



# PENN STATE LAW REVIEW

## The Kurdish Regional Constitution within the Framework of the Iraqi Federal Constitution: A Struggle for Sovereignty, Oil, Ethnic Identity, and the Prospects for a Reverse Supremacy Clause

Michael J. Kelly\*

*The Kurd has no friend but the mountain. . . .*  
—Ancient Kurdish proverb

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\* Professor of Law, Associate Dean for Faculty Research & International Programs, Creighton University School of Law. B.A., J.D., Indiana University; LL.M., Georgetown University. Chair (2009-2010) of the Association of American Law Schools Section on National Security Law and President of the U.S. National Chapter of *L'Association Internationale de Droit Pénal*. Professor Kelly teaches comparative constitutional law as well as a range of international law courses. Many thanks to Danielle Pressler, Alexander Dehner and Christopher Roth for their research assistance, and to Professors Mark Tushnet, Haider Hamoudi, Gregory McNeal, Sean Watts and Afsheen John Radsan for their thoughtful comments. Thanks also to the Kurdish Regional Government for hosting me. The views expressed here are those of the author, not the AALS nor the AIDP.

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#### INTRODUCTION

The Kurds have long struggled to control their own destiny. Through centuries of cyclical oppression and autonomy, the Kurds of northern Iraq finally united and seized an opportunity to secure a firm legal status for their *de facto* state within a federal Iraqi state in the aftermath of the Iraq War. In March 2009, I traveled to Erbil, the capital of Iraqi Kurdistan, and consulted with the Kurdish regional parliament's constitutional drafting committee as they finalized their new constitution.<sup>1</sup> As a professor of comparative constitutional and international law, this was a rewarding experience to say the least.

But as a student of history and geography, my time in Kurdistan opened an entirely new window of understanding. Appreciating the culture, customs and political reality of a geographic location deepens

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1. The team assembled for the trip to Iraqi Kurdistan at the invitation of the Kurdish regional government included Dr. Aitor Bravo Esteban, professor of constitutional law at Universidad de Deusto-Bilbao, and a Basque member of the Spanish Parliament, and Dr. Raymond Bucko, S.J., Chair of the Anthropology Department at Creighton University. This trip would not have been possible without the coordination and sponsorship of Mr. Adnan Kochar, director of the Halabja Centre-London.

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one's appreciation for the nation-building, and constitution-writing, tasks at hand. And I certainly now take a more nuanced and informed view of the constitutional dilemmas the Kurds face within the context of political and security realities and against the burdensome backdrop of local history.

The full text of the draft Kurdish Constitution is attached to this article as an appendix. Its appearance in volume 114 of the *Penn State Law Review* is the first time it has been published in English in a western academic journal. The Kurdish regional government approved the draft constitution on June 24, 2009, but it has yet to be voted on in a referendum and thereby enter into force.<sup>2</sup> This was seen as a particularly provocative move:

The proposed constitution enshrines Kurdish claims to territories and the oil and gas beneath them. But these claims are disputed by both the federal government in Baghdad and ethnic groups on the ground, and were supposed to be resolved in talks begun quietly last month [May, 2009] between the Iraqi and Kurdish governments, sponsored by the United Nations and backed by the United States. Instead, the Kurdish parliament pushed ahead and passed the constitution, partly as a message that it would resist pressure from the American and Iraqi governments to make concessions.<sup>3</sup>

The Obama Administration dispatched Vice President Biden to advise the Kurds to back down from their confrontational stance with Baghdad.<sup>4</sup> Biden was able to secure a promise by the Kurds not to put the draft constitution to a referendum yet.<sup>5</sup> Tensions remain high as of this writing, and political posturing will likely intensify as the date for withdrawal of U.S. forces nears.

This article offers an analysis and critique of the document itself, but also sets the stage for an understanding of where the Kurds have come from and where they are headed within a federal Iraqi state. Special focus is dedicated to key sovereignty, rule of law and oil wealth issues as well as comparative take-offs for other ethnically distinct entities that enjoy greater or lesser degrees of autonomy within their own

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2. Sam Dagher, *Kurds Defy Baghdad, Laying Claim to Land and Oil*, N.Y. TIMES, July 9, 2009, available at [http://www.nytimes.com/2009/07/10/world/middleeast/10kurds.html?\\_r=2&ref=world](http://www.nytimes.com/2009/07/10/world/middleeast/10kurds.html?_r=2&ref=world).

3. *Id.* ("American diplomatic and military officials have said the potential for a confrontation with the Kurds has emerged as a threat as worrisome to Iraq's fate as the remnants of the insurgency.").

4. *Id.*

5. Sam Dagher, *New Kurdish Leader Asserts Agenda*, N.Y. TIMES, July 28, 2009, available at <http://www.nytimes.com/2009/07/29/world/middleeast/29kurds.html?scp=1&sq=biden%20kurds&st=cse>.

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federal structures. Because of the unique argument postulated to force a reverse supremacy dynamic in the vertical federal interplay between the Kurdish regional and Iraqi federal constitution concerning oil and gas development, a separate section is dedicated to that discussion.

When undertaking an exercise of this sort, it is important to be mindful of the reality of what is achievable given the society and what is written in the constitutional document. The bridge between the written word and what actually happens can sometimes be long—or even unattainable. Yet to the extent that the Kurdish regional constitution reflects the aspirations of the Kurdish people, as opposed to a wholly hortatory document like the Soviet constitution, which was beautifully written, then the Kurds have made a start of it. And their openness to input from many quadrants is encouraging.

#### I. THE KURDS: A STATELESS PEOPLE

Known by the ancient Sumerians as the Karda and by the Babylonians as the Qardu, the Land of the Kurds stretches across the northern part of what was known historically as Mesopotamia. Today, the 74,000 square miles of mountainous and heavily forested terrain that “Kurdistan” covers encompasses southeastern Turkey, northwestern Iran, northern Iraq and northeastern Syria—an area the size of France. The Tigris and Euphrates rivers originate in the rugged mountains of Kurdistan, their life-giving waters cascading down to the lower plateaus of the Fertile Crescent.<sup>6</sup>

From before the time of Xenophon (427-355 B.C.), this land was in the possession of the Kurds, who consider themselves indigenous to the region. Kurds are an Aryan people and an ethnic group distinct from the Turks, Persians and Arabs, although the majority of Kurds share the Islamic faith of those populations. The Kurdish language, customs, traditions and internal tribal structures are also distinct. Numbering roughly 30 million, the Kurds are the largest ethnic group in the world without a state. Instead, they have been incorporated as minority populations within the larger surrounding states.<sup>7</sup>

Virtual independence, coupled with statelessness, has been the fate of the Kurds through history. Wedged between the larger powers of Persians, Assyrians and Babylonians, the Kurds were constantly pressed into service by the rulers of various empires up to and including that of

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6. HENRY D. ASTARJIAN, *THE STRUGGLE FOR KIRKUK: THE RISE OF HUSSEIN, OIL, AND THE DEATH OF TOLERANCE IN IRAQ* 64, 145 (2007).

7. NADER ENTESSAR, *KURDISH ETHNONATIONALISM* 2-3 (1992).

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the Greeks, which later gave way to their provincial incorporation into the Roman Empire.<sup>8</sup>

From the demise of Byzantium to rule by Arabs under the Caliph of Baghdad, the Kurds enjoyed a degree of autonomy which eventually gave way to virtual independence in the second half of the 10<sup>th</sup> Century as Kurdistan was shared among the five largest Kurdish principalities: the Shaddadid, Rawadid, Hasanwayhids, Annazids, and the Marwanid. However, one by one, these principalities were annexed by the Seljuk Turks. Their greatest leader, Saladin, ruled during the Ayyubid period, but they later came under the influence of the Mongols during the 13<sup>th</sup> Century, when Marco Polo made his famous trek across Asia to visit the court of Kublai Khan, meeting and writing about Kurdish customs along his winding journey eastward.<sup>9</sup>

Eventually, as their Mongol overlords receded back into Asia proper, the Kurds began re-forming independent principalities, only to be subsumed once again by foreign powers. The Ottoman Empire came to control much of Kurdistan early in the 16<sup>th</sup> Century as Sultan Selim I defeated the Persian Shah Ismail in 1514. As a security measure, the Persians forcibly resettled hundreds of thousands of Kurds away from their new borders with the expanding Ottomans and into the interior of Persia. Removal of the Kurds from the Anatolia region was traumatic and devastating. Ismail's successor, Shah Tahmasp I, systematically destroyed Kurdish villages and the countryside as his forces slowly retreated eastward year by year from the advancing Ottomans.<sup>10</sup>

In 1609, the Kurds rose up against their Persian masters, ruled by Shah Abbas I. They rallied around a fortress called Dimdim by Lake Urmia in what is now northwestern Iran. The Kurdish resistance, led by Amir Khan, capitulated after a year-long siege led by the Persian grand vizier Hartem Beg, who eventually captured the fortress and massacred the defenders. Shah Abbas then ordered the general massacre of Kurds in the surrounding cities and resettled Turkish tribes into formerly Kurdish areas.<sup>11</sup>

The Kurds lived divided under Persian and Ottoman rule for centuries thereafter. Following the Russo-Turkish War of 1828, Kurdish uprisings over the next three decades were put down, Kurdish governors were replaced with Turkish ones, and garrisons were strengthened within

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8. Maria O'Shea, *Tying Down the Territory: Conceptions and Misconceptions of Early Kurdish History*, in *THE KURDS: NATIONALISM AND POLITICS* 123-25 (Faleh A. Jabar and Hosham Dawod eds., 2006).

9. *Id.*

10. *Id.*

11. *Id.*

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Kurdish towns. Separatist activity continued at a low level up through the First World War.<sup>12</sup>

The collapse of the Ottoman Empire upon its defeat by the Allied powers in the First World War offered the Kurds another chance at self-rule. Kurdish representatives lobbied the victorious Allies for an independent state to rise from the ashes of the rapidly disintegrating empire. Representatives of the crumbling Ottoman order signed the Treaty of Sèvres with the Allies in 1920, which formally dismembered the old empire into “mandatory” states under the supervision of Allied powers, as well as independent states. Kurdistan was assured of independence at last.<sup>13</sup>

The method of triggering the creation of a Kurdish homeland was nuanced in the Treaty of Sèvres, as the section on Kurdistan reveals:

SECTION III. KURDISTAN.

ARTICLE 62.

A Commission sitting at Constantinople and composed of three members appointed by the British, French and Italian Governments respectively shall draft within six months from the coming into force of the present Treaty a scheme of local autonomy for the predominantly Kurdish areas lying east of the Euphrates, south of the southern boundary of Armenia as it may be hereafter determined, and north of the frontier of Turkey with Syria and Mesopotamia, as defined in Article 27, II (2) and (3).

If unanimity cannot be secured on any question, it will be referred by the members of the Commission to their respective Governments. The scheme shall contain full safeguards for the protection of the Assyro-Chaldeans and other racial or religious minorities within these areas, and with this object a Commission composed of British, French, Italian, Persian and Kurdish representatives shall visit the spot to examine and decide what rectifications, if any, should be made in the Turkish frontier where, under the provisions of the present Treaty, that frontier coincides with that of Persia.

ARTICLE 63.

The Turkish Government hereby agrees to accept and execute the decisions of both the Commissions mentioned in Article 62 within three months from their communication to the said Government.

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12. *Id.*

13. MICHAEL J. KELLY, GHOSTS OF HALABJA: SADDAM HUSSEIN & THE KURDISH GENOCIDE 14 (2008).

## ARTICLE 64.

If within one year from the coming into force of the present Treaty the Kurdish peoples within the areas defined in Article 62 shall address themselves to the Council of the League of Nations in such a manner as to show that a majority of the population of these areas desires independence from Turkey, and if the Council then considers that these peoples are capable of such independence and recommends that it should be granted to them, Turkey hereby agrees to execute such a recommendation, and to renounce all rights and title over these areas.

The detailed provisions for such renunciation will form the subject of a separate agreement between the Principal Allied Powers and Turkey.

If and when such renunciation takes place, no objection will be raised by the Principal Allied Powers to the voluntary adhesion to such an independent Kurdish State of the Kurds inhabiting that part of Kurdistan which has hitherto been included in the Mosul vilayet.<sup>14</sup>

Although the United States was not a party to the peace settlement with Turkey, as the U.S. and the Ottoman Empire had not been at war, President Wilson was regarded by the other Allied Powers as a player not to be ignored during discussions for a Middle East settlement. Specifically, Wilson was accorded the task of demarcating the boundaries of a new state for the Armenians, which was provided for in Articles 88-93 of the treaty. That Wilson took into account the Kurdish population neighboring a new Armenian state, and the potential for creation of a new Kurdish state, is revealed in his diplomatic note to the Allies explaining his rationale for the Armenian frontiers:

The White House  
Washington  
November 22, 1920

Mr. President: By action of the Supreme Council taken on April 26<sup>th</sup> of this year an invitation was tendered to me to arbitrate the question of the boundaries between Turkey and the new state of Armenia. . . . [T]he scope of the arbitral competence assigned to me is clearly limited to the determination of the frontiers of Turkey and Armenia in the Vilayets of Erzerum, Trebisond, Van and Bitlis. With full consciousness of the responsibility placed upon me by your request, I have approached this difficult task with eagerness to serve the best

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14. Treaty of Sevres art. 62-64, Aug. 10, 1920.

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interests of the Armenian people as well as the remaining inhabitants, of whatever race or religious belief they may be, in this stricken country, attempting to exercise also the strictest possible justice toward the populations, whether Turkish, Kurdish, Greek or Armenian, living in the adjacent areas. . . .

The conflicting territorial desires of Armenians, Turks, Kurds and Greeks along the boundaries assigned to my arbitral decision could not always be harmonized. In such cases it was my belief that consideration of a healthy economic life for the future state of Armenia should be decisive. Where, however, the requirements of a correct geographic boundary permitted, all mountain and valley districts along the border which were predominantly Kurdish or Turkish have been left to Turkey rather than assigned to Armenia, unless trade relations with definite market towns threw them necessarily into the Armenian state. Wherever information upon tribal relations and seasonal migrations was obtainable, the attempt was made to respect the integrity of tribal groupings and nomad pastoral movements.

From the Persian border southwest of the town of Kotur the boundary line of Armenia is determined by a rugged natural barrier of great height, extending south of Lake Van and lying southwest of the Armenian cities of Bitlis and Mush. This boundary line leaves as part of the Turkish state the entire Sanjak of Hakkari, or about one-half of the Vilayet of Van, and almost the entire Sanjak of Sairt. The sound physiographic reason which seemed to justify this decision was further strengthened by the ethnographic consideration that Hakkari and Sairt are predominantly Kurdish in population and economic relations. It did not seem in the best interest of the Armenian state to include in it the upper valley of the Great Zab River, largely Kurdish and Nestorian Christian in population and an essential element of the great Tigris river irrigation system of Turkish Kurdistan and Mesopotamia. The control of these headwaters should be kept, wherever possible, within the domain of the two interested states, Turkey and Mesopotamia. For these reasons the Armenian claim upon the upper valley of the Great Zab could not be satisfied.

The boundary upon the west from Bitlis and Mush northward to the vicinity of Erzingan lies well within Bitlis and Erzerum vilayets. It follows a natural geographic barrier, which furnishes Armenia with perfect security and leaves to the Turkish state an area which is strongly Kurdish. . . .

I have the honor to submit herewith the text of my decision.

—Woodrow Wilson<sup>15</sup>

The Treaty of Sèvres, however, was rejected by the Turkish nationalist movement which was waging a military campaign against the occupying Allied forces under the direction of Mustafa Kemal Pasha, later to be known as Atatürk—the founder of a new secular Turkey. Atatürk was a battle-hardened veteran of the Gallipoli campaign that repulsed repeated Allied attempts at landing on the narrow peninsula. This had earned him grudging British respect. Before Kurdistan could be founded, Atatürk had parlayed vital support from the Soviet Union into a successful consolidation of the countryside and a political assault on the weakening Sultan that led to the military expulsion of Allied troops, abolition of the monarchy, and establishment of the Republic of Turkey.<sup>16</sup>

In 1923, the Turks of the fledgling Republic under Atatürk signed a new treaty with the Allied powers, who were not prepared to redeploy into Anatolia to fight another war—especially since Atatürk was by then cutting deals with Lenin in Soviet Russia. By that time, a smaller version of Armenia had been converted into a Soviet Republic. The Treaty of Lausanne, recognizing the new political situation in the region, revoked the promise of an independent Kurdistan and Armenia in exchange for ceding Turkish claims to Cyprus, Iraq and Syria and agreeing to honor 40% of Ottoman debts.

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15. Letter from President Woodrow Wilson to the Supreme Council of the Allied Powers (Nov. 22, 1922), in 3 FOREIGN RELATIONS OF THE UNITED STATES 1920 790 (1936).

16. The historian Margaret MacMillan notes:

The great line of sultans that had produced Suleiman the Magnificent had dwindled to Mehmed VI. His main achievement was to have survived the rule of three brothers: one who was deposed when he went mad; his paranoid and cruel successor, so fearful of enemies that he employed a eunuch to take the first puff of every cigarette; and the timid old man who ruled until 1918. Mehmed VI was sane but it was difficult to gauge whether there were any ideas in his bony head. He took over as sultan with deep misgivings. “I am at a loss,” he told a religious leader. “Pray for me.”

The power of the throne, which had once made the world tremble, had slipped away. Orders from the government, reported the American representative, “often receive but scant consideration in the provinces and public safety is very poor throughout Asia Minor.” Although Constantinople was not officially occupied at first, Allied soldiers and diplomats “were everywhere—advising and ordering and suggesting.” Allied warships packed the harbor so tightly that they looked like a solid mass. “I am ill,” murmured the sultan, “I can’t look out the window. I hate to see them.” Atatürk had a very different thought: “As they have come, so they shall go.”

MARGARET MACMILLAN, PARIS 1919 369 (2001).

Consequently, the Kurds were victims of global, as opposed to regional, politics. Abandonment of promises made by Western powers in the Treaty of Sèvres was, from the perspective of the Kurds, a painful double-cross. It would not be the last time they were abandoned by the West. The old Ottoman province of Mosul, rich with oil fields, was attached to the new state of Iraq along with the provinces of Basra and Baghdad. The Kurds who lived under Ottoman rule for so long were thereby partitioned between Turkish and Arab rulers. Kurds in Iran remained under the rule of the Persians.<sup>17</sup>

The post-World War I settlement remains the geographic fate of greater Kurdistan.<sup>18</sup> Each of the areas of Kurdistan have suffered different degrees of repression from their foreign masters, perhaps mostly at the hands of the Turks and Arabs. Iraqi Kurdistan has over time come to enjoy the greatest level of autonomy amongst the larger Kurdish populations, but the journey to that level of autonomy has been a long and difficult one. The struggle within Iraq began shortly after the war in 1918. It continues to the present day.<sup>19</sup>

On December 1, 1918, during a meeting in Sulaimeniya with the British Commissioner for Mesopotamia, Kurdish leaders demanded support for a united and independent Kurdistan under British protection. Frustrated, Shaikh Mahmoud Barzanji, a Kurdish leader based in Sulaimaniya, formed a Kurdish government and led two revolts against British rule. It took authorities two years to put down his uprisings. The first revolt began on May 22, 1919 with the arrest of British officials in Sulaimaniya, and it quickly spread to Mosul and Erbil. Afterward, the British exiled Mahmoud to India.<sup>20</sup>

In July 1920, tribal leaders called again for independence of Kurdistan within the British mandate. British objection to Kurdish self-rule was driven by fear that granting it would encourage the Arab areas of Baghdad and Basra to follow suit, thereby threatening British control

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17. KELLY, *supra* note 13, at 17.

18. DENISE NATALI, *THE KURDS AND THE STATE* (2005):

The transition from empire to state . . . distributed the Ottoman Kurdish communities, territories, water resources, and petroleum deposits of the Fertile Crescent into geographically contiguous, sovereign territories. After the 1920 Treaty of Sèvres suggested Kurdish statehood and the ratification of the Lausanne Treaty in 1923, which rescinded the offer, the Ottoman Kurdish regions were legally subsumed into different administrative and political systems in Iraq, Turkey, and Syria. Kurdish communities no longer shared a common political center but became linked to separate governments as peripheral border regions.

*Id.* at 26. The distribution of Kurds today is 43% in Turkey, 31% in Iran, 18% in Iraq, and 6% in Syria. *Id.* at n.1.

19. DAVID MCDOWALL, *A MODERN HISTORY OF THE KURDS* 87 (1997).

20. *Id.*

over all Mesopotamia. In 1922, Britain restored Shaikh Mahmoud to power, hoping that he would organize the Kurds to act as a buffer against the Turks, who had territorial claims over Mosul. Mahmoud instead declared a Kurdish Kingdom with himself as the king, though he later agreed to limited autonomy within the new state of Iraq. In 1930, following Iraq's admission into the League of Nations, Mahmoud instigated a third uprising which was suppressed with British air and ground forces.<sup>21</sup>

After a military coup in Iraq in 1958 led by Abdul Karim Qasim, a clan leader named Massoud Barzani saw an opening for the Kurds and returned from exile to establish his own political party, the Kurdistan Democratic Party, which was granted legal status in 1960. Soon afterward, Qasim attempted to turn *Baradost* and *Zebari* tribes against Barzani. In June 1961, Barzani led his first revolt against the Iraqi government with the aim of securing Kurdish autonomy. Qasim's government was not able to subdue the insurrection. The Ba'athist coup against Qasim in February 1963 resulted from his inability to deal with the Kurds forcefully. A ceasefire with the Kurds in 1964 caused a split among Kurdish radicals and traditional forces led by Barzani.<sup>22</sup>

Barzani agreed to the ceasefire and expelled the radicals from the party. Seizing the opportunity of a crack in Kurdish unity, the central government in Baghdad moved against the Kurds militarily once again. This campaign failed in 1966, when Barzani's forces defeated the Iraqi Army near Rawanduz. Subsequently, the government in Baghdad issued a 12-point peace program. The program was not implemented, however, because of a bloodless coup by the military in 1968 which installed the Ba'athist general Ahmad Hassan al-Bakr. The new regime began a fresh campaign to end the Kurdish insurrection, however the campaign was stalled in 1969 as an internal power struggle in Baghdad and tensions with Iran began to mount. Relenting to Soviet pressure to come to terms with Barzani, the al-Bakr government entered into a broadened peace plan providing for greater Kurdish autonomy within Iraq. The plan also granted Kurds representation in government bodies.<sup>23</sup>

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21. AARON S. KLIEMAN, FOUNDATIONS OF BRITISH POLICY IN THE ARAB WORLD: THE CAIRO CONFERENCE OF 1921 168 (1970). By 1927, the Barzani clan had also become vocal supporters of Kurdish rights in Iraq. In 1929, the Barzanis demanded the formation of a Kurdish province in northern Iraq. Emboldened by these demands, in 1931 Kurdish representatives petitioned the *League of Nations* to set up an independent Kurdish government. Under the pressure from the Iraqi government and the British, the most influential leader of the clan, Mustafa Barzani was forced into exile in Iran in 1945. He later relocated to the Soviet Union. KELLY, *supra* note 13, at 17.

22. KELLY, *supra* note 13, at 18.

23. *Id.*

Simultaneously, the Iraqi government embarked on an Arabization program in the oil rich regions of Kirkuk and Khanaqin of Iraqi Kurdistan. Importing and resettling Sunni Arabs into the region became a priority for the Sunni-dominated minority government in Baghdad. In 1974, the government began a new offensive against the Kurds, pushing them closer to the border with Iran. Iraq negotiated with Iran to end Iranian support for the Iraqi Kurds in exchange for the settlement of border territory in Iran's favor. The 1975 Algiers Accords memorialized this agreement, and Tehran cut supplies to the Kurdish movement. Support of the Kurds from the United States was also withdrawn.<sup>24</sup>

Barzani, nevertheless, fled to Iran with many of his supporters. Others surrendered en masse and the resistance to Baghdad's control was quashed. The Iraqi government steadily extended its control over the northern region and advanced its Arabization program. In response to the government's repopulation policies, renewed clashes between Kurdish guerillas and Iraqi troops occurred in 1977. To punish the Kurds, Saddam's government leveled 600 Kurdish villages and forcibly removed 200,000 Kurds to other parts of the country in what was the beginning of a massive internal Kurdish diaspora.<sup>25</sup>

Although the Iraqi Kurds had been severely mistreated under successive Arab regimes, this mistreatment was nothing compared to what they would experience under the iron fist of Saddam Hussein, who engineered his control over the government and Baath party completely by 1977 and eased al-Bakr from the presidency in 1979. Saddam repeatedly played Kurdish factions off one another, with Iran serving as a constant supporting actor, and irritant to Saddam, in the melodrama. When significant numbers of Kurds sided with Iran during the 1980-88 Iran-Iraq War, Saddam was provided the perfect pretext to commit genocide against them, which he did during 1988.<sup>26</sup>

The Kurds, in turn, took the opportunity to rise up against Saddam after he was weakened in the wake of the 1991 Persian Gulf War. That

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24. MCDOWALL, *supra* note 19, at 323-340.

Besides making it difficult for Kurds in Kirkuk to hold title to their property, the governorate was rearranged to ensure an Arab majority. Towns with a heavy Kurdish majority, for example Kalar (30,000), Kifri (50,000), and Chamchamal (50,000), Tuz Khurmatu (80,000) were removed from Kirkuk and allocated to Slaymaniya, Diwaniya or the new province of Salah al Din. Other distasteful measures included financial rewards to Arabs who took Kurdish wives, a deliberate encouragement of ethnic assimilation, the transfer of Kurdish civil servants, soldiers and police out of Kurdistan, the removal of Kurdish faculty from the new university in Sulaymaniya and the Arabizing of some place names.

*Id.* at 340.

25. *Id.*

26. KELLY, *supra* note 13, at 20-32.

uprising, however, was short-lived and the Kurdish ranks were crushed by Saddam's military. This prompted western power to step in once again, this time to protect the Kurds, and allow them to create a functioning Kurdish society in the north of Iraq largely freed from Baghdad's control.

