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Working Paper Series

Federalism

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Preface to the Series: *Introduction to the Laws of Iraq and Iraqi Kurdistan*

Iraq and Iraq's Kurdistan Region is at a compelling juncture in their histories. In the wake of the transition to a democratic state, the country and region economy has prospered and its institutions have grown more complex. As institutional capacity has grown, so too has the need for a robust rule of law. An established rule of law can provide assurances to investors and businesses, while keeping checks on government and private powers and protecting citizens' fundamental rights. Institutions of higher learning, such as universities and professional training centers, can and should play a key role in stimulating and sustaining this dynamic. Indeed, education is foundational.

This paper is part of the *Introduction to the Laws of Iraq and Iraqi Kurdistan*, a series of working papers produced by the Iraqi Legal Education Initiative (ILEI) of Stanford Law School. This series seeks to engage Iraqi students and practitioners in thinking critically about the laws and legal institutions of Iraq and Iraqi Kurdistan. Founded in 2012, ILEI is a partnership between the American University of Iraq in Sulaimani (AUIS) and Stanford Law School (SLS). The project' seeks to positively contribute to the development of legal education and training in Iraq.

The working paper series devotes significant attention to pedagogy. By writing in clear and concise prose and consulting with local experts at each step of the writing process, the authors strive to make the texts accessible to diverse and important constituencies: undergraduate law students, lawyers and judges, government officials, members of civil society, and the international community. By discussing the Iraqi and Kurdish legal regimes and applying specific laws to factual situations, the authors model how to “think like a lawyer” for the reader. They also use hypothetical legal situations, discussion questions, and current events to stimulate critical thinking and encourage active engagement with the material.

These working papers represent the dedicated efforts of many individuals. Stanford Law School students authored the texts and subjected each working paper to an extensive editing process. The primary authors for the initial series including papers on Commercial Law, Constitutional Law, and Oil and Gas Law, were John Butler, Mark Feldman, David Lazarus, Ryan Harper, and Neil Sawhney (J.D., 2014), under the guidance of Stanford Rule of Law Fellow Megan Karsh (J.D., 2009) and me. Jessica Dragonetti, Kara McBride, Cary McClelland, Neel Lalchandani, and Emily Zhang (J.D., 2015) are writing papers for the latter part of the series primarily concerned with Iraq's engagement with international law. I also thank the former and current deans of Stanford Law School, Deans Larry Kramer and Liz Magill, for their financial support, and the Stanford Law School alum, Eli Sugarman (J.D., 2009), who acts as an advisor to the project.

The faculty and administration of American University of Iraq in Sulaimani provided invaluable guidance and support throughout the writing process. Asos Askari and Paul Craft in particular

played a leadership role in getting the program off the ground and instituting an introductory law class at AUIS. Ms. Askari taught the first law class in the 2014 spring semester. Former and current presidents of AUIS, Dr. Athanasios Moulakis and Dr. Dawn Dekle, have provided unwavering support to the project. And finally, a special thanks to Dr. Barham Salih, founder and Chair of AUIS, without whose foresight and vision this project would not have been possible.

Finally, the authors of this series of papers owe an extraordinary debt of gratitude to many thoughtful Kurdish judges, educators, lawyers, and others who work within Iraqi institutions for their critical insights. In particular, the textbooks received vital input from Rebaz Khursheed Mohammed, Karwan Eskerie, and Amanj Amjad throughout the drafting and review process, though any mistakes are solely the authors' responsibility.

ILEI plans to continue publishing working papers through 2014. All texts will be published without copyright and available for free download on the internet.

To the students, educators, legal, and government professionals that use this set of working papers, we sincerely hope that it sparks study and debate about the future of Iraqi Kurdistan and the vital role magistrates, prosecutors, public defenders, private lawyers, and government officials will play in shaping the country's future.

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THE IRAQI CONSTITUTION AND FEDERALISM

I. INTRODUCTION

The Constitution of Iraq explicitly divides power between the national government and regional provinces. This concept of power sharing among various levels of government within a country is known as **federalism**. As the Kurdish region is currently the only legally-defined region in Iraq, the concept of federalism significantly impacts nearly every decision made by the Kurdish Regional Government (KRG) and the daily lives of Iraqi citizens living in Kurdistan.

Though the definition of federalism is relatively straightforward, the concept in practice can be quite complex. Federalism can be adapted to help explain who is responsible for a variety of important duties including developing oil resources, enforcing criminal laws, providing access to water for drinking or irrigation, or ensuring the security of the streets or the border. More fundamentally, federalism also seeks to decide who is in the best position to have responsibility over these issues. While some policies might be better and more impactful when established at a national level, such as issues like national security which are often better coordinated centrally rather than region by region, other policies, like education or health care, might be better implemented at the local level where local politicians have a greater understanding of the needs of the local population.

This Working Paper on Federalism seeks to provide a better understanding of the singular concept and multiple characteristics of federalism. First, it provides an overview of the theories underpinning the concept of federalism by looking at its development in Iraq as well as a number of specific examples of federalism in the Iraq Constitution. Depending on the subject matter, the relative balance of power allocated to the federal or regional governorates varies depending on the text of the Constitution as well as the political, legal, and economic realities of Iraq.

II. FEDERALISM OVERVIEW

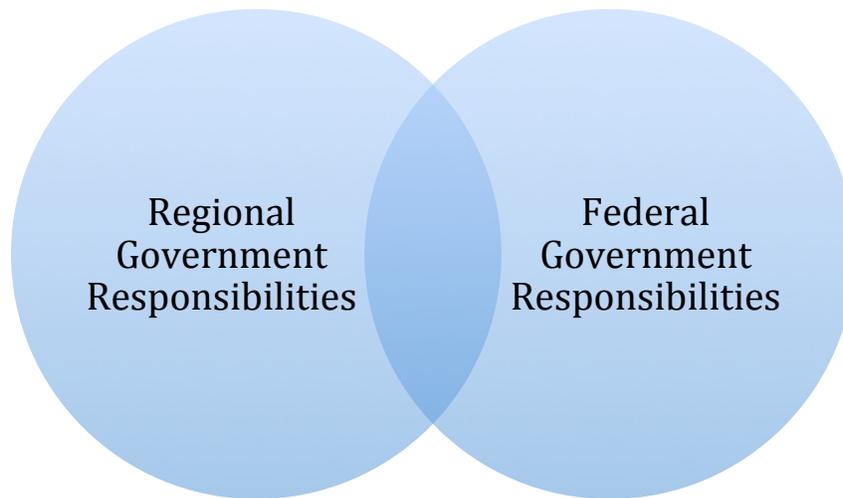
A. Federalism Defined

Federalism includes a division of labor between the national government and regional governorates to allow different-sized governments to share or have exclusive control over different sectors of society. William Riker, a renowned political scientist, established the following essential features of federalism: “(1) two levels of government rule the same land and people, (2) each level has at least one area of action in which it is autonomous, and (3) there is some guarantee . . . of the autonomy of each government in its own sphere.”¹Riker’s definition lays out the basic requirements of federalism, namely that multiple governments within a country

¹Lawrence M. Anderson, *Theorizing Federalism in Iraq*, 17 REGIONAL & FEDERAL STUDIES 159, 160 (2007).

have simultaneous responsibility over the same group of citizens, but that each government enjoys different, though often overlapping, spheres of control. As you can tell from the definition, the amount of overlap or autonomy can vary from “at least one” area to multiple areas.

