Iraq's Supreme Court recently ruled that the Council of Representatives were to enact a law, which would enable the creation of a second chamber[277].

The existence of a second Chamber is considered to be a key feature of a federal State[278]. Such a Chambers may be composed of represents of minority groups or subnational units[279]. It consists of a safety net against the tyranny of the majority, thus not only favouring the interest of the major group – Shia in Iraq –, but also ensuring other groups that their interests be taken into account[280]. The representation of every segment of a society at the federal level consists of a guarantee of the existence of a form of democracy[281] and helps prevent and resolve conflicts in a society[282]. If a federal solution has been chosen to pacify a divided society, it seems important that the constitution respect the principle features of a federal State and that they be implemented.

Hence, in this case, the fact that a second Chamber has never been created implies a potentiality of conflict. As a member of the Kurdish Islamic Group recently pointed out: « Iraq is a federal state but the federalism of this state is not complete because it does not have a Federal Council. If this council exists, there will be a filter for laws. Often, some laws are passed in the legislature which need review and it requires a party to review them and return them to the parliament »[283].

As pointed out by O'BRIEN, when a community feels that the political system is unfair, tensions and conflicts within a society are likely to arise[284]. Iraq being a parliamentary system, it is specially important for the subnational units to be represented at the parliament, as the Legislative prevails on the Executive[285].

The creation of the upper chamber in a parliamentary system and the extent of its powers is a very important feature for a federal State. The delegation of its creation to the Council of Representatives, which is constituted of a majority of Shia[286], does not seem to be an ideal solution if one wishes to ensure it will be implemented. The handing over of power usually doesn't

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[273] LIJPHART, p. 193.
[274] LIJPHART, p. 194.
[275] GHAI / COTTREL, p. 15.
[276] DANILOVICH, p. 54 ; MAJIDA, p. 311 ; Lasky, 18.01.18 ; Rudaw, 18.01.18.
[277] Lasky, 18.01.18 ; Rudaw, 18.01.18.
[278] LIJPHART, p. 4 ; PAGNAMENTA, p. 70.
[279] PAGNAMENTA, p. 71 f.
[280] RIKER, p. 113.
[281] LIJPHART, p. 200 ff.
[282] O'BRIEN, Nexus, p. 21 ; O'BRIEN, Making p. 27.
[283] Rudaw, 20.01.18.
[284] O'BRIEN, Making p. 31.
[285] PAGNAMENTA, p. 72.
[286] Martin, ISW.

occur voluntarily, which is why sharing-arrangements are supposed to be set in the Constitution and not left to the goodwill of the majority-dominant group.

2.1.2 The managing of natural resources

Although federalism does not necessarily imply that a lot of powers must be allocated to regional entities, the purpose of federalism still seems to imply a certain decentralization of powers[287]. In the case of Iraq, it seems that a consensus on the extent of decentralization has never been found, despite the agreement on a federal model[288]. Some see this division of power as weakening the Iraqi State and promote a stronger central government[289]. Such an agreement has been said to punish the Sunnis and favour the Kurds and the Shia[290]. Other are in favour of a strong decentralization[291] (*supra*, p. 11).

This difficulty to agree is reflected in the Iraqi constitution. Hence the constitution division of competences between the federal unit and the subnational units, especially related to the exploitation of natural resources has always been disputed[292].

Art. 111 Cst stipulates that « oil and gas are owned by all the people of Iraq in all the regions and governorates ». Read in conjunction with other constitutional provisions, such as art. 110, 112, 115 and 121, one could conclude that although the central government may be in control of the natural resources in Iraq, this power shall be shared with the subnational entities[293]. However, when it comes to future oil and gas fields, it seems that only the central government is in charge but would still have to share the revenue with the subnational entities[294].

