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**The Instrumentalisation of Constitutional Conferments of  
Autonomy in Iraq's Constitution to Preclude Iraqi Kurds'  
Calls for Independence**

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## Chapter 1: Introduction

“The lines of national borders on maps are artificial constructs, as unnatural to us as they are to birds flying overhead. Our first impulse is to ignore them.” - Moshin Hamid<sup>1</sup>

In the Middle East, the problem of nation-states and ethnic minorities after the first World War has become apparent. Those artificial nation-state borders, created by the dominant Western forces after the first World War, have created tension and discourse within and outside state borders. Widely debated, Greater Kurdistan is a perfect example for this. Spanning four state borders, namely Iraq, Syria, Iran and Turkey, Kurdish people seldom feel connected to their nation-state, but rather to their Kurdish identity. The creation of a Kurdistan state is the wish of many Kurds, but the international community, and especially the four states incorporating Kurdistan, are very apprehensive about the creation of such a state. One of the reasons for this is undeniably the vast oil resources the Greater Kurdistan region possesses, but fear of upheaval by other ethnic minority communities also plays into this (Gunter 201). Moreover, the internal division of the Kurds itself has prevented an independent state from emerging (O'Leary, McGarry, and Salih 23). The case of Kurdistan is exemplary, as the question rises how one can protect and enable the ethnic minority of the Kurds and its state structures, while at the same time not discouraging the national state and its sovereignty. This thesis will thereby examine how the Iraqi government, via constitutional conferments of autonomy, has precluded calls for independence of the Iraqi Kurds. The case of Iraqi Kurdistan is chosen, as — compared to the other Kurdistan regions incorporated into their respective nation-states — Iraqi Kurds enjoy the most autonomy from the federal state (Kelly 716). Moreover, the Iraqi government has always been apprehensive about Kurdish separatism, namely due to fears of secession by the Shi'ites and economic deprivation of natural

<sup>1</sup> Pakistani writer, author of the novels “The Reluctant Fundamentalist“, “Moth Smoke“ and “How to Get Filthy Rich in Asia“

resources (Gunter 201).

The case of the Iraqi Kurds can thus be transferred to other countries in the world, which are concerned with ethnic minorities who do not support the national state, but their own ethnic leaders. This lack of support of the national state by ethnic minorities often leads to a weakened position of the state government, losing monopoly over the rule of law, and can end in civil wars. As a possible solution to this dilemma, the framework of the Iraqi Kurdistan state under the nation-state of Iraq may be applicable in these situations, and is thus of utmost importance to be examined. With the integration of the ethnic minority of the Kurds, with their legal and political autonomy of the Iraqi state as established within the context of federalism and distinctive rights and responsibilities, the problem of disloyalty to the nation-state and calls for independence may be averted. As such, the legal framework within the two constitutions can provide a par-excellence example for other countries in the world.

This thesis is structured as follows. Chapter one introduces the wider topic to the audience. Chapter two will then focus on the historical and political developments in Iraqi Kurdistan between 1991 to 2005. Subsequently, chapter three will continue with the historical developments of Iraqi Kurdistan autonomy post-2005 until 2012. Chapter four will examine the clauses in the Iraqi Constitution of 2005 pertaining Iraqi Kurdistan autonomy. Moreover, it will introduce the clauses in the Draft Constitution of Iraqi Kurdistan of 2009, which focused on Iraqi Kurdistan's relationship and integrity within the Iraqi nation-state. In addition to this, the discourse in which these clauses are situated will be examined. Last but not least, chapter five will deduce the most important points and allow for a comparative conclusion.

## **Chapter 2: Historical Developments 1991-2005**

As recently stated, Iraqi Kurdistan nowadays enjoys vast autonomy, as set in the constitution and through other legal and political entities. Nevertheless, this has not always been the case. As such, this part will first quickly introduce the political developments and short history in the case of Kurdish autonomy between 1991 and 2005, ending with the adoption of the constitution. The Kurds, as part of Greater Kurdistan, have often been unable to achieve their goals, due to their infighting and disunity (O'Leary, McGarry, and Salih 23). Nevertheless, Iraqi Kurds have been able to avoid this lock-hold and have always been better organized than their counterparts, which enabled their relative success (O'Leary, McGarry, and Salih 23). The Iraqi state has always feared separatism by the Kurds, a result of the artificial creation of the Iraqi state and thereby its lack of legitimacy (Gunter 201). Moreover, about 18 percent of the Iraqi population encompasses the Kurds, and thus the Kurds portray an essential part of Iraqi society (Gunter 197).

### ***2.1 Historical Developments: 1991 until Invasion of 2003***

With the Gulf War in 1991, the political opportunities for Iraqi Kurds achieved broad success. Long-standing opposition to the Saddam government, and repression by the aforementioned, enabled the emergence of political autonomy. The creation of a safe haven for refugees in Iraqi Kurdistan, as instigated by the United States and Europe, allowed the Iraqi Kurds to achieve international recognition and political prowess (O'Leary, McGarry, and Salih 23). 'Operation Provide Comfort' and the establishment of a no-fly zone allowed for the return of more than one million Kurdish refugees (Aziz 83). After Saddam's government abandoned Kurdistan in 1991 after the Kurdish uprising, "multi-party elections were held in May 1992" (Stansfield, *The Kurdish Dilemma* 132). This separation of Iraqi Kurdistan from the Iraqi state

enabled political autonomy, a move which culminated in the election of the Kurdistan National Assembly in 1992 (O'Leary, McGarry, and Salih 23). Furthermore, as restitution for the atrocities that the Iraqi Kurds had to suffer under Saddam Hussein under his *Anfal* campaign, the Iraqi Kurds received international aid which supported the emergence of strong institutional building, economic prosperity and fostered a stable environment (Natali, *The Kurdish Quasi-State* 29). While this resulted in immense dependence of Iraqi Kurdistan on the international community, it nevertheless was crucial in reassuring basic needs, rehabilitation and resettlement (Natali, *The Kurdish Quasi-State* 31).

The aforementioned May elections of the National Assembly resulted in the power-sharing between two parties, the Patriotic Union of Kurdistan (PUK) and the Kurdistan Democratic Party (KDP) (Aziz 85). In July 1992, the formation of the regional government took place, and in October 1992, the parliament declared Kurdistan a federalist state of Iraq (Aziz 85). While a legitimate move, the Iraqi government did not recognize the elections, nor the federalism, as fear of a quest to absolute independence ran high (Aziz 85). Nonetheless, this set the irrevocable path for Iraqi Kurdistan political and governmental independence from the Iraqi state. Unfortunately, the two power-sharing parties, namely the Patriotic Union of Kurdistan and the Kurdistan Democratic Party, were unable to effectively govern together. With competition between the parties rising, the unified Kurdistan Regional Government (KRG) collapsed (Stansfield, *The Kurdish Dilemma* 132). The KDP and PUK now governed two separate areas within the Kurdistan region (Stansfield, *The Kurdish Dilemma* 132). While the next years were characterized by serious infighting, even culminating in a civil war until 1997, the process itself corroborated independence and capabilities of the Iraqi Kurdistan state (O'Leary, McGarry, and Salih 25-28). In 1998, under the auspices of the US, the two parties in power, the PUK and KDP, came to a successful point of negotiation and the conflict ended (Packard 182). Nevertheless, discrepancies remained between those two parties, and

the righteousness of official governing rule (Packard 183). Still, there are many shortcomings concerning the economy, legislature, and the obstructive independence on external, international funding, not only during the 1990s, but also in the contemporary context (O'Leary, McGarry, and Salih 29; Natali, *The Kurdish Quasi-State* 70).