Federalism can broadly be defined as a Venn diagram, such as the one below. Each of these circles might include a variety of issues that the federal or regional government has sole authority over. But any issues that are in the center, overlapped by both circles, would be issues that are the responsibility of both governments. Federalism is based on the premise that both of these governments can have separate and overlapping “spheres of control.”



Daniel Elazar, a noted professor of political science, defined federalism more narrowly as “involv[ing] some kind of contractual linkage of a presumably permanent character that (1) provides for power sharing, (2) cuts around the issue of sovereignty, and (3) supplements but does not seek to replace or diminish prior organic ties where they exist.”²Put another way,

“[P]ut more elegantly, Elazar defined federalism as ‘self-rule plus shared rule.’ This is a central point: federalism does not simply mean the separation of political authority, distributed in discrete and complete units; it is shared between the central state and its regional political units.”³

According to Elazar, in a federalist system, the national government must give up some of the power it would have in a unitary system and grant it to a regional or smaller unit of government. The power must be *shared*. Further, according to Elazar, it must be distributed according to “prior organic ties,” which means given to groups that have previously worked together to allow the group to continue to maintain unity (this could be among different ethnicities, localities, or other previously existing commonalities that might bind a group of people together).

²*Id.*

³*Id.*

Essential to Elazar's definition is also the notion of **sovereignty**, defined as the "supreme power or authority" or "the authority of a state to govern itself or another state."⁴ Elazar states that a federalist government must incorporate the idea of power sharing to allow for concurrent sovereignty⁵ with each government focused on different areas of control. Federalism requires abandoning the view of one central ruler with absolute power over the affairs of the country and instead choosing a number of rulers, each with power over different sectors.

Finally, federalism seeks to add, but not diminish, "prior organic ties," or the types of preexisting relationships that exist within a country. Federalism is founded on the basis that neither national nor regional government might be best equipped for every issue and the level of government that has the best access to a potential solution should have the ability to influence and create that solution. These solutions are going to be developed based on these pre-existing relationships between citizenry, local government, regional government, and the national government.

Discussion Questions

- 1) Think about the concept of using federalism to supplement "prior organic ties" and what that might entail. While religion and culture are common examples, are there other types of commonalities that could serve as an organizing principle for a group of people?
- 2) Before reading the next section, think through why a national government might choose to give up some of its power to a local government? What benefits might a society enjoy if power were decentralized in this way? Make sure to revisit your ideas after reading the next section.

B. Why Federalism?

Federalism is seen to provide a number of key advantages that a unitary system of government cannot always provide.

First, in a large country, federalism allows a national government to leverage local government expertise to help more effectively run the country. Regional or local officials are often closer to problems in their geographic areas and likely have more expertise in developing policies to address those problems. For example, if there is a significant amount of murder in a certain area, the national government might deal with it like a national security threat and send in a large number of armed troops to resolve the problem. But suppose that the increase in crime was not a

⁴ Oxford Dictionaries, <http://oxforddictionaries.com/us/definition/english/sovereignty>.

⁵ Concurrent sovereignty means that neither government has clear authority over the other one.

random occurrence, but the result of a feud between two warring families that has continued for hundreds of years but recently spiked in violence. While the national government's strategy might ultimately be effective, the local government, composed of members of the community, will have a better sense of what is causing the violence and will have relationships and tools allowing for quicker resolution of the problem.

Relatedly, local governments can also serve as laboratories to allow local officials to experiment with policies. If successful, the policies can potentially be expanded and applied to other parts of the country. For example, educational needs vary across ethnic groups. A local government might have a better sense than the national government of the needs of the children of that region, and might also have more flexibility to try new policies that and experiment with new ideas, whereas the national government would be more constrained in trying to create a policy for the entire country. U.S. Supreme Court Justice Brandies, a proponent of federalism, discussed the interplay between the states (i.e. provinces) and the federal government, "It is one of the happy accidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country."⁶

Federalism also allows people to be more involved in their government by allowing more direct contact with local officials and more control over their surroundings. If citizens are allowed to elect and work with local officials on a more direct basis, rather than waiting for the national government to respond to their demands, it encourages them to become more involved in the political process. Rather than having to travel to the country's capital to meet with members of the national government, local government officials are more directly accessible and accountable to the people of their region. They are often members of the community with relationships with other members of the community who will more easily be able to hold them accountable and affect the types of policies they will implement.

Proponents of federalism make an additional argument supporting federalism that is not necessarily widely believed but is worth mentioning. They argue that federalism actually helps to calm tensions and reduce conflict, particularly in countries with a history of ethnic conflict. Federalism helps calm these tensions because "[i]ntra-state conflicts are generally rooted in a group's desire for increased autonomy from its central state."⁷ Given the group's desire for increased independence, federalism is arguably the ideal solution because it allows the affected group to have increased autonomy without breaking away entirely from the country. Allowing various groups to have more of a stake in the political process encourages them to use political means to achieve their goals, rather than resorting to violent protest or revolution.

⁶ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

⁷ Anderson, *supra* note 1, at 161-162.

While federalism has many benefits, its principle consequence, and one reflected in Iraq's history, is that it can make it more difficult to achieve unity within the country. This is seen as the paradox of federalism: it often encourages ethnic groups to see themselves more independently, affiliating more closely with the region than the country. In this way, it might further promote desires for independence or greater control.⁸ In order for federalism to function, both sides must fundamentally accept that the unity of the country is vital to both the federal and regional government's success. Centrally located governments do not enjoy the benefits of federalism, and so it is a risk for any central government to cede some of its power even if it might produce a more effective and responsive government. The success of federalism depends on how it is applied in practice.

III. FEDERALISM IN IRAQ

Iraq represents one of the few countries in the Middle East to formally incorporate federalist principles into its Constitution. Because of federalism, the Kurdistan Regional Government (KRG), as the sole regional governorate recognized in the Constitution, has significantly greater power and independence compared to the years during the Saddam regime.

A. Creating the Constitution and Incorporating Federalism

After the fall of the Hussein regime, the remaining political leadership of Iraq negotiated and ultimately agreed upon the current Constitution of Iraq (adopted by referendum in 2005). Key to the Constitutional negotiations was the issue of whether Iraq would establish a federalist system, what regions would exist within Iraq, and what kinds of powers the regions would have.⁹ Adopting a federalist system was already a departure from the previous system under Hussein-led government, which was a heavily centralized government.¹⁰

Entering the negotiations, there were three primary parties negotiating the terms of the Constitution: the Sunnis, the Shi'a, and the Kurds. Sunnis were a minority bloc comprising only around 20% of the country but had previously been responsible for most of the functioning of government under Hussein. Kurds and Shi'a, long kept out of power, were eager to take on a variety of issues but also were not united on many of the most contentious issues.