A. *Iraqi Kurdistan*

Iraqi Kurdistan exists today in a *de facto* sense, but struggles to exist in a *de jure* sense. The area itself became essentially independent of Saddam's regime after the 1991 uprising. Thanks to the U.S.-British-French enforced "no fly zone" established in the wake of the first Gulf War, Iraq's Kurds were able to go about their own business unencumbered by Baghdad's retention of nominal and geographic sovereignty.<sup>27</sup>

In March of that year, in northern Iraq, ethnic Kurd separatists launched a rebellion against the Baghdad regime of Saddam Hussein. The Iraqi army responded with brutal suppression, compelling ethnic Kurds to flee northward toward the mountains bordering Turkey, creating a humanitarian emergency. In April 1991, the United States launched Operation Provide Comfort, a military intervention justified on humanitarian grounds. The United Nations (in Security Council Resolution 688) quickly urged its members to contribute to the humanitarian effort, and a coalition of states then helped the United States to protect the Kurds, establish refugee camps, provide humanitarian aid, and assist with resettlement. The United States also spearheaded a no-fly zone over the Kurdish area of Iraq, conducting missions from bases in Turkey to patrol and shoot down any Iraqi aircraft operating in that airspace. The intervention thus provided not merely emergency humanitarian aid, but long-term military assistance that shifted the balance of power within Iraq, effectively rewarding the Kurds with political autonomy that also promoted their human rights.<sup>28</sup>

Freed from Saddam's repressive hand, the Kurds could move forward politically and economically—providing their own social services, healthcare and education. Tension between the two main political parties, which played out in a four-year bloodbath, undermined much of this progress. Massoud Barzani's Democratic Party of Kurdistan (KDP) and Jalal Talabani's Patriotic Union of Kurdistan

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27. MICHAEL M. GUNTER, *THE KURDS OF IRAQ 87-95* (1992); MICHAEL M. GUNTER, *THE KURDISH PREDICAMENT IN IRAQ: A POLITICAL ANALYSIS* 67 (1999).

28. Alan J. Kuperman, *Humanitarian Intervention*, in *HUMAN RIGHTS: POLITICS & PRACTICE* 338 (Michael Goodhart ed., Oxford 2009).

(PUK) essentially divided the country among themselves and went to war. The stand-off that emerged has since evolved into a tacit understanding of shared power and engendered, if not cooperation, then toleration and a stable and secure political and economic environment.

*B. Stability from Political Equilibrium*

Disunity among Kurds exists within the nation-state elements as well. In Iraqi Kurdistan, the fault-line is political, not religious. Indeed, the overwhelming majority of Kurds are nominally Sunni Muslim. The two main political parties that fought so bitterly in the mid-1990s reached a mutual accommodation to divide their geographic control of Iraqi Kurdistan. As Figure 1 depicts, PUK headquarters is located in Sulmaneyah and KDP headquarters is located in Erbil. The parties also control security within their own zones and their respective external borders. This is particularly beneficial to the KDP because the surcharge they are able to collect on cross-border trade between Turkey and Iraqi Kurdistan is substantial.



**Figure 1: Internal Political Division of Iraqi Kurdistan**

(source: CIA, 2003)

The history of this political divide is an important backdrop to the constitution-making that is now taking place in the Kurdish National Assembly. Despite a common goal of independent statehood, the 22 million Kurds living in Iraq, Iran, Syria and Turkey are hardly unified. Several political factions exist that are not necessarily coterminous with current international frontiers.<sup>29</sup> The political factions stem from groups of clans and tribes that banded together over time in the face of adversity from foreign rulers. Because of this structure, there is inherent rigidity

29. Gareth Stansfield, *Finding a Dangerous Equilibrium: Internal Politics in Iraqi Kurdistan—Parties, Tribes, Religion and Ethnicity Reconsidered*, in *THE KURDS* 271 (Faleh A. Jabar & Hosham Dawod eds., 2003).

among Kurdish political factions—very few people move between parties. Since they are driven by family allegiance, the parties crystallized long ago.

The Kurdish Democratic Party (KDP) was founded in 1945 from the Komala nationalist movement, a grouping of urban upper-class Kurds around Mahabad, Iran. Led by Mustafa Barzani, the KDP briefly established a Kurdish Republic in 1946 in northern Iran alongside the Azerbaijani Republic. The Western Allies viewed these new republics as extensions of Soviet influence and supported the Shah's military campaign against them. When Soviet troops withdrew from Iran in May, 1946, the Shah was free to renew Kurdish suppression.<sup>30</sup>

Barzani fled to the USSR, where he remained in exile for eleven years. During this time, other KDP branches formed in Turkey, Iraq and Syria, eventually absorbing elements of the original party. Most of the leaders were drawn from the educated Kurdish cadres and exhibited strong communist sympathies. Barzani came to head the Iraqi KDP in 1964 and consolidated his base of support there. Over the next ten years, Barzani garnered power among aristocratic loyalists, established the first *peshmerga* military forces, and engaged in brief struggles with Baghdad alternating with deals for more or less power—depending on the shifting political sands that year. Independence, however, remained elusive.<sup>31</sup>

Frustrated at the lack of progress on nationalist issues, Jalal Talabani, one of the disgruntled members of Barzani's politburo, left with his supporters in 1975 to form the Patriotic Union of Kurdistan (PUK). The PUK's initial purpose was to resume the armed struggle against Baghdad for Kurdish independence. Military success brought about three-fourths of Iraqi Kurdistan under PUK influence. But progress against Baghdad ground to a standstill in the run-up to the Iran-Iraq War.

During the 1980s, Iran and Iraq both sought to play the KDP and PUK against one another with some success. Saddam was effective in creating *jahsh* militias—small armed Kurdish groups loyal to Baghdad, that could be deployed in Kurdistan to undermine defenses, collect intelligence, cajole conscripts to fight in the south against Iran, and prepare the way for Iraqi military incursions. However, by July 1987, Tehran had convinced the PUK and KDP leadership to form a united front against Saddam in exchange for Iranian support.<sup>32</sup>

Saddam responded shortly thereafter with his Anfal offensive to wipe out Kurdish resistance, consolidate Baghdad's control over Iraqi

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30. KELLY, *supra* note 13, at 48.

31. *Id.*

32. McDOWALL, *supra* note 19, at 343-55.

Kurdistan, and Arabize certain strategic regions of the north. The destruction that reigned down on the Kurds in 1988 was horrific. Over 180,000 Kurds perished in gas attacks, conventional military assaults, round-up and detention in concentration camps, and exposure to weather and starvation at the hands of Saddam's forces.<sup>33</sup>

Upon Saddam's defeat in the Persian Gulf War, both the PUK and KDP moved to retake control of Iraqi Kurdistan, inviting *jahsh* militiamen back into the Kurdish ranks under a general amnesty. In the wake of Saddam's renewed suppression following the 1991 uprisings, the Kurds withdrew north of the 36<sup>th</sup> Parallel, where U.S. and British air contingents had established a no-fly zone to protect the Kurds from Saddam's planes.<sup>34</sup>

From 1994-1998, the KDP, under the leadership of Massoud Barzani, and the PUK, under Jalal Talabani, fought a bloody war for power over northern Iraq.<sup>35</sup> The KDP controlled the northern portion of Iraqi Kurdistan, with its political base in Irbil, while the PUK controlled the southern portion, based out of Sulaymaniyah. However, after a U.S.-brokered deal in September 1998 that brought both parties together, the factions began focusing on developing their respective portions of the Kurdish economy and opening cross-border links with their Kurdish cousins in Iran and Turkey.<sup>36</sup>

After the 2003 invasion and occupation of Iraq, Kurds were able to shift their regional government into a strong bargaining position relative to the defeated Sunni Arab and newly liberated Shi'a Arab elements. Although the political logistics proved challenging, the ultimate bargain put both PUK and KDP members into a Kurdish regional assembly under an Alliance List (a form of unity government), appointed the KDP's leader, Massoud Barzani, head of the regional government, and sent the PUK's leader, Jalal Talabani, to Baghdad as president of the national government.<sup>37</sup>

No significant opposition parties have formed to challenge the status quo between the PUK and KDP. A small group known as the Kurdish Islamic Union (KIU), led by Salahuddin Muhammad Bahauddin, formed as Kurds were wrestling with the establishment of the Kurdish regional government. But that party's headquarters was torched in December 2005, and the KIU accused regional KDP officials of orchestrating the attacks; KDP denied any involvement.<sup>38</sup>

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33. KELLY, *supra* note 13, at 20-32.

34. *Id.*

35. GUNTER, THE KURDISH PREDICAMENT, *supra* note 27, at 67-109.

36. McDOWALL, *supra* note 19, at 368-95.

37. *Id.*

38. *Id.*

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The story of Kurdish political infighting in Iran is similar to that in Iraq. The KDP's struggles in Iraq during the 1960s and 1970s were the focus of Barzani's efforts. In a deal with Tehran for support to destabilize northern Iraq, Barzani commanded the remnants of the Iranian KDP ("KDPI") to cease their struggle within Iran so that the Iraq front could be developed. Most followed these orders, but a splinter group broke off and formed the KDP in Iran Revolutionary Committee (KDPI/RC). This group was crushed by the Shah's forces in collusion with Barzani.<sup>39</sup>

In Turkey, the Kurdish nationalist movement has a distinctly militaristic bent. The Kurds have waged a guerrilla insurgency in southeastern Turkey since the 1920s. By 1939, the Turkish government had forced down a series of revolts and thousands of "problem Kurds" were shipped to western Turkey. Things were quiet until the 1960s when Kurds in Turkey, emboldened by the Kurdish uprisings in Iran and Iraq, took up arms once again. Cycles of repression followed as unstable governments rose and fell during a period of coups in Ankara for the following two decades.<sup>40</sup>

The Turkish government's repression of Kurds living in Turkey was based somewhat on an idealized notion of what it meant to be "Turkish"—that only Turks lived in Turkey and the Kurds were in fact Turks:

Thus the "inferiority" of Kurds (as represented in their attachment to reactionary politics, their tribal customs, and their regional backwardness) did not exclude their "perfectibility" as Turks, if only they would submit to the nationalizing process. But as their true identity was Turkish anyway, the cultural genocide mooted by the civilizing process was not one that necessitated their physical destruction (contrary to what transpired in the Armenian massacre in the years before the Republic's founding). Kurds could become Turks by becoming modern. . . .<sup>41</sup>

In 1980, the Kurdish Workers Party (PKK) was formed by Abdulla Ocalan, a young radical, who began to stir up nationalist sentiment. By the mid-1980s the PKK carried out military attacks with support from the government in Syria—a government which sought to keep Turkey

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39. KELLY, *supra* note 13, at 12-19. Subsequently, a new group formed, the Revolutionary Order of Toilers (Komala), which organized the peasantry and women. Since the 1980's, Komala has offered itself as an alternative to the elitist KDPI and continuous battles have been fought since then. Although both groups work for more autonomy within Iran, these efforts fall short of a call for complete independence.

40. *Id.*

41. CHRISTOPHER HOUSTON, ISLAND, KURDS AND THE TURKISH NATION-STATE 104 (2001).

destabilized. There are no other Kurdish factions within Turkey to challenge the authority of the PKK; thus, their situation is unlike the divided Kurdish political base in Iran and Iraq.<sup>42</sup>

Ocalan led the PKK's insurgent operations until his capture in 1999. He was ejected from his base in Syria the year before under intense pressure, and the threat of invasion, by Turkey. He fled to Russia, which refused to harbor him, then to Greece, which had supported his movement within Turkey, but was not allowed to stay. From there he flew to Italy and was held by Italian authorities after Turkey formally requested his extradition. However, Italian law forbade extradition of individuals to countries that had the death penalty. Since Turkey still used capital punishment at that time, Ocalan was released and disappeared—to much Turkish consternation.<sup>43</sup>

Eventually, Ocalan ended up in Africa, hidden by the Greek government in its Kenyan embassy. This was not the best hiding place, as U.S. intelligence agents were everywhere in Nairobi, investigating the al-Qaeda bombing of their embassy. U.S. agents tipped off Mossad (Israeli intelligence) to Ocalan's whereabouts and this information was relayed to Turkey, Israel's military ally in the Middle East. Turkish agents then picked up Ocalan as he was being transported from the Greek embassy to the Nairobi airport on February 15, 1999.<sup>44</sup>

Over the years, tensions have flared between the PKK and Barzani's KDP faction, which controls the Turkey-Iraq border. Barzani has criticized the PKK for establishing military bases inside Iraqi-Kurd territory to launch attacks into Turkey. On a policy basis, the PKK rejected the KDP/PUK decision to seek regional self-government within a federal Iraq. The PKK believes any independent Kurdish state should be a homeland for all Kurds.<sup>45</sup>

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42. MCDOWALL, *supra* note 19, at 397-454.

43. Michael J. Kelly, *Case Studies "Ripe" for the International Criminal Court: Practical Applications for the Pinochet, Ocalan, and Libyan Bomber Trials*, 8 MSU J. INT'L L & PRAC. 21, 30-35 (1999).

44. KELLY, *supra* note 13, at 50. Ocalan is currently incarcerated as the only inmate in a Turkish prison on the island of Imrali in the Sea of Marmara. The PKK quieted its military struggle during the ensuing years under pleas from Ocalan—induced by the Turkish government. Although Ocalan received the death penalty for his part in the insurgency, he most likely will not be executed due to a moratorium on capital punishment issued by the Turkish government, which is a candidate for membership in the European Union, where execution is banned. *Turkey Abolishes Death Penalty*, CNN World, Aug. 3, 2002, available at <http://archives.cnn.com/2002/WORLD/meast/08/03/turkey.death.pen/>.

45. Miron Varouhakis, *Fiasco in Nairobi: Greek Intelligence and the Capture of PKK*, 53 STUD. INTELLIGENCE: J. AM. INTELLIGENCE PROF'L, No. 1 (Mar. 2009) available at <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/vol53no1/fiasco-in-nairobi.html>.

Unity in purpose but disunity in methodology has stymied Kurdish efforts to build a homeland since the post World War I settlement of the 1920s divided them as minorities in disparate states. Whether a consolidated effort within Iraq can achieve a gravitational center for Kurdish aspirations remains to be seen. Neither Turkey, Syria nor Iran wish to see an independent Kurdish state emerge from the chaos in Iraq. Consequently, those states will likely seek to keep the Kurdish political factions as disunited as possible for the foreseeable future.

## II. KURDISH AUTONOMY UNDER THE IRAQI FEDERAL CONSTITUTION

With an independent Kurdish state off the table, the Kurds of Iraqi Kurdistan settled for autonomy and regionalism within a federal structure. The Constitution of Iraq was negotiated in 2005 and adopted by referendum on October 15 of that year. It was a vigorously negotiated document characterized by notable tension between Kurds and Shia on key points, with the United States occasionally weighing in to break impasses.<sup>46</sup>

Prior to the negotiation and adoption of the 2005 “permanent” Iraqi constitution, an interim constitution was negotiated and adopted under the auspices of the Coalition Provisional Authority (CPA) that governed Iraq in the aftermath of the U.S.-led invasion and occupation of the country. Known as the Transitional Administrative Law (TAL), this interim constitution formed the basis of the permanent constitution to such an extent that there was very little room for maneuver between the two iterations.<sup>47</sup>

The Kurdish factions were united during the TAL negotiations,<sup>48</sup> and consequently dealt from a position of strength. Thus, while his staff was left to contend with the Arab factions, Ambassador L. Paul Bremer, head of the CPA, went to Erbil to negotiate directly with the Kurds. This parallel track opened a key avenue of power to the Kurds, of which they wasted no time taking advantage.<sup>49</sup> Not only did the Kurds have Ambassador Bremer on their home turf, but those identified as

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46. See generally Ashley S. Deeks & Matthew D. Burton, *Iraq's Constitution: A Drafting History*, 40 CORNELL INT'L L.J. 1 (2007).

47. ANDREW ARATO, CONSTITUTION MAKING UNDER OCCUPATION: THE POLITICS OF IMPOSED REVOLUTION IN IRAQ 63 (2009).

48. *Id.* at 135.

49. *Id.* at 135-45. See also James Glanz and Walter Gibbs, *American Advisor to Kurds Stands to Reap Oil Profits*, N.Y. TIMES, Nov. 12, 2009, at A1, available at <http://www.nytimes.com/2009/11/12/world/middleeast/12galbraith.html> (“In the constitutional negotiations, he [Galbraith] helped the Kurds ram through provisions that gave their region—rather than the central Baghdad government—sole authority over many of their internal affairs, including clauses that he maintains will give the Kurds virtually complete control over all new oil finds on their territory.”). *Id.*

accompanying him had little expertise in constitutional or federalism issues.<sup>50</sup>

The Kurds, on the other hand, presented a united Barzani-Talabani front backed by a team of Western constitutional law experts led by Peter Galbraith and Brenden O’Leary.<sup>51</sup> Comparatively, it was no surprise that Kurdish positions should have advanced over the split Sunni/Shia Arab positions as the TAL came together. This pre-figured to a decisive Kurdish advantage as the derivative Iraqi constitution was drafted:

[M.] Barzani . . . dominated the process of making the final constitution. And it is true: the Kurds kept everything the TAL gave them, made new gains with respect to a further weakening of the jurisdiction of the federal government and the ultimate disposition of Kirkuk as well, and even managed to gain a kind of mediating position with respect to some issues such as the question of Islam and the state.<sup>52</sup>

What emerged was a federation. Article 1 establishes Iraq as a federal entity.<sup>53</sup> Like the United States, where each state has its own state constitution that exists under the federal constitution, Kurdistan is entitled to its own regional constitution. But The Kurdish regional constitution must exist within the framework of the Iraqi federal constitution—which the Kurds helped craft to their advantage. Several specific articles of the Iraqi constitution bear mention here. Article 13 functions as a supremacy clause:

Article 13:

First: This Constitution is the preeminent and supreme law in Iraq and shall be binding in all parts of Iraq without exception.

Second: No law that contradicts this Constitution shall be enacted. Any text in any regional constitutions or any other legal text that contradicts this Constitution shall be considered void.<sup>54</sup>

Thus, the provisions of the Kurdish constitution cannot directly countermand those of the Iraqi constitution. That said, to the extent that the Iraqi constitution is silent on a matter, regional constitutions adopted under it may control a given issue or area of authority. The federal

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50. ARATO, *supra* note 47, at 142.

51. *Id.* at 313 n.30.

52. *Id.* at 232.

53. See CONST. OF IRAQ art. 1 (“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.”).

54. CONST. OF IRAQ art. 13.

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government is, in fact, granted exclusive power in only nine discreet areas:

Article 110:

The federal government shall have exclusive authorities in the following matters:

First: Formulating foreign policy and diplomatic representation; negotiating, signing, and ratifying international treaties and agreements; negotiating, signing, and ratifying debt policies and formulating foreign sovereign economic and trade policy.

Second: Formulating and executing national security policy, including establishing and managing armed forces to secure the protection and guarantee the security of Iraq's borders and to defend Iraq.

Third: Formulating fiscal and customs policy; issuing currency; regulating commercial policy across regional and governorate boundaries in Iraq; drawing up the national budget of the State; formulating monetary policy; and establishing and administering a central bank.

Fourth: Regulating standards, weights, and measures.

Fifth: Regulating issues of citizenship, naturalization, residency, and the right to apply for political asylum.

Sixth: Regulating the policies of broadcast frequencies and mail.

Seventh: Drawing up the general and investment budget bill.

Eighth: Planning policies relating to water sources from outside Iraq and guaranteeing the rate of water flow to Iraq and its just distribution inside Iraq in accordance with international laws and conventions.

Ninth: General population statistics and census.<sup>55</sup>

Articles 112 through 114 establish other areas in which the federal government and regional governments share power. These include oil and gas development, antiquities, customs enforcement, water resources, education, environmental policy, electric energy distribution and health policy.<sup>56</sup> Analogous to the 10<sup>th</sup> Amendment to the U.S. Constitution, Article 115 of the Iraqi constitution functions as a savings clause:

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55. CONST. OF IRAQ art. 110.

56. See CONST. OF IRAQ art. 112-14.

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.<sup>57</sup>

On the surface, these provisions appeared enticing enough to induce buy-in to a unified federal state by the disparate Kurdish, Shia Arab and Sunni Arab factions, which is what they were intended to do.<sup>58</sup> Instead of integrating the ethno-religious factions within Iraq into a party structure,<sup>59</sup> the decision was made by the framers to divide political power among the groups geographically.<sup>60</sup> Now that a region is establishing itself legally within Iraq, these provisions come to life and must be given meaning. How far can the Kurds go along the road of autonomy? Legally? Politically?

The Iraqi constitution, and the constitutional court created to interpret it, are not yet old enough to indicate whether flexibility or rigidity will come to rule the day. Indeed, in vibrant democracies such questions are sometimes never resolved. Arguments over whether a founding document is static or evolutionary in nature are still had on a yearly basis in the United States Supreme Court between Justices Breyer and Scalia—and the U.S. constitution is over 200 years old.<sup>61</sup> Even the struggle concerning federal versus state control over legislative areas continues.<sup>62</sup> Thus, an initial take on constitutional interpretation is not necessarily dispositive.

Whether the federal constitutional court in Iraq will enjoy the degree of judicial independence necessary to chart its own course is also

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57. CONST. OF IRAQ art. 115.

58. Paul R. Williams and Matthew T. Simpson, *Rethinking the Political Future: An Alternative to the Ethno-Sectarian Division of Iraq*, 24 AM. U. INT'L L. REV. 191, 230, 241 (2008).

59. John McGarry and Brendan O'Leary, *Iraq's Constitution of 2005: Liberal Consociation as Political Prescription*, 5 INT'L J. CONST. L. 670 (2007).

60. Nicole B. Herther-Spiro, Comment, *Can Ethnic Federalism Prevent "Recourse To Rebellion?" A Comparative Analysis of the Ethiopian and Iraqi Constitutional Structures*, 21 EMORY INT'L L. REV. 321, 341-44, 349-50 (2007).

61. See, e.g., C-SPAN, *Constitutional Conversation* (C-SPAN television broadcast Apr. 21, 2005), available at <http://www.c-spanvideo.org/program/186408-1>; Audio tape: U.S. Association of Constitutional Law: Constitutional Relevance of Foreign Court Decisions, held by American University, Washington College of Law (Jan. 13, 2005), available at <http://www.freerepublic.com/focus/news/1352357/posts>.

62. See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 29 (2005) (on the supremacy of federal legislation over conflicting state legislation under the commerce clause on the question of intrastate medicinal marijuana production and possession in California).

an open question.<sup>63</sup> On the role of Islam and the judiciary, the experiences of the role of Islam in the constitutions of Egypt and Iran, and the courts that effectuate that role, offer divergent examples.<sup>64</sup>

Much controversy accompanied the adoption of Iraq's new constitution<sup>65</sup> on questions of religious freedom,<sup>66</sup> women's rights<sup>67</sup> and human rights/minority rights.<sup>68</sup> On religion, which affects the other main areas of concern, the Iraqi constitution states in Article 2 "Islam is the official religion of the State and is a foundation source of legislation" and, moreover, "[n]o law may be enacted that contradicts the established provisions of Islam."<sup>69</sup> Thus, questions arise as to whether Islam will control or only be one source of legislation, serve as a break on parliamentary legislation, undermine democratic principles and individual rights, or unduly empower imams over elected politicians.<sup>70</sup>

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63. Matthew T. Simpson, *Iraqi High Court Authority: A State-Practice Review of the Source of High Court Authority and an Assessment of 2005 Iraq Constitution*, HOBART & WILLIAM SMITH CS. PUB. AFFS. J., Nov. 2007, available at <http://ssrn.com/abstract=1061101>.

64. See generally Forrest Hansen, Note, *The Iraqi Constitution: Upholding Principles of Democracy While Struggling to Curtail the Dangers of an Islamic Theocracy*, 12 ROGER WILLIAMS U. L. REV. 256 (2006) (The role of Islam is central to the Iranian constitution and the courts that interpret it, as opposed to the constitution of Egypt and their more secularly oriented courts).

65. See generally Noah Feldman and Roman Martinez, *Constitutional Politics and Text in the New Iraq: An Experiment in Islamic Democracy*, 75 FORDHAM L. REV. 883 (2006).

66. Nathan J. Brown, Commentary, *The Final Draft of the Iraqi Constitution: Analysis and Commentary*, CARNEGIE ENDOWMENT FOR INT'L PEACE (2005), available at <http://www.carnegieendowment.org/files/FinalDraftofIraqiConstitution1.pdf>; Nina Shea and John F. Cullinan, *Constitutional Concerns: Religious Freedom Is At Risk in the New Iraq*, NAT'L REV., Aug. 29, 2005, available at, <http://www.nationalreview.com/comment/shea200508290941.asp>.

67. See generally Hallie Ludsin, *Relational Rights Masquerading as Individual Rights*, 15 DUKE J. GENDER L. & POL'Y 195 (2008) (Focusing on the danger that law based on religion poses to women, specifically the fact that because the constitution protects religion above all else, women will be unable to enforce any human rights violations and discussing the theory that although everyone is guaranteed certain individual rights under the constitution, women only have those rights if someone with whom a woman has a close personal relationship with gives them permission based on the fact that personal status is derived from religious law, which also means that the human rights safeguards built into the constitution do not really protect rights at all.).

68. See generally Mohamed Y. Mattar, *Unresolved Questions in the Bill of Rights of the New Iraqi Constitution: How Will The Clash Between "Human Rights" and "Islamic Law" Be Reconciled in Future Legislative Enactments and Judicial Interpretations?*, 24 FORDHAM INT'L L.J. 601 (2006); Makau W. Mutua, *The Iraq Paradox: Minority and Group Rights in a Viable Constitution*, 54 BUFF. L. REV. 927 (2006).