## ***2.2 Post-2003 Political Field and the Transitional Administrative Law***

The invasion of Iraq in 2003 changed the sphere and opportunities for Iraqi Kurdistan entirely. The Kurdish Regional Government was accepted internationally as a legitimate political entity (Natali, *The Kurdish Quasi-State* 75). In 2004, the Washington Agreement was crucial in managing potential conflict, distrust and vulnerability between the PUK and KDP (Aziz 88). Long repressed by the Hussein government, they took part in the rebuilding of their federal nation and gained political prowess. While an obliteration of Kurdistan was seen as a possible and valuable solution — not only by the Iraqi government, but also other Arab countries and the US — after 2004 the existence of Iraqi Kurdistan is legally secure. A document of November 2003 proposed the establishment of governorates and “separation and specification of powers to be exercised by central and local entities” (O'Leary, McGarry, and Salih 30). This reflects views of Arab liberals and other identities who wished for a disintegration of Kurdish force and power, and wanted to create one Iraqi identity (O'Leary, McGarry, and Salih 33-34). In the end, however, Kurds were successful in pushing their own agenda by alluding to the acceptance of the federalist Kurdish region in 1992 by the international community, most importantly the United States. In addition to this, the Kurds participated in the administration of the Coalition Provisional Authority, and the Iraq Governing Council (Aziz 88). As such, the Kurds entered the post-Saddam context with increased influence and power in determining national politics. Moreover, it was impossible to ignore the ethnically diverse make-up of Iraq, and the improbability of the creation of one

Iraqi identity. This explains why an approach of ethnic nationalism in Iraqi nation-state building was not applicable in the current composition of Iraq. Thus, as late as 2004, the Kurdish politicians were able to include and emphasize their autonomous and extraordinary composition in the Transitional Administrative Law, ratified in March 2004 (O'Leary, McGarry, and Salih 35). This document, negotiated by the Governing Council under the auspices of the United States,

recognized the existing territory of Kurdistan, the Kurdistan National Assembly, and the Kurdistan Regional Government, and granted the region its own internal security. (O'Leary, McGarry, and Salih 35)

This Transitional Administrative Law, or officially the 'Law of Administration for the State of Iraq for the Transitional Period', represented an interim constitution and demonstrated the necessities for the governing of the government (O'Leary, McGarry, and Salih 48). Important to note here, is the incorporation of veto-power of the Iraqi Kurdistan Regional Government to a new constitution (Aziz 88). Due to their composition in three provinces, namely Dohuk, Erbil, and Suleimaniya, this veto-power was assured, though not exercised in the adoption of the constitution of 2005 (Aziz 88).

*Illustration 1: Autonomous Region Iraqi Kurdistan*



(Dörrbecker)



Chapter three will examine the historical, political developments after adoption of the constitution in 2005, and inspect the relationship between the Iraqi government and Iraqi Kurdistan post-2005.

## **Chapter 3: Iraq and Iraqi Kurdistan Post- 2005**

This chapter will discuss developments in Iraqi Kurdistan and Iraq post-2005. It will discuss the time frame of 2005 until 2012, as the emergence of the Islamic State has deteriorated the situation in Iraq. It will thereby disregard these recent occurrences, as an engagement with this context is problematic and insufficient, and not fit for discussion in this paper.

During the drafting process of the Constitution of Iraq of 2005, the Kurds took an unprecedented stance and were “politically united and powerful, dominating the drafting process“ (Packard 183). This was essential in including new rights, responsibilities and self-sovereignty for the Iraqi Kurdistan region.

### ***3.1 Liberal Consociation to Incorporate Diversity***

In a May 2003 report, Paul Williams stated that one of the biggest challenges to the new constitution of Iraq would be incorporating “all ethnic and religious identities” and protecting their interests and rights within the new Iraqi nation (53). A big focus in this research was the role of Kurdistan within the new order, as he felt that Kurdish participation in Iraqi politics is crucial. Thus, a decentralized state is needed for this, but one has to be cautious that it will not counter the integrity and stability of the state (54). In hindsight, one can see that Williams, two years prior to the creation of the new constitution, was spot-on with his advice. Prior to the Iraqi War of 2003, Iraqis felt that the Kurdish search for federalism was “an effort to [...] promote the disintegration of the Iraqi state” (Feldman and

Martinez 914). But this changed after the invasion of Iraq in 2003, and due to the political power of the Kurds at that time, who together with the Shi'as counterbalanced the Sunnis (Feldman and Martinez 915). Federalism was thus seen as “the sine qua non of participation in a unified Iraqi state” (Feldman and Martinez 915).

Thereby, some scholars argue that liberal consociation was necessary in the 2005 constitution, to incorporate Kurdish nationalistic sentiment within the framework of the Iraqi state (McGarry and O'Leary 670). Thus, not integration, but consociation was seen as the only appropriate choice to govern the Iraqi multi-cultural society. This resulted from an accommodationist view point on identity, which in certain cases, such as with the Kurdish identity, sees identity as stable, fixed and resilient (McGarry and O'Leary 671). Hence, integration would not have reaped benefits, as the merging of these often opposing identities would have created more tension, and therefore strengthening the pluralist tendencies of Iraqi culture was the only option. This is in accordance with the occurrences post-2003. As mentioned earlier, the Iraqi government tried to create one, unified Iraqi identity. This attempt, pushed forward by Arab liberals, was unsuccessful, and in the end it became clear that Kurdish identity was impossible to dissolve or integrate into Iraqi identity (Feldman and Martinez 915). Iraqi society is diverse and divided, and the Kurds, for example, do not identify as Iraqis. In 2007, a survey among university student asked in Iraqi Kurdistan which national identity they feel to belong to. The answer was unambiguous: 90,44% stated they feel either as Kurd, or Kurdistani (Aziz 118). Only 3% answered they either felt more Iraqi than Kurd, or only Iraqi and not Kurd (Aziz 118). Moreover, only 1.33% identified as Iraqi Kurds (Aziz 118). As such, it becomes clear that the creation of one Iraqi identity, which encompasses all ethnicities and regions, would be impossible. Thereby, with the constitutional clauses of creating federalist regions, and allowing Iraqi Kurdistan semi-autonomy, the Iraqi federal government was able to maintain their stronghold over the Kurdistani region without

creating too much tension. By making amends to the Kurdistan Regional Government, they showed that an integration as a quasi-state into the Iraqi state was possible and would reap benefits for the Kurdish people. As such, the federal government successfully incorporated the Kurds into the federal structure, whilst still accepting their need for autonomy and self-identity.

This notion of appeasement is further supported by Article 140 in the Iraqi Constitution of 2005, which will be thoroughly examined in chapter four. Article 140 of the constitution alludes to the disputed territories, such as Kirkuk. As such, it promotes resettlement of Arabs and Kurds (Natali, *The Kurdish Quasi-State* 81). Moreover, it mentions the modification of the administrative framework (Natali, *The Kurdish Quasi-State* 81). Additionally, and most importantly, Article 140 introduces a referendum by the population, determining the status of Kirkuk, either as part of the Kurdistan Regional Government, or the federal state of Iraq (Natali, *The Kurdish Quasi-State* 81). Thereby, the federal state of Iraq acknowledges the ambiguity of Kirkuk, and the clauses added show that federal Iraq cannot deny its belonging to the Kurdistan region. These amends were thereby necessary to quell dissent in the Kurdish population, and were thus used to appease the recently unified political Kurdistan power and thereby deny opportunities of uprising and quest for self-determination, which would inevitably result in an annexation of Kirkuk.

