A STUDY OF THE OIL AND GAS LAWS OF THE KURDISTAN REGION-IRAQ

by

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Abstract

This thesis examines the oil and gas legal framework of the Kurdistan Region-Iraq for the purpose of identifying current challenges in the governance of oil and gas and how such challenges can be resolved. In particular, the structure and composition of the Iraqi Constitution, the Kurdistan Region's Oil and Gas legislation and Model Production Sharing Contract are analysed to determine how the Kurdistan Region's oil and gas sector can be developed. Kurdish claims of ownership, management and entitlement to a share of oil and gas revenue has resulted in a strong legal case for Kurdish competency over oil and gas governance in Kurdish dominated areas in Iraq.

Dedication

This thesis is dedicated to my family who have always known the value of education and self-betterment. To my grandfather Mustafa Askari who passed away during my research, I am eternally thankful for the wisdom and kindness you brought to my life. To my father Ahmed and my mother Shawbo I owe everything, I would not be where I am today if it was not for you. To my wife Khoshe and our two girls Zara and Yara for the incredible patience, support and love that they have given me throughout my doctoral studies, I could not have done it without you. Finally, to my brother Alan, sisters Ariz and Ara, thank you for always being there and staying true to who you are.

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Illustration(i)[1]

This map has been adapted by the International Crisis Group from a map made available by the U.S. Government.
The Kurdish Green Line has been added, and the border of the "Disputed areas" adjusted to add more detail.

[1] International Crisis Group, *Iraq's Oil Map* (International Crisis Group).

Illustration (ii)[2]

[2] Map of Iraq created by Maximilian Dörrbecker.

LIST OF TABLES

Table [2.1]

Sector	Task and Description	Implications
Upstream	Exploration: investigating potential sites for oil and gas in commercially viable quantities	Involves major financial, environmental, political and at times legal risks. Also determines the quantity of oil and gas resources a country possesses and produces.
	Production: extraction of oil and gas deposits	Potential environmental risks but creates revenue for the state.
Midstream	Transportation and Logistics: Using different mediums of transportation such as freights, tankers, ships and pipelines for the transfer of oil and gas within the state or externally.	Requires cooperation and coordination between national governments, sub-national and local governments as well as governments of other states.
	Storing oil and gas deposits: Resources that are not transported (whether for export or domestic consumption) are stored.	Potential environmental risks (see below) and security risks.
Downstream	Refining: process of turning oil and gas resources into other products such as liquefied petroleum gas, solvents, diesel fuel, lubricating oils, asphalt and tar, sulfur etc.	Could have a number of environmental risks including water contamination, thermal pollution, oil spills, release of hazardous materials into the environment, soil and land contamination and noise pollution.
	Marketing and Sale: Commercial negotiation and sale of oil and gas or associated products.	

TABLE [2.2]

Country	Form of Governance	No. of Constitutional provisions	No. of Constitutional provisions expressly referring to oil and gas/natural resources[3]	Crude oil reserve ranking in the world [4]	Gas reserve ranking in the world[5]	Petroleum and other liquids production 2014[6]	Dry Natural Gas Production 2011[7]
Angola	Republic	225 articles	6	18	40	16	67
Brazil	Federal Republic	98 Articles	12	15	33	9	33
Indonesia	Republic	37 Articles	3	28	13	22	11
Iran	Islamic Republic	177 articles	6	4	2	7	3
Iraq	Federal Republic	144 articles	2	5	12	8	65
Kuwait	Constitutional Monarchy	183 Articles	3	6	21	11	34
Mexico	Federal Republic	136 Articles	4	17	31	10	18
Russia	Federal Republic	137 articles	4	8	1	3	2
UAE	Federation of hereditary monarchy	152 articles	2	7	7	6	16
Uzbekistan	Republic	128 articles	1	44	20	51	13
Venezuela	Republic	350 articles	10	1	8	12	27

[3] Numbers based on how many articles in a constitution that explicitly state words associated with petroleum resources. As such only articles which that explicitly state the words oil, gas, mineral, petroleum, hydrocarbon and natural resources have been counted.

[4] United States Energy Information Administration, 'International Energy and Data Analysis ' (*www.eia.gov,* 2015) <http://www.eia.gov/beta/international/> accessed 12 September 2015.

[5] Ibid.

[6] Ibid.

[7] Ibid.

TABLE 3.1

Public Body	Appointment of Members	Fixed term of members	Renewable fixed term?	Functions	Independent[8]
KEPCO	By KRG Council of Ministers and approved by an absolute majority in Kurdistan Parliament	5 years	Yes, requires absolute majority in Kurdistan Parliament	- May compete with other companies to obtain authorisations for carrying out petroleum operations on future fields. - May enter into joint ventures or other contractual arrangements in the KRI, Iraq or abroad. - Create subsidiaries to carry out petroleum operations on future fields.	Yes
KNOC	By KRG Council of Ministers and approved by an absolute majority in Kurdistan Parliament	5 years	Yes, requires absolute majority in Kurdistan Parliament	- May compete with other companies to obtain authorisations for managing current petroleum fields. - May enter into joint ventures with reputable IOCs to enhance production from current fields. - May compete to obtain authorisations regarding future fields.	Yes
KOMO	By KRG Council of Ministers and approved by an absolute majority in Kurdistan Parliament	5 years	Yes, requires absolute majority in Kurdistan Parliament	- Market or regulate the marketing of production from petroleum operations and with permission also market contractor's share of petroleum.	Yes
KODO	By KRG Council of Ministers and approved by an absolute majority in Kurdistan Parliament	5 years	Yes, requires absolute majority in Kurdistan Parliament	- Manage KRG owned infrastructure relating to petroleum operations and make available such infrastructure to private sector entities in the KRI. - May, after obtaining authorisation from Council of Ministers, create subsidiaries for petroleum operations and enter contractual arrangements in the KRI or other areas in Iraq. - With approval from the Council of Ministers, carry out new downstream petroleum operations with IOCs or local private companies. -Licence the management of its infrastructure to third parties.	Yes

[8] Reference to this column is whether these institutions are independent legal entities with financial and managerial authority.

KOTO	By KRG Council of Ministers and approved by an absolute majority in Kurdistan Parliament	Not defined	Yes, requires absolute majority in Kurdistan Parliament. The powers and accountability of KOTO to be defined by law.	- To be regulated by law for the purpose of managing revenues and distribution thereof.	Yes

TABLE 4.1

Type of Contract	Classification of IOC status	Party bearing risk before project reaches production phase	Access to Production and Financial Provisions
Modern Concession	Concessionaire	Concessionaire	Payment of taxes and royalties to government Concessionaire has access to production in absence of special provisions granting access to other parties.
PSC	Contractor	Contractor	Contractor gets only part of profit oil (access to production wise)
Risk Service	Contractor	Contractor	100% government take Contractor only takes cash subject to buy back clause or other provisions
Hybrid/Joint Venture	Contractor	Contractor	Depends on contractual joint venture or equity joint venture. If contractual joint venture- parties will get access to production in accordance with their interest in that joint venture In equity joint venture parties will not get any production but simply get dividends because they are shareholders in a company and it is the company that has access to the production. Here neither the state or contractor has access to petroleum but rather the legal entity (the company they have jointly created) will have access

TABLE 4.2

[9]Contractual model	Number of Countries adopting this contractual model	Examples of Countries using contractual model	Risks and rewards for the state and contractor
Concession	60	US, Norway, Thailand, UK, Kuwait, Peru, Australia, Brazil, Namibia	All risk and all rewards are for the contractor, no risk for the state but reward in the form of payment made for award of contract.
Service Contract	4	Mexico, Oman, Iraq	No risk for contractor, all risk and all rewards for the state.
PSC	41	Indonesia, India, Egypt, KRG, Angola, Yemen	Risk at exploration phase on contractor and rewards are shared between contractor and the state.
Joint Venture	20	Pakistan, Colombia, Cameroon, Russia	Share in risk and share in reward for both state and contractor
Hybrid	16	China, Kenya, Malaysia, Myanmar	Mixed for both state and contractor

TABLE 4.3

Tax contractor obligated to pay	Exempt
Income tax and social security contributions	Customs tax
Corporate Income Tax	Additional Profit Tax
VAT	Surface Tax
	Windfall Profits

[9] Figures based on a 2014 report at the CWC Conference of KRG petroleum industry in London. Jay Park, *Kurdistan Region's Emerging Oil and Gas Regime* (CWC 18 December 2014).

LIST OF ABBREVIATIONS

CPA	Coalition Provisional Authority
IC 2005	Iraqi Constitution 2005
IFG	Iraqi Federal Government
IGC	Iraqi Governing Council
INC	Iraqi National Congress
IOC	International Oil Companies
IS	Islamic State
JV	Joint Venture
KDP	Kurdistan Democratic Party
KEPCO	Kurdistan Exploration and Production Company
KEPIB	Kurdistan Environment Protection and Improvement Board
KNOC	Kurdistan National Oil Company
KODO	Kurdistan Organisation for Downstream Operations
KOMO	Kurdistan Oil Marketing Organisation
KOTO	Kurdistan Oil Trust Organisation
KRG	Kurdistan Regional Government
KRI	Kurdistan Region of Iraq
LCIA	London Court of International Arbitration
MCC	Modern Concessions Contract
MNR	Ministry of Natural Resources
Model PSC	Kurdistan Region-Iraq Model Production Sharing Contract
NCRC	National Council for Revolutionary Command
NOC	National Oil Company
OGL	Kurdistan Oil and Gas Law (Law No.22 of 2007)
PSC	Production Sharing Contract
PUK	Patriotic Union of Kurdistan
RCOG	Regional Council of Oil and Gas
RSC	Risk Service Contract
SOMO	State Organisation for Marketing Oil

TAL	Law of Administration for the State of Iraq for the Transitional Period
TPC	Turkish Petroleum Company

CHAPTER ONE: INTRODUCTION

1.1 General Objectives

The overall aim of this research is to investigate and analyse the oil and gas[10] legal framework of the Kurdistan Region of Iraq (KRI). It does not aspire to apply a broad brushstroke to Iraqi law but seeks to centre on how oil and gas law in the KRI is governed, identifying current challenges and proposing remedies to such challenges. Although the focus will predominantly be centered on the legal framework of petroleum governance in the KRI, this research will also consider the role of politics, economics and history for the purpose of providing contextual overview and offering plausible recommendations.

1.2 Specific Objectives

Within the parameters of the General Objectives above, this research will focus on the following debates, issues and tasks:

- Whether the oil and gas agreements between the International Oil Companies (IOC) and the Kurdistan Regional Government (KRG) are constitutional according to the Iraqi Constitution of 2005 (IC 2005).[11]
- Critically evaluate the petroleum legal framework of the KRI.
- Provide analysis of the oil and gas regime adopted by the KRG compared to other regimes.

[10] Throughout this research reference will be made to the word "petroleum", which will be used interchangeably with the words "oil and gas".
[11] The Constitution of the Federal Republic of Iraq 2005.

- Examine and critically study the composition and structure of the current petroleum contracts between the KRG and IOCs.
- Investigate the current legal challenges in the KRI for the purpose of developing and maintaining an effective and fully functioning oil and gas sector.
- Recommend solutions to the disputes between the KRG and the Iraqi Federal Government (IFG) relating to the ownership, management, production, exportation and revenue sharing from oil and gas.

There are no clear answers to some of the topics above or explanations thereto. However, a critical understanding of these issues will allow identification of current challenges and potential remedies.

1.3 Significance and Rationale

This research is significant for several reasons. First, an examination of the legal framework of the oil and gas sector in the KRI presents an opportunity to consider and analyze laws of one of the world's emerging oil and gas markets. Second, a comprehensive account of the current challenges and areas in need of reform may assist legal professionals, policy makers, politicians and IOCs in understanding and working to remedy the grievances of stakeholders in the KRI petroleum Industry. Third, oil and gas are the most precious resources in Iraq's economy,[12] therefore developing, sustaining and protecting the industry is important to the lives of the Iraqi people. Accordingly, it is the position of this study that oil and gas are the foundations of future

[12] Revenue from oil and gas accounts for 90% of Iraqi government revenue and 80% of foreign exchange earnings. It has been estimated that the KRI has proven reserves of at least 4 billion barrels. See Central Intelligence Agency, 'The World Fact Book: Iraq' (*CIA.gov*, 2014) www.cia.gov/library/publications/the-world-factbook/geos/iz.html accessed 3 February 2015 and United States Energy Information Administration 'Iraq: Overview' (*EIA.gov*, 2015) http://www.eia.gov/countries/cab.cfm?fips=iz accessed 3 February 2015.

development in the KRI and Iraq. Fourth, legal recognition of the status of IOC contracts with the KRG does not only represent a right of control over resources or financial benefits thereof, but more importantly, it represents an unequivocal acceptance by actors in the petroleum industry of the KRG's political and legal authority in Iraq. Finally, this thesis offers recommendations as to how a settlement might be reached, which may avoid or limit conflicts between the KRG and IFG. There are many divisive and contentious issues between the KRG and the IFG including:

- control and legality of Kurdish armed forces.
- ownership and control of natural resources and revenue sharing from oil and gas exploitation.
- KRG's share of the Iraqi Federal budget.
- claims over land referred to as disputed territories.
- inclusiveness and power sharing in Baghdad.
- devolution of power.

In short, the disputes between Baghdad and Erbil relate to the legal authority of the KRG and the extent or limitations of such authority. The disputes relating to oil and gas are the latest manifestations of many clashes between the parties over the past century.

The IC 2005, legislation, regulations, history and politics outlined in the coming chapters, are the battlegrounds for the controversial debates above. Recent developments since the 2003 Iraq War have seen the KRI establish its own capital (Erbil), government, parliament and court system through its official recognition as a Region, protected by the constitution. The Kurds have emerged

as one of the major power blocs in Iraq, continually pushing for devolution of Baghdad's power, and possibly its own independent state. To this end, the KRG has aggressively pursued a policy aimed at economic self-sufficiency. At the heart of this policy is ownership and control of natural resources in the KRI and other areas in northern Iraq, a policy that Baghdad has continually opposed. The Kurds contend that their agreements with IOCs, production and export of oil and gas from the KRI are not only a fundamental right, but also one, which is protected by the IC 2005.

1.4 Structure of the Research

This research will be divided into six chapters, each providing critical analysis of the legal realities in the KRI and investigating what is required to strengthen the legal framework in the context of oil and gas.

Chapter One: Introduction

Chapter One sets out the aims and objectives of this research, providing the rationale for this thesis. Furthermore, it introduces the main issues and debates, the methodological approach employed and the conceptual framework of the research.

Chapter Two: Background and Historical Context

This chapter is written as an introduction to the historic events, predating Iraq, during Iraq's creation, and ultimately providing a chronological analysis of key events until modernity. This background provides a contextual backdrop to the research, offering explanations as to how historical and political influences have shaped the governance of the petroleum sector in the KRI.

Chapter Three: The Constitutional Framework

As the highest legal authority in Iraq, the constitution defines the legal relationship between the KRG and IFG, sets the parameters for a legal framework and addresses issues relating to ownership of resources. It is therefore essential that oil and gas provisions in IC 2005 are examined comprehensively. This chapter will analyse the IC 2005 and investigate the differing interpretations of provisions relating to oil and gas among others, between the IFG and KRG. Part of the chapter will outline Iraq's constitutional history and focus on the Transitional Administrative Law (TAL),[13] as this will provide a contextual understanding of the IC 2005.

Chapter Four: The Petroleum Legal Framework

This chapter will analyse the petroleum legal framework of the KRI for the purpose of governing petroleum operations. That is to say the relevant acts of parliament and secondary legislation will be explored so as to show the context within which oil and gas laws in the KRI function. This chapter will primarily focus on the Kurdistan Oil and Gas Law 2007 and analyse the most important provisions of differing drafts of the federal hydrocarbon law.

Chapter Five: The Contractual Framework

Chapter Five will explore the most popular contractual models in international petroleum operations and advocate for the most suitable for the KRG. In particular, the KRG Model Production Sharing Contract (Model PSC) will be analysed to identify strengths and weaknesses to offer recommendations for future amendments to the model contract. Furthermore, an

[13] Law of Administration for the State of Iraq for the Transitional Period 2004.

examination of the petroleum contracts between the KRG and IOCs will take place to identify and analyse the petroleum contractual process.

Chapter Six: Conclusions and Recommendations

The concluding remarks will summarise the questions, debates and tasks undertaken in this research and offer suggestions as to how the KRG can improve its legal framework. Recommendations will be made as to how legal improvements can attract prospective investors, help facilitate clear and efficient petroleum transactions and reduce the risks associated with an underdeveloped legal system. The conclusion will also offer suggestions as to how the KRG can cooperate with the IFG to create an environment for petroleum commerce that is beneficial to all stakeholders.

1.5 Methodology

This research assesses the efficacy of the KRI petroleum legal framework by analysing and answering key research questions set out at subheadings 1.1 (General Objectives) and 1.2 (Specific Objectives). To do so, it has employed a multifaceted approach to present and examine the petroleum industry in the KRI holistically. A contextual comparative law approach relying upon immersion[14] of the researcher has underpinned the methodological approach to this research.

Although this work is legal in nature, it also makes inroads in the fields of politics and history to account comprehensively for the historical and political context of the KRI petroleum legal

[14] Vivian Grosswald Curran, 'Cultural Immersion, Differences and Categories in U.S. Comparative Law' (1998) 1 The American Journal of Comparative Law 43.

framework. The researcher believes that context[15] influences markedly the way in which legal systems are established, function and develop and that legal norms and institutions are conditioned by culture and social organization. The authority and efficacy of legal institutions often depend on underlying realities of class and power and how these fits in with the morality and custom of the region or country.[16] Social, political and historical context therefore frames the development and evolution of law in a given jurisdiction. For this reason, the researcher has relied upon historical and political analyses where relevant.

Furthermore, to acquire a deep understanding of the reality of the KRI's legal system, the researcher has resorted to a combination of desk research and legal and cultural immersion in the legal system of the KRI itself. This facilitated a better identification of key challenges and obstacles facing the petroleum legal framework in the KRI, a major step before analyzing this legal framework and providing recommendations for reform.

As laws and policies on natural resource governance generally and oil and gas in particular are in a documentary form, some of the research has focused on analyzing primary sources such as constitutions, legislation (primary and secondary) and official documents together with available secondary literature on the topics to be covered so as to meet objectives of the research outlined above. Therefore, information and data were collected from official KRG and IFG institutions as well as governments from other jurisdictions and international institutions such as the World Bank and United Nations. The study also reviewed relevant court decisions. Due to the lack of literature

[15] Phillip Selznick, 'Law in Context' Revisited' (2003) 30 Journal of Law and Society 177.
[16] Ibid.

on the current Iraqi legal system, particularly the Kurdish legal system, the primary focus is on IC 2005, the KRI legislation, relevant regulation, and Model PSC.

To fill the gaps that remained after this desk research and to acquire a deep knowledge of the legal system of the KRI, the researcher has undertaken research in the KRI. Understanding the legal culture and societal context into which the legal system is embedded requires a degree of proximity to ascribe meaning to the rules and practices of this foreign legal system. For this reason comparative researchers are encouraged whenever possible to practice cultural and legal immersion.[17] This immersion requires that researchers 'encounter' the foreign legal system on its own ground and spend time in the country itself to understand the import of culture, history, politics and society on the legal system as well as grasp the specificities of the local legal culture. This allows an understanding of the country's ideals, societal choices that underpins the legal system and helps uncover the application of law in practice through a socio-legal lens.[18]

Although the researcher traces his roots to a Kurdish/Iraqi heritage, he has lived most of his life, completed all his formal education and qualified as a solicitor in the United Kingdom. Consequently, it was decided in the early stage of the research that the researcher practised cultural and legal immersion in the KRI's legal system. To do so, the researcher spent two years working as a junior legal adviser to the Secretary of the KRG Cabinet in Erbil. During this time, the researcher was primarily engaged with oil and gas related issues, studying the way in which the KRG petroleum legal system functioned based on first-hand information and observation. This

[17] Mathias Siems, *Comparative Law* (Cambridge University Press 2014) 118.
[18] John Bell, *French Legal Cultures* (Cambridge University Press 2001) 2-5.

hands-on experience provided the researcher with a depth and wealth of knowledge that would not have been obtained in other ways.

A key advantage of resorting to cultural and legal immersion is that as an 'outsider' of the KRI's legal system, the research glimpsed at an 'insider view' and was better able to understand local concerns as well as the actual realities on the ground with respect to the KRI's petroleum legal sector. Furthermore, immersion also assisted in identifying what has shaped the current legal regime in the KRI and why. However, the researcher acknowledges that despite this immersion, he remained influenced by his own legal culture when interpreting what he observed in this foreign jurisdiction. Nevertheless, the methodology described in this section was considered the best approach to understanding and analyse critically the current petroleum structure in the KRI.

Not only has a comparative analysis been adopted for the purpose of understanding the KRI petroleum legal framework, but also for the purpose of identifying similarities and differences between KRI petroleum governance and those of other jurisdictions. Regarding the latter, the primary aim is to identify best practices in oil and gas governance and to assess whether such practices would benefit the KRI. Furthermore, the oil and gas industry in the KRI is relatively new and is still in its infancy when compared to established petroleum regimes around the globe. By comparison to such jurisdictions there is limited information written about the performance of the KRI petroleum industry. The study therefore relies on literature from various jurisdictions as well as Iraq and the KRI. In this endeavour, constitutions, domestic and international laws, government policies, regulations and other important instruments related to the governance of natural resources were reviewed and used where relevant.

This methodological approach was chosen to provide contextual understanding as well as to highlight current realities on the ground that has directly influenced the establishment of the petroleum legal framework and its implementation in the KRI. Not only is this key to the description and examination of the current legal framework in the KRI but also to propose solutions and reforms of this framework, a key objective of this research.

CHAPTER TWO: BACKGROUND AND HISTORICAL CONTEXT

2.1 Background

Understanding some of the key issues, themes and events of Iraq's troubled history is fundamental for this research as it provides a contextual backdrop and assists in comprehending the legal structure and legal challenges of the KRI petroleum Industry. History sheds light on the cause and effect of events and as such it can be used as an investigative tool to explore how the actions of actors have shaped the legal system in the KRI. To understand the laws and regulations relating to the Petroleum Industry in the KRI, it is also crucial to highlight the interaction between relevant actors and stakeholders. Historical insights may provide explanations to problems facing the KRI in the development of oil and gas law and how respective stakeholders have come to hold their positions and perspectives. That is not to say that importance of this debate only derives from history, but rather that the complex debate between Baghdad and Erbil has evolved from a political debate to a legal one. The aim is not to apply a detailed and comprehensive account of Iraq's history, but to emphasise key areas and issues that have continually obstructed Iraq's legal development. Such obstructions are numerous, all of which cannot be addressed in this text due to the goals and constraints of the research. However, it is necessary to acknowledge that current problems cannot be defined or limited to one single issue or event. Nevertheless, the relatively new KRI oil and gas frontier is arguably the most explosive and crucial factor threatening to destabilize Iraq as it embodies the contentious issues that have preceded it.

Apart from oil and gas the KRG and IFG clash on a number of other issues including but not

limited to the control and management of the armed forces, revenue sharing, constitutional powers of the KRG, the geographical borders of the KRI, the extent of power sharing with Baghdad and natural resources including water and land. These disputes vary in scale, both in terms of relevance to this research and wider implications for historians, students of politics and sociology. This chapter will detail some of the main issues as examples of the divide between Baghdad and Erbil historically under the following subheadings: History and Origins, Politics and Co-existence, Internal Politics of the KRI, Geography and Land, Water and Oil and Gas. A critical understanding of each of these sections will allow conclusions to be drawn as to how they have affected and shaped the current status-quo in Iraq and how they continue to influence/obstruct legal instruments required for the development of the KRI petroleum industry.

The Baghdad-Erbil divide can be drawn on many fault lines. However, the current competing agendas for ownership and control of natural resources perhaps best illustrates Iraq's internal legal and political problems. Considering the significance of some events in history, politics will be addressed as a stand-alone topic. The argument here is that petroleum resources and politics have affected Iraq's legal, economic and societal underpinnings in such a manner as to shape the country's identity (or lack of) and ultimately its characteristics as a state. As one of the most recognisable and important forms of energy, the struggle for Iraq's oil and gas reserves is of paramount importance as oil and gas are by far the country's most important source of income.[19]

[19] It is believed that Iraq has the world's fourth largest proven crude oil reserves. See Global Policy Forum, 'Oil in Iraq' (*GlobalPolicy.org,* 2014) <https://www.globalpolicy.org/political-issues-in-iraq/oil-in-iraq.html> accessed 4 January 2015 and OPEC, *'Annual Statistical Bulletin'* (*6th OPEC International Seminar,* Vienna June. 2015) https://www.opec.org/opec_web/static_files_project/media/downloads/publications/ASB2014.pdf accessed on 8 December 2015.

Reference to Kurds and Arabs denotes the political manifestation or representation of Kurdish and Arab blocs. Any reference made to Kurds, Arabs and Kurdish and Arab pertains to the collective political representation of the two ethnicities. The communities of Iraq have coexisted peacefully at different junctures in history and there are numerous familial, business and political ties formed across communities in many cities throughout the country. However, the history of Iraq shows that successive Iraqi governments of differing ideologies and composition have continually been in conflict with the Kurds and struggled to find a solution to the Kurdish question in Iraq.[20]

2.2 History and Origins

Much has been written about the history of Iraq and its different communities.[21]This chapter does not aspire to replicate these works but aims to introduce, discuss and examine the historically contentious issues between Kurds and Arabs in Iraq. An amalgam of different religions, cultures, languages, ethnicities and political groupings, Iraqis have coexisted and cohabited in the land that is now known as Iraq for centuries. Iraq is a myriad of complex inter-community relations, struggling for religious tolerance and identity. The disputes are multifarious and not limited to a Kurd-Arab divide but rather many other ethnic and sectarian groups within the country including Turkmen, Chaldeans, Assyrians and religious groups comprising mainly of Shi'a Islam, Sunni

[20] Reference to the Kurdish question denotes questions such as independence, autonomy and the rights of Kurds as a recognised people with their own identity, language and culture within Iraq.

[21]The writings are too numerous in number to mention here but examples of comprehensive accounts of Iraqi history can be found in Phebe Marr, *The Modern History of Iraq* (3rd edn, Westview Press 2011), Charles Tripp, *A History of Iraq* (2nd edn, Cambridge University Press 2002) and Jordi Tejel, *Writing the Modern History of Iraq: Historiographical and Political Challenges* (World Scientific Publishing Company 2012).

Islam, Christianity, Yezidis,[22] Zoroastrianism,[23] Baha'ism.[24]

Iraq, whether partially or wholly, was previously in antiquity, from approximately the years 4000-2000 BC, known by many other names including Babylonia, Mesopotamia, Sumeria, Akkadia[25] and Medea among others. This area has witnessed many invasions and continues to frequently experience wars, rebellions, and insurgencies. That is to say, that it has been in a continual state of conflict for many decades, if not centuries. Many problems have plagued the country including sectarianism, religious intolerance, dictatorship, censorship, corruption, ethnic cleansing, sanctions, economic collapse and armed conflict. Historically, all groups within Iraq including the three main groups, Sunni, Shi'a, and Kurd have grievances not only vis-à-vis the Iraqi central government but against each other.

To determine Kurdish claims to territory and resources it is important to understand the origins of the Kurds. To begin with, it is noteworthy to recognise that the true beginnings of the Kurds are unknown and are still debated by historians and academics.[26] There is conflicting research as to origins of the Kurds but some scholars have concluded that it is highly likely the Kurds were the

[22] The Yezidis first appear in history in the twelfth century as an isolated community in the Kurdish mountains of northern Iraq. They are considered as a Kurdish ethno-religious community whose religion draws on aspects of other religions such as Zoroastrianism and Islam. Yezidis have suffered centuries of persecution at the hands of other religious groups because of their beliefs, a theme that has continued to modern day Iraq where the Islamic State launched a campaign to "purify" Iraq and neighbouring countries on non-Islamic communities.
[23] Zoroastrianism is one of the oldest monotheistic religions in the world, dating back to approximately 6th century BC and follows the teachings of Zoraster. Zoroastrianism is another faith that has suffered throughout the years in Iraq and faced persecution and intolerance from other religious groups, in particular the Islamic groups.
[24] Bahaullah the founder of the Baha'i faith claimed to be God's messenger referring to the practices of Islam, Christianity and other major religions. Due to the Bahia beliefs and Bahaullah claims, the Bahia faith is severely persecuted in many countries where Islam is the prominent religion, including Iraq.
[25] John E. Woods, *Iraq* (Encyclopaedia BritannicaInc. 2014) https://www.britannica.com/place/Iraq accessed on 2 May 2015.
[26] Benedict Anderson, *Imagined Communities: Reflections On The Origin And Spread Of Nationalism* (Verso 1996).

native inhabitants of the area that is now Northwest Iran and Northeast Iraq.[27] Others believe that the first mention of Kurds in historical records was in cuneiform writings of the Sumerians approximately 3,000 B.C., which talked of the "land of the Karda."[28] However, the first time the word "Kurdistan" appeared was in the 12th century when Prince Saandjar of the Turkish Seljuk Empire created a province with that name.[29] The result of what is now an ethnic grouping referred to as Kurds can be summarised as a by-product of thousands of years of evolution stemming from local tribes that inhabited the geographical areas referred to above. The Kurds refer to themselves as the "ancestors of the Medes".[30] In fact this belief is incorporated into their national anthem, *AeeRaqeeb,* which includes reference to their Kurdish ancestry, stating, "we are the descendants of the Medes and Kai Khosrow."[31]

Arabs, however, are a Semitic people that originate from the nomadic tribes of present-day Yemen, Oman and Saudi Arabia in the Arabian Peninsula. The Arabs in Iraq also associate and trace their ancestry to the empires of antiquity in the form of Babylonia, Sumeria[32] and the rise of their prominence under their prophet, Mohammed. However, it is recognised that Arab domination of the Middle East only came with the rise of Islam. There is a wealth of literature on the origins and history of Arabs,[33] which will not be replicated here. This difference in origin, combined with both

[27] Ferdinand Hennerbichler, 'The Origins of Kurds' (2012) 2 Advances in Anthropology 64.
[28] Kurdistan Regional Government 'About Kurdistan' (Kurdistan Regional Government 2014) http://new.krg.us/aboutkurdistan accessed on 7 January 2015.
[29] Kerim Yildiz, *Kurds in Iraq: The Past, Present and Future* (Second edn, Pluto Press 2007) 12.
[30] The Kurds claim that as native inhabitants to lands they control, their claims to land are justified as these lands are the lands of their ancestors. Therefore, any foreign attempt to control Kurdish lands would be opposed and ultimately rejected.
[31] Kurdistan Regional Government 'Flag & National Anthem' (Kurdistan Regional Government 2014) <http://www.krg.org/p/page.aspx?l=12&s=050000&r=301&p=211> accessed on December 12 2014.
[32] Joshua Project, 'Arab, Iraqi in Iraq' (The Joshua Project 2014). https://joshuaproject.net/people_groups/12247/IZ accessed on 16 November 2014.
[33] See for example, Albert Hourani, '*A History of Arab Peoples*' (Grand Central Publishing 1992) and W.H.J. Rangeley, 'The Arabs' (1963) 16 The Nyasaland Journal 16 and Bernard Lewis, '*The Arabs in History*' (Hutchinson 1956).

Arabs and Kurds vying for control and power in the region for centuries has created resentment and mistrust.[34]

Some commentators argue that the idea of Kurdish nationalism is not a modern phenomenon and emerged long before the formation or demand for a Kurdish nation. From the 16th century to the middle of the 19th century, autonomous Kurdish principalities ruled much of Kurdistan.[35] During this period the Ottoman and Persian empires were strong, competing for influence in the region. They divided Kurdish lands into spheres of influence, agreeing on a border in 1639. In order to protect their small, fragile principalities and sovereign claim to the same, the small Kurdish principalities supported one or the other power usually gambling on which side was militarily stronger.[36] Arab nationalism on the other hand has been a pertinent theme in the history of the Middle East. Even at the age of empires, Arab ideology or "Arabism" was at the forefront of power, mainly owing to the most sacred Islamic holy places and relics being under Arab control and more importantly the Quran being written in Arabic. However, modern Arab nationalism was at its zenith in the 20th Century with the rise of pan Arabism and Baathist doctrine. The breakup of old empires placed Arabs in a decisive role when determining the politics and policy of the Middle East. In this respect, the Arabs were history's winners and the Kurds, history's losers.

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[34] Regardless of when disputes between Arabs and Kurds began, it is evident that disputes over land and control of those lands between the two communities are centuries old. Some geographical areas are not disputed, for example lands in provinces such as Basra, Babil and Wasit have never been claimed by Kurds and likewise Arabs do not contest geographical boundaries of the province of Duhok.