69. CONST. OF IRAQ art. 2A.

70. See generally Larry Catá Backer, *God(s) Over Constitutions: International and Religious Transnational Constitutionalism in the 21<sup>st</sup> Century*, 27 MISS. C. L. REV. 101 (2008) (offering examples of variant outcomes in the Islamic world).

Some argue that the government must make laws with two value systems in place—one of religion and one of democracy, and that this is possible because the reference to Islam in the Iraqi constitution is specifically to Islamic law as opposed to Islam itself.<sup>71</sup> Others fear that the seeds of theocratic rule by the Shia majority have been sewn. It is widely known that the Shia-dominated Maliki government is beholden to one of the Shia clerics in Iraq—Muqtada al-Sadr.<sup>72</sup> The senior Iraqi Shia Imam, Ali al-Sistani,<sup>73</sup> keeps the militant strains of Sadr and his followers in check by dint of age and honor.<sup>74</sup> After the Maliki government was installed, Sadr was recalled to Tehran for further training when his armed militias laid down their arms to support the federal government.<sup>75</sup> Again, once U.S. forces withdraw, all bets are off

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71. See Intisar A. Rabb, “*We the Jurists*”: *Islamic Constitutionalism in Iraq*, 10 U. PA. J. CONST. L. 527, 536-38 (2008).

[T]he two clauses on “Islam” . . . in Article 2 incorporate Islamic law rather than Islam itself. The constitutional text indicates that this is the case in two ways—through one negative implication and one positive one. First, “Islam” is too vague a notion to serve as a source of legislation because the term connotes a vast religious tradition with a considerable amount of internal diversity. As a religion, Islam refers to a belief system that in its simplest form entails three core tenets—belief in God, belief in the Prophet, and belief in the day of resurrection—and encourages the establishment of a just order. The religion can therefore provide little legislative guidance, unless the Constitution contemplates legislative regulations on belief. It does not. The Constitution provides for freedom of religion and belief in both inter- and intra-religious terms. Perhaps foreshadowing the sectarian strife that now threatens the very viability of the Iraqi state, the Constitution prohibits discrimination on the basis of religion or belief with respect to the many factions into which Iraqis may divide: religious, sectarian, or with regard to legal school (*madhhab*), belief, or opinion. It further prohibits groups and even *tendencies* that advocate accusing Muslims of infidelity to the faith. The negative implication is that Islamic law, rather than Islam, is what the Constitution invokes as a basis for legislation. Second, and more pointedly, is the positive implication of the non-contradiction clause in its use of two terms that connote law: “*thawābit*” and “*ahkām*.” *Thawābit* (singular *thābit*) is discussed in classical works, but does not play a rule of central importance in articulations of legal theory. With its appearance in modern documents of law and state, contemporary jurists have revisited the term, attempting to link it to the classical tradition. For example, the head muftī of Egypt, ‘Alī Jumu’a, explains that *thawābit* are agreed-upon Islamic legal rules that apply to all Muslims, regardless of time or place. *Ahkām* typically refers to legal rules in both classical and modern usage. Together, these two terms affirmatively indicate that the Iraqi Constitution has incorporated Islamic law—rather than the religion of Islam.

*Id.*

72. ARATO, *supra* note 47, at 246-47.

73. *Id.* at 59.

74. *Ayatollah Reaches Peace Deal with al-Sadr*, CNN World, Aug. 27, 2004, available at <http://edition.cnn.com/2004/WORLD/meast/08/26/iraq.main/index.html>.

75. Babak Rahimi, *The Rise of Ayatollah Muqtada al-Sadr*, FOREIGN POLICY, July 27, 2009, available at [http://www.foreignpolicy.com/articles/2009/07/27/the\\_rise\\_of\\_ayatollah\\_muqtada\\_al\\_sadr?page=full](http://www.foreignpolicy.com/articles/2009/07/27/the_rise_of_ayatollah_muqtada_al_sadr?page=full).

as to what shape the regime in Baghdad will ultimately take and what influences will be brought to bear.

As for the Kurds, they received a bit of an insurance policy by way of Article 141 in the Iraqi constitution, which protects the laws of Kurdistan and carries forward existing laws in the Kurdistan region, thereby protecting most pre-2005 Kurdish legislation from being steamrolled by the federal constitution:

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.<sup>76</sup>

### III. THE KURDISH REGIONAL CONSTITUTION

The Kurdish regional government in Erbil and the Iraqi central government in Baghdad are discovering firsthand the structural tensions built into a federal system. Such tensions, and the accompanying debates over balance of power, are new to the Middle East—where monarchy and dictatorship are the historical norm. How this relationship will play out, or even survive, remains to be seen.

Indeed, the recent feuding between the president of the Kurdish regional government, Massoud Barzani, and the prime minister of Iraq, Nouri al-Maliki, forebodes a potentially rocky turn of events once U.S. forces withdraw from Iraq in 2010.<sup>77</sup> That Prime Minister Maliki is frustrated over his lack of physical control of Iraq's borders in the north is an understatement.

When my team flew into Erbil from Vienna, we were processed by Kurdish customs officials, received by the Interior Minister's representatives, and never encountered an Iraqi federal official. Indeed, the only Iraqi federal troops that we came across were at the annual genocide memorial service in Halabja. That was also the only place we met U.S. troops. The border areas with Iran that we passed were staffed with Kurdish PUK *peshmerga* just as the Turkish border is staffed with KDP troops.

As Maliki has attempted to assert federal authority, Barzani has bristled and denied Maliki that power—for both political and economic reasons. With Arab Iraq still occupied by U.S. forces, the lid has not

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76. CONST. OF IRAQ art. 141.

77. See Ned Parker, *Kurdish Leader Talks of Authoritarian Drift in Iraq*, L.A. TIMES, Jan. 11, 2009, at A4, available at <http://articles.latimes.com/2009/jan/11/world/fg-iraq-barzani11>.

blown completely off this dispute. But Barzani is preparing. Before we arrived, the Kurdish regional government received a shipment of three C-130 cargo plane loads of small arms and ammunition from Bulgaria without securing permission from Iraq's central government.<sup>78</sup> Erbil is readying itself for anything Baghdad might try once the U.S. pulls out of Iraq—including a military assault.<sup>79</sup>

So with that general political background, how will a new Kurdish regional constitution legitimize the government in Erbil while simultaneously holding back the natural accretion of power to Baghdad in a unified country? Some would say that's a false question. They argue that the real agenda of the Kurds is independence, and anyone who reads the Kurdish constitution with a clear eye, would see that it is intended to eventually achieve that aim.<sup>80</sup> President Barzani has not gone out of his way to quash that notion.<sup>81</sup>

The constitution has gone through various iterations but has basically hewed to the underlying text attached in the appendix to this paper.

#### A. *Broad Outlines & Critiques*

Like most new constitutions of the late 20<sup>th</sup> and early 21<sup>st</sup> Centuries, the Kurdish constitution begins with a considerable preamble designed to set the provisions that follow into an historical context,<sup>82</sup> several articles of preliminary understandings and assertions, a section on governance, a laundry list of individual rights (including various bodies to carry those rights into effect), a financial section, and final provisions. The format

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78. Ernesto Londoño, *Kurds in N. Iraq Receive Arms from Bulgaria*, WASH. POST, Nov. 23, 2008, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/11/22/AR2008112202297.html>.

79. See Phil Sands and Nizar Latif, *Talk of War as Kurdish Tension Increases*, THE NATIONAL, Aug. 1, 2009, available at <http://www.thenational.ae/apps/pbcs.dll/article?AID=/20090802/FOREIGN/708019857>.

80. Parker, *supra* note 77; Paul Christopher Weber, *Iraq is a Hard Place*, GLOBE & MAIL, Feb. 27, 2009, at 38. An unofficial poll conducted in 2005 determined that 98.5% of Iraqi Kurds would prefer an independent state. ROBERT OLSON, *THE GOAT AND THE BUTCHER: NATIONALISM AND STATE FORMATION IN KURDISTAN-IRAQ SINCE THE IRAQI WAR* 219-220 (2005).

81. Parker, *supra* note 77 (“[Barzani] warned that if the [Iraqi] prime minister continued to try to make changes to the constitution and alter the spirit of post-Hussein Iraq, the Kurds might consider declaring independence. ‘That’s the bridge we will have to cross when we come [to] it,’ he said. ‘Even in the preamble of the constitution, it says very clearly [that] adherence to this constitution is a precondition to preserving the unity of Iraq.’”).

82. The Preamble is the functional equivalent of America’s Declaration of Independence in that it amounts to a catalogue of complaints and justifications, beginning, “We, the people of Iraqi Kurdistan have been oppressed for decades . . .” See CONSTITUTION OF IRAQ PmbI.

has become quite standard for modern constitutions. Aside from the document's structure, many points emerge that are worthy of note in addition to the unresolved issues concerning the city of Kirkuk and control of the region's oil, discussed separately in sections B and C below.

Security, for instance, is a very tangible and real concern for the Kurds. The current political stasis between the two dominant parties is replicated in the security situation, which may, in fact, undergird the political stasis. Our team noted during our visit that the KDP and PUK each control their own *peshmerga* soldiers, checkpoint guards, border guards and intelligence agents. Consequently, there are not one, but two defense ministers and two interior ministers within the regional government—one from each party.<sup>83</sup>

The new constitution changes this arrangement by consolidating control of all these units in single ministries for each portfolio and placing ultimate authority for them in the regional president.<sup>84</sup> The fact that the Kurdish region has a standing military consolidated under the president certainly plays into the argument that Iraqi Kurdistan is ultimately angling for independence. Political sub-units within federations are not typically armed. Moreover, under Article 104(13), the president has the power to deploy the Kurdish military beyond the Kurdistan region with the approval of parliament.<sup>85</sup> The constitution is ambiguously silent on whether that deployment power extends only to other areas within Iraq or whether the president can send his forces abroad.

The placement of territorial concerns at the beginning of the constitution belies the understandable obsession the Kurds have with this question. Article 1 acknowledges the existence of the Kurdistan region “within” the federal Iraqi state.<sup>86</sup> Article 2 demarks the borders of that region (specifically including Kirkuk) and invokes Article 140 in the Iraqi federal constitution to return areas formerly considered to lie within Kurdistan.<sup>87</sup> And Article 3 prohibits creation of a new region within the Kurdish region—so nothing can be carved away from the Kurds.<sup>88</sup>

A particularly strong sovereignty clause was written into Article 4 that poses a clear challenge to any unbalanced federal relationship

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83. Philip Shishkin, *Kurdish Rivalries Play Out on Cellphones Providers' Battle, Soon to Ease, Points to Underlying Lack of Unity in Iraq Region*, WALL ST. J., Nov. 24, 2007, at A4

84. CONST. OF KURDISTAN art. 13, 99, 104, 113.

85. CONST. OF KURDISTAN art. 104(13).

86. CONST. OF KURDISTAN art. 1.

87. CONST. OF KURDISTAN art. 2.

88. CONST. OF KURDISTAN art. 3.

Baghdad might attempt to impose. Aside from the subject areas listed in Article 110 of the Iraqi federal constitution that grant primary authority to the federal government, “the constitution and laws of the Kurdistan Region are more sovereign and supreme than those passed by the Iraqi government. . . .”<sup>89</sup> This assertion is buttressed by a choice of law provision that requires Kurdish courts to follow Kurdish law in the event of a conflict with other laws.<sup>90</sup> This emphasis amounts to a reverse supremacy clause and is a key component in the Kurdish gambit to assert control over much of the oil and gas in Kurdistan.

Moreover, the Kurdish region arrogates to itself the power to enter into agreements with foreign entities on non-Article 110 subjects, and maintains the power to sign deals with foreign entities on Article 110 subjects if the federal government consents.<sup>91</sup> This, likewise, becomes important in the context of concluding oil exploration and development contracts.

These strong sovereignty clauses are particularly muscular in light of the opt-out provision contained in Article 8. Here, the right of the Kurdish people to self-determination is invoked—and not the autonomous kind, rather the full Wilsonian ideal. Thus, the Kurdish region freely associates with the other regions in the Iraqi federation, but reserves the right to leave the federation if the central government either departs from the federal model or abandons the constitutional principles of democracy and human rights, or if the central government fails to effectuate Article 140 in the federal constitution.<sup>92</sup>

Interestingly, the Kurdish constitution places much less emphasis on Islamic identity when juxtaposed against the Iraqi constitution. Whereas the Iraqi federal constitution places Islam in Article 2 as the official religion of Iraq and “a foundation source of legislation,”<sup>93</sup> Islam is not even addressed in the Kurdish constitution until Article 7, which recognizes “the Muslim identity of the majority of the people of Kurdistan.”<sup>94</sup> Article 7 is also not as heavy-handed about Islam as a source of law; saying instead that “the principles of Islamic Shari’a is [sic.] one of the sources of legislation.”<sup>95</sup>

Indeed, the chair of the constitutional drafting committee, Furset Ahmad Abdulla,<sup>96</sup> and his chief counsel, Tarik Jambaz, repeatedly re-

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89. CONST. OF KURDISTAN art. 4(1).

90. CONST. OF KURDISTAN art. 4(2).

91. CONST. OF KURDISTAN art. 9.

92. CONST. OF KURDISTAN art. 8.

93. CONST. OF IRAQ art. 2.

94. CONST. OF KURDISTAN art. 7.

95. *Id.*

96. Chairman Abdulla’s biography, <http://www.kurdistanparliament.org/default.aspx?page=Parliamentmembers&idm=2312> (last visited on Dec. 23, 2009).

iterated to my team during our consultations that Shari'a was meant to be only *one* of many sources of law even though no other ones were identified in Article 7 out of deference to the religion. Moreover, Chairman Abdulla asserted that Shari'a would not be used in Kurdistan as a bludgeon to keep women down as it has been in Arab societies.

He specifically pointed to various provisions of the constitution that guaranteed women's rights such as equality with men, prohibition of gender discrimination, guaranteed civil and political rights covered by the constitution and international treaties to which Iraq is a party, the removal of "all obstacles which hinder their equality in cultural, social, economic and political lives . . ." <sup>97</sup> and the commitment to provide shelters for the protection of women "who have lost family security because of social reasons." <sup>98</sup> Additionally, a minimum of 25% of the seats in the regional parliament, local councils and municipalities are reserved for women. <sup>99</sup> This goes a bit farther than the Iraqi constitution, which provides that the "elections law shall *aim* to achieve a percentage of representation for women of not less than one-quarter of the members of the Council of Representatives" <sup>100</sup>—the lower chamber of the Iraqi parliament.

These statements were reassuring, but had to be taken with a grain of salt given the conservative nature of even a nominally-Islamic and tradition-bound tribally-based society. As recently as the last decade, female genital mutilation (FGM) was widely practiced in the Kurdish region and rightly condemned by the international community. <sup>101</sup> But we were assured by the chair as well as by political officers from the KDP and PUK that this practice had stopped and those who persisted in undertaking it would be prosecuted.

Although we pushed for inclusion of language in the constitution on this issue as a key backstop—explaining that legislation can be changed more easily than constitutional provisions, we were told that all segments of Kurdish society had to buy in to the document in order for it to be as widely embraced as possible and get the government off to a strong start; thus belying some resistance by unknown elements. We were fully aware throughout our experience that we were talking to people with their own agendas, and this problem is endemic to any exercise of this sort.

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97. CONST. OF KURDISTAN art. 21.

98. CONST. OF KURDISTAN art. 49(4).

99. CONST. OF KURDISTAN art. 23(2).

100. CONST. OF IRAQ art. 49(4) (emphasis added).

101. Amit Paley, *For Kurdish Girls, a Painful Ancient Ritual; The Widespread Practice of Female Circumcision in Iraq's North Highlights The Plight of Women in a Region Often Seen as More Socially Progressive*, WASH. POST, Dec. 29, 2008, at A9.

Yet the Kurds have made significant strides in the consultation of minorities within Kurdistan in the drafting of this constitution and in lodging significant protections for them in the document. Kurdish political leaders represented passionately to us and to other western academics consulting with them on this process that minority protections would move forward stridently and they will be an example for the rest of the Middle East.<sup>102</sup>

Article 18's equality clause lays the groundwork for this. It protects all citizens from discrimination based on "race, gender, color, language, social background, religion, sect, economical and social condition, or political and intellectual affiliations."<sup>103</sup> Given the conservative nature of the society, sexual orientation is naturally missing as a protected class. Nevertheless, the classes protected are in fact more expansive than one finds in other Middle Eastern constitutions. The key ethnic minorities in Kurdistan are Arabs and Turkomen—which are covered by the general equality provisions as well as language rights.<sup>104</sup>

The key religious minorities are Christians and Ezidis. The Christian community is an amalgam of Chaldean, Assyrian and Armenian,<sup>105</sup> while the Ezidi community (possibly numbering up to 300,000) adheres to an old religion blending elements of Islam, Judaism, Christianity and Zoroastrianism.<sup>106</sup> Their religious freedom rights are specially protected in Articles 7 (the same article that identifies Islamic law as one source of legislation), 65 (protection for places of worship) and 124 (internal judicial control over their own internal spiritual and family matters).<sup>107</sup>

Although not included in the draft constitution annexed to this paper, Chairman Abdulla's committee said that a new article was to be inserted guaranteeing the minority representation arrangement in the regional parliament that is already in play. Under this system, five seats are set aside for Christians (Chaldeans and Assyrians), one for Armenians, and five for Turkomen. Ezidis are included in the 100 seats assigned for ethnic Kurds. Minority rights are also respected in the

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102. See Brendan O'Leary, *The Kurds: A Ghostly and Embarrassing Nation*, Book Review, *GLOBE & MAIL*, May 17, 2008, at D3.

103. CONST. OF KURDISTAN art. 18.

104. CONST. OF KURDISTAN art. 14.

105. Abeer Mohammed and Neil Arun, *Kurdish Sanctuary for Christian Refugees*, Press Release, Kurdish Regional Government, Nov. 27, 2009, available at [http://www.krg.org/art\\_icles/detail.asp?lngnr=12&smap=02010200&rn=73&anr=32664](http://www.krg.org/art_icles/detail.asp?lngnr=12&smap=02010200&rn=73&anr=32664).

106. Michiel Leezenberg, *Political Islam Among the Kurds*, in *THE KURDS* 205-206 (Faleh A. Jabar and Hosham Dawod, eds. 2006).

107. CONST. OF KURDISTAN arts. 7, 65, 124.

criminal law provisions, which reflect provisions that are standard in most modern constitutions and do not bear mention here.<sup>108</sup>

The civil liberties section, however, is noteworthy. The simple assertion in Article 59 that “Everyone has freedom of speech and self expression” is left surprisingly unqualified;<sup>109</sup> especially in light of the qualification in the following article on freedom of the press, assembly and strikes, “as regulated by law.”<sup>110</sup> Despite this potential disconnect, the spirit of Article 59 appears to control life in Kurdistan, as far as we could tell in our travels. My team conducted at least six magazine and newspaper interviews, three television interviews and one radio interview—all with our own translator (not one imposed by the government).

Moreover, all topics were open for vigorous debate, including the constitution, human rights, women’s rights, the role of Islam in a progressive society, national elections in neighboring Iran, the influence of Iran in Iraq and Kurdistan, corrupt business practices by the Kurdish political parties, and even the legitimacy of the regional government. Indeed, the television production by KNN-TV (Kurdish National News) was in the format of a crossfire debate—encouraging and provoking argument.<sup>111</sup>

We were all in agreement that nowhere else in that part of the world, except Israel, would we be invited to engage in such free-wheeling discussions challenging the government. Thus, Kurdish society seems farther ahead in this regard than its neighbors. We certainly would not have engaged in that level of free speech in Damascus, Riyadh, Tehran or even Baghdad. Yet all the discussions were among men, not women, and all the men were Kurdish, not Arab, or some other ethnicity.

Moreover, it was our distinct impression that, as a stark counterpoint to this whiff of freedom, the Kurdish regional government maintains strict control over groups of citizens forming into civil society units. Although Article 64 commits to enhance the role of non-governmental organizations (NGO’s), they are regulated by law,<sup>112</sup> may

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108. CONST. OF KURDISTAN arts. 24-42.

109. CONST. OF KURDISTAN art. 59.

110. CONST. OF KURDISTAN art. 60.

111. As a counterpoint to this experience in 2009, see *Freedom of the Press 2008*, Freedom House Draft Country Reports, at 101 (April 29, 2008): “Extrajudicial means of harassment and intimidation of independent journalists also increased in the Kurdistan region over the last couple of years, with several editors of independent publications such as the *Hawlati* being jailed and resigning from their posts over threats of imprisonment for publishing articles critical of the KRG.”

112. CONST. OF KURDISTAN art. 64.

not be affiliated with foreign political organizations,<sup>113</sup> and must adhere to the human rights and principles contained in the constitution.<sup>114</sup> In practice, this means that NGO's must register with the government—which apparently only grants recognition sparingly. An international observer has noted that “independent civil society organizations are few and far between. Most organizations remain under the yoke of the two major political parties; they are often run by senior party members and serve as extensions of the political parties.”<sup>115</sup>

This assertion was borne out during a rather uncomfortable lunch with a leader of the KDP's parliamentary caucus, Aram Rasoul Mamand, and two Kurdish activists who were trying to start an affiliate of Chatham House in Erbil, but could not get recognition from the government despite multiple attempts. This particular group is a British-based international NGO that promotes free speech and free exchange of democratic ideals.

That group's experience would appear to violate Article 71, which provides that the freedoms articulated in the constitution cannot be restricted by law if “those restrictions and limitations do not affect the essence of the right or freedom to an extent that a society built on the just, free and democratic principles accepts them.”<sup>116</sup> Consequently, if the operation of the NGO registration provisions in Kurdistan undermines the spirit of the freedoms protected in the constitution, then legislative adjustments are in order once this constitution is promulgated.

As for the structure of the regional government, legislative power is lodged in the parliament, formally known as the Kurdish National Assembly, executive power is divided between a regional president and prime minister, and judicial power is centered on a judicial assembly composed of judges drawn from the various courts.<sup>117</sup> Separation of powers language is flirted with throughout Chapter 3, but it is difficult to go too far down this road in a parliamentary system.<sup>118</sup>

The threshold for introducing legislation in parliament is low—ten or more members,<sup>119</sup> who may also question the prime minister and his

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113. CONST. OF KURDISTAN art. 67(4).

114. CONST. OF KURDISTAN art. 67.

115. Kamal Said Qadir, *Iraqi Kurdistan's Downward Spiral*, 14 MIDDLE E. Q. 19, (Summer 2007), available at <http://www.meforum.org/1703/iraqi-kurdistans-downward-spiral>.

116. CONST. OF KURDISTAN art. 71.

117. CONST. OF KURDISTAN ch. 3.

118. See THE BLACKWELL ENCYCLOPEDIA OF POLITICAL INSTITUTIONS 408 (Vernon Bogdanor ed., 1987) (“Unlike Presidential government, which is based on the separation of powers principle, the parliamentary system involves the fusion of the executive and legislative powers.”).

119. CONST. OF KURDISTAN art. 89. Although not mentioned in the constitution, the members of parliament with whom we spoke indicated that every KRG law (whether

cabinet—over which parliament retains the power to remove through a vote of no confidence by two-thirds of the members.<sup>120</sup> Parliament also has the power to remove the president or vice president by majority vote if the Constitutional Court has accused either of a violation of their oath, a violation of the constitution, or high treason.<sup>121</sup> Another potentially powerful tool is the parliamentary investigative committee.<sup>122</sup>

The executive is strong, yet divided between a president and prime minister—who leads the majority coalition in parliament.<sup>123</sup> It is unclear whether this divided executive will shade more in practice toward the French or Russian model. Under the French model, “co-habitation” between presidents and prime ministers of different parties is common, but both have clearly defined powers and do not as a matter of course intrude on one another’s area of authority. If Barham Salih of the PUK becomes Prime Minister in 2009, then a co-habitation with President Barzani of the KDP is possible. But, as the president is limited to two four-year terms, Massoud Barzani, the current president and powerful leader of the KDP, may eventually lead the executive branch toward the Russian model if a junior KDP official is Prime Minister but then becomes president. Russian president Vladimir Putin, facing a similar term limit, became the prime minister under a weak figurehead president so that he could continue to wield power.<sup>124</sup>

Although the president exercises an objection power that is not quite as strong as a veto power, he does have the power to dissolve parliament, propose legislation, depose ministers, convene and lead the Ministers’ Council, and issue executive decrees that have legal equivalency with parliamentary laws.<sup>125</sup> His powers to declare emergencies, dispatch the military, grant amnesty, and commute death sentences<sup>126</sup> are not especially distinct from those granted executives in other constitutions.

The prime minister and his council of ministers run the day to day affairs of the region, per the normal functioning of such offices. Interestingly, there is provision in Article 111 for a fair representation of

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promulgated by parliament or a decree by the president was unclear) must cross-reference an article of the constitution.

120. CONST. OF KURDISTAN art. 90.

121. CONST. OF KURDISTAN art. 93(4).

122. CONST. OF KURDISTAN art. 93(13). If the parliamentary investigative committee is empowered by subsequent law supporting this constitutional provision to conduct independent hearings, subpoena witnesses, and issue contempt citations along the lines of House or Senate committees in the U.S. Congress, then a substantial check on executive power can potentially emerge.

123. CONST. OF KURDISTAN ch. 3, part 2.

124. C.J. Chivers, *Protégé in Russia is Sworn In*, N.Y. TIMES, May 7, 2008, at A6, available at [http://www.nytimes.com/2008/05/07/world/europe/07moscow.html?\\_r=1](http://www.nytimes.com/2008/05/07/world/europe/07moscow.html?_r=1).

