

## The constitutionality of the Iraqi Kurdistan Region's Referendum to secede

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### ARTICLE INFO

#### **Article History:**

Received: 1/3/2022

Accepted: 12/6/2022

Published: Winter 2022

**Keywords** Kurdistan regional government, Iraq constitution, Iraq government, Referendum, Self-determination Referendum

#### **Doi:**

10.25212/lfu.qzj.7.4.36

### ABSTRACT

The referendum is a mechanism whereby people can give their opinion on the public issues whether on the constitutional, legal or political issues. However, the referendums can be held by the executive or legislative powers or by the president of the state through a constitutional text. Kurdistan region of Iraq (KRI) conducted a referendum on 25 September 2017 by an overwhelming majority vote of roughly 93.25 percent in favour of Kurdistan secession. Therefore, this paper aims to investigate which sort of referendums exercised by Kurdistan Regional Government (KRG), and the constitutionality of the Kurdistan region referendum from the perspective of the Iraqi Constitution. The paper discovers information from secondary sources to cross-examine opinions and reach conclusions. It is concluded that the referendum in the Kurdistan region was a political referendum, therefore its constitutionality can be assumed that imposing the right of self-governance as a law cannot establish a State; it can only occur with the endorsement of the mother State, through a constitutional structure. At the other side, the question of the referendum's constitutionality is essentially a matter of legal controversy, which goes further than the facts of the constitutional framework.

## 1. Introduction

A referendum is an electoral process through which an issue is resolved within a national setting. Such mechanism is usually utilized by non-state actors like civil societies and multilateral organisations to solve some important teething problems.



A referendum is an avenue through which a crucial issue is resolved at national political settings. The basic qualification for the conduct of referendum is when an issue goes beyond the unilateral capacity of a person to decide upon within a state. In some cases, a referendum is evoked to test the popularity and acceptance of a proposed decision within a national setting. Likewise, it should be iterated here that referendum as a mechanism of democracy is adopted in order to attain justice, fairness, and equity in deciding over a seeming complicated issue. In other words, there is a close connection between democracy, development and referendum (Wilden, 2018). Normally, the essence of conducting referendum is to justify the adopting of a certain line of action in a given society. In the circumstance of separatist actions by a seceding faction in a host nation, the role and the dictate of a national constitutional framework is invaluable. It is invaluable because the modus operandi of the conduct and qualifications are normally spelt out by the national constitutional framework of a state. Thus, referendum in all cases has to be in alignment with the requirements of the national constitution ( Max Planck Institute for International Law,2021). Generally, one needs to recognize that most national constitutions are complex and cumbersome with regard to the issue of interpreting the function of referendum in self-determination and secession. Some states only allow self-determination through the conduct of referendum as long as that self-determination does not preclude secession from the federation. The concept of secession and self-determination are usually treated separately by the national constitution, as self-determination is not automatically synonymous to secession, since the latter is an extreme case of self-determination which most states abhor. The issue of self-determination is more easily determined by constitution than secession from the national entity. However, today the people assume the referendum as the first and final say in their affairs, especially in resolving issues. Hence, this paper purposes to provide enlightenment on the objectives of the research by deliberating on the definitions and usability of referendums as this would provide better understanding when discussing which type of referendums exercised by Kurdistan regional government (KRG), and the constitutionality of referendum of KRI from the perspective of the Iraqi Constitution. Accordingly, the paper is divided into two parts; firstly, the concept of referendums, where the definitions, origins and types of

referendums. Secondly, identifying Kurdistan region of Iraq (KRI), legitimacy of KRI Referendum from Iraqi Constitutional Perspectives.

## **2. Concept of Referendum**

Referendum<sup>1</sup> is defined as referring to people's opinion by rejecting or accepting any general issue, such as legal, constitutional, political issues as the owner of sovereignty. (AlKharasani,2000; Zakaria, 1971, p.474; Al-Bustani,1980, p. 457 & Green, 2018).