[35] Amir Hassanpour, 'The Kurdish Experience' (*MERIP.org,*1994) <https://merip.org/1994/07/the-kurdish-experience/> accessed on 12 January 2015.

[36]Ibid.

2.3 Politics and Co-existence

Although politics has at times played an important role for peaceful co-existence and power sharing, it has otherwise been the epitome of all that is wrong in Iraq, often creating suspicion, fuelling ethnic tension and ultimately dividing societies.[37] The fall of the Ottoman Empire and beginning of British colonial rule set the course for the new Iraq but according to Lyon,[38] the British position was unclear and should be studied and categorized into three phases.[39] In short, the British did not have a coherent plan for Iraq or its post-war years. Some argue that the two main characteristics of identity was religion and geography, which meant that the place of birth and the religion of ancestors determined one's place in the empire.[40] Thus one could reach the conclusion that both Arab and Kurdish communities would naturally identify themselves being Arab or Kurd respectively before "Iraqi". After the fall of the Ottoman Empire, France abandoned its claim to Iraq[41] and ceded control of the territory to Britain.[42] This paved way for the Sykes-Picot Agreement between France and Britain.[43] Britain wanted order restored immediately, such order to be determined within their interest. The subsequent "stability" that was enjoyed was due

[37]Although the Kurds had successfully integrated into the Ottoman Empire they had not been assimilated and after World War I Kurdish nationalism emerged and continued to rise throughout the twentieth century. The Arab sense of ideology and of ownership of land in the Middle East had been evident especially during the rise of Islam. The Arabs had, and continue to champion themselves as the heirs of Islamic power in the world and thus had significant power (if not rulers themselves) in the different Empires that have come and gone.

[38]Wallace Lyon and D. K. Fieldhouse, *Kurds, Arabs and Britons : the memoir of Wallace Lyon in Iraq, 1918-44* (I.B. Tauris 2002) 67.

[39] First, this was a military occupation: there was no civil state and no long-term strategy was employed. Second, from 1920 to 1932 Britain acted as Mandatory under the League of Nations to Iraq (as the British powers defined the final Treaty to decide the fate of people in the areas of Mesopotamia). Finally, from 1932, when Iraq became a sovereign state, that is to say free from British rule and its Mandate of the country.

[40] Johan Franzén, 'The Problem of Iraqi Nationalism' (2011) 13 National Identies 217.

[41] France held a diplomatic claim over the Mosul *Willayet*, which at the time consisted of much of the northern Mesopotamian lands.

[42] Edward Peter Fitzgerald, 'France's Middle Eastern Ambitions: The Sykes-Picot Negotiations and the Oil Fields of Mosul 1915-1918' (1994) 66 The University of Chicago Press 697.

[43] The Sykes-Picot Agreement was concluded over two days between May 15 and May 16, 1916 and included provisions where Britain and France agreed to "recognise and protect an Arab state or a Confederation of Arab states." See World War I Archives 'Sykes-Picot Agreement' (*World War I Archives* 2014) http://wwi.lib.byu.edu/index.php/Sykes-Picot_Agreemen accessed on 12 December 2014.

to the "heavy and unloved hand of imperial Britain".[44] For his part, Mark Sykes[45] had previously put forward two suggestions to the Bunsen Committee presiding over proceedings relating to the now defunct and ownerless Ottoman lands.[46]

Having previously agreed in principle to the notion of self-determination and given assurances of the same, the political situation changed drastically for the Kurds. Signed on August 10, 1920, the Treaty of Sevres[47] in Articles 62, 63 and 64 explicitly referred to the area of Kurdistan, granting the Kurds the right to address the League of Nations "in such a manner as to show that a majority of the population of these areas desires independence from Turkey".[48] The Treaty of Sevres was not accepted by the new state of Turkey and as a result never ratified. In its place the Treaty of Lausanne[49]came into force, which denied the Kurds a state of their own. In 1920, Arab nationalists launched a project to instil a new sense of 'Arab' identity among young Iraqis, only a small minority of whom considered themselves 'Iraqi' at the time. Soon pan-Arab ideologues that served at the Director-General of the Ministry of Education in the 1920s and 1930s such as Sati' al-Husri, Fadil al-Jamali and Sami Shawkat, were able to exploit their position to instil a new generation of

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[44] M.A Fitzsimons, 'Britain and the Middle East 1945-1950' (1951) 13 The Review of Politics 21.
[45] Sir Mark Sykes was a British Colonel and diplomatic advisor during the First World War and its aftermath. He was a member of the Conservative Party in England and became associated with the Sykes-Picot agreement, regarding the apportionment of post-war spheres of interest in the Ottoman Empire to Britain, France and Russia. Sykes was an agent for British ministers, other political powers and ultimately the British government.
[46] A proposal at the Committee meeting on 17 April 1915 was presented where either the allies annex the non-Turkish parts of the Ottoman Empire or the empire be maintained intact and divided into zones of political and commercial interest. See Elie Kedourie and Mark Sykes 'Sir Mark Sykes and Palestine 1915-1916' (1970) 6 Middle Easter Studies 340.
[47] Treaty of Peace with Turkey UKTS 11 (1920).
[48] Treaty of Peace Between The Allied Powers And The Ottoman Empire (1920).
[49] The Treaty of Lausanne was a peace treaty signed on July 24, 1923 between the allied victors of World War One, notably Britain, France and Russia, and the Ottoman Empire, signed in Lausanne, Switzerland. The Treaty replaced the failed Treaty of Sevres and officially ended the state of war that existed between the parties. The original text of the treaty is in French and was later translated into English. The treaty was ratified by the differing parties between March and August 1923 and came into force on 6 August 1924.

Iraqis with Arabist ideology.[50] Leading up to the Independence of Iraq, notable Arab tribal figures and politicians had been preparing for the creation of this new state.[51] This enabled the newly established government of Iraq to immediately disseminate pan-Arabism to the Iraqi populace from a young age.[52]

The Kurds mounted the first serious rebellion to the monarchy in 1923, when Sheikh Mahmud Barzinji, self-proclaimed king of Kurdistan[53] led a revolt against the British. He was wounded, captured and sent to exile in a British fort in India. Barzinji returned to Kurdistan and was appointed as the Governor of Sulaimani by Sir Percy Cox, the British military official and administrator to Iraq, in response to the rise of the Young Turks in Turkey. Cox had agreed to a joint Anglo-Iraqi declaration that would allow a Kurdish government if the Kurds were able to form a constitution and agree on boundaries.[54] Upon his return, Sheikh Mahmud continued to pronounce himself King of the Kingdom of Kurdistan, rejecting the deal with the British and began working in alliance with the Turks against the British.[55] Again this was demonstrative of Kurdish desire for complete self-rule. The end of the Monarchy came years later in 1958 in the form of a Coup d'état led by Brigadier General 'Abd al- Karim Qasim (referred to as the "14 July Revolution"). The newly established Republic of Iraq provided hope for the Kurds, at least in the

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[50] Franzén (n 40) 222.
[51] King Faisal came to power in Iraq on 23 August 1921 and brought with him his *Sharifian*, a group of nationalist military officers who had joined a British backed revolt against the Ottomans. Men such as Al-Husri accompanied this group and began teaching at prominent educational establishments in the country including the Higher Teachers Training College in Baghdad. Al-Husri was also appointed as Director-General of Education by the king, using this position to shape curriculum and influence selection of books and syllabi.
[52] Kaymar Abdi, 'From Pan-Arabism to Saddam Hussein's Cult of Personality: Ancient Mesopotamia and Iraqi National Ideology' (2008) 8 Journal of Social Archaeology 3.
[53] Charles Tripp, '*A History of Iraq*' (3rdedn, Cambridge University Press 2007) 60.
[54] Kevin McKiernan, *The Kurds: A People in Search of Their Homeland* (St Martin's Press 2006) 17.
[55] The British response was to deny the Kurds any say in the government. In the years that followed King Mahmud continued to lead the Kurds and was involved in several uprisings against the British until 1932 when the RAF bombed Kurdish positions and captured Malik Mahmud with the help of British trained Iraqis.

political and legal sense of Kurdish rights being upheld and enshrined in a new constitution. This did not materialise and the Kurds were to prove a perennial problem for consecutive future Iraqi governments because of their demand for far reaching autonomy.[56] Some commentators argue that Kurdish nationalist aspirations were not always so strong. Instead of calling for territorial separation with Kirkuk as their capital, in 1961 many Kurds supported General 'Abd al- Karim Qasim[57] and his promises of a Kurd–Arab partnership in Iraq.[58] However, due to the rise of Arab nationalist and Pan-Arab sentiments, this view soon shifted, with Kurds feeling even more marginalised. It has been widely recognised that Qasim attempted to draw the Kurds into the political centre and involve them in some form without actually sharing power.[59]

Mustafa Barzani,[60] also referred to as Mullah Mustafa by the Kurds, initially enjoyed a good relationship with Qasim and was invited back from exile, given accommodation and a salary. However, this relationship soon soured because of Barzani's popularity and Qasim's subsequent support of Barzani's enemies.[61] Consequently, Barzani threatened to lead a separatist revolt, to which Qasim responded by planning a military operation in the Kurdish north.[62] In 1961, Barzani led a Kurdish rebellion against the central government. This was the first militaristic encounter

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[56] Lawrence G. Potter and Gary G. Sick, *Iran, Iraq And The Legacies of War* (Palgrave Macmillan 2004) 68.

[57] Qasim's*wataniya* identity was published in 1959 in the Baghdad Review Editions of New Culture, under the heading "The Kurds and the Kurdish Question." This showed Qasim's initial appetite for Iraqi unity. In the coming decades chances such as this were few and far between. See Brendan O'Leary, *Right-sizing the State: The Politics of Moving Borders* (Oxford University Press 2001).

[58]Denise Natali, 'The Kirkuk Conundrum' 7 Ethnopolitics 433.

[59] Denise Natali, *The Kurds and the State: Evolving National Identity in Iraq, Turkey and Iran* (Syracuse University Press 2005) 52.

[60] Mustafa Barzani was the prominent Kurdish politician at the time having united many different Kurdish tribes in the fight for autonomy from Baghdad.

[61] Qasim tried to use Barzani's influence amongst the Kurds to equalize the threat of other political forces. However, as Barzani's influence and support grew, Qasim realized that he could not control Barzani and began to supply arms to Barzani's traditional tribal enemies, the Zebaris, Herkis and Bradostis. See Bryan R. Gibson, *Covert Relationship: American Foreign Policy, Intelligence and the Iraq-Iran war, 1980-1988*, (Praeger 2010) 13.

[62] Brandon Wolfe-Hunnicutt, 'The End of the Concessioanry Regime: Oil and American Power in Iraq, 1958-1972 ' (DPhil Thesis, Stanford University 2011) 36.

between Barzani and Qasim and set the tone for much of the decades to come. The Arab-Kurd divide had grown even further.

Negotiations between the Kurds and central government on the extent of Kurdish autonomy took place on a number of occasions in 1963, 1970–74, 1983 and 1991. Each time, the major points of contention and greatest obstacle were the questions of defining the Kurdish regional boundaries, jurisdiction over mixed areas, and the mechanisms used to determine Kurdish lands.[63] Talks between the factions broke down frequently, with proposed solutions being rejected by one party or the other. On March 11, 1970, the Kurds agreed to an Autonomy Accord with the central government.[64] The Baathists intolerance of political and ideological pluralism meant there would be no multi-party system and that the proposed Kurdish assembly would be an overall component of Baghdad's central authority. Whilst negotiations were taking place, Baghdad continued with its forced deportation of Kurds and other minorities from strategic geographic locations such as Kirkuk and other areas of dispute.[65] Another reason for the collapse of the agreement was that the central government excluded Kirkuk from the proposed Kurdish territory. The Kurds had hoped to not only include Kirkuk in the new autonomous region but to make Kirkuk their regional capital. For the Baathists this amounted to a declaration of war.[66]

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[63] Peter Bartu, 'Wrestling with the Integrity of a Nation: The Disputed Internal Boundaries in Iraq' (2010) 86 International Affairs 1329.

[64] The purpose was to grant the Kurds an autonomous region within Iraq, proposing the establishment of a legislative Assembly and that Erbil be confirmed as the capital of this region. The Kurdish autonomous zone would incorporate the provinces of Duhok, Sulaimani and Erbil.

[65] Human Rights Watch, 'Genocide in Iraq: The Anfal Campaign Against The Kurds' (*HRW.org,* 1993) www.hrw.org/reports/1993/iraqanfal/ accessed on 29 October 2015.

[66] Abdel-Hamid Zebari. 'Kirkuk Still Divides Arabs, Kurds In Iraq' (*Al-Monitor.com,* 2013) www.al-monitor.com/pulse/originals/2013/03/baghdad-erbil-border-dispute.html accessed on 30 October 2014.

It soon became apparent that the Ba'athists were biding for time. Some of the most important aspects of the Accord, including the census for disputed areas were postponed twice, and by 1973 the Accord had collapsed.[67] Barzani continued the Kurdish armed revolt until the 1975 Algiers Accord between Saddam and the Shah of Iran.[68] Faced with this and the lack of support from the United States, Barzani conceded defeat and left Iraq on medical grounds. With Barzani's departure, a new front called the Patriotic Union of Kurdistan (PUK), which had splintered from Barzani's Kurdistan Democratic Party (KDP), emerged as the armed resistance to Baghdad.[69]

In 1980 Saddam began an eight-year destructive war with Iran motivated by fears of the Islamic Revolution in Iran and the historical border disputes between the two countries. This war and continued Baathist treatment of Kurds further distanced the competing Kurdish and Arab polity vying for control of northern Iraq. Kurdish resistance gave Baghdad the opportunity to label Kurds as traitors and refer to them as *Mukharabeen*, saboteurs. Baghdad had the excuse it needed to embark on a full-scale attack on Kurdish areas.

The Baathists had continuously displaced Kurds since coming to power denying them access to the top jobs, education, healthcare and other needs unless they conformed to the Baathist doctrine. What followed was unprecedented. Saddam authorised a campaign of genocide code-named Al-Anfal ("the spoils of war") against the Kurds. Carried out in eight distinctive steps, the Anfal

[67] David Mcdowall, *A Modern History of the Kurds* (IB Tauris & Co., 2004) 338-339.
[68] This agreement had two primary functions, the first of which was to settle the border disputes between Iran and Iraq including the prized Shatt-Al-Arab and Khuzestan. The second noteworthy point was that the agreement made specific reference to ending the Kurdish rebellion and therefore the Kurdish struggle.
[69] The PUK was initially established as a coalition of different ideologies and beliefs that reignited Kurdish resistance against Baghdad after the Agreement between Iran and Iraq. The organisation was in essence an umbrella for the purpose of providing a new Kurdish armed front. The PUK continued to fight the Iraqi central authorities throughout the 1980s and 1990s until the fall of Saddam's regime in 2003.

campaign was one of the most systematic atrocities designed to eradicate the Kurds.[70] It was a new form of ethnic cleansing, one, where the central government in Baghdad used all the resources at its disposal not to win a war but to exact revenge and wipe out the Kurds. A Human Rights Watch report estimates that between 50,000-100,000 Kurds died during the Anfal campaign and over 2,000 villages had been completely destroyed. Kurdish sources put the figure closer to 182,000 deaths and 5,000 destroyed villages.[71] The atrocities during this period came to light from not only witnesses but also expert evidence during the Anfal Trial in the Iraqi High Tribunal in the years following the Iraq war of 2003. Some of the main charges against Saddam and senior officials of the Baath Party were Genocide, Crimes against Humanity, War Crimes and Wilful Killing.[72] Throughout Anfal, Saddam continued his vicious assault on Kurds by attacking Kurdish areas with chemical and biological weapons.[73] The attacks were deployed in the areas of Goptapa, Askar, Sargaloo, Qaradakh, Balisan, Smaquli and many other areas.[74] In Halabja alone, over 5,000 died in one chemical attack.[75] It goes without saying that for the Kurds, the memories of Anfal and the chemical weapons attacks by the central Iraqi authorities still remain painful.

In the aftermath of the Iran–Iraq war, Saddam's forces regrouped to counter the Kurdish resistance. A year later in 1991, following Iraq's invasion of Kuwait, the Shi'a and Kurdish communities

[70] Human Rights Watch (n 65).
[71] Kurdistan Regional Government 'What Happened In The Kurdish Genocide' (*Kurdistan Regional Government* 2014) http://uk.krg.org/genocide/pages/page.aspx?lngnr=12&pnr=37 accessed on 18 December 2016.
[72] Ezekiel Simperingham and Clark Gard, 'The Anfal Trial and the Iraqi High Tribunal Update Number Two: The Prosecution Witness and Documentary Evidence of the Anfal Trial' (*International Center for Transitional Justice*2007) https://www.ictj.org/sites/default/files/ICTJ-Iraq-Anfal-Tribunal-2007-English_0.pdf accessed on 12 January 2015.
[73] BBC News 'Saddam's Iraq: Key Events' (*BBC.co.uk,* 2003) http://news.bbc.co.uk/1/shared/spl/hi/middle_east/02/iraq_events/html/chemical_warfare.stm accessed on 27 March 2015.
[74] A full list of all the Kurdish areas that had been exposed to chemical weapons attacks by the Iraqi government can be found at Appendix A.
[75] Mcdowall (n 67) 358.

buoyed by what they perceived to be the green light from Washington via President George Herbert Bush's speech,[76] rose up in rebellion. The rebellion was crushed, and Saddam retaliated. Hundreds of thousands of Kurdish refugees poured into Iran and Turkey as the Iraqi army continued its offensive. Kurdish animosity and resentment towards Baghdad grew further. Such was the exodus of people from the KRI that the United States, Britain and France advocated for a UN resolution to counter the refugee crisis. This came in the form of UN Security Council Resolution 688.[77] Consequently, Britain, France and the United States pushed for the establishment of a "no fly zone,"[78] creating a "safe haven" in the territory of Iraqi Kurdistan above the 36th Parallel,[79] effectively cutting off the KRI from Baghdad. As a result, the Kurdistan region was now a de facto autonomous zone but without the original boundaries it had fought decades to obtain. This meant that the KRI was independent all but in name.

After the First Gulf War, an umbrella opposition group called the Iraqi National Congress (INC)[80] was established. Some commentators argue that the INC was "dominated" by the two Kurdish groups, the PUK and KDP who brought with them their own distinct view of Iraq and Iraqi

[76] George Bush, 'War in the Gulf: Bush Statement; Excerpts From 2 Statements by Bush on Iraq's Proposal for Ending Conflict' (*New York Times*, 2015) <http://www.nytimes.com/1991/02/16/world/war-gulf-bush-statement-excerpts-2-statements-bush-iraq-s-proposal-for-ending.html> accessed on 3 February 2015.
[77] United Nations Security Council Res 688 (5 April 1991) United Nations Doc S/RES/688.
[78] The no-fly zones were two distinct zones created for the purpose of protecting Kurds in northern Iraq and Shi'a community in South Iraq. The establishment of the no fly zones meant that Iraqi aircrafts were prohibited from flying inside these zones. U.S, British and French forces enforced this policy by continually patrolling the skies in the two zones. The enforcing powers claimed that UN Security Council Resolution 688 had authorized this operation but the resolution does not contain any explicit provisions for the creation of no-fly zones. In fact Boutros Boutros-Ghali, the Secretary General of the UN had criticized the move, condemning it as illegal. See John Pilger, 'Labour claims its actions are lawful while it bombs Iraq, strarves its people and sells arms to corrupt states' (2000) http://johnpilger.com/articles/labour-claims-its-actions-are-lawful-while-it-bombs-iraq-strarves-its-people-and-sells-arms-to-corrupt-states accessed on 3 February 2015.
[79] Chris Hedges, 'Baghdad's Move Puts The Future of Kurdish Safe Haven In Doubt' The New York Times (New York, 1 September 1996) 8.
[80] Formed of exiled diplomats, representatives of armed factions opposing Saddam's regime and political groups, the INC met to exchange information and plan for a new Iraq should Saddam's Iraq fall.

society.[81] This interpretation of Iraq influenced the way the first post Saddam governing council was formed, and bore little resemblance to Iraqi society in 2003/2004.[82] While this view is correct in assuming that most of the groups within the INC acknowledged Iraq's division along these lines, it must be highlighted that each of the different groups seemed to be comfortable with the division of power and land whether within a federal framework or otherwise. It can be argued that it was the foreign powers outside of Iraq whether in self-interest or regional security interests pushed for the unity of Iraq. Neighbouring countries such as Iran, Syria and Turkey have sizeable Kurdish minorities of their own and continue to advocate for the unity of Iraq. Other international powers such as the United States and the United Kingdom also pursued and continue to pursue a one Iraq policy so as to not upset the political balance in the Middle East. Iraq was irrevocably divided on sectarian and religious fault lines mobilised by deep communal antipathy. This led to the emergence of two schools of thought among the INC; calls for devolution of power to regions and a powerful central authority residing in Baghdad. Although not evident at the time, the agreements, debates and divisions within the INC were a precursor for the Iraqi interim government post Saddam.

The fall of Saddam Hussein marked a golden opportunity for Iraq and its fractious groups to overcome their turbulent past and govern together. This opportunity was not realised. Even though the Kurds participated in Iraq's first democratic General Election on 15 December 2005, they continued to claim that they were marginalised by the Arab majority who began pressuring them for concessions.[83] The Kurds were further disgruntled with the Baghdad government under Prime

[81] Toby Dodge, 'Iraqi Transitions: From Regime Change to State Collapse' (2008) 26 Third World Quarterly 705.
[82] Islam Al Khafaji, 'Chapter 4: A Few Days After: State and Society in a Post-Saddam Iraq' (2010) 43 The Adelphi Papers 77.
[83] Michael M. Gunter, 'Arab-Kurdish Relations and the Future of Iraq' (2011) 32 Third World Quarterly 1623.

Ministers Jafari and Maliki not abiding by promises that had been made. The Erbil Agreement of 2010[84] for example planned for the KRG and IFG to work together for the purpose of reconciliation, shared governance of oil and gas, reformation of the law including the Constitutional Review Committee, reform of national security policy and procedure, legislative reform and judicial reform. The Sunnis had ruled (in one form or another) for decades but were now ousted from power and side-lined. The Shi'a, in turn, complained about Kurdish and Sunni overreaching, often asserting that as the majority in Iraq, the Shi'a had a legitimate right to rule.

The Iraqis and the international community had hoped that the IC 2005 would address some of the biggest points of contention between the Kurds, the Sunnis and the Shiite. Although a constitution was drafted, voted on and adopted, the main sticking points remained. There are many provisions of the IC 2005 that are not only contradictory in nature but also ambiguous. For instance the constitution provides for religious freedom and the practice of religious rights but Article 2 IC 2005 also states that no law may be enacted that contradict the provisions of Islam or the principles of democracy.[85] Principles of Democracy and Islam are different from one another, leaving room for laws to contradict either or both. It is submitted that the IC 2005 does not read as a cohesive document but rather as a disparate wish list of competing actors. Depending on a particular issue, one can identify the interests of these actors. For example, issues relating to the role of Islam are associated with the Shiite bloc, issues pertaining to the rights of non-Arabs, minorities and

[84] United Nations, 'Erbil Agreement' (*UN.org,* 2010) 7https://peacemaker.un.org/sites/peacemaker.un.org/files/IQ_101107_IraqErbilAgreement%20%28English%29.pdf accessed on 12 January 2016.
[85] Article 2 The Constitution of the Federal Republic of Iraq (2005).

particularly Kurds are associated with the Kurdish bloc and matters pertaining to a strong, central Arab identity of Iraq are associated with the Sunnis.[86]

Rather than facilitating peaceful reconciliation in Iraq, some argue that negotiations between the parties over Article 140,[87] and at times lack of negotiations, have ultimately led to less likely reconciliation of the disputed territories. Others, especially in the pro-Arab camps argue that the deadline for implementing this article has passed,[88] therefore rendering it meaningless.[89] The Kurds on the other hand blame lack of political support from Baghdad and general Arab unwillingness of implementing the process referred to in Article 140. However, the Iraqi Federal Supreme Court has since held that the timeline set for implementing Article 140 does not affect the "means and objectives" of this constitutional provision and as such the article remains valid.[90]

At one-point Iraq had seemingly split into three states. The arrival of the terrorist organisation known as the Islamic State (IS)[91] and the consequent defeat of the Iraqi army in the disputed territories in 2014 created a new Sunni territory between the Kurds and the rest of Iraq, effectively cutting the KRI off from Baghdad. The composition of IS together with the atrocities committed by the terrorist group further complicated matters as many Kurdish areas in the disputed territories

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[86] Fanar Haddad, 'A Sectarian Awakening Fanar Haddad, 'A Sectarian Awakening: Reinventing Sunni Identity in Iraq After 2003' (*Hudson Institute* 2014) http://www.hudson.org/research/10544-a-sectarian-awakening-reinventing-sunni-identity-in-iraq-after-2003 accessed on 6 February 2015.

[87] Article 140 The Constitution of the Federal Republic of Iraq (2005).

[88] Article 140 Second The Constitution of the Federal Republic of Iraq (2005) states that the responsibilities placed on the executive to carry out the normalisation, census and referendum to be carried out by a date not to exceed 31 December 2007.

[89] Mohammed Rwanduzy, 'Turkmen, Arab parties in Kirkuk reject Iraqi court's view on disputed territories' (*Rudaw*, 2019) <https://www.rudaw.net/english/middleeast/iraq/310720192> accessed 2nd August 2019.

[90] Iraqi Federal Supreme Court decision 71/Federal/2019.

[91] Islamic State known by other names such as the Islamic State of Iraq and the Levant (ISIL), Islamic State of Iraq and Sham (ISIS) and *Da'ish* in Arabic, has been designated as a terrorist organisation by the United Nations. The organisation follows an extremist Salafi doctrine of Sunni Islam and gained notoriety when it defeated the Iraqi Army in a number of key battles that led to its capture of Iraqi cities and towns such as Mosul and Sinjar.

bore the brunt of IS brutality. IS control of these areas brought with it systematic rape, extortion, mass killing, slavery, torture and looting there.[92] The KRG at one point did not share a border with Baghdad, instead found itself sharing a border in excess of 70km with IS.[93] IS' ambitions soon became apparent as they continued to take land in the north of Iraq by force, almost reaching the Kurdish capital.[94] The Kurds, together with the help of the United States led coalition fought back, pushing IS out of the Kurdish administered region and began counter attacks. The Kurds advanced into the disputed territories following the collapse of the Iraqi army and drove IS out, extending the borders of Kurdish dominated areas. Kurdish security and political officials were immediately appointed to stabilise the newly acquired lands. However, Kurdish governance of the disputed territories would not last. The Iraqi army regrouped and with the help of coalition forces began taking huge swathes of territories from IS. The only land that remained for the Iraqi army to retake was those areas that the Kurds took from IS. Negotiations between Baghdad and Erbil over the future of the disputed territories recommenced. However, on 25th September 2017, the Kurds carried out an independence referendum in the KRI and the disputed territories despite objections from Baghdad, neighbouring countries and the international community. Although senior Kurdish leadership described the independence referendum as non-binding, for Baghdad this amounted to a declaration of war. On 16th October 2017, the Iraqi army and security forces launched an attack on the Kurds, prying the disputed territories, including the city of Kirkuk from KRG control. The gains that the Kurds had made had been lost.

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[92] The atrocities committed by IS led to the United Nations establishing an investigative team to collect, document and safeguard evidence relating to IS acts that amount to war crimes, crimes against humanity and genocide under United Nations Security Council Resolution 2249 (2015).

[93] Ahmed Askari, 'Current predicament of Kirkuk' (Speech at Cities in Transition Forum, Belfast 28 October 2014) https://citiesintransition.net/tag/fct-2014/page/2.

[94] Ed Butler, 'Iraqi Kurdistan's battle with Baghdad over oil revenues' (*BBC.co.uk,* 2015) <https://www.bbc.com/news/business-32220764> accessed 3rd January 2018.

2.4 Internal Politics of the KRI

Aside from the KRI-Iraq divide, internal Kurdish politics has played an important role in the exploitation of petroleum resources. Extraction of petroleum from Kurdish lands has at times been a uniting factor for the two main political parties in the region, the PUK and the KDP. However, more recently it has been one of the most pressing issues threatening to break up the KRG. After a destructive civil war between the years of 1994 and 1997, the PUK and KDP became coalition partners in the newly formed KRG. Previously, two administrative geographical zones governed the KRI, a KDP zone comprising the governorates of Erbil and Duhok (known as the yellow zone) and a PUK zone comprising the governorate of Sulaimani (known as the green zone).[95]In the aftermath of civil war and the Washington Agreement,[96] the years that followed led to a strategic alliance between the two political parties to govern Kurdistan. The early years of the alliance went without much incident but since 2013, a large component of the PUK has expressed dissatisfaction at the way in which the KDP has consolidated its power over KRG. Governance of oil and gas and proceeds from its exploitation in particular has been a source of contention. The minister of the KRG's Ministry of Natural Resources (MNR) has always been a KDP appointee and as such led to dissatisfaction amongst the PUK. As the most powerful ministry with respect to the governance of petroleum, the MNR has been central to the KRG's petroleum policies. PUK dissatisfaction derives from the concentration of petroleum governance in KDP's zone of influence via the MNR. A number of points illustrate the PUK's dissatisfaction. For instance, IOCs are required by the MNR to establish headquarters in Erbil (in the KDP zone of influence) for the purpose of carrying

[95] Although, the territories governed by the KDP and PUK changed hands on a number of occasions during the Kurdish civil war, in its aftermath it has been recognised that the KDP govern the provinces of Erbil and Duhok and the PUK govern the provinces of Sulaimani and Halabja.
[96] US Department of State, 'Washington Agreement' (*State.gov,* 1998) https://1997-2001.state.gov/statements/1998/980917a.html accessed on 12 January 2015.

out petroleum operations, regardless of the geographic location of oil and gas fields. This, the PUK argues has led to the KDP benefitting from petroleum fields in territories under its zone of influence. Despite being in the government, the PUK argue that they are not privy to most petroleum contracts signed by the KRG. Furthermore, PUK claims that KDP dominance of the MNR has resulted in other political parties not knowing how much revenue is generated from petroleum exploitation. Finally, the PUK accuses the KDP of spending proceeds from petroleum revenue solely in the KDP zone of influence, subjecting the green zone to limited infrastructural and public service projects.

2.5 Geography and Land

One of the most important and deep-rooted disagreements between the Kurds and successive Iraqi governments has been the issue of land; specifically, what is now referred to as the "disputed territories". These are the blurred internal boundaries in Iraq. This issue has been a persistent fault-line in Iraq's history and resurfaced recently as one of the key issues after the 2003 Iraq War.[97] Historically, the Kurds claim that the land stretching from the Zagros Mountains bordering Turkey, to the Hamreen Mountains in Iraq, incorporating the provinces of Duhok, Sulaimani, Erbil as well as Kirkuk[98] are Kurdish lands. They maintain that these lands are part of "Kurdistan" which has been annexed by successive Arab governments in Baghdad. This claim stems from their argument that the Hamreen Mountains represent a natural boundary between Kurdish and non-Kurdish lands

[97] Bartu(n 63) 131.
[98] In addition to Kirkuk and although not an exhaustive list, the Kurds also claim the areas of Makhmoor in the Erbil Governorate, the Aqra District, Tel Afar District in Nineveh Governorate and areas such as Kifri, Khanaqeen and Beladrooz Districts of Diyala Governorate.

because the culture, topography and peoples (and their way of life) either side of the mountains are inherently different from one another and have been for centuries.[99]

In the 7th Century, the Arabs conquered Kurdish lands, consequently imposing centuries of Arab rule.[100] More recently, since 1900, the military and political control shifted in favour of the western, industrialised countries, especially Britain.[101] Despite the knowledge that the area was diverse and multicultural, the British engineered a new identity for the peoples of what was to become Iraq.[102]

When the Ottoman Empire collapsed, both Kurds and Arabs saw an opportunity to exercise their right to self-determination. With this, came the desire of all parties to push for as much land and power as possible. The wishes of neither side were fully met but the outcome heavily favoured Arabs, particularly Sunni Arabs. The allied powers had crowned a Sunni Arab as King of Iraq, which meant that administration and governance of the country was largely left for Sunni Arabs. With the creation of the new Iraq, the control of the lands in the north by the Kurds came under threat. The idea of empire in the Middle East was no more and the population of the new Iraq was

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[99] This assertion was reiterated by then President of Iraq, Jalal Talabani's political Party, the Patriotic Union of Kurdistan. See Shafaq News, 'PUK calls to change regime in Iraq: Hamrin is boundaries of Kurdistan, the Deadline is Next Spring' (*Shafaq.com* 2014) http://english.shafaaq.com/index.php/politics/10520-puk-calls-to-change-regime-in-iraq-hamrin-is-boundaries-of-kurdistan-the-deadline-is-next-spring accessed 13 November 2015.

