

The Rights of Kurds in the Iraqi Constitutions on the Light of International Pact

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ABSTRACT

To start with the theories of constitution we should start with the Political theory and the standard definition for the constitution could be regarded as both operations and/ or customs which compose the political entity, i.e., constitution is “the fundamental ‘rule’ of state” or is the “assembling of laws” (Casiglione, pp 419-422). Thus, constitution is the supreme laws of the state that people of the state has agreed previously to be govern with, and this brings to the attention the meaning of the general system or the administration of the public affairs, as we know that any constitution in its preamble defines the people of the state and the name of the state, the system of the state, the governing rule as well as, the traditions, customs and the charters of rights of the people and their participation on the public affairs (Casiglione, pp 419-422).

The constitutional theorists argue that the constitution is a charter or a rule to the judges to judge in cases that are raised to the courts, but currently most of constitutional theorists believe that the judges will be competent to considerable discretion in judging in cases that will be produced to their courts (Casiglione, p 425).

(1-1) The Constitutional processes in Iraq:

The institution building in Iraq started in early twenty century with the first constitution-making which was identified as the Iraqi Monarchy Basic Law (1925) and in the time, drafting this delicate constitution considered as a big challenge faced the British administration and the new born state of Iraq. Because the multi-ethnic entities of Iraq with its component (Arab as the majority was divided to the majority- Sheait- Arab and minority- Sunni-Arab, and Kurds which also divided to majority- Sunni- Kurds and minority- Sheait-Kurds in addition to the other minorities like Turkmen, Christians, Yazedis, and Mandi Sabeans.

This paper studies the rights of the Iraq's Kurdish population, who are according to official sources are approximately %20 of Iraqi population and are largely (though not entirely) concentrated in the Northern provinces of the country like Erbil, Dahuk, Suleimaniyah with lesser representation in Nineveh, Dyala, Wasit and Kirkuk. Kurds have their own longest history of a separate ethnic/religious identity from any of Iraq's major groups / ethnics, and their search for independence or autonomy has deep roots, strengthened by years of oppression upon the hands of various central governments in Baghdad. Consequently, Kurdish case has been considered as a dilemma for the central government (majority) to deal with. The successive governments of Iraq tried to use many different channels like legal solutions in attempting to find one-sided and incomplete solution without recognizing Kurds as a part of the solution and hence, they did not succeed because they ignored the Kurdish liberating movement and dealt with them as outlaws or in the best situation have been considered as insurgents or the external variable most of the time. To come across those governments policies in dealing with the minorities' rights, we need to study the constitutional process of the country, taking to the considerations that the constitution is the supreme law of the state.

This paper compares the three Iraqi constitutions (the constitution of 1925, 1970 and 2005) and examines each of them to evaluate the rights of Kurds as a second ethnicity in Iraq to find out the constitutions compliance with their aspirants about contributing to the political process in the country. Furthermore, the paper will investigate whether the constitution allowed the Kurdish authority to exercise sovereign authority on their historical Land-of-Kurds (Kurdistan) through the Autonomy system or federal system.

(1-2) Iraqi Monarchy constitution (1925):

The Iraqi Monarchy Fundamental Law (constitution) of 1925 has been identified as “Fundamental Law” because this term was used by the legislators in the seventeen and eighteen centuries when they based their nomination on the fact refers to the concept of common law theory which was famous in the time. In the other world (western Society) this “Fundamental Law” had been theorized to be a supreme law for all Iraqi kingdom Territory.

On 23 August 1921, King Faisal I became the king of Iraq and on 24 October 1922, both governments of Iraqi kingdom and United Kingdom agreed to enter into treaty to organize the relations between both countries and to organize the governing regime for the new established country as well.

Article III of this treaty speculated that, his majesty the king of Iraq agree to draft an Iraqi Basic Law and submit it to the Establishment Council (Parliament) for approval, and in the article III, clause 2, 3 and 5 of the same treaty there was an attempting by the British deputized authority to mention to the minorities and multi-ethnic group on the country.

In article III-2 which stated that “To take into consideration the rights and wishes of the People of Iraq” we find a reference to the regime that it should be a democratic regime. And in article III-3 “Dictate and guarantee the freedoms and the religion rituals that not decline the general orders” and this article guarantee the freedoms for all the Iraqi components in addition to the right of faith, but it restricted by “general order” law. The implication of this article is that some of the Iraqi ethnicities have been considered as un-believers, and they should change to Islam or will be viable to execution according to the rules of Islam, because religion was to be considered as general order. In article III-5 is speculated that “To guarantee the right of each ethnicity to build there own schools and education in their own languages”, this first mentions to first to the right of different ethnicities to exist, i.e., to be free to talk and learn in their own language.

