



The power of constitution for enacting energy law and managing natural resources: The case of the Kurdistan Regional Government's oil contracts



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ABSTRACT

Depending on Iraqi constitution the Kurdistan Regional Government (KRG) has signed more than sixty oil and gas contracts with international oil companies (IOCs). These contracts have ignited significant disputes between the KRG and the federal government. The Iraqi government claims that KRG's contracts are illegal and the KRG has misused Iraqi natural resources. On the contrary, the KRG argues that Iraqi constitution has granted the KRG the right to manage its natural resources. The purpose of this paper is to examine the extent to which the Iraqi constitution grants KRG the power to sign oil contracts with IOCs. To investigate this issue, KRG's oil contracts are mainly analyzed under the light of (1) Iraqi constitution, (2) draft of oil and gas law in Iraq and (3) Kurdistan's oil and gas law. Further, primary data are collected by interviewing thirty Parliamentary members in Iraq. The paper found that the Iraqi constitution has granted the KRG's enactment of oil and gas law and the power to sign oil contracts with IOCs. However, the KRG has exceeded its power in its law and contracts by waiving of sovereign immunity for IOCs. Thus, major amendments of KRG's oil and gas law are recommended to be in line with Iraqi constitution. Transparency and decentralization of the KRG's petroleum policy are also recommended.

1. Introduction

Decentralization and power-sharing between federal and local governments is a common principle among federal constitutions. To date, more than sixty countries have adopted this model for different sectors (Colfer and Capistrano, 2012). One of the sectors that the constitution shares power between federal government and local governments is the management of natural resources. Some constitutions, the Canadian constitution for instance, grant exclusive rights to local governments in managing these resources. According to the Canadian Constitution Act, local provinces are entitled to the ownership of the resources (Hessing and Summerville, 2014). This model of federalism is different from those of Australia and the United States because the federal territories or states in these two countries have broader power over the regions for managing natural resources (Cairns, 1992). In contrast, Nigerian constitution, indicate in Article 44(3) that the federal government manages natural resources and it has the exclusive right to develop petroleum policy.

Other constitutions, such as Iraqi one, has divided the management of the country's resources between Baghdad and the regions. The constitution attempts to make a balance between the federal government

and the regions, namely the Kurdistan Region, for sharing its natural resources. This approach may be considered as a “co-management”, which concentrates on the legal recognition of local communities in constitution to have a power for developing their natural resources (Borrini and Jaireth, 2007). This is stated in Articles 111 and 112 of the Iraqi constitution (Iraqi Constitution, 2005). Pursuant to these articles, the Kurdistan Regional Government (KRG) enacted its oil and gas law in 2007. Having its own energy law, the KRG took the opportunity to sign more than sixty oil and gas contracts with IOCs. This has created a major dispute between the KRG and the federal government in Baghdad (Wahab, 2014). The KRG argues that it has constitutional rights to sign petroleum contracts. The KRG also rejects the centralization of energy policy because the constitution has decentralized managing of natural resources in the country (Natali, 2012). Thus, how constitution and energy law influence the management of natural resources between the federal government in Baghdad and the KRG is the focus of this article.

2. Literature review

Energy law is presently a center of debate among legal scholars. This area of law is still deemed to be a new field academically and

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practically (Heffron and Talus, 2016b). It is more than two decades that the debate started on energy law as a separate discipline (Heffron et al., 2018). Energy law is discussed as an independent legal discipline by a number of scholars including (Bradbrook, 1996; Heffron and Talus, 2016a, 2016b; Mauger, 2018). This type of law is growing effectively and broadly in Europe (Talus, 2016; Kruger, 2016; Leal-Arcas and Wouters, 2017). While many countries have developed energy laws and working on management of renewable energy (Wustenhagen and Bilharz, 2006; Cherni and Kentish, 2007; Coley and Hess, 2012), Iraq is still struggling to issue energy law for the management of its remarkable wealth of natural resources. After discussing it for more than ten years, it is still unknown when Iraq will have its energy law. As there is not a federal energy law in Iraq, the energy policy of the country is unstable and both the federal government and the KRG have approached two distinctive energy policy.

Previous literature has demonstrated a strong relationship between law and energy policy. Law can be used as a tool for creating proper energy policies in the country. Gupter, for instance, argues that weak enforcement of law and regulations lead to unethical practices and corruption. Heffron et al. (2013) refers to the significance of law in achieving policy delivery process and effective energy policy. Thus, countries attempt to enact and amend legislations for establishing better energy policy. For instance, the Mexican constitution reforms aimed to decrease energy prices and increase efficiency (Moshiri and Santillan, 2018). Overlooking the implementation of constitution and laws negatively influences energy policy of state and managing natural resources. Al-Kasim et al. (2013) indicate that legal framework is one of the factors that influences energy policy in oil producing countries. Strong legal institutions and legal frameworks prevent illegal actions which may be practiced by decision-makers.