[100] Abdul Rahman Ghassemlou, *People without a country : the Kurds and Kurdistan* (Zed Books 1980) 23.

[101] There was disagreement among the British powers as to how to carve out the defeated Ottoman Empire and who should rule these newly created states to protect British interest. Arnold T. Wilson, the Commissioner in Mesopotamia argued that "an Arab state headed by an Arab king would result in a disproportionate concentration of power in the hands of the Sunni minority, by virtue of their superior educational and professional standards" when referring to suggestions of appointing Hashemite nobility as king of a new Iraq. See Guiditta Fontana, 'Creating nations, Establishing States: Ethno-Religious Heterogeneity and The British Creation of Iraq 1919-23' (2010) 46 Middle Eastern Studies 1.

[102] A League of Nations Report suggested that due to coexistence of the population of the area, there were many different peoples and religions: "Everywhere, scattered in small groups throughout the plain, we meet with the remnants of populations and religions. This is the result of four thousand years of conflict and racial intermixture". See Council of the League of Nations, *Question of the frontier between Turkey and Iraq* (1924).

faced with the challenge of adopting a new identity, that of Iraqi. Naturally, this visibly calculated and forced identity did not capture the association and spirit of the local communities in the country. Soon enough many areas in the northern part of the country became disputed territories, with Kurds openly pressing for autonomy and self-rule.

The discovery of oil in Iraq was a game changer and led to submissions that Iraq was created as an oil company.[103] Some argue that Britain invented Iraq, reneging on previous promises of Kurdish statehood which ultimately led to the creation of a defective and fragmented community.[104] Although oil discovery in Kirkuk will be discussed later in this chapter, it is worth noting from the outset that there was a push by differing authorities in Baghdad to control Kirkuk and other disputed areas and identify them as Arab areas. For their part, the Kurds would point to the so-called "Arabisation program" which some believe began as early as the 1930s.[105] The inhabitants of predominantly non-Arab areas were forcefully transferred to other locations in the country or expelled from the area, changing the demographic composition in many Iraqi cities, towns and villages. From the beginning of 1970 onwards, successive Iraqi regimes forcibly displaced hundreds of thousands of people including ethnic Kurds, Turkmen, Assyrians and other minorities from the north of the country and repopulated the areas with Arabs from other areas of the country.[106] In the aftermath of the change in demographics, governorate borders were redrawn and reshaped to favour the Arab population and to suppress non-Arab minorities.[107]

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[103] Mary Kaldor, Terry Lynn Karl and Yahia Said, *Oil Wars* (Pluto 2007) 28.
[104] Brendan O'Leary, 'Departing responsibly' [University of Pennsylvania Press] 56 Dissent 30.
[105] Human Rights Watch 'Claims in Conflict: Reversing Ethnic Cleansing in Northern Iraq' (*HRW.org*, 2004) www.hrw.org/report/2004/08/02/claims-conflict/reversing-ethnic-cleansing-northern-iraq# accessed on 12 November 2014.
[106] David Romano, 'Whose House Is This Anyway? IDP and Refugee Return in Post-Saddam Iraq' (2005) 18 Journal of Refugee Studies 430.
[107] The disputed areas are those areas that are claimed by both the Iraqi Federal Government and Kurdistan Regional Government. The Kurds maintain that these areas should be incorporated into the geographical boundary of the KRI

Of the disputed territories, the Governorate of Kirkuk is the most notorious and important due to its strategic location, large oil and gas reserves as well and its symbolic importance for both Kurds and Arabs. The Kurds refer to Kirkuk as their "Jerusalem". [108] They insist that their claim to Kirkuk is not an oil grab but based on a duty to protect their people, culture, heritage and lands. The Kurds think of Kirkuk as theirs by right and continually point to the fact that Kirkuk had been a predominantly Kurdish city before Arabisation. According to the 1957 census, Kirkuk was 20% Iraqi Turkmen, 59% Kurdish with Arabs making up less than 25% of its population.[109] This demographic changed substantially. The issue of Kirkuk and the disputed territories is of such magnitude that the authors of the IC 2005 included special provisions in its text in an effort to remedy current territorial disputes. These provisions derive from the TAL, which became a blueprint for the IC 2005. The IC 2005 makes provision for the disputed territories in Article 140, which states that:

"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

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and governed by the KRG. The disputed areas have been one of the most important and therefore biggest obstacles to political progress and national reconciliation in Iraq. These disputes are not limited to land and population but also resources. Some of the disputed territories are rich in oil, gas and water. Other areas are considered important because of geo-strategic, religious or symbolic importance.

[108] Lara Fatah and Tanya Goudsozian, 'Analysis: The Kurds take Kirkuk, Now What?' (*AlJazeera.com,* 2014) https://www.aljazeera.com/news/middleeast/2014/06/analysis-kurds-take-kirkuk-now-what-201461653255207327.html accessed 4 November 2014.

[109] Brian R. Farmer, *Understanding Radical Islam: Medieval Ideology in the Twenty-first Century* (Peter Lang Publishing Inc 2006) 154.

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."[110]

This article proposes to undertake necessary steps to complete the implementation of the requirements of all sub paragraphs of Article 58. Article 140 of the IC 2005 is important for the purposes of this research, as it is the first time that a legal remedy for the dispute via the constitution has been presented.

2.6 Water

The significance of water cannot be ignored, as it is a vital element for sustaining life itself. It has been argued that water will become a commodity, the most precious commodity known to man in the future.[111] In 1985, former Secretary-General of the United Nations Boutros Boutros-Ghali claimed that the "next war in the Middle East will be fought over water, not politics".[112]

The fight to control the water resources in Iraq has been evident throughout its short history. Iraq's water comes primarily from the Euphrates and Tigris rivers which both rise in Turkey, passing through Iraqi Kurdish controlled areas and onto southern Iraq. These two rivers are the main source of over ground water in Iraq.[113] Some commentators argue that the KRI currently has plenty of

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[110] Article 140 The Constitution of the Federal Republic of Iraq 2005.
[111] Patti Domm, 'Why trading futures could be in our future' (*CNBC.com*, 2014) www.cnbc.com/id/101789481 accessed 19 October 2014.
[112] Geoffery Lean and Mark Rowe, 'Blair's Support For Dam May Speed World's First Water War' The Independent (London 12 December 1999) https://www.independent.co.uk/news/blairs-support-for-dam-may-speed-worlds-first-water-war-1131926.html accessed 28 January 216.
[113] Saladin Perbabi, 'Water Issues in Iraq and Iraqi Kurdistan' (*EMA-germany.org,* 2015) https://www.ema-germany.org/media/veranstaltungen/regfo/wafo/2010/P5_Perababi.pdf accessed 26 February 2016.

water[114] under its control. Both the IFG and KRG depend on water from Kurdish lands for drinking, irrigation, electricity and household activities. However, due to years of neglect and non-existent state-sponsored industry, Kurds have used water to produce electricity. The KRG has recognised the benefits of investing in water related projects and has budgeted $3billion US for the period between 2013-2020.[115] Iraq's rivers together with the three dams located in Dukan, Duhok and Darbandikhan supply the KRI as well as areas in south Iraq with water. In addition, the KRG has announced three major dam projects in its region. One such dam is the Gomaspan-Bastorah dam, 30 kilometres from the city of Erbil.[116]

The struggle for control of water resources is not a new phenomenon and was recognised as a strategic national security goal by the Baathists.[117] In fact, a special nine-man Security Council by the name of *MajlisAmn Al- Qawmi* was created to deal with national security issues. Water was considered as one such issue, especially given that the source of much of Iraq's fresh water is located in the KRI. This council introduced plans to poison water supplies to reduce the effectiveness of the Kurdish insurgency. During the 1980s, water was a factor that allowed the *peshmerga*[118] to survive in the Kurdish hills and mountains. Baghdad responded by implementing a campaign of drying up streams and springs cutting off access to fresh water for the *peshmerga*.[119]

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[114] Frman Abdulrahman, 'Water, water everywhere in iraqi kurdistan, soon there will be none to drink' (*Niqash*, 2012) <http://www.niqash.org/articles/?id=2973> accessed 18 December 2014

[115] Investingroup, 'Overview kurdistan Region of Iraq: Agriculture and Water ' (*Investingroup* 2014) <http://www.investingroup.org/publications/kurdistan/overview/agriculture-water/> accessed 21 November 2014.

[116] Tugba Evrim Maden, 'Water Resources and Dams in Iraqi Kurdistan ' *Today's Zaman* (Turkey September 22 2013) <http://www.todayszaman.com/orsam_water-resources-and-dams-in-iraqi-kurdistan_326911.html> accessed 3 November 2014.

[117] The Iraqi Baath party was founded in 1951 and later came to power in Iraq in 1963. The Baath Party was a national socialist party and a staunch advocate for Arab nationalism, secularism and Arab unity.

[118] The peshmerga are the armed forces of the Kurdistan Region. The word peshmerga translates as "those who face death". The roots of the peshmerga derive from the resistance fighters that had protected Kurdish lands and challenged Baghdad throughout the 20th Century.

[119] Human Rights Watch (n 65).

Apart from the internal dynamics of control for water resources, Iraq has also had diplomatic quarrels with Turkey over water coming into Iraq. In fact, the water policies of neighbouring countries Iran, Syria and Turkey have effectively stopped much of the headwaters of Iraq's biggest rivers. The Turkish state has over the past decade put in place plans including plans for the notorious Ilisu Dam which has drastically reduced the flow of water into the IKR.[120] The Euphrates and Tigris originate in the mountains of Eastern Turkey. The water in this region has therefore led to the region being labelled as the Fertile Crescent.[121] Indeed these rivers and other sources of water are as important, if not more, to Iraq today.

A former Iraqi Minister for Water had at a press conference in Ankara stated that "We all need to get a fair share," and that "Iraq is a downstream country. Our drinking water supplies, agriculture and electricity depend on how the water resources are managed upstream. We need to manage water properly and come to agreements."[122] Iraq's dispute with Turkey and other neighbours over water further exacerbates water disputes between Arabs and Kurds simply because there is less water to share. Control over water, like other resources, has been a powerful bargaining tool. An example of this could be seen when some Kurdish officials openly advocate for cutting the flow of water to southern Iraq. However, no official policy has been pursued.[123]

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[120] United Press International 'Iraq Water Crisis Could Stir Ethnic Clashes' (*UPI.com* 2012) http://www.upi.com/Business_News/Energy-Resources/2012/01/27/Iraq-water-crisis-could-stir-ethnic-clash/UPI-56601327698003/ accessed on 3 November 2014.

[121] Marwa Daoudy, 'Asymmetric Power: Negotiating Water in the Euphrates and Tigris' 14 International Negotiation 361 S.M. Hassig, *Iraq: Cradle of Civilization* (Times Books International 2003).

[122] Hilal Elver, Turkey, 'Turkey's River of Dispute' (*MERIP.org,* 2010) https://merip.org/2010/03/turkeys-rivers-of-dispute/ accessed on 17 April 2015.

[123] Shafaq News 'Kurdistan Alliance Denies Cutting Dam's Water' (*Shafaq.com,* 2014) www.shafaaq.com/en/iraq-news/kurdistan-alliance-denies-cutting-dams-water/ accessed on 1 February 2015.

The importance of water was again highlighted during the IS conflict. IS were quick to seize the Mosul dam and other strategic locations close to water resources such as the towns of Saadia and Jalawla in August 2014.[124] These areas as well as being geographically crucial are important for the supply of water to the south of Iraq. Indeed, the IS takeover and control of this dam led to some commentators and think-tanks warning that water is (or could be) used as a weapon in Iraq.[125] The Kurds have since succeeded in taking the dam from IS and had held on to control of it before handing it over to federal authorities. It has been estimated that with the inclusion of the Mosul dam, the Kurds would control approximately three-quarters of Iraq's surface water before it enters the southern areas of Iraq.[126]

2.7 Oil and Gas

Oil and gas have played a pivotal role in Iraqi history and been a recurring theme in numerous uprisings, rebellions and conflicts involving Kurdish and Iraqi forces. Sectarian conflict in Iraq is not a recent phenomenon and cannot be attributed to Arabs and Kurds alone, especially when the issue of oil is concerned. There are numerous examples of sectarian clashes over oil and gas in Iraq. However, one of the most striking was the Turkmen-Kurdish clash of 1959 in Kirkuk,[127] which erupted for a number of reasons, including claim to the city's identity and its oil. More recently, there have been several stand-offs between the Peshmerga and the Iraqi military over

[124]Alex Milner, 'Mosul Dam, Why the battle for water Matters in Iraq' (*British Broadcasting Corporation* 2014)<http://www.bbc.co.uk/news/world-middle-east-28772478> accessed 17 December 2014.

[125]John Vidal, 'Water supply key to outcome of conflicts in Iraq and Syria, experts warn' *The Guardian* (London 2 July 2014) <http://www.theguardian.com/environment/2014/jul/02/water-key-conflict-iraq-syria-isis> accessed 13 December 2014.

[126] The Economist, 'Iraq's Water: Another Threat' (The Economist 11 August 2014) https://www.economist.com/pomegranate/2014/08/11/another-threat accessed 17 January 2016.

[127]Gareth Stansfield, *Iraq: People, History, Politics* (Polity 2007) 98

control of oil-rich areas.[128]

Oil and oil-related interests have great influence on the political economy of Iraq as well as internationally.[129] Since the first oil discovery in the country in the 1900s at Chia Surkh, Diyala[130] and subsequent finds in Kirkuk, oil has been a major component of Iraqi political, economic and ethnic disputes. With known oil discoveries in Iraq, control of the country or parts thereof became a prized possession, not only for internal groups but also major regional and international powers. The discovery of oil in commercial quantities, its development, production and sale has meant different and often opposing things to different actors in Iraq. For its people, it has been a source of economic hope and aspirations of affluence and prosperity. For some of its minorities this has been seen as an opportunity for self-sufficiency and protection. For its politicians this has meant power and control and for the international community this has meant opportunities for private enterprises through international oil companies.

From the 1960s, ending in 1975, Iraq gradually took control of its oil industry.[131] The nationalisation of the oil industry in Iraq, gave the Iraqi central government complete control, side-lining IOCs and potentially increasing revenue for the central government. Indeed, advocates of

[128] See Mohammed Salih, 'Kurds reject proposed rival force in Kirkuk' (*Al-Monitor* 2015) <http://www.al-monitor.com/pulse/originals/2015/02/iraq-national-guard-shiite-peshmerga-kurds.html#> accessed 13 February 2015 Tim Arango, 'For Iraq, Year Ends the Way It Began, With Guns Drawn' *The New York Times* (New York 4 December 2012) Middle East A6 <http://www.nytimes.com/2012/12/04/world/middleeast/iraqs-latest-crisis-is-a-standoff-with-northern-kurds.html?_r=0> and Suadad Al-Salhy, 'Talks to defuse Iraq army-Kurdish standoff make little headway' (*Reuters.com,* 2012) <http://www.reuters.com/article/2012/11/22/us-iraq-kurds-standoff-idUSBRE8AL0YF20121122> accessed 9 February 2015.

[129] Giacomo Luciani, 'Oil and Political Economy in the International Relations of the Middle East' in Louise l'Estrange Fawcett (ed), *International Relations of the Middle East* (Oxford University Press 2004).

[130] Edward Earle, 'The Turkish Petroleum Company – A Study in Oleaginous Diplomacy' (1924) 39 Political Science Quarterly 265.

[131] Amy Myers Jaffe, *Iraq's Oil Sector: Past, Present and Future* (2007) 22.

the linkage between oil finance and arms/warfare suggest that throughout its modern history, Iraq has continually adopted a policy of internal and external warfare, financed by oil. The periods of the 1970s, 80s and 90s stand out as a particularly compelling case of extreme authoritarianism, financed by revenues produced from oil by the central government, under which a vulnerable and "dis-empowered population fell victim to institutionalized ethnic cleansing."[132] The association of conflict and genocide financed by oil revenue is still very much in the living memory of Kurds who do not want a repeat of history. It is in this context that the Kurds argue that it is right that they own and control oil and gas in the KRI.

Some claim that disputes between KRG and Baghdad began as early as 2006 when the Norwegian company DNO began operations in the KRI as the first IOC to start drilling operations.[133] Others argue that the issues relating to oil and gas transcend the central government-sub central divide and have been a source of tension between the Iraq's differing communities.[134]

Kirkuk sits on 40% of Iraq's known reserves and is therefore seen as a crucial future source of revenue.[135]Although 70-80% Iraq's proven oil reserves are located in the country's southern oil fields,[136] this does not denote that oil and gas deposits in the KRI held territory are insignificant. According to the Natural Resource Governance Institute, Iraq has a proven reserve of over 115 billion bbl. of oil with an additional estimated reserve of 45 to 100 billion bbl., making it the

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[132] Romano (n 106) 432.
[133] Rex Zedalis, *The Legal Dimensions of Oil and Gas in Iraq: Current Reality and Future Prospects* (Cambridge University Press 2009) 29.
[134] RaadAlkadiri, 'Oil and the question of federalism in Iraq' (2010) 86 International Affairs 1315
[135] Liam Anderson and Gareth Stansfield, *Crisis In Kirkuk: The Ethnopolitics of Conflict and Compromise* (University of Pensylvania Press 2009) 46.
[136] U.S. Energy Information Administration, 'Official Energy Statistics: Iraq" (*U.S. Energy Information Administration 2014*)www.eia.doe.gov/emeu/cabs/iraq/oil.htm accessed on 7 October 2014.

world's largest untapped pool of easily extracted (traditional) oil.[137] Since the Second Gulf War, oil has been found in viably commercial quantities in the west, centre and the north of Iraq. The KRG has witnessed some of the most significant finds in its territory and controls 6% of the reserves in the north of the country. However, if the northern oil fields of Kirkuk are included, this figure rises significantly to 20%.

The issue of ownership of natural resources between the central government and other regional or local authorities is complex and exacerbated by the lack of clarity in the IC 2005 and the absence of hydrocarbon legislation. Both the Kurds and Arabs claim ownership and control over Iraq's natural resources of Iraq, including its oil and gas. Baghdad has continually threatened the KRG with a number of punishments, the most significant occurring at the beginning of January 2014 when Baghdad officially announced that it would not send the KRG its share of the Iraqi budget generated from the country's export of oil in direct retaliation to the Kurds own production and export of oil.[138] Consequently, the KRG has been left in a position of paying wages to civil servants and other government for the entire calendar year of 2014.[139] Furthermore, the Kurds state that they have never received the 17% share of oil as previously agreed even when Baghdad was sending money to the KRG. This has led to accusations of dictatorship and marginalisation by the Kurds against Baghdad and resulted in continuous threats by the Kurds to secede from Iraq if it is not considered as a key part of the power sharing bloc.[140] Baghdad, in turn, accuses the Kurds of

[137] Natural Resource Governance Institute, 'Iraq Extractive Industries' (*Natural Resource Governance Institute* 2014) www.resourcegovernance.org/countries/middle-east-and-north-africa/iraq/extractive-industries accessed 3 October 2014.
[138] Rudaw, 'Kurdistan Government Blasts Baghdad Over Budget Freeze' (*Rudaw.net,* 2014) http://rudaw.net/english/kurdistan/030320141 accessed 14 December 2014.
[139] Harvey Morris, 'Breakthrough in Baghdad-Erbil Budget Dispute, Says Finance Minister Zebari' (*Rudaw.net,* 2015) http://rudaw.net/english/middleeast/iraq/131120141 accessed 1 February 2015.
[140] Steve Negus, 'Iraq's Kurds threaten secession over oil rights' *The Financial Times* (28 September 2006) Middle East and North Africa <http://www.ft.com/cms/s/0/1fdf15ea-4f11-11db-b600-

a number of misgivings including unlawfully entering into oil and gas contracts with the IOC and undermining the unity of Iraq. To this end, Baghdad argues that the Kurds are using Iraq's natural resources for the purposes of annexing oil rich territory for their own gains.[141] The disputed territories also present a major topic of dispute with Baghdad accusing the Kurds of a land grab, seizing Kirkuk and other disputed areas when the opportunity presents itself. The Kurds counter this by claiming that not only is it their legitimate right but they are also protecting the civilian population from insurgents and terrorists, something that the Iraqi army has not been able to do, at least not effectively.[142]

Baghdad has not only threatened the KRI but also IOCs that enter into agreements with the KRG. In 2013, the IFG attempted to blacklist Chevron and Exxon Mobil by prohibiting them from bidding for any contracts outside of the KRI.[143] This was in response to the two oil companies signing huge contracts with the KRG. Despite these threats, both Chevron and Exxon Mobil continue to operate in the Kurdish areas. Both the Kurds and the IFG point to the IC 2005 and use the constitution as their main legal argument. For example, the Kurds contend that the exclusive

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0000779e2340.html#axzz3S5mVpdaD> accessed 1 February 2015 'Iraqi Kurd leader threatens secession unless power share demands met' (*Al-Arabiya News* 2012) <http://english.alarabiya.net/articles/2012/04/26/210364.html> accessed 29 January 2015 Jamal Al-Badrani, 'Kurds in troubled Iraqi province threaten to secede' (*Reuters.com*, 2009) <http://www.reuters.com/article/2009/07/19/us-iraq-mosul-idUSTRE56I1I120090719> accessed 19 January 2015 Dexter Filkins, 'Kurds Threaten to Walk Away From Iraqi State' *The New York Times* (New York)World <http://www.nytimes.com/2004/06/09/international/middleeast/09KURD.html> accessed 17 January 2015.

[141] The Associated Press, 'Iraq Kurds Take Over 2 Northern Oil Fields' (*The Associated Press* 2014) www.nydailynews.com/news/world/iraq-kurds-2-northern-oil-fields-article-1.1863449 accessed on 28 October 2014.

[142] Jonathan Marcus, 'Factors behind the precipitate collapse of Iraq's army' (*British Broadcasting Corporation* 2014) <http://www.bbc.co.uk/news/world-middle-east-27838435> accessed 18 January 2015 Martin and Hawramy Chulov, Fazel, 'Iraqis raise questions over army's collapse as jihadi advance slows' *The Guardian* <http://www.theguardian.com/world/2014/jun/17/iraq-army-collapse-questions-theories> David Landau, *Why Iraq's Army Crumbled* (The Economist Newspaper Limited 2014).

[143] Christopher Helman, 'The High Stakes Chess Game For Iraqi Oil' (*PARS International Corp*, 2012) <http://www.forbes.com/sites/christopherhelman/2012/08/02/its-big-oil-versus-baghdad-in-an-iraqi-chess-game-who-will-win/> accessed 15 January 2015.

authorities set out in Article 110 does not mention oil and gas as an exclusive authority of the IFG. Furthermore Article 115 states that:

"All powers not stipulated in the exclusive powers of the federal government belong to the authorities of the regions and governorates that are not organized in a region. With regard to other powers shared between the federal government and the regional government, priority shall be given to the law of the regions and governorates not organised in a region in case of dispute."[144]

The IFG on the other hand relies on Article 111, which states that "Oil and gas are owned by all the people of Iraq in all the regions and governorates."[145] Furthermore, they contend that the control and management of oil and gas must be shared between the Federal Government and the regions and governorates as per Article 112 and Article 114.[146] The debate as to whether the KRG actions of directly negotiating with and awarding contracts to IOCs are constitutional is further exacerbated with the debate of what contractual regime should be in place throughout the country. The former Iraqi Oil Minister Hussain Al-Shahristani (now Education Minister) claimed that the terms of the KRG's Production Sharing Contract (PSC)[147] were less favourable for the people of Iraq compared to Baghdad's Technical Service Contracts and other contractual models.[148] This

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[144] Article 115 The Constitution of the Federal Republic of Iraq (2005).
[145] Article 111 The Constitution of the Federal Republic of Iraq (2005).
[146] Articles 112 and 114 The Constitution of the Federal Republic of Iraq (2005).
[147] First developed in Indonesia, the PSC is an arrangement whereby the sovereign owner of mineral resources, usually a state, enters into an agreement with a foreign oil company for the purpose of that company providing financial and technical expertise for exploring or developing the mineral resources of the sovereign's land. In return for providing such services and risk it has taken, the foreign company will obtain an entitlement to a pre-determined share of the oil produced. However, the sovereign (state) remains the owner of the petroleum produced subject to the foreign company's entitlement to its share. In most cases, the state or sovereign is represented by one or more of its bureaus such a national oil company. See Zhiguo Gao, *International petroleum contracts : current trends and new directions* (London : Graham & Trotman/Martinus Nijhoff 1994) and Kirsten Bindemann, *Production Sharing Agreements: An Economic Analysis* (1999).
[148] A Technical Service Contract is an agreement between a sovereign owner of mineral resources (host state) and a foreign oil company for oil and gas exploration or production. The oil and gas company agrees to perform specific services for the host state and is awarded a fixed payment in return. Here the host state chooses a successful bidder from the tender round based on the oil company's resources and expertise of exploration, development and production

stance is not merely to weaken the KRG by undermining its policies but to also push forward an agenda of centralising all oil and gas contracts through Baghdad.[149] The Kurds have ignored these calls and continue to press ahead with their oil and gas production which they aim to export to Fishkabour in Turkey via newly constructed oil pipelines in the KRI.[150] This continued defiance of central government has created an uneasy and fractious relationship, one that is drawing-in Iraq's neighbours and regional powers.

The IS advance into Iraq from Syria, taking large swathes of territory including one of Iraq's largest cities, Mosul, changed the situation on the ground drastically. IS had captured one of Iraq's biggest oil refineries in the town of Beiji. Although the Iraqi forces recaptured the town in November 2014, it highlighted the deep sectarian divisions and mistrust between the differing factions. The IS advance provided an opportunity for Sunni, Shia and Kurdish nationalists to argue for the fragmentation of Iraq as realities on the ground for approximately 3 years was that the Kurds were neighboured with a new entity.[151] The Kurds sent their forces into much of the disputed territories in the *Garmian* area as well as into Kirkuk, arguing that the purpose was to protect the local populace[152] and Kurdish lands. The Arabs saw this as an opportunist land-grab, particularly in areas that are oil-rich. The Kurdish counter was that the Iraqi army had proved that it was

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of oil and gas. For an insight into Iraq's TSC contracts see Pedro Van Meurs, *Commentary on the Iraq Draft Technical Service Contract* (2009).

[149] Rex Zedalis, *Oil and Gas in the Disputed Kurdish Territories: Jurisprudence, Regional Minorities and Natural Resources in a Federal System* (Routledge 2012) 118.

[150] Grant Smith and Nayla Razzouk, 'Iraq's Kurds to Export Oil by New Pipeline 'Very Soon'' (2014) <http://www.bloomberg.com/news/2013-06-19/iraq-s-kurds-to-export-oil-by-new-pipeline-very-soon-.html> accessed 21 November 2014.

[151] The Iraqi army had suffered catastrophic defeats in strategic areas, losing large amounts of territory to IS. This called the Kurds into action. The *Peshmerga* were deployed to the disputed territories, which further complicated the already murky relationship with Baghdad.

[152] Hamza Mustafa, 'Iraqi Kurds Say Seizure of Kirkuk Oil Fields to Protect Against ISIS' (*AAwsat.net,* 2014) www.aawsat.net/2014/07/article55334184 accessed on 30 October 2014.

incompetent and ineffective in defending not only Iraq's land but also its people. Although they have maintained that self-determination as a right, the Kurds have stated that for now, they are committed to a Federal Iraq that is based on cooperation and power sharing.[153]There were signs that Baghdad–Erbil relations were beginning to thaw. This was perhaps due to the appointment of a new Prime Minister, Hayder Al- Abadi. On 2 December 2014, the Baghdad – Erbil stalemate was broken. An agreement was reached where the Kurds would produce and calculate the oil through Baghdad and in return Baghdad would send the KRG the 17% of Iraqi budget as revenue. Indeed, Dr. Ashti Hawrami, the KRG Minster of Natural resources referred to this deal as a two phase process[154] at the annual Kurdistan-Iraq Oil & Gas Conference in London in December 2014. These issues naturally require time but more crucially need political support and willingness of all parties to create, implement and promulgate the importance of legal rules and its enforcement in the oil and gas sector. Towards the end of Al-Abadi's tenure as Prime Minister of Iraq, the relationship between Baghdad and Erbil had once again broken down.

2.8 Conclusion

Considering the issues discussed in this chapter, it is not surprising that Kurds and Arabs continue to compete for governance of oil and gas in the KRI. Because of historic Arab domination of power and government campaigns of brutality against the Kurds, the Kurds are wary of any attempts by

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[153] Luke Harding and Fazel Hawramy, 'Kurds hope oil boom will fuel prosperous independent future' *The Guardian* (14 July 2014) <http://www.theguardian.com/world/2014/jul/14/kurdish-technocrats-discuss-kurdistan-oil-wealth> accessed October 17, 2014.

[154] The first of the two phases would see the KRG supplying 250,000 bpd from the KRI with a further 300,000 bpd drawn from northern fields near the city of Kirkuk to Turkey via a pipeline that runs through the Kurdish Region. Although a very important first step that has broken the deadlock, it should be noted that the more crucial and harder task lies in the second phase. The second phase of the agreement relates to the core of the dispute, that of ownership of natural resources, revenue sharing, a hydrocarbon law, a constitutional review committee specifically charged with oil and gas issues and regulation of the industry.

Baghdad to assert control over their region. In short, Kurds do not want history to repeat itself. The Kurdish psyche associates Baghdad's power with Arab power and oppression. In turn, the Arabs associate the Kurds with separatism and insubordination. This complex relationship between Kurd-Arab and Baghdad-Erbil has resulted in a divided society drawn on sectarian lines. Rather than pull together, each bloc or group within Iraq attempts to exert its belief, ideas or vision for Iraq onto the others. The groups therefore attempt to consolidate power themselves whilst weakening other groups. This consolidation takes shape in the form of military prowess, control of resources, control of land and control of people. In this context, oil and gas are important commodities to not only fund this struggle for power and control politically but also for the people of the area who aspire for a better life.

Both Kurds and Arabs have their own ethnic narrative, based on history, accumulated economic and political grievances and rigid sense of entitlement.[155] The historic issues and the decades of mistrust has meant that Iraq is at a juncture where political, economic and social issues within the country is not approached by all sides as national problems but through the eyes of differing blocs, each pushing its own agenda.

Although both the KRG and IFG have attempted to reach an agreement on the issues discussed in this chapter, it is difficult to see a settlement to the conflict anytime soon. Lack of unity has seen terrorist groups such as the Islamic State take advantage of ethnic tensions and uncoordinated

[155] International Crisis Group, 'Iraq and the Kurds: The High-Stakes Hydrocarbons Gambit' (*CrisisGroup.org,* 2012) www.crisisgroup.org/middle-east-north-africa/gulf-and-arabian-peninsula/iraq/iraq-and-kurds-high-stakes-hydrocarbons-gambit accessed on 19 March 2015.

security efforts. Whilst the United States announced[156] the end of the military campaign against IS, some have voiced concern[157] that it is likely for IS or another terrorist group to emerge once again and threaten Iraq's territorial sovereignty.[158] Iraq's vulnerability and weak military and security framework, coupled with continuous threats from extremist groups to destabilise and control parts of Iraq remains a great concern for the Kurds. In this respect, much will depend on how politically united and committed the Kurds and their counterparts will be in keeping Iraq as a unitary state and how they will work together.

Internal Kurdish politics with respect to governance of petroleum in the KRI also presents a challenge. Without a unified government that can govern KRI territories effectively, it is difficult to envisage how Kurds could develop petroleum resources in a manner that continues to attract investment from IOCs, and ultimately benefits the people of the KRI. Furthermore, disunity may adversely affect the KRG's desire and constitutional claim to govern petroleum development and operations in the KRI.

Uncertainty, politics and foreign intervention continue to plague Iraq. Aside from theoretical factors that articulate Iraq as one entity for the purpose national and international law, in practice Iraq's political and legal system has fragmented on sectarian lines in many different ways. There are numerous examples of this division.[159] It is crucial that all of Iraq's groups uphold and respect

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[156] Kevin Breuninger, 'White House says the US is pulling its troops from Syria after Trump declares victory over ISIS' (*CNBC.com,* 2018) <https://www.cnbc.com/2018/12/19/us-wants-to-pull-troops-from-syria-as-trump-declares-victory-over-isis.html> accessed 22 December 2018.
[157] Tanya Goudsouzian, 'Interview with Kurdish Intel Chief Lahur Talabani' (*Newsweekme.com,* 22 November 2016) <http://newsweekme.com/exclusive-interview-kurdish-intel-chief-lahur-talabani/> accessed 21 January 2017.
[158] Ibid.
[159] For example each of the three main blocs Kurd, Shia and Sunni each have various armed groups and do not rely on the Iraqi army to protect their interests.

the laws within the country, failure to do so presents a continuation of Iraq's history and the current status quo. Ultimately, Kurds have their autonomy and have not given up their claims to the disputed territories. IS ambition to once again control and administer Sunni territories poses a danger that Iraq's federal government cannot protect and guarantee Iraq's territorial sovereignty. This leaves Baghdad and the southern areas that are governed by the Shia who are interested in protecting Shi'a people and territory. Consequently, the result has been that of a weak central government, ineffective constitution and vulnerable system of law.