The origin of referendums in the modern era traces back to Switzerland and France because the Latin word referendum was recognized in the diplomatic context in Switzerland, where the first seed of referendum was planted in the form of legislative referendum. It is considered to be the first to define legislative referendum in its 1874 constitution under Article 89 that states: "Federal laws and federal decrees must be approved by both Councils. Federal laws and generally binding federal decrees must be submitted to the people for approval or rejection if 50,000 Swiss citizens were entitled to vote or eight Cantons so demand." (Switzerland Constitution, 1847). In France, the seed of constitutional referendum has grown where it was defined as constitutive referendum in 1793 and 1793 referendums, (Al-Ghali,1990, p.290) thus, France proceeded from Switzerland in implementing referendum. It also involved a referendum on the president, where the people voted to make Napoleon the president in 1799. (Saif Al-Dawla, 1976, p. 129).

These countries also include Germany in the Weimar Constitution of 1919, Austria in its 1920 Constitution, Greece in its 1920 Constitution, Czechoslovakia in its 1922 Constitution, and Spain in its 1931 Constitution. (Metwally, 1954, p.122). As for the Arab countries, most of them adapted the referendum system after obtaining their independence, including Egypt where all Egyptian constitutions were adopted by referendum, starting with the 1956 Constitution, Mauritania in its 1960 Constitution, Syria in its 1971 (temporary) Constitution, and Sudan in its 1973 Constitution.(Auras Legal Forum,2012). However, Mohamd Naqib Eishan Jan, who is a professor of law,

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<sup>1</sup> Linguistic Definition: Referendum in Arabic means to ask for an opinion or a verdict on a certain issue. When a jurist gives an opinion concerning an issue, it means that he clarifies its verdict, or if someone asks a jurist about an issue, i.e. he asks about its verdict. However, the word referendum enters English straight from Latin, whereas plebiscite was absorbed into English from Latin through French.



in a conversion with the writer of the paper defined the referendum as “a question or proposal that is submitted to direct vote. A referendum may be used to find out the will of the electorate without making the vote binding, or it may be a binding decision.”

The majority opinion in jurisprudence divides referendums, based on its issue, into legislative, constitutional, and political referendums (Hassan, 1991, p.24). Constitutional referendum is defined as taking into consideration the opinion of the people with regard to the Constitution and making any amendments to it.( Abdul Jawad Al-Abbasi,2015). Therefore, constitutional referendum is categorized into two: either a referendum on drafting the state’s new constitution, which is called the constitutive referendum, or a referendum on the amendment of the existing cons which is also known as amendment referendum.

A legislative referendum signifies a survey on the opinion of the populace concerning a law, or a draft bill, whether it is a common bill or a regulatory bill that relates to the organization of public authorities for people to give their opinions by approval or rejection. The legislative referendum can be divided into two types. Firstly, it aims at public opinion on the draft legislation before it is issued, i.e. on principle only; and secondly, it comes after the issuance of a law which aims at obtaining the consent of the populace. (Al-Khatib,199, p.65). The consent of the populace in the referendum legalizes the draft to become actual law, which is why this referendum is of great importance as the people participate with the Parliament in the issuance of laws, and therefore have a significant role in refining the laws that govern their lives, because they can reject any draft that does not correspond to their desires. They have freedom of opinion and can make appropriate decision. (Abdul Jawad Al-Abbasi, 2015).

Political referendum is defined as a public opinion poll on the position of a particular person to a particular political post such as to elect a person as the head of state or when people express their opinion on a policy that politicians intend to follow. (Al-Mafraji, Zagher and al-Grandma,1990, p.237). Therefore, the subject of this referendum or its context is a specific person, or a person and the subject raised by that person, likewise, this subject may be a constitution draft, constitutional amendment, a political decision, or a specific plan. (Al-Naqshbandi,1994).



It should also be noted that within the framework of this referendum type involves those subjects that relate to matters of public policy such as referendums on the approval of a particular proposal, self-determination, making international agreements or matters that relate to the advanced benefits of the nation. In addition, the actors of political referendums can be regarded as a specific person; for example, the head of state, a person, and a particular subject posed by a person and a specific topic related to the policy of the State. Examples of political or personal referendum include the referendum of the Iraqi people in the accession of Prince Faisal as the King of Iraq in 1921, the referendum on the Hitler-era in Germany and the Referendum of Mussolini in Italy. (Abdul Jawad Al-Abbasi,2015).