Because of the vagueness of the constitutional provisions, it is important that a federal law be enacted[295]. Indeed, there is no information as to what is understood under exploitation of future oil fields or on how the revenue shall be divided. However, Iraq being a very divided society with antagonistic interests at stake, the postponing of every controversial issue to the future creation of legislation seems somewhat utopic – specially, when the creation of the Parliament itself hasn't been agreed on. Thus, no hydrocarbon law has been passed to govern the management of oil and gas[296].

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[287] LIJPHART, p. 176.
[288] ALKADIRI, p. 1317.
[289] MCGARRY / O'LEARY (2007), p. 681.
[290] MCGARRY / O'LEARY (2007), p. 681.
[291] MCGARRY AND O'LEARY (2007), pp. 677 f.
[292] ALKIRI, p. 1318 ; DANILOVICH / OWTRAM, Introduction, p. 8 ; OWTRAM, p. 117.
[293] MCGARRY / O'LEARY (2007), p. 680 f.
[294] GHAI / COTTREL, p. 33.
[295] DANILOVICH / OWTRAM, Introduction, p. 8.
[296] ALKADIRI, p. 1323 ; Rudaw, 20.01.18.

The absence of a federal legislation on the oil and gas sector is a brake to Iraq's economical development[297]. Indeed, there has been an on-going fight between the KRG and the central government, both of them attracting foreign investment independently of each other[298].

Negotiations are still in progress regarding the exploitation and revenue sharing of the oil between Erbil and Baghdad[299]. Thus, nearly thirteen years after the adoption of the constitution, no common agreement has been found as to its implementation. The question of the oil, because so closely linked to political power, is still unsettled and is one of the most contested federal issues[300]. The division of powers, as foreseen in the Iraqi constitution, implies a close cooperation between different segments of the population[301], which implies a more consociational approach than an integrated one[302].

However, proposals on the adoption of a federal law are blocked at the parliamentary level[303]. The existence of an upper Chamber would certainly facilitate the adoption of a federal law, as it would insure the Kurdish region to be represented. This would most certainly help the KRG to trust the central government and would reduce the rising anti-Kurds sentiment[304]. As a matter of facts, the regions have often not been paid for the oil they allowed Baghdad to export[305]. This led to some oil companies cutting their investment in the Kurdish region, the Kurdish government not being able to pay them[306].

The ineffectiveness of the constitution could be the result of an unbalanced division of power. In this case the tensions existing as regards to the oil would be linked to a constitutional power-sharing decision - content of the constitution-, namely to allocate it to the regions and the governorates[307].

As WIMMER pointed out in 2003, in order to avoid « an escalating fight between centre and federal entity over the distribution of resources »[308], fiscal federalism should be adopted. This would imply the existence of a strong centre in charge of the collect and redistribution of oil revenue[309].

Nonetheless, this paper argues that the existence of tensions between the central government and the Kurdish region is related to the vagueness of the constitution[310], and not directly to the

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[297] Iraq-business News, 20.10.18.
[298] ALKADIRI, p. 1321 f. ; OWTRAM, pp. 121 ff. and 133.
[299] Rudaw, 20.01.18.
[300] ALKADIRI, p. 1320 ff.
[301] GHAI / COTTREL, p. 32.
[302] MCGARRY / O'LEARY (2007), p. 671.
[303] ALKADIRI, p. 1321.
[304] ALKADIRI, p. 1321 ff. ; ANDERSON / STANSFIELD, p. 134.
[305] OWTRAM, p. 133.
[306] OWTRAM, p. 133.
[307] GHAI / COTTREL, p. 5.
[308] WIMMER, p. 123.
[309] WIMMER, p. 124.
[310] GHAI / COTTREL, p. 30 ff. ; Konrad Stuftung, p. 2.

decision to allocate the Kurdish region a lot of autonomy on this matter. Hence, if correctly drafted, the relations between Erbil and Baghdad would be smoother. This issue has notably been identified by ALKADIRI: "The critical obstacle blocking agreement on national legislation to manage the hydrocarbon sector and revenue distribution has been not ethno-sectarian concerns but the failure to reach a broadly accepted accommodation over the role of the central government"[311].