During conducting interviews for the present study, oil experts and members of Iraqi and Kurdistan Region Parliaments also refer to the role of oil institutions in the dispute between the federal government and the KRG over the management of the country's natural resources. Hence, oil institutions have a positive role in legal compliance. It is argued that existing proper laws and legislations related to energy policy may not be effective if these legislations are not supported by strong institutions (De Medeiros Costa and dos Santos, 2013). It is also argued that if natural resources have positive contributions in a country like Norway and have negative contributions in a country like Nigerian, it is due to the presence/absence of strong political and legal institutions (Buonanno et al., 2015). The significant role of institutions for natural resources management and avoiding resource curse is broadly discussed in the literature. Oil curse is linked strongly to the role of institutions in resource management (Sala-i-Martin and Subramanian, 2008; Bank, 2007; Mehlum et al., 2006; Robinson et al., 2006; Charlier and N'cho-Oguie, 2009; Stevens and Dietsche, 2008; Van der Ploeg, 2011; De Medeiros Costa and dos Santos, 2013; Mehrara, 2009).

The institutions that manage oil resources have a significant role in developing energy policy if there is a rule of law in the country. Ongoing dispute between the federal government in Baghdad and the KRG may lead to creating informal institution. This causes corruption and absence of market competition (Silvestre et al., 2018). In addition, these institutions negatively affect the IOCs interests and weaken enforcement of the rule of law (Korppoo, 2018). Hence, the rule of law influences energy policy and assists oil-producing countries to avoid resource curse (Kolstad and Wiig, 2009; Mehlum et al., 2006; Norman, 2009). Significantly, examining the relationship between legislations and institutions in Iraqi federal state could be a tool for determining the success or failure of managing natural resources. As Iraqi and the KRG oil institutions remain weak, it may lead to oil curse in the country. Thus, the establishment of democratic institutions for managing natural resources in Iraq may be considered an effective method for the development oil and gas sector (Birdsall and Subramanian, 2004). In addition, the establishment of independent institutions for the management oil and gas in the Kurdistan Region may assist in solving the

issues related KRG's oil contracts. Reviewing the contracts by federal institution and amendment of the KRG's oil and gas law may also have a great impact in settlement of the dispute.

On the one hand, the KRG argues that all its contracts are constitutional and that the KRG has the right to sign petroleum contracts with IOCs. On the other hand, the federal government claims that the KRG does not have the right to sign oil contracts without the consent of the federal government, which would mean that all the contracts signed by the KRG to date are unconstitutional. It is argued the KRG has mismanaged forty to forty-five billion dollars since 2008 from oil revenues (Banco, 2017). This dispute will not only affect legal and political circumstances of the country; it will affect sustainable development of natural resources of the country. In such situations, application of any regulation or law related to sustainable development will be difficult (Maniruzzaman and Al-Saleem, 2017).

In addition, the KRG relied on Production Sharing Contracts (PSCs) to develop the oil sector in the region which is rejected by the federal government of Baghdad. According to the federal government this model is not beneficial for the Iraqi people; therefore, Baghdad has adopted Technical Service Contracts (TSCs) (Cameron, 2011). Both sides have approached different energy strategies and policies. Thus, the present work examines the power of constitution in allowing the KRG to take a different energy policy contrary to the federal government. The paper also provides a number of policy implications to contribute to solving the issue. Major amendment in oil and gas law in Iraq and Kurdistan Region, reforming energy policy and reviewing the KRG's oil contracts by independent institutions will result in effective energy policy in the country.

3. Methodology

The dispute between Iraq and the Kurdistan Region regarding the KRG's oil contracts and the role of the Iraqi constitution have been discussed in the literature (Crawford, 2008; Cameron, 2011; Al-Mehaidi, 2006; Holland, 2012). Most studies regarding this issue have been written during the beginning of signing the oil contracts. Other recent studies argue that federal constitution is designed in favor of regions and provinces for managing their energy policy and the role of the federal government is restricted in this regard (Abdulrahman, 2017; Walsh, 2018; Ipek, 2017; Romano, 2014a; Wahab, 2015). However, all these studies are based on anecdotal information, which have largely overlooked the views of local experts. Thus, the present paper is an attempt to combine the view of local experts and policy makers with the existing literature to provide effective results and policy implications.

This paper has adopted a qualitative design, where semi-structured interviews are conducted with thirty members of Iraqi and Kurdistan Parliaments, influential legal and oil experts and policy makers. Even though the KRG has published some of the contracts for public, but data related to financial and technical issues of the contracts remain confidential. In addition, it not easy for researcher to obtain accurate data in related area because these data are not for public and only a few members of government and parliament have access to them. Thus, the paper combines available literature with the qualitative interviews to assess the power of constitution in enacting energy law in Iraq. The main question that the paper attempts to answer is: to what extent the Iraqi constitution has granted KRG the right to sign oil contracts with IOCs independent of Baghdad's approval? To answer this question, The KRG's contracts will mainly be analyzed under the light of (1) Iraqi constitution, (2) draft of oil and gas law in Iraq and (3) Kurdistan's oil and gas law and the views of local policy makers and experts

The rest of the paper is structured as follow: Section 4 of this paper analyses the power of constitution for the management of present and future oil fields in Iraqi Kurdistan. In the Sections 5 and 6 the contracts are compared with the oil and gas law of the Kurdistan Region and also with the Iraqi oil draft which is yet to be adopted by the Iraqi Parliament. Finally, Section 7 provides conclusion with number of policy implications.