This persistent uncertainty is partly attributed to Iraq's new constitutional arrangements, variously decried (by their critics) for too much decentralization and applauded (by their champions) as a realistic accommodation of Iraq's communities. The constitutional process was seen as a negotiation between Shi'i and Kurdish party leaders and the US, and was largely rejected by Sunni Arabs (Bartu 1331).

As such, one can see that minorities previously ignored and subjugated by the Hussein

government, gained exemplary rights within the post-Saddam context.

### ***3.2 The Washington Agreement and Collaboration between the PUK and KDP***

This necessity of cooperation, arising from the wish to play an active political role, resulted in the Washington Agreement, which allowed for collaboration between the PUK and KDP as one unified actor, and their decision to enter the Iraqi elections of 2005 as one single entity. Thereby, one can see that the drafting process of the constitution itself, and the opportunities that presented itself to the Kurdistan political elite when acting unified, were conducive in creating a collaboration between the two power-sharing parties. The Kurdistan Democratic Party and the Patriotic Union of Kurdistan successfully collaborated during the drafting process of the constitution, despite prior rivalries and bitter infighting, and protected and secured Kurdish interests, such as a strong federal Iraqi system (Feldman and Martinez 888). As such, Kurdistan's political actors were able to gain political prowess and achieve legitimacy in the overall political sphere of Iraqi politics by acting united and pushing forward their constitutional agenda. Stansfield notes that the Kurds, after the invasion of 2003, in difference to historical notions, are nowadays no longer openly divided, play a big role in Iraqi politics and are acknowledged internationally (*Governing Kurdistan* 210). Thus, he argues, the demands of autonomy by the Kurds over Kirkuk (with the resource revenues distributed to all of Iraq), which have so far not been met, are inevitable due to the strong position and unity of the KDP and PUK. Denise Natali shares the point of view that Iraqi Kurdistan is a quasi-state nowadays, and is an internationally recognized and legitimate entity ("The Spoils of Peace" 1111). Moreover, Natali agrees that the Kurdistan Regional Government was empowered by the Constitution of 2005 and thereby achieved its prominent role ("The Spoils of Peace" 1111), thus also awarding the constitution a central role in Kurdish state power.

After years of tension, the PUK and KDP brokered a deal in 2006, called the Kurdistan Regional Government Unification Agreement, which allowed effective power-sharing between the two parties (Packard 183). Since then, the leadership of Iraqi Kurdistan Government has been effective and has acted as a de-facto sovereign entity from the Iraqi state, exercising its power in unity (Packard 183). In the Kurdistan region, political pluralism was diversified and the representation of diverse parties, ethnicities and religious groups grew of importance in institutions and politics (Natali, *The Kurdish Quasi-State* 84). As such, one can examine “the entry into parliament of members of various demographic groups, e.g., women and minorities, and of diverse territorial, linguistic and socio-economic segments of society” (Banai 267). Additionally, the KDP and PUK grew closer together and cooperated as one single unity, as exemplified in the decision of running as one Kurdistan list in the 2005 Iraqi elections (Natali, *The Kurdish Quasi-State* 84). This can be seen as a result of the successes reaping from collaborative action in the case of the drafting process of the Iraqi Constitution of 2005, which thus showed the PUK and KDP that cooperation is needed to increase autonomy from the federal state and gain political prowess.

### ***3.3 Discrepancies between Arbil and Baghdad***

The Kurdistan government, post-2003, reinforced Kurdish nationhood, improved economic vibrancy, and re-emphasized political unity (Aziz 90). Exemplary, “employment, economic, and demographic trends have increased standards of living” (Aziz 99). Moreover, the emergence of civil society is a clear trend in post-Saddam Iraqi Kurdistan (Natali, *The Kurdish Quasi-State* 80; Aziz 101). This clear distinction from other regions in Iraq, where economic stagnation and unemployment are abundant, has resulted in what Aziz called 'The other Iraq' (103). The vibrancy and political freedom of Iraqi Kurdistan is thus in stark contrast to conditions in other parts of Iraq.

While there have been conferments of autonomy to Iraqi Kurdistan in the constitution of 2005, in the form of new rights, there is still unresolved tension between the federal government and the Kurdistan region (Aziz 103). Moreover, while the emergence of the Kurdish quasi-state has been aided by the invasion of 2003 and a post-Saddam road, the reliance on international political support, funding and patronage, discourages self-sufficiency and autonomy for the region as a whole (Aziz 103).

If one examines the relationship between Arbil and Baghdad, there are still many discrepancies that have not been bridged in the post-Saddam context. Namely, security issues, differences in forms of administration, and political mistrust (Aziz 104-106). In terms of security issues, the Kurdistan Regional Government has “demanded a strict security environment” in order to prevent instability of other Iraqi regions to reach its borders (Aziz 104). This has resulted in increased distrust between Arabs and Kurds. In addition to this, “institutional ties between regions remain virtually non-existent”, and as such cooperation is low (Aziz 104). Additionally, the political environment guided by mistrust remains even after the fall of the Hussein regime. While the Kurdistan Regional Government does support the Iraqi Constitution of 2005, presumably due to their inscribed new rights, Sunni Arab groups do in fact not, and wish for amendments which would decrease the role of the Kurds, and increase their own political rights (Jawad 19). This is exemplified by a rejection of the constitution in two Sunni-majority provinces, and a call for amendments by Sunni Arab political figures and the Sunni population (Jawad 14;19) However, not only these Arab groups wish for improvements in the constitution, but the Kurds also see possible improvements. One still debated topic is the integration of Kirkuk into the region. While demographically (and arguably geographically) Kurdistan, due to the vast oil resources and thus potential revenue in the area, federal Iraq does not want its integration in the Kurdistan region and thus remain its stronghold on resources (Aziz 107-110; Jawad 12). However,

as previously mentioned, Article 140 in the Iraqi Constitution of 2005 addresses these issues of disputed territories in terms of resettlement of Kurds and Arabs, reshaping of administrative structures and a possible referendum to decide belonging to the KRG or the central state (Natali, *The Kurdish Quasi-State* 81).

Nonetheless, through the Advanced Development Provincial Reconstruction program, the Iraqi federal state further encouraged regional decentralization and increased allocated resources to the Kurdistan's regions provincial council 300 percent (Natali, *The Kurdish Quasi-State* 82). Imported in 2005 by Afghan example, the reconstruction program provides assistance to “provincial and local governments in Iraq to govern effectively and deliver essential services” (Perito 1). Additionally, the Kurdistan Regional Government also receives 17 per cent of all petroleum exported revenues from Iraq (Holland 28). Moreover, despite continuous mistrust between the central state and the Kurdistan region, “after 2003 it gained important representation in Baghdad” and Kurdish officials were appointed to high-level positions, such as in ministries or administrative posts, often in key central roles (Natali, *The Kurdish Quasi-State* 81). Additionally, “federalist structures gave the KRG the authority to alter Iraqi laws not related to foreign policy, national security, or financial issues; to control its own police and security forces; and to manage natural resources in the region” (Natali, *The Kurdish Quasi-State* 81)<sup>2</sup>. “Not only did the constitution allow for the legal extension of Kurdish autonomy demands into the framework of governance throughout the country, the Kurds were also king-makers in the new politics” (Bartu 1333).