Thus, it can be sustained that the existing disputes are the consequences of a rushed draft, which aimed at ensuring a formal federalism without giving the different groups at stake the time to reach a full understanding or agreement on the content of their constitution[312]. This is apparent in the very vague constitutional provisions regarding the management of oil, the creation of the upper chamber or the future of Kirkuk, all the most sensitive issues raised during the negotiation process.

2.1.3 The future of Kirkuk

Kirkuk is a strategic point for the exploitation of natural resources[313], and is a disputed territory between Baghdad and Erbil[314]. Already in 1970, the Kurds rejected an autonomy agreement because it didn't include the city of Kirkuk.[315] During the Baathist regime, it was subjected to a very strong Arabization policy (*supra*, p. 5). Nonetheless, it seems that the Kurdish government also moved Kurdish families to Kirkuk in order to maintain a Kurdish majority[316]. This struggle to obtain a majority in an oil rich region depicts the economical nature of the tensions in Iraq and shows how ethnical-belonging can be exploited to gain economical and political power.

The TAL initially prevented Baghdad and Kirkuk of becoming regions because of the strong opposition of Shias and Sunnis and because of the province's mixed population[317]. However, art. 140 Cst. allows any province, to constitute a region if the local population accepts it through a referendum, including Kirkuk. The question of the future of Kirkuk, namely whether it will join the Kurdish region or express it's will to create its own region is uncertain and causes many tension between the central government and the regions.

The federal arguments against the inclusion of Kirkuk to the Kurdish Region related to the risk of secession[318]. All in all, the actual insecurity regarding the future of Kirkuk also relates to a big margin of appreciation left in the Iraqi constitution and its bad implementation. However, as the following part will assess, the Kurds didn't need to have the control over Kirkuk to attempt to claim their independence.

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[311] ALKADIRI, p. 1316.
[312] ALKADIRI, p. 1317 f. ; MAJADI, p. 314.
[313] MCGARRY / O'LEARY (2007), p. 682 ; OWTRAM, p. 125.
[314] MAJIDA, p. 319.
[315] BRANCATI, p. 19.
[316] JAWAD, p. 9.
[317] JAWAD, p. 9.
[318] BRANCATI, p. 19 – Turkey threatened to invade the Northern part of Iraq if Kirkuk was to be given to the Kurds.

2.2   *The paradox of federalism*

The last section of this paper focuses on the recent Kurdish Independency Referendum. The question this part aims at answering is whether the Kurdish Referendum implies that federalism is not a successful tool to resolve the existence of conflicts and accommodate diversity in a society on a *long-term* basis (*supra*, p. 9).

One of the main fears, when designing an ethno-federation coupled with a strong decentralization of powers is that it will lead to secessionist trends. Such a consequence is understood as a paradox, the objective of the instauration of a federal system being precisely the opposite (*supra,* p. 10).

On the 25th of September 2017, the President of the Kurdish region organized a referendum on the question of independence. More than 90% of the Kurds of Northern Iraq declared their wish to secede from Iraq[319]. This event seems to have made some of the experts' fears during the federal debate in Iraq come true.

Regarding the Kurdish situation, one might be tempted to say that such an issue was likely to occur due to the type of federation chosen. Although the Kurds of Iraq opted for a federal solution only because independency seemed very unrealistic[320], this paper argues that the reason for the 2017 referendum wasn't directly linked to political arrangements but was more related to the implementation of the federal model.

The Kurds have been said to be privileged by the constitution of 2005 because of the very extended autonomy they acquired[321]. Many have mentioned the risk of a Kurdish secession attempt – due to the combination of a high level of decentralization and the region's division along ethnical borders[322].