4. Management of oil and gas under Iraqi constitution

The constitution of Iraq has determined the limits of federal power with the power of regions and provinces. Article 13 of the constitution confirms that constitution is the highest legal statute and is a supreme law in all Iraq (Iraqi Constitution, 2005). Article 110 of the constitution identified the matters that the federal government have absolute power for issues related to: (1) national security policy (2) foreign policy (3) fiscal and customs policy; (4) standards, weights and measures, (5) citizenship and migration, (6) postal and broadcasting policies, (7) budget, (8) flowing water resources policies, and (9) statistics and census (Iraqi Constitution, 2005). In addition, article 114 of the constitution mentions seven types of matters which are subject for sharing authorities between the federal and regional governments. Neither article 110 nor 114 explicitly mention that petroleum policy is part of federal or regional governments. Here, the important point is that the federal government and the KRG cannot claim for absolute power over natural resources. Thus, managing and developing energy sector could be found only in articles 111 and 112. The two articles make a balance between central and regional governments for management oil and gas in the country. The articles do not allow a single institution to have exclusive power for managing petroleum resources in Iraq (Richter, 2014).

It is clear that the most important articles related to the distribution of power over natural resources are articles 111 and 112 of the Iraqi constitution. The constitution explains that managing natural resources and sharing revenues should be arranged between federal and regional governments. Some scholars claim that the article 112 creates long term dispute between federal and regional governments because previous federal experiences of other countries have proved that. They believe that it is a mistake to grant regions a privilege in conflict of laws between federal and regions (Moradi and Saie, 2013). However, comparing Iraq with other failed federal experiences may not be appropriate because the Iraqi situation is unique. There were two governments inside Iraq including federal government and the KRG before the enactment of the new constitution in 2005.

4.1. The language of federal constitution

As alluded for above, Iraqi legislators attempted to make a balance between the federal government in Baghdad and the KRG and convince both sides by distribution of power and sharing revenue between the two governments. In addition, the KRG and federal government are not the only actors in this dispute, but major regional and global powers have their interest in this long-term dispute. According to Quan, articles 111 and 112 of the Iraqi constitution enforce federal government to share natural resources in the country. This is an opposite approach to Iraqi constitution in 1970 because the previous constitution was emphasized on public ownership of natural wealth. This decentralized management reflects the American influence on the new constitution (Quan, 2012).

However, the generalization and ambiguity of article 111 has produced different interpretations and various understandings. The Article states “Oil and gas are owned by all the people of Iraq in all the regions and governorates” (Iraqi Constitution, 2005). In interpretation of this article, Zedalis believes that the article obliges political leaders of Iraq to utilize oil and gas in the county for benefits of all Iraqi people regardless of ethnic or religious groups. The article enforces provinces to give priority to federal government rather than thinking about their regions or provinces alone (Zedalis, 2013). It is also argued that the Iraqi government wants to rely on this article regarding illegality of KRG's PSCs. The federal government claims are based on article 111 which indicates that the ownership belongs to Iraqi government, not to any particular region or sector (Holland, 2012).

It is clear that most scholars have been confused in the distinct language between article 111 and 112. While the language of article

111 indicates that natural resources are part of national resources and belong to Iraqi people, article 112 refers for sharing power over oil and gas between federal government and KRG. This article also emphasizes on consultation and cooperation between Iraqi government and regional government for managing petroleum policy in the county (Zedalis, 2012). This understanding expresses shallow interpretation of the two provisions in particular article 112. Article 111 is short and general, but article 112 needs deep investigation and comprehensive understanding which is explained in Section 4.2 below. Thus, most members of Iraqi and the Kurdistan Region parliaments believe that neither the KRG nor the federal government can depend merely on article 111 for enacting energy law. According them, article 111 should be understood in the context of article 112 of the constitution.

4.2. Distinguishing between current and future oil fields in the constitution

Article 112 (1) states that “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” (Iraqi Constitution, 2005). The article has been interpreted superficially and narrowly because there is a belief that the article refers to cooperation between federal and the regions (Zedalis, 2009). Both articles 111 and 112 can be interpreted from two different perspectives because the meaning is not clear. On the one hand, article 111 can be understood that oil and gas with their revenue belong to all Iraqi people. It means that the federal government has the right to enact legislation for managing petroleum and distributing its revenue in Iraq. On the other hand, article 112 grants a greater right to regions and provinces for managing ‘future fields’. Hence, there is a contradiction between article 111 and 112 of the constitution (Deeks and Burton, 2007).

Article 112 provides the details about managing oil fields that was under production prior to the enforcement of the constitution and the fields will be discovered in the future. If the federal government manages present oil field or the KRG managing future fields, in both conditions the petroleum will be managed by all Iraqi people in the federal government and the regions (Crawford, 2008). The most significant point for understanding and interpreting article 112 is the distinction between ‘present fields’ and ‘future field’. This has been overlooked by many scholars and petroleum analysts. Article 112(1) merely covers the “present fields”, and “present fields” refer to the fields which existed before the enactment of the new constitution in 2005. Article 112(1) obliges the federal government to work with regions and provinces for managing petroleum policy and distribute revenue fairly regarding these fields (Crawford, 2008).