Thereby, one can clearly see that the Iraqi government attempted to increase support and make amends to the Kurdistan region, in hope of repairing the strained relationship and thus precluding calls for independence and integrating the region inside its federal structure. Despite years of oppression, persecution, and civil war, nowadays one can declare the Iraqi

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2 For more information see Chapter four on constitutional clauses in the Iraqi Constitution of 2005 pertaining the Kurdish region

Kurdistani state as an “autonomous state controlling its own foreign policy, borders, security, economy, and natural resources within the Republic of Iraq“ (Packard 183). As such, the federal Kurdistan region within Iraq acts as a quasi-state, with its own administrative and political responsibilities.

### ***3.4 Merely a Historical Process? Autonomy of Iraqi Kurdistan***

Gareth Stansfield argues in his essay that Iraqi Kurdistan has already been a state-like entity that plays a major role in the international relations of the Middle East since 2005, thus that this political power is not a recent occurrence (“The Unravelling” 260). As such, he argues that the constitution itself lacks the political force necessary in determining Kurdish autonomy. Unlike the other actors, who stress the importance of the constitution, Stansfield argues that Iraqi Kurdistan's greater role has been twenty years in the making, especially voicing their opposition to Saddam Hussein as one of the reasons (“The Unravelling” 267-269). More importantly, however, he notes the increased nationalistic feeling of the Kurds and will to self-govern during the 1990s as one of the reasons for Kurdistan's state-like entity (“The Unravelling” 269). Moreover, the Kurdish leaders as opposition to Hussein's regime had become actors on an international stage, with allies in the US and Europe, which aided the Kurds in pursuing and establishing their idea of federalism in the Iraqi Constitution of 2005 (“The Unravelling” 270). Stansfield concludes with acknowledging that an Iraqi Kurdish state is now a possibility more than ever. Thus, this view of point argues that even the constitutional clauses making amends to the Kurdish people are the result of a historical process, in which the Iraqi government could not continue avoiding the Kurds strive for independence. Thereby, this view decentralises the role of the constitution itself. Moreover, while taking the momentum out of the strive for self-determination at the moment, one can thereby argue that once the situation in Iraq settles down, Kurds will achieve their



independent state.

## **Chapter 4: Constitutional Clauses and its Implications on KRG's**

### **Autonomy**

My thesis focuses on how the Iraqi government has instrumentalized constitutional conferments to preclude calls for independence by the Iraqi Kurds. As such, it is necessary to examine the discourse about the constitution, and which impact it has had on Iraqi Kurdistan's autonomy. Chapter four will thereby discuss the Constitution of Iraq 2005. Within this, this part will firstly look at the legislature applying to the Kurdistan region, namely Article 117, 120, 121, 140 and 141 of the constitution. Moreover, the political debate surrounding this incorporation will be examined. In addition to this, and that will comprise the largest part of this chapter, the discourse about these clauses will be analyzed. Therefore, this part will draw conclusions and apply expertise from different academic scholars. Currently, there is vast information available in which academics discuss the constitutional clauses itself, and what they entail, but most do not go further and explain changes within the Iraqi Kurdistan state. In addition to this, and unfortunately, there is still a lack of academic material available about the role of the draft constitution of Iraqi Kurdistan of 2009. This can be seen as due to its relative recent occurrence, secondly due to it still being a draft constitution, and last but not least because there have been other academic priorities in the region, e.g. the civil war and insurgence of the Islamic State. Thus, this chapter will only shortly discuss the draft constitution.

An article in the Harvard Law Review in 2006 argues that the reason for the improved position of minority groups, such as the Kurds, has to do with the ratification process of the constitution. The “ratification requirements granted substantial political influence to large,

concentrated minorities in Iraq, specifically the Sunnis and Kurds” ( “Democracy in Iraq” 1213). Due to the stronghold the Kurds have in specific regions, they could have vetoed a ratification of the Iraqi constitution, and thus the Iraqi constitution of 2005 makes vast amends to improve their position and ascertain their power (“Democracy in Iraq” 1214). As aforementioned, with the Kurdish majority in three regions necessary for veto-power, the Kurds were able to achieve constitutional benefits which otherwise would not have been possible. Thus, one could argue that the ratification requirements itself allowed for the strengthened position, and not, the strong identity character of the Kurds <sup>3</sup>.

The Constitution of Iraq 2005 consists of two clauses specifically pertaining to the autonomy of the Iraqi Kurdistan region, and others introducing the rights and duties of federal regions, thereby including the Iraqi Kurdistan region.

#### ***4.1 Article 117, 120 and 121: Establishing Autonomy within the Context of Federalism***

Article 117 (1) states that “this Constitution, upon coming into force, shall recognize the region of Kurdistan, along with its existing authorities, as a federal region.” Article 120 and 121 (1-5) determine the responsibilities and rights of such federal regions, therefore including Iraqi Kurdistan. Article 120 thereby suggests the creation of a constitution of Iraqi Kurdistan which designates the “powers of the federal region, its authorities, and the mechanisms for exercising such authorities” (Constitution of Iraq of 2005) <sup>4</sup>. As such, “the devolution of power to the regions also expanded to the KRG's internal sovereignty within its official

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3 as for example McGarry and O'Leary, or the Century Foundation and the Public International Law & Policy Group argue

4 “Each region shall adopt a constitution of its own that defines the structure of powers of the region, its authorities, and the mechanisms for exercising such authorities, provided that it does not contradict this Constitution“ Constitution of Iraq 2005, Art. 120

territorial boundaries” (Natali, *The Kurdish Quasi-State* 80). Article 121 (1) allows for executive, judicial and legislative autonomy, except in cases of federal authority <sup>5</sup>. Moreover, Article 121 enables administrative autonomy, including police and security forces (Art. 120 (5)) <sup>6</sup>. Thereby, legitimacy is provided to the Kurdish Peshmerga forces, and more importantly, the forces are acknowledged as a legal entity. In addition to this, Article 120 (2) states in case of a contradiction between legislation set by the regional government, and the national government, and if the issue does not pertain federal authority concerns, the regional government has power “to amend the application of national legislation within that region” (Constitution of Iraq of 2005). Thus, vast power in this aspect has been attributed federally to the regional government. Thereby, Article 120 of the Iraqi Constitution explains responsibilities and duties of the regional government, applicable to the Iraqi Kurdistan region.