125. CONST. OF KURDISTAN art. 104.

126. *Id.*

minorities in the council of ministers. There is some sensitivity to the question of diversity within the government already. The cabinet of Prime Minister Nechirvan Barzani (the president's nephew and influential member of the KDP) includes a Christian finance minister, for instance.<sup>127</sup>

But the most completely articulated section of the constitution dealing with the prime minister concerns his sway over the oil and gas sector of the Kurdish economy. Article 113 empowers the prime minister to draw up the oil and gas policy for the region and, after parliamentary approval, implement it.<sup>128</sup> The provisions call for the prime minister to jointly administer oil and gas fields with the federal government that were in production prior to August 15, 2005 at a rate of five thousand barrels per day.<sup>129</sup> Taken in tandem with the region's oil and gas law, discussed below, and control of the region's budget, the prime minister is essentially the chief architect of the region's economy.

There are currently forty-two ministers in the prime minister's cabinet.<sup>130</sup> This was widely regarded as excessive by the politicians, parliamentarians, and the members of the general population with whom we interacted during our visit to Kurdistan. However, the patronage and nepotism strands in Kurdish society run deep and long. These impulses have ensured party loyalty in difficult times and, consequently, are viewed as valid survival techniques. It will be hard to dislodge them completely.<sup>131</sup>

Corruption has long influenced the judiciary in Kurdistan.<sup>132</sup> This is not surprising given the security situation the Kurds had to endure. Nevertheless, a complete lack of judicial independence, party loyalty of the judges, favoritism, and random judgments led to an atmosphere of unpredictability.<sup>133</sup> This atmosphere was exacerbated by a system of courts divided among parties and other entities that neither worked in concert nor toward the ends of justice:

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127. The finance minister is an Assyrian named Sarkis Aghajan Mamendu. Peter Kenyon, *Christian Security Forces Growing Stronger in Iraq*, NPR NEWS, Oct. 6, 2008, available at <http://www.npr.org/templates/story/story.php?storyId=95343489>.

128. CONST. OF KURDISTAN art. 113.

129. *Id.*

130. See *Caught in the Whirlwind: Torture and Denial of Due Process by the Kurdistan Security Forces*, Human Rights Watch Report, at 15 n. 22 (July 2, 2007), available at <http://www.hrw.org/sites/default/files/reports/kurdistan0707webwcover.pdf>.

131. See CONST. OF KURDISTAN art. 153 (prohibiting government officials from engaging in business or real estate affairs, but not prohibiting their family members from engaging in this activity).

132. See Qadir, *supra* note 115.

133. *Id.*

The legal system of the region is both chaotic and compromised. There are five parallel judicial systems in Iraqi Kurdistan: the regular courts, state security courts to try political offences, military courts with jurisdiction over *peshmerga* forces, separate KDP and PUK party courts known as Komalayati (social) courts, and special tribal courts with jurisdiction only over the members of a certain tribe. With the exception of the regular courts that apply Iraqi laws, all the other courts are, in fact, illegal. Their judgments are arbitrary and often contradict the law.<sup>134</sup>

Recognizing that the rule of law and judicial independence are cornerstones to a stable society and growing economy, which the regional government seeks to boost through foreign investment,<sup>135</sup> the constitution goes a long way toward rooting out the problems endemic to the pre-constitutional judiciary.

Responding to criticisms leveled against the courts, the first article in the judicial section mandates an independent judiciary.<sup>136</sup> Judges are prohibited from holding other posts, maintaining party affiliations, or participating in political activity.<sup>137</sup> Court hearings are presumed open.<sup>138</sup> As private or exceptional courts are banned,<sup>139</sup> party courts will be a thing of the past, although special courts continue to exist for *peshmerga* forces.<sup>140</sup>

Separate courts will also be allowed to control family and social issues for followers of non-Muslim religions.<sup>141</sup> Such courts are not unknown in the West. Tribal courts exist within Native American communities of the United States. These are separate from state courts, but like state courts, their decisions are potentially reviewable by the federal courts. Jurisdiction in these courts is likewise limited to family and social issues, although these courts often also retain misdemeanor-level criminal jurisdiction.<sup>142</sup>

In the United Kingdom, separate Islamic courts have also been allowed to deal with family and social issues—although the decisions of

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134. *Id.*

135. Kirk Semple, *Pointing to Stability, Kurds in Iraq Lure Investors*, N.Y. TIMES, June 27, 2007, at A1, available at <http://www.nytimes.com/2007/06/27/world/middleeast/27kurds.html>.

136. CONST. OF KURDISTAN art. 116.

137. CONST. OF KURDISTAN art. 120.

138. CONST. OF KURDISTAN art. 121.

139. CONST. OF KURDISTAN art. 122.

140. CONST. OF KURDISTAN art. 123. Note that the wording of this article is broad enough that it could conceivably become the basis for a national security court if the government moved to devise one.

141. CONST. OF KURDISTAN art. 124.

142. DAVID H. GETCHES, CHARLES F. WILKINSON & ROBERT A. WILLIAMS, JR., FEDERAL INDIAN LAW 414-455 (5th ed. 2005).

these courts must be approved by a local state court to be given legal force.<sup>143</sup> Some, worry, however, that women's rights within the British Muslim community could be impaired by this new system:

Robert Whelan, of the Civitas think-tank, said: 'The problem with the Government's attitude is the big question over how far submission to *sharia* courts is voluntary among Muslim women. 'Women who live in some communities may have no option but to go to the *sharia* court. The case is then rubber-stamped by a family court without any of us knowing how the decision was reached.'<sup>144</sup>

Nevertheless, as of June 2009, it is estimated that at least 85 separate *sharia* courts were operating in the U.K. to serve the needs of Britain's Muslim community.<sup>145</sup> This is in keeping with a longer tradition of allowing religious communities in Britain to exercise some internal dispute resolution functions. "The Church of England has its own ecclesiastical courts. British Jews have had their own 'beth din' courts for more than a century."<sup>146</sup> Thus, the provision for separate courts for religious communities in the Kurdish constitution is by no means a new concept. How it is ultimately implemented, however, will be the test of its effectiveness.

As for governance of the judiciary in Iraqi Kurdistan, a judicial authority is established as a separate and independent entity comprised of prosecutors and judges from the various courts,<sup>147</sup> as well as a judicial assembly comprised of the heads of those divisions.<sup>148</sup> The judicial assembly monitors the independence of the judiciary<sup>149</sup> and the judicial authority controls its own budget<sup>150</sup>—which, if true, can be a real testament to judicial independence.

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143. Steve Doughty, *Islamic Courts Cleared to Deal with Family and Divorce Disputes as Government Endorses Sharia*, DAILY MAIL (London), Oct. 25, 2008, available at <http://www.dailymail.co.uk/news/article-1080509/Islamic-courts-cleared-deal-family-divor ce-disputes-Government-endorses-sharia.html>.

144. *Id.*

145. John Bingham, *At Least 85 Sharia 'Courts' operating in Britain, Says Civitas Report*, TELEGRAPH (London), June 29, 2009, available at <http://www.telegraph.co.uk/news/newstoppers/religion/5675166/At-least-85-sharia-courts-operating-in-Britain-says-Civitas-report.html> (last visited Oct. 1, 2009). For procedures on divorce and other family matters in the U.K., see The Islamic Sharia Council, <http://www.islamic-sharia.org/> (last visited Oct. 1, 2009).

146. Elaine Sciolino, *Britain Grapples with Role for Islamic Justice*, N.Y. TIMES, Nov. 18, 2008, available at <http://www.nytimes.com/2008/11/19/world/europe/19shariah.html>.

147. CONST. OF KURDISTAN art. 130.

148. CONST. OF KURDISTAN art. 131.

149. CONST. OF KURDISTAN art. 131(2).

150. CONST. OF KURDISTAN art. 132.

Yet judicial independence is more a behavior that evolves over time and, although the wording of the constitution seeks to back this goal, it is only just a goal. Procedure and practice are the meat and potatoes of judicial independence, and these have not yet been served—we've only the menu. Many constitutions declare judicial independence to be the norm, like that of Zimbabwe,<sup>151</sup> but of course the courts operate very closely under a political yoke. Missing provisions in the Kurdish constitution on how long judges serve (lifetime versus term of years) are put off under Article 130 for subsequent legislation.<sup>152</sup> Thus, a legal culture must grow up in Kurdistan to carry this pledge forward meaningfully.

The Constitutional Court is tasked with interpreting the constitution and is comprised of seven members who each possess at least twenty years legal experience.<sup>153</sup> They are selected by the judicial assembly in consultation with the regional president.<sup>154</sup> The interpretive task of the Constitutional Court will make it a key player as arguments over regional control of oil and gas fields move forward.

The provisions on finances and local government are standard. The amendment procedures can be initiated by the president and prime minister acting jointly or by half the members of parliament, which in any case must approve an amendment by a two-thirds vote.<sup>155</sup> No amendment can undermine the republican, democratic or parliamentary system.<sup>156</sup> The constitution is deemed ratified once a majority of the regional population has approved it in a referendum by majority vote,<sup>157</sup> and it becomes effective sixty days thereafter.<sup>158</sup>

#### B. *The Question of Kirkuk*

Traditionally regarded as the capital of Kurdistan, the city of Kirkuk was “Arabized” by Saddam’s regime. Strategically located over vast oil reserves, Saddam considered it unwise to leave the “treacherous” Kurds (who backed Iran in the Iran-Iraq War) in sole possession of the city.<sup>159</sup> Thus, thousands of Kurds were dispossessed of their homes and relocated elsewhere to make room for Sunni Arab families loyal to the

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151. CONST. OF ZIMBABWE art. 79B.

152. CONST. OF KURDISTAN art. 130.

153. CONST. OF KURDISTAN arts. 134, 137.

154. CONST. OF KURDISTAN art. 134.

155. CONST. OF KURDISTAN art. 159.

156. *Id.*

157. CONST. OF KURDISTAN art. 158.

158. CONST. OF KURDISTAN art. 160.

159. Michael J. Kelly, *The Tricky Nature of Proving Genocide Against Saddam Hussein Before the Iraqi Special Tribunal*, 38 CORNELL INT'L L.J. 983, 988-89 (2005).

regime to move in and repopulate the city. The resulting ethnicity-laced property disputes, possession of the city and use of the oil under it are key points of contention between the Kurdish regional government and Baghdad.<sup>160</sup>

Yet the struggle to dominate Kirkuk is not a new one. The city has been contested for centuries:

Nebuchadnezzar, exploiting Jewish captives from Palestine, built the Citadel and a stone bridge leading to it . . . . Alexander the Great, Central Asian tribes of Kara-Qoyunlu, Aq-Qoyunlu, the Seljuks, and numerous other conquering armies have waged wars here to control the trade routes connecting Persia and Istanbul with Baghdad.

In 1732, the Safavid and the Ottoman Empires fought bitter wars over control of Kirkuk; Safavid Nadir Shah won. A year later, the city was in the hands of the Ottoman Empire, to be lost once more in 1743 to the Safavids. Finally, the 1746 peace treaty gave the control to the Turks. Thus, Kirkuk remained under Ottoman domination for a little short of three centuries, until the end of World War I (in 1918), when they lost the war and Iraq.<sup>161</sup>

Kirkuk is now a multi-ethnic city with a mixed population of roughly 52% Kurds, 35% Arabs, 12% Turkomen (ethnic cousins of Turks) and about 12,000 Christians.<sup>162</sup> The supergiant oilfield that lies under the city is reason enough for any faction to try to assert control over it, let alone the historical and political grudges.

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160. Sam Dagher, *Can the U.S. Avert a Kirkuk Border War?*, CHRISTIAN SCI. MONITOR, April 25, 2008, available at <http://www.csmonitor.com/2008/0425/p06s02-wome.htm>.

161. ASTARIAN, *supra* note 6, at 1.

162. *U.N. Gives Iraq Report on Troubled Kirkuk*, USA TODAY, Apr. 22, 2009, available at [http://www.usatoday.com/news/world/iraq/2009-04-22-iraq-report\\_N.htm](http://www.usatoday.com/news/world/iraq/2009-04-22-iraq-report_N.htm). The Kurdish regional government has exhaustively catalogued, document by document, the displacement of the Kurdish population from Kirkuk and other Kurdish areas in a 2007 report. See generally KRG MINISTRY OF EXTRA REGIONAL AFFAIRS, REPORT ON THE ADMINISTRATIVE CHANGES IN KIRKUK AND THE DISPUTED REGIONS (Dec. 2007), available at <http://www.perleman.org/files/articles/130508111135.pdf>.



**Figure 2: The Speaker of the Kurdish Regional Parliament, Adnan Mufti, points to Kirkuk, identified on an 1878 Ottoman Empire map as the capital of Kurdistan (photo taken March, 2009, in the Speaker's office).**

Yet, the Kurds identify with Kirkuk in a similar fashion to the Jewish identification with Jerusalem. Although the Kurdish capital and largest city is Erbil, as Tel Aviv is Israel's functional capital and largest city, the place of Kirkuk in the hearts of the Kurdish population—no matter what their political allegiance, is special.<sup>163</sup> And, there is little political appetite in Erbil to give it up, despite Baghdad's reluctance to recognize Kirkuk as part of the Kurdistan region.

The Kurdish gambit to reclaim Kirkuk included identifying it as part of the region of Iraqi Kurdistan in Article 2 of the Kurdish constitution.<sup>164</sup> This does not directly contravene the Iraqi constitution, which calls in Article 140 for a referendum in Kirkuk "to determine the will of their citizens."<sup>165</sup> But it is, nevertheless, at least hopeful and at most provocative depending upon one's point of view.

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163. An earlier draft of the Kurdish regional constitution identified Kirkuk as the capital, but later versions abandoned this in favor of Erbil, *see* CONSTITUTION OF KURDISTAN art. 11, in order to diffuse the rhetoric and rely instead on the promise of Article 140 in the Iraqi federal constitution to instead deliver the city over to Kurdish control.

164. CONST. OF KURDISTAN art. 2.

165. CONST. OF IRAQ art. 140(2).

The [Kurdish] constitution contains nothing remarkably new and does not call for full Kurdish independence. It does, however, firmly spell out the Kurds' aspirations to take full control of areas they consider to be part of a Kurdish national homeland, including Kirkuk. The oil rich northern city has become a central point of contention between Erbil and Baghdad and has come to symbolize [sic] the competing aims of each authority. The Kurdish constitution insists that a referendum must be held over Kirkuk's future, with residents allowed to decide whether the city joins the Kurdish area or stays outside, under the umbrella of the central government. Such a referendum is enshrined in Article 140 of Iraq's national constitution and should already have been held. But, with the Kurds certain they have a majority of the population, it has been indefinitely delayed by Baghdad. Instead, the United Nations has been brought in to come up with possible compromise solutions for Kirkuk and other disputed zones.<sup>166</sup>

In 2007, the International Crisis Group issued a set of recommendations to resolve the Kirkuk impasse, calling for Baghdad and Erbil to share oil and power and postpone the referendum on the city's fate, for Turkey to stay out of it, for the U.N. to build consensus, and for the U.S. to provide protection and funding for development.<sup>167</sup> This initiative was acknowledged but not widely embraced.<sup>168</sup> The United Nations then attempted to broker a deal between the two sides on the fate of the city.

In April 2009, a special U.N. commission issued a set of recommendations designed to resolve the disputed status of several territories in Iraq—including Kirkuk.<sup>169</sup> The document was not publicly released, but laid out four possible options—two of which kept the city as a single entity and called for the residents to ultimately decide their fate. One option creates Kirkuk as an autonomous region of Iraq run by Kurds, Arabs and Turkomen with a budget financed by Kirkuk's oil revenues.<sup>170</sup> Another option creates Kirkuk as a "special region" jointly administered by the Kurdish regional government and the central

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166. Sands and Latif, *supra* note 79.

167. International Crisis Group, *Iraq and the Kurds: Resolving the Kirkuk Crisis*, MIDDLE EAST REPORT No. 64, Apr. 19, 2007, available at <http://www.crisisgroup.org/home/index.cfm?id=4782>.

168. Nouri Talabany, *Who Owns Kirkuk? The Kurdish Case*, 14 MIDDLE EAST Q. 75 (Winter, 2007), available at <http://www.meforum.org/1075/who-owns-kirkuk-the-kurdish-case>.

169. Timothy Williams, *U.N. Report Lays Out Options for Oil-Rich Iraqi Region*, N.Y. TIMES, Apr. 22, 2009, available at <http://www.nytimes.com/2009/04/23/world/middleeast/23iraq.html>.

170. *Id.*

government in Baghdad with a referendum on the city's final status delayed for five years.<sup>171</sup>

However, fresh from an overwhelming re-election as president of the Kurdish regional government in July 2009, Massoud Barzani rejected the U.N. proposal on Kirkuk, "Regrettably, the recommendations of the United Nations are unrealistic."<sup>172</sup> President Barzani, instead, insists on effectuating the Iraqi federal constitution's provisions on Kirkuk which, he rightly believes, will deliver the city to his region. "We will not accept that the United Nations or anyone else present us with alternatives to Article 140."<sup>173</sup>

Our team discussed some options directed at finessing the Kirkuk issue with the constitutional drafting committee. Among those the committee found most interesting was the notion of guaranteeing Arab seats in the regional parliament for Arabs living in Kirkuk, along the lines of dedicated Christian, Armenian and Turkomen seats. Another idea involved divorcing the question of Kirkuk from the question of the oilfields underlying it. In other words, the Kurds could "buy Kirkuk" by allowing Baghdad to control Kirkuk's oil for ten or twelve years in exchange for allowing the city of Kirkuk to pass into the region.

### C. *Oil Resources*

A second major area of contention between the dueling federal and regional constitutions concerns oil. A viable region within a federal structure should have an economic base, and that base in Iraqi Kurdistan is a mix of agriculture and oil. Agriculture, not surprisingly, is the least contentious of these. Thus, a large amount of time and effort was spent by the constitutional drafting committee on the question of regional control over oil exploration and production.

Figure-3 depicts oil infrastructure in the Kurdish areas of northern Iraq. The Tawke and Taq Taq fields have already gone into production under controversial production sharing agreements negotiated by the Kurdish regional government with foreign firms that were concluded with neither input nor permission from the federal government.<sup>174</sup>

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171. *Id.*

172. Dagher, *supra* note 5.

173. *Id.*

174. *Kurdistan Goes Glug Glug; Iraq's Kurdish Oil*, THE ECONOMIST, May 30, 2009, at 48:

The Tawke field will start by pumping 60,000 barrels a day (b/d). A new pipeline will carry the crude from the wells east of Zakho to join the main northern pipeline on the Iraqi side of the Turkish border. Meanwhile 40,000 b/d will be trucked from the Taq-Taq site to Khurmala. The crude from both fields will flow through Turkey to the Mediterranean port of Ceyhan. Mr Hawrami (the Kurdish minister of natural resources) says the new fields should

The operations at Taq-Taq and Tawke are run under PSAs whereby private companies get 10-20% of the profit. The rest goes to the federal government in Baghdad before being distributed across the rest of Iraq. But Iraq's oil ministry and its trade unions dislike PSAs. A long row between the Kurds and the authorities in Baghdad over rules for the north has yet to be resolved. Baghdad wants to approve all oil deals. The Kurds say the federal constitution lets them run—and profit from—their own oil industry, though they accept that revenue should somehow be shared. The Kurds' parliament passed a hydrocarbons law in 2007. But a new national oil law has been stalled in the federal parliament in Baghdad for at least three years.

The Kurds say they have shown up the decrepitude of Iraq's oil establishment. Despite billions of dollars of investment since 2003, production is still just over 2m b/d, about what it was when Saddam Hussein was toppled. The federal oil minister, Hussein al-Shahristani, loathes the Kurds' success and has tried to stop them running their own oil industry, declaring all deals (now at least 20) signed by them to be illegal. He has also threatened to blacklist any oil company that does business up north from applying for licences [sic] down south.<sup>175</sup>

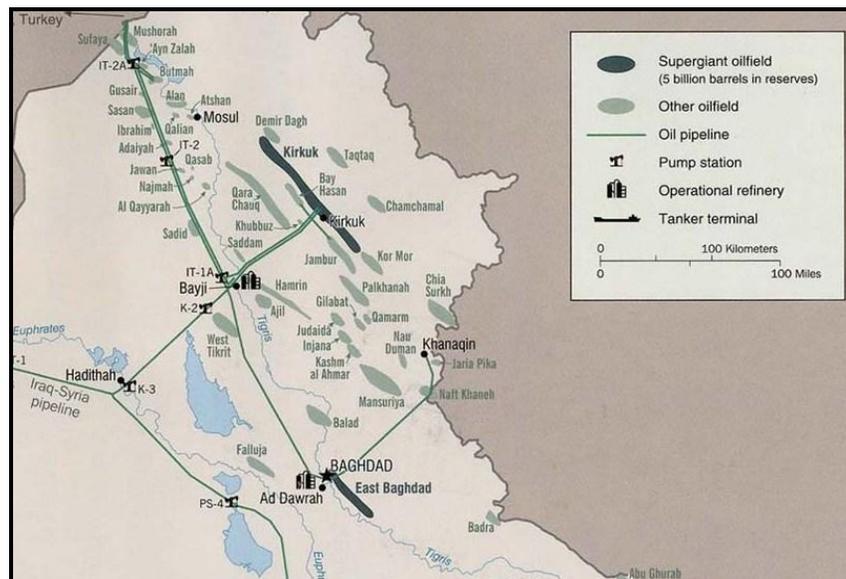


Figure 3: Oil Infrastructure In and Around Kirkuk (Source: CIA, 2003)

produce 450,000 b/d by 2011 and 1m b/d by the end of 2012. That would represent 42% of Iraq's production, if output from the rest of the country stays the same.

175. *Id.*

There is no set pattern for Kurdistan to follow, in a federalism context, for a consistent balance of authority between regions and the central government over oil exploration and production. Some federations reserve this power to the central government exclusively, while others allow a degree of control to the regions over some or most aspects of the oil sector.

For example, in the United States,<sup>176</sup> Canada,<sup>177</sup> Australia,<sup>178</sup> power is shared between state/provincial governments and the federal government in the oil sector. In the U.S., oil and gas exploration and production are governed by either public or private leases (oil and gas can be private property in the U.S.) and the public lessee can be either the state or federal government, depending upon whether the area of development in question is owned by the state or federal government.<sup>179</sup>

The situation is somewhat analogous in Canada, but only in the sense of shared power. The provinces exercise much more direct control over their natural resources—which results in a lack of uniformity across the country. “Canada’s federal government and provincial governments share jurisdiction over energy policy and, accordingly, there is no single energy policy in place.”<sup>180</sup> The divergence in power allocation in Canada is mainly attached to onshore versus offshore resources.<sup>181</sup> Onshore, “the provinces have clear constitutional authority with respect to oil and gas activities . . . within their province.”<sup>182</sup> But offshore, “the right to

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176. Charles Caldwell, Cathy Lewis, Larry Nettles & William Vigor, *United States, in OIL REGULATION IN 28 JURISDICTIONS WORLDWIDE* 145 (Craig Spurn ed., 2009) (“Regulation is differentiated between the federal and state levels and by segment.”).

177. *Id.* at 146:

The right to explore and develop oil on the lands of others (whether public or private) is obtained through oil and gas leases. The terms of these oil and gas leases control the activities of the lessees together with some federal and state regulations governing protection of the environment and other matters. Leases that are negotiated between private individuals and private owners may follow widely used forms or may contain terms and conditions specific to the given lease. Separate state agencies control the exploration and production of oil from state-owned public lands. For federal lands . . . [t]he Department of Interior regulates. . . .

178. Nathan Evans, *Offshore Petroleum in Australia—Cooperative Governance in a Sea of Federalism*, 26 *DALHOUSIE L.J.* 175, 176 (2003) (“In Australia, offshore hydrocarbon development legislation established a shared policy and administration regime, under which the Commonwealth and states are essentially equal partners in decision-making.”).

179. Craig Spurn and Selina Lee-Andersen, *Canada, in OIL REGULATION IN 28 JURISDICTIONS WORLDWIDE* 27 (Craig Spurn, ed. 2009).

180. *Id.*

181. Keith R. Evans, *Canadian East Coast Offshore Oil and Gas Industry: Sustainable Development Through Cooperative Federalism*, 26 *DALHOUSIE L.J.* 149 (2003).

182. *Id.* at 151.

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explore and exploit mineral resources in the seabed . . . has been held by the Supreme Court of Canada to stem from the sovereign rights of the coastal state”—which is Canada.<sup>183</sup>

It was our impression that increased control over the energy sector within the region is clearly the path that the Kurdish Regional Government wishes to follow if it can. Thus, the Canadian constitutional format could prove instructive for Kurdistan as it seeks to balance its constitutional relationship with the federal government on the question of controlling the oil sector. As the Kurdish region is a landlocked unit, Canadian offshore federal supremacy would not be analogous—only the onshore provincial control.

In Canada,

The division of powers between federal and provincial governments is set out in the Constitution Act of 1867. Generally, the federal government has jurisdiction over matters of national and international importance, whereas the provinces have jurisdiction over matters of a local or private nature. . . .

The federal government has authority to make laws for ‘peace, order and good government’ in relation to all matters not exclusively assigned to the provinces and including the regulation of trade and commerce. The provinces have authority over property and civil rights and in respect of exploration for, and conservation and management of, non-renewable natural resources in the province.

Balancing the federal government’s authority over trade and commerce with the provinces’ specific powers presents a challenge in determining which level of government is responsible for regulating a particular matter. Jurisdiction will typically be determined based upon the location, nature and scope of the matter and certain other factors. Canadian courts have traditionally interpreted the federal power over trade and commerce to be limited to inter-provincial and international trade and commerce and to general trade and commerce, which has been narrowly interpreted and historically applied most significantly to intra-provincial aspects of business competition.

Accordingly, the two levels of government exercise constitutional powers in respect of different aspects of energy development, transportation, marketing and use. Generally the provinces regulate local matters regarding oil and gas exploration and production and energy transportation and marketing within its provincial boundaries. With respect to energy transportation and marketing, the movement of goods inter-provincially is regulated by the federal government.

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183. *Id.* (citing Reference re: Seabed and subsoil of the continental shelf offshore Newfoundland, [1984] 1 S.C.R. 86 (Can.)).

