

# **The Constitutional Case for Kurdistan's Independence**

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## **A Record of the Violation of Iraq's Constitution by Successive Iraqi Prime Ministers and Ministers, the Council of Representatives, the Shura Council, the Judiciary and the Army**

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## Executive Summary

Kurdistan's distinct case for its constitutional secession from Iraq is elaborated here. It complements its case under international law: Kurdistan has been de facto an independent state since 1991; it meets all the criteria for statehood in the Montevideo convention; and it has a right to self-determination under the UN Charter.

In 2005 Kurdistan formed a voluntary union with Iraq, in which limited powers were granted to the federal government. The provisions of this voluntary union were ratified by referendum in October 2005. A voluntary union may be rightly voluntarily dissolved when one party has failed to fulfill its obligations. Iraq's Constitution deliberately does not define its territory, render the union permanent, or prohibit secession.

Kurdistan retained its sovereign status in joining the voluntary union, and its commitment to being part of Iraq was conditional on the constitution being honored. As this text demonstrates, Iraq's violations of the Constitution are extensive. No less than 55 of its 144 Articles have been violated, and a further twelve have not been fulfilled or implemented (see Appendix 1). Therefore, just less than half of the articles have either been violated or are unfulfilled. These failures are persistent and deliberate; they cannot be excused by the presence of insurgencies.

The referendum to be held on September 25 2017 is constitutional, and also lawful under Kurdistan's own legislation. The federal government has no exclusive powers over referendums (see Appendix 2). Therefore, in this domain regions have legal supremacy (see Articles 115 and 121(2) of Iraq's Constitution). That Constitution is supposed to respect Kurdistan's laws since 1992. Therefore, claims that the referendum is unconstitutional and unlawful are without merit.

Iraq has failed to be established as a federation. Twelve years after its constitution was ratified there is no second chamber to protect the rights of regions and governorates. There is no Supreme Court, as per Article 92 (2), so there is no body with constitutional standing to adjudicate disputes. Without a federal second chamber and without a valid federal supreme court Iraq is not a federation; it is a Shiite Arab sectarian and majoritarian state outside of Kurdistan, and aspires to rescind Kurdistan's rights and powers. There is therefore a federal government in name only.

The Baghdad government has consistently, unconstitutionally, and unlawfully blocked the efforts of governorates elsewhere in Iraq to become regions: that has been the fate of six of Iraq's eighteen governorates. It has deliberately blocked the implementation of Article 140 that made provision for a referendum in Kirkuk and the disputed territories enabling these places to reunify with Kurdistan by democratic means. That Article was time-tabled for completion by December 2007.

The independent public bodies envisaged by the Constitution have either been suborned or have not been established; and those that have been established have operated in violation of Kurdistan's rights, notably Article 4, in which Kurdish is supposed to be one of the two official languages of Iraq. Similarly, the flag of Iraq has not been re-designed to symbolize all the components of the federation. The currency, for example, is issued

in Arabic and English, but Kurdish is not included.

The Baghdad government has violated the constitutional bargain that accepted that Kurdistan had constitutional ownership and control over its own oil and gas, and has refused to accept the limitations placed on the role of the federal government regarding natural resources, as specified in Articles 110, 111 and 112. It has acted as if Saddam's laws are still valid.

The Baghdad government has never paid Kurdistan its constitutionally mandated portion of oil and gas revenues from fields in production before October 2005, arbitrarily deducting 'federal expenses,' without appropriate law or audit. Since 2014 it has completely stopped making any such payments. While the Baghdad government paid toward salaries and services in ISIS-occupied Mosul, it refused to make any payments toward its alleged federal partner, Kurdistan.

No federal government can be worthy of the name if it fails to protect all its citizens and territories equally. The federal Iraqi army miserably failed to protect Christian, Yazidi and Kurdish citizens from genocidal assaults by ISIS, and the Iraqi government followed this devastating failure of duty by refusing to facilitate the appropriate resourcing of the Peshmerga, who are the constitutionally established regional guards of Kurdistan (see Articles 121 (5) and 141). While refusing to recognize and compensate the Peshmerga the Iraqi authorities have allowed numerous Shiite militias to flourish in flagrant violation of Article 9 of the Constitution. The official Army has also ceased to be representative of Iraq.

The democratic as well as the federal principles of the Constitution have been systematically violated. The rights of women and the rights of religious minorities have been regularly undermined. The rule of law and respect for due process are rendered incredible by gross human rights abuses by militias who operate with impunity. In particular, the rights of nationalities and other minorities have never been upheld in accordance with Articles 14 and 125 of the Constitution. Hundreds of thousands of IDPs currently have refuge in Kurdistan, unsupported by the federal government which has failed to protect their lives or livelihoods.

The promise of power-sharing arrangements within federal institutions has been broken by successive prime ministers' usurpation of authority, at the expense of the Council of Ministers, and of the Council of Representatives. The sole transitional provisions of the Constitution to have been implemented have been those that allowed for the powers of the Presidency Council to disappear. The operation of electoral laws and of coalition agreements have simply confirmed Kurdistan's judgment that neither pluralist democracy nor federalism can be expected from any Baghdad government.

This referendum will enable the people of Kurdistan and those in Kirkuk and the disputed territories to express their democratic right to dissolve the Constitution of 2005, which has been irreparably damaged.

## Preface

Kurdistan has been de facto an independent state since 1991. After the formation of the Kurdistan Regional Government in 1992, Kurdistan has elected its own parliament that has written the laws applicable in Kurdistan. The Kurdistan Regional Government (KRG) has exercised exclusive jurisdiction on the territory of Kurdistan, maintained a separate military (the Peshmerga) and controlled Kurdistan's external borders. One measure of Kurdistan's independence is that the Peshmerga were allies of the US-led coalition that fought against the Iraqi Government led by Saddam Hussein.

In 2005, Kurdistan formed a voluntary union with Iraq in a federal state. Under the voluntary union, Kurdistan conceded certain very limited powers to the federal government (as specified in Article 110 of the constitution)<sup>1</sup> but otherwise retained its separate sovereign status including the right to annul or amend federal laws as applied in Kurdistan, to maintain its separate military, to keep the Iraqi military out of Kurdistan, and to maintain relations with foreign countries.

The explicit premise of the voluntary union was that the new Iraq would be a federal and democratic state that fairly represented its diverse peoples and in which Kurdistan would remain autonomous. The terms of this voluntary union were codified in a new Iraqi constitution that Iraqi voters ratified in the October 2005 referendum. The Constitution was ratified by the voters in the Kurdistan Region and in the so-called disputed territories, in the then four governorates of Duhok, Erbil, Kirkuk and Sulaimania, and both inside and outside of these four governorates.

Iraq has never implemented key provisions of the constitution, or shown credible signs of intending to respect them. Iraq's violations of the constitution—as detailed below—are extensive and ongoing. These violations are neither trivial, nor to be excused by the exigencies of emergencies or slow-paced implementation. They are deliberate. They go to the essence of the voluntary union between Kurdistan and Iraq. Because the Iraqi authorities have never substantively implemented the constitution the promise of the voluntary union has been irreparably broken.

Iraqi Kurdistan has a right to self-determination both under the UN Charter and because Kurdistan has, as a matter of international law, all the attributes of an independent state.