It is important to mention that the language of article 112 of the constitution does not grant “exclusive” rights to federal government. The article also limits federal government's power on petroleum regarding “present fields”. The article enforces the federal government to cooperate and collaborate with oil producing regions and provinces to manage petroleum in these fields. Hence, misinterpretation of this article led to major disputes between Baghdad and Erbil governments (Romano, 2014b). In addition, the second section of article 112 emphasizes on cooperation between federal and regional government and states “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” (Iraqi Constitution, 2005). This section of article 112 explains the cooperation regarding future development and constructing long term policy between federal and regional governments (Crawford, 2008).

Hence, the federal constitution of Iraq has approached decentralization regarding energy policy. It is argued that the constitution grants regions and provinces the right to manage their oil fields which

have been discovered after 2005 (Billon, 2015). Other scholars, Choudhry (2008) for instance, indicates that the constitution grants provinces and regions more power compared to federal government for managing natural resources. He confirms that article 112 along with article 115 and 121 grants “legal supremacy” to regional governs over federal governments regarding petroleum issues (Choudhry, 2008). Both articles 115 and 121(2) give priority to regions’ legislation over federal legislation. In case if there will be contradiction for authorities that do not mention as federal power according to constitution, the regional laws will apply (Iraqi Constitution, 2005). Thus, article 112, 115 and 121 limits federal governments’ legal power over natural resources in three main ways. First, federal role is subordinate to regions and provinces in case if there is any contradiction between them. Second, federal management power is shared with provinces and regions. Third, federal power is restricted to cover only present field (Choudhry, 2008).

In interpreting the first paragraph of article 112, most of the participants of this study argued that the paragraph only covers present fields which were producing oil before enforcement of the new constitution. However, all other fields which have not been discovered during formation of Iraqi constitution lie outside article 112 (Iraqi Constitution, 2005). Importantly, the KRG has not signed any contracts with IOCs without mentioning about Iraqi constitution as a legal power base. All the contracts that were signed after the enactment of the new constitution were pursuant to the second paragraph of article 112 of the constitution (Mnrs, 2018). The second paragraph of the article 112 encourages both federal and regional government to cooperate for developing oil and gas sector and establish proper energy policy. Thus, it is argued that the KRG was successful by distinguishing “future fields” from present oil fields during the formation of the constitution. According to Voller (2013) the term is full of misty and not clear. The KRG used the term in the article 112 for its benefits and signed several dozen contracts with IOCs based on this article (Voller, 2013).

This argument confirms the logic of KRG’s oil contracts because article 112 is a legal base for KRG’s oil contracts. In the preamble of all the signed contracts, the term “consistent with the Constitution of Iraq including Article 112” has been repeated to give legitimacy to these contracts (MNRS, 2018). These articles of the constitution refer to revenue sharing among all Iraqi people. These provisions are general principles and guidelines for fair share of natural resources. It is Iraqi political parties’ responsibility to make law from these principles (Wahab, 2014). Thus, the Iraqi Federal Supreme Court rejected federal government’s claim in 2012 for banning the KRG’s oil export (Walsh, 2018). This confirms that the KRG has legitimacy to enact energy law and sign petroleum contracts.

5. Oil and Gas Law of the Kurdistan Region of Iraq

After the second world war, most countries adopted free market economy (Hasan and Ibrahim, 2016). The KRG, as a semi-autonomous region, has attempted to be more open to foreign investors in general and IOCs in particular (Ahmad et al., 2017). Therefore, in the absence of a federal energy law, the KRG issued its own law to manage the region’s energy policy. The KRG attempted to manage its resources immediately after the formation of new federal constitution in 2005. While the Ministry of Oil (MOO) in Baghdad does not have oil and gas law yet, the KRG drafted its petroleum law in October 2006 which was later revised and approved by the Kurdistan Region parliament in 2007 (Voller, 2013). Enacting oil and gas law by the KRG is considered a significant strategy to benefit all Iraqi people.

The KRG practiced its constitutional rights to enact the law and develop its natural resources (Van Meurs, 2008). The constitution in article 121 (1) grants regional governments power to “exercise executive, legislative, and judicial powers in accordance with this constitution” excluding all these authorities which are exclusive to the federal government (Iraqi Constitution, 2005). In addition to articles 111 and

112, the KRG also depended on these articles for issuing the first oil and gas law in 2007 (Crawford, 2008). The KRG is recognized by the federal constitution and the Kurdistan Region has legal capacity to enact law and regulations (Hasan, 2016). The KRG also has the right to exercise legislative, executive, and judicial powers (Ahmad and Cheng, 2018).

The KRG’s Oil and gas law No (22) contains seventeen chapters and sixty-one articles. The KRG’s constitutional rights are supported through the law by preventing federal government to take any unilateral action against the region. Article 2 (2) of the law reject any legislation, agreement, particular conference, memoir understanding or any agreement from federal government without authorization of Kurdistan regions’ institutions. The law depended on articles 115 and 121 of the constitution to protect this constitutional right (Oil and Gas Law, 2007). Hence, it is important to explain the KRG’s constitutional rights and its’ legal capacity to enact the law. Importantly, does Iraqi constitution grant regional and local legislation priory over federal legislation?