As it mentioned, one of the political referendum forms is self-determination referendum, this referendum aims to abide to the population's aspiration whether to be an independent state or to stay in a state. For instance, the Kurdistan Region people's referendum that was held on 25 September 2017 indicated a separation from Iraq for the Kurdistan region to be recognized as independent state.( "Iraq's Kurdistan Region Holds Referendum," 2017). Other examples include the Catalan people's referendum that was held on 1 October 2017 to separate from Spain,( Alandete,2017), the United Kingdom European Union membership referendum that occurred on 23 June 2016 to secede from the European Union (EU),(EU referendum, n.d.) as well as Austrian people's referendum that took place after Second World War (WWI) to stay with Germany.( Nohlen & Stover,2010, p. 176).

### **3. Identifying Kurdistan Region of Iraq (KRI)**

Kurdistan Region of Iraq (KRI) also alluded to it as Iraqi Kurdistan or the Kurdish Autonomous Region includes the four Kurdish majority inhabited Governorates of Dohuk, Erbil, Halabja and Sulaymaniyah. Iraq's Constitution of 2005 acknowledged this region's autonomy within the Kurdistan Regional Government (KRG). ("Iraqi Kurdistan profile," 2016). The Kurdistan Regional Government (KRG) placed the region's populace at 5.2 million, in an undated article on their website. Inhabitants include, as well as Kurds, Turkmen, Armenians, Arabs, Chaldeans, and Assyrians. (Kurdistan Regional Government, n.d.). However, in March 2021, KRG's Statistics Office reported that KRI contained more than six million people.( KRG's Statistics



Office). The Kurdistan Region covers much of Iraqi Kurdistan but lacks Kurdish places that Iraq has prohibited the Kurdish people from ruling after the first Kurdish polls in the wake of the Gulf War were conducted in 1992. Parliament of the Kurdistan Region is headquartered in Erbil that is Iraq's largest capital, hence it currently has 111-seat parliament. ("Iraq takes disputed areas," 2017 & Freedom House, 2016). Throughout the 20th century, the Kurdish people in Iraq struggled considerably for either autonomy or secession and endured Arabization and ethnic cleansing at Iraq's powers. Nevertheless, the American-led no-fly zone of March 1991 over much of Iraqi Kurdistan provided the Kurds an opportunity to try-out with self-governance and de facto formed the autonomous region. Iraq, however, acknowledged Kurdistan's autonomy only after Saddam Hussein's collapse in 2003, with just a new Iraqi constitution in 2005. (Danilovich, 2016p.18, Lambert,1997 & Hadji, 2015).

### **3.1. The Referendum of Kurdistan Region of Iraq**

The emergence of the Islamic State of Iraq and the Levant (ISIL) in the Middle East in which much of Iraq was taken over led to the immediate recognition of the Kurds as an important partner. The Iraqi troops abandoned their positions in northern Iraq and fled for safety because of ISIL's onslaught. The withdrawal of Iraqi forces from northern Iraq in 2014 greatly enhanced the international recognition of Kurds. Thus, in order to fill the military and security vacuums left unattended by national Iraq forces, the Peshmarga stepped in to salvage the situation by taking over Kirkuk ("Iraqi Kurdistan profile – timeline," 2017) and other earlier disputed areas which were hitherto claimed by the KRG. However, this gave Kurdish an ample chance to hold referendum in those disputed areas along with the Kurdistan region. (Morris, 2016 & Amnesty International, 2016).

On this development the government of Nouri al-Maliki was widely criticized for his inability to contain the ISIL onslaught which resulted in outcry for the withdrawal and the resignation of the Prime Minister. ("Iraqi media welcome new premier,"2014). By July 2014, it was imperative on the part of Ex-President of Kurdistan Region, Masoud Barzani, to utilize the national tragedy in Iraq to the Kurds' advantage. Such led to the call for a referendum for eventual independence as the country was said to have been



portioned among various groups and factions. ("Iraq Kurdistan referendum planned,"2014).