Likewise, pipelines which cross provincial or international boundaries are under federal jurisdiction.<sup>184</sup>

Moreover, each province within the Canadian federation can adopt its own unique approach to the regulation and production of oil over which it enjoys jurisdiction.<sup>185</sup> Alberta is an example of one model.

[I]n Alberta, the ERCB [Energy Resources and Conservation Board] requires that participants seeking to license for and engage in oil exploration, development and production activities obtain a business associate code. A corporation applying for a . . . code must be resident in Alberta, which means that it must have an office and staff located in Alberta.<sup>186</sup>

But in some federations, the central government enjoys a constitutionally mandated monopoly in the oil sector, most often exercising this control via a corporate entity, as is the case in Brazil,<sup>187</sup> Mexico,<sup>188</sup> and Nigeria.<sup>189</sup> This arrangement can be made at the state's creation or constitution's adoption, or it can come about over time. Malaysia is a good example of the latter. A federation of thirteen states and three federal territories created in 1963 by a union of the Malay states and former British Crown colonies of Sabah, Sarawak, and Singapore (Singapore left the union in 1965), Malaysia initially

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184. Spurn and Lee-Anderson, *supra* note 162.

185. *Id.* at 29 (“The regulatory authority in each jurisdiction . . . requires that a party seeking to undertake exploration and production activities by licensed and each proposed activity be licensed. Each province has its own set of procedures, criteria and fees for obtaining these licenses.”).

186. *Id.*

187. Luiz Antonio Maia Espinola de Lemos, *Brazil*, in OIL REGULATION IN 28 JURISDICTIONS WORLDWIDE 23 (Craig Spurn, ed. 2009) (“The Brazilian Federal Constitution establishes that all activities related to the oil industry are a federal government monopoly. Notwithstanding, such activities may be delegated to state-owned or private companies, with due regard for the conditions set forth by the Petroleum Law.”).

188. Mayuca Salazar Canales & Gabriel Ruiz Rocha, *Mexico*, in OIL REGULATION IN 28 JURISDICTIONS WORLDWIDE 88-89 (Craig Spurn, ed. 2009) (“The key participant in the oil industry is . . . Pemex, Mexico's state-owned oil company. In accordance with Mexican law, Mexico maintains direct ownership over oil . . . and only Pemex is charged by law to develop Mexico's oil reserves on behalf of the nation. . . . [A]rticle 27 of the Mexican Constitution provides that all natural resources, including hydrocarbons, are the property of the nation.”).

189. Soji Awogbade, Sina Sipasi & Gloria Iroegbunam, *Nigeria*, in OIL REGULATION IN 28 JURISDICTIONS WORLDWIDE 94 (Craig Spurn, ed. 2009) (“The entire property and control of oil in place within any land in Nigeria, under its territorial waters, continental shelf and exclusive economic zone is vested in the federal government by virtue of the Constitution of Nigeria (1999) and the Petroleum Act.”).

established in its first constitution that onshore oil would be controlled by the states, not the central government.<sup>190</sup>

The Federal Constitution defines the distribution of legislative powers and responsibilities between the federal and state governments. It stipulates that all mineral resources, including oil, within or upon any land in a state are owned by the state and the state government is allowed to collect revenue from such mineral resources. Exploration and production of oil were made pursuant to oil prospecting licenses and oil mining leases pursuant to the Mining Enactments of the States in Peninsular Malaysia; the Mining Ordinance of Sabah; and the Oil Mining Ordinance of Sarawak. Pursuant to these oil prospecting licenses and oil mining leases, oil companies were granted the exclusive right over all crude oil won and saved in mining areas in return for payment of rent and royalty to the state government.<sup>191</sup>

And in 1966, this regime was further bolstered with the Petroleum Mining Act, which provided that “companies wanting to explore or extract oil onshore in any state must apply to the state government for an exploration license or enter into a petroleum agreement with the state government.”<sup>192</sup>

But after the 1973 world oil crisis, Malaysia’s central government acted to consolidate its control over the oil sector and the states were stripped of their power. The government incorporated a new national oil company, PETRONAS. Under the Petroleum Development Act of 1974, “the entire ownership in and exclusive rights, powers, liberties, privileges of exploring, winning and obtaining petroleum onshore and offshore Malaysia were vested in PETRONAS.”<sup>193</sup> Thus, at least in the onshore context, the Malaysian experience illustrates how a federation can move from one extreme to the other over time in power allocation between states and the central government.

Although not a federation, Denmark has spun off the most authority over oil exploration and production to the other constituent units of the Danish Common Community: the Faroe Islands and Greenland. The Faroe Islands were granted self-rule from Copenhagen in 1948 and a subsequent 1992 agreement granted the Faroe Islands “independent of Denmark, . . . the legislative authority and the administration of the area

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190. Faizah Jamaludin, *Malaysia, in OIL REGULATION IN 28 JURISDICTIONS WORLDWIDE* 82 (Craig Spurn, ed. 2009).

191. *Id.*

192. *Id.*

193. *Id.*

of exploration and production of hydrocarbons.”<sup>194</sup> Greenland was granted home rule in 1979 and, subsequently, under the 2009 Self-Rule Act, it was recognized that “Greenland owns and has the right of disposal of all mineral resources, including oil and gas, in Greenland.”<sup>195</sup>

Presently, the Kurds appear to be following the more typical Mexican model in their new oil and gas law, promulgated before the constitution, with a ministry and a nationalized company to oversee operations.<sup>196</sup> This perhaps rests on the premise that they operate economically as a *de facto* state along the lines of Taiwan already. But the most fruitful model to follow for the Kurdish Regional Government might be the Canadian model, where provinces control their own natural resources, and each province within the federation may adopt their own exploration and development rules independent of the other provinces. The 2005 Iraqi federal constitution may allow the Kurds to do just that.

#### *D. A Reverse Supremacy Opportunity on the Question of Oil*

Figure 3 depicts the oil resources in and around the Kurdistan region. The oil fields close to Kirkuk and to the east include Demir Dag, Taqtaq, Chamchamal, Kor Mor, and perhaps Chia Surkh. Who controls these oil fields is a constitutional question that depends upon the interplay between the Kurdish regional constitution and the Iraqi federal constitution.

As noted earlier, the Iraqi constitution is supreme in designated areas, over which the federal government enjoys exclusive authority. Oil is not one of them. The Kurdish delegation was incredibly successful in pushing this item into an area of shared competency during negotiations on the Iraqi constitution.

[T]he drafting history shows the relative success of the Kurds during the negotiation process. . . . By the end of the process . . . many of the exclusive authorities in the earlier drafts had been shifted to the section on joint competencies, and the federal government’s authority to directly manage oil and gas had been cut back to apply expressly only to resources from “present fields.” The result, therefore, favored

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194. Per Hemmer, Johan Weihe & Per Vestergaard Pedersen, *Faroe Islands*, in *OIL REGULATION IN 28 JURISDICTIONS WORLDWIDE* 41 (Craig Spurn, ed. 2009).

195. Per Hemmer, Johan Weihe, Per Vestergaard Pedersen & Rania Kassis, *Greenland*, in *OIL REGULATION IN 28 JURISDICTIONS WORLDWIDE* 51 (Craig Spurn, ed. 2009).

196. Oil & Gas Law of the Kurdistan Region—Iraq art. 6-61, 2007, available at <http://www.perleman.org/files/articles/070708090735.pdf> [hereinafter Oil and Gas Law of the Kurdistan Region].

the overall Kurdish interest in limiting the role of the federal government in Iraq and ensuring broad powers for the KRG.<sup>197</sup>

Article 112 is the operative portion of the Iraqi federal constitution that establishes some room for maneuver by the Kurdish regional government on the question of controlling oil resources within Kurdistan. It should be read in the context of Article 111, which places ownership of oil wealth in people of Iraq and the regions.<sup>198</sup>

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.<sup>199</sup>

The definition of the term “present” in section one of Article 112 is the fulcrum of the argument the Kurds will proffer to control the oil within Kurdistan. Because the federal government may expressly assert management over only the present oil fields, “present” not being defined in the document, and no mention is made of “future” oil fields, the savings clause of Article 115, reserving all other powers to the regions, would appear to open the door for Kurdish control of “non-present” fields in Kurdistan.<sup>200</sup> This argument is bolstered on a plain reading of Article 121, which empowers regions to essentially override federal legislation that touches on areas outside the exclusive competency of the federal government.

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197. Deeks and Burton, *supra* note 46, at 64 (citations omitted).

198. CONST. OF IRAQ art. 111 (“Oil and gas are owned by all the people of Iraq in all the regions and governorates.”).

199. CONST. OF IRAQ art. 112 (emphasis added).

200. This language did not exist in the interim constitution; the Kurds and Shia had it inserted. Under the TAL (Art. 25e), the central government controlled the state’s oil wealth. *See* ARATO, *supra* note 47, at 235-36.

“Present” could simply mean known or currently producing. Of Iraq’s eighty known oil and gas fields, only twenty have been developed.<sup>201</sup> Two members of the U.S. delegation that negotiated the Iraqi constitution acknowledge that this ambiguity in Article 112 could feasibly cut either direction.<sup>202</sup> However, they ultimately conclude that, based upon the legislative history of the negotiations as the Iraqi constitution was being drafted, an interpretation favoring greater regional control over truncated federal control of oil resources (based on the use of Article 115 and buttressed by Article 121) would be disingenuous:

On one hand, Articles 115 and 121(second) could be read to permit regional or governorate laws to trump federal laws concerning oil and gas regulation in certain circumstances, because the constitution technically provides for concurrent jurisdiction over these natural resources. On the other hand, one might argue that the drafters, choosing to address oil and gas separately in Articles 111 and 112 rather than within Article 114 on concurrent authorities, did not intend regional or governorate law automatically to trump federal laws on oil and gas.

The tenor of the oil and gas negotiations strongly argues for the second reading. The drafters battled over the oil and gas language for weeks, ultimately holding up negotiation of all other unresolved areas until treatment of natural resources was resolved. In contrast, an early version of Article 115 arrived in the document for the first time on August 21 with little or no debate preceding its inclusion in the document. It seems quite unlikely that the drafters, while undertaking painstaking efforts to agree that the federal government would manage oil and gas and distribute income “with” the producing regional and governorate governments, would have intended to upend such carefully negotiated language through the insertion of a last minute provision giving regional and governorate governments primacy over federal regulation in areas of concurrent authority. In addition, the drafting history shows that negotiators considered addressing oil and gas within provisions on exclusive and concurrent authorities in earlier drafts, but, with the final compromise, decided to address oil and gas outside of the exclusive-concurrent dichotomy.

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201. Danny Fortson, *Kurdistan Defies Iraqi Authorities on Oil Contracts*, INDEP. (London), Feb. 9, 2008, available at <http://www.independent.co.uk/news/business/news/kurdistan-defies-iraqi-authorities-on-oil-contracts-780291.html>.

202. Deeks and Burton, *supra* note 46, at 55 n.306 (“Terms like ‘current fields,’ ‘present fields,’ and ‘existing fields’ are inherently ambiguous. The Kurds may have intended the proposed term to mean fields where oil and gas are currently being extracted, but it is at least plausible to define terms like “current” and “present” much more expansively to encompass fields identified by seismic surveys, whether or not exploration has begun.”).

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Similarly, although Article 121(second) . . . was included in the draft Constitution somewhat earlier than Article 115, the singular focus on resolving the distribution of authority over oil and gas, in conjunction with the separate textual treatment of these provisions, suggests that the more reasonable reading is that the drafters did not intend Article 121(second) to override the careful compromise on oil and gas.

[Moreover,] Article 115 . . . could be read to mean that the federal government maintains no authorities outside its area of exclusive competence. There are at least two textual arguments for rejecting this interpretation. First, Article 121(second) presumes that the federal government has the power to enact legislation outside the area of exclusive federal authority, by providing for regional law supremacy “in case of a contradiction between regional and national legislation in respect to a matter outside the exclusive powers of the federal government.” Second, many sections of the constitution that address areas outside the scope of Article 110 on exclusive authorities contemplate that the federal legislature will enact laws to give substantive provisions greater definition and shape.

Here, as above, the negotiating history may help resolve any lingering textual ambiguity. The late date on which the drafters introduced Article 115 is not by itself a reason to discount the meaning of the plain language. However, the timing and ambiguity of the provision, when juxtaposed against other provisions that clearly support the federal government’s prescriptive legislative power outside its area of exclusive federal authority, support disregarding conflicting or unworkable readings of the language. Instead, Article 115 should be interpreted to achieve consistency with the rest of this Section and other provisions discussing the respective primacy of federal and regional law.<sup>203</sup>

Conversely, a legal opinion offered by a Cambridge international law professor concludes that the KRG’s authority trumps that of the federal government.<sup>204</sup> Our team was presented a copy of this opinion at the regional parliament by Chairman Abdulla in a private meeting after the constitutional drafting committee had departed. It appears to have been commissioned in 2007 through the London offices of Clifford Chance LLP by the Prime Minister of the Kurdish Regional Government, Nechirvan Barzani, specifically to rebut the above assessment.

On the question of interpreting the term “present” in Article 112, Dr. Crawford argues that this means “[oil] fields already in production.

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203. *Id.* at 66-67 (citations omitted).

204. James Crawford, *The Authority of the Kurdistan Regional Government over Oil and Gas Under the Constitution of Iraq* at 6 (Jan. 29, 2008) [on file with author], republished in the OIL, GAS & ENERGY LAW INTELLIGENCE JOURNAL 3 (2008).

This interpretation is indicated by the word ‘extracted’ and by the reference to ‘producing’ governates. The clear inference is that Article 112, first, covers oil and gas extracted from fields presently in production.”<sup>205</sup> Thus, all non-producing fields in Kurdistan would be “managed by the relevant regional government alone.”<sup>206</sup>

Moreover, the relevant date on which such fields would be deemed present or not present is, according to Dr. Crawford, the date on which the Iraqi constitution entered into force (2006). And, as of that date, there were no producing fields in the Kurdistan region.<sup>207</sup> Consequently, a plain reading of the text, divorced from the background of the negotiations, establishes that:

On the footing that there is a dispute between the federal and regional authorities [over oil] (of which there can be no doubt), Article 115 provides that priority is to be given to the law of the region—subject only to the Constitution itself. As to non-producing and future fields, there is under Article 112, Second, no federal right to manage, although regional management has to respect strategic policies, which have still to be formulated by the federal government “with” the KRG.<sup>208</sup>

Dr. Crawford also pronounced the twenty concession agreements already negotiated between the KRG and foreign oil prospectors as legally valid.<sup>209</sup> The KRG, in turn, relied heavily on this legal opinion in moving forward on those agreements and seeking to conclude others without the permission of the federal government.<sup>210</sup> To date, major oil

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205. *Id.*

206. *Id.* “According to the sworn translator the English phrase ‘extracted from’ is an accurate rendering of the Arabic text, which means ‘that the management is to be undertaken only in respect of the oil and gas that has been—now or in the future—extracted from ‘present fields.’” *Id.* at n.7.

207. *Id.*

208. *Id.* at 12.

209. *Id.* at 13 (“As to contracts entered into by the Kurdistan Region authorities for oil and gas development . . . , I see no reason to question their validity or legal effect. [T]he authority of the KRG to authorize the conclusion and implementation of such contacts is, in my opinion, unqualified.”).

210. Fortson, *supra* note 183:

The KRG [published] an independent formal legal opinion from James Crawford, a widely respected expert in international law at Cambridge University, that the PSAs [oil concession agreements] were legally valid. The KRG has thus far signed nearly 20 PSAs with different companies. It is in discussions “with several other parties” and was keen to reassure those thinking about going into the country that they will not later be invalidated by the federal government. Alex Munton of Wood McKenzie said: “The legal opinion is so important because it allows [the KRG] to respond quite strongly to the argument that what Korea National and OMZ have done is in any way illegal.” Under the terms of PSAs, foreign oil companies agree to put up all of the initial

companies such as Shell and British Petroleum have been reluctant to contract with the Kurdish authorities so as not to upset the federal government.<sup>211</sup>

Nevertheless, with dueling opinions over controlling oil wealth, this matter may yet end up before the federal Constitutional Court in Baghdad. The Kurdish gambit is nothing less than a constitutional *ju jitsu* move based upon a reverse supremacy clause argument. The Kurds have moved ahead with promulgating their own oil law,<sup>212</sup> and they fix the date of definition for current oil fields as those that were “in Commercial Production prior to 15 August 2005”<sup>213</sup> and future oil fields as those not in production as of that date.<sup>214</sup>

The Kurdish regional government will likely take a litigation path to cement its claims by first seeking an opinion from the Kurdish regional Constitutional Court—which will be formed once the regional constitution enters into force. The regional court of cassation will function as the constitutional court in the interim as the Constitutional Court is being established. It would be wise for the president to await the Constitutional Court’s creation before bringing such a case.

In any event, the Kurdish Constitutional Court is only empowered to interpret the Kurdish constitution, not the Iraqi constitution. Consequently, with this judicial decision in hand, the Kurds would next take their case to the federal Constitutional Court in Baghdad—banking on the impartiality of the court to directly interpret the terms of the Iraqi constitution with their plain meaning as courts in civil code systems typically do. If the federal Court decided to go into the negotiating history, then any outcome would be possible.

With a favorable outcome before the Court in Baghdad, the federal prime minister would then be obligated to implement its decision or be accused of breaching the principles of the federal constitution—thereby triggering Article 8’s opt-out provision in the Kurdish constitution. Kurdish secession is always “a threat but not a fatal one, unless they could take Kirkuk and the oilfields with them . . . .”<sup>215</sup> This too could be threatened—by force, to which an unstable Iraqi military may not be able to respond.

The Kurds well know that Turkey, Syria and Iran are anxious never to see an independent Kurdish state emerge on their borders, lest the

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cost of finding and exploiting wells, and then to share in the revenue they produce for periods of between 20 and 30 years.

211. *Id.*

212. Oil and Gas Law of the Kurdistan Region, *supra* note 178.

213. *Id.* at Art. 16.

214. *Id.* at Art. 17.

215. ARATO, *supra* note 47, at 144.

Kurdish populations in their own respective border areas agitate to break away and join such a state. Thus, as cagey negotiators, the Iraqi Kurds may be relying on political pressure from Tehran, Ankara and Damascus to force Baghdad to concede quite a bit on the oilfields in the interests of keeping Iraq together and the Kurds within it. Along with U.S. financial pressure to cut a deal, the central government in Baghdad may have no choice but to sit down with the Kurds and bargain.

Although the terms of the federal constitution provide for a joint development agreement, none has yet been reached. And without the flesh and muscle of such a politically negotiated settlement, all the parties are left with are the bare legal bones of the constitutional text. Consequently, while any legal outcome is possible (and is most interesting to game), a political solution will almost certainly carry the day on the oil issue.

#### IV. COMPARATIVE APPROACHES TO ETHNIC AUTONOMY IN FEDERATIONS

The experiences of the Basques and Catalans within Spain, the Quebecois and Inuit within Canada, and the ethnic republics within Russia offer some useful examples and cautionary tales for the Kurds of Iraq to consider as they move forward. While the abbreviated highlights that follow merely touch the surface of all possible analogies and structural parities, they hopefully allow the casual reader to place the evolving situation in Iraqi Kurdistan into a loosely comparative context.

The attraction of the federal model over the unitary model for states that contain large ethnic minorities is obvious:

In contrast to a unitary state, which is characterized by a high degree of centralization, the federal state is a system of constitutional power sharing between a central government and several local governments, which possess exclusive legislative competencies in certain areas. A federal state is formed when two or more states (1) conclude a treaty conferring power over them and their citizens to an organ of the community composed of the contracting states, and (2) subsequently accept a federal constitution outlining the competencies of the federation and member states. Thus the federal state is said to exist side-by-side with its member states.

Federal states can be found in nearly every region of the world and contain approximately 40 percent of the world's population. Federalism has proven to be a particularly popular and effective form of governance for states administering large land masses with diverse regions and communities. By advocating regional autonomy, federalism produces two important effects. First, it deflates secessionist pressures and safeguards national unity. In a world

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characterized by increasing fragmentation . . . measures that can successfully overcome divisiveness and promote stability cannot be casually dismissed. Second, it upholds the self-determination of peoples to organize their own affairs without external interference, and protects political communities which “often preserve linguistic, cultural and religious features that would be disrupted or submerged by central control.”<sup>216</sup>

I only focus on the most obvious federal examples here, and purposely exclude the experiences of significant ethnic minority populations in France or the United Kingdom, which do not have federal structures, or the native populations of Australia, New Zealand or the United States, which are not granted a constitutional status similar to that of the Kurds. I would observe in passing, however, that it appears to be the case that ethnically distinct groups within larger societies tend to fare better within those societies if they have constitutional tools at their disposal to leverage some degree of autonomy than those groups who do not have similar constitutional tools.

A. *Basques and Catalans within Spain*

The Basque and Catalan communities that exist within Spain are culturally and linguistically distinct from the larger Castilian population. Like the Kurds in Iraq, they have carved out separate provinces or regions for themselves and enjoy a greater degree of self-government than other units in Spain. Spain has seventeen autonomous communities and two autonomous cities.<sup>217</sup> The Spanish constitution, which came into effect in 1978, provided sufficient regional autonomy to muster the majority support of the Basques for ratification, although the abstention rate was very high (over 40% of the electorate).<sup>218</sup>

Since then, the Basque Country, like the other autonomous communities, has operated under the legal framework of a “Statute of Autonomy.” In the Basques’ case, this statute is popularly known as the Statute of Guernica, and it was enacted in 1979. The Statute lays out the governing institutions of the Basque Country. It provides for a regional legislature, executive bodies (including a treasury), and even a judicial

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216. Babak Nikraves, *Quebec and Tatarstan in International Law*, 23 FLETCHER F. WORLD AFF. 227, 229-30 (1999).

217. These include Andalucía, Aragón, Asturias, Baleares, Ceuta, Canarias, Cantabria, Castilla-La Mancha, Castilla y León, Cataluña, Comunidad Valencia, Extremadura, Galicia, La Rioja, Madrid, Melilla, Murcia, Navarra, and País Vasco. See Silvia Acierno & Julio Baquero Cruz, *The Order of the Spanish Constitutional Court on the proposal to convert the Basque Country into a freely associated community: Keeping hands off constitutional politics*, 3 INT’L J. OF CONST’L L. 687 (2005).

218. *Id.*

branch headed by a Supreme Court of Justice. Eligibility for judicial posts is grounded in an expectation that candidates be able to speak Basque and possess an understanding of traditional Basque law. An important cultural aspect of the Statute is the recognition of both Basque and Spanish as official languages.

Yet the situation of the judiciary in the three Spanish provinces that make up the Basque Country is an example of the problem noted in the introduction to this article of a constitution's language not reflecting what actually happens. Most of the judges appointed to courts in the Basque Country are not, in fact, ethnically Basque. They are Castilian. Consequently, the courts are viewed by Basques as bastions of federal control in their autonomous area.<sup>219</sup> Sometimes, this provocation results in violence, as with the 2001 assassination of a judge by nationalists.<sup>220</sup>

But the problem is somewhat more pedestrian than one might assume. There are simply not enough trained Basque lawyers entering the judicial ranks.<sup>221</sup> A similar problem is faced in the United States by the courts of American Indian tribes. Judges in those courts are not typically ethnically Native American. They are mostly white—as are the public defenders and prosecutors, due to a very low enrollment of Native Americans in law schools.<sup>222</sup> There simply are not enough people of that ethnicity trained as lawyers who want to return to the reservations to fill the ranks of tribal judiciaries. Thus, the Caucasian judge who dons the robe to hold court on an Indian reservation, thereby embodying tribal sovereignty, is placed in an incongruent position.

Notwithstanding the powers solely within the jurisdiction of the Basque government (expressly provided in Article 10 and ranging from delimitation of municipal territories to tourism and sport),<sup>223</sup> the Statute provides that it is still incumbent on the autonomous community to execute the legislation of the “State,” i.e. the Spanish national government. Furthermore, according to the Basque government, many of the powers expressly granted to the Basques under the Statute of

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219. Interview with Senator Aitor Esteban Bravo, MP Spanish Parliament, in Omaha, Neb. (Nov. 3, 2009).

220. Emma Daly, *Spanish Judge Shot to Death; Basque Rebels are Suspected*, N.Y. TIMES, Nov. 8, 2001, at 8, available at <http://www.nytimes.com/2001/11/08/world/spanish-judge-shot-to-death-basque-rebels-are-suspected.html>.

221. Esteban interview, *supra* note 191.

222. See generally, Barbara Ann Atwood, *Tribal Jurisprudence and Cultural Meanings of the Family*, 79 NEB. L. REV. 577 (2000); Wenona T. Singel, *Labor and Employment Laws in Indian Country: The Institutional Economics of Tribal Labor Relations*, 2008 MICH. ST. L. REV. 487, 501 (2008) (“Throughout Indian country, there are a large number of tribes that allow non-Indians to hold public office. For example, it is very common for non-Indians to serve as judges on tribal courts.”).

223. Statute of Autonomy, Articles 10.1 and 10.36, available at [http://www.basques.euskadi.net/t32-448/en/contenidos/informacion/estatuto\\_guernica/en\\_455/estatu\\_i.html](http://www.basques.euskadi.net/t32-448/en/contenidos/informacion/estatuto_guernica/en_455/estatu_i.html).

Guernica have yet to actually be transferred to the region. This includes the National Employment Institute, the management of the Basque Country's ports and airports, and the organization and operation of prisons.<sup>224</sup> Finally, the use of the term "State" indicates a continued respect for and adherence to Spain's federal structure.