The first important article in the constitution for responding to this question is article 115. Majority of interviewed legal experts in the Kurdistan Regional parliament agree that article 115 refers to the legitimacy and supremacy for regional powers over federal powers. According to them, the article indicates that any power which is not mentioned as exclusive federal or shared power between federal and regions will be part of regions’ and provinces’ powers. This means that any legal power that is not mentioned in either article 110 and 114 is considered as a regions’ power. The supremacy will be granted to regional power in this regard, too. In addition, the article stated explicitly that if any conflict of laws accrued regarding not mentioning power between federal and regional authorities, “priority shall be given to the law of the regions”, (Iraqi Constitution, 2005). Thus, the oil and gas law in Kurdistan region relied on articles 115 and 112 of the constitution for using its own legal right regarding petroleum policy. This reflected in article 3 (4) of the KRG’s oil and gas law which focuses on these two articles of the constitution, while article 3 (1) of the law refers to article 111 of the constitution to prove that the KRG has ownership over natural resourced as well as federal government (Oil and Gas Law, 2007).

The second article in the constitution which grants legal supremacy for regions over federal law is article 121. The article 121 (second) grants power to regional government for amendment and modification of federal legislation if there was any contradiction between regional and federal legislation. This article has limited federal power for issues which are exclusively outside of federal authorities. The article refers to contradiction between “regional and national legislation”, but it does not mention ‘provinces’. From here, this article will be applied only to Kurdistan Region because it is the only region in Iraq (Iraqi Constitution, 2005). Hamoudi (2011) argues that the article “permits a region to limit the applicability of national legislation.” He also confirms that the legislator distinguished between the region and provinces because there is not any similar power for provinces in the constitution (Hamoudi, 2011). Thus, Iraqi constitution not only grants Kurdistan Region the right to enact petroleum law, but it grants power to reject federal legislations for issues outside of federal power.

5.1. Oil and Gas Law and management of natural resources with federal government

Despite enacting KRG’s oil and gas law, the management of oil fields is considered a significant issue between Erbil and Baghdad in general and in the disputed areas in particular. According to article 140, issues of these areas should be solved in a referendum and ask people in these areas whether they want to be part of the KRG or federal government (Iraqi Constitution, 2005). The disputed areas includes all areas which are presently outside of the Kurdistan Region’s authority, but the KRG claims to be Kurdish territories which were ‘Arabized’ by former Iraqi regimes and now attempts to return these areas back to under its control (Romano, 2014a). The KRG’s oil and gas law attempted to prevent

the MOO and Iraqi draft law to managing petroleum policy in these areas. Article 19(4) of the law rejects any petroleum activity by Iraqi government in these areas without KRG's permission "until such time as the referendum required by article 140 of the federal constitution is conducted." (Oil and Gas Law, 2007). Some scholars refer to illegality of this unilateral decision by the KRG because they believe that these areas are under federal government's jurisdiction. They also accuse KRG by having petroleum operation in the disputed territories without cooperation with federal government (Group, 2012). Article 19(4) is considered a response to federal government after they listed unilaterally most of oil fields in the disputed territories for development under the MOO policy (Susman, 2007). According to a number of parliament members interviewed for this article, neither the KRG nor the federal government have a right to manage petroleum in these disputed areas unilaterally.

Regarding legality of KRG's contracts, Iraqi constitution determined legal status of the contracts which signed by KRG before formation of the constitution in 2005. The constitution granted approval to legislations and contracts of the KRG prior to the enforcement of the constitution. Article 141 of the Iraqi constitution explicitly confirmed that all KRG's legislations and contracts "shall be considered valid". Thus, the contracts were signed by the KRG before 2005 have legitimacy according to the Iraqi constitution (Iraqi Constitution, 2005). Moreover, oil and gas law of the region granted a Regional Council reviewing all contracts which have been signed by the KRG before enacting oil and gas law in Kurdistan. The Regional Council has the power to make these contracts consistent with KRG's oil and gas law. The decisions of the Council will be crucial, but the Council should take the circumstances when the contracts have been signed. This is expressed obviously in article 54 of the law (Oil and Gas Law, 2007). This is different direction compared to the previous draft of Kurdistan region oil and gas law in 2006. According to article 74 of the draft, all contracts which have been signed by the KRG and approved by KRG's oil minister prior to enforcement oil and gas law in Kurdistan "shall remain enforce" (Zedalis, 2010).

5.2. Breaching the constitution

A number of parliament members and policy makers in the Kurdistan Region and Iraq refer to some constitutional breaches by the KRG's oil and gas law. They argue that the law is 'too flexible' and 'too friendly' to investors and contractors. For instance, article 43 of the law grants significant power to the minister of natural resources to grant 'waive of sovereign immunity' in the oil and gas contracts relating to "legal proceedings and the enforcement of judgment" (Oil and Gas Law, 2007). According to the law, KRG's oil minister can determine terms and conditions of the contracts. The minister has the authority to regulate these contracts (Zedalis, 2017).