#### ***4.2 Article 140: Disputed Territories and the Shortcoming of the Constitution***

Secondly, Article 140 (1) pertains to the situation of disputed territories, such as Kirkuk, and alludes to the necessity of fulfilling the “requirements of all subparagraphs of Article 58” of the TAL<sup>7</sup>. The second part of the article stipulates the normalization of the context, a census,

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5 “The regional powers shall have the right to exercise executive, legislative, and judicial powers in accordance with this Constitution, except for those authorities stipulated in the exclusive authorities of the federal government.” Constitution of Iraq 2005, Art. 121 (1)

6 “The regional government shall be responsible for all the administrative requirements of the region, particularly the establishment and organization of the internal security forces for the region such as police, security forces, and guards of the region.” - Constitution of Iraq 2005, Art. 121 (5)

7 “First: The executive authority shall undertake the necessary steps to complete the implementation of the requirements of all subparagraphs of Article 58 of the Transitional Administrative Law.  
Second: The responsibility placed upon the executive branch of the Iraqi Transitional Government stipulated in Article 58 of the Transitional Administrative Law shall extend and continue to the executive authority elected in accordance with this Constitution, provided that it accomplishes completely (normalization and census and concludes with a referendum in Kirkuk and other disputed territories to determine the will of their

and a referendum in Kirkuk (“and other disputed territories”) and to hand over the administrative jurisdiction to the KRG by the end of 2007 (Bartu 1330). Moreover, it reassigns the responsibilities of the TAL, Article 58, to the continuing executive authority elected. Thereby, it is important in this context to examine Article 58 of the Transitional Administrative Law<sup>8</sup>. Article 58 discusses the injustices of forced migration, settlement, forced unemployment and nationality correction in the past by the Iraqi government in Kirkuk. As such, it proposes steps to remedy these measures taken, such as resettlement, compensation, restoring of property, new employment opportunities, and the repeal of nationality correction. Moreover, Article 58 (b) of the TAL proposes to re-examine administrative boundaries which were manipulated and changed by the Hussein Government<sup>9</sup>.

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citizens), by a date not to exceed the 31st of December 2007. “ - Constitution of Iraq 2005, Art. 140

8 (A) The Iraqi Transitional Government, and especially the Iraqi Property Claims Commission and other relevant bodies, shall act expeditiously to take measures to remedy the injustice caused by the previous regime’s practices in altering the demographic character of certain regions, including Kirkuk, by deporting and expelling individuals from their places of residence, forcing migration in and out of the region, settling individuals alien to the region, depriving the inhabitants of work, and correcting nationality. To remedy this injustice, the Iraqi Transitional Government shall take the following steps:

(1) With regard to residents who were deported, expelled, or who emigrated; it shall, in accordance with the statute of the Iraqi Property Claims Commission and other measures within the law, within a reasonable period of time, restore the residents to their homes and property, or, where this is unfeasible, shall provide just compensation.

(2) With regard to the individuals newly introduced to specific regions and territories, it shall act in accordance with Article 10 of the Iraqi Property Claims Commission statute to ensure that such individuals may be resettled, may receive compensation from the state, may receive new land from the state near their residence in the governorate from which they came, or may receive compensation for the cost of moving to such areas.

(3) With regard to persons deprived of employment or other means of support in order to force migration out of their regions and territories, it shall promote new employment opportunities in the regions and territories.

(4) With regard to nationality correction, it shall repeal all relevant decrees and shall permit affected persons the right to determine their own national identity and ethnic affiliation free from coercion and duress.” - TAL Article 58

9 “The previous regime also manipulated and changed administrative boundaries for political ends. The Presidency Council of the Iraqi Transitional Government shall make recommendations to the National Assembly on remedying these unjust changes in the permanent constitution. In the event the Presidency Council is unable to agree unanimously on a set of recommendations, it shall unanimously appoint a neutral

Additionally, Article 58 (c) states that before discussing the permanent status of Kirkuk and other territories, these aforementioned measures have to be taken, and a census has to be executed and the permanent constitution has to be ratified<sup>10</sup>. Only after this, a discussion about the permanent status of Kirkuk can be initiated.

Unfortunately, this article is also the biggest shortcoming of the constitution and the political process afterwards, pertaining to the role of Iraqi Kurdistan. Article 140 (and as such Article 58 of the TAL), which discusses the status of Kirkuk and other disputed territories, could not be realized.

By the end of 2008, a realization had emerged across all communities that article 140 could not be implemented without further negotiation and political agreement concerning boundaries, voter eligibility, the referendum question, and units of decision (governorate, district and subdistrict). Initially rejected by many non-Kurds, article 140 became a rallying point for even its most hard-line opponents on the basis that it was impossible to implement. Up to now this has left the administrative status of Kirkuk and the other disputed areas in a state of suspended animation. (Bartu 1331)

Moreover, in order to avoid the joining of Kirkuk into the Kurdistan Regional Government, there have been amendments to the electoral law, namely Article 23 Council Elections Law of 2006 and the 2010 parliamentary elections law, instigated by Sunni and Shi'a Arabs (Bartu 1337). These measures were negotiated by Arabs to undermine the possibility of Kirkuk's self-sovereignty under Kurdish leadership, and thus a joining to Kurdistan. Thus, these

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arbitrator to examine the issue and make recommendations. In the event the Presidency Council is unable to agree on an arbitrator, it shall request the Secretary General of the United Nations to appoint a distinguished international person to be the arbitrator.“ - TAL Article 58 (b)

10 “The permanent resolution of disputed territories, including Kirkuk, shall be deferred until after these measures are completed, a fair and transparent census has been conducted and the permanent constitution has been ratified. This resolution shall be consistent with the principle of justice, taking into account the will of the people of those territories.” - TAL Article 58 (c)

amendments enabled “to discredit the voter registry and to undermine any claims that the parliamentary elections in Kirkuk could be described as a de facto referendum on its future status.” (Bartu 1337-1338). Thereby, one can see that even though this constitutional clause was added to increase Kurdish rights and responsibilities and settle the dispute over Kirkuk, it was relatively easy for the Arabs, as opposition to Kurdish quests, to override these clauses and advance their own agenda.

Thereby, one would be wrong to view the Iraqi federal state solely as a bestower of increased rights and autonomy to the Iraqi state out of political pressure and the diversity of Iraqi society. This clause 140 portrays the opinion of some scholars, who identify the constitutional clauses as sounding nice in theory, but in reality describe an overriding of these clauses by the federal state, and thus autonomy of Iraqi Kurdistan, as a relatively easy act. As such, this implementation and inclusion of conferments can be seen as agenda-backed to appease the Kurdistan Regional Government, but in reality still mainly adhering to the needs of the federal state, if necessary. Burton and Deeks, for example, mention that there are legal ambiguities that allow the Iraqi federal state to override these clauses, which de-facto shows great potential for the federal Iraqi state to reaffirm itself (72-74). As aforementioned, these legal ambiguities provided the Arabs (and as such federal Iraq) with the opportunity for amendments of electoral law, which resulted in the impossibility of integrating Kirkuk into Kurdistan. Thus, while one can certainly examine increased power and political weight the constitution of 2005 attributes to Iraqi Kurdistan, many scholars oversimplify the clauses in the constitution and disregard its potential for the Iraqi government to hold onto its power even within these autonomous regions (Burton and Deeks 73). Reidar Visser, a specialist in Iraqi politics, agrees with Burton and Deeks about the fact that the constitution with its specific clauses, commonly seen as providing the Iraqi Kurds with more power, in reality will result in a decline of Kurdish power by 2010 (89). Furthermore, he stresses the importance of

the rise of Iraqi nationalism in the years 2007 and 2008, instigated by former Prime Minister Al-Maliki, which limited and decreased Kurdish power and demands (Visser 86-89). Therefore, Visser believes that after the initial increase of power and national character of the Kurdish state in Iraq after the Iraqi Constitution of 2005, the Kurds' role in reality became marginalized and decreased. As such, he is seen as one of the proponents who believe the constitution to be a power-tool to in fact decrease Kurdish power, and limit their influence in politics. As a result, this means that the constitution was instrumentalized to avoid calls for independence, and by allowing for shallow rights, in fact actually undermines the Kurdish quest for statehood.