In October 2003, the Basque government adopted a proposal, commonly known as the Ibarretxe Plan, for a new Statute for the Basque Country. The new statute would amend the 1979 version considerably, giving the Basque autonomous community increased powers, some in areas reserved explicitly for the Spanish government, such as international relations. The Ibarretxe Plan was inspired by the commonwealth status of Puerto Rico within the United States.<sup>225</sup>

Article 161(2) of the Spanish Constitution provides that "the government may challenge the provisions and resolutions adopted by the organs of the Autonomous Communities before the Constitutional Court," and indeed it did challenge the amendment as unconstitutional on the basis that it was, in fact, "an original constitutional act disguised as a proposal for the amendment of the Statute of Autonomy."<sup>226</sup> Nonetheless, the Court held that the government's challenge was premature and improperly based on Article 161(2).<sup>227</sup>

The Court supported its holding on the grounds that there can only be a constitutional breach after political debate has subsided, a vote has occurred, and the enactment of legislation is complete. Because the legislative process regarding the statutory amendment was still incomplete at that time, the government's challenge was deemed inadmissible. In order to come into force, the amendment needed to be approved by the Spanish parliament and by a referendum in the Basque country. Not surprisingly, the plan for amendment was rejected by the Spanish parliament in February of 2005 by a vote of 313 to 29.<sup>228</sup>

On the national level, the Spanish Constitution deals with the power division between the state and the autonomous communities in a fairly complex series of sections (i.e., articles). On a macroscopic level, section 153 seems to provide the vehicles for maintaining control over the autonomous regions. It provides that:

Control over the bodies of the Self-governing Communities shall be exercised by:

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224. *Id.*

225. Katya Adler, *Basques Seek 'Puerto Rico' Deal*, BBC NEWS, Sept. 25, 2003, available at <http://news.bbc.co.uk/2/hi/europe/3140714.stm>.

226. Acierno & Cruz, *supra* note 199, at 689.

227. *Id.* at 687 (citing Case No. 6761-2003, STC, April 20, 2004, available at <http://www.tribunal.constitutional.es/ATC2004.htm>).

228. Acierno & Cruz, *supra* note 199.

- a) The Constitutional Court, in matters pertaining to the constitutionality of their regulatory provisions having the force of law.
- b) The Government, after the handing down by the Council of State of its opinion, regarding the exercise of delegated functions referred to in section 150, subsection 2.
- c) Jurisdictional bodies of administrative litigation with regard to autonomic administration and its regulations.
- d) The Auditing Court, with regard to financial and budgetary matters.<sup>229</sup>

As an enforcement mechanism, section 155(1) provides that failure by an autonomous region to comply with the obligations imposed on it by the Spanish government entitles the government to “take all measures necessary to compel the Community to meet said obligations, or to protect the [general interest of Spain].”<sup>230</sup>

In matters of regional autonomy, Catalonia shares much in common with the Basque Country, as it is also governed by a Statute of Autonomy that was adopted in 2006 to update the older one adopted in 1979. The new law is known as the Organic Law.<sup>231</sup> The primary difference with the Basques is that, to date, there appears to have been no proposals in the Catalan community quite like that of the Ibarretxe Plan in the Basque country. The Organic Law allows for shared jurisdiction with the federal government in many areas, but places emphasis on primary jurisdiction in the Catalan government for culture, education, environment, health, justice, commerce, public safety, transportation, and communication. In fact, the Catalans have their own police force—although this is along the lines of a constabulary as opposed to a full-blown military like the Kurds maintain.<sup>232</sup>

### B. *Quebecois and Inuit within Canada*

Canada is organized along the lines of traditional federations except for two of its thirteen provinces and territories—which are ethnically distinct from the rest of the nation. The Francophone population of

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229. Andre Lecours, *The Ibarretxe Plan: A New Formalism*, 6 MCGILL INT’L REV. 22 (2005), available at <http://www.irsam.ca/mir/Lecours%5B22-26%5D.pdf>.

230. *Id.* See also Jorge Martinez-Paoletti, *Rights and Duties of Minorities in a Context of Post-Colonial Self-Determination: Basques and Catalans in Contemporary Spain*, 15 BUFF. HUM. RTS. L. REV. 159 (2009).

231. Organic Law 6/2006 of the 19<sup>th</sup> of July, on the Reform of the Statute of Autonomy of Catalonia, available at [www.parlament.cat/porteso/estatut/estatut\\_angles\\_100506.pdf](http://www.parlament.cat/porteso/estatut/estatut_angles_100506.pdf).

232. Martinez-Paoletti, *supra* note 230.

Quebec and the Native population of Nunavut each have their own regional polity and enjoy the accompanying constitutionally mandated political representation in the federal parliament in Ottawa.<sup>233</sup> The Quebecois have maintained their separate status in a province since the federation's founding,<sup>234</sup> whereas the Inuit people have had their territory only since it was carved out of the Northwest Territories in 1999.<sup>235</sup>

The difference between province versus territory within the Canadian federation is not a dispositive one *per se*. Instead, it goes to the source of power or inherent jurisdiction that the regional government wields. Provinces are recognized in the Canadian constitution as such and their authority stems from that document. Territories, on the other hand, are creations of the federal government and derive their authority from the federal government by extension instead of from the federal constitution itself.<sup>236</sup>

The Canadian federal government has long acknowledged the unique status of French-Canadians within the federation. In November of 2006, the House of Commons passed (by a wide margin) a motion by Prime Minister Stephen Harper which stated “[t]hat this House recognize that the Quebecois form a nation within a united Canada.”<sup>237</sup> There is on-going debate about what exactly this statement entails. It would appear to acknowledge the Quebecois as a distinct group of Canadians, i.e. a nation as a people, not a nation as a state. The fact that there was

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233. Geoff Gilbert, *Autonomy and Minority Groups: A Right in International Law?*, 35 CORNELL INT'L L.J. 307 (2002).

234. Nathalie Des Rosiers, *From Telling to Listening: A Therapeutic Analysis of the Role of Courts in Minority-Majority Conflicts*, 37 CT. REV. 54, 58 (2000) (“In 1867, the federal structure that Canada continues to have today was adopted, and the province of Quebec, with a definite French majority, was created.”). See also, A.H.F. LEFROY, CANADIAN CONSTITUTIONAL LAW 48 (1918).

235. Jeffrey Wutzke, *Dependent Independence: Application of the Nunavut Model to Native Hawaiian Sovereignty and Self-Determination Claims*, 22 AM. INDIAN L. REV. 509, 537 (1998) (“On April 1, 1999, the NWT [Northwest Territories] will be split in two, and a new territory, named Nunavut, will be created. Nunavut will consist of a large section of mainland North America, and will also include almost the entire Canadian Arctic archipelago of islands west of Greenland (Kalaallit Nunaat), and all of the islands within Hudson Bay and James Bay—an area one-sixth that of the entire country of Canada. Rather than establishing an autonomous region within (or on top of) existing provincial or territorial boundaries, the Nunavut Territorial Government will have the same rights, responsibilities, and duties as the Government of the Yukon Territory and the Government of the NWT.”).

236. Compare Nunavut Act, S.C. 1993, c. 28, available at <http://laws.justice.gc.ca/PDF/Statute/N/N-28.6.pdf>, with The Constitution Act, 1867, 30 & 31 Victoria, c. 3, available at [http://www.solon.org/Constitutions/Canada/English/ca\\_1867.html](http://www.solon.org/Constitutions/Canada/English/ca_1867.html).

237. House of Commons Debates, Vol. 141, No. 87, 39<sup>th</sup> Parliament, 1<sup>st</sup> Session, Monday, Nov. 27, 2006, available at <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Pub=hansard&Language=E&Mode=1&Parl=39&Ses=1&DocId=2544166&File=0#SOB-1798651>.

widespread support from legislators from all across Canada reinforces this conclusion.<sup>238</sup> In other words, the motion was primarily symbolic, as opposed to an attempt to establish a legal conduit for secession.

To date, this motion has not been assimilated into the Canadian constitution. As it currently stands, examples of the uniqueness of Quebec must be found in the more subtle construction of constitutional provisions. For instance, in outlining the distribution of legislative powers between the Canadian parliament and the provincial legislatures, Article 93 provides that education is left to the provinces, “subject and according to” certain restrictive provisions.<sup>239</sup> This article is immediately followed by the caveat that these provisions do not apply to Quebec.<sup>240</sup>

Judicially, the question of Quebec’s special status culminated in the 1998 Supreme Court case regarding the legality of secession under the constitution.<sup>241</sup> In a somewhat non-committal decision, the Court left the door open for future discourse on secession, while establishing itself as an authority on how pure democratic expressions (such as popular referenda) and calls for self-determination should affect the legitimacy of a constitutional system such as Canada’s.<sup>242</sup>

Nevertheless, the Quebecois seem to enjoy a relatively high degree of autonomy, and their cultural heritage is freely acknowledged and even protected. As one scholar notes,

Given the strong concessions toward regionalism on matters such as language, and given that overall economic benefits flowed to rather than from Quebec, there were not readily credible claims of oppression of the sort that may have sustained independence claims in the Baltics under the Soviets or in the broader regions of Kurdistan, for example.<sup>243</sup>

Indeed, some believe that the Canadian parallel should be followed by the Kurds:

In Canada, the Quebecois, like the Kurds of Iraq, around one fifth of the state’s population, consider themselves a distinct nation with their own culture. . . . Quebec has a dominant francophone majority, which comprises the bulk of Canada’s francophones. If applied to Iraq, the Canadian model would suggest a single federal unit including most Kurds and in which Kurds form a strong majority. . . .

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238. *Id.*

239. Constitution Act, 1867, Article 93(1).

240. *Id.*

241. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, available at <http://csc.lexu.m.umontreal.ca/en/1998/1998rcs2-217/1998rcs2-217.html>.

242. *Id.*

243. Samuel Issacharoff, *Democracy and Collective Decisionmaking*, INT’L J. OF CONST’L L. (forthcoming), <http://ssrn.com/abstract=1031080>.

What evidence is available from Iraq suggests that a federation structured like Canada's would be more likely to secure agreement, and more in keeping with self-determination principles, than one that divides the Kurdish homeland into several units, or the Kurds' preferred model of a two-unit federation of Kurdistan and 'Arabstan.' The Canadian model would allow Kurdistan to continue to be governed as a single national unit, as its leaders and people want.<sup>244</sup>

In addition to the Quebecois, the Canadian federal constitution expressly addresses native peoples. Article 35 preserves the "existing aboriginal and treaty rights of the aboriginal peoples of Canada," including the Inuit.<sup>245</sup> Moreover, Article 35.1 ensures that parts of the constitution applicable to aboriginal peoples will not be amended without first holding a constitutional conference on the issue, to which representatives of these peoples will be invited.<sup>246</sup>

Because Nunavut is a territory, not a province, the federal government can take a more direct role in governance. But this is a dormant power that Ottawa has not sought to actively wield. One might assume that because the federal minister of Indian Affairs appoints a commissioner who acts as Nunavut's chief executive officer, an unusually low level of self-government results. In fact, the commissioner's role is largely symbolic, so that supposition would be based on form over substance. A premier serves under the commissioner who is elected from among the individually elected members of the unicameral territorial parliament known as the Legislative Assembly of Nunavut. It is the premier's government that largely runs day to day operations within the territory.<sup>247</sup>

### C. *Ethnic Minorities within Russia*

The Russian Federation asserts that it is a "democratic, federal, rule-of-law state, with a republican form of government."<sup>248</sup> Geographically the largest state in the world, the Russian federation is subdivided into 83 constituent elements; however these do not all share the same degree of autonomy from the central government.<sup>249</sup> The 21 ethnically distinct

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244. John McGarry, *Canadian Lessons for Iraq*, in *THE FUTURE OF KURDISTAN IN IRAQ* 92, at 94-97 (Brendan O'Leary, John McGarry, & Khaled Saleh eds. 2005).

245. Constitution Act, 1982 (Canada), available at [http://www.solon.org/Constitutions/Canada/English/ca\\_1982.html](http://www.solon.org/Constitutions/Canada/English/ca_1982.html).

246. *Id.*

247. See Nunavut Act, *supra* note 236; Nunavut Government information, available at <http://www.gov.nu.ca/english/cabinet/>.

248. Jeffrey Kahn, *Vladimir Putin and the Rule of Law in Russia*, 36 GA J. INT'L & COMP. L. 511, 512 n.3 (2008).

249. Henry E. Hale, *Will Elections Erode Russia's Democracy?*, 24.1 FLETCHER F. WORLD AFF. 123, 124 (2000).

republics within the Russian federal system enjoy the most self-determination.<sup>250</sup> Not only are they guaranteed their own official language under the Russian constitution,<sup>251</sup> they have their own constitutions and parliamentary assemblies.<sup>252</sup> Unlike the other units within the Russian federation that have executives appointed by Moscow, the Republics each elect their own presidents—although they are represented in international affairs by the central government.<sup>253</sup>

Internally, the ethnic republics, along with the other units of the federation are represented in the upper house of the federal parliament—the Federation Council.<sup>254</sup> As is the case with most parliamentary upper chambers, this is the weaker of the two in the bicameral system. As the Russian federation emerged from the collapse of communism in the early 1990s, the republics were able to assert their independence more freely:

[Russia's] system of ethnic federalism promoted a degree of regional autonomy and minority control over regional politics, particularly during the 1990s when President Boris Yeltsin ruled over a system of asymmetrical federalism that provided rather widespread autonomy to regional elites in non-Russian regions.<sup>255</sup>

However, this has become less and less the case as Prime Minister Vladimir Putin and, perhaps to a lesser extent, President Dmitry Medvedev, have centralized federal power over the last ten years.<sup>256</sup>

For example, the July 2001 Law on Political Parties requires organizations to have at least 10,000 members nationwide and regional party organizations in at least 45 of Russia's 89 republics. Russia's ethnic minorities are generally too small and/or geographically concentrated to meet this standard, including even the largest minority, the Tatars. Russia lacks any one major minority group; rather, it is

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250. G. Alan Tarr, *Creating Federalism in Russia*, 40 S. TEX. L. REV. 689, 701 (1999).

251. KONSTITUTSIYA ROSSIYSKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 68.

252. KONST. RF art. 5(2).

253. Hale, *supra* note 249.

254. KONST. RF art. 95.

255. Michael P. Dennis and Robert G. Moser, *The Voting Behavior of Islamic Minorities in a Fledgling Democracy: The Case of Russia* (2009), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1450282](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1450282).

256. Alexander N. Domrin, *From Fragmentation to Balance: The Shifting Model of Federalism in Post-Soviet Russia*, 15 TRANSNAT'L L. & CONTEMP. PROBS. 515, 549 (2006) ("The Russian federal government has taken a number of measures aimed at the elimination of 'ethno-territorial federalism' in the country. Specifically these measures are aimed at changing the status of ethnic republics and bringing them down to the level of ordinary Russian regions. As provided by Federal Law No. 159-FZ of December 2004, the RF President has the power to remove regional leaders, including 'presidents' of ethnic 'republics.'").

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composed of dozens of very small groups, only three of which comprise more than one percent of the total population.<sup>257</sup>

Another example is the re-issuance of the constitution for the republic of Chechnya. A mostly Islamic republic in the Caucasus, Chechnya has had its share of violent interaction with the central government—most notably in the late 1990s as a civil war broke out inflaming separatist tension in the region. The new constitution, which was approved in 2003, deletes the word sovereignty from the text (it appears in the text of other republics' constitutions), declares Chechnya part of the Russian federation, allows the federation president to sack the Chechen president at any time, and asserts a strong hold over the Chechen judiciary by subordinating the republic's prosecution office to that of the federal prosecution apparatus.<sup>258</sup>

Thus, while constitutionally mandated, the power of ethnic republics in Russia tends to fluctuate with the power of the central government. This is clearly not a model the Kurds wish to emulate as they move forward in the new Iraqi federation. But, the Kurds have been successful enough in lodging sufficient autonomy provisions in the Iraqi federal constitution that they would enjoy more legal breaking power than the Russian republics. Nevertheless, whether that would be sufficient to discourage a political attempt at consolidated control in Baghdad, as was the case with Moscow, is unclear.

#### CONCLUSION

Over the long term, people who do not wish to live together shouldn't be made to do so. The pages of geographic history are littered with fragments of empires, colonial territories and artificial states that once contained multi-ethnic populations who, when given the chance, seized an opportunity to break free. Modern Iraq exemplifies the latter. Its neighboring states are keen to keep it together, as is the U.S. Iraq's Kurds have long dreamed of charting their own destiny in the world—a dream that may yet come true. But for now, they have settled for what amounts to full autonomy within a federal system whereby they control their own borders, security, economy, and natural resource base.

The regional constitution they have devised is designed to fit hand-in-glove with Iraq's federal constitution. The Kurds cleverly pressed for certain provisions in the federal constitution that, when activated, would secure for them an even greater share of sovereignty—return of Kirkuk,

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257. *Id.* at 7.

258. Compare Chechnya Constitution 1992, available at [http://www.servat.unibe.ch/icl/cc01000\\_.html](http://www.servat.unibe.ch/icl/cc01000_.html), with Chechnya Constitution 2003, available at [http://www.servat.unibe.ch/icl/cc00000\\_.html](http://www.servat.unibe.ch/icl/cc00000_.html).

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control of non-producing oilfields, preservation of pre-existing Kurdish laws, and regional control over subjects not expressly included in the federal government's limited area of legislation. The Kurdish regional constitution's provisions fit precisely into those holes negotiated into the federal constitution.

Not surprisingly, the central government does not like this and is resisting Kurdistan's progressively dogged insistence that Baghdad adhere to the terms of its own constitution. The Kurdish regional government wins the legal argument because it carefully laid the groundwork to do so. But, it may yet lose the political argument if it presses too hard and loses the backing of key foreign and domestic constituencies. The Kurds must tread carefully as America withdraws its military presence and Iraq takes fuller control over its internal affairs.

The Kurds have achieved much since the 1991 uprising, and even more since the last days of Saddam. It would be a shame for them to throw it all away in an over-ambitious fit of nationalism. However, the patience with which they successfully navigated the U.S. occupation and the early days of the federation bodes well for them. Their ability to "work the system" from within the system to advance their cause will carry them forward dramatically if they let it.

Over 900 years ago, another Kurd cleverly rose to prominence within an Islamic political/military system dominated by Arabs and Turks. His name was Saladin. In the end, he commanded the entire Near East and defeated the Pope's persistent Crusaders in the 12<sup>th</sup> Century. The old saying up in the desolate highlands where they live, that "the Kurd has no friend but the mountain" may be true. But the Kurd has survived, despite all odds. And the Kurd continues to thrive in a land surrounded by enemies. Patience and courage are the qualities that will see them peacefully through this re-founding of the state of Iraq.

## APPENDIX

**KURDISTAN NATIONAL ASSEMBLY—IRAQ**

Draft of the Iraqi Kurdistan Region's

Constitution Project

22<sup>nd</sup> August 2006[21<sup>st</sup> Kharmanan, 2706 Kurdish Year]

In the Name of God the Most Merciful, the Most Gracious

***Preamble***

We, the people of Iraqi Kurdistan have been oppressed for decades by a dictatorial regime which monopolized all kinds of power. A regime that deprived us of freedom and all those natural rights God bestowed upon humans. The regime found out that all the civilized, political, economical, social and cultural rights recognized inside the international treaties are too much for us.

Unlike those peoples derived from the Ottoman Empire who immediately after the First World War received benefit from the Fourteen Principles presented by the American President Woodrow Wilson; we have become victims of international interests by being deprived of our rights to self-determination and deciding for ourselves the limits of our political and legal bases.

Articles 62, 63 and 64 of the Sevres Treaty (1920) recognized the self-determination rights of the people of Kurdistan, but that right was rescinded in the Lausanne Treaty (1923). Then the League of Nations realized that South Kurdistan (later labeled as Iraqi Kurdistan) has never been a part of Arab Iraq and there is no historical evidence backing the demands and requests of the neighboring countries. The maps drawn by Europeans in the 16<sup>th</sup> and 20<sup>th</sup> centuries refute those historical books and maps written and drawn by the ancient Arab historians and demographers. Europeans realized that the Iraqi northern border does not pass Hamrin Mountain and Kurdistan has never been a part of Anatolia, which also refutes those requests. Additionally, they have annexed Kurdistan to Arab Iraq for some international interests without questioning us, or taking our opinions.

When the Iraqi Government partially recognized some of our rights in a statement published on 30th May 1932, those obligations received international recognition; however, the government prevented

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implementation of Article 10, without seeking the approval of the League of Nations to either amend or omit the obligation. And although the commitment of the Iraqi Government remained valid after the United Nations was formed, it remained only as ink on paper.

The policy of suppression increased year after year for eighty years. Nothing from the international declarations and treaties; which always hailed justice, freedom and equal opportunities and which were included in the successive Iraqi Constitutions of: 1925, 1958, 1964, 1968, 1970 and the 1990 draft; was able to stop or decrease that policy. As a result, the sequential Iraqi governments crossed all the red lines and in besides not recognizing our rights; they conducted genocides and ethnic cleansing policies; demolished and destroyed approximately 4,500 villages, and changed the demography of almost all the parts of Kurdistan by forcibly displacing the people of Kurdistan from those towns and villages which were left undestroyed in order to change those villages' nationality. They (the former Iraqi governments) conducted ethnic cleansing policies through the use of chemical weapons in Halabja city, Balisan and the Badinan area and many other areas. Thousands of young Faily Kurdish people were driven towards death, chemical experiment and mass graves, after these martyrs' families were displaced outside of Iraq and had their national identity taken. This was followed by a campaign to kill Barzani people and the so-called notorious Anfal campaign that killed 182,000 Kurdish civilians including the young and old, women and innocent children.

The hatred, atrocities, oppression, annihilation and genocides conducted against us by the Iraqi rulers, inspired within us a revolutionary spirit and made our ancestors' path of defending our existence, stronger and brighter and pushed us to respond to the instinct for survival. For eighty years our revolutions, uprisings and struggles followed these inhumane acts. During that time, if any opportunity came forward our leaders never failed to ask for peace but, all the former Iraqi rulers oppressed us in one hand, and ignored their promises in the other.

That was the callous essence of the government's path, traditions and policies. The best evidence is the abolition of the June Treaty in 1966, and hiding from the March Treaty of 1970, and signing the doomed Algiers Treaty in March 1975, which paved the way to dominate the Kurdish movement, but without success. Shortly afterwards, the Kurdish movement was revived and waged the 1991 uprising which led to the exodus to the neighboring countries and which rocked the world. Then on 5th April 1991, the United Nations Security Council Resolution number 688 was issued, and as a result, the Coalition Forces of the Second Gulf War were based in Kurdistan and saved us from an unknown fate.

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We seized the opportunity and held the first Parliamentary elections on 19th May 1992, and formed the first government on 5 July 1992, followed by the formation of the Judicial Authority. Shortly afterwards, the Parliament decreed its well-known declaration regarding the federalism of Kurdistan in its relation to any Iraqi central government; labeling Iraq as a Federal Republic, democratic, parliamentary, and plurality. This is according to our legitimate rights to self-determination. For this we have relied on the United Nations Treaty, the International Conventions on Civil and Political Rights and the International Treaty on Cultural, Economic and Social Rights which was issued by the UN in 1966, and joined by Iraq on 25th January 1971.

Our hope was renewed when Iraq was freed from the atrocious dictatorial regime and the decision was made to govern Iraq through a transitional period while establishing a Federal Iraq. Then on the same principles the permanent Iraqi constitution was written.

Most of the Iraqi peoples ratified the constitution of Federalism in a poll held on 15th October 2005, which substantiated the Kurdish choice in diagnosing an appropriate governing system for Iraq including both major nations, Kurds and Arabs with other nationalities such as: Turkomans, Chaldeans, Assyrians and Armenians; as well as various religions such as: Islam, Christianity, Ezidis, Suby and Mandaean. They all receive benefit by the establishment of a federal country which would be stronger and more conscious of achieving justice, security, freedom, democracy and equity among all the nations and religions.

So we feel all the oppression, annihilation and sufferings were perpetrated against our generations. We respect the symbolic leaders of the Kurdistan Freedom Movement, the Peshmerga and those martyrs who sacrificed their lives for the freedom of Kurdistan, its legitimate rights and its right to self-determination. Under the auspices of the International Declaration of Human Rights, the international treaties and conventions, a democratic society has emerged in the Kurdistan Region, based on social justice where the human rights of all nations and religions are provided for. And the citizens in Iraqi Kurdistan are enabled to form a unified and democratic Region while building an Iraq where our will would be unified with the will of all the Iraqi people and its national and political forces on the grounds of a federal, democratic and parliamentary Iraq which believes in human rights and pluralism.

Because of all those reasons mentioned above, we have initiated this constitution.

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**CHAPTER ONE****Major Principles****ARTICLE 1:**

The Kurdistan Region is a “Federal” Region within the Federal Iraqi state. Its political system is republican, parliamentary and democratic system which is based on political pluralism, sharing power peacefully and the principle of separating powers.

**ARTICLE 2:**

*First:* Iraqi Kurdistan includes: Duhok Governorate with its current administrative border, Kirkuk, Suleimaniyah and Hawler Governorates with the 1968 border; Akre, Shekhan, Sinjar, Tal Afar, Talkeif and Qaraqush Districts; Zumar, Bashiqa and Aski Kalak Sub-districts of Nineveh Governorate; Khanaqin and Mandali districts of Diyala Governorate; Badra district and Jassan Sub-district in Wasit Governorate, with their administrative border before 1968.

*Second:* To determine the Kurdistan Region’s administrative borders, we depend on Article 140 in the Federal Constitution.

*Third:* Those areas that are returned to the Kurdistan Region according to Article 140 of the Federal Constitution, shall fairly receive benefit (as do all the other people of Kurdistan), from those rights, duties and protections mentioned in this constitution.

**ARTICLE 3:**

There is no way for building a new region inside the border of the Iraqi Kurdistan Region.

**ARTICLE 4:**

*First:* The People are the source of authority and the base of their legitimacy is practiced through the constitutional institutions. The constitution and laws of the Kurdistan Region are more sovereign and supreme than those passed by the Iraqi Government except for those fields related to the authority of the Iraqi Government mentioned in Article 110 of the Iraqi Federal Constitution.