By February 2016, Barzani informed KRG parliamentarians that the referendum would be slated for 2016. However, the referendum was postponed due to preparations for liberation of Mosul which was occupied by ISIL. (Radio Free Europe/Radio Liberty, 2016). In April 2017, the momentum for the referendum was very high and the Peshmarga continued to intensify their campaign to protect Kurdish areas from ISIL. Both political parties, KDP and PUK started to make it public that the referendum would eventually take place in 2017. (Lifos – Centre for Country of Origin Information and Analysis, 2017).

The process towards the referendum was hectic and complex as dates continued to change as events unfolded. Despite the inconsistencies and delay in the conduct of the referendum, Barzani finally gave the green light in June 2017, stating explicitly it would be done on 25 September 2017. (Sattar, 2018). However, the referendum included the claim that the exercise will be extended to Kirkuk, Makhmour, Sinjar, and Khanaqin regions. The extension of the referendum to these parts was based on the fact that virtually all are disputed territories being exclusively demanded by the central government.

On 14 August, 2017, as the date of the referendum drew closer, like a normal election, the progress towards the public campaign was officially slated to commence by the beginning of September 2017. The body charged with the responsibility of holding and conducting the election made it clear that three weeks will be set aside for the campaign exercise while the Diaspora Kurds would vote two days before the official schedule of the referendum in Iraq. However, the national government was trying to play politics with the aspirations of the Kurds, and by September 2017, the national parliament announced its rejection of the referendum. (Aldroubi, 2018).

As the rejection of the referendum unfolded, the regional Kurdistan parliament expressly decided to move on with the conduct of referendum. The Iraqi Kurdistan Parliament accepted a proposal to conduct the referendum on 15 September and Barzani subsequently vowed to go ahead with the referendum.( Muhammed, Narayan & Sterling , 2017).



Finally, on 25 September, 2017 the referendum was took place. Thus, the referendum was conducted and recorded a positive response in favour of Kurdistan secession with an overwhelming majority vote of roughly 93.25 percent. The result of the referendum tacitly showed the eagerness on the part of the Kurds to secede from the federation of Iraq. One needs to note that such attempt has also been replicated in the United Kingdom (UK) by the Scots and the result was acceptable to the national government. However, the results from the Scots showed that the majority wanted a union with the United Kingdom.( MacDiarmid,2017).

The result of the KRI was different as the majority of the Kurds did not want to be identified with the state of Iraq anymore. The reason for these different outcomes in both scenarios can be explained by democratic norms and ethics. A referendum is only acceptable in a federation and society where democracy dictates the structural functioning capacity of a state. In this way, as the national government in Baghdad had earlier declared the unconstitutionality of the referendum, by inference the result of the referendum was not acceptable to Baghdad. The KRG declare the result as legally binding on the federal government. (MacDiarmid, 2017). It needs to be reiterated here that international community along with Iraq federal government did not recognize the referendum. (Dolven, Margesson & Vaughn, 2012).

#### **4. Legitimacy of KRI Referendum from Iraqi Constitutional Perspectives**

This section shows that the Kurdistan region referendum conceptually falls within the category of a political referendum by holding Kurdistan secession referendum as discussed earlier. This section also explains the constitutional complexity of the conduct of the Kurdistan referendum. As long as self-determination and secession are not synonymous, it may be very difficult, and in most cases impossible to conduct a referendum that will be acceptable to a federation in the case of secession. The cases of Kosovo and Timor Leste are not exclusively achieved through referendum. Both cases were given full support by international power brokers. However, the Iraqi Constitution is very complex and subject to different interpretations from various national actors concerning the right to self-determination and secession. For example, the KRG justifies its status to exercise secession while Iraqi federal





government assumes that the constitution has not included any provision concerning secession of regions but it has prevented this action. (O’Driscoll,2015,p.2-3).