### ***4.3 Article 141 and the Dispute over the Budget***

Article 141 reads

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.

Thereby, the legislation enacted since 1992 is still applicable in all cases, except when in contradiction with the Constitution of 2005. Moreover, such legislation will continue being in force, unless an Iraqi Kurdistan body determines the legislation to be inapplicable or in need for amendment.

Moreover, the Iraqi Constitution of 2005 grants the Kurdish Region “an annual capital investment budget of 17 percent of the federal budget”, which thereby increased by about 250 percent ( Natali, *The Kurdish Quasi-State* 82). However, since January 2014 Baghdad has not

met these constitutionally entitled demands, and the KRG only received 11 per cent of the shares (United Kingdom Parliament). These funds are set to be redistributed to the KRG in order to pay for public services. Moreover, Baghdad has been unwilling to fund the Peshmerga forces, which, as based on constitutional Article 121, are the legal security force of the KRG (“Kurdish Ministers”). This has led to a dispute between Baghdad and Arbil, and the KRG officials accusing Baghdad of not adhering to constitutional law, a claim which cannot be refuted. Kurdish political actors have thereby demanded constitutional devotion, or Iraqi Kurdistan will secede from the federal state (United Kingdom Parliament). As such, it is important for Baghdad to adhere to the amends as inscribed in the constitution, to prevent a further unraveling of the situation and enable the improvement of political relations. Nonetheless, this is a clear portrayal of how the Iraqi federal state has used constitutional conferments to discourage the disintegration of Iraqi Kurdistan. Moreover, it also shows that Kurdish willingness of affiliation to the federal state ends if the aforementioned does not hold up its end of the bargain.

#### ***4.4 Draft Constitution of Iraqi Kurdistan of 2009***

The Draft constitution of Iraqi Kurdistan of 2009 moreover introduces clauses pertaining to its role to the Iraqi nation-state. Namely, and most importantly, these clauses are Articles one, two, three, four and seven of the draft constitution. This draft constitution has been approved by the Kurdistan parliament in Iraq in June 2009, but up until today has not been ratified yet. This is a result of calls by the United States, who persuaded the Iraqi Kurdistan government to wait for a referendum to avoid confrontations with Baghdad (Kelly 709). Article 1 of the draft constitution explicitly mentions the incorporation of Iraqi Kurdistan into federalist Iraq as a region. Nevertheless, the second sentence proclaims Iraqi Kurdistan to be a “democratic



republic”, thereby reaffirming its independence and autonomy from the Iraqi nation-state<sup>11</sup>. Moreover, this demonstrates the usage of language in the constitution, may it be political or legal, which repeatedly insists on separation from the Iraqi state as an own political entity. Moreover, Article 2 established the regional borders of Iraqi Kurdistan, all in accordance with the federal Constitution of Iraq 2005, Article 140. Thereby, one can clearly see that the Iraqi Kurdistan draft constitution does acknowledge the federal constitution's superiority, though the language used in some articles questions this authority. Article 3 of the draft constitution establishes the authority of the Iraqi Kurdistan government and its constitution. Thereby, it authenticates sovereignty of the constitution of Iraqi Kurdistan and other legal entities, apart from exclusive federal jurisdiction<sup>12</sup>. Article 3(2) reinforces the possibility of amendments to federal laws if only applicable to regional conditions or outside its jurisdiction, and thereby re-establishes the regional government's supremacy in all cases except when exclusively under jurisdiction of the federal entity<sup>13</sup>. Article 4 reinstates this matter, and reemphasizes the right of the Kurdistan government to introduce any legislature deemed necessary without consultation of the federal government, as long as it does not oppose federal law as instigated

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11 „The Iraqi Kurdistan Region is a region within the Federal State of Iraq. It is a democratic republic with a parliamentary political system that is based on political pluralism, the principle of separation of powers, and the peaceful transfer of power through direct, general, and periodic elections that use a secret ballot.“ - Draft Constitution of Iraqi Kurdistan 2009, Art. 1

12 „The people are the source of authority and the basis of its legitimacy: said authority shall be exercised by the people through their constitutional institutions. The Constitution and the laws of the Kurdistan Region are sovereign and supersede all laws issued by the Iraqi government outside of the exclusive jurisdiction of the Federal Republic of Iraq.“ - Draft Constitution of Iraqi Kurdistan 2009, Art 2(1)

13 „In accordance with Article 115 and Paragraph 2 of Article 121 of the Federal Constitution, in the event that the federal law deals with matters within the exclusive jurisdiction of the federal authorities, as listed in Article 110 of the Federal Constitution, or with other matters outside this jurisdiction, this shall not detract from the sovereignty and supremacy of the Constitution and laws of the Kurdistan Region, nor shall it limit the powers of the Region's authorities.“ - Draft Constitution of Iraqi Kurdistan 2009, Art. 2(2)

in Article 110 of the Iraqi Constitution of 2005<sup>14</sup>.

Article 7 of the draft constitution is of utmost importance. It states that

The people of Iraqi Kurdistan shall have the right to determine their own destiny, and they have chosen out their own free will, to be a federal region within Iraq, as long as Iraq abides by the federal, democratic, parliamentary and pluralistic system, and remains committed to the human rights of individuals and groups, as stipulated in the Federal Constitution.

This Article 7 shows the integrity of Iraqi Kurdistan within federal Iraq, but only, and this is crucial in this case, 'as long as Iraq abides' by certain rules. As such, this can be seen as an article which will be drawn upon in case of malpractice by the Iraqi state, and could thus legally lay path for independence. While not acknowledged by the Iraqi constitution in itself, this article still demonstrates the willingness of Iraqi Kurdistan to become a legal independent entity, if federal Iraq does not cherish the disciplines aforementioned. Thereby, this, as a representation of popular opinion of Iraqi Kurds, can be seen as political leverage which can be acted upon so that Iraq allows Kurdistan its federal autonomy and disintegrates from political processes within Iraqi Kurdistan. Thus, this Article 7 is a warning to Iraq. If the federal state of Iraq does not abide by the rights and rules, Iraqi Kurdistan will become independent and “determine their own destiny” (Article 7). In practice, these demands have been made in 2014 regarding the aforementioned issue with the budget allocation. How rational or factual this opportunity of self-determination is, remains to be determined, but one cannot deny its political leverage.

Unfortunately, scholarly literature regarding the draft constitution of 2009 in Iraqi Kurdistan and its effect on the character of the Kurdish state is not available yet. However,

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14 „Kurdistan Parliament may put into effect in the Region any federal law that is outside the exclusive jurisdiction of the federal authorities, as stipulated in Article 110 of the Federal Constitution of the Republic of Iraq.“ - Draft Constitution of Iraqi Kurdistan 2009, Art. 4

Yussuf Muhammad Sadiq addresses the issue of a missing constitution in Kurdistan nowadays. While there was a draft constitution in 2009 which was approved by the Kurdish Regional Government, due to calls by the United States it has not been ratified yet (Packard 178). Many scholars call the lack of a constitution as one of the most pressing issues in Iraqi Kurdistan, as it has led to infighting, an unequal distribution of power and no clearly stated relationship between the executive, legislative and judiciary branches (Sadiq 15). However, in Sadiq's opinion, the draft constitution of 2009 ascertains too much power to the executive which could result in abuse of power by the president and dependency of legislative and judiciary (15). Still, Sadiq believes that in order for the rule of law to be applied and to draw clear power relations between the different political bodies, the draft constitution needs to be implemented. In his opinion, a constitution is necessary in order for a democratic regime to be established and the only way the Kurdish Regional Government can maximize its efficiency and gain independence (15). Constitutions form the basis of a state and are the legal backbone of a new state. Constitutions aim to

- 1) generate legitimacy for the state; 2) channel political conflict through formal institutions rather than violence; 3) limit the agency costs of government; and 4) facilitate the production of public goods. (Ginsburg and Huq 120)

They are thereby essential for the state-building and overall governing of a population, determining rights, responsibilities and restrictions for a state. Thereby, ratification of the draft constitution by the Kurdish Regional Government is of utmost importance to state-building.

