

The Constitutionality of the Kurdistan Regional Government Petroleum Contracts under the 2005 Iraqi Constitution

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Abstract

Since 2007 up to now, around 50 oil and gas contracts have been concluded by the Kurdistan Regional Government KRG with the international oil companies. All these contracts are rejected and regarded unconstitutional and illegal by the Iraqi Federal Government. On the other hand, the KRG claims that its contracts are legal and constitutional, because, it has been empowered by the 2005 Iraqi constitution to sign them. This study examines in detail the division of powers relating to oil and gas under the 2005 Iraqi Constitution and the current disputes between the Iraqi Central Government and the KRG to evaluate the constitutionality of the KRG's oil contracts with the foreign companies. This paper takes a qualitative approach and combines theoretical and analytical evaluation. The interpretation of constitutional experts is used to analyze how the provisions function in reality.

Keywords: Constitution, Division of Oil and Gas Powers.

Oil and Gas in the 2005 IRAQI Constitution

Background

The constitutional model for the division of powers in the Iraqi Federal State between the Central and the sub-central governments is recognised as a distinctive model. Several powers that should only be exclusively exercised by the Federal Government are listed under Article 110 of the 2005 Iraqi Constitution. Powers listed under Article 110 are recognised as exclusive powers, which cannot be practiced by the sub-central entities, and they cannot be expanded by adding other competencies.¹ Moreover, Article 114 establishes a set of powers that should be shared between the Central Government and the sub-units and provinces.²

In the 2005 Iraqi Constitution, powers relevant to oil and gas are dealt with under Articles, 111 and 112 and are separate from other lists of exclusive and shared powers. This means the powers in relation to petroleum are neither enumerated within the exclusive powers of Article 110 nor the shared powers of Article 114. Additionally, the language of these Articles does not allow the understanding that they should be regarded as 'exclusive' powers of the central government. Therefore, one can suggest that the understanding is that the oil and gas powers should be indisputably exercised by the regions and provinces. This is because, firstly, the language of Article 115's first paragraph, states "*All powers not stipulated in the exclusive powers of the federal government belong to the authorities of the regions and governorates that are not organized in a region*"³ and secondly, Article 121(1) states "*The regional powers shall have the right to exercise executive, legislative, and judicial powers in accordance with this Constitution, except for those authorities stipulated in the exclusive authorities of the federal government.*"⁴

Because article 115 specifically states that any powers not listed as exclusive to the federal government belong to the regions, and because powers relating to oil and gas are not listed as exclusive powers, it would seem logical to assume that they belong to the regions.

¹ Iraqi Const, art 110

² Ibid, art 114

³ Ibid, art 115

⁴ Ibid, art 121, First

However, article 112 [oil and gas powers] opens with the declaration that the powers over oil and gas reside in “[t]he federal government, with the producing governments and regional governments” and, as Zedalis⁵ points out, this seems terribly peculiar, and completely incongruous. “He offers two possible explanations for this anomaly:

(1)[The Constitution] nonetheless considers the relevant oil and gas powers of article of 112 as a hybrid sub-species of federal powers; or (2) it considers them to be exclusive federal powers, even though not described as such by inclusion in article 110 or express characterisation in the language of article 112 itself.

The first of these possibilities seems to be excluded by the inclusion of the words “the federal government, **with** the producing governments and regional governments” (author’s emphasis). As Zedalis’s points out, considering petroleum powers as exclusive powers of the federal government would be contradictory with the intention of the drafters of the Iraqi 2005 Constitution who plainly listed petroleum powers under Article 112, separate from the exclusive powers of the Federal Government which are enumerated under Article 110.⁶ Therefore, according to the above interpretation, exclusive legislative control over the management of oil and gas cannot be completely vested to the sub-central governments, such as the Kurdistan Regional Government (KRG), nor the provinces.