Among the issues discussed, federalism was the most contentious issue in the negotiating process,¹¹ primarily because it was both at odds with Iraq's traditionally centralized

⁸ Donald Horowitz, *Ethnic Groups in Conflict* 601 (1985).

⁹ Ashley S. Deeks & Matthew D. Burton, *Iraq's Constitution: A Drafting History*, 40 *Cornell Int'l L.J.* 1, 76 (2007).

¹⁰*Id.* at 75

¹¹ Noah Feldman & Roman Martinez, *Constitutional Politics and Text in the New Iraq*, 75 *Fordham L. Rev.* 883, 885 (2006).

government,¹² and there were fears as to whether it would weaken the country too much. The other central issues included the role of religion, security, structures of authority, and personal rights and freedoms.¹³

Compared to other regions, the KRG already enjoyed a relatively large degree of autonomy in 2003, gained after the Gulf War in 1991. This independence and relative unity among the political factions within the Kurdish region gave the Kurdish political representatives a strong bargaining position as they knew they represented a united, significant portion of the Iraqi population that could credibly threaten to leave the country if the region was not given significantly more power than it had under Hussein.

In negotiations, the KRG insisted on at least maintaining, if not growing, the level of autonomy it had obtained after the 1990s. The Kurds' initial negotiating position was ambitious. The Kurdish bloc released a negotiating document describing Iraq as a "voluntary federation," calling for broad powers for the regional governorates, creating the possibility of secession, and establishing specific boundaries for Kurdistan around many disputed regions.¹⁴ The KRG's priorities were also to create "a remediation of the forced removal of Kurds from the areas of Northern Iraq, most notably Kirkuk; and a legal process by which those areas could, if they so choose, officially join the Kurdistan Region."¹⁵

Others, including the Sunnis, remained concerned about the effects that such strong regional governorates might have on the unity of Iraq (particularly as to what the Shias might do with the ability to create new regional governorates). Sunnis focused on limiting the ability to create new regions including requiring procedures to form new regions to be approved only through a two-thirds majority vote, people within the regions to approve a region being formed by a two-thirds majority, and a final approval by two-thirds of the Council of Representatives. Finally, they sought a three-governorate ceiling on the number of governorates that could form a region.¹⁶ The Sunnis also sought a Constitutional requirement of a simple majority vote in the Council of Representatives before a new region would be created. They had previously called for an absolute majority vote, but the demand was weakened in the final version.

Despite the Sunni's objections, "[v]irtually none of the compromise ideas that had arisen during constitutional negotiations to appease Sunni fears of regional formation appeared in the final law."¹⁷ The final provisions related to regional formation were the result of an alliance between

¹² Nathan J. Brown, *Post-Election Iraq: Facing the Constitutional Challenge*, CARNEGIE ENDOWMENT INT'L PEACE (Feb. 2005), available at <http://carnegieendowment.org/files/PO10.brown.final.pdf>.

¹³ *Id.*

¹⁴ See Deeks, *supra* note 9, at 79.

¹⁵ Orrick, Herrington & Sutcliffe LLP, *Kirkuk 19* (June 2007), available at <http://publicinternationallawandpolicygroup.org/wp-content/uploads/2011/02/PILPG-KirkukReport6-6-07.pdf>.

¹⁶ Deeks, *supra* note 9, at 81.

¹⁷ Deeks, *supra* note 9, at 83.

the Shi'a and Kurds, whereby the Kurds agreed to allow a larger role for Islam in the Constitution in exchange for a greater degree of autonomy granted to the regions. Professor Feldman explains that the Shi'a recognized that this was the core issue for the Kurds and that any effort to limit the region's autonomy would have unraveled the political process.¹⁸ Ultimately, the Kurds succeeded in maintaining a significant degree of independence from the central government (the details of which will be discussed later in this paper).

In summary, the Kurdish representatives helped ensure that the Constitution guaranteed a relatively large degree of autonomy for the Kurdish region. Despite this success, these federalism provisions only lay out the framework, but do not resolve more specific, and significant, questions regarding control over oil, boundaries, and internal security in Kurdistan and other potential regions not yet created. While these issues will likely take many years to resolve, the Constitution is the core document that leaders will interpret in helping to decide these issues. The federalism principles underlying the document are essential to crafting a framework to resolving these issues.

C. Federalism in Iraq: An Overview

The 2005 Constitution of Iraq set up a federalist system allowing for coexisting national and regional governorates, each having greater degrees of influence in particular areas. Since other regional governorates have not yet been created, the KRG remains the sole example of the interplay between regional governorates and the national government.

In order to understand the contours of the federalist system and its goals to create separate spheres of power while still maintaining a strong national government, it helps to begin with the text of the Constitution.

Constitution of Iraq

Article 116

The federal system in the Republic of Iraq is made up of a decentralized capital, regions, and governorates, as well as local administrations.

Article 115

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.

¹⁸ Feldman, *supra* note 11, at 915.

Article 141

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.

Section IV of the Constitution details the powers of the Federal Government and includes a number of important provisions related to the KRG. The Constitution defines areas where the federal government is supreme in power to the regional governorate. These include, but are not limited to:

- international relations (formulating foreign policy, negotiating treaties, and ratifying debt policies)
- national security policy (armed forces and security of Iraq borders)
- formulating fiscal and customs policy (currency, commercial policy, budgetary policy).¹⁹

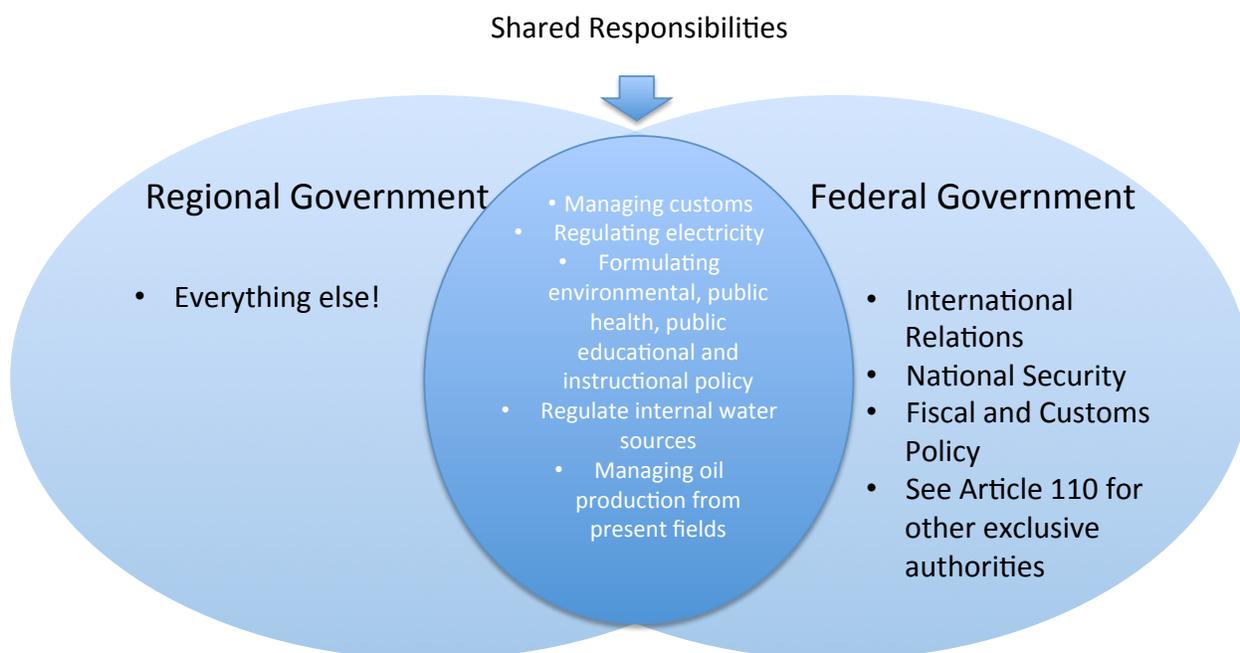
Article 114 then specifically defines areas of responsibility shared by the federal authorities and regional authorities including:

- managing customs and controlling the flow of goods in and out of the country
- regulating electricity
- formulating environmental policy, development and planning, public health policy, and educational policy.