CHAPTER THREE: THE CONSTITUTIONAL FRAMEWORK

The primary aim of this chapter is to study, interpret and analyse key provisions of the IC 2005 with respect to the governance of oil and gas in the KRI. For this purpose, this chapter is divided into six sections, each examining the relevance of constitutions and constitutional provisions generally with oil and gas governance as the main focal point. The first section will begin with a brief introduction outlining the definition, function and purpose of a constitution and whether a constitution needs to include provisions relating to natural resources. This backdrop will provide understanding as to whether constitutional provisions regarding natural resources, particularly oil and gas, are needed to protect and govern natural resources in a state. The second section will introduce Austrian legal theorist Hans Kelsen's hierarchy of norms as the theoretical basis that has influenced legal orders of many jurisdictions. Kelsen's work offers one way of understanding how constitutions are structured and function as well as its standing in legal orders. As a traditional and leading authority on constitutions, Kelsen's work is of great importance in defining a constitution's role in the legal order and how its relationship with legislation and ordinances functions. In short, Kelsen's work helps shape how and what we think about the role of the constitution in legal orders. This section will therefore draw on Kelsen's hierarchy of norms with specific reference to the *grundnorm* (translated from German as the basic norm)[160]. The main purpose of this theoretical discussion is to clarify the role of the constitution in law making and the hierarchical theoretical legal structure according to Kelsen. Kelsen's hierarchy of norms has been selected as the theoretical underpinning of this research as it reflects the structural validity of the Iraqi state's current legal order.

[160] Hans Kelsen, *Pure Theory of Law* (University of California Press 1967) 8.

The third Section will provide an overview of Iraqi constitutional history, highlighting where relevant, differences and similarities with the IC 2005 and identifying underlying themes, if any. Discussions will then turn to the negotiating and drafting process of the IC 2005 with fastidious reference to natural resources, determining sources and influences from which authors of the constitution drew inspiration.

The fourth section will centre on Iraqi constitutional framework from the perspective of its relevance to natural resources other than oil and gas, focusing on water and land. The purpose is to investigate whether such provisions in the IC 2005 are different to oil and gas provisions and if so, how and why. This discussion is important to identify whether petroleum resources have been given special consideration in the IC 2005 or whether they are comparable to other natural resources. The objective is to investigate whether a workable and effective framework has been successfully incorporated into the IC 2005 with respect to non-oil and gas resources and how this is expressed in the constitution. Pertinent provisions within the IC 2005 relating to water and land will be examined to evaluate whether lessons can be drawn from the way in which the IC 2005 accommodates non-petroleum resources, which could apply to oil and gas.

The fifth section will centre on how Kelsen's Pure Theory of Law and particularly the hierarchy of norms may be applied to the context of the KRI. The sixth and final section will analyse the Iraqi constitutional framework in terms of its significance to the oil and gas sector. The relevant provisions of the IC 2005 will be examined to determine whether oil and gas provisions in the IC 2005 are fit for the purpose of providing a legal framework which addresses issues such as access

to, ownership, management, equitable distribution of revenue and control of petroleum resources in the KRI and Iraq. Furthermore, the question will be explored as to whether the constitution has adequately identified and assigned responsibilities to the IFG, sub-central entities (such as the KRG) and IOCs. In addition, a discussion as to who has the right to award and confer exploration and production rights will take place. A supplementary component to this question is whether any preference is given to a particular contractual model for oil and gas exploitation and whether KRG's actions with respect to oil and gas exploitation in Iraq are constitutional.

3.1 Constitutional Overview

The Oxford Companion to Law defines a constitution broadly as "…The fundamental legal and political structure of government of a distinct political community, settling such matters as the head of state, the legislature, executive and judiciary, their composition, powers and relations."[161] For the purpose of this work and in its most basic form, a constitution is simply a set of rules and principles by which a country is governed. A constitution produces and outlines the relationship and powers of and between different branches of government, national legislature and judiciary. It also establishes a link between a sovereign nation and its citizens through which social, religious, ideological and economic values are established and protected. Furthermore, constitutions serve as vital components in the governance of sovereign nations, providing a platform for the rule of law. Constitutions also exist to safeguard underlying principles or specific issues. For example, most constitutions determine the nation's capital[162] or whether the state will be a republic, a

[161] David M. Walker, *The Oxford Companion to Law* (Clarendon Press 1980) 388.
[162] For example, Article 22 of the German Constitution 1949 states Berlin as the capital, the Constitution of Lithuania1992 in Article 17 stipulates Vilnius as the capital and Article 21 of the Constitution of Afghanistan 2004 identifies Kabul as the capital.

monarchy, a federation etc.[163] Constitutions can also attempt to safeguard issues that are considered of national importance, such as ownership and management of natural resources. It is for these reasons that most sovereign nations and sub-national entities within them adopt constitutions, usually in a codified form.[164]

By the same token natural resources find constitutional expression and have become a fundamental component of utilising such resources for the benefit of the public, especially in resource rich countries. Constitutions are both legally and politically symbolic outlining agreements between competing actors, creating a platform from which to build and continue negotiations. However, natural resources have not always been perceived as important enough to include in constitutions. In some countries, especially those where oil and gas do not form a significant sector of the economy, natural resources have either been incorporated into revenue, fiscal and financial provisions or under the umbrella term of "natural resources". Examples of this can mainly be found in European countries that have no or limited natural resources. More recently, the trend has been that constitutions deal with natural resources separately from other elements of the wealth-sharing framework of states. This is mainly true of developing countries where natural resources are the only or predominant source of wealth because these resources are seen as national treasures to be shared equitably. The challenge is to balance local interests against overall importance of natural

[163] For instance, the Constitution of Algeria 1989 in Article 1 identifies Algeria as a Democratic, Peoples Republic. The Constitution of Denmark at Part I(2) refers to the Kingdom of Denmark as a Constitutional Monarchy. The Constitution of Brazil 1988 refers to the state as a Federative Republic.

[164] Although such discussion is outside the remit of this research, it is important to recognise that not all states have a constitution or constitutions that are codified. Historically, differing empires that ruled large geographic territory did not have constitutions. For example, many Islamic and Christian Empires sought solace in the words of the Quran and Bible respectively. More often, their rule of law doctrine came from a figurehead or a ruling elite who would determine the laws of the land. In Saudi Arabia this tradition has continued, where the Quran is the highest legal document in the country. There are a number of other states in the modern era, that do not have a constitution in a codified single document including the United Kingdom, Canada, Israel and New Zealand.

resources development to the state and its population. Constitutions are therefore expected to prevent, mediate or reconcile such tensions.

In the post-colonial age, most sovereign states have adopted codified constitutions for the purpose of simplicity and clarity[165] for the purpose of determining the state structure and governance of a country. It is almost impossible to identify a model constitution or to even classify what is a 'good' or 'bad' constitution as there is no universally accepted ideology, religion or values to underpin a constitution. Although some principles are termed universal, it generally falls on the respective nation states to develop constitutions that establish a link between citizens and the state, establishing state identity and shared values through which citizens can co-habit within predetermined and identified geographical borders.

Principles of constitutionalism and rule of law gave way to political, social and economic advances as can be seen in the United States and European countries. The main aim of a constitution is therefore to introduce, promulgate and protect a social contract between a state and its citizens.[166] Constitutions are seen as a source of legitimacy that should contain the demands and desires of the people. It is important, however, for a constitution to be stable so that the common values and ideals of citizens are upheld but at the same time flexible enough to change and evolve with the passage of time. Just as importantly, constitutions, once adopted, need to be upheld by differing organs of the state (the executive, legislature, judiciary) and citizens. Violation of the constitution

[165] Judith Pryor, *Constitutions: Writing Nations, Reading Difference* (Birbeck Law Press 2008) 4.
[166] Saad N. Jawad, 'The Iraqi Constitution: Structural Flaws and Political Implications' (2013) LSE Middle East Center. Paper Series /01 http://constitutionnet.org/sites/default/files/the_iraqi_constitution-structural_flaws_and_political_implications.pdf accessed on 19 March 2016.

undermines not only the process of governance in a state but arguably severs the link between the citizens and the state itself, in effect changing the dynamics of the national compact.

It is recognised that constitutions are not the only vehicle to achieve lasting agreement on natural resources, but its importance should not be ignored. It is possible to reach agreement without constitutional expression in the form of legislation and custom. However, constitutions are typically regarded as the most important legal document of a state as they lay the foundational step towards putting the national compact into practice.

3.2 Kelsen's Pure theory of Law and Hierarchy of Norms

This section aims to ground the discussions and examination of the Iraqi constitution in theory and to substantiate points made in this and subsequent chapters concerning the validity of the sources that make up the Iraqi legal systems and constitutional orders. To ground such an examination, an overview of Kelsen's understanding of the concepts law, norms, constitution and hierarchy of norms is necessary.

3.2.1 The Pure Theory of Law

Kelsen put forward a theory of law that attempted to identify the 'fundamental character of law'[167] and to understand the nature of law itself. In many ways, Kelsen's theory is a reaction to contemporaneous studies of law; Kelsen's examination of the concept of law was guided by two refusals: first that understanding law and legal systems will not be acquired through reliance upon

[167] David Schiff, 'Modern Positivism: Kelsen's Pure Theory of Law' in James Penner, David Schiff and Richard Nobles (eds), *Introduction to Jurisprudence and Legal Theory: Commentary and Materials* (Butterworths 2002) 190.

natural or social science and their methodology; second, that law should not be contaminated by elements of morality, politics, sociology, economics, history or other disciplines. His positive theory of law[168] leads him to advocate for the purity of law cleansed from external elements,-which he articulates in his Pure Theory of Law.[169] Consequently, the Pure Theory of Law cannot answer questions as to whether a specific law is just or fair; this requires a subjective assessment outside legal science and outside the realm of the Pure Theory of Law.[170] The object of this 'legal science' is the study of legal norms, i.e. those norms that identify acts or behaviours as legal or illegal.[171]

3.2.2 The Concept and Validity of Norms

As explained above, Kelsen's main challenge was for his theory of law to provide an explanation of law and normativity so as not to reduce jurisprudence to a social science.[172] For Kelsen, legal norms can either take the form of general legislation or individual decisions. The specific characteristic of a legal norm is explained by Kelsen's articulation of law as an 'ought'– proposition; thus, legal norms allows or dictates that a person ought to behave in a specific way.[173] Importantly, he reminds us that only the norm itself is of interest to legal science, not the behaviour of individuals (in fact, he admits that people may not behave as required by the norm).[174] Furthermore, while a legal norm dictates how someone should behave, it does not express the will

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[168] Hans Kelsen, '*Pure Theory of Law*' (Max Knight tr, The Lawbook Exchange Ltd 2009) 1.
[169] Henry Janzen, 'Kelsen's Theory of Law (1937) XXXI American Political Science Review 205.
[170] Hans Kelsen, 'The Pure Theory of Law and Analytical Jurisprudence' (1941) 55 Harvard Law Review 45
[171] Kelsen (n 168) 3.
[172]Andrei Marmor, 'The Pure Theory of Law' (Stanford Law School, 18 November 2002) <https://plato.stanford.edu/entries/lawphil-theory/#:~:text=The%20jurisprudence%20Kelsen%20propounded%20%E2%80%9Ccharacterizes,%E2%80%9D%20(PT1%2C%207).> Accessed 14 September 2020.
[173] Kelsen (n 168) 5.
[174] Kelsen (n 170) 50.

of anyone.[175] Instead, the 'essence' of a legal norm rests upon the coercive character of this norm, the sanction that is attached to the norm to 'punish' any breach.

The validity of norms rests on a chain of validity with the validity of the more detailed and lower norm resting upon the more general and higher norm (which may be referred to as Superior and subordinate norms respectively). Therefore, law is presented by Kelsen as a system of norms; norms only exist in an interconnected system of legal norms.[176] However, this system of legal norms is organised in a complex and multi-levelled hierarchy. For Kelsen another "specificity" of law is that it regulates its own creation.[177] Thus the general and superior norms determine the procedure by which a lower norm is created and dictates the content of the norm to be created (albeit sometimes in a rather general way).[178] Taking the hierarchy of norms presented below, each norm is considered as valid by virtue of a prior norm which itself is valid pursuant to another prior (and higher) norm and so on, creating a chain of validity of legal norms. This chain of validity forms a hierarchical system of legal normativity:

The Basic Norm (*Grundnorm)*

The Historically First Constitution

The 'Reigning' Constitution

Acts of Parliament – Custom – Precedents

Ordinances

[175] Kelsen (n 170) 56.
[176] Kelsen (n 168) 47.
[177] Kelsen (n168) 221.
[178] Kelsen (n168) 221.

3.2.3 Grundnorm

However, this creates a problem: while all norms need a pre-existing one in order to be valid, the ultimate origin of legal validity becomes difficult to locate. To address this, Kelsen introduces the concept of the *grundnorm*, which is considered the ultimate source of legal normative validity. Therefore, this hierarchical normative structure relies on tracing its validity to this a *priori* legal assumption which Kelsen calls basic norm or *grundnorm*.[179] Kelsen argues that one reaches a point at the top of hierarchy where one can go no further.[180] At this stage, Kelsen relies on the concept of the *grundnorm*, the validity of which can only be presumed. The *grundnorm* represents the transcendental-logical propositions that ground this entire hierarchy of norms.[181]

For its own normative validity, the *grundnorm* does not depend on a higher norm and therefore must be different in character from all other norms in the hierarchy of norms. However, the *grundnorm* rather than having an existence in fact is the meaning of an act of thinking and one that is only available to be conceived.[182] From there, Kelsen articulates the relationship between the different levels of this normative structure.

3.2.4 Hierarchy of norms

Deriving its validity from the *grundnorm*, the constitution represents the highest level of positive law in a national legal order. When explaining this 'echelon' of the hierarchy of norms, Kelsen specifies that the *grundnorm* prescribes that one ought to obey the 'historically first constitution'.[183] Beyond the historically first constitution, the 'reigning' or current constitution is

[179] Kelsen (n168) 222.
[180] Schiff (n 167) 199.
[181] Kelsen (n 168) 201.
[182] Schiff (n 167) 201.
[183] Kelsen (n 168) 200.

therefore the highest positive norm of this hierarchy. This (material) constitution[184] regulates the creation of general legal norms (i.e. legislation) and creates the institutions and organs that are authorized to create this legislation.[185] It is the nature of these organs that determines the form of Government: autocratic, if legislative power is granted to a monarch or dictator, democratic if legislative power is vested in a representative parliament elected by the people.[186] In addition, the constitution stipulates the constitution's amendment procedure which is typically more rigorous than that of legislation.[187]

The level down in the hierarchy immediately below the constitution is constituted of the norms created by legislation or by customs. With regard to legislation, the legislative body details and develops constitutional principles or creates legislation so long as these respect the constitution, bearing in mind that the constitution may prohibit certain content.[188] Constitutions may also establish customs in what Kelsen describes as "law-creating fact".[189] Constitutions may recognise customs arising in situations and environment where people belonging to the same legal community behave in the same way for a sufficiently long time thus resulting in the formation of a collective will that dictates one's behaviour.

At the lower level of this hierarchy of norms, one finds statutes and ordinances. While both these norms are adopted by government or administrative authorities, they are quite distinct. Statutes are general norms of secondary legislation and they detail and elaborate on legislation. Ordinances are

[184] Kelsen (n 168) 222.
[185] Kelsen (n 168) 223.
[186] Kelsen (n 168) 225.
[187] Kelsen (n 168) 222.
[188] Kelsen (n 168) 223.
[189] Kelsen (n 168) 226.

norms of legislative content that are adopted by government or administrative authorities (sometimes in periods of exceptional circumstances).[190]

We have now established Kelsen's hierarchical structure which is based on a descending connectivity of norms and identified the meaning and function of the *grundnorm*, the constitution and the remainder of the structure. Following on from the examination of Kelsen theoretical framework, the remainder of the chapter focuses on the Iraqi constitution.

3.3 Iraq's Constitutional History

Since its birth, Iraq has officially adopted two constitutions: in 1925 and 2005. Between these periods Iraq intermittently promulgated a series of interim and transitional constitutions in 1958, 1963, 1964, 1968 and 1970 but these were never officially adopted as permanent constitutions. Years of coups, revolts and war produced an environment of constant violence, where establishment and governance of civil society came second to conflict and warfare.

3.3.1 The 1925 Constitution

In the aftermath of the First World War and demise of the Ottoman Empire, Iraq was placed under British mandate where a Constitutional Monarchy was imposed on the country. Subsequently, at the Cairo Conference a treaty between Great Britain and Iraq[191] was agreed and ratified in 1922.[192] A group of British political officers led by the then commissioners, Sir Percy Cox and followed

[190] Kelsen (n 168) 229.
[191] Stacy E. Holden, '*A Documentary History of Modern Iraq*' (University Press of Florida 2012) 70.
[192] This treaty resulted in the appointment of British administrators to all of Iraq's 18 provinces. In exchange, the British would assist Iraq with the governance and administration of the country. Consequently, the British High Commissioner was appointed as the sole legal and executive authority in the country.

by Sir Henry Dobbs were chosen to form a committee in an effort to draft Iraq's first constitution. This committee drew much of its influence, when drafting, from adapted constitutional models of New Zealand, Australia and other commonwealth countries. The final text, a document of 123 articles, titled *Al-Qanoon al-Asasi al-Iraq* (The Basic Law of the Iraqi State) was approved in 1925.[193] Despite British influence and pressure, ratification of the constitution was not a formality, with members of the Iraqi Parliament openly opposed to many constitutional provisions. When voting to ratify the document, the outcome was 37 in favour, 24 against and 8 abstentions.[194]

Article 2[195] of this newly adopted constitution confirmed Iraq as a sovereign, independent and free state, based on principles of a Constitutional Monarchy and centralisation of power.[196] The King's role and powers, *inter alia*, included concluding treaties (Article 26(4)),[197] selecting and appointing the Prime Minister (Article 26(5)),[198] appointing members of the Senate (Article 26(6)),[199] appointing and dismissing all diplomatic representatives, civil officials, judges, bestowing military ranks (Article 26(7)),[200] commander in chief of the Iraqi armed forces (Article 26(8)).[201] From the beginning, Iraq was established as a state where political, legal and economic power would reside in Baghdad, under the authority of one individual. Although Part I of this constitution provides for the "The Rights of the People" and non-discrimination (Article 6),[202] no violation of personal

[193] Jawad(n 166) 6.
[194] Phillip Willard Ireland, 'Iraq: A Study In Political Development' (2004) 17 International Foreign Affairs' 583.
[195] Article 2 Constitution of Iraq 1925.
[196] Part II of the constitution outlined the powers and prerogatives of the Crown. Article 26(1) Constitution of Iraq 1925 for instance states: "The King is the supreme head of the State. He confirms laws, orders their promulgation and supervises their execution. By his order regulations are drawn up for the purpose of giving effect to the terms of laws, in so far as such laws contain provisions therefor."
[197] Article 26(4) Constitution of Iraq 1925.
[198] Article 26(5) Constitution of Iraq 1925.
[199] Article 26(6) Constitution of Iraq 1925.
[200] Article 26(7) Constitution of Iraq 1925.
[201] Article 26(8) Constitution of Iraq 1925.
[202] Article 6 Constitution of Iraq 1925.

liberty (Article 7),[203] freedom of expression (Article 12),[204] it does not specifically mention the Shiite community or minorities such as Kurds and Turkomen or their rights as a people. The pretext here is that Iraq is established as a unified Arab Sunni state with ultimate power residing in one figure, the monarch. This constitution was silent on issues relating to natural resources except for Article 94, which articulates:

"No monopoly or concession shall be granted for dealing with or using any of the natural resources of the land, nor for any public service, nor shall the State revenues be farmed out, except in accordance with law, provided that where the period relating to them exceeds 8 years, they must in each case be the subject of a special law."[205]

Here, the constitution attempts to provide guidance within which oil and gas concession contracts are awarded, government revenues are spent and land as a resource is exploited. Although this article states that monopolies or concessions cannot be granted unless within the confines of the law, in reality the British mandate and the power of the King ensured that whatever the King and the British desired would be supported by Iraqi law. Iraq's experimentation with a constitutional monarchical system ended abruptly in 1958. In the years leading up to the overthrow of the monarchy and establishment of a Republic, there were 47 different governmental cabinets between 1937 and 1941, plus six attempted military coups.[206] Such dramatic changes in a short period of time highlights the instability of Iraqi politics and the state itself from the outset. Iraq was created as a country that had no sense of identity, homogeneity, or desire to become a sovereign state from

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[203] Article 7 Constitution of Iraq 1925.
[204] Article 12 Constitution of Iraq 1925.
[205] Article 94 Constitution of Iraq 1925.
[206] Constance A. Johnson, *Iraq: Legal History and Traditions* (2004) 14.

a defunct empire. The British had imposed a constitutional monarchy, headed by a non-Iraqi, and created a constitution that was alien to the populace.

3.3.2 The 1958 Interim Constitution

In 1958, the Iraqi monarchy was violently overthrown by Brigadier General Abdal Kereem Qasim. Qasim realised that Iraqis associated the monarchy with foreign control and began a nationalistic campaign of reform promising a better life for poor Iraqis. A new interim constitution consisting of only 30 articles[207] was drafted, replacing the 1925 Constitution, continuing the rhetoric of unity and sovereignty of Iraq but for the first time, there was reference to the Kurds. Article 3 of this constitution states:

"The [structure of Iraq][208] is based on cooperation of principles between its citizens and respecting their rights and maintaining their freedom. Arabs and Kurds are considered partners in this county [where][209] the constitution will state their national rights under Arab unity."[210]

This was a political gesture to the Kurds who had led several uprisings and revolts against the British. Although Kurds are considered as "partners" in this provision, the status of Iraqi identity remained under "Arab unity". It could be interpreted that the constitution intended to create a form of partnership not on equal footing but where Kurds would have limited say on the governance of Iraq with the majority of power and influence being wielded by Arabs. The focus in this interim

[207] Interim Constitution of the Republic of Iraq (1958).
[208] Text amended from translated version available. Original words "Iraqi structural" replaced by the "structure of Iraq".
[209] Text amended from translated version available. Original word "were" is replaced by "where".
[210] Article 3 Iraqi Interim Constitution 1958.

constitution was on the rights of Iraqi citizens, emphasising their role in the Iraqi state. For instance, Article 7 states "citizens are the source of authority".[211] Although natural resource exploitation was firmly established in Iraq by this time, there was no mention of the exploitation, development, management, governance or ownership of natural resources in the interim constitution. Only one provision, in Article 14, referred directly to land, which stated: "Agricultural property is determined and regulated by the law."[212] Furthermore, Article 13 referred to the protection of personal property stating, "personal property is safeguarded by the law".[213] The emphasis on land and agriculture was again based on a policy of appealing to the masses that predominantly resided in rural areas.

Considering it was only 30 articles in length, the interim constitution gave rise to a legal vacuum of power and authority. The provisions were not detailed enough, and the legislation required to fill this vacuum was either non-existent or inadequate. This meant that Qasim and his supporters dictated law. Although Qasim continued to champion the rights of the poor, he did not manage to replace the system that he had inherited where one individual or ruling elite dominated the political and legal spheres in the country. The result was that another form of autocracy had effectively replaced the monarchy. On 8 February 1963, Qasim's opponents took over key government ministries and facilities such as the Ministry of Defense and gave orders for Qasim to be executed without trial.[214]

[211] Article 7 Iraqi Interim Constitution 1958.
[212] Article 14 Iraqi Interim Constitution 1958.
[213] Article 13 Iraqi Interim Constitution 1958.
[214] Johnson(n 206) 23.

3.3.3 Interim Constitutions of 1963, 1964 and 1968

Beginning in 1961, the Kurds fought the Iraqi government, vying for independence or, at the very least autonomy. In 1963, the first republican regime fell and subsequently a new interim constitution was introduced. During these periods because of rising pan-Arab ideology and the political climate in the Middle East, these interim constitutions were similar in nature. The Baath party was now in power, advocating for hardline Arabist ideology. However, there were divisions between pro and anti-Nasser camps.[215] During the month of November in 1963, Abdul Salam Arif and the Baath party came to power and a new pro-Nasserite government was formed. This government lasted three years until Arif's death in 1966 where his brother Abdal Rahman Arif succeeded him. Abdal Rahman Arif continued pan-Arabist policies and remained President until 1968. In 1968 the non-Nasserite Baathists came to power in a nearly bloodless coup.[216] Ahmed Hassan Al-Bakr brought the Iraqi regional branch of the Baath Party to power in an attempt to decrease the influence of Nasser and his supporters. As a result, two further interim constitutions were drafted in 1968 and 1970. A new body called the National Council of the Revolutionary Command ("NCRC") was established as the highest decision-making body in the country and installing Al-Bakr as Chairman of the Council and President of Iraq.[217] Three of the five members of the NCRC were Sunnis from the Northern town of Tikrit,[218] the hometown of Saddam Hussein. Saddam's relationship with Al-Bakr and ruthless political skills soon saw him become Vice-Chairman of the Baath party, in effect a role given to the second most powerful man in Iraq at the time.

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[215] These were two competing spheres of influence which differed on the role that pan-Arabism (which was championed by then President of Egypt Gamal Abdel Nasser) should play in Iraq. Nasser and his supporters advocated for Arab supremacy via a union of Arab states to promote Arab identity, culture and political ideology.
[216] Robert L. Maddex, *Constitutions of the World* (CQ Press 2007) 218.
[217] Johnson (n 206) 29.
[218] Maddex (n 216) 127.

Considering the strong Arab sentiments at the time, the language used in these interim constitutions is vehemently pro-Arab, characterizing Iraqi society as Arab in nature, showing the deep-rooted Arabist political and legal culture within Iraq. While this in itself is perhaps not a problem for the majority of the country, the Kurds saw it as an attempt to marginalize minorities. During these years a pattern emerged where interim constitutions were being replaced frequently, each time with the promise that elections would be held in order to promulgate a new permanent constitution but this promise was not upheld.[219] Another theme throughout this time was the reiteration of Iraq's unity and centralization of power in Baghdad.[220]

3.3.4 Interim Constitution of 1970

In March 1970, a proposed peace plan between the Kurds and Iraqi government was announced, providing broader Kurdish autonomy, promising Kurds representation in Iraqi governmental bodies. This was an attempt by the new Iraqi Baath regime to secure their grip on power[221] and therefore many Kurds did not see this as a genuine attempt at reconciliation. To consolidate power, the NCRC in a session held on 16 July 1970 passed Resolution No.792, which promulgated a new interim constitution. This new interim constitution declared in Article 2 "the people are the source of authority and its (the Republics) legitimacy".[222] It also reaffirmed the territorial integrity of Iraq in Article 3(a) "Sovereignty of Iraq is undivided unity"[223] and Article 3(b) "The land of Iraq is undivided unity and any part of it may not be given up".[224] However, it recognized in Article 5

[219] Jawad (n 166) 7.
[220] None of the interim constitutions attempted to reform the framework of Iraq, to make it more inclusive for all Iraqis. Provisions relating to natural resources, including oil and gas were not incorporated and left to the legislature to detail.
[221] Human Rights Watch (n 105).
[222] Article 2 Interim Constitution of the Republic of Iraq 1970.
[223] Article 3(a) Interim Constitution of the Republic of Iraq 1970.
[224] Article 3(b) Interim Constitution of the Republic of Iraq 1970.

that Iraq was composed of two nations: the Kurdish nation and the Arab nation.[225] Article 7(b) recognized the Kurdish language as the official language (alongside Arabic) in Kurdish areas.[226] The constitution also provided a pro-forma list of “Basic Rights and Obligations”[227] but consistent human rights abuses were documented by independent reputable organizations such as the United Nations.[228] In addition, this Interim Constitution in Article 13 attempted to enshrine ownership of natural resources as belonging to the whole nation:

“Natural Resources and the principal instruments of production are the property of all of the nation. The central authority of the Republic of Iraq shall invest them directly in accordance with the requirements of the general planning for the national economy.”[229]

This is the only provision relating to oil and gas and suggests petroleum operations are to benefit the Iraqi people. The NCRC under Article 37 was declared as the “supreme institution in the state”[230] and the President of the NCRC was to be President of Iraq. The NCRC was so powerful that it dictated the law, which was used to protect its members. Article 40 for example stipulated that all members of the NCRC “shall enjoy full immunity and that no measure may be taken against any one of them except by prior permission of the Council”.[231] Moreover, under Article 42 of the Interim Constitution, the NCRC exercised the following competencies:”(a) to promulgate laws and decisions which have the power of law”[232] and b) to issue the resolutions in what is required

[225] Article 5 Interim Constitution of the Republic of Iraq 1970.
[226] Article 7(b) Interim Constitution of the Republic of Iraq 1970.
[227] Articles 19-36 Part ThreeInterim Constitution of the Republic of Iraq 1970.
[228] Maddex (n 216) 128.
[229] Article 13 Interim Constitution of the Republic of Iraq 1970.
[230]Article 37 Interim Constitution of the Republic of Iraq 1970.
[231] Article 40 Interim Constitution of the Republic of Iraq 1970.
[232] Article 42(a) Interim Constitution of the Republic of Iraq 1970.

by the necessities of application of the provisions of enforced laws."[233] The centralization of power and legal legitimacy to the NCRC became foundations on which Saddam Hussein would rise to power, purging the body of any opposition. For example, amendments to the interim constitution could only be made in accordance with Article 63[234] which required two-thirds vote of the NCRC but in reality all that was required was Saddam's approval.[235]

Even though the interim constitution did afford some rights to Kurds, the Iraqi government's conduct in practice suggested something different, a policy of Arab control over the whole country including Kurdish areas.[236] Partnership indicates some form of participation[237] in politics, legislation and exploiting and benefiting from Iraq's petroleum wealth. This exploitation was under the firm grip of the Sunni minority who spent Iraq's wealth as they pleased[238] through direct or indirect actions of the NCRC.[239] During peace negotiations, which led to the drafting of the new interim constitution, the Iraqi government continued its ill treatment of Kurds, especially those that were labeled as political dissidents. Article 14 of the interim constitution stipulates "The State shall guarantee, encourage and support all kinds of cooperation in production, distribution and consumption"[240]. Although vague, this provision could be interpreted as the state having the final say on the production, control, management and distribution of all goods. Furthermore, Article

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[233] Article 42(b) Interim Constitution of the Republic of Iraq 1970.
[234] Article 63 Interim Constitution of the Republic of Iraq 1970.
[235] Maddex (n 216) 127.
[236] Human Rights Watch, 'Whatever Happened to the Iraqi Kurds?' (*HRW.org,* 1991) <http://www.hrw.org/reports/1991/IRAQ913.htm#_ftn5> accessed 11 October 2015.
[237] Karwan Salih Waisy, 'The Role of Iraq in the Middle Eastern Problems' (2015) 5 International Journal of Humanities and Social Science 125.
[238] Most Sunni Arab's lived a comfortable life as the state policy was to support and award them. When it came to the Shia, the Kurds or any other minority, the government willingness to offer a share of Iraq's wealth was simply not there.
[239] Ismet Sheriff, 'Kurds In Iraq' in Gerard Chliand and David McDowall (eds), *'A People Without A Country: The Kurds and Kurdistan'* (Zed Books 1980) 152.
[240] Article 14 Interim Constitution of the Republic of Iraq 1970.

12(b)[241] articulates that the state shall undertake the "planning" and "directing" of the national economy for the aim of achieving "Arab economic unity". This would mean that the purpose of the Iraqi government was to promote Arabs and pan Arabist ideology.

Just as crucially, Kurdish demands of the incorporation of Kirkuk into an autonomous Kurdish zone in the north of Iraq were not met.[242] The Iraqi government did not allow Kurds to identify themselves with Kirkuk because of the city's petroleum wealth, indicating to the Kurds that Kurdish claims would go unanswered. It became clear to Kurds that the Iraqi government had no intention of following through with its promise of a Kurd-Arab partnership, even if there was legal foundation for such action. One year later, the relationship between the Kurds and Baghdad broke down and Saddam Hussein became the President of Iraq in 1979.[243]

Prior to 2003, it could be said that much of Iraq's constitutional influences stemmed from the legal reforms of the Ottoman Empire in that they were generally very secular. Post 1958, as the interim constitutions thereafter reflected, the Arabist philosophies of the Baathists became deep rooted in the state.[244] This legacy and Arab Sunni chauvinist ideology would fragment Iraq's differing communities further. What is noticeable from Iraq's constitutional history is that there were no, or very few, provisions in Iraq's constitutions relating to natural resources. There are two main reasons for this. First, the Iraqi state, as highlighted above was and had always been completely centralized with autocrats dictating the law of the land. This meant that the interest of individuals

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[241]Article 12(b) Interim Constitution of the Republic of Iraq 1970.