As demonstrated above, the regions and governorates are plainly given greater powers than the central government by Articles 115 and 121(2) of the Constitution. Furthermore, these articles also state that in the case of a dispute between the centre and the regions, the regions have priority:

Article 115 states:

“With regard to other powers shared between the federal government and the regional government, priority shall be given to the law of the regions and governorates not organized in a region in case of dispute.”⁷

Article 121 Second states:

“In case of a contradiction between regional and national legislation in respect to a matter outside the exclusive authorities of the federal government, the regional power shall have the right to amend the application of the national legislation within that region.”⁸

Therefore, if an issue comes under the exclusive powers stipulated in Article 110, it will be subject to the federal law. However, all other disputes arisen under the description of shared powers under Article 114 and the residual powers will be subject to regional law, based on Articles 115 and 121.

Division of Powers Relating to Oil and Gas under the 2005 Iraqi Constitution

The 2005 Iraqi Constitution is used by the Kurds to justify the individual steps taken towards the independence of the Kurdish petroleum industry. However, legal disputes between the Government of Iraq (GOI) and the KRG result from different interpretations by both sides. Paz⁹ states that: “the KRG is prepared to discuss the legal details until the differences are settled and they have the legal rationale to back their argument. The GOI believes that it benefits from delaying because it knows that it would most likely lose in sober analysis of the legal right legislated to the Kurdistan Region by the Constitution.”¹⁰

From several scholars` point of view, the Constitution has greatly contributed to creating these disputes due to the ambiguity of the language used in drafting the Articles relevant to oil and gas.

Under the 2005 Iraqi Constitution, ownership and management of oil and gas are fundamentally restricted to Articles 111 and 112, which means that any matter associated with oil and gas resources is addressed via these two articles. To understand the entire situation, it is important to provide the exact words of both articles;

⁵ R Zedalis, *Oil and Gas in the Disputed Kurdish Territories Jurisprudence, Regional Minorities and Natural Resources in a Federal System* (Routledge, USA & Canada 2012) 65

⁶ D Tas, ‘Petroleum Development in the Kurdistan Region of Iraq: A struggle over Competency’ (2011) 5 215, 224

⁷ Iraqi Constitution, art (115)

⁸ Ibid, art (121, Second)

⁹ A Paz, ‘Oil and Political Authority: An Analysis of Relations Between the Government of Iraq and the Kurdistan Regional Government’ [2011] 6 NIMEP Insights

http://www.tuftsgloballeadership.org/files/resources/nimep/v5/NIMEP_Insights_2011_22-47.pdf accessed 1 December 2012

¹⁰ Ibid, p. 38

Article 111:

Oil and gas are owned by all the people of Iraq in all the regions and governorates.

Article 112

First: The federal government, with the producing governorates and regional governments, shall undertake the management of oil and gas extracted from present fields, provided that it distributes its revenues in a fair manner in proportion to the population distribution in all parts of the country, specifying an allotment for a specified period for the damaged regions which were unjustly deprived of them by the former regime, and the regions that were damaged afterwards in a way that ensures balanced development in different areas of the country, and this shall be regulated by a law.

Second: The federal government, with the producing regional and governorate governments, shall together formulate the necessary strategic policies to develop the oil and gas wealth in a way that achieves the highest benefit to the Iraqi people using the most advanced techniques of the market principles and encouraging investment.¹¹

Generally speaking, four main objectives can be elicited from the two above provisions. **Firstly**, they emphasise that the reserves of petroleum are the assets of the Iraqi people. This point is considered in Article 111 which explicitly states the country's petroleum should be "owned by all the people of Iraq in all the regions and governorates." **Secondly**, the revenues arising from the sale of petroleum should be justly distributed over the nation. This objective is pointed out by the wording of Article 112's first paragraph. **Thirdly**, they address the provision of powers to regulate the management of oil and gas. The second paragraph of Article 112 specifies that it is the Federal Government's task, jointly with the regional and governorates in which the petroleum is produced. **Finally**, they seek to maximise the revenue from Iraq's petroleum resources by coordinating strategies and approaches between the centre and the regions. Article 112's second paragraph is the relevant part to that aspect, and states that the objective should be to "to provide the greatest benefit for the people of Iraq."¹²

It can be noticed that there is an analogy between the language used in drafting Article 111 of the new Iraqi Constitution and Article 13 of the 1970 Constitution. The latter stated "natural resources and basic means of production are owned by the people."¹³ However, the new constitution specifically states "regions and governorates." The exact purpose of using this phrase is unknown; it could be a reference to regional and governorate ownership. Whatever the purpose, conflict or perhaps violence may be the outcome of this ambiguity.¹⁴