Kurdistan's inherent right of self-determination does not depend on current or future Iraqi conduct. Nevertheless, Iraq's past, since its formation by the British empire, is a catalogue of violations of the people of Kurdistan's rights as a nation, as a people with a distinct language, ethnicity and ethos of its own, culminating in episodes of coercive assimilation, ethnic expulsion and genocide. Kurdistan also has the right of self-

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<sup>1</sup> See the provisions of Article 110 in Appendix 2.

determination by virtue of past colonial imposition; because of the sustained denial of democratic and human rights to its people; and as a remedial right to rectify its experience of racism, coercive assimilation and genocide. These are core inalienable features of Kurdistan's rights under international law, and are independent of the arguments that follow here. What is provided here is the record of Kurdistan's constitutional case for secession and a preliminary record of the violation of Iraq's Constitution of 2005.

The constitutional union between Iraq and Kurdistan has never been consummated by one party: the Baghdad government. It is therefore appropriate for Kurdistan to rescind its commitment to this violated constitution by the same means by which it was ratified: by referendum. That referendum is both constitutional and lawful.

1. **Iraq is a voluntary union that may be voluntarily dissolved by its constituent units**

The Preamble to the Constitution of 2005 defines Iraq as a 'free union of people, of land, of sovereignty.' Inherent in this statement is the right of its people to withdraw from the free union. Kurdistan voluntarily entered into a limited union with Iraq in 2005.

Iraq's Constitution says nothing about the permanence of the union, and its text neither prohibits secession, nor a referendum on independence. And, unlike many constitutions, it does not define the territory of the state.

These features of Iraq's Constitution were not accidental. Kurdistan voluntarily entered into a limited union with Iraq on the solemn and express understanding that Iraq would be a federal, democratic, and law-governed state. In negotiating the constitution in 2005, Kurdistan's leaders made clear that their participation in the voluntary union was contingent on Iraq remaining a federal and democratic state in which Kurdistan's federal and democratic rights would be fully respected. Kurdistan's leaders never hid the long-term ambition of nearly all Kurds for independence from Iraq. They consistently opposed efforts to describe the union as permanent and knew that Kurdistan's voters would never have approved a constitution that made the union permanent. They made a commitment to a constitution that would bind them if and only if that constitution as a whole was fully implemented, both in letter and in spirit.

In short, the Constitution of 2005 was a voluntary union from which Kurdistan may voluntarily and lawfully secede, not least because the federal and democratic rights, protections, and obligations contained in that constitution have not been honored.

## **2. The Referendum is constitutional and lawful**

Articles 115 and 121 (2) of Iraq's Constitution make regional law supreme over federal law except as it relates to a short list of exclusive powers of the federal government that are enumerated in Article 110 of the Constitution.<sup>2</sup> The conduct of elections—including the holding of a referendum—is not an exclusive power of the federal government as enumerated in Article 110. Therefore, the Kurdistan Regional Government is within its rights to call for any election it judges appropriate, including a referendum on independence.

The referendum is also lawful as it is being conducted under Kurdistan's own legislation, passed in 1992, which is constitutional by virtue of Article 141 in conjunction with Articles 115 and 121(2).

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<sup>2</sup> See Appendix 2.

### **3. Iraq has not honored the Constitution that was the basis for the voluntary union.**

Iraq's Constitution was, in effect, a contract among the peoples of Iraq, and in its federalism clauses, a specific contractual bargain between Kurdistan and Iraq. As with any contract, a material breach by one party frees the other party from its obligations, especially when unilateral performance would put it at a disadvantage.

Iraq's unity, integrity, independence and sovereignty are contingent on the federal authorities upholding 'its federal democratic system' (Article 109). Since the latter obligation has not been upheld, the authorities in Baghdad have no standing or authority to insist on Iraq's unity.

Specifically,

Kurdistan voluntarily entered into a limited union with Iraq on the solemn and express understanding that Iraq would be a federal, democratic, and law-governed state, and that Kurdistan's federal rights, including its right to unify with places in the so-called disputed territories in accordance with local majority preferences, would be fully protected by that constitution.

The Constitution included transitional arrangements, specific provisions to establish key federal institutions, and specified rules of law-making and amendment. These duties have not been honored in substantive ways.

The failure to implement the transitional provisions; the failure to establish federal institutions; and the failure to respect the rights of regions, the rights of governorates to become regions, and the rights of governorates not organized in regions; all these failures separately and jointly render the Constitution null and void.

#### **3.1. Violations of the rights of Kurdistan and others promised in the transitional provisions**

Key portions of the *Transitional Provisions* of the Constitution that mattered to Kurdistan, and to others, have not been implemented.

Article 140 placed an affirmative duty on the executive authority to implement Article 58 of the Transitional Administrative Law. Specifically, the federal government was to conduct a census in the disputed territories, redraw administrative boundaries that had been gerrymandered by Saddam Hussein to disadvantage non-Arabs, and conduct a plebiscite in which the population would choose between being part of the Kurdistan Region or the rest of Iraq. The constitution set a December 31, 2007 deadline to complete all these steps. Nearly ten years later, no steps have been substantively executed.



In recent correspondence with the Governorate Council of Kirkuk the Iraqi Government declared that it could not hold the plebiscite in Kirkuk because the Iraqi Government had not implemented the prerequisite conditions of a census and a redrawing of Kirkuk's boundaries. In short, the Iraqi Government has admitted that the reason the constitutional bargain on the disputed territories was not implemented was because of its refusal to do so. It pleads its own failure to implement the Constitution as a reason to deny Kurdistan's right to hold a referendum to remedy promises broken by the Baghdad government.

The relevant article reads:

**Article 140:** 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 citizens), by a date not to exceed the 31st of December 2007.

Article 140 was intended to reverse the effects of injustices caused by the racist policies of former regimes, which had deliberately reduced the presence of Kurds in their homeland, and illegally induced settlers to take their place. This policy of 'Arabization' was intended to prevent the people of Kirkuk and other places from freely reunifying with the people of Kurdistan. Since 2005 successive Iraqi governments have refused to implement Article 140 or to allocate an appropriate budget for its execution.

The High Committee that was established pursuant to Article 140 had most of its recommendations ignored or minimally followed. These included the following:

1. Restoring to their employment those dismissed from their positions because of their political affiliations.  
With a few exceptions, this recommendation has not been implemented.
2. Returning deportees and displaced persons (both Kurdish and other) to their original residences.  
Such repatriation has occurred on a very small scale.
3. Returning Arab settlers (mostly from the South) who had displaced local residents and employees to their governorates of origin and granting them financial incentives of approximately \$18,000 each.

Yet most who have received such financial grants from the federal government have remained in Kirkuk, sometimes purchasing new land in Kirkuk.

4. Approving compensation to displaced families covered under Article 140.  
These grants have been paid only to a limited number of people: the federal government has declined to spend further under the pretext of “lack of adequate budget.”
5. Approve returning the areas of Tis’in and Hamzeli to their rightful Kurdish owners. These properties were confiscated by Saddam Hussein.  
The recommendation was never approved by the Council of Ministers, despite the High Committee’s emphasis on its importance in resolving many property disputes in Kirkuk.

In fact, the Iraq government’s collusion in Arabization continues through numerous administrative measures, e.g., through the granting of ration and housing cards; and by refusing to return agricultural lands confiscated from Kurdish and Turkmen farmers of Kirkuk and given to Arabs. It has refused to redraw the provincial borders to return them to their locations before the Baathist programs of ethnic expulsion, territorial gerrymandering, and settler-infusion began. Most obviously, all of these failures to implement the letter and spirit of Article 140 have been used as a pretext to prevent a referendum in Kirkuk as mandated by the Constitution, and as requested by the Kirkuk Governorate Council.