These above three articles mentioned are generals about the rights of the minorities in Iraq and the coming constitution included these general principles also. Even it did not refer to the Kurdish rights directly, it was an attempt to abreast the



requisition of the Kurds, and to guarantee that this constitution will be implemented peacefully.

On 14 June 1924 the Establishment Council (Parliament) voted to approve the draft of the Fundamental Law (constitution) with his 125 Articles and sent to the King Faisal for approval, and after that on 21 March 1925, the Iraqi Fundamental Law (constitution) have been published on Al-Wakay'a Al-Iraqya, the official gazette of the government of Iraq and the article (1) stated that provisions of this constitution shall be enforced in all parts of the Kingdom of Iraq.

In the content of this constitution there is no clear reference to the Kurds as a minority, but in Part I in the section of the Rights of the People, we find that in article 6. This states that "There shall be no discrimination in the rights of Iraqis before the law, regardless to differences in language, race or creed", there is a contained statement admits the existence of more than one ethnicity in the state by reference to the language, race or faith. And in article 17 which stated that the "Arabic shall be the official language, except for cases prescribed by special laws", this exception have been treated as the case of languages, but this remain invalid until the law no. 74 was issued, "the Law of the Local Languages" by Iraqi government on 23 May 1931.

This law recognizes the Kurds as a second ethnicity by approving the Kurdish language as official language in the Northern provinces of the country, Erbil, Kirkuk and Suleimaniyah and left the decision to the people in choosing between Arabic and Kurdish language in Mosul province and in the districts of Mosul because in that time Dahuk was not recognized as a province and it was a district within Mosul province. Accordingly, for that reason, districts such as Dahuk, Emadya, Zakho, Zebar and Akree chose Kurdish language as official language.

Despite of the right of using Kurdish language as official language, but this did not meet the minimum demands of Kurdish people on their fighting for the independency or autonomy. Hence, Kurdistan area witnesses many revolutions in Mezori, Barzan , Mergasour and Sinjar areas on 1935 and around Mosul in 1939 , Sulemanyah in 1941 , Barzan , Rawandoze , Akree and Emadya in 1945 and Rawandoz and Zebar in 1947. (Barzani p73)

These revolutions has been faced with a fist of steel by the government of Iraq and used the article 120 of the constitution which allowed the “King to have power, subject to the approval of the Council of Ministers, to proclaim Martial Law provisionally in those districts of Iraq which are exposed to the danger of disturbances or attacks”. And these actions and re-actions pushed the situation to the edge, and for decades most of Iraqi budgets has been allocated to the military operations and the development and rebuilding has been done very slowly or stopped most of the time all over Iraq. In particular, Kurdistan area experienced a destroyed infrastructure that has been destroyed due to the war between both sides, and this situation remained between flux and ebb, and when the fight stopped due to the cease fire, the rebuilding started to re-habitat what destroyed, and unfortunately most of these re-habitations not done due resuming the fights.

These instabilities produced a situation of no war and no pace. In Kurdistan and Iraq, due to misunderstanding that the Kurds were perceived as a separate ethnic/ identity with the other Iraq's major groups / ethnics, and this situation continued until the coup to overthrow the Monarchy regime in Iraq on 14 July 1958 by a nationalist military officers and this caused for another tragedy era to the Kurdistan specifically and to Iraq generally.

(1-3) the Republic Temporary Constitutions (1958, 1963 and 1964):

Between 1958 to 1968, Iraq witnessed three military presidents, whose affectations were ranging from Brigadier Abdulkareem Qasem and his left wing affectation to Socialist and his rapprochement from the former Soviet Union, to Colonel Abdulsam Aref , the Arab nationalist, and his continues requisition for unify with other Arab countries like Egypt and Syria.

Within a decade, three temporary constitutions on 1958, 1963 and 1964 have been issued to the republic of Iraq, and some development have been taken place to approve the rights of the Kurds, but because that our essay will cover only (1925, 1970 and 2005) constitutions , therefore, we suffice by this short reference to this period.

(1-4) The Third Republic Temporary Constitution (16 July 1970):

After a decade of instability in the Iraqi political system, Colonel Ahmed Hassan Al-Bakir comrades-in-arms of Colonel Abdulsam Aref's, overthrew his regime on 17 July 1968, and brought the Arab Ba'ath Socialist Party to the power, and since that time and until 2003, Kurds faced the most darkness era and experienced their bloodiest history that registered by their self- sacrifice.