[242] Human Rights Watch(n60).

[243] The next decade would propel Iraq into a crippling war with Iran, huge domestic upheaval and the collapse of the Iraqi economy. During Saddam's reign as President no interim constitution was passed. Although Saddam ordered a committee to draft a permanent constitution in 1990, the text remained in draft and was never approved. The war with Kuwait and continued conflict with the Kurds would mean that this permanent constitution would not be adopted. The constitution of 1970 remained in force, governing Iraq until the fall of the Baath regime in 2003.

[244] Maddex(n 216) 128.

or ruling elite outweighed interests of the state. Without pluralism and decentralization of powers, there was no pressing concern to enshrine natural resource provisions in the constitution. Second, constitutions were not (and arguably still are not) seen as documents that aim to detail issues relating to natural resources. The usual practice was to either not mention natural resources, which by default mean that the state would own and control all aspects through its autocratic leaders or would expressly state that the 'state' owned, controlled and managed all natural resources. This in itself was the fabricated political, economic and legal national compact between the people and the government.

3.3.5 Transitional Administrative Law

The TAL or Law of Administration for the State of Iraq for the Transitional period as it is also known was Iraq's transitional constitution in the aftermath of the 2003 Iraq War. Signed on 8 March 2004 by the Iraqi Governing Council ("IGC"),[245] the TAL came into force on 28 June 2004 after official transfer of power from the Coalition Provisional Authority ("CPA")[246] to a sovereign Iraqi government. The CPA, as an occupying power, did not have the right to amend the constitution[247] but was recognized by political leaders in and outside of Iraq in the hope that this authority could steer Iraq towards democracy and the rule of law. In response to this recognition and commitment to a new Iraq, the CPA cancelled the Iraqi constitution and issued the TAL as a

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[245] The Iraqi Governing Council was the provisional government in Iraq following the Iraq War of 2003 established by the victorious Coalition powers. The Council was made up of twenty five individuals from Iraq's differing religious and ethnic groups; 13 Shia, 5 Kurd, 5 Sunni, 1 Assyrian and 1 Turkoman. A rotating Presidency was implemented where representatives from the most dominant groups would assume power, usually for a period of one month. On 1 June 2004, the Governing Council was dissolved having agreed to appoint one of its members, Ghazi Al-Yawer, as the new President of Iraq.

[246] The CPA was established as the transitional government of Iraq in the aftermath of the 2003 Iraq war. A coalition of many nation states, the CPA vested itself with legislative, executive and legal authority to govern Iraq under United Nations Security Council Resolution 1483 (2003).

[247] Jawad (n 166) 9.

temporary constitution.[248] It is important to note that the IGC functioned principally as an advisory group to the CPA but gradually evolved into a "vetting body of sorts".[249] Legal and political power resided with the CPA after the adoption of the TAL. CPA did not transfer decision-making authority to the IGC but created and used the group to gain legitimacy among Iraqis. The authority given to the IGC was limited in nature and used for specific actions such as implementing de-Baathification[250] and creating the Iraqi Special Tribunal to put Saddam and his henchmen on trial. During the first two post-Saddam years, Iraq was effectively governed by two sets of laws: the laws set by Paul Bremer[251] and those set by the TAL.

Forty-five years of instability, conflict and different interim constitutions had undermined the value of constitutionalism[252] and rule of law.[253] This history provides a backdrop as to why Iraqi leaders and CPA did not refer to the TAL as an interim or provisional constitution at the time. They realised that provisions of interim constitutions had a tendency to become permanent in Iraq even though they were not officially declared as such.[254] This was a message to all Iraqi's that the TAL was a temporary document which could be replaced at a later date.

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[248] Jawad (n 166) 10.
[249] Nora Bensahel and others, *'After Saddam: Prewar Planning and the Occupation of Iraq*(RAND Corporation 2008) 106.
[250] De-Baathification was the term given to the process that removed Baathists from many decision-making posts. It was a concerted effort to remove Baath party influence in the Iraqi political system and at the same time remove officials that were complicit in the crimes of Baathist rule in Iraq.
[251] Paul Bremer arrived in Iraq as the first chief US civil administrator in Iraq in May 2003. Bremer effectively led the CPA and pushed for the creation of the TAL. It was a known fact that Bremer had no previous knowledge of Iraqi politics or people. During his time in Iraq, Bremer issued a total of 100 orders and regulations, which had the effect of law. For further information see Paul L. Bremer and Malcolm McConnell, *My Year in Iraq: The Struggle to Build a Future of Hope* (Simon & Schuster 2006).
[252] From the fall of the monarchy in 1958 until 2003 Iraq war, Iraq was governed at different times by the whim and impulse of a single ruler, a strong man. During this period, the notion and principles of a constitution and constitutionalism had disappeared.
[253] Feisal Amin Al-Istrabadi, 'Reviving Constitutionalism in Iraq: Key Provisions of The Transitional Administrative Law' (2005) 50 New York Law School Review 269.
[254] Al-Istrabadi (n 253) 270.

Assisted by legal experts from the United Nations and the United States, a ten-man committee[255] from the IGC[256] was tasked with drafting the TAL. After a long protracted negotiating process, the TAL came into force and was generally considered by Iraq's western allies as a liberal and progressive document, looking to rebuild Iraq anew.[257] It is noteworthy to mention that although aspirational in its objective (as constitutions ought to be), the preamble of the TAL served as a brief summary of what Iraq endured and what it could achieve in the future. In fact, Article 1(C)[258] specifically refers to the preamble as an integral part of the TAL. The preamble was considered important as Iraqi decision makers wanted to highlight the mistakes of the past and to project a new vision for Iraq, one of brotherhood and fraternity. One of the first agreed provisions was Article 3, which affirmed the TAL's position as the highest legal authority in Iraq, stating, "This Law is the Supreme Law of the land".[259]

The TAL also attempted to promote democratic values and uphold principles of human rights but made clear the preeminence of Islam in politics and society.[260] Article 4 states:

"The system of government in Iraq shall be republican, federal, democratic, and pluralistic, and powers shall be shared between the federal government and the regional governments, governorates, municipalities, and local administrations."[261]

[255] The Committee included prominent politicians and legal experts Adnan Pachachi, Feisal al-Istrabadi, Mohsen Abdel Hamid, Salem Chalabi.
[256] Steven Wheatley, 'The Democratic Legitimacy Of International Law' (2010) 22 European journal of International Law 278.
[257] George W. Bush, President of the United States, 'Statement By The President' (Statement released by Office of The Press Secretary, Texas, 8 March 2004) https://govinfo.library.unt.edu/cpa-iraq/transcripts/20040308_Bush_TAL.html accessed 17 March 2015.
[258] Article 1(C) Law of Administration for the State of Iraq for the Transitional Period 2004.
[259] Article 3 Law of Administration for the State of Iraq for the Transitional Period 2004.
[260] Noah Feldman and Roman Martinez, 'Constitutional Politics and Text in the New Iraq: An Experiment in Islamic Democracy' (2006) 75 Fordham Law Review 883.
[261] Article 4 Law of Administration for the State of Iraq for the Transitional Period 2004.

This new structure for governance opened the door for the concept of power sharing and peaceful cohabitation between the different communities. The two most controversial issues that dominated TAL negotiations and drafting were the role that Islam and the role the Kurds were to play in the new Iraq. Article 7 of the TAL recognized that "Islam is the official religion of the state and is to be considered a source of legislation. No law that contradicts the universally agreed tenets of Islam, the principles of democracy or the rights cited in chapter two of this law may be enacted during the transitional period."[262] This provision was contentious because Islam as a religion can be interpreted in many ways by followers of different denominations and sects, which ultimately meant that democratic principles could be restricted or held invalid if they were in contradiction with any one of these different interpretations of Islam.

The nature and extent of Kurdish rights was also a great point of contention. Article 9[263] for example recognized Kurdish as an official language of the state alongside Arabic. The role of the Kurds at the negotiating table had changed, as the Kurds for the first time were major players in Iraq. One of the underpinning principles of the TAL was to break away from a concentrated centralized power of the state to a devolved local system. This was the first time in Iraqi history that a legal document supported decentralization. Article 52 explains that the "design of the federal system in Iraq shall be established in such a way as to prevent the concentration in the federal government that allowed the continuation of decades of tyranny and oppression under the previous regime".[264] This is further supported by Article 56(C),[265] which stipulates, where applicable, that the IFG will devolve additional functions to local, governorates and regional administrations.

[262] Article 7 Law of Administration for the State of Iraq for the Transitional Period 2004.
[263] Article 9 Law of Administration for the State of Iraq for the Transitional Period 2004.
[264]Article 52 Law of Administration for the State of Iraq for the Transitional Period 2004.
[265]Article 56 (C) Law of Administration for the State of Iraq for the Transitional Period 2004.

These provisions show the intent of the drafters to create a system where Baghdad serves an administrative capital, carrying out exclusive competencies of the IFG and devolving other powers to local authorities. In Article 53, the KRG was recognized as the official government of territories[266] held by the Kurds. Article 54[267] gave the KRG authority in all matters except matters that fall within exclusive competence of the IFG under Article 25.[268]

Provisions in the TAL regarding the exploitation of natural resources and distribution of revenue from petroleum proceeds were generally limited. However, under the exclusive competencies of the Iraqi government, Article 25(E) relates directly to "managing the natural resources of Iraq".[269] This provision states that natural resources belong to all the people of Iraq. Just as importantly the "regional and local governments together with the central government" must distribute the revenues from exploiting natural resources. Once revenue is incorporated into the national budget, such budget must be distributed in an equitable and "fair manner, proportional to the population and with regard to areas that were unjustly deprived of these revenues by the previous regimes."[270] The text does not offer any explanation as to what is meant by "equitable", "fair manner" or "unjustly deprived". Considering the infancy and ineffectiveness of the Iraqi constitutional courts, Iraq's political problems and lack of competent judges with necessary skills and experience, it is regrettable that no objective legal definitions were provided. However, some words may be easier than others to interpret or define. For example, the words "areas that were unjustly deprived" as

[266]Article 53 Law of Administration for the State of Iraq for the Transitional Period 2004.
[267] Article 54 Law of Administration for the State of Iraq for the Transitional Period 2004.
[268]The exclusive competence of the Iraqi government related to formulating foreign policy, negotiating and signing treaties Article 25(A), formulating and executing national security policy Article 25(B), Formulating fiscal policy Article 25(C), Regulating weights and measures Article 25(D), Managing the Natural resources of Iraq Article 25(E), Regulating Iraqi citizenship and immigration Article 25 (F) and regulating telecommunications policy Article 25(G).
[269] Article 25(E) Law of Administration for the State of Iraq for the Transitional Period 2004.
[270] Article 25(E) Law of Administration for the State of Iraq for the Transitional Period 2004.

some of the events set out in Chapter One suggests, could refer to the distribution of Iraq's wealth and how this wealth is allocated among areas that bore the brunt of previous Iraqi governments military campaigns. Therefore, one could interpret this text to mean that Kurdish and Shia areas should be the first areas to benefit from Iraq's oil wealth because not only had they been deprived of the benefits of oil and gas but had suffered because of it. This wealth had previously not only been denied to the Kurds and Shia but it was used to purchase weapons for the purpose or targeting Kurdish and Shia groups. This right to wealth would become a benchmark for demands in the coming years, especially for the Kurds. However, even if Shia and Kurdish areas were first to benefit, what amount of monetary compensation would be fair or just? How could one determine which area(s) would receive benefit first?

Other areas where exclusive competence was given to the IFG were not in question. There were few, if any, disputes related to the IFG controlling foreign, defense or fiscal policies but who would or could control and distribute the revenues from natural resources?[271] The Kurds had enjoyed over a decade of de-facto independence and saw oil revenues as a power that could destroy[272] and therefore did not want this power to be vested in the central government, in fear of history repeating itself. Pre 2003, the constitutional provisions and legislation were used to favor areas such as Anbar, Tikrit and Baghdad, mainly Sunni dominated areas effectively making Sunnis the "elite" of the country.[273] In contrast, conflict, civil unrest and destruction occurred in Shia, and Kurdish areas. The people in Kurdish and Shia areas were only rewarded if they were completely loyal to

[271] Al-Istrabadi (n 253) 291.
[272] For instance, Saddam Hussein's home governorate saw an overly generous income from Iraq's oil whereas Shia and Kurdish areas were deprived. Furthermore, the Kurds will argue, the very weapons used to pillage and destroy Kurdish villages; towns and cities were purchased through Iraq's natural resource revenue, specifically oil and gas.
[273] Zaki Chehab, *Iraq Ablaze: Inside the Insurgency* (I.B. Tauris & Co Ltd 2006) 133.

the Iraqi state, the leadership and its notion of the Sunni Iraqi Arab republic. The Kurds therefore pressed to protect their region and identity insisting that they control their own natural resources. A faction led by Adnan Pachachi argued that anything other than federal government control of natural resources could result in civil war because while the north and south of the country enjoyed an abundance of wealth in natural resources, the center and west of the country had nothing.[274] This would potentially lead to conflict with differing sectarian groups competing for the natural resources of Iraq. In this scenario, the Sunnis in particular would lose out as much of Iraq's oil and gas are in Shia and Kurdish lands. The thinking in Iraq was (and still is) whoever controlled the oil and gas resources of the country would ultimately keep such wealth for their own community as Iraq's history had proved.

The Kurds reluctantly agreed[275] that ownership of natural resources was to be vested in all the people of Iraq and that petroleum revenues would be collected and distributed via Baghdad in coordination with IFG.[276] The Kurdish position was that the words "all of the people of Iraq" would naturally include them.

Article 60[277] afforded power to the national assembly to draft and negotiate a permanent constitution and Article 61[278] provided for a timeline for drafting and adoption of the same. Some, especially Iraq's leading politicians, saw the TAL as a vehicle to reach a fully legitimate elected

[274] Al-Istrabadi (n 253) 292.
[275] Part of the reason why the Kurds reluctantly accepted was that they would continue to push for further concessions of oil and gas related matters when drafting the permanent constitution. Moreover, the constant pressure by the United States for all parties to reach an agreement had trumped the Kurds own desires. The Kurds recognized that the TAL was a necessity for the United States and its allies to score political points in the international arena and had hoped that by agreeing to the TAL, they would foster better relations with the West.
[276] Al-Istrabadi (n 253) 291.
[277] Article 60 Law of Administration for the State of Iraq for the Transitional Period 2004.
[278] Article 61 Law of Administration for the State of Iraq for the Transitional Period 2004.

government and to do so on a 'sound legal footing'.[279] In this sense, the TAL had served its purpose and carried Iraq through a turbulent period but to what degree it did this on a sound legal footing is debatable.

The TAL would prove to be the "baseline" for a permanent constitution that would be negotiated by the differing Iraqi groups.[280] However, the political circumstances in which the document was drafted and approved remained contentious. Furthermore, the occupying powers were eager to show the world that Iraq had taken crucial steps to becoming a democracy. This coupled with criticism aimed at the governments appointed by the CPA meant that the CPA was looking for an early exit. The worry was that such a speedy exit was premature and could lead to an ill-considered permanent constitution. Some legal experts have described the process of the TAL as "notoriously, if unintentionally, hasty, and secretive, and heavily influenced by US political interests."[281] They point to the fact that the formal drafting process of the TAL took less than six months. Furthermore, the Iraq war was not a popular war in the United States, which affected the popularity of President George. W. Bush and the Republican Party. Considering this and the casualties of war, the United States was eager to prove that the war was justified, that Iraq was on its way to becoming the world's newest democracy and that this would be to the benefit of the Iraqi people.

[279] Al-Istrabadi (n 253) 300.
[280] Feldman and Martinez (n 260).
[281] Jonathan Morrow, 'Iraq's Constitutional Process II: An Opportunity Lost' (*United States Institute Of Peace* 2005) https://www.usip.org/publications/2005/12/iraqs-constitutional-process-ii-opportunity-lost accessed on 16 February 2015.

3.3.6 Negotiating the IC 2005

The IC 20005 was not just a fresh start for Iraq but also an opportunity to redress the wrongs of the past. This spirit, which embodied hope, soon changed, once it became apparent that each ethnic, religious and political grouping placed greater importance on their respective demands than what Iraq as a nation required. Each side pressed for their own interest and demanded concessions from others.[282] Debates continue as to the power that ultimately drafted and secured the adoption of the IC 2005. Some argue that US advisors such as Peter Galbraith and Noah Feldman[283] were instrumental in the drafting process, influencing the political environment that led to the adoption of the IC 2005.[284] Others, including some within IFG are of the view that Iraqi politicians and lawyers carried out the work.[285] The importance here is to observe the two arguments as they affect the perceived legitimacy and content of the IC 2005.

A committee of 55 persons was appointed to draft the IC 2005. The aim was to include Iraq's major ethnic and religious communities by devising a quota system that would give representation to different groups on the committee. Consequently the committee was divided on sectarian lines.[286] As no official census has been carried out in Iraq for many years,[287] it is difficult to determine the populations of each of the communities, however it is recognized that the Shia

[282] For an overview of the drafting, see AS Deeks & MD Burton, "Iraq's Constitution: A Drafting History, (2007) 40 Cornell *ILJ* 1.
[283] Noah Feldman was a lecturer at New York University and served as a senior constitutional advisor to the CPA in Iraq. He also advised the IGC on the drafting of the TAL. Peter Galbraith was a US diplomat who was influential in the drafting of the IC 2005.
[284] Jawad (n 166) 4.
[285] Al-Istrabadi (n 253) 301.
[286] Membership consisted of 28 from the Shia coalition, 15 from the Kurdish lists, 8 from Ayad Alawi's Al-Iraqia list and one representative from each of the Christian, Turkoman, Sunni and Communist blocs.
[287] The last "official census" was carried out in 1997. However, considering the nature of Saddam's regime and their manipulation of statistics, coupled with the fact that Kurds controlled an area that was cut off from government control, it is difficult to say whether this census provides precise data.

population in Iraq is by far the largest.[288] The Shia bloc had worked to limit Sunni representation but after receiving complaints, the IGC added 14 Sunni members to the committee.

Some argue that the committee lacked inclusiveness of other groups such as women, specialist constitutional law experts and experienced politicians. Others have implied that negotiations were carried out in secret, effectively sidelining many different communities and ignoring public opinion.[289] Such accusations may be unfounded. Iraq is a myriad of different ethnic, religious and social communities. Drafters of the constitution would have found it impossible to completely ignore the public as the post-Saddam era had given many Iraqis new found hope. There was great expectation on politicians and drafters of the IC 2005 to ensure that the final document reflected the changes that the people of Iraq had longed for.

Allegations of intimidation and coercion by Shia members against the rest of the committee followed, which the Sunnis argued limited their ability to influence negotiations.[290] Each bloc concentrated on its own limited objectives. Shia members of the committee were predominantly concerned with establishing Islam as the state religion, the only or the main source of law and recognition of their majority in Iraq. Sunnis were focused on Arab unity and Arab identity of Iraq. The Kurds, however, had clearer ideas about what they wanted compared to the other groups.[291]

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[288] According to the Central Intelligence Agency the population of Iraq as of July 2015 is 37,056,169 which can be broken down as 75-80% Arab, 15-20% Kurdish, and 5% Turkoman, Assyrian and other. Islam is depicted as the main religion with approximately 99% of the population being Muslim, 60-65% of which are Shia and 32-37% Sunni. It is important to note that although that most Kurds are Muslim and Sunni. The 32-37% of Sunni population therefore includes an overall number of followers of the Sunni form of Islam. See Central Intelligence Agency, 'The World Fact Book: Iraq' (*Central Intelligence Agency*, 2015) <https://www.cia.gov/library/publications/the-world-factbook/geos/iz.html> accessed 12 September 2015.
[289] Morrow(n 281).
[290] Jawad (n 166) 11.
[291] Andrew Arato, *Constitution Making Under Occupation: The Politics of Imposed Revolution in Iraq* (Columbia University Press 2009) 82.

The Kurds continued their demand for a broad federal system to be adopted in the country, the right to control and administer their own region, to claim disputed territories as part of their region in the future and determine their share of Iraq's wealth. The inability or refusal by competing groups to see beyond their own limited requests meant the scene had been set for divisive and confrontational negotiations. The main points of contention were:

- The role of Islam in the new Iraq.[292]
- The composition of the state and extent of federalism.[293]
- The identity of the state.[294]
- Relationship between the decentralized entities and the central government.[295]
- The disputed territories.[296]
- Distribution of state wealth.[297]
- De-Baathification Law.[298]

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[292]The aim was to incorporate clear provisions within the constitution that would establish Islam as the religion of the state and the (only) source of all legislation. Furthermore, the Shia wanted to include their own religious practices and authority, the Shia Higher Religious Authority in their holy cities, as bodies that would play a significant role in the country. Other groups including the Kurds, pressed for a secular state.

[293] The Kurds insisted that Iraq should become a federal state and that the word 'federal' should be included in the official name of the state. The Sunni group pressed for the word 'united' instead of 'federal' as they did not see Iraq as a country that was made up of different entities. The Shia members did not object to Kurdish demands as long as other parts of Iraq were free to establish a federal region also.

[294] As Sunni-Arab ideology has always dictated that Iraq is an Arab state and part of the Arab nation, the Sunni contingent pressed for a provision to clearly include this in the IC 2005. The Kurds refused outright that the Iraq is an "Arab state" and that the people of Iraq belong to the 'Arab nation'. Other minorities maintained that Iraq was a multiethnic country and the constitution should not only reflect this but to protect minority rights. The rift between the Kurds and Sunnis on this point naturally relate to issues such as language, education and minority rights.

[295] Sunni members of the committee wanted a strong centralised government in Baghdad. The Kurds however demanded a broad federal system where the federal entity would have powers that superseded those of the central government.

[296] The Kurds have long campaigned and fought for the return of Kirkuk and disputed territories as part of Kurdistan. Sunni Arabs in particular regard the territories as Arab and therefore insisted that these areas be governed by the central government.

[297]The Kurds advocated for a provision that would allow federal regions to control and exploit any wealth within its borders and give a share of the same to the central government. Sunni ideology coupled with the fact that the Sunni areas were not wealthy in natural resources meant that the Sunnis argued for the central government to control, manage and exploit and then distribute the proceeds in a fair and just manner throughout Iraq.

[298] The CPA together with Iraqi politicians removed high-ranking Baathist officials from positions of power and seniority. Sunnis regarded this as excessive and demanded that a new democratic Iraq must also recognise Baathist ideology. The Shia and Kurdish groups refused this outright.

In order to better understand the legal arguments of both the KRG and IFG with respect to natural resource governance, it is important to recognize the political, economic and security environment within Iraq at the time of drafting and adopting the constitution and current environment. At the time of the negotiating, drafting and adoption phase the United States and its coalition partners were heavily involved in the governance of the country which provided some form of balance in that no one bloc or group could force their will onto another. However, United States and coalition withdrawal created an immediate power vacuum. The CPA left Iraq unreconciled and fragmented with little hope for unity. Iraqi legal institutions were left weak and vulnerable, unable to provide checks to balance abuse of political authority.

3.3.7 Structure and Provisions of the IC 2005

The IC 2005 was adopted on 15 October 2005 following a referendum of the Iraqi people. The referendum witnessed a 63% turnout of eligible voters, approximately 80% of which voted for its adoption.[299] This codified document consists of 144 articles divided among six sections.[300] At first, the document was hailed as a breakthrough for the Iraqi legal and political system, one that would help reconcile various groups within Iraq, promoting a new united Iraq. However, many years later, the constitution has become a source of some of Iraq's most divisive issues.

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[299] Zedalis (n 133) 27.
[300] The Constitution of the Federal Republic of Iraq 2005
Section One: The Fundamental Principles
Section Two: The Rights and Liberties
Section Three: Distribution of the Powers between the Branches of the Federal Government
Section Four: Powers of the Federal Government and
Section Five: Powers of the Regions
Section Six: Final and Transitional Provisions.

Before beginning the examination of the IC 2005, it is worth noting that the text below refers to the constitution of Iraq as it stands. Although Article 142[301] provides for the Iraqi Council of Representatives to create a Constitutional Review Committee for the purpose of presenting recommendations and suggesting amendments to the IC 2005, no such amendments have yet been made due to internal politics of Iraq. The mechanisms through which amendments can be made require appointments of judges and legal experts to courts and committees. In all cases appointments are political with many judges and legal professionals being accused of serving their political masters instead of upholding the law.[302]

Currently, under Article 126, First,[303] a vote of only one fifth of the Iraqi Parliament is required to propose constitutional amendments. However, where a proposed amendment of Section One regarding the "Fundamental Principles"[304] and Section Two regarding "Rights and Liberties"[305] is made, the threshold of votes is two thirds of votes in the Iraqi Parliament. In addition such amendments require approval of the Iraqi electorate in the form of a referendum and the ratification by the President within 7 days.[306] The same process is required for all other amendments as described in Article 126, Third.[307]

Although the constitution contemplates the creation of other regions as components of a federal Iraq, only the Kurdistan Region is recognised as a federal region. Article 117, First states that

[301] Article 142 The Constitution of the Federal Republic of Iraq 2005.
[302] Fanack 18 May 2016 https://fanack.com/iraq/governance-and-politics-of-iraq/judiciary-hanging-in-the-balance/ accessed 12 March 2018.
[303]Article 126, First The Constitution of the Federal Republic of Iraq 2005.
[304] Section 1 The Constitution of the Federal Republic of Iraq 2005.
[305] Section 2 The Constitution of the Federal Republic of Iraq 2005.
[306] Article 126, Second The Constitution of the Federal Republic of Iraq 2005.
[307] Article 126, Third The Constitution of the Federal Republic of Iraq 2005.

“This constitution upon coming into force, shall recognize the region of Kurdistan, along with its existing authorities, as a federal region”.[308] This provision emphasises KRI’s status and autonomy within Iraq. As the Kurds had enjoyed de-facto independence for over a decade prior to 2003, they would not decrease or limit their authority in the new Iraq. The Constitution therefore afforded them protection and granted recognition of Kurdistan’s “existing authorities” which preserved the powers that the Kurdistan region previously held. This recognition was important for the Kurds as it provided political and legal legitimacy. However, as time would prove, actual devolution of power would remain difficult and contentious in practice for not only the Kurds but other groups within Iraq. Some Sunni groups had, for example, expressed interests in creating their own autonomous region but to date, this has not materialized due to political obstruction.[309]

According to the IC 2005, Iraq is made up of a decentralized capital, regions and governorates as well as local administrations.[310] Currently the Iraqi state comprises of one region, the KRI, and 19 governorates[311] (also referred to as provinces). The terms “Region” and “Governorate” are not defined in the IC 2005. However, for the purpose of clarity, governorates in Iraq are administrative constituencies determined by a set geographical boundary. Each governorate has a local government and is subdivided among smaller geographical areas such as districts, sub-districts and villages[312] and is granted ‘broad administrative and financial authorities’.[313] Regions also have a

[308] Article 117, First The Constitution of the Federal Republic of Iraq 2005.
[309] Hemin Salih, ‘Sunnis Ask US for Autonomous Region in Iraq’ (*Bas News.com,* 2014) <http://www.basnews.com/en/news/2014/12/16/sunnis-ask-us-for-autonomous-region-in-iraq/> accessed 21 September 2015.
[310] Article 116 The Constitution of the Federal Republic of Iraq 2005.
[311] When the IC2005 was adopted Iraq consisted of 18 governorates, however during the period of undertaking this research the geographical area of Halabja was formally recognised as a governorate by Iraqi Federal authorities and the KRG.
[312] Article 122, First The Constitution of the Federal Republic of Iraq 2005.
[313] Article 122, Second The Constitution of the Federal Republic of Iraq 2005.

geographically determined border and are granted administrative and financial authorities. However, the major distinction between governorates and regions is that powers and authorities of regions are far greater than that of governorates. A region enjoys far greater autonomy from the IFG and can adopt its own constitution and establish its own capital.[314] In addition, regions are granted a number of competencies that are shared with the federal government. For example, regions together with the federal authorities are granted powers to manage customs[315], regulate and distribute electricity[316] as well as the formulation of environment[317], health[318], education[319] and water[320] and policies. Such competencies are not granted to governorates. Article 117, Second provides opportunity for other regions to be established. According to the constitution, one or more governorates have the right to organize themselves into a region based on a request which is voted on via a referendum.[321]

The IC 2005 includes a number of positive, forward-looking clauses that were incorporated in the true spirit of improving the Iraqi people's standard of living and for the development of the Iraqi state. These include but are not limited to the following provisions:

- Article 5: Importance of the Rule of Law where the people are the source of power and its legitimacy.[322]

[314]Article 120 The Constitution of the Federal Republic of Iraq 2005.
[315] Article 114, First The Constitution of the Federal Republic of Iraq 2005.
[316] Article 114, Second The Constitution of the Federal Republic of Iraq 2005.
[317] Article 114, Third The Constitution of the Federal Republic of Iraq 2005.
[318] Article 114, Fifth The Constitution of the Federal Republic of Iraq 2005.
[319] Article 114, Sixth The Constitution of the Federal Republic of Iraq 2005.
[320] Article 114, Seventh The Constitution of the Federal Republic of Iraq 2005.
[321] Article 119 The Constitution of the Federal Republic of Iraq 2005.
[322] Article 5 The Constitution of the Federal Republic of Iraq 2005.

- Article 45: Importance of civil society organizations.[323]
- Article 2(B): No law should impede or contradict the principles of democracy.[324]
- Articles 19,[325] 87[326] and 88:[327] Independence of the judicial system.
- Article 9: Submission of the armed forces to civil authority.[328]
- Chapters One and Two: Protection of the rights and liberties of citizens.
- Article 37(C): Prohibition of torture.[329]

Some of the points mentioned above had been incorporated into previous constitutions and interim constitutions but due to the authoritarian nature of successive Iraqi governments, consecutive revolutions, the political environment at the time and lack of institutions, the positives of these principles were never realised. The practical reality is that the constitution has served as a rubber stamp for differing political interests at different times. Where politicians choose to rely on a provision of the constitution (which usually suits their own interests) they would do so. For example arbitrary arrests, torture and corruption are consistent themes in Iraq.[330] There are countless examples of how some of the provisions of IC 2005 have been ignored or not enforced but not all can be expressed here.[331] Nevertheless, a number of examples can stress this point. First, not only is the rule of law not being developed, it is being ignored.[332] Second, the judicial system

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[323] Article 45 The Constitution of the Federal Republic of Iraq 2005.
[324] Article 2(B) The Constitution of the Federal Republic of Iraq 2005.
[325] Article 19 The Constitution of the Federal Republic of Iraq 2005.
[326] Article 87 The Constitution of the Federal Republic of Iraq 2005.
[327] Article 88 The Constitution of the Federal Republic of Iraq 2005.
[328] Article 9 The Constitution of the Federal Republic of Iraq 2005.
[329] Article 37 (C) The Constitution of the Federal Republic of Iraq 2005.
[330] BTI, 'BTI 2014/ Iraq Country Report' (*Bertelsmann Stiftung*, 2014) <http://www.bti-project.org/reports/country-reports/mena/irq/index.nc> accessed 26 October 2015
[331] Examples include the detention and torture of political dissidents and Iraqi Citizens by security forces. In fact so-called "death squads" had been operating in Baghdad for years between 2005 and 2009.
[332] The rule of law requires meaningful access to an effective and impartial legal system. Most Iraqis do not have this, in most cases the efficacy of the system is compromised by corruption, ethnic, religious or gender bias. See Stephen

continues to struggle for independence.[333] The executive authorities are generally based on a system of nepotism and patronage and appoint judges for political gain.[334] Third, torture, although prohibited, continues to be practiced amongst the armed forced and internal security apparatus of the country.[335] Fourth, rights and liberties of citizens only exist if they do not conflict with the interests of politicians and the ruling elite.[336] The adoption of the IC 2005 gave hope that the principles of rights, liberty and freedom would gain real meaning in a new democratic system. The IC 2005 also referred to the devolution of power, expressly outlining the decentralized nature of the state. Article 16 stipulates, "The federal system in the Republic of Iraq is made up of a decentralized capital, regions, and governorates, as well as local administrations."[337]

It has been argued that the IC 2005 is by no means a sophisticated legal document[338] that addresses the real problems facing the Iraqi state and its quarrels with its sub-national entities, its people and the interaction between them. There are a number of structural flaws and negative provisions that are not only divisive but have actively contributed to the creation of other serious problems for Iraq, including:

Kalin, 'Iraqi PM Orders Judicial Reform in Anti-Corruption Drive' (*Thompson Reuters* 2015) http://uk.reuters.com/article/2015/08/14/uk-mideast-crisis-iraq-reforms-cleric-idUKKCN0QJ1G620150814 accessed 9 September 2015.