Article 141, which protected the legislation, decisions and contracts of the Kurdistan Region made after 1992, has been ignored by successive federal prime ministers and ministers, especially regarding Kurdistan’s rights over its natural resources, and these violations are further documented below. The relevant article reads:

**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.

The Iraqi government has not recognized legislation passed by Kurdistan since 1992. That includes, of course, Kurdistan’s legislation that entitles it to conduct referendums. Nor does it acknowledge the legality of the opinions of Kurdistan’s courts, or recognize that they override Iraqi law when the provisions of Articles 115 and 121 (2) apply. Iraq does not even acknowledge all of Kurdistan’s universities, refusing to validate their degrees, even though this is not a matter within the exclusive powers of the federal government.

Article 136 (1), which provided for a property claims commission, has yet to complete effective work to compensate victims of the Baathist dictatorship, both in Kurdistan and elsewhere.

All the transitional provisions, by definition, were intended to precede the operation and bedding down of the constitution. The violation of the articles specified above is sufficient to render the constitution void. The few transitional provisions that have been implemented, by contrast, were clearly in the interests of the Shiite majority in Iraq. Most notable among these, the Shiite majority pressed ahead to implement the clauses that weakened the Presidency Council, which had previously functioned to provide a veto power to Sunni Arabs and to Kurds that could have served to secure their rights, interests and identities.

### **3.2. Federal Institutions programmed for establishment under the Constitution do not exist**

Key federal institutions, provided for in the Constitution, have not been established. Notably, Article 65 required the formation of a Federation Council, to function as the second chamber of the promised federation. No law to create this Council has been enacted, effectively rendering Iraq's commitment to become a federation null and void. No second chamber has functioned to protect Kurdistan's rights, or the rights of other potential regions, or of the governorates not organized in regions. The relevant article reads:

**Article 65:** A legislative council shall be established named the "Federation Council," to include representatives from the regions and the governorates that are not organized in a region. A law, enacted by a two-thirds majority of the members of the Council of Representatives, shall regulate the formation of the Federation Council, its membership conditions, its competencies, and all that is connected with it.

The failure to implement Article 65 renders the article specifying the federal legislative power inoperative: Article 48 defines that power as held by 'the Council of Representatives and the Federation Council.' The time specified by which legislation under Article 65 should have been passed has also expired (Article 137). The Council of Representatives, dominated by Shiite religious parties, has refused to establish the second chamber, thereby denying Kurdistan its rightful representation in an entity that is constitutionally required to pass valid legislation. The Council currently unilaterally passes legislation without consulting the Kurdistan Government and those governorates not organized within a region. Therefore, the Sunni Arab and Kurdish components of Iraq are subject to the arbitrary discretion of the Shiite controlled legislature. Instead of federal pluralism there is a tyranny of the majority.

Article 92 (2) required the formation of the Federal Supreme Court, through the passage of a law by the Council of Representatives. No such law has been enacted. Iraq therefore 'functions' without the Supreme Court envisaged by its constitution. That fact renders inoperative Articles 92 (1) and Articles 93 and 94. Article 92 reads:

**Article 92:** First: The Federal Supreme Court is an independent judicial body, financially and administratively.

Second: The Federal Supreme Court shall be made up of a number of judges, experts in Islamic jurisprudence, and legal scholars, whose number, the method of their selection, and the work of the Court shall be determined by a law enacted by a two-thirds majority of the members of the Council of Representatives.

The court that exists and claims to adjudicate disputes has an expired mandate, left over from the transitional government. It has no constitutional standing to interpret the constitution, or to bind any party to the constitutional contract, either to its letter or spirit, and it therefore cannot adjudicate constitutional disagreements

Even the transitional court has been suborned. Notoriously in January 2011 it issued a ruling complying with Prime Minister Maliki's wish that the 'independent commissions' be placed under the authority of his cabinet, thereby terminating their independence. That action has rendered Articles 102-108 inoperative, though the Court had no standing to issue this determination. The transitional court fell under Maliki's sway, with its chief justice attending political meetings and events. It was this court that issued the arrest warrant for Vice President Tariq al-Hashimi (Iraq's most prominent elected Sunni Arab leader), and later one for MP Sabah Al Saidi, an independent Shia Islamist and critic of Maliki. These facts mean that the independence of the judicial power has been violated (Articles 87 and 88).

A state without a federal second chamber, or a federal supreme court, cannot be described as a federation. Most matters thought to be have been settled by the constitution, including its federal design, are now practically subject to the unrestrained whims of temporary majorities in the Council of Representatives, usually controlled by Iraqi Prime Ministers. There is no federation, let alone a federal democratic system. There is an institutional shambles.

### **3.3. Efforts to establish other federal regions have been unlawfully blocked.**

A federation is successful when there are multiple federal units. The Iraqi Constitution provided for procedures to establish new regions with powers identical or similar to those of Kurdistan. The Government in Baghdad has consistently obstructed efforts to create new regions and therefore to create a genuine federation that would protect Kurdistan's standing and rights. Article 118 and the legislation that followed from it,

namely, procedures to establish regions from governorates, have never been successfully invoked to create a region outside of Kurdistan. The relevant articles in the Constitution read:

**Article 117 (2):** 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.

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

In this case, the programmed legislation under Article 118 was passed, albeit late, but since then its spirit has been completely violated. Six of Iraq's 15 non-KRG governorates have tried to exercise their rights under Articles 117-19 to establish a region. Their legitimate petitions have been improperly ignored, refused, or met with force.

In accordance with Article 119, Diyala Governorate's Provincial Council voted to become a region. Baghdad sent security forces to the province to block the effort. Shia demonstrators allied with Baghdad attacked the provincial government headquarters and Shiite militias blocked major highways. The Baghdad Government then issued arrest warrants for the members of the mainly Sunni political bloc that sponsored the measure. Maliki justified his response to Diyala's efforts to establish a region by claiming he could not accept initiatives 'based on sectarianism.' But he had no constitutional authority to do so. (In fact, Diyala is Iraq's most ethnically and religiously diverse province and none of the other governorates seeking to form a region—Nineva, Salahaddin, Basra, Wasit, and Kut— did so on an ethnic or sectarian basis.) Maliki had no constitutional authority to veto governorates' decisions to form regions. He exercised an unconstitutional veto which he defended on the grounds that the governorates included those with unresolved territorial disputes! This stratagem justified one deliberate constitutional violation by hiding behind the deliberate violation of another. All these denials of region-formation under Articles 117-119 are shameful examples of the Iraq government blocking the democratic federalization process mandated by the Constitution.

#### **3.4. The work of the independent commissions and public bodies, vital safeguards in federal democracies, has been suborned. In some cases, such**

**bodies have not functioned, and where they have functioned they have done so in violation of constitutional provisions.**

The case of the failure to establish a valid Supreme Court has already been cited, as has the suborning of the transitional court. This failure leaves a gaping hole in the separation of powers, and fatally weakens the provision of checks on executive and legislative abuses of authority. Regrettably, independent bodies have not served to fill the void.

The Electoral Commission and the Commission on Public Integrity have had their work and integrity suborned, thereby affecting adversely the obligation to have Iraq function as a federal democratic state (Article 1 and 109).

None of the independent commissions established under Articles 102-08 function systematically in both languages of Iraq (thereby violating Article 4 (2) C and E).