Regarding the language of the Articles, Zedalis comments:

The language of article 111 recognises the importance of the nation's oil and gas resources to the restoration of stability and the eventual development of the country. And as other provisions of the Constitution seem to suggest a sense of equality in a nation populated by diverse ethnic and sectarian groups, the language endorses the opportunity of all to share in the benefits of Iraq's oil and gas resources.¹⁵

Two implications arise from Article 111. **Firstly**, Iraqi oil and gas resources are not viewed as the property of a person in power, nor of the Iraqi government, officials of that government, political parties, nor of ethnic and religious groups: it is a resource of its citizens in all the regions and the provinces.

Secondly, there is no doubt that a legitimate claim can arise, not only by the majority of an ethnic or a sectarian group, but also by a minority of people towards the Iraqi petroleum resources located in any part of the country in order to benefit from the petroleum resources of the country.¹⁶

¹¹ Iraqi Constitution 2005, arts (111&112)

¹² R Zedalis, 'Recent Oil Contracts with Iraqi Kurdish Authorities: are they Legally Valid?' (2008) 2008 IELR 16, 17-18

¹³ Iraqi Constitution 1970, art (13)

¹⁴ M Mounim, 'The Legal Framework for Managing oil in Post-Conflict Iraq: A Pattern of Abuse and Violence Over Natural Resources', in P Lujala & S.A. Rustad et al. (eds.), *High-Value Natural Resources and Post-Conflict Peacebuilding* (Earthscan, USA & Canada, 2012). 413-435 at 420

¹⁵ R Zedalis, *The Legal Dimensions of Oil and Gas in Iraq Current Reality and Future Prospects* (Cambridge University Press, USA 2009) 35

¹⁶ R Zedalis, *Oil and Gas in the Disputed Kurdish Territories Jurisprudence, Regional, Minorities and Natural Resources in a Federal System* (Routledge, USA & Canada 2012) 57-58

In observing the above interpretation, it is necessary to specify the exact level of government with the exclusive power to legislate in order to develop the oil and gas for the benefit of all Iraqi people.¹⁷ However, neither the federal government nor the regional governments or provinces are supplied with a supreme power by Article 111.¹⁸ The constitutional power to legislate over the nation's petroleum resources, therefore, cannot be assumed by the federal government or sub-unit governments by means of Article 111.

By contrast, Article 111 is heavily used by Iraqi officials to justify their position that Iraqi oil and gas should be controlled and managed by the Central Iraqi Government, Nuri Al-Maliki, the former Iraqi Prime minister, stated in an interview that it took a lot of difficult discussion, at the time of writing the Constitution for the inclusion of the expression of "*Oil and gas are owned by all the people of Iraq in all the regions and governorates*. There is a fundamental philosophy within it. Al-Maliki argued that if the wealth was considered to be the property of the people of Iraq, two objectives will be achieved: **Firstly**, a human aspect in which the Iraqis participate in their wealth. **Secondly**, it will be a basis on which to build a united states. Oil and gas, therefore, is the property of the Iraqi people it is neither the property of the provinces nor of the Kurdistan Region.¹⁹

However, Tas²⁰ argues that "it appears that Art 111 neither vests ownership in the federal government nor the particular regions or governorates." The constitutions of some of Iraq's neighbouring countries specifically state that all natural resources are the property of the state. One may suggest that Art 111 seems indirectly to vest ownership in the federal government because "representation of all components of the people shall be upheld in [the federal Council of Representatives]."²¹ However, it has not been specified in Article 111 that this level of government should exercise the ownership stipulated on behalf of the Iraqi people, and Iraq is a federal country, which many of its neighbouring countries are not. Therefore, the present author believes that the purpose in the declaration that "oil and gas are owned by all the Iraqi people" is to ensure the distribution of the revenue arising from the Iraqi petroleum reserves to all Iraqi people without heeding where the petroleum is produced or where the people are located in Iraq. The fundamental issue for this research is to establish the powers of the federal and the regional governments relevant to petroleum and to explore the extent of the legality of the oil and gas contracts concluded by the KRG with the International Oil Companies (IOCs).