[333] David Pimentel and Brian Anderson, 'Judicial Independence in Post-Conflict Iraq: Establishing the Rule of Law in an Islamic Constitutional Democracy' (2013) 46 George Washington International Law Review 29.

[334] Sarwar Abdullah, 'The Definition of Corruption in a Sectarian Context: Iraq as a Case in Point' (2019) 42 Journal of South Asian and Middle Eastern Studies 59.

[335] There are many accounts of torture, brutality, rape and humiliation in prisons and holding facilities. For some accounts see Wijhat Nadhar, 'The Dark and Secret Dungeons of Iraq: Horror Stories of Female Prisoners' (*Global Research* 2012)http://www.globalresearch.ca/the-dark-and-secret-dungeons-of-iraq-horror-stories-of-female-prisoners/5313974 accessed on 20 September 2015.

[336] In most cases, the political or military elite can take rights and liberties away. For an account see Dahr Jamail, 'Maliki's Iraq: Rape, executions and torture' (*Al Jazeera* 2013) <http://www.aljazeera.com/humanrights/2013/03/201331883513244683.html> accessed 11 September 2015

[337] Article 116 The Constitution of the Federal Republic of Iraq 2005.

[338] Jawad(n 166) 21.

- The role of Islam.[339]
- The relationship between the central government and regional governments.[340]
- foreign affairs.[341]
- armed forces.[342]
- disputed territories.
- natural resources.
- the identity of the state.
- The language in the constitution.

The points above would suggest that the negotiating and drafting process of the constitution was the incorporation of points from different wish lists and not a coherent document created for the purpose of establishing a modern state based on reconciliation and consensus. Although it is not uncommon for different groups to put forward competing agendas to influence the drafting of

[339] Article 2, First(A) establishes Islam as the official religion of the state and as the preeminent source of legislation where no law can contradict the tenants of Islam. Although this in itself may not be cause for concern, especially when considering that the majority of Iraqis are Muslim, what is worrying is that this provision has the potential to render almost all of the positive aspects mentioned in Chapter Two (The Liberties), Articles 14 – 46, useless. In practice what this means is that liberties and rights could be cancelled if religious institutions deem that these rights contradict the principles of Islam. As previously stated, it is also important to recognise that like most religions, Islam consists of many denominations and sects who believe in different practices. This potentially widens the scope of what are considered to contradict Islamic principles as interpretations of Islam and the Quran are numerous.

[340] While the supremacy clause in Article 13 and others such as Article 120 and 121 states that Regional constitutions cannot contradict the IC 2005, the regions have far greater power with respect to legislation.

[341] Although formulating foreign policy and dealing with foreign affairs is conferred to the IFG as a competency under Article 110,First, Article 121, 4, states: 'The regions and governorates shall establish offices in the embassies and diplomatic missions, in order to follow up cultural, social and developmental affairs'. This has led to the KRG establishing many offices under the banner of its Department of Foreign Relations in many countries. This has created further problems, especially since the breakdown of the relationship between Baghdad and the KRG. The KRG finds itself in a position to negotiate and barter with sovereign states without informing or conferring with the central government.

[342] Article 9 IC 2005 refers to the armed services of Iraq and its National Intelligence Service, promoting equality and inclusiveness of the Iraqi people in the army as one body. Article 9,First(B) states that 'the formation of military militia outside the framework of the armed forces is prohibited'. Conversely the Iraqi military apparatus in practice has no control of Shia militia groups, the *peshmerga* or Sunni armed groups.

constitutional provisions, the danger is that this may lead to the creation of an ambiguous and contradictory document. Although the supremacy clause of Article 13 states that the IC 2005 is the supreme law of the country,[343] this has not transpired as examples above would show. This article attempts to ensure that disputes with respect to the law of the country would be dealt with by referring back to the constitution. Unfortunately, in most cases, the constitution has been the cause of and not the remedy to the problems.

3.3.7.1 The Federal Supreme Court

Under Article 92 of the constitution, the Federal Supreme Court is established as a financial and administratively independent judicial body, acting as the highest court in Iraq,[344] whose decisions are final and binding.[345] This court, *inter alia,* is tasked with ensuring compatibility of legislation and regulation with the constitution,[346] interprets provisions of the constitution,[347] and is the highest appellate court[348] settling disputes between the federal government and sub-national governments where they arise.[349]

Political interference and interests of elites in Iraq have at times undermined the constitutional status and crucial role of the Supreme Court as an independent judicial body. The premiership of Prime Minister Nuri Al-Maliki between 2006 and 2010 highlights this point. During this time the

[343] Article 13 First The Constitution of the Federal Republic of Iraq 2005 stipulates "This Constitution is the preeminent and supreme law in Iraq and shall be binding in all parts of Iraq without exception."
[344] Article 92 The Constitution of the Federal Republic of Iraq 2005.
[345] Article 94 The Constitution of the Federal Republic of Iraq 2005.
[346] Article 93 The Constitution of the Federal Republic of Iraq 2005.
[347] Article 93 The Constitution of the Federal Republic of Iraq 2005.
[348] Article 93 The Constitution of the Federal Republic of Iraq 2005.
[349] Article 93 The Constitution of the Federal Republic of Iraq 2005.

Supreme Court Chief Justice attended political meetings and events and was instrumental in closure of political parties and issuing arrest warrants for political leaders.[350]

Over the past decade claims and appeals to the Federal Supreme Court have mainly centred around checking ministerial power, settling inter and intra ministerial disputes as well as commercial claims against the Iraqi government.[351] Whilst, claims related to independent KRG oil exports have been made by the IFG, such claims have been limited in number. A claim by the Iraqi Oil Ministry against the MNR was made in 2012 arguing that KRG governance of oil and gas was unconstitutional citing independent exports by the KRG was contrary to the provisions of IC 2005. This hearing has been postponed a number of times and the Federal Supreme Court has yet to rule on the claim made. Parallel to this the Iraqi Oil Ministry petitioned the court for a ruling to suspend KRG oil exports in 2014.

On 24th June 2014, the Federal Supreme Court declined to issue a temporary suspension ban on independent exports of oil by the KRG. The claim against the KRG was made by Iraq's Deputy Oil Minister based on the view that KRG exports are unconstitutional and all exports by the KRG must cease.[352] The Supreme Court held that it could not issue a suspension of oil exports as the original claim made by the Iraqi Oil Minister depicting KRG oil exports as unconstitutional must be decided before any suspension of exports can be issued. The court refused to grant the Ministry

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[350] David Romano, 'Iraq's Descent into Civil War: A Constitutional Explanation' (2014) 68 Middle East Journal 547.
[351] See Federal Supreme Court of Iraq, 'Decisions and Judgments' <https://www.iraqfsc.iq/constitutional-appeal/page_1/> accessed 1 August 2019.
[352] Kurdistan Regional Government of Iraq, 'The Supreme Federal Court Rules Against Iraqi Minister of Oil's Request to Prevent KRG Oil Exports'(*Kurdistan Regional Government*, 30 June 2014) http://www.krgspain.org/the-supreme-federal-court-rules-against-iraqi-minister-of-oils-request-to-prevent-krg-oil-exports-7/ accessed 14 December 2017.

of Oil an injunction against the KRG prohibiting it from exporting oil independently on the basis that "granting such an injunction would give an impression of a premature decision on the subject"[353] matter of the proceedings and the decision that shall be issued by the court' which would contravene legal procedure and contravene judicial context and norms.[354] In the interest of protecting procedural law the court could not offer any opinion or ruling to suspend oil exports until a ruling on the original claim was made.

Another claim by the Iraqi Oil Ministry seeking a court ruling for the KRG to hand over oil export rights to the Iraqi Federal Government was heard on 27th June 2018 by the Federal Supreme Court. The Iraqi Oil Ministry requested that the court "implement and apply what is in the rulings of the constitution and relevant law". The Iraqi Oil Ministry accuse the KRG of unilaterally exporting oil without including the federal government, an act that they consider unconstitutional.

The Supreme Court had previously requested the involvement of the Iraqi Prime Minister (Haider Al-Abadi) and KRG Prime Minister (Nechirvan Barzani) as third parties to weigh in on the constitutional debate. Al-Abadi forwarded a response outlining the federal governments arguments but no response was given by Nechirvan Barzani. A spokesman for the Federal Supreme Court published a statement that stated "following examinations of the response, it [the court] found that it didn't focus on necessary points to conclude the law suit because the plaintiff backs the lawsuit with reference to Articles 111 and 112 of the constitution". The spokesman added that "the Federal Court found that Article 111 of the constitution provided the general rule for the oil and gas resources, and Article 112 stipulates how the ruling of Article 111 is implemented, which

[353] Iraqi Federal Supreme Court decision No.71/Federal/2019.
[354] Iraq Federal Court decision No.59/2012.

is to be based on a law that will be passed by the Council of Representatives, and the relevant law is yet to be passed,"

Article 111 of IC 2005, as examined at subheading 3.6.1 articulates that "Oil and gas are owned by all the people of Iraq in all the regions and governorates,"[355] Meanwhile Article 112 states that management of oil and gas extracted from "present fields" is a shared competency between the federal and subnational governments provided that distribution of revenue is conducted in a fair manner.[356] The IFG's case is primarily built on these two provision of the constitution. However, the KRG argues that because Article 110 (Exclusive competencies of the federal government) does not include oil and gas governance, the KRG has a constitutional right to govern oil and gas affairs. The KRG supports this argument with Article 115 which stipulates "All powers not stipulated in the exclusive powers of the federal government belong to the authorities of the regions and governorates that are not organized in a region".[357] Furthermore, the KRG contends that since Article 112 of the constitution refers only to "present fields", the KRG has the right to oversee oil and gas related matters for all fields that were not "present fields" at the time of the IC 2005 being adopted.

Considering arguments put forward by the parties, the Federal Supreme Court postponed its ruling on the matter so that parties could present further submissions and evidence at a hearing scheduled for 14 August 2018. The court also requested objective third-party expert evidence to be submitted but selection of third-party experts has further delayed proceedings. To date the Federal Supreme Court has not ruled on this matter.

[355] Article 111 The Constitution of the Federal Republic of Iraq 2005.
[356] Article 112 The Constitution of the Federal Republic of Iraq 2005.
[357] Article 115 IC 2005 The Constitution of the Federal Republic of Iraq 2005.

The Federal Supreme Court's inability or unwillingness to conclude important constitutional claims highlighted above has cemented the realities on the ground and strengthened Kurdish claims that its governance of oil and gas is constitutional. The longer the current status quo continues, the less likely it is for IFG to pressure Kurds into making major concessions.

Whilst KRG independent oil exports are of great significance in determining competency over oil and gas governance in the KRI, it is nonetheless less crucial than determining ownership and management rights of the KRG and IFG and how revenue from oil and gas exploitation should be distributed in Iraq. To this end, the KRG must be proactive in seeking legal redress to the current disputes with the IFG. The KRG should utilize the power afforded to the Federal Supreme Court by the IC 2005 to file grievances and complaints against the IFG so that it can obtain a legally enforceable decision as to the rights of the KRG in oil and gas governance.

3.4 Constitutional Framework and Governance of Natural Resources

Constitutions of many countries acknowledge the significance of natural resources through provisions to clarify and outline agreed competencies of the national government and sub-national governments with respect to ownership, management and revenue obtained from oil and gas exploitation. Like other constitutions, the IC 2005 attempts to replicate this principle through its provisions that affect the governance of natural resources. However, unlike some other constitutions, the IC 2005 does not apply a general brush stroke to provisions related to natural

resources. Constitutions such as Iran,[358] Kuwait,[359] Qatar,[360] Angola,[361] Indonesia[362] and Mexico[363] for example focus on the notion that all natural resources are owned by and managed by the state. In the constitutions above, the language used attempts to assert state control on all forms of natural resources by either articulating that all natural resources are owned by the state or explicitly providing a lengthy list of different types of natural resources as state owned. By contrast, Iraq's constitution refers to specific natural resources. Oil and Gas and water are explicitly stated whereas land is implied through articles that refer to the IC 2005's predecessor, the TAL.

Apart from petroleum, water and Land, the constitution remains silent on other forms of natural resources. These have not found expression in the IC 2005 because economically, Iraq is heavily reliant on the exploitation of oil and gas resources. The country does not have any other major natural resources such as gold, minerals, coal, phosphorous, iron and timber (forests). Even if such resources do exist, they exist in nominal amounts that are overwhelmingly trumped by oil and gas deposits. Singling out specific natural resources could negatively impact a state's claim of ownership and management of resources. All-encompassing provisions relating to natural

[358] In Article 45 of the Constitution of Iran 1979 expresses that "Public wealth and property, such as uncultivated or abandoned land, mineral deposits, seas, lakes, rivers and other public water-ways, mountains, valleys, forests, marshland, natural forests, unenclosed pastureland, legacies without heirs, property of undetermined ownership, and public property recovered from usurpers, shall be at the disposal of the Islamic government for it to utilize in accordance with the public interest. Law will specify detailed procedures for the utilization of each of the foregoing items."

[359] The Kuwaiti Constitution of 1962 in Article 21 states, "All of the natural wealth and resources are the property of the State. The State shall preserve and properly exploit those resources, heedful of its own security and national economy requisites."

[360] Article 29 of the Constitution of Qatar 2003 states "Natural wealth and resources are owned by the State, which preserves and exploits them well according to the provisions of the law".

[361] The Constitution of Angola of 2010 in Article 16 declares "The solid, liquid and gaseous natural resources existing in the soil and subsoil, in territorial waters, in the exclusive economic zone and in the continental shelf under the jurisdiction of Angola shall be the property of the state, which shall determine the conditions for concessions, surveys and exploitation, under the terms of the Constitution, the law and international law."

[362] Article 33(3) of the Indonesian Constitution 1945 articulates "The land, the waters and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people".

[363] Article 27 of the Mexican Constitution 1917 states that "Ownership of the lands and waters within the boundaries of the national territory is vested originally in the Nation…".

resources could alleviate further confrontation between the stakeholders in Iraq if new natural resources were found in the country. With technological advances and scientific breakthroughs, it is not inconceivable to think that new forms of natural resources could exist that were not know about or be exploited using technology that was previously unknown.

3.4.1 Land

Section Four of the IC 2005 in Articles 109-115,[364] sets out the powers of the IFG. Although not all of the articles on which the IFG relies, these six articles form the basis of the arguments against the KRI regarding the IFG's power vis-à-vis sub-central entities and are therefore the focal point to claims over natural resources. Article 109[365] attempts to reiterate Article 1[366] of the Constitution. These two articles are important to note when considering the differing interpretations by the IFG and the Kurds. Baghdad's fear is Kurdish secession, which would mean the loss of a large area of land that is rich in natural resources including land, water, oil and gas. The Kurds, however, believe self-determination is an inalienable right that has been recognized by the international community via UN resolutions and declarations.[367]

Central to the issues of ownership of territory in Iraq between the IFG and KRI are the disputed territories. The most contested and important of these is Kirkuk because of its vast reserves of oil. Just as important is the physical land itself, which is strategically valuable politically, economically

[364] Section Four The Constitution of the Federal Republic of Iraq 2005.
[365] Article 109 of IC 2005: "The federal authorities shall preserve the unity, integrity, independence, and sovereignty of Iraq and its federal democratic system."
[366] Article 1 of the IC 2005 states that " "The Republic of Iraq is a single federal, independent and fully sovereign state in which the system of government is republicanism, representative, parliamentary, and democratic, and this constitution is a guarantor of the unity of Iraq."
[367] For example, The Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly resolution 1514 (XV) of 14 December 1960.

and militarily. The possible annexation of the disputed territories by the KRI is politically important as it provides strong symbolism that these areas are Kurdish and as such would strengthen the Kurdish profile politically on the international stage. If the Kurds were to regain these territories, the geographical area that the KRG would control would almost double. Furthermore, control of these lands presents a military and geographical advantage, as these areas are strategically important. In legal terms, the re-drawing of municipal, governorate or regional boundaries raises a number of questions in the fields of administrative law, land law and powers of national and sub-national governments and may also influence outcome of national elections. Although great political and legal argument is placed on the disputed territories, the IC 2005 indirectly refers to the issue of the disputed territories and Kirkuk in Article 140,[368] which states that Articles 58 of the TAL must be implemented and Article 143,[369] which stipulates that the TAL will be annulled except for two articles.

Article 140, if implemented, forces stakeholders to make a decision on the status of Kirkuk and other disputed territories. A major concern for Iraqi Arabs regarding Article 140 is how it would affect the Iraqi government's control over Kirkuk's oil and gas resources.[370] While the Kurds consistently assure other Iraqis of their intention to remain an integral part of Iraq, many Arab remain unconvinced and skeptical and see it as an oil grab.

[368] Article 140 The Constitution of the Federal Republic of Iraq 2005.
[369] Article 143 The Constitution of the Federal Republic of Iraq 2005.
[370] Nazar Janabi, 'Kirkuk's Article 140:Expired or Not?' (*WashingtonInstitute.org,* 2008) <http://www.washingtoninstitute.org/policy-analysis/view/kirkuks-article-140-expired-or-not> accessed on 28 February 2016.

Apart from Article 119, the IC 2005 does not make adequate preparations for any of Iraq's governorates to join an existing region.[371]Although the borders of the KRI are not directly defined in the text, the IC 2005 explicitly recognizes existence of the KRI in an official capacity denoting that if the disputed territories were to return to the KRI, the enlarged Kurdistan Region would enjoy the same constitutional protections as the existing one.[372]

Upon adoption of the IC 2005, the provisions of the TAL were annulled except for Article 53(a),[373] which referred to the recognition of the Kurdistan Region and its boundaries and Article 58,[374] providing a road map for solving the disagreements related to the disputed territories. The proposed remedy of Article 58 is laid out in four steps. First, those who were deported, expelled or displaced from their homes would be restored as rightful owners of their property and in addition they would be given just compensation for damages or loss incurred.[375] Second, those who had been resettled and taken ownership of others homes and property will be relocated, given new land in the region/area from which they originally resided and would also be given compensation by the state.[376] Third, those who had suffered loss or deprived of employment due to forced relocation would have new employment opportunities provided for them.[377] Fourth, all those affected who had relocated and were forced to change their nationality (presumably from Kurdish/Turkoman etc. to Arab) would be given the opportunity to freely determine their national identity and ethnic affiliation without duress or intimidation.[378]

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[371] Stefan Wolff, 'Governing (in) Kirkuk: Resolving The Status Of a Disputed Territory In Post-American Iraq' (2010) 86 International Affairs 1361.
[372] Ibid 1362.
[373] Article 53(a) Law of Administration for the State of Iraq for the Transitional Period 2004.
[374] Article 58 Law of Administration for the State of Iraq for the Transitional Period 2004.
[375] Article 58(A)(1) Law of Administration for the State of Iraq for the Transitional Period 2004.
[376] Article 58(A)(2) Law of Administration for the State of Iraq for the Transitional Period 2004.
[377] Article 58(A)(3) Law of Administration for the State of Iraq for the Transitional Period 2004.
[378] Article 58(A)(4) Law of Administration for the State of Iraq for the Transitional Period 2004.

The TAL also recognized in Article 58(B)[379] that boundaries of some territories had been manipulated for political gain and would therefore need to be addressed. This would be done either by recommendations from the Iraqi government or if does not bring unanimous consent, by the United Nations. Finally, and perhaps most importantly, Article 58(C)[380] states that a permanent resolution for the disputed territories, including Kirkuk, cannot take place and will be deferred until such a time that the steps mentioned above have taken place. This condition precedent also stated that such resolution of disputed territories should be "consistent with the principle of justice, taking into account the will of the people of those territories."[381]The fact that this is the penultimate article suggests that it was included, perhaps reluctantly, at the last minute to appease the Kurds. The TAL was the only available road map that had previously been agreed by the competing blocs of power for the purpose of settling the issue of the disputed territories.

To date, no genuine steps have been taken to implement Article 140 for the purpose of carrying out a referendum and settling the dispute. An initial date of 15 November 2007 was planned for a referendum to take place but this was soon delayed to 31 December 2007 and then by a further six months. This deadline has come and gone and years later no new date has been set for the referendum leading to some Arab politicians and law makers declaring that the deadline had now 'expired'.[382] The Kurds have argued that the IFG has continually stalled the process of implementing Article 140 because Baghdad is fearful that any referendum held would register a majority Kurdish vote in Kirkuk and other major cities and towns. Ultimately, Baghdad has been afraid of upsetting the status quo in a fragile political order. If Kirkuk was recognized by the IFG as a majority Kurdish city, according to the constitution, the people of Kirkuk could ask for another

[379] Article 58(B) Law of Administration for the State of Iraq for the Transitional Period 2004.
[380] Article 58(C) Law of Administration for the State of Iraq for the Transitional Period 2004.
[381] Article 58(C) Law of Administration for the State of Iraq for the Transitional Period 2004.
[382] Janabi (n 370).

referendum to determine whether Kirkuk should be incorporated into the Kurdistan Region as per Article 119[383] which can be interpreted as permitting governorates to join Regions if a referendum is carried out after a request by one-third of the council members of the governorate or upon request of one-tenth of the voters in the governorates.[384]

3.4.2 Water

Like land, water is an invaluable natural resource. Disputes regarding water resources in Iraq have rarely been reported.[385]Unlike oil and gas, Iraq is not rich in water resources, making the potential fight for water in the Iraq as fierce as oil and gas, if not more. In the past two decades, a combination of poor water resource management and a drop in water levels in the country have heavily hit Iraq's water supply.[386] The reasons for this drop in supply are mainly historical.[387] Iraq's involvement in conflict and sanctions against it[388] has been costly, adversely affecting Iraq's infrastructure. Iraqi and Kurdish administrations have found it difficult to establish an environment that promulgates the creation, implementation and enforcement of legislation and regulation to effectively control the water sector. These obstacles are compounded by Iraq's unenviable geographical downstream position with respect to water as more than two thirds of its water resources originate from the neighboring countries.

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[383] Article 119 The Constitution of the Federal Republic of Iraq 2005.
[384] Article 119 The Constitution of the Federal Republic of Iraq 2005 stipulates "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."
[385] Frederick Michale Lorenz, 'Strategic Water For Iraq: The Need For Planning And Action' (2008) 24 American Law Review 275.
[386] Aysegül Kibaroglu and others (eds), *Water Law and Cooperation in the Euphrates-Tigris Region* (Martinus Nijhoff Publishers 2013) 66.
[387] Lorenz (n 385) 276.
[388] Investingroup (n 115).

Historically, Iraq's constitution and interim constitutions have either remained silent on the magnitude of water resources or included water resources under the umbrella term of natural resources.[389] There are a number of reasons for this but a few main points stand out. First, Iraq has not always suffered droughts and experienced limitations of water as it has done over the past three decades. Countries such as Turkey and Iran had not developed their industry or built dams (which they now have)to restrict the flow of water into Iraq. Second, low population in previous decades meant that problems that might have existed were not highlighted, as there was enough water to meet the demands of the public. Third, Iraq did not carry out high industrial activity, which did not have a detrimental impact on water resources. Finally, Iraq was in a constant state of emergency. Stability was rare, as the country had experienced years of volatility and unpredictability.

By the time the IC 2005 was written, water had become a pressing and important resource to politicians who recognized that water should be a stand-alone provision and given urgent consideration as imminent water shortages in the country was a threat to Iraq's national security. To this end water (albeit from outside of the country flowing into Iraq) had been included as an exclusive competency of the Iraqi state even though oil and gas had not.

In most jurisdictions, water resources are protected by the constitution. It has been explicitly enshrined in some constitutions as a fundamental right as can be seen in the constitutions of South

[389] Kibaroglu and others (n 386) 68.

Africa[390] and Venezuela.[391] In other jurisdictions, it has been implied as a right under the umbrella of natural resources, health and the environment, such as the case of Iran,[392] Colombia,[393] Belgium[394] and India.[395] Either way, recognition of the right to water and sanitation has become a pressing concern for many states, so much so that some states see it as a basic human right. Furthermore, Islamic law is a fundamental source of law according to Article 2 IC 2005 and requires water resources to be dealt in a specific way. Particular hadiths[396] state that water should be accessible to all: *Men are co-owners in three things: water, fire and pastures*".[397] Under Islamic Law it is said that the prophet established a communal right to water meaning that no one person or entity could own the water of the land. Access to water, at least for human substances, is considered to be the right of all people whether publicly or privately held.

The IC 2005 attempted to embody the spirit of protecting its water resources through provisions that aimed to comply with international laws and conventions. Article 110[398] of the IC 2005

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[390] Section 27.1(b) of the South African Constitution 1996 as amended states that every person has the right of access to sufficient food and water.

[391] The Constitution of the Bolivarian Republic of Venezuela 1999 stipulates in Article 127 that the state has a fundamental obligation to ensure that the country's population develops in an environment that is pollution free and water is given special protection under the laws of the state.

[392] The Constitution of the Islamic Republic of Iran 1979 recognises in Article 43 that the country's economy is based on the provision of basic necessities for all citizens such as housing, food, hygiene, clothing medical treatment, education and other facilities that may be necessary for the establishment of a family.

[393] Although the Constitution of Colombia 1991 does not confirm individual right to water, it does stipulate in Article 49 of the constitution that the state is responsible for public health and environmental sanitation.

[394] Article 23 of the Belgian Constitution 1831 as amended articulates that the citizens of the state should live in an environment that is in keeping with human dignity.

[395] In India, the Supreme Court of the country ruled that both water and sanitation are constitutional rights and are a right to life in as per the language of Article 21 of the Constitution of India 1994 which states; "No person shall be deprived of his life or personal liberty except according to procedure established by law." See A.P. Pollution Control Board II v Prof. M.V. Naidu and Others (Civil Appeal Nos. 368-373 of 1999).

[396] Hadiths are the words, actions and habits of the prophet Mohammed and include his teachings. In Islamic jurisprudence, the Hadiths are second only to the Quran.

[397] Thomas Naff and Joseph Dellapenna, 'Can There Be Confluence? A Comparative Consideration f Western and Islamic Fresh Water Law' in Mashood A. Baderin (ed), *International Law and Islamic Law*' (Routledge 2016) 283.

[398] Article 110 The Constitution of the Federal Republic of Iraq 2005.

contains a list of competencies referred to as "exclusive authorities" of the IFG.[399] These areas, one would assume, have been flagged as subjects of great importance, which should fall completely under the authority of the central government alone. Article 110, Eighth, refers to water resources:

"Article 110

The Federal Government shall have exclusive authorities in the following matters:

…Eighth

Planning policies relating to water sources from outside Iraq and guaranteeing the rate of water flow to Iraq and its just distribution inside Iraq in accordance with international laws and conventions."[400]

Although this article does not directly mention 'water resources management' nor refers to 'water protection' explicitly, the language 'planning and policies' is sufficient to conclude that this reference is interpreted as protection and management of water resources.[401] As much of Iraq's water comes from the Zagros mountains of Iraqi Kurdistan bordering Turkey, this provision was important to protect the Arab majority in the south of Iraq and their right to benefit from the water flowing into Iraq. This provision interprets "just distribution" as that which is in line with international laws and conventions which may in itself pose potential problems as discussed below.

[399] These "exclusive authorities" include formulating foreign policy, formulating and executing national security policy, formulating fiscal and customs policy, regulating standards, weights and measures, regulating citizenship, regulating broadcast frequencies and mail, drawing up the general and investment budget bill, planning policies related to water sources from outside Iraq and general population statistics and census.

[400] Article 110, Eighth The Constitution of the Federal Republic of Iraq 2005.

[401] Kibaroglu and others (n 386) 68.

The language of Article 110 provides some degree of clarity in that the control and management of water sources outside Iraq must conform to international law such as the United Nations General Assembly Resolution on the right to water and sanitation**,** which formally recognised the right to water and sanitation by supporting the resolution championed by Bolivia on 28 July 2010. Resolution 64/292[402] acknowledges that clean drinking water and sanitation are integral to the realization of all human rights. Furthermore, United Nations Human Rights Council Resolution on Human Rights and access to safe drinking water and sanitation of 2010[403] affirmed that the right to water and sanitation were part of existing international law and that these rights were legally binding upon States. This recognition is now considered universal but is different from the rules and laws governing the transboundary flow of water, which is crucial for downstream states. What's more, the United Nations Convention on the Law of Non-Navigational Uses of International Watercourses adopted on 21 May 1997 recognized the impact of water of human behaviour and aimed to reach international consensus on the way waters crossing international borders were used and conserved. This convention intended to impose an obligation on UN member states to reflect on the impact of their actions on neighbouring or other states with respect to water resource. It provides an intergovernmental platform for the day-to-day development and advancement of transboundary cooperation. The purpose is to find mutually acceptable solutions to the problems relating to water and in the event that problems continue to plague relations, the matter would be forwarded to arbitration if necessary or taken to the International Court of Justice. Equitable distribution of water resources is not universally agreed. Many countries are not signatories to the Convention on the Law of Non-Navigational Uses of International Watercourses

[402] UNGA Res 64/292 (28 July 2010).
[403] UNHRC, 15th Regular Session September 2010 'Human Rights and Access to Safe Drinking Water and Sanitation' (October 2010) Res 15/9.

and therefore it may take a long time before the convention influences the way in which states currently manage and control water resources. Without Turkey and Iran becoming parties to the convention, it may prove difficult to look to international law to remedy some of the current problems regarding water resources in Iraq.

Moving on to other articles of the constitution, Article 114, Seventh sets out the competencies that are to be shared between central and sub-central authorities. IC 2005 has dealt with water in the same spirit as oil and gas resources. Article 114 articulates:

"Article 114

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

….Seventh: To formulate and regulate the internal water resources policy in a way that guarantees their just distribution, and this shall be regulated by a law."[404]

The principle is that both the national government and regional authorities share decision-making and management authority with the details such as divisions of responsibility, infrastructure, strategic policies, and general management incorporated into legislation. Achieving this requires political will, legal expertise and technical know-how. Currently none of these crucial factors exist in a robust mechanism between the KRG and the IFG. Moreover, identifying what "just distribution" means is a legal exercise unto itself as it is open to great interpretation. Article 114 does stipulate that the formulation of internal water policy and subsequent governance of the same

[404] Article 114, Seventh The Constitution of the Federal Republic of Iraq 2005.

must be regulated by law; it does beg the question why this provision was not incorporated into Article 110 as an exclusive competence of the IFG. The obvious answer would be that Kurds pressed for some control of water resources in their region. This highlighted that the Kurds were better organised with their demands and their vision of water resource management than their IFG counterparts. The KRG established and developed its own independent water resource management system that oversaw strategic planning. Just like they had done in many other areas, the Kurds were moving forward with their own plans of development for the region without waiting for a war-torn Baghdad to stabilise. Considering that much of Iraq's internal surface and ground water is in the Kurdistan Region, the Kurds have considerable leverage over Baghdad with respect to water. Water, like oil, gas and other natural resources has become a bargaining chip for Iraq's differing political actors.

Stripped down to the basics, the correlation between the IC 2005 and natural resources is dependent on how constitutional rights are interpreted.[405] Although importance is placed on water resources, the reality is that the IC 2005 has yet to address the fundamental questions regarding control, strategic management and policy objective between the KRG and IFG. Provisions relating to water and oil and gas have not been treated adequately in the IC 2005, not implemented or not followed up by legislation. As stated above, KRG's strategic water policies, management and control thereof are independent from that of the IFG. Such distinctions can cause contradictory policies and management strategies, effectively side-lining the provisions of the IC 2005. In this respect and considering the functions of water and land no effective lessons or considerations can be drawn to apply the same principles to the field of oil and gas in Iraq. An examination of water and land

resources compared to oil and gas resources would suggest that remedies to these disputes overlap and are intertwined. Any changes to current practices in these areas may affect the governance of each of these resources.