The Central Bank is not representative of Iraq as a whole and has been instructed to deny Kurdistan the ability to exercise its constitutional rights, including its abilities to exploit its resources, attract inward investment, and export its resources (Article 103).

Key commissions have not functioned at all. The relevant provisions include:

**Article 105:** A public commission shall be established to guarantee the rights of the regions and governorates that are not organized in a region to ensure their fair participation in managing the various state federal institutions, missions, fellowships, delegations, and regional and international conferences. The commission shall be comprised of representatives of the federal government and representatives of the regions and governorates that are not organized in a region, and shall be regulated by a law.

**Article 106:** A public commission shall be established by a law to audit and appropriate federal revenues. The commission shall be comprised of experts from the federal government, the regions, the governorates, and its representatives, and shall assume the following responsibilities:

First: To verify the fair distribution of grants, aid, and international loans pursuant to the entitlement of the regions and governorates that are not organized in a region.

Second: To verify the ideal use and division of the federal financial resources.

Third: To guarantee transparency and justice in appropriating funds to the governments of the regions and governorates that are not organized in a region in accordance with the established percentages.

**Article 107:** A council named the Federal Public Service Council shall be established and shall regulate the affairs of the federal public service,

including appointments and promotions, and its formation and competencies shall be regulated by law.

None of the mandated bodies specified above has been established since 2005. It is hardly surprising that Iraq is among the most corrupt countries in the world.

### **3.6 Iraq has ignored the Constitutional requirement to make Kurdish an official language on the same basis as Arabic**

Article 4(1) establishes Kurdish as one of Iraq's two official languages, and Article 4(2) specifies how bilingualism must operate. These provisions have never been implemented by the federal authorities in the functioning of federal institutions. The relevant article reads as follows :

**Article 4: First:** The Arabic language and the Kurdish language are the two official languages of Iraq. The right of Iraqis to educate their children in their mother tongue, such as Turkmen, Syriac, and Armenian shall be guaranteed in government educational institutions in accordance with educational guidelines, or in any other language in private educational institutions.

**Second:** The scope of the term "official language" and the means of applying the provisions of this article shall be defined by a law and shall include:

- A. Publication of the Official Gazette, in the two languages;
- B. Speech, conversation, and expression in official domains, such as the Council of Representatives, the Council of Ministers, courts, and official conferences, in either of the two languages;
- C. Recognition and publication of official documents and correspondence in the two languages;
- D. Opening schools that teach the two languages, in accordance with the educational guidelines;
- E. Use of both languages in any matter enjoined by the principle of equality such as bank notes, passports, and stamps.

Article 4 provides that Arabic and Kurdish are the official languages of Iraq. It is intended to strengthen the partnership of the two main components of Iraq, the Arabs and Kurds, just as Canada is bilingual in French and English. The Iraqi Government is required to put the Official Languages Law into force to give both Arabic and Kurdish the same official status. It has refused to do so. Kurdish is absent from federal government institutions, in discussions in the Council of Representatives, and in the work of the independent public bodies and commissions. Kurdish is absent on the Iraqi Dinar currency. The federal government writes all its documents solely in Arabic and demands that any Kurdish document be translated into Arabic before recognizing it as official.

### **3.7. Iraq has failed to establish inclusive federal forms of symbolic inclusion.**

The relevant constitutional article reads:

**Article 12:** First: The flag, national anthem, and emblem of Iraq shall be regulated by law in a way that symbolizes the components of the Iraqi people.

The unambiguous meaning of this article is that the Iraqi flag, emblem, and national anthem should symbolize the diversity and composition of Iraq. Yet the Baghdad authorities continue to use the flag approved by Saddam Hussein, which reflects no emblem symbolic of Kurdistan: it is a pan-Arabist flag. Kurdish holidays are also ignored by federal authorities. In violating Article 4 and Article 12, and in further violations listed below (e.g., of Articles 9, 110, 112, 141), the Iraqi government has violated the first article of Iraq's federal civil and political rights, namely,

**Article 14:** Iraqis are equal before the law without discrimination based on gender, race, ethnicity, nationality, origin, color, religion, sect, belief or opinion, or economic or social status.

### **3.8. Iraq has abrogated the constitutional bargain that gave Kurdistan control over its oil and has refused to limit the powers of the federal government to those matters prescribed in the Constitution.**

Article 110 specifies the exclusive jurisdiction of the federal government (see Appendix 1). Article 115 makes Kurdistan's law superior to federal law within Kurdistan on all subjects except the few listed as being in the exclusive jurisdiction of the federal government in Article 110. Articles 121 (1) gives Kurdistan the power to amend or cancel the application of a federal law within Kurdistan unless it concerns a matter under the exclusive jurisdiction of the federal government as listed in Article 110. These articles read as follows:

**Article 115:** All powers not stipulated in the executive 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 laws of the regions and governorates not organized in a region in case of dispute.

**Article 121 (2):** In the case of a contradiction between regional and national legislation in respect to a matter outside the exclusive authorities of the federal government, the regional power shall have the right to amend the application of the national legislation within that region.



In spite of these very clear provisions that grant priority to a region's laws, Iraqi Prime Ministers have consistently ignored provisions that are central to Kurdistan's rights.

As part of this usurpation of power, the Iraqi federal authorities have refused to acknowledge or implement Kurdistan's constitutional right to develop its own resources, a subject at the core of the constitutional bargain agreed between Kurdistan and Iraq in 2005. Control or ownership over natural resources are not listed in Article 110 as one of the exclusive powers of the federal government. Therefore, per article 115, Kurdistan's law is superior to federal law regarding the development of oil and gas resources within the Kurdistan Region. Further, per Article 121(1), Kurdistan has the power to amend or cancel any federal oil law within the Kurdistan Region.

The relevant constitutional articles are as follows:

**Article 111:** Oil and gas are owned by all the people of Iraq in all the regions and governorates.

**Article 112:** First: The federal government, with the producing governorates and regional governments, shall undertake the management of oil and gas extracted from present fields, provided that it distributes its revenues in a fair manner in proportion to the population distribution in all parts of the country, specifying an allotment for a specified period for the damaged regions which were unjustly deprived of them by the former regime, and the regions that were damaged afterwards in a way that ensures balanced development in different areas of the country, and this shall be regulated by a law.

**Article 112:** Second: The federal government, with the producing regional and governorate governments, shall together formulate the necessary strategic policies to develop the oil and gas wealth in a way that achieves the highest benefit to the Iraqi people using the most advanced techniques of the market principles and encouraging investment.

Article 111 is understood by Kurdistan to mean that oil and gas in Kurdistan is owned by the people of Kurdistan. Another interpretation would suggest that oil is a public resource that cannot be owned privately, but that would be inconsistent with using the most advanced techniques of market principles and encouraging investment. No one, however, could interpret Article 111 to mean that the federal government owns any oil or gas; any such attempted interpretation is precluded by Article 110, the immediately preceding article, which specifies the exclusive powers of the federal government, and which deliberately includes no provisions regarding oil and gas (see Appendix 1). The clear intention of the constitution's framers was to entrench regional supremacy over the future development of natural resources and to encourage federal power-sharing and resource-sharing over fields in exploitation when the Constitution came into force.

There is no ambiguity in Article 112. It gives the federal government the right to develop oil from existing fields (i.e., those in commercial production on October 15, 2005, the date the constitution was ratified) provided that

1. the federal government co-operates with the government of the producing region or governorate; and that
2. the oil revenues from these existing fields are shared among all of Iraq on the basis of population with something extra for regions like Kurdistan that suffered under Saddam Hussein.