However, secession movements can only be understood in relation to the context in which they take place[323]. Saying that a strong decentralization coupled with an ethnical division of borders would always or never lead to secession trends would be too simple. Yet, one could say that the Kurdish region being the only subnational unit in Iraq, it was more exposed to secession than states divided in multiple smaller units[324]. Besides, Iraq's majoritarian electoral system and its Judicial Supreme Court's influence on the electoral system[325] could also be seen as indications of a potential secession movement[326]. Economical and social factors should also be taken into account[327]. In the case of Iraq, the Kurdish Region's economy had been declining

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[319] Filkins, 16.10.17.
[320] BRANCATI, p. 11 ; DANILOVICH / OWTRAM, Introduction, p. 3.
[321] JAWAD, p. 9.
[322] ANDERSON, p. 159 ; BRANCATI, p. 19; DANILOVICH, Federalism, p. 104.
[323] ANDERSON, p. 169.
[324] ERK / ANDERSON, p. 197.
[325] MAJIDA, p. 310.
[326] ERK / ANDERSON, p. 197.
[327] SUMER / JOSEPH, p. 4.

since 2014 and tensions arose with Baghdad when new oil fields were discovered in the Kurdish region[328]. The North of Iraq was also directly affected by the situation in Syria. The Kurdish army had been effectively fighting against ISIS troops since 2014 and more than a million persons seeking shelter arrived in the region[329].

Regarding the Kurds' situation in Iraq, the federal regime originates from a « coming-together » federalism (*supra*, p. 9). Such federations are said to be more vulnerable to secessionist trends because of the previous *de facto* autonomy the group enjoyed[330]. Indeed, in such constellations, the group *willingly* accepts to create a federation but imposes its conditions, as the Kurds have tried to do. The new constitution can then be understood as a « federal deal », which both parties are expected to respect. Thus, it can be sustained that the origin of a federation will impact its success or failure[331].

In the case of Iraq, despite many provisions of the Constitution favourable to the Kurds, many were not well implemented. The creation of the upper Chamber – meant to represent the Kurdish Region – was never established. The exploitation of the oil in the Kurdish region is still an unsettled matter and the city of Kirkuk still hasn't held its referendum. On top of that, the Council of Representative drafted a bill in 2018 on budget regulation heavily criticized by the Kurds. The Kurdish region declared the bill violates the constitution, as the Kurdish Region couldn't participate in its planning[332]. Many Kurds seem to believe that the bill doesn't allocate enough resources to the regions and that it aims at punishing them for the referendum of September 2017[333]. Therefore it seems arguable to claim that it is not the power-arrangements as such, which led to the Referendum in Iraq, but the non-observance of the federal deal.

This implies that the breaking of federalism is not linked to the Kurdish attempt to secede. Federalism broke in Iraq because of the impossibility of implementing the constitution of 2005. The inapplicability of the constitution itself is the result of a rushed and instrumentalized drafting process. Thus, the Kurdish independency is the result of the failure of federalism, not its cause.

Conclusion

This paper aims to analyse the making and breaking of federalism in Iraq. It is divided in two principle parts, the first focusing on the making and the second on the breaking. The hypothesis, which crosscut the whole paper was that the making of the 2005 constitution had a major impact on the failure of federalism in Iraq.

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[328] SUMER / JOSEPH, p. 7 f.
[329] SUMER / JOSEPH, p. 9.
[330] ANDERSON, p. 164.
[331] BURGESS, p. 278 f.
[332] Sangar, 15.11.17 – namely art. 105, 106 and 121 Cst.
[333] Rudaw, 22.12.17.

To this extent, various questions arose. The first principle part is divided in two subsections. The former focuses on the historical context surrounding Iraq's transition to federalism, and attempts to answer to the following questions: How has Iraq's historical background impacted the transition to federalism and what were the main challenges faced? Subsequently, why was federalism thought to be adapted to Iraq?