3.5 Application of Kelsen's Pure Theory of Law

In his Pure Theory of Law, Kelsen wanted to establish a legal science and positive theory of law so as to identify the essential character of law. To this effect, he took a decision to keep out all external elements from his theoretical analysis, i.e. the political, historical social elements to cite but a few. However, to truly understand both the Iraqi and the KRI legal and constitutional orders and their relations, it was felt that the research needed to take account of a much wider context and bring into the research elements of the political, economic, ethical and historical context. These external factors are key in determining the IC 2005 constitution, its application and its effectiveness, especially when the constitution itself embeds political tensions and exacerbated competition for resources. As explained above, the Iraqi legal and constitutional order is yet to develop as robustly as those in other countries; non-implementation of constitutional provisions, a degree of non-legal compliance against a background of weak rule of law paints a picture that seems removed and difficult to reconcile with the positivist choices of the Pure Theory of Law. As explained in this chapter, historical, political, economic, sociological and ethical considerations have directly influenced the drafting and implementation of the IC 2005 and have since continued to impact the Iraqi legal and constitutional order. Consequently, a reliance upon Kelsen's Pure Theory of Law will struggle to provide the theoretical framework necessary to make sense of the constitutional orders of Iraq and the KRI and their complex inter-relationships. While the hierarchy of norms tends to provide a useful paradigm to understand the internal organisation of national

legal orders, it is particularly challenging to use this paradigm to throw light and interpret the competing constitutional claims of the Iraq and KRI legal orders.

Furthermore, as Kelsen himself stated, the Pure Theory of Law is an analytical tool to comprehend the Law as it 'is', not as it 'ought' to be. It is not particularly well suited when the research attempts at framing a reflection regarding the reforms that Iraq and the KRI ought to consider so as to improve the present oil and gas regime and governance there. For these reasons, while the Pure Theory of Law gives an elegant explanation of law and the validity of norms through the concept of legal order, it struggles to capture, explain and theorise the constitutional reality on the ground, particular with regard to Iraq and the KRI.

3.6 Constitutional Framework and Governance of Oil and Gas

Deciding how to develop, manage and share the petroleum resources of a state has become one of the most difficult and contentious components of constitutions in the modern era but is still considered necessary for the purpose of documenting national agreement. Mechanism for the harmonisation of national and local laws to ensure efficient and effective planning, administration and execution of natural resource policy are crucial in oil and gas operations, which constitutions should aim to address adequately.

Discussions in this section will focus on whether issues relating to oil and gas should have been dealt with more comprehensively in the IC 2005. In addition, intentions of the negotiators and drafters of the IC 2005 will also be highlighted to assess reasons for Iraq's failure to govern petroleum exploitation in a consensual, transparent, efficient and equitable manner. At the core of these debates are questions of ownership, control and management rights to oil and gas and

distribution of revenue from oil and gas proceeds. One of the most important points is to resolve whether sub-national entities such as KRI, are permitted to negotiate and conclude petroleum contracts with IOCs under the provisions of IC 2005. Disputes between KRI and IFG regarding oil and gas dates from at least 2006[406] when the KRG signed an agreement with the Norwegian company DNO to start drilling operations in the Kurdistan Region.[407]

The KRG and IFG Interpret oil and gas provisions in the IC 2005 differently. Both present legal arguments as to why the KRG can/cannot continue with petroleum operations. As previously concluded, the manner and haste within which the IC 2005 was negotiated, drafted and adopted resulted in a document that was not only vague in nature but one which also tried to appeal to all Iraqi political groups who had competing agendas. This exacerbated an already complex relationship between the Kurdish leadership and counterparts in Baghdad. The IC 2005 was a constitution of willing consensus amongst Iraq's differing communities albeit under pressure from United States and its CPA allies.

3.6.1 Ownership of Oil and Gas

Ownership of petroleum involves a number of potentially overlapping claims such as private title (individual or corporate ownership), communal or customary land rights and state ownership. It is important for a constitution to clearly establish legal ownership rights to the nation's petroleum resources for several legal, political and economic reasons. Primarily, ownership rights may increase investor confidence and activity in a state bringing financial rewards that transcend

[406] Zedalis (n 133) 29.
[407] The agreement was for DNO to produce 50,000bpd from the Taweke fields, which was met with a great deal of objection by Baghdad. Soon enough other companies such as Addax Petroleum, Genel Energi and Schtat Oil followed.

benefits in a particular sector or industry, which may be advantageous to the economy. Potential investors require clarity of ownership rights to mitigate risks and in order to achieve a return on their investment so that that they will be able to monetise as soon as practically possible. If ownership rights are not been determined, potential investors run the risk of legal ownership unexpectedly changing. Such changes could lead to contractual disputes, litigation, increase in cost for the investor and potentially taking a long time to remedy. An example of unclear ownership rights over natural resources can be seen in Angola. According to a World Bank Report,[408] investors are hesitant to invest in the country because ownership rights to petroleum are unclear. In addition, identifying legal ownership of oil and gas could reduce conflict between competing groups, tribes, communities and sometimes governments as can be seen in Iraq. Similarly, clarifying ownership may impact the authority to enact laws and regulations where a constitution is silent on management and wealth sharing mechanisms.

Typically, constitutions differentiate between ownership of the surface of the land, which are commonly owned by private or communal entities and subterranean resources, which are typically the property of the state. Furthermore, constitutions may contain remedies to redress any damage or deprivation to property caused by events such as expropriation and confiscation. Similarly, some provisions may limit an individual or entity in developing the land or exercising the right to the property in particular circumstances.

[408] World Bank, 'Angola: Country Economic Memorandum Oil, Broad-Based Growth, and Equity' (*World Bank* 2006) http://documents1.worldbank.org/curated/en/591191468002432699/pdf/35362.pdf accessed 12 March 2016.

Constitutional provisions relating to ownership of petroleum can vary in many ways. One way is dependent on the structure of the state. In homogenous societies[409] constitutional provisions on oil and gas ownership are expected to address national development of these resources. Another component of ownership is how natural resources are shared between government and private entities (if at all). Typically, if the structure of the state is unitary, power is vested in one central authority. In contrast, in heterogeneous/divided societies[410] constitutional treatment of petroleum resources is more focused on how wealth from such resources is shared whether guarantees can be given to ensure continued equitable distribution.

At a fundamental level, constitutions may or may not guarantee private property rights and extent to which private (including foreign ownership) is permitted. Countries typically determine property regimes with respect to natural resources in the text of their constitution or by legislation. Over time, countries have increasingly opted to clarify legal title of petroleum resources in their constitutions, which can take several different forms. Most constitutions guarantee and protect the right to private property where ownership vests in individuals, corporations or organisations. However, in nearly all cases this right applies to the surface of the land and does not extend to the sub-surface, which means that the right does not extend to the right to own petroleum resources. The United States is a rare exception in that ownership rights extend to natural resources found in the subsurface such as oil and gas unless a previous deed or agreement states otherwise. Even

[409] Unitary states where numbers of different ethnic communities and number of ethnic minorities themselves are very low and a there is a strong sense of national identity.
[410] Where the number and size of minorities is large and a much weaker sense of national identity may exist (such as Iraq).

though oil and gas laws differ from state to state in the United States, the laws regarding ownership prior to, at, and after extraction[411] are very similar if not identical.

Constitutions can also confer communal or customary title where a collective right to access and use property is given without absolute individual title. In most jurisdictions resources in situ are the property of the state, sub-national or other form of government. For example in Article 45 the Iranian Constitution states that natural resources amongst other things "shall be at the disposal of the Islamic government for it to utilize in accordance with the public interest".[412] Similarly, the Angolan Constitution stipulates that natural resources "shall be the property of the state".[413]

In some cases a mixed approach is taken to distinguish between resources that are vital for human survival and others that are important to a nation's economy.[414]In Nigeria, under section 44 (3) of the constitution the Federal Government is the owner and "controls all minerals, mineral oils and natural gas in, under or upon any land in Nigeria, its territorial waters, and exclusive economic zone."[415] All such minerals, oils and gas shall[416] "vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly."[417]

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[411] Nicholas Haysom and Sean Kane, 'Negotiating Natural Resources For Peace: Ownership, Control and Wealth-Sharing (Centre For Humanitarian Dialogue 2009) 9.
[412] Article 45 Constitution of the Islamic Republic of Iran 1979.
[413] Article 16 Constitution of Angola 2010.
[414] For example the Nigerian Constitution provides a number of constitutional provisions to safeguard water resources whilst at the same time determining ownership rights to petroleum for the state.
[415] Article 44(3) The Constitution of Nigeria 1999.
[416] The World Bank, 'Conference Report: World Bank Conference on Oil and Gas in Federal Systems' (Conference on Oil and Gas in Federal Systems, Washington D.C., March 3-4 2010) http://documents1.worldbank.org/curated/en/426621468158367697/pdf/687760WP0P120700G0Conference0report.pdf accessed on 7 April 2016.
[417] Article 44(3) The Constitution of Nigeria 1999.

A different approach to vesting ownership in a constitution is to confer such rights to the people. The implication is that the entire population of the country is entitled to benefit from the country's natural resources. In Iraq, IC 2005 determines that ownership of oil and gas are vested in the "people of Iraq in all of the regions and governorates"[418] attempting to promote equality in a multi-ethnic, multi-religious society.[419] However, this principle is not unique to Iraq.[420] Ownership of oil and gas by the people presents its own challenges and flaws. First, a clear ownership regime does not emerge. Does such a provision mean that oil and gas resources are held in trust by the government for the benefit of the people? If so, who or which government would hold it in trust: the federal government, regional government, local governments? Such language may suggest communal public ownership to natural resources. This interpretation also raises a number of other questions, such as how and who can exercise rights of ownership? As a stand-alone provision, this article becomes a very broad constitutional principle that does not provide definitive answers to key questions. Reference to ownership by all of the people in all of the regions and governorates in the IC 2005 would also suggest that regions and governorates (such as the KRG) have a shared interest in ownership of oil and gas resources.

The current ownership disputes between Baghdad and Erbil are not unique. Competing ownership claims between the national government and sub-national entities have existed and still exist in several different countries. Such disputes usually arise in federal systems although it has developed in some unitary states also. Federal systems such as Canada and Australia, favoured ownership of petroleum being vested in the state with management and control of natural resources to be

[418] Article 111 The Constitution of the Federal Republic of Iraq 2005
[419] Zedalis (n 133) 28.
[420] The Article 32 Constitution of Egypt for example stipulates "Natural Resources belong to the people".

determined at sub-national level.[421] In contrast constitutions in the modern era have distinct natural resource provisions as a response to the internal divisions of a state, especially in heterogeneous societies. The result has seen the rise and recognition of sub-national authority over oil and gas management, development and exploitation, codified in a national standard of rules and regulations via a constitution or legislation. In federal states, the legal framework whether via the constitution or legislation should determine ownership of resources between the national government or sub-national government. The absence of such mechanisms can lead to confusion, disputes and political, social and legal problems. In an effort to diffuse tension between competing groups and in anticipation of preventing conflict, some federal systems, have assigned ownership rights of petroleum resources to the state but have assigned other possessory rights such as management powers and rights to revenue to sub-national entities. Brazil for example, in its constitution[422] of 1988 in Article 20(IX)[423] confers ownership rights to minerals to the state but in Article 20 Section 1[424] affords and guarantees some powers to sub-national entities so that they can benefit from the country's wealth. In other jurisdictions, sub-national authority is given much more prominence and are officially recognised as legal owners of natural resources. For example, the Canadian Constitution of 1867[425] in Article 109 recognises the provinces, that is to say the sub-national governments as owners of natural resources whether in "situ or arise"[426] in effect to guarantee the regions rights to a share of the state wealth.

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[421] This could be because in the 19th century the required technology, communication and transport infrastructure as well as capacity did not exist, making it harder to force centralised control over exploitation of oil and gas. Furthermore, at the time of the creation of these countries, oil and gas resources had yet to be found, so it did not find expression in the constitution.
[422] Constitution of Brazil 1998.
[423] Article 20 IX Constitution of Brazil 1998.
[424] Article 20, section 1 Constitution of Brazil 1998.
[425] Constitution of Canada 1867.
[426] Article 109 Constitution of Canada 1867.

In some cases, the powers of the state and sub-national entities are described in the constitutional text in detail. For instance, in the United Arab Emirates the "natural resources and wealth in each Emirate are deemed the public property of that Emirate".[427]In contrast, some constitutions explicitly clarifies that the state is the owner of natural resources of the country. The Angolan Constitution for example determines that natural resources are the property of the state. Similarly, the Iranian constitution uses language of utilization rather than ownership. Whether a constitution incorporates natural resources provisions or not, in most cases, there is clarification on ownership and management of oil irrespective of whether it is the state or the sub-central entities. In the IC 2005 however, such explanations are not stated with any certainty.

3.6.2 Oil and Gas Management and Development

This section considers how constitutions might address issues relating to the management and development of oil and gas, providing examples of how different jurisdictions have expressed such issues in their constitutions. Because management and development can be visibly dissected into specific areas of responsibility, many countries engrain managerial and developmental rights into their constitution.

Ownership of petroleum does not necessarily imply rights to manage, develop or claim proceeds from oil and gas revenues. Determining ownership of natural resources are subject to clear distinctions as to where authority lies with respect to management and development of oil and gas. It is therefore prudent to separate ownership of petroleum resources from authority to manage, develop, and revenue collection. The allocation of management and development authority is

[427] Article 23 The Constitution of the United Arab Emirates 1971.

usually highly contested between the national government and sub-national entities because it is this allocation of power (and not ownership) that determines control over natural resources. Following on from the discussions regarding the need for clarity of ownership, it is just as crucial to ensure that allocation of executive and legislative authorities is clear for all stakeholders when management responsibilities are designated. Such clarity may provide petroleum companies with confidence to invest in a country's oil and gas sector. Any concern or uncertainty regarding who has authority to enter into contracts or who regulates the natural resources sector can be major obstacles to the development of the oil and gas industry in a country.

Before entering the discussion as to how constitutions deal with the management of the petroleum sector and its development, it is prudent to determine what 'management of petroleum' means. Management is a very broad term used to describe a number of intricate activities in oil and gas exploration, development and production that directly affect how these resources are dealt with at different stages of oil and gas operations which generally fall under the classification of upstream,[428] midstream[429] and downstream[430]activities. Table [2.1] provides some of the activities attributed to each of these sectors. The purpose of classifying the different sectors in oil and gas operations is so that responsibilities can be identified and distributed as appropriate between the different executive, legislative and institutional bodies within a country. This research solely

[428] Upstream activities include exploration and production of petroleum. The purpose of upstream activities is to bring petroleum in situ to the surface and incorporates activities such as drilling wells, rig operations and extraction of chemical supplies.
[429] Once petroleum resources have been brought to the surface, midstream operations are carried. This includes the storage of petroleum produced as well its transfer (whether by pipeline, oil tankers, rail, truck or other mode of transport).
[430] Downstream typically involves refining petroleum as well processing and purifying natural gas. Downstream activities also include the marketing and sales of petroleum by-products such as gasoline, kerosene, asphalt and other petrochemicals.

focuses on upstream activities of petroleum operation but for the sake of completeness the Table 2.1 above has been produced to highlight the different classifications of petroleum operations.

There are of course many benefits that can be drawn from embedding management authority in a constitution, but this does not mean constitutions should detail every aspect of oil and gas management. Constitutions should identify and include provisions that cover the most crucial areas of petroleum sector management. Issues that require greater detail or special attention are usually left to legislation and regulation because these legal instruments are much more flexible than constitutions to amend, change or replace rules governing current practices. Authority, whether executive or legislative, over oil and gas ultimately determines who can make and administer laws regarding the exploitation of oil and gas.

It is becoming increasingly common to recognise that national governments are not the only level of government that has legitimate interests in the development and management of petroleum resources. Sub-national and local governments in many countries play a significant role in petroleum governance. This role can find expression in constitutions in a number of different ways including:

- *A clear division of responsibility and accountability between the national and sub-national governments.* For example, sub-national entities could be given a leading role in exploration and production of natural resources and powers over transportation networks, refining, marketing and export of natural resources are retained by the national government.

- *A power sharing model* which focuses on coordination between national and sub-national levels of government to create or develop policies and strategies regarding natural resources. The aim here is to reconcile any contradictions between national and sub-national laws and practices by including regional representatives, members of parliament and experts at both the national and sub-national level in the policy formulation and decision-making process. The German constitution and its model of federalism is a good example of this.
- *Dividing executive and legislative responsibilities between national and sub-national entities* where the national government formulates the oil and gas framework of a state governing the management of oil and gas resources but the lead role for implementing such standards will be carried out at the sub-national level.
- *Independent bodies* that are set specific goals, free from government interference or influence are established.

It can be challenging to allocate legislative and executive authority in resource rich states as such allocation is often dependent on a number of criteria including accountability, national interest, equity and capability/productivity. With respect to accountability, questions such as which level of government is competent to deal with oil and gas operations or who is accountable to the public arise. Similarly, should petroleum resources in Iraq be recognised as a national interest and therefore treated differently to other natural resources? The issue of equity also raises some questions. How will the government(s) set a minimum standard to ensure all areas of the country receive public services so that resources wealth is not restricted to certain areas or provinces? Finally, the capacity, capability and productivity of different levels of government should be

determined to identify who has the ability and capacity to develop and manage oil and gas resources most efficiently. For example, it may be more efficient to separate allocation of authority on the basis of capacity and technical know-how where logistics of oil transportation network can be managed from one area and matters relating to collection of seismic and exploration data in another area.

There is no universal agreement as to whether private, national government or sub-national government authority over oil and gas exploitation is most efficient or beneficial to a state and its people. There are many competing variables that may determine what is best for a particular country and its citizens. However, it is submitted that devolving authority to sub-national governments in many aspects of oil and gas exploitation can be advantageous. Sub-national governments may be better placed to determine the needs, preferences and concerns of its population, theoretically improving accountability because politicians and lawmakers live and work locally. Equally important is that sub-national authorities have a direct interest in maximising benefits from petroleum exploitation in their region or province. Actors at the national level may not have an interest in promoting the development of a particular geographical area, province or region as much as the executive and legislative branches at the sub-national level. In fact, it may be the case that actors at the national level may block or hinder the development of natural resources in regions.

However, proponents of national control in oil and gas exploitation argue that devolution of power to the sub-national level may be disadvantageous for the state. There may be efficiency and capacity concerns when assigning powers to sub-national government(s). Some regions and provinces that have previously been excluded from petroleum governance may find it challenging

to find technical and skilled expertise to develop the oil and gas sector from their own population pool and may need to hire expatriates from other countries at great cost to assist in the creation or development of a petroleum sector. Additionally, far reaching devolution of authority to sub-national entities can be a major obstacle to developing a consistent and sustainable nationwide policy on oil and gas governance. It could create or increase political and economic friction between differing regions, blocs and communities. Furthermore, it could lead to the adoption of contradictory policies, which may result in less interest from potential investors who could view inconsistencies as a further risk that they need not take. Another point of concern is that in most states, oil and gas deposits are not equitably distributed as some areas or provinces oil and gas deposits simply do not exist. If we take the example of Iraq, there are a number of provinces such as Basra, Kirkuk and Maysan that are rich in natural resources but other areas such as the province of Anbar have very little or no deposits of oil and gas. Therefore, if the state is not given overall control of oil and gas resources it may be difficult to ensure revenue from petroleum resources are equitably distributed. Finally, sub-national entities in their pursuit of attracting investment in the region and their oil and gas sector, may engage in a 'race to the bottom',[431] providing potential investors with much more lucrative incentives.

Where management and development provisions are not addressed constitutions in unitary states would usually, by default, fall under the powers of the central government. In contrast, in federal states or where secessionist identity-based conflicts exist, the authority to manage or develop oil and gas resources has been devolved to sub-national entities such as provinces and regions. For example the conflicts between Aceh (sub-national government) and Indonesia (national

[431] Alan Tonelson, *The Race To The Bottom: Why A Worlwide Worker Surplus and Uncontrolled Free Trade are Sinking American Living Standards* (Westview Press 2002) 127.

government) and Papua New Guinea (national) and Bougainville (sub-national) have highlighted how authority has been passed to the sub-national governments in an effort to reach national reconciliation and peace. Historically, the same could be argued for the KRI, where the Kurds had previously pursued armed struggle against the Iraqi government.

In states where civil war, ethnic, competing regional dynamics are observed, constitutional drafters have tended to detail management and developmental provisions to ensure that little room is left for interpretation or doubt as to how natural resources would be managed in a country. Examples can be found in the constitutions of Brazil and UAE as highlighted earlier in this chapter.

3.6.3 Authority to Conclude Petroleum Contracts

The main constitutional provisions relevant to the debate as to whether or not the KRG has the constitutional authority to enter into petroleum agreements can be found in Articles 110,111,112,114,115 and 121 respectively.[432] Examining these Articles as a collective would suggest, though not in explicit terms, that the IC 2005 grants authority to sub-central entities to enter into petroleum agreements. There are a number of reasons for this. First, Article 110 does not mention the words oil and gas or natural resources as part of the Iraqi state's exclusive competencies. Furthermore, the wording of this article does not allow one to draw implied references that natural resources in general fall under the exclusive competence of the Iraqi state. In addition, Article 115[433] specifically states that any authority that has not been included in Article 110 will be given to the sub-central entities. A clear distinction can be made between this provision

[432] Articles 110,111,112,114,115 and121 The Constitution of the Federal Republic of Iraq 2005.
[433] Article 115 of the Iraqi Constitution: "All powers not stipulated in the exclusive powers of the federal government belong to the authorities of the regions and governorates that are not organized in a region. With regard to other powers shared between the federal government and the regional government, priority shall be given to the law of the regions and governorates not organized in a region in case of dispute."

and Article 114, which explains some competencies are to be shared between the IFG and sub-national entities. However, this provision does not state oil and gas as a shared competency. The only mention of "energy" is "electric energy" at Article 114, Second.[434]

Perhaps, the most detailed provision of the IC 2005 regarding oil and gas management is Article 112. Unlike many other constitutions, the IC 2005 attempts to deal with development issues of oil and gas by explicitly referencing the word "management" itself. Considering the IC 2005 as document and provisions to oil and gas as whole, drafters attempted to establish a joint management structure to divide management responsibilities between the KRG and IFG. However, the text that has emerged has created more confusion than clarity. Article 112 stipulates:

"First: The federal government, with the producing governorates and regional governorates 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 law.

Second: The federal government, with the producing regional and governorate governments, shall together formulate the necessary strategic policies to develop the oil and gas wealth in a way that achieves the highest benefit to the Iraqi people using the most advanced techniques of the market principles and encouraging investment."[435]

[434] Article 114 Second The Constitution of the Federal Republic of Iraq 2005 stipulates…"To regulate the main sources of electric energy and its distribution".
[435] Article 112 The Constitution of the Federal Republic of Iraq 2005.

The ambiguous wording of this article can lead to differing interpretations, where more questions than answers are provided. From this article, it is not known what ‘producing governorates and regional governments’ mean. This does not distinguish the role and function of the national and sub-national governorates. Does the IFG have to ask for permission from sub-national governments before engaging in management activities or does it merely have to consult? Do sub-national entities have to be involved in identifying and implementing strategies and decision making with respect to management and development of the oil and gas in all of Iraq? This article also sets forth that oil and gas should be produced, managed and distributed in a fair manner. It does so through two separate paragraphs, the first of which attempts to deal with the management of petroleum activity and subsequent distribution thereof, whereas the second paragraph refers to the partnership between the IFG and sub-central units in formulating long-term aims and policies for the Iraqi petroleum sector.[436] Furthermore, this article suggests that both IFG in coordination with sub-central entities should manage the exploitation of oil and gas from “present fields”. However, it fails to specify which government is responsible for the performance of specific tasks or in specific areas or to give meaning to what is meant by “present fields”.

It could be interpreted that shared management of oil and gas activity in Article 112 is limited because it refers to the management of oil and gas after it has been extracted. If this interpretation were taken, it would suggest that the IFG role and power with respect to oil and gas would be limited to processing, transportation and export,[437] in effect logistical matters. This would mean

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[436] Zedalis (n 133) 41-46.

[437] James Crawford, ‘The Authority of the Kurdistan Regional Government’ (Clifford Chance LLP 2008) http://mnr.krg.org/images/pdfs/James_R_Crawford_Kurdistan_Oil_Legal_Opinion_English__2008.pdf accessed on 19 February 2016.

that issues such as ownership, management including the award of contracts and control of petroleum resources in KRI territories would, by default, be under the competency of the sub-national authorities.

A condition is placed on Article 112 in that the federal government is obligated to disburse revenues from oil and gas exploitation in a fair manner. In addition, immediate disbursement of revenues to areas that have been unjustly deprived of Iraq's wealth and areas that have suffered loss through the acts of the previous governing regime must occur.[438] The Kurds continually argue that the obligations placed on the Iraqi state in this provision have not been met. This provision also acknowledges the need for balanced development of the oil and gas industry and ensure disbursements are, in the long term, distributed proportionate to the population of the regions and governorates.[439] Again the Kurds argue they have never received the full amount of monies that they are entitled to. Finally, it stresses that the law must regulate the exploitation and management of oil and gas. There are examples of similar provisions in constitutions of other countries such as Russia,[440] where such obligations are shared between the state and sub-national entities. Although the power sharing provisions in the Russian Constitution does not solely determine the way in which oil and gas resources are dealt with, it does explain in much clearer language (compared to IC 2005) the competencies and rights of the state and sub-national governments.

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[438]As discussed earlier in this chapter, the wording of this article is unclear in that no definitions are available. It is therefore left to the reader to interpret what is intended.
[439] Zedalis (n 133) 139.
[440] Article 72 Constitution of the Russian Federation 1993 states
"The following shall be within the joint jurisdiction of the Russian Federation and
Constituent entities of the Russian Federation:

c. Issues of the possession, utilisation and management of land and of subsurface, water and other natural resources;".

Articles 121, First[441] and 122, Second[442] refer to the powers of sub-national entities. These two sub-articles state explicitly that regions have the constitutional authority to exercise executive, judicial and legislative competence in all areas that have not been assigned in the "exclusive powers" of the central government as per Article 110.[443] Moreover, Article 121, Second affords priority to sub-national entities over federal authority in cases where there is a contradiction between legislation that fall outside of Article 110. Article 121, Third[444] follows by stating that sub-central entities should be allocated an equitable share of the national revenues.[445] This article highlights the priority of sub-central entities over the federal government in matters that are non-exclusive authorities, which could include petroleum exploitation.

It would be absurd to think that oil and gas were not included in the exclusive competencies because the drafters simply forgot to add this provision. The second part of Article 115 clearly states that in the event of any dispute over shared competencies, priority will be given to the sub-national entity, that is to say a region or province. The Kurds held a strong negotiating position when the constitution was being drafted and did not want to give up ownership, control and management claims to petroleum in their region.

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[441] Article 121, First The Constitution of the Federal Republic of Iraq 2005.
[442] Article 122, Second The Constitution of the Federal Republic of Iraq 2005.
[443] Article 110 The Constitution of the Federal Republic of Iraq 2005.
[444] Article 121, Third The Constitution of the Federal Republic of Iraq 2005.
[445] Article 121 The Constitution of the Federal Republic of Iraq 2005
"First: The regional powers shall have the right to exercise executive, legislative and judicial powers in accordance with this Constitution, except for those authorities stipulated in the exclusive authorities of the federal government.
Second: In case of 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.
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."

Considering the importance of oil and gas to Iraq's economy, it is surprising that the sectarian/political blocs that are now challenging the Kurds did not insist on the inclusion of ownership and exploitation of oil and gas in Article 110 when the constitution was drafted and adopted. The IFG may have believed that the Kurds would not be able to create their own oil and gas sector due to the huge resources and investment required. Bearing in mind the nature of the IC 2005 drafting process referred to earlier in this chapter, it is likely that the reason of its exclusion was political. Inclusion of oil and gas in the exclusive competencies of the IFG would have heavily weakened the legal arguments of the Kurds in their efforts to create and manage their own oil and gas sector.

In an effort to argue their position, the KRG commissioned a legal expert opinion by Professor (now Judge) James Crawford in 2008.[446] Crawford's legal opinion explained the division of competences over natural resources between the federal government and the KRG and addressed the sovereign authority of the KRG to manage petroleum resources of the KRI in conjunction with the IFG, pursuant to Articles 111 and 112 of the constitution. Crawford argues that Article 112 provides the IFG with a qualified right to only undertake shared management of oil and gas extracted from the "present fields".[447]

3.6.4 Revenue

Revenues from petroleum operations are generated in a number of different ways, including royalties, taxes, bonuses and licence fees and will be discussed in detail in Chapter Four. Revenue

[446] Crawford (n 437).
[447] Crawford (n 437).

sharing mechanisms and provisions are usually a determining factor of the viability of oil and gas provisions in a constitution but addressing revenue collection and distribution issues can be challenging. Ultimately, if revenue sharing formula or agreement does not work between competing actors and governments within a country, it implies that such provisions are either missing from a constitution/legislation or dealt with inadequately. Including revenue provisions in a constitution are important for the same reasons as that of ownership and management provisions and will not be repeated here.

Fair collection and distribution of revenue is at the core of some of the biggest internal disputes in petroleum resource rich countries. According to the World Bank, lack of trust between competing actors, which is often a by-product of history and conflict, is an important component of revenue sharing principles.[448] Therefore, expression of revenue collection and distribution in a constitution and implementation mechanisms could be critical in finding overall consensus on power sharing with respect to petroleum resources. Addressing matters related to revenue requires specific and distinct treatment because raising, collecting and sharing revenue from petroleum resources may have different objectives and concerns for different actors. Therefore, constitutions have important roles to play in establishing wealth-sharing systems by clearly assigning responsibilities to various levels of government, setting out stable principles and formulae for raising, collecting, sharing and transfer of revenue.

Authority over revenue collection and allocation is important because lack of clarity or unjust distribution of revenue can lead to inequitable division of wealth, potentially fracturing the stability

[448] Hana Brixi, Helen Lust and Michael Woolcock, *Trust, Violence and Incentives: Learning From Local Success Stories in Service Delivery in the Middle East And North Africa* (World Bank 2015) 306.

and cohesion between differing communities of a state. While clear rules regarding 'collection triggers' and the collection of revenue are important, they are usually dealt with by legislation and regulation. However, what is imperative is that authority to collect and allocate revenue is clearly enshrined in the constitutional design of a state such as Iraq, as local and national economies are dependent on such revenues.[449]

Generally, constitutions can follow principles of equalization[450] or derivation[451] for allocation of resource revenue. Historically, Iraq has been a state that has practiced the principles of equalization. It is only since 2003 that efforts have been made to move towards the principles of derivation. The recognition of such division is deep rooted in history and how the role of natural resources in the social contract (constitution) has changed. In many first-generation constitutions of the 20th century national sovereignty was highlighted as a main foundational principle, which implied homogeneity of formerly colonised territories (e.g. Nigeria and Venezuela). With respect to petroleum resources, focus was on recognition that these resources were owned by and for the benefit of the state as opposed to international oil companies or other internal sub-national entities. Later generation constitutions concerned themselves with trying to resolve internal conflicts, forcing recognition of diversity and heterogeneity. Consequently, the provisions of natural resources in these constitutions attempted to resolve claims by competing internal groups and

[449] This is especially the case if local or national governments (as in the case of Iraq and the KRG) have huge social policies that the public are dependent on (e.g. health care, education, pensions, subsidies on petrol, electricity and basic commodities).
[450] Where natural resource revenues are allocated as necessary for the development nationally for non-commercial, economic and social objectives in specific areas or regions in a state. Proceeds from natural resource exploitation are not allocated to such areas based on production or in proportion to contributions made to the national revenue from natural resources but are based on what the government perceives to be the financial need of each area.
[451] Here, natural resource revenue is allocated to regions and other sub-national areas as compensation in proportion to the costs associated with exploiting the natural resources.

stakeholders over ownership, control, allocation and distribution of natural resources (examples include Sudan, Iraq, Indonesia and pap new guinea).[452]

In unitary states, responsibility for collecting and distributing resource revenues is typically assigned to the central government, in the form of the Ministry of Finance (or equivalent). However, in a system where some degree of executive and legislative authority is devolved a more complex approach to revenue collection and distribution is required in order to accommodate local demands for a direct share of revenue generated locally and at the same time consider the national governments interests.

There are challenges associated with the transparent and equitable collection and distribution of natural-resource revenues in both unitary and federal countries. Selling, collecting and allocating proceeds from revenue from natural resources outside of prior agreed issues (or in absence of agreement) could undermine a country's institutions and lead to corruption. For example, prior to 20003, it was estimated that the Sierra Leone Government collected customs duties on no more than 5% of diamonds exported from its territory. Given the prominent role that diamond industry plays in the state's economy it is prudent to consider institutional arrangements for the transparent collection of revenues from key natural-resources, especially in countries where a particular natural resource is the backbone of the economy. According to several studies and by the Iraqi government's own admission, proceeds from oil and gas account for approximately 95% of all of Iraq's income.[453]

[452] Haysom and Kane (n 411) 7.
[453] United Nations Assistance Mission In Iraq, *Iraq's Fiscal and Economic Situation: ISIL Crisis And The Sharp Drop In Oil Revenue As Catalysts of Economic And Financial Reform* (2015).