The exploration and development of 'new' (as opposed to 'existing' or 'present') oil fields were deliberately omitted from Article 112, thereby reserving these powers for the Regions (per Article 115) which are also entitled to the revenues from these new oil fields.

All of these carefully worded provisions have been violated. No federal law has been passed compliant with Article 112 (1).

The Baghdad oil ministry has consistently acted as if these provisions had never been placed in the constitution, and has continued to function as if Saddam's laws were still valid. Baghdad has never honored this key constitutional bargain. It has falsely claimed that the KRG's oil contracts are illegal, and has blacklisted companies doing business with Kurdistan. And, it has gone to foreign courts to block the sale of Kurdistan's oil from new fields.

### **3.9. Iraq has not paid Kurdistan its share of oil revenues as required by Article 112 (1) of the Constitution**

Article 112 (1) required a fair (proportional) distribution of revenues across all parts of Iraq from existing exploited fields, and that a law should be passed to that effect. That has not happened. Instead there has been under-payment, radically disproportionate payments from what are supposed to be jointly shared revenues from the fields that were being exploited when the Constitution came into force, and finally, there has been non-payment.

'Federal expenses' have been arbitrarily deducted from Kurdistan's joint share of revenues, which never once was allocated at the agreed rate of 17 per cent. These 'federal deductions' have never been transparent or audited.

Kurdistan is not alone in having its constitutional rights violated regarding production from fields that were producing in 2005, and revenue distribution: the same has been true of all producing governorates not organized in regions.

When Kurdistan started large-scale oil exports in 2014, the Iraqi government unlawfully stopped making any payments to Kurdistan in flagrant violation of Article 112(1) of the constitution. While Kurdistan's entitlement to its proportional share of Iraq's total oil revenue from existing fields does not depend on Kurdistan sharing oil revenues from

new fields (in fact, new fields and their revenues fall under Article 115, meaning they are subject to the Region's law), Kurdistan has since 2007 offered to share these revenues with the federal government. The Maliki and Abadi governments have refused any revenue sharing and have tried to starve Kurdistan into giving up its constitutional right to natural resources and revenue.

A draft Federal Oil and Gas Law was submitted to the Council of Representatives in 2007. It complied with the constitutional provisions. It would have established the powers of regions (Kurdistan) to manage and develop the oil and gas sector. This draft law was submitted to the Iraqi Shura Council for legal review, though that Council does not have authority beyond legal and linguistic editing. Its edited draft did not comply with Article 112 to recognize the principle of full partnership in the oil and gas sector between the federal and regional governments, specifically Kurdistan.

The Kurdistan Region agreed to a memorandum of understanding signed by President Masoud Barzani, President Jalal Talabani, and Prime Minister Nuri al-Maliki. Attached to the first federal oil and gas law draft is an appendix that states that if the federal oil and gas law is not passed by May 31, 2007, the parties are entitled to enter into development and production contracts in accordance with the Constitution. The law was not passed.

Therefore, the KRG relied on the Constitution and this subsequent agreement, to develop its own laws and natural resources, but the Iraqi government now claims such development is illegal, and lays claim to the right to supervise all oil and gas contracts, a power neither present in the Constitution nor part of a federal law.

Twelve years after the 2005 Constitution entered into force Iraq has a legal vacuum regarding how to manage oil and gas, the most important sector of its economy. Its federal government has persistently violated the principles of federal partnership with Kurdistan and the governorates not organized in regions, thereby also violating Articles 1 and 109. Among other federal design principles, the Constitution carefully specified the following in Article 121 (3):

**Article 121: Third:** Regions and governorates shall be allocated an equitable share of the national revenues sufficient to discharge their responsibilities and duties, but having regard to their resources, needs, and the percentage of their population.

Combined with Article 112 (1), this provision of the Constitution required the federal authorities to provide from revenues of existing oil fields sufficient resources to enable the Kurdistan Regional Government to discharge its duties. In 2005, the KRG reached an agreement with the Iraq government that 17% of the total federal revenue (based on an estimate of the Kurdish population) would be allocated to the Kurdistan Region until a valid census could determine the exact proportion. Iraq has never paid Kurdistan this

agreed 17%, but instead, has arbitrarily and unilaterally deducted federal expenses, usually paying about 10% of federal revenue. And in 2014, Iraq ceased to make any payments to Kurdistan.

### **3.10. Iraq has not honored the security provisions of the Constitution**

The Constitution envisaged that regions would be 'responsible for all the administrative requirements of the region, particularly the establishment and organization of the internal security forces of the region such as police, security forces, and guards of the region' (Article 121). Nevertheless, and despite Article 141 (and Kurdistan's law of 1992 establishing the Peshmerga), the federal government has not formally recognized the status and rights of the Peshmerga, or provided pensions for its veterans.

The federal government has combined this policy of formal non-recognition of the Peshmerga with intermittent desperate entreaties for the help of Kurdistan's soldiers when their help has been sought to repress insurgencies that have partly been caused by re-centralizing, monopolistic and sectarian conduct by the authorities in Baghdad. Had the KRG dissolved the Peshmerga, as the federal authorities had earlier demanded, there would have been no force to resist ISIS when the federal Iraqi army fled from Mosul and Kirkuk in the summer of 2014.

The first duty of government is to protect its citizens from external attack and internal subversion. That is especially true of a federal government which is usually created to ally or federate territories in external defense. The federal government itself should never become a source of insecurity. The new constitution was drafted to prevent a repetition of Iraq's past in which it had been in a state of civil war or attempted totalitarian repression for over half a century, and in which its military had become an instrument of domestic repression, both ethnic and sectarian. Article 9(1) guarantees an Iraqi federal army representative of all of the components of Iraq. It reads:

**Article 9: First:**

A. The Iraqi armed forces and security services will be composed of the components of the Iraqi people with due consideration given to their balance and representation without discrimination or exclusion. They shall be subject to the control of the civilian authority, shall defend Iraq, shall not be used as an instrument to oppress the Iraqi people, shall not interfere in the political affairs, and shall have no role in the transfer of authority.

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

Article 9 obligates a fair balance of the components of the Iraqi people participating in the Iraqi army. This text was included because of the bitter experiences triggered by the misuse of the Iraqi army to suppress and exclude certain ethnic and religious groups.

The current composition and conduct of the federal army officer corps and rank and file make a mockery of this Article.

Iraq has also violated Article 9 by creating or recognizing numerous armed militias outside the command and control of the Iraqi army, most notably the Popular Mobilization Forces (PMF), which were improperly given legal status by the one-house legislature in violation of Article 9. The PMF are independent of the Iraqi army, which is required under the Constitution to be non-sectarian. The PMF are uncontrolled and unprofessional forces that act on political and sectarian considerations; some are controlled by political parties. The Constitution prohibits the armed forces to be involved in politics. Yet the PMF are comprised of forces that are overtly both anti-Kurdish and anti-Sunni, and that are directed by religious and political Shiite parties and factions. Arab Iraq is awash with these so-called Popular Mobilization Forces, some under the command of former ministers. The Hasd al-Shabi has been recognized by the Iraqi parliament while the same parliament refuses to recognize the Peshmerga, even though the latter are constitutional and lawful by virtue of Article 121 (5) and Article 141.