Moreover, the law grants a significant power to KRG's oil minister for managing petroleum in the country and the minister has the right to act on behalf of the whole Region (Kelly, 2009). Waiver of sovereign immunity is one of the most important clauses for investors. The clause is considered a major success for contractors during contract negotiation and drafting contracts because it protects the contractors in possible future disputes and arbitrations (Sagar, 2014). Applying this clause in oil and gas law of the KRG and KRG's contracts is an obvious breach of article 109 of Iraqi constitution because this power is considered a part of federal authorities. Thus, article 43 of the KRG's oil and gas law should be removed or amended to be consistent with the Iraqi constitution.

Furthermore, a number of parliament members indicate that the energy policy has not been institutionalized in the Kurdistan Region. This factor negatively contributed to the dispute. According to them, the effectiveness of KRG's law is questionable for the establishment of several entities related to petroleum policy. Article 10–15 of the law refer to establishing several public institutions in the region for

managing and developing petroleum policy. Kurdistan Exploration and Production Company (KEPCO) described in Article 10, Kurdistan National Oil Company (KNOC) projected in Article 11, Kurdistan Oil Marketing Organization (KOMO) described in Article 12, Kurdistan Organization for Downstream Operations (KODO) Article 13 and Kurdistan Oil Trust Organization (KOTO) projected in Article 15 (Oil and Gas Law, 2007). All these entities were supposed to be established after 2007, but none of them have yet been created by the KRG. Thus, the legislator was quite ambitious for developing independent public entities, but management of KRG's energy policy by oil minister solely and centrally makes transparency of the policy questionable.

6. The federal oil and gas draft law

Constitution is an essential and basic legal document in the country, but it does not provide details in most cases. It is parliament's responsibility to enact legislation for organizing any specific issue. In the mid of 2006, Iraqi Prime Minister Nouri al Maliki appointed three members of oil and gas committee to draft oil and gas law for Iraq. The committee completed the draft in several months and they sent it to the Council of Ministries for approval. The Council approved the draft in February 2007 (Blanchard, 2009). The KRG's representatives in the committee participated in the drafting process in a high level. They insisted to protect KRG's right for signing agreements with IOCs in line with Iraqi constitution. They were also concerned about the role of federal oil and gas council in reviewing KRG's contracts (Muttitt, 2011). However, the draft was criticized by political parties and majority members of Iraqi parliament. Thus, the draft has not been approved by the Iraqi parliament and Iraq still does not have an oil and gas law.

In addition, the draft was criticized by academics, oil experts and oil workers' union because the drafting committee did not consult them (Hasan, 2018). Iraqi oil federation unions started a strike in June 2007 because they believed that the draft will have negative impacts on Iraq's economy (Blanchard, 2009). An oil expert like Mahdi argues that the draft law will allow IOCs to exploit Iraq's natural resources for a long term. He believes that the draft will eliminate all attempts which took place for nationalizing Iraqi oil industry in 1972 because the industry should be developed by national companies, workers and technicians (Mahdi, 2007). The process of drafting was also criticized because it was prepared by a committee which was appointed merely by the prime minister. After finishing the draft, Iraqi government sent a copy to Iraqi parliament, oil companies, IMF and US government (Bejesky, 2010).

The draft took a different energy policy from that of the KRG by granting oil minister a power to implement Service contracts (Federal Oil and Gas Draft Law, 2011). Thus, both federal government and the KRG employed different models for oil contracts; each claiming that their model is in the best interest of Iraqi people. The draft also emphasizes on reviewing all contracts which have been signed between the KRG and IOCs. Article 47 (2) confirms that all the contracts signed by the KRG should be reviewed by specific body from Kurdistan Region within three months after enforcement of this law. The body should investigate whether these contracts are consistent with provisions of this law or not. In addition, the contract should "achieve the highest economic benefit for the Iraqi People" (Federal Oil and Gas Draft Law, 2011).

Regarding future contracts, Annex 3 of the draft grants KRG a right to negotiate and sign petroleum contracts with oil companies in the region. However, these contracts will be subject to approval from federal oil and gas council (Sakmar, 2007). Thus, Maliki's cabinet attempted to pass the draft law quickly to review all signed petroleum contracts in general and those signed by the KRG in particular (Anderson, 2013). Nevertheless, there is not a valid law in Iraq for managing petroleum in the county because the oil and gas law has not been approved by the parliament. In the absence of law, the oil minister claims that he depends on the law of 1972 for managing petroleum policy in Iraq.

7. Conclusion and policy implications

Energy law, as a concept, has been developed by Heffron and other influential legal scholars (2016b; 2016a; 2018). Traditionally, this field was more about oil, gas and coal, with exception of some legislations which crossed this border. However, this field has developed broadly in the new century. Energy law as a discipline is now concentrating on management of natural resources in general (Heffron, 2017). In Iraq, energy law still does not have a significant position among academics, lawyers and policy makers. This field is still circulating around oil and gas only. In addition, the direction of energy law is still not clear in the country because both regional and federal authorities have different approaches in energy policy and they have different interpretations for energy law. Thus, the debate on legality of the KRG's contracts continues. The KRG had signed three contracts with IOCs before the formation of Iraqi constitution in 2005. These contracts are subject to article 141 of the constitution. The article 141 approves all laws and contracts which were enacted or signed by Kurdistan Region authorities since 1992–2005 (Iraqi Constitution, 2005). Thus, the oil contracts which signed by the KRG before 2005 are valid and legal. However, the KRG has signed about sixty oil contracts after the enforcement of Iraqi constitution in 2005. All these contracts are Production Sharing Contracts (PSCs). Articles 110 and 114 determined federal and regions authorities, but the two articles did not mention that petroleum is a part of the federal or regions authorities.