Aside from these two sections that specifically delineate power, Article 115 grants all remaining unlisted powers to the regions and governorates. This means that any provision not listed in Article 110 or 114 is under the power of the regional governorate and that the regional governorate's opinion controls in those areas so long as they do not conflict with the Constitution.²⁰ Though not in Section IV, Article 141 goes even farther than Articles 115 and 121 by specifically granting the Kurdish government and courts the ability to issue decisions that are protected by the Constitution, unless they specifically violate the Constitution. These provisions are largely the reason the KRG enjoys a large amount of control of the Kurdish region.

¹⁹Article 110, Doustour Joumhouriat al-Iraq [The Iraq Constitution of the Republic of Iraq] of 2005.

²⁰Article 121, Doustour Joumhouriat al-Iraq [The Iraq Constitution of the Republic of Iraq] of 2005.



These Articles provide a basic overview of federalism principles in the Constitution. Next, we will look at several Articles in depth.

D. Federalism in Iraq: Analysis of Key Areas

To fully understand the incorporation of federalism into the Constitution, you must also look at Section IV's delineation of powers and, specifically, Article 115's supremacy clause. This Article provides that if a regional law is in conflict with a national law in an area of shared responsibility, the regional law is *supreme* to the other law. The rest of this Paper looks at how the Constitution seeks to delineate power between the national government and the regional governorates in certain areas and then looks at how that delineation has played out in practice.

It should be noted from the outset that few of these issues have been resolved and all continue to create significant conflict between the regional and national government. But remember that one of the virtues of federalism is to create checks and balances between the various levels of government. Other countries often have to spend centuries to work to resolve many of these key issues. In this way, so long as the country remains united, federalism may provide a pathway for various factions to resolve and work through these differences.

Unfortunately, the Constitution does not provide a clear answer on how to resolve these issues. One potential way is through the Federal Supreme Court, but, as of 2013, neither the national nor

the regional government has sought to utilize it to resolve any of these constitutional disagreements. Without a ruling from the Federal Supreme Court, these issues will have to be resolved through political compromise and agreement,²¹ but the political discussion surrounding these issues will still revolve around various interpretations of these Constitutional issues.

E. Boundaries and Creating New Regions

In order to determine whether the national government or the regional government gets to decide an issue, we must first understand where the incident took place and what region was affected by the incident. Currently, the Kurdish region is the only constitutionally-created region, so for most of the country the national government's law is usually controlling. But the Constitution explicitly contemplates the creation of new federal regions and additional power-sharing arrangements between the central government and more regional or local governing bodies.

The Constitution recognizes Kurdistan as an independent region, but also provides a pathway for creating additional regions. These are encompassed in Section V and briefly summarized below.

Constitution of Iraq

Article 117

First: This Constitution, upon coming into force, shall recognize the region of Kurdistan, along with its existing authorities, as a federal region.

Second: This Constitution shall affirm new regions established in accordance with its provisions.

Article 118

The Council of Representatives shall enact, in a period not to exceed six months from the date of its first session, a law that defines the executive procedures to form regions, by a simple majority of the members present.

Article 119

One or more governorates shall have the right to organize into a region based on a request to be voted on in a referendum submitted in one of the following two methods:

First: A request by one-third of the council members of each governorate intending to form a region.

²¹ For an example of a failed political compromise, in November 2008, the main governing parties established leadership committees to address the most contentious issues including disputed territories, power sharing and constitutional reform, security and the Peshmerga, foreign policy, and oil/gas. The committee has not produced a report, however, because of animosity between the leadership of the parties. See Int'l Crisis Group, *Iraq and the Kurds: Trouble Along the Trigger Line*, 3 (Middle East Report No 88, July 8, 2009), available at <http://www.crisisgroup.org/en/regions/middle-east-north-africa/iraq-iran-gulf/iraq/088-iraq-and-the-kurds-trouble-along-the-trigger-line.aspx>.

Second: A request by one-tenth of the voters in each of the governorates intending to form a region.

These three articles both formally recognize a region, Kurdistan, and create a framework for how new regions can be formed. In particular, Article 118 mandates that the Iraqi National Assembly create “executive procedures”, or the process that the federal government must follow, for creating a new region. Article 118 is further clarified by Article 119, which outlines ways that governorates can submit petitions to form new regions. The Iraqi Parliament further clarified Article 119 in 2006, when it approved a law creating the mechanics for forming regions (though with notable absentees from the vote).²² This bill, entitled “Law on the Operational Procedures for the Creation of Regions,” allows new regions to be created through the following channels:

“(1) Request presented by one third of the members in each of the Governorate Councils established under the Constitution that seek to create the Region.

(2) Request presented by one tenth of the voters in each of the Governorates that seek to create the Region.

(3) Request presented by one third of the members of Legislative Councils in the Regions wanting to merge.

(4) In the case of a request by a Governorate to join a Region the request is presented by one third of the members of the Governorate Council together with the consent of one third of the members of the Legislative Council of the region.”²³

Therefore, once a region is formed, the new region has significantly greater autonomy to run the affairs of that region independent of the national government under the Constitution. Because the law allows governorates to join other already formed regions, this law creates a path for the KRG to incorporate the disputed territories into the KRG region.²⁴

Boundaries and disputed borders remain a contentious issue within Iraq. The KRG has constitutionally recognized authority over the provinces of Erbil, Duhok, and Sulaimani. Control of a number of disputed areas—Kirkuk, in particular—is hotly disputed and the subject of much of the disagreement between the national and regional government. As is well known, Kirkuk is particularly important not only because of its vast oil reserves, but because of its ethnically mixed population and cultural significance.

In 2003, during the Constitutional negotiations, the KRG insisted that this forced migration be remedied before passing a referendum to determine Kirkuk’s regional status. The KRG’s hope was that enough Kurds would return to the region by the time of the referendum to result in Kirkuk joining the KRG. Article 58 of the Transitional Administrative Law (TAL), and

²² *Iraq Passes Regional Autonomy Law*, BBC Baghdad (Oct. 11, 2006 7:56 PM), http://news.bbc.co.uk/2/hi/middle_east/6041916.stm.

²³ Law on the Operational Procedures for the Creation of Regions of 2006 (Iraq).