Article 61 provides that the Council of Representatives must approve the appointment of 'the Iraqi Army Chief of Staff, his assistants, those of the rank of division commander and above, and the director of the intelligence service, based on a proposal from the Council of Ministers.' Under the Maliki and Abadi governments, this constitutional obligation to obtain parliamentary approval has been frequently ignored, and commanders have been appointed to special units answerable only to the prime minister. Competent commanders of other units have often been replaced, without parliamentary approval, by men whose greatest virtue was political loyalty to Maliki. That partly accounts for the performance of the Iraqi Army during the summer of 2014 that left the people of Kurdistan and the disputed territories imperiled by the forces of the so-called Islamic State. This episode marked a manifest failure to accomplish the duties of the federal government specified in Article 110 (2).

Armed militia groups, not controlled by the constitutional army, continue to stop citizens at random checkpoints, and to extort payments for passage. The Baghdad authorities do nothing, thereby violating Article 28 of the Constitution that prohibits any taxes or fees from being levied, amended or collected except by law.

### **3.11. Violations of Democracy and Rights**

A federal democracy requires the protection of democratic institutions, a democratic ethos, the protection of the rights of citizens, and their civil associations. The provisions on Rights and Freedoms in Section 2 of the Constitution of Iraq (Articles 14-46) are binding on the federal government of Iraq, and on governorates not organized in regions, but not on Kurdistan (because the regulation of these rights and freedoms are not among the exclusive powers of the federal government specified in Article 110, and

therefore are subject to the regional supremacy of Kurdistan law). Nevertheless, Kurdistan cannot avoid noticing the destruction of democratic principles and the rule of law outside Kurdistan. A democratic federation cannot function if the larger entity in the federal partnership is not democratic.

Below, significant violations of the democratic rights and freedoms of the Iraqi Constitution by the federal Iraqi government are itemized—including human rights, minority rights, and democratic rights. Even if every one of the violations was to be rectified tomorrow, the voluntary union would nevertheless be irreparably broken because of the failure to deliver the federal commitments detailed above. Article 1 provided that Iraq would be a federal and independent state with a democratic, parliamentary system of government. Yet, twelve years after the Constitution's ratification, Iraq functions as a government that aspires to act as a centralized unitary state. The fundamental principles of a federal system have not been created, such as a bicameral legislature and a constitutionally authorized judiciary, and the principle of federal partnership never animates the Baghdad authorities.

Iraqi governments have violated Article 14 by discriminating against distinct components of citizens, treating the Shiite community as first class citizens while other communities are discriminated against. This discrimination is pervasive in all domains, such as public service, income distribution, postgraduate studies, scholarships, populating diplomatic missions, and even in providing security.

**Article 14:** Iraqis are equal before the law without discrimination based on gender, race, ethnicity, nationality, origin, color, religion, sect, belief or opinion, or economic or social status.

Iraqi governments have further failed to guarantee political, administrative, cultural, or educational rights to the various nationalities in Iraq, as obligated under Article 125.

**Article 125:** This Constitution shall guarantee the administrative, political, cultural, and educational rights of the various nationalities, such as Turkomen, Chaldeans, Assyrians, and all other constituents, and this shall be regulated by law.

Outside of Kurdistan in areas where non-Shiites are the majority, there is no fair representation in local governments, schools are not taught in native languages, and religious beliefs are not protected. Non-Shiite religious groups, such as Christians, Yazidis, and Sunnis, have been murdered and kidnapped, and their holy places blown up. Yazidis have been subjected to mass rape and enslavement. The Iraq government has been lax in pursuing or punishing the perpetrators of all these crimes against religious and national minorities, and it failed totally to protect the Yazidis from what is now internationally recognized as a genocide. Hundreds of thousands of IDPs have fled, many to the Kurdistan Region where there is no discrimination based on religious beliefs (or ethnicity), but the Iraqi government has failed to supply humanitarian funding to support these victims of religious and gross human rights violations.

**Article 2:** Second: This Constitution guarantees the Islamic identity of the majority of the Iraqi people and guarantees the full religious rights to freedom of religious belief and practice of all individuals such as Christians, Yazidis, and Mandeans.

Article 37.2 of the Constitution guarantees protection of the individual from intellectual, political, and religious coercion, yet successive Iraqi federal governments and some governorates have imposed religious beliefs that are not universally agreed tenets of Islam, and are inconsistent with any democratic ethos. Persistent efforts are being made to oblige children to be registered as Muslim if their father or step-father is Muslim or has converted to Islam. Article 43.2. guarantees freedom of worship and the protection of places of worship, yet Christian churches and Yazidi temples have been destroyed; non-Muslims have fled to Kurdistan to escape religious persecution; and everywhere in Arab-majority Iraq religious freedom has been disgraced by sectarian discrimination and destruction.

The Iraq government has failed to provide a secure and stable life for its citizens as well as its national, ethnic, religious and linguistic minorities. Incompetent institutions and weak security have resulted in misery, as evidenced by in the ISIS invasion, kidnappings and assassinations. Militias operate with impunity, frequently violating Articles 15 and 17:

**Article 15:** Every individual has the right to enjoy life, security and liberty. Deprivation or restriction of these rights is prohibited except in accordance with the law and based on a decision issued by a competent judicial authority.

**Article 17:** First: Every individual shall have the right to personal privacy so long as it does not contradict the rights of others and public morals.

Second: The sanctity of the homes shall be protected. Homes may not be entered, searched, or violated, except by a judicial decision in accordance with the law.

The right of citizens to a fair trial and the independence and authority of the judiciary are emphasized in Articles 19, 37 (1) B and 88.

**Article 19:** Fifth: The accused is innocent until proven guilty in a fair legal trial. The accused may not be tried for the same crime for a second time after acquittal unless new evidence is produced.

**Article 37:** First:

B. No person may be kept in custody or investigated except according to a judicial decision.

**Article 88:** Judges are independent, and there is no authority over them except that of the law. No power shall have the right to interfere in the judiciary and the affairs of justice.

However, the decisions of the dissolved Ba'ath Revolutionary Command Council are still in force, in violation of judicial independence. Citizens may be arrested and held for up to a month; the Minister of Commerce may seize funds; and the Minister of Transport may detain persons. Iraq's governments have repeatedly violated Article 37 1 B. There are many arrests and detentions of Sunnis without any legal or judicial basis. In addition, there are numerous confirmed reports of the Executive interfering in decisions of the left-over court from the period of the Transitional Administrative Law.

Article 37.1(c). expressly prohibits unlawful detention and torture of any kind, while Article 38 guarantees 'freedom of expression using all means' — including 'freedom of assembly and peaceful demonstration' — provided that the exercise of these freedoms does not 'violate public order or morality.' Yet unlawful killings, torture, illegal detention, assault and rape by the popular mobilization forces and the federal Iraqi forces have been widely documented. Emergency powers have operated well in excess of what was required to quell insurgencies. In 2012 Sunni Arabs engaged in peaceful demonstrations that were run over by Iraqi security forces, and by 2013 Iraqi troops had fired on protesters in Salahaddin.

The Constitution protects the rights of martyrs, their families and former political prisoners:

**Article 132: First:** The State shall guarantee care for the families of the martyrs, political prisoners, and victims of the oppressive practices of the defunct dictatorial regime.

**Second:** The State shall guarantee compensation to the families of the martyrs and the injured as a result of terrorist acts.

Yet Iraq's governments have ignored the rights of martyrs and political prisoners, especially those of the Kurdistan Region. Iraqi governments have not compensated the Anfal victims for Saddam Hussein's chemical weapons attack. They have not compensated Kurdish or other political prisoners, or properly compensated families of martyrs and those injured because of recent terrorist acts. For example, in the war against ISIS, almost 1800 Peshmerga forces have been killed and over 10,000 wounded. The Iraqi government neither compensated their families or the wounded for their injuries, nor has expressed any intention of doing so.