The Iraqi Constitution of 2005 accords autonomous status to the Kurdistan region and that explains the rationale behind having the KRG as the regional governance within the state of Iraq under Article 126(4) that states “Articles of the Constitution may not be amended if such amendment takes away from the powers of the regions that are not within the exclusive powers of the federal authorities, except by the approval of the legislative authority of the concerned region and the approval of the majority of its citizens in a general referendum.” (Iraqi Constitution, 2005).

The autonomous status also allows Kurdistan region to elect their representatives to the national parliament to represent their interests on any national issues. At this juncture, it should be pointed out explicitly that such regional autonomous status does not automatically translate to a movement towards secession. It is a normal constitutional directive in a federation to have regional autonomy within a federation and that privilege does not translate to outright secession. (Srihari, 2018).

Because of the necessity to guarantee the territorial integrity of nations within the global system, most nations are conditioned to side-line and jettison the place of secession and self-determination in their constitutions. The Iraqi Constitution denies any region the entitlement to self-determination, and by extension, secession. As long as Iraq’s national constitution is completely silent on the issue of any part of Iraq possessing the constitutional entitlement to self-determination, then the Kurdistan region is not allowed to secede from the federation. What the Iraq Constitution does stipulate is the uncompromising nature of national unity of Iraq. Such constitutional standing is stated in Article I which provides that “The Republic of Iraq is a single federal, independent and fully sovereign state in which the system of government is republican, representative, parliamentary, and democratic, and this Constitution is a guarantor of the unity of Iraq.” (Iraq constitution, 2005).

In the meantime, the Kurds in order to situate their agitation for secession within the confines of law have tried to quote some sections of the Iraqi constitution to buttress their claim. The Kurds are of the claim that as long as the governance of the Kurdistan region is strictly in the hand of the KRG, it is also incumbent on the federal government to recognize their right to self-determination and secession. Article 117



of the Iraqi Constitution states that, “First, this Constitution, upon coming into force, shall recognize the region of Kurdistan, along with its existing authorities, as a federal region, and second: This Constitution shall affirm new regions established in accordance with its provisions.” (Iraq constitution, 2005).

This provision in all interpretations gives legal room for Kurdish regional autonomy and subscribes to “the legitimacy of any legislation, court decisions and contracts of Kurdistan, unless the Kurdish government through any subsequent laws has cancelled the same legislation.” The regional autonomy as stipulated in the constitution led to the Kurdistan region regaining freedom which subsequently led to the election into the parliament their own legislatures and lawmakers that will represent the region in the national parliament. Between 1991 and 1992, such milestone achievement led to improvement in the status of Kurdistan region which eventually gave the status of a de facto autonomous government under the KRG in Iraq. (Srihari, 2018).

Moreover, looking at the position of the Iraqi Constitution on the status of Kurdistan and other regions within the Iraq federation, the federal constitution clearly stipulates that each region is an appendage of the federation that makes up the state of Iraq. From such point of view therefore, the constitution does not state in clear terms conditions under which a state can be separated from the federation. And provided that the federal constitution is not explicit on the mode of secession, it is expected that the federal government and international community may not be part of the referendum. This does not at all suggest that the world is not aware of the political and social predicament of the Kurds in the state of Iraq; the only reliable mechanism through which the referendum can receive legitimacy is the federal constitution of Iraq. Notwithstanding the conduct of referendum in the Kurdistan region, it does have instant administrative effects regardless of what the residents of the Kurdish-controlled areas had decided. From the perspective of the federal constitution, the conduct of the referendum is viewed by the federal government as illegal and unconstitutional and thus null and void. Such declaration from the federal government does not settle the matter as the Kurds regarded the referendum as a legitimate means to achieve statehood without any recourse to the action of some critics who allege the referendum is in violation of the self-determination right. (Park et al., 2017).