Considering Article 112:

The different aspects relevant to oil and gas are examined by two separate paragraphs of Article 112. The management of oil and gas activity and the revenue created from such oil and gas distribution are dealt in the first paragraph. The partnership between the central and the sub-central governments to establish long-term development strategies and goals relating to Iraqi petroleum are addressed in the second paragraph.²²

Zedalis argues that Article 112, with its two paragraphs which directly touch on oil and gas, are similar to Article 114, in its consideration of shared powers. The difference between these two articles is only in the language adopted.²³ He states that the language of the two paragraphs of Article 112 began with "the declaration of power over oil and gas by indicating it is the 'federal government' with the sub-central units, that possesses the powers. Article 114, though, describes its enumerated powers as 'competencies...shared between the federal authorities' and sub-central."²⁴

Therefore, this difference can be interpreted as the federal government having the lead role over oil and gas shared power in Article 112, but the lead role over the shared powers enumerated in Article 114 belongs to either the federal government or sub-central governments.²⁵

¹⁷ D Tas, 'Petroleum Development in the Kurdistan Region of Iraq: A struggle over Competency' (2011) 5 IELR 215, 221

¹⁸ R Zedalis, op.cit., p. 59

¹⁹ Maliki's Answer accused Barzani to move towards dictatorship [online video], presenter M Al-Assadi, Iraq, AL-Iraqiya TV, 2011 <http://www.youtube.com/watch?v=LurZpmu9ohw>, (accessed 12 December 2012)

²⁰ D Tas, op. cit., p. 219

²¹ Ibid

²² R Zedalis, the Legal Dimensions..., op. cit., P. 36

²³ R Zedalis, Oil and Gas..., op. cit., p. 57

²⁴ ibid

²⁵ ibid

Zedalis stated that the language used in the first paragraph of Article 112, which grants the federal government the lead role in “management of oil and gas extracted from present fields,”²⁶ imposed three restrictions on the federal government in its exercise of its lead role. **Firstly**, any action taken by the federal government under that provision should only encompass the issues relevant to “**management**” of oil and gas. Although the term “**management**” has not been detailed, Zedalis states that it certainly includes decisions relating to “the where, when, how, and how much” of petroleum from a specific area. And also, it probably includes “sales, distribution, and transport decision.” **Secondly**, the power of the federal government is restrained by the language of article 112(1): it includes the words the “**management**” of petroleum that has been “**extracted**”.²⁷ Based on that, “**management**” only encompasses the procedures after extraction and production.²⁸ Therefore, the petroleum remaining inside the producing fields would not be subject to federal authority under Article 112(1). **Finally**, the federal management power referenced in article 112(1) over extracted oil and gas must be limited to oil and gas extracted from “**present fields**”.²⁹ Notwithstanding the above, the role given to central government in the Article should be exercised “**with the producing governorates and regional governments**” (author’s emphasis). In other words the centre and the regions should act jointly.

It is important to note that “**present fields**” have not been described in the 2005 Iraqi Constitution, and it has led to considerable argument respecting “whether ‘present’ fields refers to fields that have gone beyond discovery, identification, and initial development to the point of actual production”.³⁰ Because, its meaning has not limited in the Constitution, therefore, ‘**present**’ should give its ordinary meaning of ‘**existing**’.³¹ In addition, , according to international law professor James Crawford from Cambridge University, the concept “presents fields means fields already under production. This interpretation is indicated by the word ‘extracted’ and by the reference to ‘producing’ governorates. The clear inference is that Article 112(1) covers oil and gas extracted from fields presently in production.”³² Therefore, “fields not producing, developed or even discovered – and the oil and gas yet to be extracted from them – fall outside Article 112(1). They fall under the Constitution to be managed by the relevant regional government alone.”³³ In addition, the date on which the fields are considered as “present”, according to Professor Crawford, is the date the Iraqi Constitution into force (2006). No producing fields were available in the Kurdistan Region at that date, therefore there were no “present fields” in the region. Consequently, the stipulation for shared management under Article 112 does not have any implications.³⁴ With the greatest respect to Professor Crawford, the present, author, as a Kurdish national, can state from personal knowledge that there were two fields in Kurdistan before the toppling of Saddam’s regime in 2003 and they had been contracted by the KRG before the enactment of the Constitution (2006).