²⁴ *Iraqi Parliament Approves Law to Form Federal Regions*, The Daily Star, Oct. 12, 2006, available at <http://www.dailystar.com.lb/News/Middle-East/Oct/12/Iraqi-Parliament-approves-law-to-form-federal-regions.ashx#axzz2GSu4ZMM7>.

subsequently Article 140 of the Iraqi Constitution, sought to create a mechanism to allow this and fully resolve the Kirkuk issue. This mechanism, if successful, might also have been a tool for resolving future disputes over various regions or borders within the country. The mechanism attempted to reinforce the Article 58 of the TAL.

Article 140 of the Iraqi Constitutions calls for a three-step process to remedy the policies from the former regime. First, those previously evicted from Kirkuk are entitled to return to their property or receive just compensation. Next, the government is required to conduct a transparent census. Then, the government can hold a referendum to determine Kirkuk's regional status.

Despite these specifics, the referendum is unlikely to occur in the near future. It was originally supposed to occur in 2007, but was delayed by the KRG because the normalization process was incomplete. Many Kurds suggested that the central government had not done enough to allow Kurds to return to the region and accused the central government of intentional delays.²⁵ Because the country missed the deadline, some argued that the missed referendum meant Article 140 was void. There were rumors the matter was sent for review to the Constitutional Court,²⁶ while a new referendum date was set for May 2008. Soon after, the Iraqi Parliament passed Article 23 of the September 2008 provincial elections law, which sought to establish a committee to resolve these matters. But the committee failed to achieve much progress in resolving the issue.²⁷ President Talabani recently proposed a bill on the subject of administrative changes to boundaries of governorates altered by the Ba'ath regime (the requirements of which are similar to Article 140) that would adjust boundaries back to 1968 levels.²⁸ There has been some support for the bill, including from Prime Minister Maliki,²⁹ but the ultimate status of the region and the referendum remains in limbo.

1. Oil

Oil sharing is related to the question of Kirkuk and is one of the primary issue areas affected by Federalism. The relevant sections of the Constitution state:

Constitution of Iraq

Article 111

²⁵ Sumedha Senanayake, *Tensions Increase in Iraq over Kirkuk Referendum Delay*, 11 RADIO FREE EUROPE/RADIO LIBERTY, (Dec. 3, 2007).

²⁶ *Iraqi Constitution Court Gets Kirkuk Issue*, United Press Int'l, Jan. 11, 2008, available at http://www.upi.com/Business_News/Energy-Resources/2008/01/11/Iraqi-Constitution-Court-gets-Kirkuk-issue/UPI-38681200083988/.

²⁷ *See Iraqi Parliament's Mission To Kirkuk Ends In Failure*, RADIO FREE EUROPE RADIO LIBERTY (Sep. 19, 2013), http://www.rferl.org/content/Iraqi_Parliament's_Mission_To_Kirkuk_Ends_In_Failure/1741044.html.

²⁸ Reidar Visser, *Disputed Territory in Iraq: Talabani Tries to Create Another Article 140*, Iraq and Gulf Analysis (Feb. 12, 2012, 06:28 PM), <http://gulfanalysis.wordpress.com/2012/02/28/disputed-territory-in-iraq-talabani-tries-to-create-another-article-140/>.

²⁹ *See Reidar Visser, Talabani, Maliki and the Disputed Territories*, Iraq and Gulf Analysis (Jan. 12, 2012, 07:58 PM), <http://gulfanalysis.wordpress.com/2012/01/12/talabani-maliki-and-the-disputed-territories/>.

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

Article 112

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 ... 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 ...

Article 115

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.

Article 111 and 112 appear to give broad powers to the national government to regulate oil and gas reserves. The national government only has plenary control over “present” oil fields, which means any areas that are deemed unexplored, and therefore exploration of non-presently determined oil fields seemingly comes under the control of the regional government. More specifically,

“The definition of the term —presently 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.”³⁰

The debate over what constitutes “present,” however, is not resolved. Disagreements in 2012 and 2013 have focused on this issue including disputes over contracts signed by the KRG to export oil to Turkey and Baghdad’s negotiations with BP to develop oil fields in Kirkuk.³¹ The KRG has also begun exploring and creating oil exploration deals without the consent of the national government (including the 2013 oil exploration deal signed with Exxon-Mobil). The KRG, using Article 115, argues that the Kurds can explore and manage the resources. Baghdad, by contrast, “interprets this article that Iraqi people are the sole owner of the natural resources and the federal

³⁰ Michael Kelly, *The Kurdish Regional Constitution Within the Framework of the Iraqi Federal Constitution: A Struggle for Oil, Sovereignty and Ethnic Identity*, 114:3 Penn State L. Rev., 707, 755 (2010).

³¹ Staff Writers, *Baghdad Oil Disputes with Kurds Deepen*, United Press Int’l, Jan. 24, 2013, available at http://www.energy-daily.com/reports/Baghdad_oil_disputes_with_Kurds_deepen_999.html.

government, the sole representative of the will of the Iraqis throughout the country, should manage them.”³²

Inherent in this dispute is Baghdad’s fear of the Kurds gaining total control over the reserves and blocking Baghdad’s oversight of the process (or potentially even its share of the revenues). Prime Minister Maliki asked U.S. President Barack Obama to intervene in the dispute on the side of the national government to ensure the stability of the country.³³ President Obama responded by expressing support for the Constitution of Iraq but did not declare his support for either point of view.

It is not clear how this dispute will be resolved. Various government leaders in Iraq have attempted various solutions. For example, under a 2007 draft agreement between Baghdad and Erbil, the parties agreed to grant the management of the oil to a committee consisting of the Prime Minister, the Deputy Prime Minister, various Ministers, and the KRG Natural Resources Minister.³⁴ The agreement, however, states that the committee must act within one month to disapprove of signed contracts or else the agreement is automatically approved, a significant challenge given the composition of the committee. Other options include the national government bringing the case before the Constitutional Court, but it has not taken that step or shown signs that either side would obey the ruling. This issue will be explored further in Working Paper: Constitutional Law.

Discussion Questions

1) If you were designing a new power sharing agreement between the national government and a regional government, like the KRG, how do you think oil should be handled given the federalist principles we have discussed so far?

Answer: Fortunately, Federalism allows for multiple scenarios that could work and allow for the efficient development of oil while sharing the profits from the production with the rest of the country. On one hand, the regional government oversees the land atop the oil and, at least with regards to the KRG, is likely to develop these fields more quickly. At the same time, the central government is concerned about losing control of such a vast field of resources and wealth that, according to the Constitution, should benefit the rest of the country. An ideal agreement might create ways for the national government to audit or monitor the oil output to make sure the rest

³² Metin Turcan, “*Today Stems from Yesterday*”: A Kirkuk-Centric Analysis of Central Periphery Relationship of Baghdad and Iraqi Kurds, 7 REV. INT’L LAW & POLICY 87, 90 (2011).

³³ *Iraq Asks Obama to Halt Exxon’s Kurdish Deal*, REUTERS (Jan. 19, 2012), <http://www.reuters.com/article/2012/06/19/us-iraq-oil-exxon-idUSBRE85I15520120619>.