The KRG therefore resists the claim from the federal government that the Iraqi constitution is not in support of the referendum at all levels. It can be argued further that there is a section in the Iraqi Constitution that, in a way, supports the conduct of the KRG referendum. The Article 140 states that, “First the executive authority shall undertake the necessary steps to complete the implementation of the requirements of all subparagraphs of Article 58, Second: The responsibility placed upon the executive branch of the Iraqi Transitional Government stipulated in Article 58 of the Transitional Administrative Law shall extend and continue to the executive authority elected in accordance with this Constitution, provided that it accomplishes completely (normalization and census and concludes with a referendum in Kirkuk and other disputed territories to determine the will of their citizens), by a date not to exceed the 31st of December 2007.”(Park et al., 2017 and Iraqi Constitution, 2005). Article 140, it needs to be stressed here, does not guarantee that the referendum could eventually lead to the granting of secession to any region. In addition, it has been elaborated and justified by scholars that the controversial Article 140 is only referring to areas where conflict and incessant war usually take place.( Şen,2017). It does not extend such to all areas bordering the Kurdistan region. The complexity and ambiguous nature of the federal constitution is spotted when it affirms that Iraq is a liberated union of citizens. Such constitutional standing reveals the intended feature of the union and endows its founding members the entitlement to self-determination at any time from Iraq.

However, the argument so far in support of the referendum is absent in reasoning due to the provision in Article 140, stating that referendums that determine the resolve of the citizens are only applicable to conflict-ridden regions such as Kirkuk. The federal constitution does not in any way state that the conflicted area is entitled to break away from Iraq. The federal constitution only stipulates that any referendum conducted in the conflict-prone areas would need to choose between joining the KRG or the Iraqi federation. The constitution has not in any way given permission legally for any component units to conduct a referendum for the sole purpose of secession from the federation.(Srihari, 2018).

In latent and manifest conflict situations, each party to the conflict usually advances reasons to support their position. This is exactly what happened in the case of the



KRG and Iraq federation. It has been argued by the KRG that the right of the Kurds to handle its internal matters is not a federal task and thus the territorial state is entitled to organize a referendum for self-determination without adequate consultation with the federal government.(Srihari, 2018). Based on Article 115 of the Iraqi Constitution, “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. 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.”(Iraqi Constitution, 2008). The above quotation from the federal constitution points to the fact that in the occurrence of a dispute between the federal law and regional law, the regional law would assume its superior position.(Srihari, 2018). Besides, it has been established that the conduct of 2017 referendum is constitutional and legal given the Iraqi Constitution’s preamble. The preamble states that “The adherence to this Constitution preserves for Iraq its free union of people, of land, and of sovereignty.” (Iraq constitution, preamble, 2005).

The foregoing preamble has shown that the federal government has refused to dance to the tune of the constitution, which is supposed to be the guide through which issues are resolved within the federation. Going by this preamble therefore the unilateral conduct of the referendum is justifiable and thus valid and legal from the federal constitution point of view.

The argument thereof is further strengthened by the 2005 Constitution of the federation. It in effect allows that intended union may be disbanded when one caucus is unsuccessful in fulfilling its responsibilities. But the Iraqi federal constitution intentionally does not define the scope of territory to be covered by the said Article and thus makes the union permanent, or proscribes secession as the case may be. However, territory and regions have legal supremacy under Article 115 of the Iraqi Constitution to conduct referendum. It does not end there. There are other provisions within the confine of the federal constitution that allows the referendum of the Kurdistan region. (GOV, KRG,2017).

The Iraqi Constitution thus gives the Kurdistan region a legal base in the occurrence of conflict between federal government and the Kurdistan region when there is a



problem beyond the power of the federal government. This is covered under Article 121(2) that 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.” (Iraq constitution, 2005).

Besides the anomaly in the constitution as regards the nullification of the referendum, the Iraqi government was also unable to form the nation as a federation. (Mohammed,2013). Fourteen years after its constitution was approved there is no role of Federal Supreme Court as second chamber to safeguard the rights of regions and governorates. However, the Federal Supreme Court is stated in Article 92 (2) “The Federal Supreme Court shall be made up of a number of judges, experts in Islamic jurisprudence, and legal scholars, whose number, the method of their selection, and the work of the Court shall be determined by a law enacted by a two-thirds majority of the members of the Council of Representatives.” Therefore, there is no entity with statutory authority to adjudicate disagreements. In the absence of a federal second chamber or legitimate federal Supreme Court, Iraq cannot be considered a federation. (Iraq constitution, 2005). It is thus federal government only by name in its operation and establishment.