The main challenges identified were; the existence of a plurality of ethnic groups and different religious beliefs among the Iraqi population; the fact that Iraq had never experienced a democratic regime before, as power had always been allocated according to tribal networks and patronages. As for the close relationship between political power and the control over the oil, it clearly had the potential of skewing the rebuilding of Iraq and definitely seems to have attracted the attention of foreign forces. In addition, the existence of multiple ethnical identities combined with a brutal dictatorship resulted in a sectarian division of the population.

This is precisely why experts agreed on the fact that federalism was the best solution in order to ease tensions, help rebuild trust and avoid a future civil war. Federalism was therefore chosen for its palliative virtue. Indeed, the allocation of a certain autonomy to the diverse ethnical groups, which they could exercise within a predefined region, was seen as the best existing solution to enable the peaceful coexistence of a plurality of identities.

However, two risks were identified in relation to this new division of power, namely the fear that the allocation of too much autonomy would lead to secessionist trends instead of helping the society stick together, and the concern that minorities in the newly formed subnational units would be even more excluded.

The purpose of the following subsection was to examine the making-process of the constitution, thus answering the following questions: What were the main steps in the constitution building process and what was the result? The power-arrangement provisions chosen led us to the conclusion that the Iraqi constitution fulfilled the basic features of a federal state, identified in the former subsection.

The second principal part focused on the breaking of federalism in Iraq. For a start, it sought to identify the major flaws within the Iraqi federation.

Three main issues were identified as problematic during the drafting process, namely: the lack of legitimacy of the process – consequence of the failure to include the population and the main stakeholder – (1), the lack of time in which the drafting took place (2), and the intervention of foreign forces, which had other interests in mind than ensuring a successful implementation of a federal model in Iraq (3).

As to the constitution in itself, it was observed that despite a federal skeleton, it was never correctly implemented. Thus, some of the basic federal characteristics are still missing, such as the existence of an upper Chamber at the Parliament or a clear division of competence between the regions and the central government. An additional observation as to the breaking of federalism in Iraq relates to the recent secession attempt of the Kurdish region. Based on

those facts, one could easily conclude that federalism wasn't successful in Iraq. Hence, various interrogations followed such an observation. Should the bad implementation of the Iraqi constitution be related to the federal choices taken during the negotiation process, or is it the consequence of a poor drafting process? How should the Kurdish Referendum of 2017 be understood? Is it the cause of the breaking of federalism in Iraq or rather its consequence?

The first conclusion reached by this paper is that the flaws of the Iraqi constitution are directly related to the drafting-process. Not only was the whole process rushed, but there was no inclusion of the population and hypocritical influence of the US.

Although it could be sustained that it is the incapacity of the major stakeholders to agree, which led to the lack of clarity and ineffectiveness of the Iraqi constitution, this argument does not seem convincing. Indeed, it is based on the assumption that even if given more time, no consensus could have been reached. Such a reasoning reflects a very simplistic and fatalist vision of the Iraqi society. In addition, it seems to be in contradiction with the original purpose of a federal state, which is to allow antagonistic interests to coexist. It would therefore be paradoxical to choose a federal model, precisely because it allows diversity to cohabit while arguing that because no agreement will ever be found, little time should be allocated to negotiations. The first conclusion reached is therefore that the breaking was a direct consequence of the making process.

The second conclusion follows the first one and claims that because the failure of federalism wasn't directly linked to the federal model implemented, it cannot imply that federalism, as such, cannot resolve the existence of conflicts in the Iraqi society.

Although, federal choices clearly have a big importance as to the resolution of ethnical conflicts, this paper argues that, because federalism never was effectively implemented, it cannot be sustained that the federal arrangements are the cause of the failure of federalism in Iraq. Thus, it cannot be sustained that federalism is an unsuccessful tool for conflict resolution based on the Iraqi case because the Iraqi people never experienced the application of federalism.

Such a conclusion implies that federalism cannot be limited to the existence of a formal federal constitution. It embodies a result, and not a simple set of formal rules. All in all, one could say that federalism never really broke in Iraq, as it never seems to have existed in substance.

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