³⁴ *Baghdad Threatens to Take KRG to Court over Oil Dispute*, KURDISH GLOBE (July 31, 2012, 9:56 AM), available at <http://www.kurdishglobe.net/display-article.html?id=FEB22BCC23FF40C49A0823E72DB6D145>.

of the country is afforded its fair share. To continue incentivizing the KRG to search for oil, however, the national government could continue to allow the KRG to sign contracts with oil companies and manage oil and gas production directly.

2) What does the statement “owned by the people of Iraq” mean to you? Does it imply a specific enough intent to resolve this oil dispute?

2. Domestic Security / Military

One area that is traditionally reserved for the national government in federalist systems is controlling the military and national armed forces and defending the national borders. Domestic security, on the other hand, typically remains under the purview of the local governing bodies, though the local governments may request help from national authorities in times of crisis where they are not equipped to provide sufficient security. Domestic security involves regulating the borders of the area, providing protection to government buildings, and stopping significant crime in the region. Iraq is in a unique position given that, in general, federal governments generally maintain significantly greater military power than the regional government. But as of 2013, the KRG’s internal security forces have arguably greater capacity to secure the country at this stage while the Iraqi National Army is in early stages of development.

In Iraq, the Constitution provides a framework for dividing military and domestic security duties between the national and regional governments:

Constitution of Iraq

Article 9

The formation of military militias outside the framework of the armed forces is prohibited.

Article 110

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

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.

Article 121

...

Fifth: 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.

In summary, the national government has authority over and responsibility for protecting the country from most external forces, such as foreign countries and terrorist groups. The regional government is responsible for providing domestic security protection from most internal sources of conflict, such as criminals. These two areas will obviously overlap, however, as external actors may enter the country drawing in both the national and domestic security forces. In these situations, the Constitution does not specify, and thus requires, both national and regional authorities to define respective responsibilities and cooperation agreements so the two groups of security forces can work together to combat threats.

In practice, the division of powers between the national and regional government in Kurdistan does not always conform closely to the framework set forth in Articles 9 and 110. For example, while Article 110 clearly grants the sole power to protect the national borders to the national government, the Kurdish Peshmerga largely control the national border surrounding Kurdistan through customs enforcement, airport security, and border security.³⁵ Even with Article 121, however, the Kurdish police (or military) are in fact providing the constitutionally required provisions of Article 110 while under the supervision of a regional government. Is this a violation of the Constitution? If Iraq's central government is unable to provide security along the borders, do they have a right to control the Kurdish forces that have protected the border so far even if they have not trained or provided resources for the Peshmerga?

Since 2010, when Prime Minister Maliki recognized a number of Peshmerga brigades as part of the Iraq Security Forces (ISF), there have been efforts to integrate part of the Peshmerga into the broader military structure. This would allow them to receive national training and salary. As of 2013, integration had not been achieved, leading to escalating tension between the Peshmerga and central command.³⁶ The KRG have used Article 121 as justification for the Peshmerga not reporting to the Iraqi central command.³⁷ The Constitution seems to contemplate that the KRG would control internal security/police forces while the Iraqi Security Forces controlling the external borders. But the Constitution does not seem to resolve the more difficult question of whether the KRG needs to turn over part of its domestic security forces to the national government or what the KRG should do if the ISF is unable to adequately protect the border.

Ultimately, despite fairly specific constitutional guidance, this dispute is unlikely to be resolved until the Iraqi army gains strength and the ability to adequately protect the border (or force the Peshmerga to integrate). For now, it provides an interesting constitutional case study of whether the Peshmerga is a militia, in violation of Article 9, or whether it is merely a strong internal

³⁵ Kelly, *supra* note 30, at 732.

³⁶ See *Kurdish Troops Fire on Iraqi Army Helicopter in Dispute*, Reuters (Dec. 18, 2012), <http://www.reuters.com/article/2012/12/18/us-iraq-kurdistan-idUSBRE8BH17720121218>.

³⁷ See *Maliki Calls for an End to Military*, Shafaaq (July 29, 2012 9:51 AM), <http://www.shafaaq.com/sh2/news/kurdistan-news/43767> (in Arabic)

security force, providing security on the borders only because the ISF is unable to do so. Militia is defined as “a part of the organized armed forces of a country liable to call only in emergency” or “a body of citizens organized for military service.”³⁸ Under this definition, one could argue the Peshmerga do not qualify as a militia because they are not a body of citizens organized for military service, merely domestic security. This argument is challenged by the fact that the Peshmerga previously engaged in significant military action against Saddam’s forces, implying that they were, at least at one time, a military force. Now that their role is more related to domestic security, however, it is questionable whether Iraq could argue that all the Peshmerga belong under its authority. But it is likely in both the national government and the KRG’s interest to secure the borders, suggesting that there is a Constitutionally permitted compromise available.

Additionally, if part of the definition of militia requires non-constant service (i.e. only being called in an emergency), the KRG could argue that the constant presence of Peshmerga means they are not a militia. On the other hand, in a country like Iraq where there are constant calls to declare a state of emergency because of various security issues,³⁹ the Peshmerga could be considered a standing military. This type of analysis is unlikely to fully persuade either side in the debate, but political leaders routinely ground their arguments in these frameworks and understanding this analysis will help you understand why these issues are so difficult to resolve.

Discussion Questions

1) How would you define the difference between internal security forces and military forces? Does it seem to you that the Peshmerga are a militia, in violation of Article 9 (or at least required to integrate with the military in order to not be in violation of Article 9), or an internal security force? As defined above, the Peshmerga seem to be a militia primarily serving as domestic security forces but serving as national security forces out of a particular need. But can you imagine what might happen if a neighboring state invaded the KRG? Would the military response likely come from the ISF or from the KRG?

2) This dispute highlights a fundamental issue with enforcing the Constitution in a newly established government. When the government is unable to act and requires supplemental assistance, at what point should the Constitution be enforced? Does this reality represent a challenge to the integrity of the Constitution, or is the Constitution supposed to be more of a framework to guide discussions?

³⁸ Merriam-Webster’s Collegiate Dictionary (11th ed. 2008).

³⁹ *Uprising calls on the Prime Minister to suspend the constitution and declare a state of emergency* (July 23, 2013), <http://www.ikhnews.com/index.php?page=article&id=93974>

Answer: Generally, a Constitution is designed to provide a framework for the governance of a country, but is also flexible enough to accommodate the varying needs of a country. In this case, given the lack of specificity on what exactly constitutes a militia, the Peshmerga could arguably fall into either category and ultimately it will likely be resolved on other grounds outside of the Constitution.

3. Foreign Policy

Under Article 110, the federal government has exclusive jurisdiction over “[f]ormulating 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.” While the federal government has broad authority over foreign affairs, however, Article 121 allows regional governments to maintain representative offices and consulates in Iraqi embassies in other countries. This means that the KRG could send Kurdish government representatives to foreign countries to bolster trade with the region, create relationships and partnerships with other country’s regions or companies, and take various steps to improve the economic and political relationship of the KRG with foreign entities. But the KRG’s representatives will be limited in what actions they can take, as they cannot infringe on the authority granted to the federal government under Article 110.