The KRI referendum 2017 was initially adjudged to be constitutional and lawful until the Federal Supreme Court issued “the decision to consider the Kurdish region’s referendum unconstitutional and this ruling is final.” (Iraqi Federal Supreme Court, 2017). A court spokesperson further reiterated that “the power of this ruling should now cancel all the results of the referendum.” (Rasheed and Jalabi,2017). However, the former prime minister KRG, Nechirvan Barzani said the decision of Federal Supreme Court to reject the referendum can be considered partial because the Iraqi government forced the court institution to reject the Kurdistan referendum due to its ambition of political power on the court. (BBC News,2017).

This verdict is not subject to appeal as the Federal Supreme Court is accountable for resolving dispute between Iraq’s central government and its territories. All issues and articles of the Constitution considered, federalism is a system of government that constitutionally allows powers to be shared between component political entities and central authority. One of the most well-known examples is federalism in United



States, Canada and European Union.(Bright hub education,2013). However, the right to self-determination of the Kurdish people should be based on principles of federalism as a way of solving territorial integrity problems. In this manner, there are two governments within the so-called Iraqi federation, i.e. the KRG and Iraqi governments. The KRG and Iraqi government operate separately according to their own definition for the constitutional federation of Iraq. The Iraqi government defines federation as a central government including all powers, for example exercise of economic, security and international relations powers without consulting with regional governments, while the KRG defines the Iraqi federation as sharing powers, which means the Iraqi government should consult KRG representatives in drafting policies of the country in general. (FACT/MYTH, 2019).

Generally, it can be said that, the KRI referendum was a political referendum while the validity of the referendum is primarily a legal controversy that extends beyond the facts of the constitutional framework.

## **5. Conclusion**

This paper has deliberated on the various definitions, origins and types of referendums with examples of each application. This is meant to shed light on the discussion on the secession referendum held 25 September 2017 in the circumstance of KRI when reviewed from the Iraqi Constitution perspective, and point out that the Kurdistan region referendum was a political referendum. The Iraqi Kurdistan region referendum established validity taking into consideration the principle of people's right in governing their politics according to their will when Iraqi federal government violated their rights. In order to achieve democracy, it is necessary to involve people in making important decisions related to their future through referendums. This paper further assessed the constitutionality of the Kurdistan referendum that the implementation of the privilege to self-governance does not as a rule create a State; it can only occur with the endorsement of the parent State, through a constitutional structure.

On other hand, the issue of constitutionality of the referendum is basically a matter of legal dispute and it goes beyond the proof of any constitutional framework. As long as cases that render secession inevitable are present, the legality or illegality of the

referendum should not arise. From what has been discussed thereof, the case of intimidation, repression and persecution is clearly present which should have culminated in the acceptance and recognition of the referendum. Thus, the case of legality of Kurdistan referendum goes beyond the constitutional framework at national level. The case here is as long as the Iraq federal government is not interested in the disintegration of Iraq, no matter how fair and free the conduct of any referendum may be by the Iraqi Kurds, it may still be adjudged unconstitutional. And, no section of the Iraq government has explicitly stipulated that a region can secede by conducting a referendum. Such constitutional ambiguity has become a crucial technical avenue that the Iraq federal government employs to discount the secession of Kurdistan region. However, the KRG held the referendum as a result of unpleasant background by Iraqi federal governments against the constitutional rights of Kurdish people, this is why, it justified as constitutional.