Between "17 to 30 July 1968", Al-Bakir the new president of Iraq and with cooperation of Saddam Hussein the head of "Ba'ath assassination aquad" progressed a campaign to eliminate their competent colleagues, and on August 1968, Saddam the thirty years old became vice president of Iraq and the most powerful person on the Ba'ath regime and started a new tenure in Iraqi history.

On 21 September 1968, after setting up their regime, the new leaders of Iraq issued their new constitutions which incorporated their party's ideology, but it was clear for the observers that most articles of this constitution have been copied from the pervious 1964 constitution, and as well as, there was no development in terms of the Kurds rights.

In September 1969, the Revolution Command Council (RCC) "the supreme authority in Iraq until 09 April 2003" started peace negotiation with the leader of the Kurdish revolution Mala Mostafa Barzani the head of Kurdistan Democratic Party (KDP) which is the main Kurdish political party in Iraq, and this negotiation came to the end with the Agreement of 11 March 1970.

This agreement included 15 articles, and on the agreement visage, stated that the RCC guarantee the rights of the Kurds and supports them to develop their nationalist poverty and to fully enjoy their nationalist rights.

In article 1, "Kurdish language is official, beside Arabic language, in the areas which most of the residences are Kurds, and the schools on these areas will teach in Kurdish and the Arabic language will be taught as a second language, and in other parts of Iraq, Kurdish language will be taught as a second language with the Arabic language ".

In article no. 2 stated that Kurds contribution in the governing system will be equal with Arabs, and their rights on getting official posts on the important and sensitive post, such as, Ministers and Army commanding are preserved.

In article no. 4, the officials on the administration units whose most of their population are Kurds shall be mostly Kurds, like the (governor, mayor, police commander, chief of security and other important posts), and starting a re-habitations campaign to develop the Kurdish area and transfer back the Kurds and the Arabs who left their region because of the conflict in their original areas

Article 10 of this peace agreement refers to amendments of some articles in the constitution, such as, “the Iraqi people are composed of two principal nationalities, the Arab nationality and the Kurdish nationality, and this constitution acknowledges the national rights of the Kurdish people and the legitimate rights of all minorities within the Iraqi unity).

Regarding the areas that will be included to the autonomy law, the agreement on article 14, which stated that the government will do the necessary steps to unify the governorates and districts that are inhabited by Kurdish majority depending on the official statistics, and until completing this procedures and establishing the self-administration of the Kurds, but the article still kept the management of national sources on the central government hands.

In the article 15, the agreement stated that the Kurdish people participation in the legislature is according to their percentage in the whole population of Iraq compared the other Iraqi populations.

On 16 July 1970, the Revolution Command Council issued a new temporary constitution for Iraq, and it included all the amendment which they agree with Kurdish leadership on 1970 peace agreement and are as follows:

In the Article 5-B is stated that “The Iraqi people are composed of two principal nationalities, the Arab nationality and the Kurdish nationality” and this showed a development which considered Kurds as second nationality on the country.

The Article 07-B stated that “the Kurdish language will be the official language along with the Arabic language in the Kurdish areas”, and after that on 11 March 1970, Iraqi Revolution Command Council issued another amendment to the constitution on the Article 08-C which stated that “the regions which mainly inhabited by Kurds enjoy is autonomy according to the law speculations).

After that the legislative council for Kurdistan Autonomy Area and the executive council for Kurdistan Autonomy Area as well are established. An appeal court to run the courts on the Autonomy Area is established, and they start to reconstruct the infrastructure in the region and establish Sulemanyah University in addition to many other institutes which have been established in the region, and Erbil became the capital of Kurdistan Autonomy Area.

But because the supremacy of the central government and their regular interfering on the new areas institutions, as well as, the Kurdish- Kurdish conflict which caused to separation among the Kurdish leaderships resulted to boycott the 11th of March agreement by the historical leader Mala Mustafa Barzani and his party KDP and the new young leadership which headed by Mam Jalal Talabani and his new established party the Patriotic Union of Kurdistan (PUK) emerged as supporter to apply the 11 March agreement.