*Second:* If the laws of the Kurdistan Region contradict with other laws, the Courts of Kurdistan should follow the Constitution and laws of Kurdistan, unless the law is abolished or amended by the Parliament or invalidated by the Constitutional Court.

**ARTICLE 5:**

The Kurdistan Parliament has the right to apply any law passed by the Iraqi Federal Republic, even if the law is not mentioned in the limited authorities in the Article 110 of the Federal Constitution, if that law serves the interest of the people of Kurdistan. This shall be organized by law.

**ARTICLE 6:**

*First:* The people of Iraqi Kurdistan consists of Kurds and other nationalities (Turkomans, Chaldeans, Assyrians, Armenians and Arabs) and according to law, they are all citizens of the Region.

*Second:* The authorities of the Region have the right to regulate the rights of citizenship in the Region according to the law.

**ARTICLE 7:**

This constitution asserts the Muslim identity of the majority of the people of Kurdistan and the principles of Islamic Shari'a (i.e. The Islamic Law) is one of the sources of legislation. It also secures all the rights of Christians and Ezidis and other religions regarding the freedom of belief and practicing religion.

**ARTICLE 8:**

The people of Iraqi Kurdistan have the right of self-determination. Accordingly, they are free in determining their political status and pursuing economic, social and cultural growth. They have freely chosen a union with Iraq and its people, land and sovereignty while it commits to a Federal Constitution and a federal, parliamentary, plurality and democratic system that respect the human rights of individuals and the community. They may reconsider themselves in selecting their future and political base in the cases below:

*First:* Violation of the dignity of the Federal Constitution, by the recession of the commitment to the federal system or the major constitutional principles of democracy and the human rights of individuals and the community.

*Second:* Practicing discriminatory policies and changing the demography of Kurdistan, or maintaining traces of the previous policies which are retroactive from the constitutional commitment of Article 140 of the Federal Constitution.

**ARTICLE 9:**

A major and constitutional right of the Region should:

*First:* Take the opinion of the Region before signing any contract and convention between the Federal Government and any state or foreign

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entity relevant to the situation or the current or future rights of the Kurdistan Region.

*Second:* The Region, within its authorities, is entitled to pass those laws which are outside the limited authorities of the Federal Government, has the right to sign agreements with the government of territories of foreign states.

*Third:* The Region, within its authorities, is entitled to pass those laws which are outside the limited authority of the federal government, has the right; with the approval of the Federal Government to sign deals, and the federal Government should not disapprove those agreements without legal justification.

#### **ARTICLE 10:**

The major and constitutional rights of the Region are:

*First:* The Region shall have a fair share from the federal revenues based upon the population, and taking into consideration some acts perpetrated against Kurdistan such as burning, destruction and depriving its people of their legitimate rights during the eras of the former regimes.

*Second:* Participation in the federal positions and institutions on an equitable basis.

*Third:* The citizens of the Region shall receive the ratings of employment in the federal institutions in the Kurdistan Region.

#### **ARTICLE 11:**

Hawler city [Erbil] is the capital of Iraqi Kurdistan; and the Parliament has the right to designate another city of the Region as the capital.

#### **ARTICLE 12:**

*First:* The Kurdistan Region has a special flag which is hoisted side by side with the Federal Iraqi flag; and it has its own anthem and national feast (Nawroz); which are organized by law.

*Second:* The Kurdistan flag consists of red, white and green colors with a 21- beamed yellow drawing of the sun in the center.

*Third:* The medals, badges of honor and formal holidays are organized by law.

#### **ARTICLE 13:**

The Kurdistan Region has a Peshmarga Defensive Force to protect the Region and its structure, duties and works. The force is organized by law. Armed militias may not be formed outside of the basis of law.

**ARTICLE 14:**

*First:* Kurdish and Arabic are the two official languages in the Region, and this Constitution guarantees the rights of citizens of the Region to teach their children in their mother tongue, such as: Turkoman, Syriac, and Armenian; in the governmental education institutions according to the educational procedures.

*Second:* In addition to the Kurdish and Arabic languages, the Turkoman and Syriac languages are official in those administrative units where people form the majority in speaking in the Turkoman and Syriac languages. This shall be organized by law.

*Third:* To define a formal language, Article 4 of the Federal Constitution will be applied if there is a basis to implement it in the Region.

**ARTICLE 15:**

The Kurdistan Region depends on a free market economic system and does not allow monopolies and exploitations, and provides for free and legitimate competitions.

**ARTICLE 16:**

The Regional Government sponsors economic reform of the Region on the basis of the modern economic principles for reviving the economical infrastructure and development and encouraging investment in the various sectors. And that is organized by law.

**ARTICLE 17:**

*First:* The public wealth in the Region is the property of the people of Kurdistan and is organized by law to protect and manage it; and the conditions for disposing it are all organized by law.

*Second:* The natural resources, surface and underground water unextracted minerals, quarries and mines are national resources for the Region. Their extraction, management and disposal are organized by law to protect the interests of current and future generations.

**CHAPTER TWO****PART ONE****The Civil and Political Rights****ARTICLE 18:**

Citizens are equal before the law in rights and duties without discrimination based on race, gender, color, language, social background,

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religion, sect, economical and social condition, or political and intellectual affiliations.

**ARTICLE 19:**

Everyone has the right to life, liberty and security, and no one should have these rights denied or restricted, except by law according to a special judicial decision.

**ARTICLE 20:**

Equal opportunity is a right granted to for all citizens of the Region, and the authorities of the Region shall take appropriate procedures to achieve that.

**ARTICLE 21:**

Women are equal with men and discrimination against women is prohibited. The Regional Government guarantees them all the civil and political rights mentioned in this Constitution as well as in those international treaties and conventions ratified by the Iraqi state. All obstacles which hinder their equality in cultural, social, economic and political lives, shall be removed.

**ARTICLE 22:**

*First:* Education is a right that the Regional Government provides for everyone without discrimination. The elementary teaching stage is compulsory and the Kurdistan Regional Government commits to eradicate illiteracy among all ages, the male and the female.

*Second:* The Regional Government provides free education in the primary, secondary and high schools, universities, technical and vocational institutes. It also commits to developing and encouraging scientific research aimed at peaceful and civil objectives, and sponsors success, invention, novelty and all kinds of creativity.

*Third:* Private education is organized by law.

**ARTICLE 23:**

*First:* The citizens of the Region have the right to participate in running public affairs directly or by their freely elected representatives; and to participate in the general elections, referenda, municipal, local council and private corporation elections. They have the right to hold public positions according to law and based on equal opportunity.

*Second:* No less than 25% of the seats are reserved for women in the elections of the Iraqi Kurdistan Region Parliament, local councils and municipalities.

**ARTICLE 24:**

Punishments are personal, the freedom and dignity of humans are protected.

**ARTICLE 25:**

There is neither crime nor punishment except by law. No act is considered a crime if the law does not consider it a crime at the time of the act. There is no way to impose a tougher punishment on a criminal than that which is allowed at the time of the criminal act.

**ARTICLE 26:**

Justice in front of a competent court is a guaranteed right for all.

**ARTICLE 27:**

The accused is not guilty unless the crime is proved through a legal and just trial against him.

**ARTICLE 28:**

According to the rules of law, the right of self-defense is available through all stages of investigation and trial.

**ARTICLE 29:**

All people in the judicial and administrative procedures have the right to be dealt with based on justice; there is no way to use bad conduct against them, or to torture them psychologically and physically, or use inhumane conduct against them. It is prohibited to use force, threat, promises and torture against somebody in order to coerce a confession. If this is violated one may ask for compensations for the psychological and physical damages, and the rate of the compensation is limited by law.

**ARTICLE 30:**

Law shall have no retroactive effect unless stated by law, except for those laws relevant to taxes.

**ARTICLE 31:**

The punishment law has no retroactive effect, unless it serves the interests of the accused.

**ARTICLE 32:**

Criminal investigators shall present the preliminary investigation file to a competent judge in no more than 24 hours from the time the

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criminal is arrested, and that period may only be extended once for the same duration.

**ARTICLE 33:**

*First:* No one may be arrested and confined, jailed or sentenced without a competent judicial order as regulated by law.

*Second:* Arrest, detention and imprisonment are prohibited outside those locations specified by law. Those locations shall be observed by health and social supervisors and shall be under the control of the governmental agencies.

**ARTICLE 34:**

The court, shall appoint a defense attorney for the accused in both the investigation and trial, if the accused is not able to obtain a defense attorney.

**ARTICLE 35:**

*First:* Homes and residential places shall have their privacy respected and not violated; and shall not be entered and inspected, nor monitored except as determined by law.

*Second:* No person or their belongings may be searched, except as provided by law.

**ARTICLE 36:**

One who is arrested should be immediately informed of the reason for their arrest and the crime of which they are accused.

**ARTICLE 37:**

There should be no discrimination toward prisoners regarding their race, color, gender, religion, political affiliation, social matters, birth place, wealth, or any other reasons.

**ARTICLE 38:**

The religious beliefs, moral principles and ethics of the prisoner are to be respected.

**ARTICLE 39:**

Submitting complaints and petitions to the authorities of the Region is a legitimate right of citizens. The authorities have no more than fifteen days to decide on the matter; and if they do not receive the complaint or petition, or do not decide on it without having an appropriate justification, they shall be investigated according to law.

**ARTICLE 40:**

The political refugees may not be forcibly sent back to their country of origin.

**ARTICLE 41:**

The Government of Iraqi Kurdistan guarantees protection to the families of the martyrs of the Kurdistan Freedom Movement, the Peshmerga, the Anfal and chemical bombardment victims and its handicapped victims.

**ARTICLE 42:**

No entity or group shall be allowed involvement in chauvinism, fascism, racism, terrorism, Takfeeriyeens (i.e. Expiators) and ethnic cleansing, nor encourage or promote them, glorify them, or promote their justifications. Iraqi Kurdistan Authorities shall fight terrorism and strive to protect the land of the Region lest it should be a stronghold, or safe haven for their activities.

**PART TWO****The Economical, Social and Educational Rights****ARTICLE 43:**

Employment is the right of everyone. People must be provided with the means of living through jobs they choose of their own free choice.

**ARTICLE 44:**

The Regional Government establishes programs for the vocational and artistic trainings and instructions to generate employment opportunities.

**ARTICLE 45:**

Workers are entitled to equal benefit for equal work. As regulated by law, the relationship between the employee and the employer shall be based on economic bases while observing for social justice regulations and protecting the employees from exploitation.

**ARTICLE 46:**

Employees have equal rights in promotion opportunities in their jobs for no other basis but seniority and competence.

**ARTICLE 47:**

The Regional Government guarantees the right to establish syndicates and vocational unions and to freely affiliate with them, as regulated by law.

**ARTICLE 48:**

Private property is protected. No one's property may be expropriated except for public benefit, and the compensation should be quick and fair and provided to the owner before disposition of the property or at the time of seizure. This shall be regulated by law.

**ARTICLE 49:**

Family is a natural, social, and fundamental unit in society. It has the right to protection by society and the Government. Therefore:

*First:* A marriage bond may not be completed without the consent of the couple to be married willingly and without force.

*Second:* The Government protects motherhood, childhood and the old aged people and establishes a consultancy council for family affairs.

*Third:* Children have the right to be educated and supervised by their parents and parents have the right to be respected and cared for by their children; specifically in cases of need, old age and disability.

*Fourth:* Economic exploitation of children is prohibited and the Government shall take necessary measures to protect them.

*Fifth:* All forms of discrimination, violence and abuse in the society, family and school shall be prohibited.

*Sixth:* The Regional Government shall provide shelters to protect and to take care of women who have lost family security because of social reasons.

**ARTICLE 50:**

All have the right to health care. The Regional Government must provide means of prevention and treatment and according to its capabilities provide for those families which, due to imperative circumstances, lost their source of income due to disease, disability, loss of spouse and old age.

**ARTICLE 51:**

*First:* The Regional Government takes care of public health and commits to it by building hospitals, health centers, and social care centers for elderly people and provides means of prevention and treatment.

*Second:* Individuals and civil firms can build private hospitals and care centers under the supervision of special establishments of the Regional Government, and this is regulated by law.

**ARTICLE 52:**

*First:* The handicapped and disabled people have the right to be respected as humans. Whatever the cause of their case is, they still have the same rights as others have. And they have the right to live a decent life according to their capabilities.

*Second:* The handicapped have the right to medical and psychological treatment, education, employment and access to artificial limbs, enabling them to get tools and all that improves their capabilities so that they may reintegrate with society.

*Third:* The handicapped have the right to have their special needs taken into account for all of the economic and social planning.

*Fourth:* The handicapped have the right to be protected from all forms of exploitation, or any kind of system or action that is discriminatory or unfair or degrades their dignity.

*Fifth:* The Regional Government shall demonstrate interest in gestures and mimics language and in the Braille reading and writing method language for the needy handicapped.

**ARTICLE 53:**

The Regional Government takes care of the Kurdistan universities, and protects their campuses, and respects their moral identity within the law.

**ARTICLE 54:**

*First:* The Regional Government sponsors science, literature and the arts and encourages scientific research.

*Second:* All people have the right to participate in cultural life and enjoy the benefits from the application of scientific developments; and to receive benefit from the legal protection for the intellectual property resulting from any artistic, literary or scientific work.

*Third:* All people have the right to be free in scientific research and creative activities.

*Fourth:* The Regional Government provides the protection of innovation property, design, sample, trademarks, brands, art and scientific intellectual property rights.

**ARTICLE 55:**

Kurdistan Regional Government takes care of youths and youngsters through:

*First:* Protecting them from exploitation and delinquency.

*Second:* Developing their skills, enhancing their capabilities and encouraging their activities.

*Third:* Educating them, enhancing their moral and national values and encouraging their initiative, awareness of their nation's cultural, historical, national and militant heritage and the national sense of awareness within them.

*Fourth:* Providing them with opportunities so that they may invest their humanitarian skills in the economic, social and educational projects.

*Fifth:* Promoting plans for youth through which they take responsibility and play their roles in society.

*Sixth:* Encouraging individual and group initiatives and sponsor their creativity and establish appropriate centers to morally and materially supervise and support them.

*Seventh:* Encouraging cooperative spirit, team work, democratic practice, and providing them with tools in their leisure times to further improve their skills and productive capabilities.

**ARTICLE 56:**

Sport is a legitimate right for all and the Regional Government has to encourage athletic activities and provide athletic equipment.

**ARTICLE 57:**

*First:* Environmental protection (land, water, air, plants and animals) is a responsibility of all and if anyone causes damage to them, they are responsible to fix it and to be punished by law.

*Second:* All citizens have a legitimate right for freedom and equality in an appropriate living status, in a social and economical environment which will provide a prosperous and happy life and has a responsibility for protecting the environment and improving it for the present and future generations.

*Third:* The Regional Government shall take action to mitigate and treat the sources of pollution in the environment, and in regard to this it, strives to develop forests and protect the fields and protect the green zones inside the cities and their outskirts. The Regional Government shall develop, enlarge and construct public parks, natural parks for protecting animals, plants, and natural resources and prohibit buildings and institutions and the use of machines and instruments in the natural protectorates.

**ARTICLE 58:**

The Regional Government takes necessary procedures into account to protect and encourage consumers so that they may defend themselves

according to the law, and to establish unions and associations for this purpose.

### **PART THREE**

#### **Freedoms**

##### **ARTICLE 59:**

Everyone has freedom of speech and self expression.

##### **ARTICLE 60:**

The Regional Government guarantees the rights of freedom of the press, publishing, printing, assembly, peaceful demonstration and strikes, as shall be regulated by law.

##### **ARTICLE 61:**

The freedom of communication and exchanging correspondence via the post, telephone, and E-mails is protected and these may not be monitored, wiretapped, or revealed except in necessary cases of law and security, which shall be according to a judicial decision.

##### **ARTICLE 62:**

The citizens of the Kurdistan Region are free to travel and settle outside the Region or to return to it.

##### **ARTICLE 63:**

Everyone who is legally in the Region has the right to move freely, and to choose a place of residence, and there shall be no restriction for this right except in cases to protect national security or public traditions, public health, or the rights and freedoms of others.

##### **ARTICLE 64:**

The Regional Government is committed to enhancing the role of civil organizations and supporting, developing, and protecting their independence to achieve their goals as shall be regulated by law.

##### **ARTICLE 65:**

Religion is not compulsory. Everyone is free in religious, belief and thought. The Regional Government provides citizens (Muslims, Christians, Ezidis and others) with freedom to practice their worship, rites, and religious ceremonies, and to respect and develop mosques, churches and other places of worships.

**ARTICLE 66:**

Any sort of compulsory or forced work shall be prohibited. Dismissing people from work may not be exercised:

*First:* As a compulsory means, because of a political orientation, or as a punishment for political beliefs, or views, or declaration of such views, which are opposite to the social, economic or political system.

*Second:* As a way to gather effective labor force and using them for the purpose of economic growth.

*Third:* As a punishment for political party participation.

*Fourth:* As a means to ethnic, social, national, religious, creed or political discriminations.

**ARTICLE 67:**

*First:* The freedom to establish associations, political parties, or to affiliate with a party shall be regulated by law.

*Second:* No one may be compelled to be affiliated with a party or association, or compelled to continue or discontinue their membership.

*Third:* The associations and political parties shall be committed to the principles of democracy in managing their organization, their structure and the rights of membership.

*Fourth:* A political party may not be a branch of a foreign party, or related to the interests of a foreign political party.

*Fifth:* The parties and associations in their platform, Bylaws and practices are committed to the principles of the basic rights mentioned in this Constitution, and to accept others' views pluralism and reject violence.

*Sixth:* The parties, organizations, associations and individuals are not allowed to use any part of a religion or a religious ceremony as a way to degrade the political and social standing of others, in order to achieve their goals or for electoral gains.

*Seventh:* The associations whose acts and goals are against criminal law and who practice a position contradictory to the political system of the Region, or affect the peaceful coexistence between the national and religious components of the people of Kurdistan, are prohibited.

**ARTICLE 68:**

Everyone has the right to participate in meetings and peaceful associations, and according to the law no restrictions are imposed on this right.

**ARTICLE 69:**

Conventions, agreements and international declarations regarding human rights ratified or joined by Iraq are complementary provisions of this Constitution.

**ARTICLE 70:**

Foreigners enjoy those freedoms and rights decided in the international treaties, convention and agreements which the Iraqi Federal Republic has ratified; in return, the foreigners should take the duties inside them into account.

**ARTICLE 71:**

Practice of the rights and freedoms provided in this Constitution shall not be limited or restricted except by law, provided that those restrictions and limitations do not affect the essence of the right or freedom to an extent that a society built on the just, free and democratic principles accepts them.

**PART FOUR****Duties****ARTICLE 72:**

Defending the homeland, the safety of its land, protecting its constitutional establishments, national unity and integrity, and commitment to the typical victories of the Kurdistan people and struggles for freedom and democracy, are sacred duties that every citizen should bear.

**ARTICLE 73:**

Commitment to the Constitution and the laws and respecting the public discipline are duties on all the citizens in the Region.

**ARTICLE 74:**

Respecting and honoring the symbols of Kurdish liberation movement, its revolutions, martyrs, and protecting the dignity and jobs of people, the old Peshmerga and struggles are sacred duties of the Government and the citizens of Kurdistan.

**ARTICLE 75:**

Protection of the public property and wealth, and respecting the rights of others' property are duties of all the citizens.

**ARTICLE 76:**

Everyone shall support and contribute in the public expenditure through paying taxes and due tariffs according to laws.

**ARTICLE 77:**

Anyone who assumes an official position or a public job should carry out his duties honestly, with honor and discipline.

**CHAPTER THREE****The Authorities of the Iraqi Kurdistan Region****ARTICLE 78:**

The Authorities of the Iraqi Kurdistan Region include:

*First:* The Legislature Authority (Kurdistan Parliament)

*Second:* The Executive Authority.

*Third:* The Judiciary Authority.

**PART ONE****The Legislative Authority (Kurdistan Parliament)****ARTICLE 79:**

The Kurdistan Parliament is the legislative authority in the Region and constitutes the absolute power to decide on issues of supreme importance to the people of Kurdistan Region; and the Members of Parliament are representatives of the people and shall be elected by public, free, secret and direct elections.

**ARTICLE 80:**

*First:* The method of electing the Members of the Iraqi Kurdistan Parliament, term limits, proportions of representation in the Parliament, the conditions of elections and the members shall be organized by law.

*Second:* The Parliament structure should reflect a fair representation of the nationalities of the Kurdistan Region.

*Third:* The Member of Parliament is a representative of the Iraqi Kurdistan peoples including all nationalities, political groups, and religious organizations, regardless the member's constituency.

**ARTICLE 81:**

*First:* The term of Parliament is four years and it starts working after its first session.

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*Second:* After announcing the elections results, the President of the Region should summon the Parliament to hold its first session within fifteen days; if it has not been summoned to convene within the fifteen-days period, the Parliament should hold its session at noon of the following day.

**ARTICLE 82:**

The Parliament shall hold its first session under the leadership of the oldest member, and subsequently through a secret ballot, the Parliament's President, his Deputy and Secretary General, shall be elected.

**ARTICLE 83:**

Parliament Members shall swear this oath before beginning their duties: "I swear by Almighty God that I shall safeguard the welfare and interests of the people of Kurdistan, the dignity and integrity of the Region, the rights and freedoms of its population and to carry out my duties with absolute honesty and dedication."

**ARTICLE 84:**

Upon being sworn in, a Parliament Member is considered to have resigned his previous job; and after ending his period of membership, he has the right to return to his job, or a similar job to that which he had before; and the period of membership in the Parliament shall be taken into account for increasing his salary, promotion and retirement.

**ARTICLE 85:**

There is no way to exercise the duties of Kurdistan Parliament memberships, federal Parliament memberships, memberships of local councils, municipalities or public employment together.

**ARTICLE 86:**

The Parliament holds two sessions annually. The Parliamentary Bylaws should stipulate how and when each session should be held. However, the session in which the general budget is discussed, should not end before the budget is ratified.

**ARTICLE 87:**

It is possible to extend the Parliamentary session to conclude incomplete matters by a maximum of 30 days, upon a request by the President of the Region, the Prime Minister or 25 Members of Parliament.

**ARTICLE 88:**

A quorum is considered present in the Parliament by the presence of a majority of the Parliamentary members; and the resolutions are decided by a majority votes of the members if this does not contradict with this law. And if the votes are equal, the President of the Parliament's vote shall have the predominant effect.

**ARTICLE 89:**

Ten or more than ten Members of Parliament may propose a law draft or resolution.

**ARTICLE 90:**

*First:* A Member of Parliament has the right to ask the Prime Minister, or his Deputy about the activities specifically related to the Council of Ministers or one of the Ministries and utilizes Parliamentary regulations and Bylaws in this process.

*Second:* Ten or more Members of Parliament may ask the Prime Minister or members of the Council of Ministers questions, and discussions on the issue should start after eight days as of the arrival of a request to the Presidency of the Council of Ministers. If the discussion results in a no confidence decision in the Prime Minister or any minister, a no confidence vote for the Prime Minister should be approved by two-thirds of the number of the Parliament members and for any Minister on the approval of the majority of Parliament Members.

**ARTICLE 91:**

The rights and privileges of the Parliament's President, the Deputy, the Secretary General and Members of Parliament shall be organized by law.

**ARTICLE 92:**

Laws and Parliamentary Bylaws shall detail the proceedings of Parliament, its conducting regular and special sessions, termination of memberships and how vacant seats are to be filled.

**ARTICLE 93:**

The Parliament practices the following authorities:

*First:* Resolving the decisive issues of the Iraqi Kurdistan people.

*Second:* Determining the ratification of suggested amendments to the Regional Constitution, which requires a two-thirds majority of Parliament Members' approval and which may not reduce the fundamental rights and freedoms.

*Third:*

- A) To enact, amend and abolish laws relevant to the Region.
- B) To amend the application of those federal laws that are outside of the exclusive jurisdiction of the Federal government.
- C) To enact those laws relevant to the joint jurisdiction of the Federal and Regional authorities.

*Fourth:* To Remove the President of the Region or his Vice President requires a majority vote of Parliament members, which shall occur after his accusation by the Kurdistan Constitutional Court in one of the cases below:

- A) Violation of the constitutional oath.
- B) Violation of the Constitution.
- C) High treason.

*Fifth:* To give confidence to the government and its members or to withdraw confidence from them is performed by a majority vote of Parliament members.

*Sixth:* To approve common policies of the Regional and Federal Government.

*Seventh:* To monitor the activities of the Executive branch and to question the Prime Minister, his deputy and the ministers in accordance with law and rules of Parliament.

*Eighth:* To approve the annual budget of the Kurdistan Region, to approve the final budgetary accounting, to approve reallocation of funds from one account to another, and to approve any supplemental funds not included in the initial budget.

*Ninth:* To approve public development plans.

*Tenth:* To impose and abolish taxes and tariffs.

*Eleventh:* To decide on the eligibility of Members of Parliament.

*Twelfth:* To adopt the bylaws and procedures of Parliament, to determine its staffing, to establish the budget of the Parliament, to choose a Parliamentary staff and their compensations.

*Thirteenth:* To create temporary, permanent and investigative committees as necessary.

#### **ARTICLE 94:**

The Parliament shall not relinquish its legislative powers except as provided in Part Seven of Article 104 in this Constitution.

#### **ARTICLE 95:**

*First:* The Parliament Member has parliamentary immunity and he is free to talk within the limits stated in the Parliament's Bylaw.

*Second:* The Parliament Member's freedom may not be restricted nor may he be watched without the Parliament's approval.

*Third:* The Parliament Member may not be Pursued or interrogated or inspected personally or his home personally or his home or office or arrested by any side, whatsoever, when the session is ongoing without the consent of the Parliament except when he is caught red-handed with a serious crime.

*Fourth:* The Parliament Member may not be pursued or interrogated or inspected personally or his home of office or arrested when the session is not ongoing without the consent of his president except when he is caught red-handed with a serious crime and he shall inform the Parliament of what measures were taken against him once the Parliament resumes its session.