The issue of “present fields” is relevant when considering the legality of KRG petroleum contracts. Issam Al Chalabi, the former Iraqi Oil Minister, states that only two contracts issued by the KRG with the IOCs are considered to have some sort of legality. The first one was signed in 2002 with Genel Enerji Company over the TakTak field, and the second one was in 2004 with DNO for Tawke. This is because Article 141 of the 2005 Iraqi Constitution states that all decisions and contracts of the KRG since 1992 until the issuing of the Constitution are considered valid.³⁵ From this statement, it could be concluded that “present fields” were available, and the KRG’s contracts over them before the enactment of the Constitution (2006) are valid.

²⁶ Iraqi Const, Art 112 (1)

²⁷ R Zedalis, Oil and Gas in the..., op., cit. p. 67

²⁸ J Crawford, ‘The Authority of the Kurdistan Regional Government over Oil and Gas Under the Constitution of Iraq’ (2008) 3 OGEL 1, 7

²⁹ R Zedalis, Oil and Gas in the..., op., cit. p. 67

³⁰ D Tas, op. cit., p. 223

³¹ *ibid*

³² J Crawford, op. cit., P. 7

³³ *ibid*

³⁴ *ibid*

³⁵ P Smith, ‘Former Iraqi Oil Minister Issam Al Chalabi’ (2011) ME 47,49

Article 141 states [Legislation enacted in the region of Kurdistan since 1992 shall remain in force, and decisions issued by the government of the region of Kurdistan, including court decisions and contracts, shall be considered valid unless they are amended or annulled pursuant to the laws of the region of Kurdistan by the competent entity in the region, provided that they do not contradict with the Constitution].

It can be concluded from the arguments of both Crawford and Isaam that the dispute between the Federal Government and the KRG is over the power to contract the “**future fields**”. “Future fields” are not recognised in Article 110 as exclusive powers of the Federal Government,³⁶ nor in Article 114 as shared powers.³⁷ Therefore, they are subject to Article 115, which states that “powers not stipulated in the exclusive powers of the federal government belong to the regions.” This is reinforced by Article 121(1) which states that executive, legislative, and judicial competences can be exercised by the regional authorities, “except for those authorities stipulated in the exclusive authorities of the federal government.”³⁸ Accordingly, one might argue that “**future fields**” are dominated and managed exclusively by the producing region or province. This argument however, may not be fully correct,³⁹ because Article 112(2), also declares that the governments of the regions and governorates “shall together formulate the necessary strategic policies to develop . . . oil and gas wealth in a way that achieves the highest benefit to the Iraqi people using the most advanced techniques of . . . market principles and encouraging investments.”⁴⁰ Because, no difference between future and present fields is made by that provision, and both types of field may be addressed by the same strategic policy, even if an implicit power is given to the regional governments for the management of petroleum extraction from so-called future fields in the absence of federal legislation, the constitution could be interpreted as suggesting that the federal government will be involved in the strategic policies for those fields.⁴¹ Assuming that all future petroleum development is covered by the “necessary strategic policies”, the federal government may have an opinion about any contracts associated with such development. However, it is not precisely plain how that opinion will be known or implemented.⁴²

On the other hand, according to Professor Crawford, Article 112(2) is concerned only with “**policies**” not “**management**”, and here states that “policies” should be jointly formulated. However, no legislative authority is granted to the federal government by Article 112(2). Crawford argues further “nor does it stipulate that no contracts are to be concluded for the management by a region of present or future fields until the strategic policies are agreed. Such a stipulation would give the federal government a veto over regional authority which the Constitution nowhere gives, outside the enumerated list of exclusive powers in Article 110. Even in respect of present fields, oil is not an exclusive power; a fortiori with new fields projects.”⁴³

With regards to its position on the legality of its petroleum contracts, the KRG has a dual position. **Firstly**, it argues that it is allowed autonomy in oil and gas matters because they are not covered in the list of powers reserved to the Federal Government. **Secondly**, it claims that the provisions of Article 112 are not applicable because there were no producing fields in Kurdistan at the time of the enactment of the constitution in 2006. Also they say that Article 112(1) relates only to the management of petroleum after extraction. Finally, the KRG states that Article 112(2) does not relate to regulation and contracting. It is only about negotiations with OPEC, etc.⁴⁴