Iraqi governments have prohibiting women from traveling alone, which restricts their freedom of movement, and violates Article 44 (and Article 14).

**Article 44: First:** Each Iraqi has freedom of movement, travel, and residence inside and outside Iraq.

Article 18 (1) specifies that citizenship is a right for every Iraqi, and further provisions provide that,

**Article 18: Second:** Anyone who is born to an Iraqi father or to an Iraqi mother shall be considered an Iraqi. This shall be regulated by a law.



Third. A. An Iraqi citizen by birth may not have his citizenship withdrawn for any reason.

Fourth. An Iraqi may have multiple citizenships.

Yet despite these express provisions it is well-documented that Iraqi women are being denied the ability to pass on their citizenship to their children if the father of the children is not Iraqi.

Article 135 (1) requires the National Commission for Accountability and Justice to work as an independent body and coordinate with the judiciary and executive bodies. It is subject to the supervision of the Council of Representatives. But it has been used to exclude and marginalize the Sunni Arab component by the dominant Shiite majority.

Successive Iraqi governments in governorates outside of Kurdistan have not provided the rights specified in Articles 28, 29 and 30, or implemented subsequent provisions regarding health care. Thousands of families have been fragmented, whether because of war, poverty, or disability. Parents, children, and the elderly have lost their homes through forced displacement, or because of terrorism and the inability of the Iraqi government to maintain security. Thousands of children have been deprived of the right to education. The provisions in Section 2 Chapter 2 of the Constitution (Articles 22-36) on economic, social, and cultural freedoms have been rendered hollow by the federal government's failure to deliver basic services outside Kurdistan. These administrative failures have been compounded by the deliberate blocking of the governorates' right to develop their own capacities, and by extraordinary levels of corruption.

The failure to respect or achieve rights has obviously thoroughly impaired the democratization of Iraq, meaning that Kurdistan lacks a potential democratic partner with which to remain in federation.

These failures have been compounded by the fact that the executive has usurped the authority of the legislature by failing to conform to Article 61 (5) C and (9):

**Article 61:** The Council of Representatives shall be competent in the following:

Fifth: Approving the appointment of the following:

C. The Iraqi Army Chief of Staff, his assistants, those of the rank of division commander and above, and the director of the intelligence service, based on a proposal from the Council of Ministers.

Ninth:

A. To consent to the declaration of war and the state of emergency by a two-thirds majority based on a joint request from the President of the Republic and the Prime Minister.

B. The state of emergency shall be declared for a period of thirty days, which can be extended after approval each time.

C. The Prime Minister shall be delegated the necessary powers which enable him to manage the affairs of the country during the period of the declaration of war and the state of emergency. These powers shall be regulated by a law in a way that does not contradict the Constitution.

D. The Prime Minister shall present to the Council of Representatives the measures taken and the results during the period of the declaration of war and the state of emergency within 15 days from the date of its end.

There has also been systematic usurpation of power within the federal executive itself. Both Prime Ministers Maliki and Abadi have usurped powers of the Council of Ministers. Successive Iraqi governments have not implemented Article 80, which specifies the Council of Ministers' powers. Article 85 mandates the Council of Ministers to establish working bylaws. That has not happened. The 2014 Political Agreement Document emphasized the importance of enacting bylaws for the Council of Ministers. However, Prime Minister Abadi has continued to act unilaterally and to reduce the number of representatives of other government components under a so-called "reform" package.

Article 5 provides that the rule of law is "sovereign," a provision necessary in any functioning federal democracy, but its letter and spirit has repeatedly been violated by Iraqi governments, especially but not only by their non-compliance with the provisions mandating the Kurdistan Region its proportionate share of federal revenues.

In the foregoing recital, manifest violations of constitutional articles that affect democratic functioning, including human, democratic and minority rights, have been referenced. But no democracy can function unless its electoral laws are legitimate and unless its political executive honors its agreements. In these respects, successive Iraqi governments have violated the ethos of what is minimally required to facilitate democratic consolidation.

**Elections:** The Council of Representatives passed the latest General Elections Law without consulting the Kurdistan Region or minorities, thereby failing to establish the consensus required to make elections legitimate. The claimed rationale for the new pattern of representation in the Council was that it was based on population proportions. However, there has been no reliable census, and had there been, there would be no further excuse for failing to implement Article 140. The law will result in minorities losing seats to the Shiite majority. It will penalize places where people turn out to vote in higher numbers, notably Kurdistan. The Constitution provides that

**Article 49: First:** The Council of Representatives shall consist of a number of members, at a ratio of one seat per 100,000 Iraqi persons representing the entire Iraqi people. They shall be elected through a direct secret general ballot. The representation of all components of the people shall be upheld in it.

But because there is no reliable measure of population, the appropriate number of representatives cannot be fairly determined. Yet the Shiite parties have and will win a disproportionate number of seats compared to the numbers of citizens that vote for them. Here, both Article 49 and 110 (9), requiring the federal government to conduct a census, have been violated.

**Coalition Agreements:** To function, a constitution requires more than simple adherence to its formal provisions. Parties must respect the formal constitution and work in a spirit of federal partnership. Since the Constitution of Iraq was ratified successive agreements have been signed by the Kurdistan Region and Iraqi governments, by both Prime Ministers Maliki and Abadi. They have involved such material questions as payments to the Peshmerga, reparations to the Kurds for past ethnic expulsions, coercive assimilation and genocide, and the management of oil and gas rights. None of these agreements has been implemented. In consequence, the people of the Kurdistan Region and the disputed territories have no trust in any Iraqi government's pledges to implement their obligations and commitments.

### 3.12. Failure to Pass Laws Required by the Constitution

Many of Iraq's constitutional provisions require the passage of relevant laws. Below there follows a recital of the failure to enact such laws, beyond those already cited. Eleven missing laws effectively violate the obligations imposed in ten articles. This is a conservative list, e.g., the absence of legislation under Article 123 is not counted. Most of these failures of implementation adversely affect federal and democratic functioning, and prevent Iraq from adhering to the rule of law.

**Article 7:** First: Any entity or program that adopts, incites, facilitates, glorifies, promotes, or justifies racism or terrorism or accusations of being an infidel (*takfir*) or ethnic cleansing, especially the Saddamist Ba'ath in Iraq and its symbols, under any name whatsoever, shall be prohibited. Such entities may not be part of political pluralism in Iraq. This shall be regulated by law.

No Law has been passed protecting Iraqis from these practices.

**Article 21:** First: No Iraqi shall be surrendered to foreign entities and authorities.

Second: A law shall regulate the right of political asylum in Iraq. No political refugee shall be surrendered to a foreign entity or returned forcibly to the country from which he fled.

Third: Political asylum shall not be granted to a person accused of committing international or terrorist crimes or to any person who inflicted damage on Iraq.

No law has been passed regulating the right to political asylum.

**Article 22:** First: Work is a right for all Iraqis in a way that guarantees a dignified life for them.

Second: The law shall regulate [iii] the relationship between employees and employers on economic bases and while observing the rules of social justice.

Third: The State shall guarantee the right to form and join unions and professional associations, and this shall be regulated by law.

No law has been passed to protect Iraqi workers or their right to form unions.

**Article 24:** The State shall guarantee freedom of movement of Iraqi manpower, goods, and capital between regions and governorates, and this shall be regulated by law.