Finally, the 11 March agreement have been implanted from one side by Iraqi government, and this led to break the cease- fire and renew the clashes in the region, and the military operation continues to bankrupt the Iraq army until “the army magazines and warehoused became empty on 1975 after Iraq’s joining to October war against Israel on the Syrian front and the tough fighting against the Peshmarga (the Kurdish name for the fighters for freedom)”, all this variables pushed the government of Iraq to make a way into to Algiers Agreement on 1975, with Mohammed Ridha Pahlavi the former Shah of Iran, which submitted a whack attack to the Kurdish revolution rachis, as Kurdish leaders confess . (Saddam Hussein, 1982).

The Barzani leadership don’t made a historical mistake on losing this opportunity; because this was the first time in the Kurdish history the Iraqi government (GOI) recognizes the Kurds as nationality and consider Kurdish language as official language besides the Arabic language in the Kurdish area. Furthermore, regarding identifying the border for the Kurdistan area, the constitution stated that the region which mainly

inhabited by Kurds enjoys its autonomy according to the law speculations. The Kurdish leadership allegation was that the GOI was hampering and postponing the implementing of the agreement, and they given an example that GOI gone behind the schedule of pinpointing the border for the autonomy area. but as realty this rights was not exist.

Losing the trust between both sides and the dishonest intentions between them as well as, the external variables like the neighboring countries who have a Kurdish minorities and the Arab- Israeli conflict and continues attempting to get Iraq out from this conflict by keeping it busy with its internal problem, all this caused to fail this historical agreement.

(1-5) Kurdistan between “1975 to 2003”:

After Algerian Agreement on 1975 and falling down the Kurdish revolution, the situation in Kurdistan witnessed a tranquility period until 1980. When the Iraq- Iran War broke out and Iran started to support the Kurdish parties and their (Peshmarga) to fights beside Iranian army against Iraqi army, and this cooperation continues until 1987 when a small battalion of the (Peshmarga) assisted Iranian revolution guards (Pasdaran) to occupy Halabja district near the Iranian border , and this act caused to unstudied re- action, when Iraqi leaders replay by giving the order to Iraqi air force to use the prohibited chemical weapons against them and on the result a serious civilian casualties “more than 5000” have been killed by poisoning. (Kurdish official sources)

On 08 August 1988, the Iraq- Iran war was brought to an end, and directly after that, Iraqi army supported by thousand of Kurdish fighters “Jash” started a multi- phase military operation which identified as Al-Anfal (chapter “Sorat” from the holly Qura’n , talking about fighting the unbelievers), and this caused to most hideousness crimes against Kurdish civilians, Which described by “Iraqi tribunal criminal court when they issued the judgment record that Al-Anfal considered as a Crime Against Humanity”. (Court decision on Al-Anfal case)

On 17 January 1991, President Bush’s administration led a coalition of 33 states to liberate Kuwait from six months of Iraqi occupation, and on February 1991, most of the Iraqi people on 15 governorates from 18 appraised against President Saddam Hussein’s regime. And on Kurdistan the Kurdish Front which was include the main eight parties (KF) controlled the Kurdish governorate and with direct support from the US

administration and the United Nations Security Council Resolutions on establishing the safe haven for the Kurds which known as the (no-fly- zone above of the line 36). With the International community protection and support, the Kurdish parties succeeded to build their own quasi- state institutions such as Parliament, council of ministers and before the post war on Iraq in 2003; Kurdistan became a real quasi- state.

On 09 April 2003, the coalition that led by the U.S. forces succeed to occupy Baghdad and destroy the system of the state, leaving a mass destruction, and as a part of this destruction, the Iraqi temporary constitution of 1970, which has been canceled practically by collapsing the regime, and a new pact and system have been introduced, and the last insurgents and neglecting parties / ethnics became the new leaders for the state of new democracy Iraq.

(1-6) Iraqi Interim Constitution (October 2005):

On October 2005, Iraq got its Interim Constitution when most of the Iraqis got out from their houses challenging the security situation to put their fingers on the inkpot and vote “Yes” for the new constitution, this “Iraqi” legal supreme document which is drafted supported with U.S.

And for the first time the federal system have been chosen as system for the government; two official languages to the country is recognized, the sectors are almost certain to be determined by Iraqis' ethnic and religious identity. The Iraq people consisted of into Shia', Sunni, Kurdish, Turcoman, Assyrian, Christian, Yazedis, and Mandi Sabeans identities.

And because of the Kurdish active participation in the “new Iraq”, the constitution indicated most of their requests as mentioned on the articles below:

In the article 1 it is stated that “The Republic of Iraq is a single, independent federal state with full sovereignty. This Constitution is the guarantor of its unity”, and the federal system was chosen under the Kurdish request, and this will be their condition to stay with Iraqi unity.