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## رادەى دەستورىبوونى راپرسى ھەرىمى كوردستانى عىراق بۆ جىابوونەوہ

### پوختە:

راپرسى برىتتیه له میکانیزمیک، که به هۆیه وه خەلك دەتوانن، له باره ی پرسه گشتیه كان، جا چ پرسى دەستورى بن، یان یاسایى، یان سیاسى بن، پىاده ی رای خۆیان بکن. له کاتیکدا دەتوانریت راپرسى له لایه ن دەسه لاتی جییه جیکردنه وه یان دەسه لاتی یاسادانانه وه، یانیش له لایه ن سه رۆکی ده وه له ته وه، به پشتبه ستن به ده قیکى دەستورى، ئەنجام بدریت. ھەرىمى كوردستانى عىراق راپرسییه کی له 25 ی ئەیلولى 2017 ئەنجامدا، که تییدا له سه دا 93.25 ی خەلك، ده نگیان بۆ سه ربه خۆیى ھەرىمى كوردستاندا. بۆیه ئەم توێژینه وه یه، مه به ستیه تی لیکۆلینه وه له جوړی ئەو راپرسییه بکات، که له لایه ن حکومه تی ھەرىمى كوردستانه وه ئەنجام دراوه، له گه ل ئە وه شدا راده ی دەستورىبوونى ئەم راپرسییه له چوارچۆه ی دەستورى عىراقدا، شى بکاته وه. ھه روه ها ریبازى زانستى ئەم توێژینه وه یه، بۆ شیکردنه وه ی رایه جیاوازه كان و گه یشتن به ده رنه جامه كان، پشت به سه رچاوه دووه میه كان ( ناسه ره کییه كان) و ده قه دەستوریه یه كان ده به ستیت. ئەم توێژینه وه یه پى وایه که راپرسى ھەرىمى كوردستان بۆ سه ربه خۆیى راپرسییه کی سیاسى بوو، ئەم راپرسییه ش ده کرىت بگوترىت له ده ره وه ی دەستورى عىراقدا بوو. به لام پرسى دەستورىبوونى ئەم راپرسییه به شپۆه یكى سه ره کی، پرسیکه، مشتومرى یاسایى زیاتر له راستیه كانى چوارچۆه ی دەستورى، ھه لده گرىت. وشه کللیه كان: حکومه تی ھەرىمى كوردستان، دەستورى عىراق، حکومه تی عىراق، راپرسى، راپرسى بۆ سه ربه خۆیى.

## مدى دستورية استفتاء إقليم كردستان العراق للانفصال

### المخلص:

الاستفتاء آلية يمكن من خلالها للناس إبداء رأيهم في القضايا العامة سواء في القضايا الدستورية أو القانونية أو السياسية. ومع ذلك، يمكن إجراء الاستفتاءات من قبل السلطات التنفيذية أو التشريعية أو من قبل رئيس الدولة من خلال نص دستوري. أجرى إقليم كردستان العراق استفتاءً في 25 سبتمبر 2017 بأغلبية ساحقة بلغت 93.25 بالمئة لصالح انفصال كردستان. لذلك، يهدف هذا البحث إلى التحقيق في نوع الاستفتاءات التي تمارسها حكومة إقليم كردستان، ودستورية استفتاء إقليم كردستان من منظور الدستور العراقي الحالي. اعتمد هذا البحث على مصادر ثانوية ونصوص دستورية لتحليل الآراء المختلفة والتوصل إلى الاستنتاجات. وفي النهاية توصلنا



## QALAAI ZANISTSCIENTIFIC JOURNAL

*A Scientific Quarterly Refereed Journal Issued by Lebanese French University – Erbil, Kurdistan, Iraq*

Vol. (7), No (4), Winter 2022

ISSN 2518-6566 (Online) - ISSN 2518-6558 (Print)

إلى أن الاستفتاء في إقليم كردستان كان استفتاءً سياسياً، وبالتالي يمكن افتراض دستوريته أن فرض حق الحكم الذاتي كقانون لا يمكن أن يؤسس دولة. لا يمكن أن يحدث إلا بموافقة الدولة الأم من خلال الإطار دستوري. من ناحية أخرى، فإن مسألة دستورية الاستفتاء هي في الأساس مسألة خلاف قانوني يتجاوز وقائع الإطار الدستوري.

**الكلمات المفتاحية:** حكومة إقليم كردستان، الدستور العراقي، الحكومة العراقية، الاستفتاء، استفتاء تقرير المصير