No law has been passed to regulate trade among the regions and governorates.

**Article 61:** Ninth:

A. To consent to the declaration of war and the state of emergency by a two-thirds majority based on a joint request from the President of the Republic and the Prime Minister.

B. The state of emergency shall be declared for a period of thirty days, which can be extended after approval each time.

C. The Prime Minister shall be delegated the necessary powers which enable him to manage the affairs of the country during the period of the declaration of war and the state of emergency. These powers shall be regulated by a law in a way that does not contradict the Constitution. [vi]

D. The Prime Minister shall present to the Council of Representatives the measures taken and the results during the period of the declaration of war and the state of emergency within 15 days from the date of its end.

No law has been passed to regulate the affairs of the country during war time. Iraqi Prime Ministers have exercised emergency powers without legal authority and to the detriment of the fundamental rights of Iraqi citizens.

**Article 84:** First: A law shall regulate the work and define the duties and authorities of the security institutions and the National Intelligence Service, which shall operate in accordance with the principles of human rights and shall be subject to the oversight of the Council of Representatives.

No law has been enacted regulating the work of the security and intelligence institutions. They have not been subject to oversight by the Council of

Representatives. These institutions do not operate in accordance with human or minority rights principles and they are among the most serious perpetrators of rights violations.

**Article 86:** A law shall regulate the formation of ministries, their functions, and their specializations, and the authorities of the minister.

No law has been enacted.

**Article 93:** Sixth: Settling accusations directed against the President, the Prime Minister and the Ministers, and this shall be regulated by law.  
[ix]

Although there have been multiple accusations against the Prime Minister and various Ministers, no law has been enacted. As a result, the process for handling accusations has been arbitrary and highly political. Competent ministers have been removed and corrupt ones have enjoyed impunity.

**Article 113:** Antiquities, archeological sites, cultural buildings, manuscripts, and coins shall be considered national treasures under the jurisdiction of the federal authorities, and shall be managed in cooperation with the regions and governorates, and this shall be regulated by law.

Iraq's archaeological heritage has been profoundly and sometimes irreparably damaged by looting, mismanagement and willful destruction since 2003. Yet, no law has been enacted to protect this heritage, nor have the regions and governorates been consulted appropriately.

**Article 114:** First: To manage customs, in coordination with the governments of the regions and governorates that are not organized in a region, and this shall be regulated by a law.

No law has been enacted to fulfill this requirement of federal power-sharing.

#### **4. The Referendum As a Marker of Constitutional Dissolution**

The referendum in September 2017 will enable the people of Kurdistan to express their verdict on the failure of the Iraqi Constitution, and their inalienable right to self-determination. The referendum was originally scheduled to be held in 2014, after Kurdistan's leaders and people had concluded that there was no prospect that the Constitution of Iraq would be respected by Baghdad governments. The invasion by ISIS, and the necessity to defeat that invasion, necessarily postponed these plans. Now that ISIS is being defeated, there is an opportunity to complete the unfinished business of recovering Kurdistan's freedom.

In 2005 the people of Kurdistan Region, and the people of the so-called disputed territories, endorsed the Constitution on the express understanding that the new Iraq would be a voluntary union of land and people. The referendum in September 2017 will enable the people of Kurdistan and of the disputed territories freely to withdraw their ratification of 2005, and to acknowledge the end of their formal relationship with Iraq in a democratic manner. The precise boundaries of the new state of Kurdistan (if that is what voters choose) will be established through a separate process involving either a plebiscite in the so-called disputed territories on whether to join Kurdistan or remain with Iraq and/or through a process of negotiation with the government in Baghdad.

Referendums are the established means through which people affirm their wish to be independent, to secede, or to associate freely with other states; and thereby conform to the norms of the free peoples of the world. It will be the task of the KRG's leaders to implement their choice. If the people vote to leave Iraq, Kurdistan's leaders will be mandated to complete a peaceful, amicable, just and efficient dissolution of the voluntary union, and to achieve friendly and co-operative relations with all of Kurdistan's neighbors.

The people of Kurdistan have the inalienable right to freedom and self-determination. That is why on September 25, 2017 they will vote in the referendum on Independence.

## Appendix 1. Record of Violated Articles

There are 144 Articles in the Constitution of Iraq. In the text above the most important violations and manifest failures to fulfill provisions from the perspective of Kurdistan have been presented. A more thorough investigation would certainly unearth further violations. The Constitution has six sections. The Table below records manifest violations of the articles in each of these sections in Column A and/or the failure to pass legislation to give effect to the relevant article in Column B. In the final column C we avoid double-counting, and only count an article once if it is found both in column A or column B.

There are 55 articles that have been manifestly violated, and 67 violations in total when one includes additional failures to provide required legislation. Differently put, nearly half of the articles in the Constitution have been violated or have not had the requisite legislation passed to give them force. These quantitative measures oblige a grim assessment, but they are not decisive. What matters is the manifest failure to make Iraq a functioning federation, and a functioning rights-respecting democracy. That is what accounts for Kurdistan's right to determine in this referendum that the voluntary union of 2005 has been irreparably damaged, and therefore must be dissolved.

Section of the Constitution	A Numbers of Manifestly Violated or Unfulfilled Articles	B Numbers of Articles where required legislation has not been passed	C (A+B)/total articles
Fundamental Principles	1, 2 (2), 4, 5, 9, 12	7, 9	7/13 [54%]
Rights and Freedoms	14, 15, 16, 17, 18, 19, 23, 24, 28, 29, 30, 31, 32, 34, 37, 38, 40, 42, 43, 44, 46	21, 22, 28,	23/32 [72%]
Federal Powers	48, 49 (1), 61 5C, 65, 80, 87, 88	61 9C, 65, 84 (1), 85, 86, 92 (2)	10/53 [19%]
Independent Commissions	102, 103, 104, bodies all violate Articles 4 and 14	105, 106, 107, 108	7/7 [100%]
Powers of the Federal Government	109, 110 (9), 111, 112, 115, 117, 118, 119, 121 (1), (3), (5), 125	112 (1), 113, 114, 125	12/14 [86%]
Final and Transitional Provisions	130, 132, 135(1), 136 (1), 137, 140, 141	132 (3), 142	8/18 [44%]
Total(s)	<b>55</b>	<b>21</b>	<b>67/144</b> [47%]

## Appendix 2.

Article 110 specifies the exclusive powers of the federal government

**Article 110:** The federal government shall have exclusive authorities in the following matters:

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

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

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

Fourth: Regulating standards, weights, and measures.

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

Sixth: Regulating the policies of broadcast frequencies and mail.

Seventh: Drawing up the general and investment budget bill.

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

Ninth: General population statistics and census.

Observations:

- (i) The federal government has no exclusive powers over oil and gas, or over any other natural resources other than water originating from outside Iraq.
- (ii) The federal government has no exclusive powers over rights within Iraq, i.e., regions are free to develop their own bills of rights and freedoms.
- (iii) The federal government has no exclusive powers over elections or referendums.
- (iv) Many of these exclusive powers are confined to formulation, and do not cover execution.
- (v) By virtue of Articles 115 and 121 (2) discussed above, Kurdistan's laws are supreme in all domains outside the exclusive powers of the federal government.
- (vi) Any 'legal text that contradicts' the Constitution is to be considered void (Article 13 (2)); this provision alone renders all of Saddam's oil and gas laws null and void yet the Baghdad ministries persist in believing they still apply.