Dr, Ashti Hawrami, the KRG Natural Resources Minister, argues that Article 112 only allows the federal government “an administrative role confined to the handling, i.e. exporting and marketing, of the extracted oil and gas from existing producing fields.... The elected authorities of the regions and producing governorates are now entitled to administer and supervise the extraction process; in other words local oil field managers are answerable to the local authorities.”⁴⁵

The question, arises as to why Article 112 (1) has been drafted in this way? It specifies the role of the Federal Government in the management of extracted petroleum, jointly with the regions, over “present fields” in the regions. Some commentators argue that there were no “present fields” in Kurdistan at the date of the enactment of the Iraqi Constitution.

³⁶ Iraqi Const, art 110

³⁷ Ibid 114

³⁸ Ibid, 121 (First)

³⁹ A Deeks& M Burton, `Iraq`s Constitution: A Drafting History` (2007) 40 CILJ 1, 69

⁴⁰ Iraqi Const, Art 112 (Second)

⁴¹ A Deeks& M Burton, loc.cit

⁴² ibid

⁴³ J Crawford, opt. cit., p. 8

⁴⁴ D Laurence, N Brimson& C Thomson, `Investment amid ongoing disagreement over production sharing contracts in Kurdistan` [2011] <http://www.lexology.com/library/detail.aspx?g=e1c075a9-25ef-4e67-9001-fe52d03763d4> accessed 21 December 2012

⁴⁵ M Gunter, `Economic Opportunities In Iraqi Kurdistan` (2011) 2 MEP 102,102

Even if it is accepted that there were, and they were contracted by the KRG, these contracts would have been legal and would not be subject to Article 112(1) because of the provisions in Article 141 of the 2005 Constitution. The effect of Article 112(1) may have been intended for the regions or provinces which would be established as federal units in the future.

The Scope of the Authority of the KRG to enter into Petroleum Development Contracts

Article 110 which specifies the exclusive powers of the federal government does not include the oil and gas competences, therefore, based on Article 110, exclusive power to conclude oil and gas development contracts cannot be granted to the federal government. However, an implicit power for the federal government to conclude oil and gas development contracts may be inferred because Article 111 is “best read as indicating that the Constitution vests in the federal government the power to contract in connection with the nation's [petroleum] resources.”⁴⁶ Nevertheless, the intention of the 2005 Iraqi Constitution drafters in listing the exclusive powers of the federal government in Article 110 and restricting its function concerning petroleum in Article 112 would appear to be in conflict with the above reading.⁴⁷ An additional consequence of claiming that the federal government may have such an implied power to conclude petroleum development contracts is that:

“[l]eaving implementation of [Article 111] to the [regional] authorities would allow each region of the country blessed with [petroleum] to deny the benefits to either those regions less well endowed, or even minority populations within their own regions.”⁴⁸

However, Article 13(1) of the 2005 Constitution counters this proposition by the statement,⁴⁹ “This Constitution is the preeminent and supreme law in Iraq and shall be binding in all parts of Iraq without exception.”⁵⁰ Accordingly, Articles 110 and 111 cannot be considered to vest exclusive power for concluding petroleum development contracts in the federal government.

Similarly, power to conclude petroleum development contracts cannot be considered to have been exclusively awarded to the regional authorities by virtue of Article 115 and 121(1)[residual powers], because any such interpretation would lead to the nullity of Article 112(1)[oil and gas powers]. Moreover, Article 112(1) “may be irrelevant to the KRG's residual competency to conclude petroleum development agreements given the references in that provision to the terms “**extracted**” and “**present fields**”,⁵¹ as well as “**management**”.