In article 4-1 stated “The Arabic language and Kurdish language are the two official languages of Iraq.... The right of Iraqis to educate their children in their mother tongue” and this right have been guaranteed to the Kurds in the 1970 constitution.

And a considerable development has been done on the same article 4-Second:

A. “Publication of the official gazette shall in the two languages”, because since the establishment of Iraq as a state on 1921, the official gazettes Al-Wakay’a Al-Iraqya, was printed in Arabic language only.

B. “Speech, conversation and expression in official settings, such as the Council of Representatives, the Council of Ministers, courts, and official conferences, shall be in either of the two languages”. Since 1992 all the institutions and agencies in Kurdistan are using the Kurdish language, but for the other parts of Iraq, only the Arabic language was used, and this article has been taken from the Canadian constitution which deals with the French speakers minorities, when they considered as a second language beside the English and French shall be used in all Canada.

C. Recognition and publication of the official documents and correspondences shall be 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 settings enjoined by the principle of equality such as bank notes, passports and stamps.

In the article 4-Third: (The federal institutions and agencies in the Kurdistan region shall use the Arabic and Kurdish languages), because after 1991 most of the schools which were in Arabic has been closed, and in Erbil governorate in 2002, there was one primary school and one secondary school conducting education Arabic and it was allocated for the Arab students only, and this was one of the reason to issue this article.

In Section Five: Powers of the Regions, the Article 113 mentioned (First: “This Constitution shall approbate the region of Kurdistan and its existing regional and federal authorities, at the time this constitution comes into force”, the constitution recognizes the establishing the federal region on 1992.

Furthermore, for the article 137 which stated that the “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 agreements - shall be considered valid unless it is 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”, and this also considered as positive reference to the regions institutions.

Conclusion

During the history the Iraqi Kurds succeed to write their national rights by the blood, and from the constitution of 1925 when there was no reference to the Kurds and to 1970 constitution and the agreement of 11th of March 1970, when confess that Iraqi people are composed of two principal nationalities; Arab and Kurd and considering Kurds as second nationality in Iraq, and their language became the official language beside the Arabic in Kurdistan, and establish Kurdish administration which identified as Kurdistan Autonomy Area (KAA), and establishing the legislative council for this Area, in addition to the executive council and appeal court to run the courts in the Autonomy Area, and developed the infrastructure of the area ,opening Sulemanyah University.

But even these amendments on the 1970 constitution, not succeed to solve the Kurdish case in Iraq for many reasons. First: Losing the trust between both sides and the dishonest intention between them. Second, the supremacy of the central government on autonomy areas’ institutions and works. Third: the Kurdish internal conflict between two generations which caused to separate the leaderships to two wings, one of them Barzani and his party the KDP which boycott the 11th of March agreement and the second new young leadership which headed by Talabani and his PUK party which emerged as supporter of the agreement.

This disunity on the side of the Kurdish leadership caused to implant the agreement by Iraqi government only, and this caused the renewal of the clashes on the region, until 1975 when GOI signed Algerian Agreement with the former Shah of Iran, which submitted a whack attack to the of the Kurdish revolution rachis, as the Kurdish leaders confess .

The Barzani leadership don't made a historical mistake on losing this opportunity; because this was the first time in the Kurdish history the Iraqi government (GOI) recognizes the Kurds as nationality and consider Kurdish language as official language besides the Arabic language in the Kurdish area. Furthermore, regarding identifying the border for the Kurdistan area, the constitution stated that the region which mainly inhabited by Kurds enjoys its autonomy according to the law speculations. The Kurdish leadership allegation was that the GOI was hampering and postponing the implementing of the agreement, and they given an example that GOI gone behind the schedule of pinpointing the border for the autonomy area. But in fact like this right was not received practically.

Losing the trust between both sides and the dishonest intentions between them as well as, the external variables like the neighboring countries who have a Kurdish minorities and the Arab- Israeli conflict and continues attempting to get Iraq out from this conflict by keeping it busy with its internal problem, all this caused to fail this historical agreement.

The 2005 interim constitution recognizes the Kurdish region and its self-governing system, and the regional judiciary and legislature will have relative independence. And recognize the Peshmarag as the Region Guards whose salaries are allocated from the federal budgets. And the KRG will control over police forces and internal security. As well as, control over natural resources, but the borders of Kurdistan remain vague until implementing the article 140 from the constitution. It is recognized as a single autonomous federal region.



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