#### **ARTICLE 96:**

*First:* the Parliament may disengage itself on obtaining the consent of a majority of two- thirds of the number of the Members.

*Second:* The Parliament is disengaged by a decree released by the President of the Region in the following circumstances:

- (1) The resignation of more than half of its Members.
- (2) If quorum for its convening has not been attained within forty-five days starting from the date of summoning it for convening to begin its electoral session.
- (3) Not rendering confidence for three various successive proposed ministerial formations.

*Third:* A decree shall be released for the elections of Kurdistan Parliament within fifteen days from the date of its disengagement and through the period of two months before the deadline of electoral session.

#### **ARTICLE 97:**

In case the Parliament has been disengaged or the end of its electoral session, new elections shall be conducted for electing a new Parliament within a maximum period of sixty days from the date of its disengagement or within the two months before the end of the electoral session.

#### **ARTICLE 98:**

If the period of the Parliament's session ended and due to war or natural disasters, new elections could not be carried out, the Parliament should go on its duties, until new elections are conducted and it holds its first session.

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## PART TWO

### The Executive Authority

#### First: The President of Kurdistan Region

##### ARTICLE 99:

*First:* The Region has its own President called (President of Kurdistan Region) and he is the Supreme President of the Executive Authority and the General Leader of the Peshmerga (Region's Guard). He represents the Region's people and replaces it on the national and patriotic occasions and he manages co-ordination between the Federal Authorities and the Region's Authorities.

*Second:* The President shall have a Deputy who assists him in his duties and replaces him in his absence and he shall be the Deputy of the General Leader of the Peshmerga.

##### ARTICLE 100:

The President shall be elected through casting a public direct secret ballot by the Region's populations.

##### ARTICLE 101:

The method how the Kurdistan Region's President is elected, the stipulations of electing him, how he is accused, tried and the terminations of his period of rule, are specified in accordance with a law.

##### ARTICLE 102:

The Region's President shall take the following constitutional oath in front of Kurdistan Parliament—Iraq prior to his taking over his task:

(I swear by Almighty God to preserve the rights, the gains, the unity and the interests of Kurdistan Region's people and to practice my commission honestly and sincerely and to adhere to the Kurdistan-Iraq Constitutions).

##### ARTICLE 103:

The period of rule of Kurdistan Region's President shall be four years and he may be re-elected for a second reign.

##### ARTICLE 104:

The Region's President shall practice the following authorities:

*First:* Proposing the law projects and the resolutions of Kurdistan Parliament-Iraq.

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*Second:* Releasing the laws and the resolutions that Iraqi Kurdistan Region Parliament has enacted within ten days as of the date of receiving them by the Presidency Divan and he is entitled to object them entirely or partially and return them to the Parliament for reviewing and the Parliament's resolution on them shall be decisive and they shall be deemed ratified in case they have not been released within the mentioned period of time.

*Third:* Releasing a decree on conducting the public Elections of Kurdistan Parliament-Iraq on its disengagement, or the termination of its electoral session's period of time as per Article(96) of this Constitution taking into consideration the periods of time specified in Articles ( 96 and 97) of the constitution.

*Fourth:* Releasing a decree for summoning the Kurdish Parliament to the first convening session of the electoral session within fifteen days as of the date of announcing the final results and if it has not been summoned , the Parliament, by itself, will convene the next day after the termination of the mentioned period of time.

*Fifth:* Disengaging the Kurdistan Parliament-Iraq shall be by a decree in the circumstances referred to in this Constitution or Kurdistan Parliament Law.

*Sixth:* Deposing a Minister as per a proposal from the Prime Minister.

*Seventh:* Releasing decrees having equal influences of Laws after negotiating and agreement with the President of the Parliament and the Region's Council of Ministers in case the Kurdistan Region, its political system or its public security or its constitutional establishments face a sudden danger which threatens its existence and it was difficult to the Parliament to convene, provided that those decrees be displayed to the Parliament on its first session that follows. If they have not been displayed to the Parliament but it did not approve them, they will lose their legal feature.

*Eighth:* Granting a specific amnesty for the convicted in accordance with the Law.

*Ninth:* Ratifying the death sentences or minimizing them to life sentences.

*Tenth:* Announcing a state of emergency during warfare of occupation or rebellion or anarchy or natural disasters or an outbreak of diseases or any other emergency cases provided that the first period of time does not exceed one month and the later extensions should be applied on the absolute approval of majority or the Members of the Parliament and for a period of time not exceeding three months for every extension and the laws regarding states of emergency shall be organized in accordance with a Law.

*Eleventh:* Summoning, exceptionally, the Ministers' Council for convening, when necessary, and discussing the defined matters for which the convention is arranged and he (i.e. the President) shall chair the convention.

*Twelfth:* Permitting Federal Armed Forces or any other Military Units to enter the Region, when necessary by the approval of Kurdistan Parliament-Iraq provided that they specify their mission, place and the time and duration of their existing.

*Thirteenth:* The Region's President is entitled to dispatch Peshmarga Forces (Region's Guard) outside the Internal Security Forces outside the Region by the approval of the Parliament of Kurdistan -Iraq.

*Fourteenth:*

- a- Ordering the Parliament Faction Nominee with the majority in number, to form the Cabinet within the period of thirteen days as from the day when he had been ordered.
- b- The President orders another nominee of the same bloc to form the Cabinet if the first nominee failed in forming it within the period of time stated in Paragraph (1) mentioned above.
- c- If the second nominee failed in forming the cabinet, the President of the Region is entitled to select another person whom he finds proper and the President orders him to form the Cabinet.
- d- The person who has been ordered to form the Cabinet may be either one of the Members of the Parliament or others.

*Fifteenth:* Releasing a decree on accepting the resignation of the Cabinet of the Ministers or concealing confidence from either of them.

*Sixteenth:* Releasing a decree on accepting the resignation of the Cabinet of the Minister and ordering them to continue their missions till forming the new Cabinet.

*Seventeenth:* Releasing a decree on establishing departments relating the Region for the cultural, social and developmental affairs in the Iraqi Embassies and Diplomatic Missions abroad.

*Eighteenth:* Assigning holders of distinguished private ranks after being nominated by the concerned Minister and the Ministerial Council's approval.

*Nineteenth:* Assigning judges, the head and the members of the general prosecution after having been nominated by the Region's Justice Assembly.

*Twentieth:* Granting military ranks of Peshmarga (Region's Guard), and the Internal Security Forces, discharging them or retiring them in accordance with the valid applied Laws.

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*Twenty-first:* Awarding badges of honor and medals in accordance with the Law.

**ARTICLE 105:**

The salaries and the allowances of the Region's President and his Deputy are determined in accordance with a Law.

**ARTICLE 106:**

The Region's Presidency shall have a Diwan whose establishments and duties are determined in accordance with a law.

**ARTICLE 107:**

*First:* If the President of the Region resigns, dies or has become permanently ineffective, his successive shall be elected in the same method which has been demonstrated in this constitution.

*Second:* When the post of the President of Kurdistan Region is vacant, the President of Kurdistan Parliament shall take over his tasks till a new President has been elected.

*Third:* When the President of Kurdistan Region is absent and outside Kurdistan Region or enjoying a leave, his Deputy shall take over his tasks.

**Second: Kurdistan Region**

**Council of Ministers**

**ARTICLE 108:**

The Council of Ministers of Kurdistan Region is the Executive and Administrative Authority in the Region and it performs its tasks under the supervision and directives of Kurdistan Region's President.

**ARTICLE 109:**

*First:* The Council of Ministers consists of the Prime Ministers, his Deputy and the Ministers. Its formation is specified by a Law.

*Second:* Ordering the nominee ordered to form the Cabinet shall be in accordance with Paragraph (Fourteen) of Article (104) in this Constitution.

*Third:* The Prime Minister, who is entitled to choose his Deputy and the Ministers, shall choose them from the Kurdistan Parliament or others who are legitimate for Kurdistan Parliament's Membership.

*Fourth:* The Nominated Prime Minister, who is entitled to from the Cabinet, shall forward the President of Kurdistan Region with a list with the Members of his Cabinet's names for ratification.

*Fifth:* Once the President of the Region has ratified the list of the Members of the Cabinet, the entitled Prime Minister shall introduce his Cabinet's members to the Kurdistan Parliament demanding that they be granted confidence.

*Sixth:* The Prime Minister shall chair the meetings of the Council exempting the meetings which are attended by the President of Kurdistan Region.

**ARTICLE 110:**

The Prime Minister and Members of the Cabinet shall take the following Constitutional oath in front of the Parliament after obtaining its confidence and before starting their official duties:

(I swear by God, the Almighty, to honestly preserve the Unity of the people and land of the Iraqi Kurdistan and to respect the Constitution, the valid applied Laws and to, completely, keep the people's interest).

**ARTICLE 111:**

A fair representation of the Minorities should be represented in the formation of the Kurdistan Region's Council of Ministers.

**ARTICLE 112:**

The Ministers are jointly consolidated before Kurdistan Parliament in their responsibilities for the matters concerning the Ministers and every Minister is, individually, responsible for the activities of his Ministry and he is its foremost and direct person.

**ARTICLE 113:**

The Council of Ministers Practices the following authorities and functions:

*First:* Putting into effect the Laws, Resolutions and Regulations as well as reserving Region's Security and Public Wealth.

*Second:* Drawing the Region's general policy jointly with the President of Kurdistan Region and executing them after the Parliament has approved them.

*Third:* Setting up development plans' projects and implementing them after being determined by the Parliament.

*Fourth:* The Kurdistan Regional Government jointly with the Federal Government shall administer the fields of oil and gas which are extracted from Iraqi Kurdistan's land and which are commercially invested before 15/08/2005 provided that the revenues incurred from them be fairly divided basing on the principles of Article (112) of the Federal Constitution and this shall be organized as per law. The commercial production measure for the purpose of applying this

paragraph is to produce five thousand barrels a day throughout the past period of twelve months before 15/08/2005.

*Fifth:* Kurdistan Government and the Federal Government shall draw the strategic policies needed for developing oil of and gas wealth provided that Iraqi Kurdistan Parliament approval is obtained.

*Sixth:* Kurdistan Regional Government shall take over all the requirements of the fields of oil and gas which have not been extracted or the extracted oil and gas which were commercially invested before 15/08/2005 in the operations of exploration, extraction, administration, selling, marketing, exporting and so on. These operations shall be organized according to a Law and the Commercial Production measure for the purpose of applying this paragraph is to produce five thousand barrels a day throughout the twelve months before 15/08/2005.

*Seventh:* Exercising all that has been shown in the exclusive specialization of Federal Authorities such as the executive authorities concerning the Region according to paragraph (110) of the Federal Constitution.

*Eighth:* Exercising the joint authorities it has been empowered by the Federal and the Region's Authorities in accordance with the provisions of the Federal Constitution.

*Ninth:* Working out the Region's draft general budget

*Tenth:* Working out and providing the Iraqi Kurdistan Parliament with the laws and resolution.

*Eleventh:* Releasing the executive and administrative resolutions according to the laws and regulations.

*Twelfth:* Supervising the Ministries, establishment and Public utilities in Kurdistan Region and directing, following up and monitoring them and coordinating with them.

*Thirteenth:* Appointing, promoting, discharging, segregating and retiring the employees according to the Law in such a way not to contradict with the law of civil the Service Council in the Region.

*Fourteenth:* Nominating the Region's International Security Forces such as Police, Security and Region Guards.

#### **ARTICLE 114:**

*First:* The Council of Ministers is considered resigned in the following cases:

- a. When the Prime Minister resigns.
- b. When the Parliament of Kurdistan withdraws its confidence from its President
- c. When a new period of rule of the Kurdistan Region- Iraq has started
- d. When a new President of Kurdistan Region has started.

e. When the President of the Council passes away.

*Second:* The Minister is considered resigned if the Kurdistan Parliament withdraws its confidence from him.

*Third:* The resigned Council of Ministers is regarded as a Council for managing the duties till a new Council has been formed.

**ARTICLE 115:**

*First:* According to a law, the way how the President of the Council of the Ministers, his Deputy and the Ministers are convicted and tried.

*Second:* According to a law, the salaries, the allowances and the prerogatives of the President of the Council of Ministers, his Deputy and his Minister are specified.

**PART THREE**

**Judicial Power**

**First: General Principles**

**ARTICLE 116**

Judiciary is independent, there is no jurisdiction on it except law.

**ARTICLE 117:**

Judiciary has a general rule on all natural and incorporeal persons in Kurdistan Region.

**ARTICLE 118:**

The Judicial judgment and resolutions are released and executed in the name of people.

**ARTICLE 119:**

The judges are not to be segregated except in the cases which the Law allows.

**ARTICLE 120:**

The judge and the members of the General Prosecution are prohibited from:

*First:* Clustering judicial post and the two legislative and executive posts or any other work.

*Second:* Affiliation to a party or political organization or under taking any political activity.

**ARTICLE 121:**

Court hearings are open unless the court decided to make them closed observing public discipline or ethics or for preserving a family's honor and respect provided that the court sentences are announced in open sessions.

**ARTICLE 122:**

Establishing private or exceptional courts is prohibited in the Region.

**ARTICLE 123:**

A law shall organize the courts for looking into the crimes relating to the military feature, crimes of this type committed by the Peshmarga and Internal Security Forces as well as the crimes that occur among the affiliates of Peshmarga Forces or Internal Security Forces.

**ARTICLE 124:**

*First:* No personal rules of a religion may be imposed on another religion or diverting it.

*Second:* The followers of other non-Muslim religion and sects such as Christian, Ezidis and so on, can establish their own spiritual communities and practice the regulations and rituals relating their personal status and which are specified with a law and are perceived by the Personal Status Court.

*Third:* Fulfilling the valid effective rules of the laws in the Region as regards Personal status for the non-Muslims till a law which shall organize the provisions of their personal status, has been enacted.

**ARTICLE 125:**

The text in the Laws on preventing the Courts from hearing the cases arising from them shall be prohibited.

**ARTICLE 126:**

The next in the Laws on immunity of any administrative action or resolution's being appealed, shall be prohibited.

**ARTICLE 127:**

The Law ensures that the administration is impartial and oppressors and in using the authority, shall be penalized.

**ARTICLE 128:**

Every person who is afflicted by harm due to the behavior or action or negligence by those who are working in the government offices and

establishment in the Region while performing their works has the right to demand compensations from the mentioned sides.

**ARTICLE 129:**

The judicial provisions should be implemented and refusal or delaying from their implementation shall be deemed a punishable offense according to the Laws and if the accused is a main employee or has been ordered to perform a general service, he shall be segregated from his post as well as being punished and the accused can sue to the court directly and the government shall guarantee him a full compensation in case of damage.

**Second: Judicial Assembly**

**ARTICLE 130:**

The Judicial Authority in the Region is independent and it is comprised of: Judicial Assembly, Constitutional Court of Cassation, Consultation Council, the Judicial Supervision Board, the Public Prosecution Board and the courts with various ranks, types and boards. The method of its formation, stipulation and procedures for appointing its members and interrogating them shall be according to a Law.

**ARTICLE 131:**

*First:* The Judicial Assembly is comprised of: The Head of the Constitution Court, one of his Deputies, the Head of the Judicial Supervision Board, the Head of the Public Prosecution and the Head of Cassation Courts in the Region.

*Second:* The Judicial Assembly shall take over managing the judiciary affairs, monitoring Judicial Board and securing its independence according to the Law.

**ARTICLE 132:**

*First:* the Judicial Authority has its own budget annexed to the Region's budget.

*Second:* The Judicial Authority shall prepare the annual Judicial Authority's draft project and it shall forward it to the Parliament of Kurdistan-Iraq for approval, provided that the final amount of the budget is listed down in the Region's annual budget.

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### **Third: Constitutional Court**

#### **ARTICLE 133:**

The Iraqi Kurdistan has a Supreme Court named (Kurdistan Constitutional Court) and it shall be established according to a law.

#### **ARTICLE 134:**

*First:* the Kurdistan Constitutional Court is comprised of seven members including the President and they shall be selected from judges, law professors and the lawyers whose services in the judicial legislation, teaching or legal profession altogether are not less than twenty years.

*Second:* Selecting the members of the Constitutional Court shall be carried out by the Judicial Assembly and through consultation with the President of the Kurdistan Region.

*Third:* Assigning the Members of the Court shall be carried out by the President of Kurdistan Region by a decree after approval on the nominees by the Parliament, has been obtained.

#### **ARTICLE 135:**

The Court shall elect its president from its members.

#### **ARTICLE 136:**

The President and the Members of the Constitutional and Cassation Courts shall take the legal oath before the President of Kurdistan Region before assuming their assignments. The other Court Judges in the Region shall take oath before the Head of Judiciary Council.

#### **ARTICLE 137:**

The Constitutional Court is specialized in the following matters:

*First:* Explaining the Constitutional Texts of the Iraqi Kurdistan Region.

*Second:*

- a. Monitoring the constitutionality of the laws according to a request by the President of Kurdistan Region or the Council of the Ministers or the claim by the direct harmed person.
- b. Making the final decision on the legitimacy of the regulations, resolutions and directives basing on a direct claim forwarded by the harmed.

*Third:* Making a decision on the complaint forwarded to the Court on the non-constitutionality of the law or a resolution or regulation or directives. The Court trying the case should delay it till a solution is taken on the complaint

*Fourth:* Ratifying the general elections of the President of Kurdistan and the President of Iraqi Kurdistan.

**ARTICLE 138:**

According to a law, the court memberships stipulations; managing its work; how cases and claims tackled, are organized.

**ARTICLE 139:**

The Constitutional Court's decisions are decisive and obligatory for everyone and if the Court—on taking a decision on the constitutionality of the laws or the legitimacy of the regulations and directives—decided that either of them is against the Constitution or the Law, should notify the concerned authority in Kurdistan for taking the needed measures for eliminating the constitutional breach or setting it right.

**Fourth: Prosecution General**

The Public Prosecution shall represent the community and shall handle a public case personally defending the Public right to achieve justice and he should do his utmost for the implementation of the criminal laws, monitoring the affairs of judicial verification, monitoring law breaches as well as executing the resolutions, regulations and penalties.

**Fifth: Consultation Assembly**

**ARTICLE 141:**

According to a law Region's Consultation Assembly, which shall be specialized with the following tasks, shall be established:

*First:* Having the final decisive words on the refutation relating to the disciplinary and regulation measures and employment service issues relating to the staff of the governmental offices.

*Second:* making the final decision on disputes of specialization among the Ministries, Government Institutions and offices in the Region basing on the Prime Minister's request.

*Third:* Setting up and drafting law projects in the Region on a request by the President of the Region or Council of Ministers or the concerned Ministers or the sides which are not related to a Ministry

*Fourth:* Bringing into view opinions and consultations on juristic matters which are presented to it (i.e. the Consultation Assembly) by the Ministries, and the sides which are not related to a Ministry as well as making decisions in matters with different opinions among them if those

related to the issue appealed to the Assembly and the Assembly's view shall be obligatory to them.

## **CHAPTER FOUR**

### **Local Administrations and Municipality Councils**

#### **ARTICLE 142:**

The Administrative Divisions in Kurdistan Region shall be: (Governorate, District and Sub- district). Designing them; pointing out or changing their centers; demarcating or amending their border lines; disjoining them and annexing them to other administrative units shall be in accordance with the Law.

#### **ARTICLE 143:**

*First:* Administrative decentralization in running the administrative units in Kurdistan Region (Governorate, District and Sub-district) shall be adopted and each of them shall have a local assembly elected through a direct secret public ballot. The way how it is elected and its authorities and tasks shall be specified in accordance with a Law.

*Second:* Each Administrative Unit shall have an executive administrative council headed by the President of the administrative unit. A Law shall indicate how it is to be formed and specify its authorities, tasks and its relationships with the local council of the Administrative Unit itself, the Ministries and the Central Establishment in Kurdistan Region.

#### **ARTICLE 144:**

The centre of every Governorate, District and Sub- district, and Village whose population is three thousand or more, shall have a municipality managed and run by an elected municipality council which shall take over extending public services to its citizens in accordance with a Law.

#### **ARTICLE 145:**

*First:* The Local Councils and the Municipality shall have their incorporeal personalities.

*Second:* Each Administrative Unit or Municipality shall have its own independent budget.

#### **ARTICLE 146:**

In forming the Local and Municipality Council a fair representation of the nationals, existing within the administrative Unit or Municipality,

should be taken into consideration. This shall be arranged in accordance with a law

## **CHAPTER FIVE**

### **Independent Institutions and Commissions**

#### **ARTICLE 147:**

*First:* In accordance with Law the following are established:

- A. The Supreme Independent Institution for Elections and Polling in Kurdistan Region.
- B. Civil Services Council.
- C. Auditory Accounts' Diwan.
- D. Public Integrity Institution.
- E. Commission of the People's Right Protection.
- F. Commission Concerned with Faylien Kurd's rights.
- G. The Public Board for the Safety and good Quality of the Local and Imported Products.
- H. Independent Kurdistan's Board for Media and Communications.

*Second:* In accordance with a Law the Following are established:

- A. Consultancy Assembly for the Economic and Social Affairs
- B. The task of the Assembly shall be to offer the consultancy in the economic and social affairs for Kurdistan Region Presidency, Kurdistan Parliament- Iraq and the Council of Ministers' affairs.

#### **ARTICLE 148:**

The Commissions and the Institutions stated in Article (147) shall be subject to monitoring by Kurdistan National Assembly in Accordance with the Law.

## **CHAPTER SIX**

### **Financial Provisions**

#### **ARTICLE 149:**

*First:* No taxes or dues may be imposed or amended or cancelled and no one is exempted from paying them and no one may be ordered to pay other taxations unless Law permits.

*Second:* People with low incomes are excused from paying taxes in such a manner to secure them the minimum fair livelihood and this shall be organized by a Law.

**ARTICLE 150:**

The Kurdistan Region's Revenue are as follows:

*First:* Taxes, dues, public utilities services, charges, incomes from establishments, firms, public interest in the Region and what has been received as administration expenditure, tax collection, custom dues and other federal incomes in the Region.

*Second:* Incomes received from investing the natural resources in the Region.

*Third:* Grants and Presents.

*Fourth:* The internal and external loans related to Kurdistan Region.

*Fifth:* The Region's shares from the oil and gas wealth, custom dues and the other Federal incomes.

**ARTICLE 151:**

The Fiscal year shall be specified in accordance with a Law.

**ARTICLE 152:**

*First:* Every fiscal year Kurdistan Region Budget's Law shall be enacted and it shall include the estimated incomes and expenditure.

*Second:* The draft budget of the fiscal year shall be forwarded to the Parliament of the Iraqi Kurdistan Region, three months before the end of the fiscal year.

*Third:* In case of delay in arranging or forwarding the budget at the start of the year for any reason, whatsoever, Kurdistan Government shall adopt spending a ratio of one-twelfth of the previous determined Fiscal Year's appropriations for each month's delay in forwarding the budget

**CHAPTER SEVEN**

**The Final Provisions**

**ARTICLE 153:**

The President of the Region, the President of the Iraqi Kurdistan Parliament, the Members of the Parliament, the Prime Minister and his Deputy, the Ministers, the Judges, the Public Prosecutors and their Deputies, Persons with Special Ranks, the Director Generals and those of their ranks, are prohibited from buying or renting any public possessions in the Region or renting or selling their properties to the Region

Authorities or entering a contact directly or thorough a mediator for being committed or as importers or contractors.

**ARTICLE 154:**

No other Constitutional or Federal Law Text that discredits the authorities of Kurdistan Region-Iraq and which are not included within the specific specializations of the Federal Authorities is valid unless the Kurdistan Region's approval and the consent of Kurdistan Region's people on it through a questioning win the majority voters.

**ARTICLE: 155**

*First:* It is valid on the areas of land whose ownerships have not been settled or the lands whose settlement has not got its final degree decision in Kurdistan Region in accordance with Article (12) of the Agrarian Reform Law No. (117) of the year 1970 and it abolishes the validity of the provisions of Article (8) of the Law No (90) of the year 1975.

*Second:* The Courts shall be specialized in hearing cases related to compensation payability for the rightful possession of the lands which have been seized by the government for the public interest in accordance with the paragraph (First) mentioned above and the concerned committees were unable to fix the rights related to them (i.e. the lands).

**ARTICLE 156:**

The Court of Cassation of Kurdistan Region is specialized—besides its normal specializations—in clarifying the texts of this Constitution and making a decision on the complaints forwarded to the Court on non-constitution laws, resolutions, regulations and instructions on the cases sued before the judicial authority , till the Constitutional Court is being formed.

**ARTICLE 157:**

The Laws shall be published in the official Gazette (Kurdistan Events) of the Kurdistan Region-Iraq and shall be operative as from the date of its issuance unless it contains a contradictory text.

**ARTICLE 158:**

The Constitution shall be regarded as ratified after the consent of the majority of the voters for the people of Iraqi Kurdistan on it, in a public questionnaire process.

**ARTICLE 159:**

*First:* The President of the Region and the Prime Minister jointly or half of the number of the Parliament Members have the right to propose this Constitution to be amended provided that the amendment should not affect the Region's Republican, Parliamentary and Democratic System.

*Second:* The Iraqi Kurdistan Parliament has the right to approve the proposal by a majority of its two-thirds of its members' votes.

*Third:* Questioning is the right of Kurdistan Region's citizens and 25% of those who have the right for elections in the Region to request a questionnaire being carried out on a certain subject, provided that it is arranged and implemented in accordance with the Law.

**ARTICLE 160:**

This Constitution shall be effective after sixty days as from the date of its being approved through the public questionnaire and the President of the Region takes upon himself the task of issuing it in the Official Gazette (Kurdistan Events) though ten days as from the date of its being approved in the Public Questionnaire.

*Translated from Arabic and Kurdish Languages  
By Matti Derman Khammo & Goran Sabah Ghafur*