The term “present field” has not been explained in the Constitution, and still it is arguable. Two hypotheses therefore, can be adopted to interpret the expression:

Firstly, by considering the term “present fields” in the light of the rest of Article 112(1), particularly the terms “extracted” and “regional governments and producing governorates”, “present fields” includes those fields “that have gone beyond mere pre-production development and have actually produced petroleum,”⁵² at the date of the enactment of the Constitution (2006). Accordingly, Article 112(1) would apply only to “present fields”, and “fields not producing ... fall outside Article 112 (1).”⁵³ Therefore, the federal government would not appear to have competency to conclude petroleum development contracts relevant to so-called future fields. In contrast, they would be subject to the regional authorities in concluding development contracts relevant to them, by considering articles 115 and 121(1) [residual powers].⁵⁴

Secondly, the term “present fields” can be considered as all fields without making any difference between “present” and “future” fields, and its purpose in Article 112(1) therefore extends to all fields in the Kurdistan region.

⁴⁶ R Zedalis, `Comment—Foundation of Baghdad's Argument that Regions Lack Constitutional Authority Over Oil and Gas Development Agreement` (2008) 26 JENRL 303,314.

⁴⁷ D Tas, op. cit., p. 224

⁴⁸ R Zedalis, `Comment—Foundation of Baghdad's Argument that Regions Lack Constitutional Authority Over Oil and Gas Development Agreement` (2008) 26 JENRL 303,314

⁴⁹ D Tas, loc. cit

⁵⁰ The Iraqi Constitution 2005, art 13 (1)

⁵¹ D Tas, op. cit., p. 223

⁵² R Zedalis, *the Legal Dimensions of Oil and Gas in Iraq*. P. 57

⁵³ J Crawford, op. cit., p. 7

⁵⁴ The Iraqi Constitution, arts 115 & 121 (1)

Under this hypothesis one may still argue about whether the central government is authorised to conclude petroleum development contracts, because Article 112(1) only awards the federal government the lead role to manage petroleum “extracted”. The answer to this is fundamentally dependant on the interpretation of the term “management” in Article 112(1).⁵⁵ To that end, the term “management” should “be read in the ordinary sense of conducting or supervising all of the business aspects relating to oil and gas extracted from present fields.”⁵⁶ While, the term “management” in isolation could be interpreted as contracting for petroleum development, it has a different meaning in Article 112(1),

“...considering the unequivocal reference in article 112 (1) to management of petroleum “extracted” from present fields, which is conceptually distinct from the management of the process of actually extracting petroleum. The management competency provided by article 112 (1) would therefore appear to be limited to petroleum after it has been extracted. Consequently, while petroleum remains in situ it is not extracted and accordingly not subject to any federal government competency conferred by article 112 (1).”⁵⁷

This interpretation suggests that, even if it is accepted that the fields within the region of Kurdistan could be regarded as ‘present fields’, the residual powers granted under Articles 115 and 121(1) would still enable the KRG to enter into development contacts for them. A proposal in a provisional report by the federal Constitutional Review Committee published in May 2007 for the removal of the word “extracted” from Article 112 (1) seems to concur with this interpretation.⁵⁸

It can be concluded that the management of petroleum “extracted” is the aim of Article 112(1). In order for petroleum to be extracted, both the process of exploration and the process of production are needed. These two processes, which should be achieved by contract, are not listed as the exclusive powers of the Federal Government under Article 110 and according to Articles 115 “all powers not stipulated in the exclusive powers of the federal government belong to the authorities of the regions and governorates.”⁵⁹ Furthermore, Article 121(1) states that “The regions shall have the right to exercise executive, legislative, and judicial powers in accordance with this Constitution, except for those authorities stipulated in the exclusive authorities of the federal government.”⁶⁰ Accordingly, the KRG has been empowered to conclude development contracts for petroleum located in the Kurdistan region. However, its powers to enter into development contracts are constrained by two significant limitations: (i) Article 111 of the Iraqi Constitution requires the development of petroleum in the region to benefit all Iraqi citizens; and (ii) The KRG must respect any federal strategic policy that it has approved under Article 112 (2).⁶¹

The above analysis leads to the conclusion in that the KRG’s petroleum contracts are constitutional and the KRG has authority to sign them, but that authority is limited by the constraints discussed above.

Conclusions

Despite Iraq having massive petroleum reserves, ranking as the second largest oil reserves after Saudi Arabia, its current production does not reach 3 million barrels per day. The generally-accepted reason for that, apart from technical problems, is that there are several serious legal and constitutional disputes among the ethnic and political groups, specifically between the Federal Government and the KRG, over various aspects relevant to oil and gas.