Here, neither the federal government nor the KRG claims for absolute power over hydrochloric resources in the Kurdistan region. Thus, management of oil and gas could be found merely in articles 111 and 112. The two articles make a balance between federal and regional governments for managing petroleum resources in Iraq. First section of article 112 refers to cooperation between the federal and regional governments for management for the 'present fields' only. Thus, the KRG contracts which were signed after enforcement of the constitution in 2005 are subject to section two of article 112. Section two of the article obliges both federal and regional governments together to develop petroleum policy in Iraq. This means they have the responsibility to manage future fields or the fields that were discovered after enforcement of Iraqi constitution in 2005.

Even article 112 encourages both the federal government and the KRG to work together for management oil and gas, but the KRG argues that they cannot wait for the issuance of the federal oil and gas law. Based on these articles of the constitution, the KRG issued its oil and gas law and has managed petroleum policy in the region. The KRG depended on the constitution and its law for signing all the oil contracts with IOCs. Dependent on the power of the constitution is obvious in the KRG's oil and gas law and in the contracts. Moreover, federal oil and gas law draft recognizes KRG's oil contracts, if they will be reviewed by a competent body in the Kurdistan Region. As a result, Iraqi constitution has granted Kurdistan Regional authorities a power for enacting oil and gas law, managing petroleum resources and signing oil and gas contracts with IOCs. This right is reaffirmed in the KRG's oil and gas and federal oil and gas law draft. However, the KRG exceeded the power of constitution in its law and in the contracts because the KRG managed some oil fields in the disputed territories unilaterally. The KRG also waived sovereign immunity for IOCs without federal governments permission.

Moreover, the claim of illegality of the KRG's contracts is not solely circulated around the constitution, but other factors such as non-transparency of KRG's energy policy and the contracts also contributed to this claim. According to some of the interviewed oil experts and policy makers, over centralism and non-transparency of KRG's energy policy have significantly contributed to deteriorating the dispute. For example, the KRG's oil minister has absolute power to negotiate, execute and monitor contracting process. He has continuously exercised all these powers since 2006. Therefore, a number of legal and policy implications are recommended.

7.1. Amendment of Iraqi constitution

It is claimed that the KRG attempts to exploit Iraqi constitution because the articles related to petroleum allows the KRG towards economic independence. It is also claimed that revenue sharing destabilizes the country and it motivates minorities for self-determination and secession (Moss, 2013). In addition, the federal government claims that KRG's contracts are illegal as they have mismanaged natural resources of the country. It is argued that the ambiguity of some articles in Iraqi constitution has created the dispute between federal and the KRG regarding management of natural resources (Ipek, 2017). For all above reasons, amendment of the Iraqi federal constitution can be suggested as a solution for the dispute.

However, according to interviewed legal experts, the amendment of constitution is a weak possibility. According to article 126 of the constitution, amendment process is difficult and it would be impossible in some circumstances. Section three of the article stipulates that amendment of general issues of the constitution require two-thirds of members of Iraqi parliament. In addition to that Iraqi people has to approve the amendment in a general referendum.

Furthermore, section four of the article which is related to amendment of regions' power makes constitutional amendments almost impossible. Section four of article 126 does not allow any amendment which would decrease the power of the regions that are not part of federal authorities except in two conditions. Firstly, the parliament of the region has to approve the amendment. Secondly, the majority of people of the region has to accept this amendment in a general referendum. Hence, the constitution cannot be amended in these circumstances. Finally, the paper found that the constitution is the most powerful document in the formation of energy policy and the management of natural resources in the country. Provisions of constitution should be formed clearly to avoid its misinterpretation because all laws and regulation will follow these provisions.

7.2. Amendment of oil and Gas Law of the Kurdistan Region of Iraq

All interviewed members agree that the KRG has a power to develop and manage new fields in the Kurdistan Region of Iraq. According to them, revising and amending the KRG's oil and gas law is considered an effective solution for the dispute between Baghdad and Erbil. The law could be amended to be consistent with Iraqi constitution. The following points could be considered in this regard:

1. Developing energy infrastructure is considered as one of the crucial elements for energy sector. United States is considered as a leading country for investing hugely in this area. The UK and the EU have also invested heavily in energy infrastructure in their countries. This investment can be organized through energy law because the main purpose of energy law is to encourage building new energy infrastructure (Heffron, 2014). Both Iraqi and KRG governments can follow the US, UK and EU for building energy infrastructure in the next decades. This policy will assist Iraq and the KRG for avoiding oil curse and increase economic growth in the country. This should be a part of oil and gas law because energy infrastructure is weak and inefficient in the Kurdistan Region.
2. Decentralization of KRG's energy policy is considered an effective method toward institutionalizing petroleum policy in the region. Articles six to nine of KRG's oil and gas law granted the minister of natural resources a board power, including negotiation and signing oil contracts. These articles need amendment and transferring some of the powers to Regional Council or Regional Parliament. The KRG can benefit from Norwegian Model for developing its own energy policy. Norway is considered as a success case because three different decentralized institutions which are national oil company, government ministry and regulatory body manage petroleum in the country (Thurber et al., 2011).