In September 2006, the KRG established a Department of Foreign Affairs (DFR). KRG officials cited Article 121 as the Constitutional basis allowing them to do so.⁴⁰ The KRG established the DFR to expand the KRG’s international reach while “operating in tandem with the Iraqi Ministry of Foreign Affairs.”⁴¹ The DFR was established by Official Order No. 143,⁴² which designates seven directorates in other countries that help to organize visits by foreign delegations and incentivize businesses to visit and invest in the KRG.⁴³ From 2006 to 2013, the DFR undertook a variety of activities including promoting the Erbil International Trade Fair, advertising economic opportunities in the KRG to various Turkish companies, encouraging European countries to accept Iraqi Kurdish asylum seekers, and coordinating response with neighboring governments to the refugee situation created by the Syrian conflict.

Many of the DFR’s responsibilities may potentially conflict with the national government’s responsibilities. For example, economic ties are central aspect of their diplomatic relations. The DFR, in seeking improved economic relations with foreign countries, can therefore indirectly

⁴⁰ See Article 22, Kurdistan Regional Government Council of Ministers Law No. 1 (June 15, 2006).

⁴¹ Jason E. Strakes, *Southern Kurdistan: From Conflict Zone to Subregional Integration in Greater Eurasia*, in *Conflict and Peace in Eurasia* 134, 137 (Debidatta Mahapatra ed., 2012).

⁴² Official Order No. 143, Kurdistan Regional Government (Jan. 25, 2009), available at http://www.krg.org/uploads/documents/Official_order_25_Jan_09_2009_06_04_h19m0s19.pdf.

⁴³ Strakes, *supra* note 41.

affect the diplomatic relations with other countries. The DFR has, as a result, been accused of attempting to “consolidate the federal autonomy of the KRG” along with increasing its international reputation.⁴⁴

Discussion Questions

1) Imagine a scenario where the government of Chile wants to sign a trade agreement to export goods to the KRG. Would the DFR, in conjunction with the KRG, have the authority to sign that agreement? The Constitution clearly contemplates the KRG and the DFR engaging in economic development and this treaty clearly seems to fall within that authority. But what if a different country that was the declared enemy of the national government and that had been sanctioned by Baghdad wanted to sign a trade agreement with the KRG? That scenario would create a more difficult issue because the DFR’s economic development efforts now directly contradict the stated foreign policy of the national government. In that situation, the national government would likely have the authority to override the KRG’s preference.

4. Jurisdiction of Courts and Judicial Power

The Iraqi Constitution creates and grants federal courts the authority to hear and try certain types of cases that affect national laws or constitutional powers (the extent of this power is known as the court’s “jurisdiction”), while also allowing for the creation of regional courts. While the federal courts have power over Constitutional interpretation, Iraq’s regional courts have near exclusive authority over all legal matters in the region.

The Constitution endows the federal judicial power in a hierarchical structure of federal courts. The exercise of federal judicial power, and therefore the enforcement of federal laws, lies with these courts, laid out in Article 89.

Constitution of Iraq

Article 89

The federal judicial power is comprised of the Higher Juridical Council, the Federal Supreme Court, the Federal Court of Cassation, the Public Prosecution Department, the Judiciary Oversight Commission, and other federal courts that are regulated in accordance with the law.

Article 89 creates the overarching framework for the federal court system. As discussed in Working Paper: Constitutional Law, Article 93 lays out the areas of jurisdiction for the Federal Supreme Court, including jurisdiction to oversee the constitutionality of laws and regulations in effect, interpret the provisions of the Constitution, and settle a variety of issues that might arise between the federal government and regional governments or between regional governments.

⁴⁴ Strakes, *supra* note 41.

Despite Article 93's seemingly broad grant of jurisdiction to the federal courts over Iraqi citizens in a variety of subject matter areas, remember that Article 115 requires the Kurdish Parliament to adopt federal laws before they have any power in the KRG. In addition, Article 141 grants significant authority to Kurdish court decisions.

Constitution of Iraq

Article 141:

[D]ecisions 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.

Article 141 states that the Kurdish court decisions are “considered valid” unless they conflict with the Constitution, which can only be determined by the Federal Supreme Court. Therefore, unless the Federal Supreme Court specifically rules against the Kurdish courts, they have broad authority to regulate the region. For example, if a KRG court ruled that an oil discovery was a newly discovered oil field, and not an existing oil field, that decision would be considered valid unless it was brought to the Federal Supreme Court and the Court ruled the opposite.

In reality, the KRG had in place a regional court system before the 2005 Constitution went into effect. Per Decree No. 11 of August 1992 and the Judicial Authority Law No. 44 of December 1992, the KRG was permitted to establish a largely autonomous region.⁴⁵ The KRG has operated a court system similar in structure to the national judiciary since the early 90s. Similar to the national judiciary's Court of Cassation in Baghdad, the highest court in Kurdistan is named the Court of Cassation.

The KRG judicial system operates independently of the federal system in regard to federal laws. Under Article 13, however, Article 93 still controls in those areas that invoke the Constitution, including disputes between regional governments if other regions are established or on issues involving the interpretation of the Constitution. For example, the Baghdad courts cannot review

⁴⁵ Decree No. 11 of August 1992, <http://gjpi.org/wp-content/uploads/kurdish-decree-11-of-1992.pdf> (needs translation); see also University of Utah College of Law, *The Judiciary and the Law in the Kurdistan Region of Iraq*, Global Justice Project: Iraq (Aug. 14, 2009), <http://gjpi.org/2009/08/14/the-judiciary-and-the-law-in-the-kurdistan-region-of-iraq/>.

the Kurdish Court of Cassation's judgments, with the exception of judgments that conflict with the Iraq Constitution or other areas as noted under Article 93.⁴⁶

5. Water

The regulation of water is another area where both the federal government and regional authorities share powers and duties. Article 110 grants exclusive authority to the federal government for regulating the water outside of Iraq and guaranteeing its "just distribution" inside Iraq. Concurrently, the Constitution grants authority to regional authorities to play a role in formulating and regulating "the internal water resources policy" and to ensure "just distribution."

Constitution of Iraq

Article 110

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

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.

Article 114:

The following competencies shall be shared between the federal authorities and regional authorities:

Seventh: To formulate and regulate the internal water resources policy in a way that guarantees their just distribution, and this shall be regulated by a law.

The wording of Articles 110 and 114 raise important questions of interpretation that affect how to appropriately divide power between the national and regional governments. For example, the Constitution is silent as to what constitutes "just distribution." The Constitution is also silent on who "owns" the water. If Article 110 is read broadly, the federal government has the authority to guarantee water flow to Iraq, meaning that it could potentially divert water flowing into the KRG to a different area if it wanted to. On the other hand, the KRG could argue that it has the shared authority with the national government to ensure the just distribution of the internal water resources and that any restrictions on the natural water flow would not be a "just distribution" under the Constitution.