The causes of these disputes include: the division of powers between the federal and regional governments in controlling oil and gas management, the ownership of petroleum located in the regions and provinces, a lack of a proper mechanism for the fair distribution of petroleum revenue, whether management of petroleum should be nationalised or privatised and payment to international oil companies.

⁵⁵ D Tas, loc. cit.

⁵⁶ J Bell & C Saunders, ‘Memorandum-Iraqi Oil Policy: Constitutional Issues Regarding Federal and Regional Authority’ (2006) 5 MEES 1, 2

⁵⁷ D Tas, op. cit., p. 24

⁵⁸ *ibid*

⁵⁹ Iraqi Constitution 2007, art 115

⁶⁰ *Ibid*, 121(1)

⁶¹ *Ibid*, p. 26

From several scholars` point of view, all these disputes result from the 2005 Constitution, due to the ambiguity of the language used in drafting the Articles relevant to oil and gas.

Under the 2005 Iraqi Constitution, provisions relating to the ownership and management of oil and gas are generally restricted to Articles **111** and **112**. Article **111** provides that the ownership of petroleum resources is for **all** the Iraqi people, irrespective of where the resources are located. Therefore, no groups, no levels of government, no regions and no provinces can claim to be the owner of the petroleum resources. Accordingly, the revenue created from the sales of oil and gas should be distributed to all the Iraqi People, *“in a fair manner in proportion to the population distribution in all parts of the country, specifying an allotment for a specified period for the damaged regions which were unjustly deprived of them by the former regime, and the regions that were damaged afterwards in a way that ensures balanced development in different areas of the country,”*⁶² and the process of distribution shall be organised by legislation.

With regard to Article **112 (1)**, it gives the federal government the role of **“management”** of oil and gas **with** the KRG as a producing regional government, and concluding development oil and gas contracts is considered as one aspect of management. However, the federal government`s role in the management of oil and gas is limited to the following restrictions: firstly, **“present fields”**, which include those fields which were under production at the date of the enactment of the Iraqi Constitution (2006). Accordingly, fields not producing are called **“future fields”** and are not subject to this management provision. Alternatively, by reference to Articles 115 and 112(1), **“future fields”** would fall under the competency of the KRG for the conclusion of development contracts. This is because these articles state that any power that has not been listed under the exclusive powers of the federal government will be considered as a power of the region. Nevertheless, the KRG`s competency to develop the **“future fields”** located in the Kurdistan region should be (i) for the benefit of all Iraqi people in accordance with article 111; and (ii) subject to any **“necessary strategic policies”** established by the central government with the KRG under Article 112(2), because under this subsection, the **“present”** and **“future”** fields are dealt by the same strategic policy. Secondly, it is limited to oil and gas **“extracted”** from present fields. Based on that, management only encompasses the procedures after extraction and production, and the petroleum remaining within the producing fields cannot be regarded as **“extracted”** petroleum. Therefore, it would not be subject to federal authority. In order for petroleum to be extracted, there needs to be process of exploration and production and these are achieved by contracting. Consequently, both exploration and production contracts for petroleum located in the Kurdistan region are subject to the authority of the KRG. This is because the power to conclude exploration and production development contracts has not been listed as an exclusive power of the Federal Government under Article 110. By reference to Article 115 of the 2005 Constitution, *“all powers not stipulated in the exclusive powers of the federal government belong to the authorities of the regions and governorates.”*⁶³ Furthermore, Article 121(1) states *“The regional powers shall have the right to exercise executive, legislative, and judicial powers in accordance with this Constitution, except for those authorities stipulated in the exclusive authorities of the federal government.”*⁶⁴ Nevertheless, once again the power of the KRG to conclude exploration and production contracts is restricted by Article 111, which states that oil and gas revenue should be for the benefit of the Iraqi people, and the **“necessary strategic policies”** should be drafted by the federal government with the approval of the KRG following Article 112(2).

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⁶² Iraqi Constitution 2005, art 112

⁶³ Iraqi Constitution 2005, art 115

⁶⁴ Ibid, art 121(1)

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