3. It is discovered in the previous literature that the absence of oil institutions or weak institutions contributes considerably to oil curse (De Medeiros Costa and dos Santos, 2013). This is consistent with the KRG's case because the KRG does not have strong oil institutions to assist the region in avoiding oil curse. In addition, in interviewing oil experts and members of Iraqi and Kurdistan Region Parliaments, the paper found that lack of independent and strong oil institutions significantly contributed to the dispute between the federal government and the KRG over the management of the country's natural resources. The oil and gas law of the Kurdistan Region enforces the KRG to establish various petroleum entities to supervise petroleum industry in the Kurdistan Region such as KEPCO, KNOC, KODO, KOMO and KOTO. Postponing the creation of these entities does not benefit Kurdish and Iraqi people because there is a strong link between law enforcement and corruption (Gupta, 2017). The absence of these bodies affects the petroleum sector negatively because the ministry cannot supervise all petroleum operations. This step also assists the KRG to decentralize its petroleum policy.
4. According to a number of parliamentary members, transparency of KRG's energy policy is questionable because accurate financial and technical data is not available. There is a number of reasons that push both IOCs and host governments to hide oil-related data from the public. For instance, concerning of future contracting enforces the host government not to disclose licensing information for a period of time. IOCs also do not have the motivation to release these data because of financial concerns (Cameron and Stanley, 2017). The ministry of natural resources actively published oil contracts and reports related petroleum until 2012, but there is not much data available since then. Thus, establishment of democratic institutions related petroleum has positive impact on increasing transparency of KRG's energy policy.
In addition, most of the parliamentary member are doubtful about KRG's oil revenue. Even though the KRG increased oil production since 2009, the KRG still suffers from a severe financial crises and let government employees' payments fall in arrears (Ahmad and Cheng, 2018). This fact refers to the level of oil curse in the region. This should not happen because oil prices are recovering. It is also expected that the oil prices will remain higher than the average (Bentley and Bentley, 2015). Thus, the KRG should take advantage of that and use oil revenue to recover from financial crisis.
5. Policy makers should be aware of granting primacy of "the cost of decision-making and the utilization of cost-benefit analysis" in society (Heffron and Mccauley, 2017). The KRG should evaluate benefits of its contracts and reviewing them. Thus, an article should be added to the law for granting the regional parliament a power for reviewing signed contracts. If the revision will be in cooperation with federal authorities, it will have more impact on resolving the dispute.
6. Article 43 of the oil and law of the KRG should be modified or removed. According to the Article, the KRG waives its sovereign immunity for the IOCs. This causes significant issue for the KRG in the future because it prevents the KRG to nationalize oil in any circumstances and it makes the KRG's position weaker in any potential disputes with IOCs in domestic or international courts. After attracting significant number of IOCs, the KRG is not required to waive of the Sovereign immunity.

7.3. The Federal Oil & Gas Draft Law

Energy law is growing quickly as one of the significant legal subjects. There are many universities which provide energy law as an academic subject in both the USA and the UK (Heffron et al., 2016). However, knowledge about energy law and its significance is still weak among Iraqi politicians. Since the enforcement of Iraqi constitution, federal government attempts to have a new oil and gas law, but Iraqi political parties in parliament have not reached an agreement yet.

Remaining a rich resource country like Iraq without a law for managing energy sector will increase corruption because there is a strong relationship between law enforcement and corruption (Gupta, 2017).

Furthermore, the continuing of this legal conflict between the KRG and the federal government will contribute in deepening oil curse in the country. With all factors causing oil curse and discussed in the literature (Al-Kasim et al., 2013; Stevens and Dietsche, 2008; Mehrara, 2009), legal dispute between federal and regional governments over the management of natural resources can be considered as another additional factor for oil curse. In this case, federal authorities may not able to monitor energy policy in their federal regions and this decreases transparency in their policy. For instance, the federal government and the KRG continuing on this legal fight for more than ten years and there is not much attention on benefiting of oil revenues for economic growth in the country.

In addition, the KRG issued its law and signed oil contracts independently in the absence of the federal energy law. Thus, approving federal oil and gas draft by Iraqi parliament is considered an effective energy policy not only for federal government, but for the KRG too. A federally approved law will grant KRG's oil contracts greater legal power because the draft has significant articles that services federal and regional energy policy.

However, the federal government and the KRG should concede to each other. The federal government needs a new policy toward the KRG because the KRG has already signed the contracts. Reviewing the contracts by regional body to make contracts consistent with constitution would benefit the KRG, IOCs and the federal government. This will assist to solve this long term dispute under the power of Iraqi constitution. In additions, it is the KRG's responsibility to not sign any other petroleum contracts for three reasons. First the KRG has signed more than sixty oil and gas contracts which are enough to develop petroleum sector in the region. Second, the KRG has to change the terms and conditions of the PSCs to fit environmental and economic conditions similar to those in the developed world. Third, the KRG has to leave a space for Kurdish national company KEPCO to work on some oil blocks in the region.

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