One possible resource for resolving these questions of interpretation is the TAL which vested authority for the control of all natural resources in the people. While no longer authoritative, the TAL provides guidance in answering this question. In addition, some scholars look to Islamic

⁴⁶ American Bar Association, Judicial Reform Index for Iraq: Kurdistan Supplement 5 (2006), available at <http://apps.americanbar.org/rol/publications/jri-iraq-kurdistan-2006.pdf>.

law, which indicates that citizens have a “right of thirst” and a “right of irrigation.”⁴⁷ This would mean that water should be held in some sort of a public trust for all citizens to decide how to use, though given the current water crisis, it seems unlikely that all citizens will be able to maintain equal access to water⁴⁸

Given Article 110’s reference to international law, international law or human rights law could also help define what constitutes “just distribution.” Under international law, the U.N. Watercourses Convention, ratified by Iraq,⁴⁹ has three primary principles, including that international waterways should be used in a way that is “equitable and reasonable,” that countries should work to prevent “significant harm” to other countries, and that countries should work with other states before modifying international waterways.⁵⁰ Further, the UN General Assembly recently passed a law, which Iraq voted for, in favor of “the human right to water and sanitation.”⁵¹

Discussion Questions

1) The Constitution endows a basic right for all citizens to access water, but difficulties arise in application. For example, if the KRG decided to build a dam that would create greater access to water for most of its farms, but which results in less water available to other areas of the country or region, would this actually violate the Constitution? On one hand, the national government could argue the dam harms its ability to engage in other types of water distribution techniques such as dams for electric generation or redirecting rivers to allow farms to have water even during droughts. On the other, almost any significant construction project might affect access to ground water, or might even use up a lot of water, affecting the distribution inside Iraq. It’s unlikely the Constitution intended for Article 110 or 114 to limit all significant construction projects.

This issue is made more complicated when you recall Article 115, which states that in areas of shared responsibility, the Constitution defers to the regional governments rule or interpretation. Does that mean the Iraqi central government is unable to act to require a more “just distribution”

⁴⁷See Sharmila L. Murthy, *Iraq’s Constitutional Mandate to Justly Distribute Water: The Implications of Federalism, Islam, International Law, and Human Rights*. 42 Geo. Wash. Intl. L. Rev. 749, 774 (2010).

⁴⁸*Id.*

⁴⁹Note that not all of Iraq’s neighbors have adopted the Convention, however, including Turkey. See SALMAN M.A. SALMAN & SIOBHAN MCINERNEY-LANKFORD, *THE HUMAN RIGHT TO WATER: LEGAL AND POLICY DIMENSIONS* 12 n.35 (2004).

⁵⁰Murthy, *supra* note 47, at 774.

⁵¹Murthy, *supra* note 47, at 777; see also Press Release, U.N. General Assembly, General Assembly Adopts Resolution Recognizing Access to Clean Water, Sanitation as Human Right, by Recorded Vote of 122 in Favour, None against, 41 Abstentions, U.N. Press Release GA/10967 (July 28, 2010), <http://www.un.org/News/Press/docs/2010/ga10967.doc.htm>.

if the KRG blocks a waterway that affects another part of the country? The KRG's definition of "just distribution" might vary considerably from the national government's definition.

These are difficult questions that the Constitution does not answer, leaving it up to the government, the courts, and the people to interpret what constitutes "just distribution." Given the vagueness of the provision, the question is unlikely to be resolved until a more specific water law is passed. Still, it presents an interesting case study for how to work within a constitutional framework when the constitutional requirements might seem unrealistic or even contradictory to the long-run goals of economic or agricultural development.

6. Kurdish Constitution

The Kurdish Regional Constitution, not yet officially adopted by referendum but passed by the Kurdish Parliament, represents another interesting interplay between the federal government and the regional government's power and also touches on all almost all of the issues discussed in this Paper.

Article 120 specifically requires each region to adopt a constitution:

Constitution of Iraq

Article 120: 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.

Article 120 requires regional constitutions that specifically define how the region chooses to distribute its regional power so long as they do not conflict with the Constitution. Under this authority, the KRG approved the Kurdish Regional Constitution on June 24, 2009. The KRG chose to not send it to the Kurdish citizenry for a referendum vote, however, in large part because of political pressure exerted by the central government and U.S. government officials, electing instead to resolve some of issues raised through continued dialogue.⁵² This is principally due to the controversy of the proposed constitution, however, as it touches on a number of the most controversial issues between the KRG and the central government.⁵³ The Constitution's most controversial positions include:

- Article 2 – incorporating Kirkuk and other disputed territories into the KRG (invoking Article 140 of the Iraqi Constitution for authority)
- Article 3 – prohibits creation of regions within Kurdistan

⁵² *US-IRAQ: Kurds Caught Up in Biden's Diplomatic Offensive*, Inter Press Service News Agency (July 15, 2009), <http://www.ipsnews.net/2009/07/us-iraq-kurds-caught-up-in-bidens-diplomatic-offensive/>.

⁵³ 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.

- Article 4 – “the constitution and laws of the Kurdistan Region are more sovereign and supreme than those passed by the Iraqi government” including a requirement that Kurdish courts follow Kurdish law if there is a conflict in laws
- Article 9 – authorizes the KRG to enter into agreements with foreign entities on non-Article 110 matters⁵⁴

Recall that Article 121 gives regions “the right to exercise executive, legislative, and judicial powers.” Even with this provision, issues might arise as to how far the regional government should describe, or attempt to resolve, the remaining issues of dispute between the KRG and the national government. Ultimately, the interpretation of the National Constitution, as defined by the Federal Supreme Court, will triumph. But until a party brings the case to the Federal Supreme Court, the KRG is permitted to establish its own Constitution that touches on these sensitive issues.

IV. CONCLUSION

The principles of federalism underlie most of the Iraq Constitution and are at the center of many important, disputed topics in Iraq today. As seen in other countries as well as in the KRG, federalism allows the varying units of government at different levels of power to leverage their comparative advantage in different areas and achieve powerful results. Federalism encourages citizen participation, local innovation, and checks on the accumulation of power while allowing the country to speak with one voice in relations with other countries and better protect its citizenry through the coordinated actions of a central military.

The challenge, as demonstrated throughout this Paper, is where the lines of power are drawn. The Constitution and principles of federalism effect how regions can be formed and whether there will be future KRG-like regions. The Constitution also defines the roles of the central government and KRG in terms of managing oil exploration and revenue sharing, whether the Peshmerga are considered national security forces and must come under the control of the Iraqi national government or can stay under the KRG control, the limit on the KRG’s economic development missions, the jurisdiction and power of Kurdish courts, and even the distribution of water within the country.

Ultimately, each of these issues relates back to the central theme of federalism: when is a regional government allowed to assert its authority and act without input from the national government, and when is the national government justified in similarly opposing the actions of the regional governments? Most of these questions remain to be resolved in Iraq. And

⁵⁴ Draft Constitution of the Kurdistan Region-Iraq, 2009. For a fuller discussion of the creation of the Kurdish Regional Constitution, see Kelly, *supra* note 30.

unfortunately, there is no easy solution. Even in states with hundreds of years of experience debating these issues in their judicial, executive, and legislative branches, solutions to these issues often involve political compromise and extended negotiations before reaching a conclusion. In order to resolve these issues, however, one must understand the principles of federalism underpinning the various articles of the Constitution.