#### ***4.5 Implications of the Iraqi Constitution of 2005***

The Iraqi Constitution of 2005 incorporates several additional and new clauses which allow

Iraqi Kurdistan to act as a quasi-state. Namely, those are Articles 120, 121, 140 and 141. Not only does the constitution increase the revenues of the region, moreover it also allows for its own administrative structures, its own security structures, and autonomy in the political sphere. Additionally, it acknowledges the special status of disputed territories, such as Kirkuk. This can be seen as a formal acknowledgement of pre-existing political autonomy conditions in Iraqi Kurdistan, which have existed and improved since 1992. Helpful for this emergence of acknowledgement was the inevitable momentum and political prowess the unification of the KDP and PUK created. Moreover, post-Saddam, changing political and cultural contexts allowed for Kurds to be one of the strongest players in the field, backed by the United States. In essence, the Iraqi Constitution of 2005 improved Kurdish political autonomy from the federal Iraqi state. Nevertheless, it is important to mention that there are legal ambiguities in the constitution, which allow an overriding of Kurdish interests, if deemed necessary by the federal state. A perfect example of this is the aforementioned avoidance of implementation of Article 140 and the stalemate status of Kirkuk. Nonetheless, one can clearly see in the constitution that the federal Iraqi state has made amends to the Kurdish region, in order to maintain the status quo of the KRG as an entity of Iraq. The best example of this notion of appeasement is probably the insight that Paul Bremer, US head of the Coalition Provisional Authority, provided. He

reports negotiating with the Kurds their price for staying in Iraq on virtually every issue, and navigating the constant tension of attempting to reward the Kurds for their commitment to the democratic project in Iraq while laying the ground for a communal accord and a sustainable security framework—interpreted, inconsistently, as re-enfranchising the Sunnis. (Bartu 1333)

As such, this portrays a clear example that the Iraqis bought Kurdish integrity with the constitutional clauses, and thereby tried to avoid the quest for independence. Moreover, this

also provides an explanation of why so many amends were made to the Kurds, as this ethnic group was crucial for the democratic project of Iraq. As such, one can see both sides benefiting from this project of integration. On the one hand, Kurdistan increased its independence and autonomy under the framework of federal Iraq, and this time even formally recognized. On the other hand, Iraq discouraged separatism by the Kurds and reaped benefits of their attempts at democratization and the economic benefits of the resources of the Kurdistan region.

#### ***4.6 Exclusive Authorities and Increased Role***

Michiel Leezenberg states that the case of secession into Kurdistan is used by Kurdish leaders more as a negotiation tactic, rather than a real prospect for the future (644). Moreover, Packard, like Feldman and Martinez, argues that the Kurds since the Iraqi Constitution of 2005 have improved and strengthened their importance within Iraqi politics and the constitution allowed them to increase their power (184). Burton and Deeks support this view in that the role of the Iraqi Kurdistan government has increased over the constitution and it “ensures broad powers for the KRG”, unprecedented under the 'Law of Administration for the State of Iraq for the Transitional Period', with exclusive authorities given to the Kurds (64). Many scholars see the federalist state of Iraq as weakened, and the governorates' powers as strengthened through the constitution, as exemplified in legislation set in the constitution in Article 121 and 115 (McGarry and O'Leary 680; Packard 185). Feldman and Martinez explain that the core of the document was a power deal made between the Shi'as and the Kurds, and that the most important issue, federalism, was included to meet the Kurdish and Shi'a demands (900). In addition to this, a USIP special report in 2005, by Jonathan Morrow on the constitution drafting process in Iraq, states that there was no opposition by Sunni Arabs (politically the oppositional player of Shi'ites and Kurds in Iraq) to an autonomous region of

Kurdistan (12). Thus, the United States Institute of Peace report declares this to be of no issue whatsoever, and the formality of taking the status quo of self-autonomy, which has been practised since 1992, into constitutional law was of no issue. Thereby, most scholars ascertain an improved position of the Iraqi Kurdistan state after implementation of the constitution of 2005.

#### ***4.7 Buying the Loyalty of the Kurds: A Failed Project?***

Michiel Leezenberg writes in 2005 before the new constitution was ratified, “it is not very likely that the drafting of a new constitution will in and of itself secure the loyalty of the Kurds, or, for that matter, of any Iraqi population group.” (644) This can be seen in the wish of the Kurds to gain control of Kirkuk, which was elaborated on in a previous paragraph. While the Kurds achieved and gained immense power due to the constitution and especially during the drafting process, as exemplified by Leezenberg, they identify as Kurds rather than Iraqis, and thus are not loyal to the Iraqi state even though they were involved in the creation of the Iraq of today. Thus, this demand for Kirkuk, which would further strengthen and centralize a Kurdish state, can be seen as in agreement with Leezenberg's view of disloyalty by the Kurds toward the Iraqi state. This is important to consider, because having a valuably sized minority which does not identify with the nation-state, often creates problems. Thereby, the assertion of not achieving loyalty by the Kurds after implementation of the constitution, implies a further quest of self-autonomy by the Kurds and disregard of the amends made by the Iraqi federal state.

As such, Leezenberg proposes the idea of incorporating beneficial clauses in the constitution to discourage self-autonomy, and achieve loyalty, as a failed project (644). This opinion can be perceived nowadays as outdated. Yes, the Iraqi Kurds still identify as more Kurdish than Iraqi, and do not proffer much loyalty to the Iraqi state. However, one can also

clearly see that the Iraqi federal state was successful in limiting the Kurdish pursuit of self-autonomy with the constitutional amendments made to its population. Thereby, the inclusion of these clauses has not disrupted the incorporation of Iraqi Kurdistan into the federal state.

However, Packard attributes the option for Iraqi Kurdistan to become independent from Iraq as one of 'earned sovereignty' (179). He thus goes further than most scholars in the field, by arguing that Iraqi Kurdistan has the legal, political and social requirements necessary to achieve independence and sovereignty from the Iraqi state, and links the case of Kurdistan to others such as South Sudan and East Timor (179). In essence, he thereby disregards the constitution as limiting the Kurds' pursuit to self-autonomy and independence, and projects independence as a valid option. Therefore, while the Kurds might be loyal to the federal Iraqi state at the given time, reasonably due to the tumultuous situation in the Middle East, a secession from Iraq is still a viable option for the future.

## **Chapter 5: Conclusion**

Since 1992, Iraqi Kurdistan and the Kurdish Regional Government increasingly performed autonomously from the Iraqi state. Backed by international actors, such as the US and Europe, aid programs allowed for political autonomy, economic prosperity and the emergence of a secure environment. Unfortunately, this political autonomy culminated in a civil war until 1997, with the two power-sharing parties, namely the KDP and PUK, negotiating an end of the conflict in 1998 under the auspices of the US. But discrepancies between the two parties remained until the Washington Agreement in 2004. Iraqi Kurdistan has a long-reaching history of autonomy, formally acknowledged in the Iraqi Constitution of 2005. The constitution introduced many new rights and responsibilities to the Kurdistan Regional

Government. Regardless of previous executions of these by the KRG since 1992, the constitution formally endorsed these rights and thereby provided a legal foundation for the performance of the KRG. While this certainly aided in legally securing these responsibilities, one cannot deny the agenda-backed inclusion of these privileges. Surely, the Iraqi government knew that it was an impossibility after the US invasion of 2003 not to give the Kurds an active role in the political field. On the one hand, Iraqi Kurds enjoyed international recognition and political weight, mainly accredited by the United States for their appreciation of democracy, fundamental rights and freedoms. On the other hand, Iraqi Kurds had suffered under the former regime and were in long-standing opposition of the Saddam government. As such, the post-Saddam road was aimed at creating a democratic political arena including the Kurdish minority, to enable the respect for human rights and active political participation. Moreover, the incorporation of Iraqi Kurdistan into the federal Iraqi state, within the framework of liberal consociation, was crucial in order to maintain the status quo of the territorial borders of the Iraqi state. The creation of one Iraqi identity was a failed attempt, and thereby the only viable option remained the incorporation of the diversity of identities in a federal Iraqi state structure.

The Kurds were actively involved in the constitution-making process in Iraq post-Saddam. The ratification process in itself, with a veto-power of the Kurds, enabled improvements and a strengthening of the political position. Moreover, the Kurds were also seen as crucial in contributing to the democratic project in Iraq. This allowed the inclusion of vast rights and responsibilities to and for the Kurdistan Regional Government. The tactic of appeasement was fundamental in securing Kurdish integration and “commitment to the democratic project in Iraq” (Bartu 1333). Thereby, the notion of introducing and reinforcing new rights and responsibilities to the KRG, and increased financial aid by the Iraqi federal state, enabled an averting of secession by the Iraqi Kurds. The Kurds nowadays are able to



autonomously govern their region how they please. Furthermore, they have the capacity to introduce new laws in their region (as long as not in contradiction with federal law), as instigated by the Iraqi Constitution of 2005. Moreover, the allocation of financial aid has increased tremendously since 2005. Nonetheless, it is important to mention the legal ambiguities existing in some of these articles, for example the aforementioned situation of Article 140, pertaining to disputed territories and as such Kirkuk. As such, it was possible for actors to override Article 140 and thus Kurdish demands, and the situation of Kirkuk remains uncertain. Moreover, the situation of the budget allocation of 17 per cent by Baghdad to the KRG has recently not been met, and is of utmost importance to be resolved. Otherwise, an independent Iraqi Kurdistan as a result of constitutional inconstancy by the federal state will be the near future. Nevertheless, the Kurds enjoy nowadays a strengthened political and legal position as a result of the Iraqi Constitution of 2005. However, the introduction and incorporation of these constitutional rights was instrumental in avoiding separatism from federal Iraq. The adopted notion of federalism, to successfully incorporate different identities and ethnicities into the Iraqi nation-state, was on the forefront of Kurdish agenda. It is clear that the privileges the Kurds nowadays enjoy, and while strengthening their autonomy, were used by the Iraqi nation-state to preclude calls for independence. The necessity of an Iraqi Kurdistan under Iraq was too important for the Iraqi federal government to ignore Kurdish demands, and thus they made amends. The Kurds, as an ethnic minority in Iraq enjoying vast political power and rights, are currently not actively seeking secession of the Iraqi state. This is certainly a result of the rights and responsibilities inscribed by the Iraqi Constitution of 2005.

As Packard proposes, in the long run Kurdistan could achieve their own independent status in accordance with the principle of 'earned sovereignty', which has been used in cases such as Northern Ireland and South Sudan (185). This portrays the quest for nation-hood by

the Iraqi Kurdish population itself. A 2007 survey asserted that 90% of Iraqi Kurdish respondents agreed with the statement that “Kurdistan should become independent, separate from Iraq” (Aziz 135). Thereby, one can see that the strive for self-autonomy and independence is central to Kurdish identity. Still, even though it is the wish for most Kurds to gain independence from the Iraqi state, there are far more important issues to tackle at the moment than this pursuit of statehood and national independence. As such, with the destabilization of Iraq due to political actors and insurgent forces, the Kurdish pursuit of sovereignty currently lies at rest.

### ***5.1 Necessity for a Nation-State?***

Michael Wuthrich opposes the modern assumption of the necessity of a nation-state for every ethnicity, which can be applied to the Kurdish case. Overall, his point of view is probably the most feasible, given the current political context of the Middle East.

There is a danger of maintaining the same teleological assumptions derived from classical modernization theory that there is a necessary and right process of development which begins with an ethnically defined group and ends with a centralized nation-state. This ignores the possibility that the current global context might offer other possibilities for governance and the protection of one’s cultural and political rights and that members of the group involved may not be of one mind regarding their ultimate good – a complex view that would be extremely useful in the Kurdish case. (Wuthrich 309)

Thereby, he promotes the integration of the Kurdistan region into federal Iraq as the most viable option in the current global context. One can see that while certainly a daring proposition, the incorporation of minority ethnicities into a federal state, instead of striving for a nation-state, can be more appropriate. This form of appeasement creates benefits for

both sides, such as an increased political position of the ethnic minority, a decrease of violence between the two parties, and the stabilization of a federal state. Moreover, the creation of a new nation-state often culminates in new problems, such as forms of irredentism, destabilization of regions and the unravelling of political and security situations. As such, the case of Iraqi Kurdistan and its incorporation into a federal state, with vast autonomy, rights and responsibilities for the distinctive region, provides a par-excellence example to other countries. Constitutional conferments, and thereby the prescription of distinctive rights and responsibilities to substantial minority ethnicities, can therefore aid in precluding calls for independence. Consequently, the case of federal Iraq and Iraqi Kurdistan can be applied to other countries which are concerned with ethnic minorities' strive for self-determination.

Thereby, the decision by federal Iraq, to provide allowances to Iraqi Kurdistan in order to achieve integration, can be seen as beneficial to both sides. Not only does it allow for the settlement of conflicts between the two parties, but it moreover promotes beneficiaries to the Kurdistan regional government, if they remain a part of federal Iraq. Thereby, while one cannot deny the inclusion of constitutional clauses to preclude independence for Iraqi Kurdistan, this does not have to be seen in a negative light. After all, what might the future entail in case of an independent Iraqi Kurdistan. Will other nations, especially those spanning the Kurdistan region, accept such independence? Will it result in a deterioration of conflict? An independent Kurdistan, at this point of time, would be a huge mistake in the current unravelling situation in the Middle East. Such a proposal of independence might be feasible in future times, once the region of the Middle East has calmed down. Right now, it is more important to tackle other issues in the region, such as the emergence of extremist groups, civil wars, economic stagnation, and basic human rights. Thus, at the moment, the integration of Iraqi Kurdistan as a federal region of Iraq might be the best option, for Kurds and Iraqis alike.

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