Although there are a number of different ways in which revenues can be collected and distributed by the national government, by the sub-national government, a private third party or a combination of these:

- *National Government Collection and Allocation:* All applicable revenues associated from petroleum operations are pooled together by the national government into one account and then distributed among the different levels of government in accordance with a pre-determined formula. The constitution of countries such as Nigeria, Venezuela and Indonesia apply this form of system. The formula can be based on a number of possible criteria, including: population ratios, land mass, ensuring an equal standard of public services between provinces, distinguishing between presently producing resources and future resources, provincial and national expenditure needs among other things.
- *Sub-national Government Collection and Allocation*: in this system, applied in Canada and Sudan, sub-national governments collect and allocate most of the revenue obtained from oil and gas operations in their recognised geographical area. However, some other revenues are attributed to the national governments in the form of corporate income tax and customs.
- *A Combination of National and Sub-National Collection and Allocation:* Some constitutions, including Iraq's attempt to incorporate a combination of both national and sub-national authority over the collection and allocation of natural resources. Iraq's constitution looks to the federal government collecting income from revenue and a population-based distribution of revenues from currently producing oil fields while allowing for separate regional-led arrangements for "future" oil fields.

- *Independent Third-Party Collection and Allocation:* Theoretically, third party institutions can operate as the body that collects and allocates revenues from oil and gas revenue. A body of the United Nations for example can fill this role, especially in nations where mistrust or conflict is so intensive that no reliance can be placed on a workable relationship between the national and sub-national entities. However, the practical implications of adopting such a system may present its own challenges. For instance, third party control may not be in the best interest of the people of the country. Furthermore, politicians and lawmakers may not welcome outside interference, citing loss of sovereignty.

Whatever mechanism is used for revenue raising, collection and distribution, the overriding concern is to ensure a transparent and automatic collection process and sharing of the national-resource wealth of a country in accordance with whatever wealth-sharing principles have been agreed between the different levels of government. In my opinion, dependent on strong cooperation and transparent revenue sharing mechanism, the KRG could conduct its petroleum operations, collect revenues from this and allocate such revenue for projects and salaries of its population. There should be an agreed formula whereby the KRG contributes to the Iraqi national budget, taking into account sovereign expenses. In turn, the KRG cannot request a share of the national budget, as it would have received revenue from petroleum operations, which would be incorporated in its own budget to govern the KRI. If KRG agrees to contribute to the Iraqi national budget, is transparent about its petroleum contracts and revenues obtained from petroleum operations, this proposal would have a realistic chance of success.

With respect to the Iraqi constitution, two main provisions of the IC 2005 relate to revenue sharing, Article 112, First, which implies that the power of the IFG to collect revenue is conditional upon revenue being distributed equitably and Article 121, Third which states that regions and governorates must be given a fair share of the IFG revenue.[454]

As identified earlier in this chapter, it is prudent to treat issues of ownership, management and revenue separately. The constitution has separated ownership as a standalone clause in Article 111 but has mixed both management and revenue sharing rights in Article 112, setting preconditions that management of oil and gas revenue will only be shared with the national government if it distributes revenues in a fair manner. This together with conditions placed on compensation victims that 'were unjustly deprived' in an allotted time is not only vague but is merely recognition that such disadvantaged persons are entitled to a remedy. A more favourable outcome would have been for the issues of management and revenue to be dealt with in two (or more) separate articles of the constitution. This may have provided greater clarity and detail and left less room for interpretation. In addition, it would have been prudent to give some negative or positive incentives for the parties to reach an agreement and pass legislation. For instance, a constitutional provision could have stated that if legislation regarding compensation to victims and separate laws addressing issues of management and revenue sharing are not passed by the federal legislature by a specific date, sub-national governments may determine their own mechanisms for the same as long as they do not contradict with other provisions of the constitution.

[454] Zedalis (n 133) 39.

In contrast, the language in Article 121, Third does not take retrospective stance and concentrates on division of revenue in a fair and systematic manner. The wording of Article 121, Third requires allocation and distribution of IFG revenue to be considered in light of the "….resources, needs and the percentage of the population".[455] This shows the competing agendas in play when the IC 2005 was negotiated and drafted. The groups that had suffered greatly at the hands of Saddam's regime, the Kurds and the Shia would have advocated for a retrospective provisions (Article 112) that recognized the damage to people and land whereas the Sunni elements would have been more interested in ensuring that their areas receive a proportionate share of Iraq's wealth, especially considering as their areas do not compare to the vast oil wealth in the north and south of Iraq (Article 121).

The revenue disputes between the KRG and IFG elevated to new heights during the drop of oil prices in 2015/2016. The federal government should have transferred payments to the KRG in accordance with the federal budget law for each year, which stated that the KRG is entitled to a 17% share of Iraq's wealth.[456] This formula for revenue sharing was conceived in the Iraqi Budget Law of 2009 and was repeated in the national budget laws in the years after.[457]

However, the IFG stopped all transfers to the KRG in June 2014. The Kurds claim that even prior to June 2014 when IFG made regular payments to meet its obligations under the constitution and the law, it did not at any time transfer to the KRG the full 17% of the Iraqi national revenue that it

[455]Article 121, Third The Constitution of the Federal Republic of Iraq 2005.
[456] Hevidar Ahmed, 'Kurdish MPs Pressure Abadi To Listen To IMF's Advice For 2018 Budget ' (*Rudaw* 2018) <http://www.rudaw.net/english/middleeast/iraq/06022018> Accessed 12 December 2018.
[457] Peter D. Cameron and Michael C. Stanley, *Oil Gas and Mining: A Sourcebook for Understanding the Extractive Industries* (World Bank Group 2017) 207.

should have done. However, Baghdad argues that the 17% share is the KRG's share but what should be transferred to it is the net proceeds after sovereign expenses are deducted as a contribution towards the expenses of the federal government's operational expenditure. From December 2014 until March 2015 Baghdad made what the Kurds refer to as "nominal payments' but these were not close to what Baghdad should have transferred. Baghdad stopped payments all together during 2016, 2017 and 2018, resulting in a huge financial crisis for the KRG.

To summarise, two important points need to be stressed. First, Article 112 provides the IFG with a conditional role in the exploitation and management of oil and gas in "present fields" upon discharging its obligations to allocate revenues in a proportionate and fair manner. The language of "present fields" has been interpreted by some, including the Kurds, as fields that existed at the time of the constitution.[458] The words "present fields" would suggest the petroleum fields that were operational at the time of adopting the IC 2005. If the intention was so that the "present fields" be managed between IFG and KRG but future policies and strategic policies are dealt with as a separate issue, clear language could have solved this problem. Second, there can be no doubt that the constitutional text grants executive, legislative and judicial powers not assigned in the exclusive competencies of the federal government to sub-central entities such as the KRI. In order to fully understand these issues, the provisions of the constitution should be read in conjunction with another. Again the issue of clarity (or lack of) becomes important. If the IFG truly intended for the Iraqi state to own and manage all of Iraq's oil fields, the constitution would not have introduced the term "present" fields. Drafters of the IC 2005 may have settled on this language

[458] Ben Holland, 'Are Kurdistan's Oil Contracts Constitutional? ' (*CMS Cameron Mckenna* 2006) <http://www.cms-cmck.com/Hubbard.FileSystem/files/Publication/63538de4-c6c3-47ee-aea9-c58e03f60e57/Presentation/PublicationAttachment/de7979f5-590b-44a9-ae76-c5d5fc52b686/ADIPEC%20BH%20Kurdistan%20copy.pdf> accessed 26 October 2015.

because it was the only way to break the deadlock when finalizing the IC 2005. This would, as it has, allow both KRG and IFG to continue respective claims over ownership and management of oil and gas. Finally, Article 112 would suggest that both the IFG and sub-central entities have a role to play in formulating policy and planning for the long-term development of the oil and gas industry.

As stated above, it would seem that there is a lack of petroleum provisions in the IC 2005. Table [2.2] refers to some of the world's wealthiest states in terms of oil and gas production/reserves. Here, we can see that the number of constitutional provisions is not that high yet in most of these countries disputes regarding the ownership, management, control and distribution of petroleum wealth is uncommon at best and non-existent at worst. From Table [2.2] we can observe that express mention of oil and gas resources are relatively low. This is true when comparing the number of oil and gas related provisions to the number of articles of the respective countries. For example, the Angolan Constitution is formed of 225 Articles, yet only 6 articles refer expressly to petroleum resources. Similarly, the constitution of the United Arab Emirates is 152 Articles in length but only 2 articles refer to petroleum resources explicitly.

With reference to Table [2.2] and in comparison, to IC 2005, only 2 out of 144 Articles expressly refer to petroleum resources which is approximately in proportion and similar to that of most of the states in the table. However, there are some exceptions. For example, the Brazilian Constitution, although 98 Articles in length, mentions petroleum resources in 12 separate articles. Arguably, if Iraq had included more oil and gas provisions, it may have settled some of the outstanding issues. However, it is the clarity of the wording and not the number of constitutional

provisions that are important. In some constitutions the clarity with which the federal and sub-central powers (where applicable) are defined and separated, has led to fewer disputes.

3.7 Resolving Constitutional Deadlock

IC 2005 should incorporate and clearly express competencies of the federal government and sub-national governments. The most important issues in governance of oil and gas in Iraq should not always be left to legislation. Doing so may delay important questions to a time where a suitable political, social and economic environment allows for further negotiation between Iraq's differing communities to agree on issues regarding oil and gas exploitation discussed in this chapter. This delay could be an infinite process without result.

The findings in this chapter suggest that current constitutional mechanisms in place with respect to oil and gas governance are not adequate. Before offering recommendations as to how these issues can be remedied, there are a number of general considerations to contemplate. First, how can the constitutional framework recognize a technocratic system of exploiting oil and gas resources away from politics. Second, how can an equitable agreement between the KRG and the IFG be reached considering oil and gas is one factor in several overlapping and inter-dependent issues which are at the heart of disputes between the two governments. Third, how should new agreement be documented and enforced to ensure both IFG and KRG abide by the rules agreed.

With respect to constitutional provisions relating to oil and gas governance, there are four options (or a mix of these options), which could settle current disputes:

1. Strict implementation of the IC 2005
2. Amendments to the current constitution
3. Creation of a new constitution
4. Promulgating an oil and gas legislative package to detail principles set out in the constitution.

I believe that Iraq should first attempt to implement and enforce the provisions of the current constitution. If all constitutional provisions are implemented and enforced it is highly likely that transparency and anti-corruption mechanisms will be incorporated into the Iraqi system of governance and new institutions will be established. However, Iraq has had ample opportunity to implement the constitution. The reason why it has not done so is because the political will required from key decision makers and political parties is not forthcoming.

This leads to us to the next option, which is to amend the constitution. The IC 2005 details how amendments to the constitution can be made. Amendments should specifically address the issue of ownership to give practical meaning to what is meant by oil and gas being owned by ‘All the people of Iraq in all the Regions and Governorates’[459]. Similarly, clear language as to who has the authority to manage oil and gas resources and revenues obtained thereof are necessary amendments. If changes could be made, Iraq would benefit from robust constitutional provisions relating to transparency in breaking some of the current deadlock. Any attempts to draft amendments to the IC 2005 should take place through cooperation between representatives at national and sub-national levels, including KRG. However, constitutions by definition are

[459] Article 111, The Constitution of the Federal Republic of Iraq 2005.

notoriously difficult to amend as rigid mechanisms are in place to block attempts for changes to it unless there is a huge majority supporting changes. As highlighted earlier in this chapter, it took a lot of political pressure from outside actors before Iraq's communities came together to adopt the current constitution. Attempting to amend the constitution for the purpose of clarifying ownership, management and revenue sharing mechanisms may not be as easy in Iraq as it would in other countries. This is especially true when considering Article 126, Fifth[460] that stipulates that no amendments to the IC 2005 can be made that removes the powers of the Regions, which are not under the exclusive authorities under Article 110.

Although currently unrealistic, replacing the IC 2005 with another constitution may be an option to consider in the future. Rising ethnic tensions, religious conflict and current geo-political clashes may change the balance of power in Iraq and perhaps the structure of the state. The threat of Kurdish secession, rising power of Shia groups and terrorist groups operating in Iraq's territory has led to fears that Iraq may disintegrate as a state. It is only in such circumstance that the possibility of adoption of a new constitution can realistically emerge.

The most realistic option is for the Iraqi/KRI legislature to enact a number of federal/regional laws aimed at settling current disputes and improving petroleum governance. The Iraqi parliament has yet to enact a federal hydrocarbon law. Just as crucially, although Article 48 stipulates that "The federal legislative power shall consist of the Council of Representatives and the Federation Council,"[461]the Federation Council has not been established. Article 65 explains that the

[460] Article 126, Fifth The Constitution of the Federal Republic of Iraq 2005.
[461] Article 48 The Constitution of the Federal Republic of Iraq 2005.

Federation Council will be established after a law, enacted by a two-thirds majority of the members of the Council of Representatives"[462] is passed.

3.8 Conclusion

Comparisons between different constitutions of the world and IC 2005 in this chapter supports arguments that no universal approach to oil and gas provisions exists. However, constitutions can outline agreements made by actors within a state to determine ownership, management of resources and revenue sharing within a national compact but are not all-encompassing documents to solve disputes.

Key provisions of IC 2005 have not been implemented or otherwise ignored including oil and gas related provisions. Lack of clarity over ownership, management and revenue sharing with respect to natural resources has resulted in differing interpretations of IC 2005. Despite these differences, analysis of the IC 2005 suggests that KRG claims of competence over oil and gas governance in the KRI are not unconstitutional. Such competencies include ownership and management rights, collection and distribution of revenue from petroleum production and extend to KRG entering into oil and gas agreements with IOCs.

Historically, there has been a pattern of centralization in previous Iraqi constitutions. Iraq's constitutional history, whether via permanent or interim constitutions illustrates that constitutions with limited text and vague terminology have not solved the country's internal disputes, especially the issue of oil and gas. Whilst Iraq produced and exported natural resources prior to 2003, it does

[462] Article 65 The Constitution of the Federal Republic of Iraq 2005.

not mean disputes did not exist. Previously, authoritarian regimes had controlled Iraq's resources, leaving no room for debate or dissent as to who owned, managed and distributed revenue from oil and gas exploitation. It was not the principles of constitutionalism and rule of law, which assisted in the governance of the country, but rather the iron rule of dictators.

The historic, political and social problems set out in this chapter suggests that disputes will not be remedied in the way drafters of the IC 2005 hoped. Robust wording and clear language in the IC 2005 could have avoided some disputes. The IC 2005 could have done more to establish a framework through which all communities and groups could benefit from Iraq's wealth. If basic rights, obligations and principles of both the federal and sub-national entities had been clearly separated and defined, it would have been much easier to enact legislation and issue regulations for the purpose of establishing and maintaining a successful petroleum resources sector. This is because the key points of contention would already have been resolved and clarified at the constitutional level, the rest of the issues would have not been as significant when negotiating the promulgation of legislation.

In many countries, whether unitary or federal, courts are designated to resolve disputes or interpret and apply the constitutional provisions on natural-resource issues. However, much is dependent on whether or to what extent the KRG will accept the authority of national institutions to adjudicate on 'their' natural resources. The current reality is that Kurdish leaders have de-facto control of the KRI's oil and gas wealth and continue to impress on the security front. Asking Kurdish leaders to make major concessions that would concede Kurdish gains that have been won through years of conflict, oppression and injustice is not impossible but highly unrealistic. This together with IFG's weaknesses means the national government has a limited role in the Kurdistan Region, which

extends to the oil and gas industry. While the IFG may dispute some of the powers that Kurds perceive to be theirs, the fact remains that the Kurds enjoy a number of far reaching and extensive powers which are enshrined in the constitution, granting them authority to establish their own constitution, governmental structure, conduct their own elections, control the management of natural resources in their territory, and control their own internal security.[463]

[463] Liam Anderson, 'Iraq's Kurdish Problem ' (*WorldPoliticReview.com,* 2010) <http://www.worldpoliticsreview.com/articles/5491/iraqs-kurdish-problem> accessed January 1 2016.

CHAPTER FOUR: THE PETROLEUM LEGISLATIVE FRAMEWORK

A country's legal framework concerning oil and gas sets out fundamental administrative, economic, and fiscal rules for the purpose of governing oil and gas operations. The aim of this chapter is to examine the legal framework of the KRI with respect to petroleum operations. Whilst there are limitations as to what the law can achieve, it is nonetheless necessary to devote attention to what is expected of the legal framework and outline objectives of relevant stakeholders. To this end, the most prominent provisions of the OGL[464] will be examined to assess the current legislative framework and its impact on petroleum operations in the KRI. In short, this chapter will investigate whether the legal framework is sufficiently placed to govern petroleum operations. Identification and analysis of principal features of the oil and gas legal framework will be followed by recommendations as to how legislation can be improved and what reforms are required to enhance the development and governance of the KRI oil and gas sector.

Throughout this chapter references to the experiences of other countries will be made to better understand how the KRI can benefit from these experiences. In an ever evolving and competitive international petroleum industry, most states endeavour to learn from and draw on experience and practice of other states in their dealings with IOCs[465] in the hope of creating an efficient and favourable environment for petroleum governance. Referencing and comparing the experience of other countries is beneficial because it may highlight common themes that have either assisted or adversely affected governance of oil and gas operations. Experience of other jurisdictions helps to

[464] Oil and Gas Law of the Kurdistan Region, Iraq Law No. (22) of 2007.
[465] See K Talus, 'Internationalization of Energy Law' in K Talus (ed), *Research Handbook on International Energy Law* (Cheltenham, Edward Elgar 2014) 8-12.

identify good practice and offers insight into how other countries have resolved issues/problems in the sector.[466]

4.1 Petroleum legislation

At its core, petroleum legislation incorporates laws, rules and regulations, which are designed to govern petroleum operations in a host country.[467] A petroleum legislative framework is typically borne out of strategic objectives and policies of governments, defining the principal administrative, economic, and fiscal guidelines for investment activity. Petroleum legislation complemented by regulations and model contract(s), if drafted clearly, should give host countries and IOCs a transparent legal and contractual framework in which to operate.[468] Politically, petroleum legislation emphasises a government's sovereign right of ownership over petroleum resources and how best to approach governance of petroleum operations. Economically, legislation may detail how revenues from petroleum exploitation can be collected and distributed for the benefit of the general public as well as ensuring adequate supply for both domestic use and export.[469] How legislation details governance of petroleum affects economic growth, job creation, transfers of technology, improvements in local infrastructure and encourages the development of related

[466] Mathias Siems, *Comparative Law* (Cambridge University Press 2014) 4-5.
[467] Bernard Taverne, *Petroleum, Industry and Governments: A Study of Involvement of Industry and Governments in Exploring for and Producing Petroleum* (Third edn, Kluwer Law International 2013)115.
[468] William T. Onorato, 'Legislative Frameworks used to Foster Petroleum Development' (1999) World Bank Legal Department Policy Research Working Paper 1420 <http://invenio.unidep.org/invenio//record/10818/files/wps1420.pdf accessed on 13 March 2016.
[469] Determining how much petroleum is exported vis-à-vis how much is allocated for domestic consumption is a major economic and political policy choice. Striking a balance between revenue obtained from exporting petroleum and meeting the domestic demand can be difficult. In Uzbekistan for example, state policy has for a long time taken the decision to export the majority of its petroleum to China and other countries, in an effort to obtain revenue. Domestically, this left many citizens without gas even though Uzbekistan is in the top ten of countries with largest gas reserves in the world. The key for host governments is to balance or prioritise such important issues and prioritise what it perceives to be the most pressing points to safeguard public and national interest. See IWPR, 'Uzbek Gas In Short Supply' (*Institute For War and Peace Reporting*, 2019) <https://iwpr.net/global-voices/uzbek-gas-short-supply> accessed 2 April 2019.

industries. However, in practice there is much overlap and complementarity between the influence of politics and economics in the governance of petroleum operations. Governance of petroleum can also impact the local community. Studies suggest that petroleum exploitation has led to both positive and negative effects on life expectancy, malnutrition rates, poverty level and educational performance.[470] With respect to environmental issues, petroleum operations can raise a number of concerns including air, water and noise pollution as well as changing ecological systems in areas where petroleum operations are carried out. In the legal framework of petroleum operations, legislation is viewed as a key instrument[471] that sits atop of a hierarchy of legal sources (Figure 4.1).

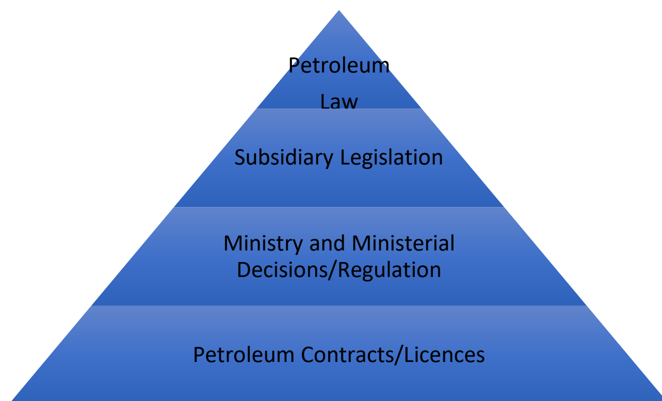

Figure 4.1- The hierarchy of the legislative framework

Legislation can outline general or defined rules that authorise, grant, sanction, restrict or outlaw actions by stakeholders in petroleum operations. The government or governmental bodies create

[470] Terry L. Karl, ' Oil-Led Development: Social, Political and Economic Consequences' (2007) Stanford University Center For Democracy, Development and the Rule of Law Working Papers https://fsi-live.s3.us-west-1.amazonaws.com/s3fs-public/No_80_Terry_Karl_-_Effects_of_Oil_Development.pdf accessed on 15 April 2016.
[471] Ernest E. Smith and others, *International Petroleum Transactions* (Third edn, Rocky Mountain Mineral Law Foundation 2010) p216.

subsidiary legislation if/when it deems it necessary. Ministry and/or Ministerial decisions are made to implement petroleum legislation and subsidiary legislation.

The current legal order in KRI and Iraq functions as a top down hierarchical structure with the constitution representing the highest legal authority in the country akin to Kelsen's theoretical structure. As with Kelsen's theoretical model a relationship between superior and subordinate levels of legal authority is evident with subordinate levels deriving validity from superior levels. The IC 2005 determines a mechanism through which a legislative body is established and the process through which legislation is promulgated. Thereafter the relationship between legislation and subordinate levels of the hierarchical legal order emerges as illustrated above.

Although this hierarchical structure resembles Kelsen's theoretical model, there are nevertheless important differences. Kelsen's hierarchy of law hypothesises that there is one constitutional order. When applied to Iraq we can see that there is an argument to be made that two constitutional orders emerge, one on a federal level and the other at a subnational level as the KRI has a mandate to draft, establish and implement its own constitution. Kelsen's view of the law does not capture this. Considering this and other points raised in Chapter Three, this research requires a pluralistic approach to understand constitutions that capture the complex dynamics of the Iraqi legal order.

It is common for petroleum legislative frameworks to address a several issues, including:

- Ownership of petroleum.
- Type and scope of legislation.

- Granting instruments.[472]
- Powers of the host government, including its ministries, department, ministers and other public officials.
- Minimum requirements oil companies must meet to take part in bidding processes.
- Awarding contracts, licences and permits and approving work programmes at the appropriate stages of upstream petroleum operations.
- Management of oil and gas fields and right of access to such fields for the purpose of petroleum operations.
- Rights & obligations during the Exploration, Appraisal, Development, Production and Decommissioning phases.
- Duration of each of the five stages.
- Fiscal provisions, including taxes, royalties, bonuses and other payments the state may receive and the way production is allocated between the parties (if at all).
- Domestic preferences provisions such as the need for local procurement of goods and services by IOCs, investment in research, technology transfer, provisions of scholarships, local training, building local infrastructure and other domestic preferences.[473]
- Dispute resolution mechanisms.
- Environmental considerations.

[472] As states typically own petroleum resources in situ within their geographical borders, granting instruments are used to allow companies to explore, develop and produce petroleum resources. See United Nations General Assembly resolution 1803 (XVII), Permanent Sovereignty over Natural Resources 1962 and United Nations General Assembly resolution 3281(XXIX) Charter of Economic Rights and Duties of States 1974.

[473] Sometimes referred to as local content, these are local (host state) requirements for participation in petroleum operations. Local content and domestic preference requirements usually take into account the governments policy and regulatory approach to issues such as building infrastructure (hospitals, schools, roads etc.) procurement of local labour and services, training for the local workforce, technology transfer, and investment in petroleum research.

To understand why such topics are usually incorporated into legislation, it is necessary to identify objectives of the state and commercial enterprises. Most countries lack necessary financial resources for technological expertise associated with exploration, drilling, production, transportation and marketing and sale of oil and gas.[474] Therefore, governments enter contractual arrangements with commercial enterprises to overcome such shortcomings. Furthermore, states do not want to take the financial risk of investing public funds to explore and determine whether an oil and gas field is commercially viable to develop.

The way in which energy is produced, consumed and distributed is changing dramatically. Over time, the petroleum industry has reacted to different commercial needs[475] to adapt to changing consumer habits,[476] technological innovations and world events.[477]Technological advances[478] and environmental concerns[479] in particular have had a major impact on the petroleum industry.

[474] Smith and others (n 471) 214.

[475] These environments have been a mixture of changes in the political and economic fields. Demand for petroleum has increased in the past 50 years to meet consumption needs of rising populations, expansion of industrial production and manufacturing sectors. By-products from petroleum for instance are used in the production of plastics and chemicals, as well as many lubricants, waxes, tars and asphalts which the general public and businesses use in everyday life. Some states such as China have seen their economy grow at rapid pace, needing petroleum to power factories, homes and cars. Furthermore, the Shale gas revolution and emergence of fracking as a way to extract petroleum resources have also given IOCs and governments different options to pursue when exploiting petroleum.

[476] Muqsit Ashraf, 'The energy industry is changing rapidly – what's at stake for oil and gas companies?' (*World Economic Forum*, 2017) <https://www.weforum.org/agenda/2017/03/the-energy-transition-what-s-at-stake-for-oil-and-gas-companies> accessed 22 April 2018.

[477] Major economic, political and military events directly affect the petroleum industry. For example, confrontation of major world and regional powers could lead to sanctions, conflict or conversely access for potential investors to markets that they may not have been able to invest in previously. The current standoff between the United States and Iran can affect the petroleum market around the world, as Iran is a major producer of petroleum.

[478] IOCs invest in research and development to find more efficient ways of carrying and lower costs associated with petroleum operations. The World Economic Forum has claimed that a digital transformation in the industry will lead to savings of approximately $1.6 trillion for the petroleum industry and its customers. This digital technology includes using lasers and data analytics before drilling to ensure a well has enough oil, as well as finding strategies to extract more crude oil from new and old wells (see http://www.industrialoutpost.com/technological-advances-in-the-oil-and-energy-industry/).

[479] Petroleum operations and petroleum consumption can be detrimental on a global in scale, including air pollution, global climate change, and oil spills. Exploration for and production of petroleum, has caused local detrimental impacts to soil, surface, groundwater, and ecosystems. Many IOCs recognise the need to reconcile with the goals of energy security and environmental protection. Some companies have funded environmental projects to reduce adverse impact on the environment or to support projects that proactively beneficial for the environment. For example, Exxon

Companies are working closer with governments to promote policies and educate local populations about the benefits of energy innovations to secure their investment.

4.2 Objectives of Stakeholders

Objectives of stakeholders (governments and IOCs) define desired outcomes for each party, determining the nature and dynamic of their relationship. The paragraphs below identify their different and often competing objectives.

4.2.1 Host Governments

Aside from economic benefits associated with petroleum exploitation, political, social and environmental matters are major concerns for states.[480] Governments seek petroleum companies to assist them, where possible, to: meet domestic demand for petroleum and its by-products,[481] earn revenues, gain access to modern technology and transfer of this technology to citizens, and secure social and economic benefits for the public (such as employment and use of local goods and services), whilst protecting the environment. Furthermore, states pursue investment in oil and gas operations to fund infrastructural projects such as roads, hospitals and schools and seek technological and scientific research and development projects.[482]

Mobil has funded projects such as the “Billion Oyster Projects” aimed at restoring ecosystems in New York harbour, Royal Dutch Shell in Australia has invested in water treatment facilities to turn produced water into a resource that can be used by the local community.

[480] Smith and others (n 471) 40.

[481] Petroleum by-products refer to refined products such as gasoline, kerosene and diesel.

[482] Kamal Hossain, *Law and policy in petroleum development : changing relations between transnationals and governments : a comparative study sponsored by the Commonwealth Secretariat* (London : Pinter ; New York : Nichols 1979) 33.

The objectives of the state can vary throughout different stages of petroleum operations. During early stages of operations prompt and thorough exploration is desired by the state to avoid investors sitting on the concessions.[483] If significant petroleum resources are discovered and worthy of appraisal, the IOC will typically be required to submit an appraisal work program to the state. Once accepted, the IOC works to determine the size and quantity of petroleum deposits in accordance with the appraisal work program. When the necessary data and information has been obtained during the appraisal phase, commerciality can be declared by either the state, the IOC,[484] or by way of consensus depending on how commerciality is dealt with. During the production phase, the state considers a number of issues such as gas flaring,[485] water[486] and production of toxic chemicals. The state will also aim to price and market petroleum to ensure maximum benefits for its national economy. Here, it may provide support to local industries and employ local nationals to work in the petroleum industry. In short, the state's objective is to exploit the natural resources within the country for the benefit of the state and its citizens whilst remaining attractive for investors.

4.2.2 International Oil Companies

IOCs are driven mainly by financial gain, customarily looking to monetise their investment as soon as possible. The main priorities for IOCs are to maximise profits for their shareholders quickly,

[483] In old Concession contracts in the first half of the twentieth century the practice of sitting on concessions was wide spread in petroleum producing countries in the developing world. Although this is not common today, host states are nonetheless wary about IOCs sitting on concessions.
[484] Article 7.1 Model Modern Concession Contract of Brazil 2008 allows IOCs to determine commerciality.
[485] When oil deposits are extracted, raw natural gas that is associated with the oil is brought to the surface, which could be damaging to the environment and be a concern for health and safety. The gas therefore needs to be flared which means that is wasted or non-usable. However, in some cases the associated gas is re-injected into the well in an effort to avoid wastage.
[486] Just like associated gas, when oil is extracted, it is often accompanied by water. Extracting water from the subsoil could contribute to depleting water levels underground.

limit costs[487] including tax and royalties payable to host governments, whilst minimising risk. IOCs also approach petroleum exploration and exploitation as a way to diversify their sources of supply of hydrocarbons. There could be a multitude of reasons[488] for this but commonly IOCS want greater security of supply so that they are not bound or dependent on one source. Protecting investments is of paramount importance for IOCs as petroleum exploitation involves high risks over a long period. This is where a legal framework of a country is crucial as IOCs look for legal protection of their investments. Such protection can derive from legislation, terms of negotiated agreements or international conventions.[489] If the IOC deems petroleum operations in a country too risky or if it is thought more profitable elsewhere, they will look to relocate their investment.

Although objectives of host governments and IOCs differ, there is a range of complementarity and overlap,[490] allowing parties to achieve their objectives.[491]There is usually a mutual interest in exploiting petroleum in an efficient and effective manner.[492] The ultimate goal for each stakeholder

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[487] Generally, both the state and IOCs aim to keep costs down. However, IOCs may not always wish to keep costs down to a minimum for a number of reasons. First, depending on the contractual regime employed and the provisions thereof, IOCs could cost-recover expenditure during petroleum operations. Depending on the health of its cash flow, expenditure may not need to be kept at a minimum. Second, in some cases, the cost of petroleum operations may be tied to taxation of the host state. The more costs that an IOC incurs, the less its tax liabilities may be depending on the contractual regime employed.

[488] These could include IOCs taking into account geographical locations of operations that are in close proximity to other businesses they own. Another reason could be the pursuit of locations where extraction of petroleum is easier to conduct compared to other areas where the company operates.

[489] International conventions include multilateral treaties such as the International Energy Charter 2015, the North American Free Trade Agreement (NAFTA) 1994 and bilateral treaties such as the Agreement between Japan and the Republic of Iraq for the Promotion and Protection of Investment 2012.

[490] Vlado Vivoda, ‘International Oil Companies and Host States: A New Bargaining Model’ (2011) 9 OGEL 2.

[491] Lorraine Eden, Stefanie Lenway and Douglas A. Schuler, ‘From The Obsolescing Bargain To The Political Bargaining Model’ in Robert Grosse (ed), *International Business and Government Relations in the 21st Century* (Cambridge University Press 2005).

[492] Although IOCs wish to conduct petroleum operations in a timely manner generally, there are instances where IOCs will not wish to carry out operations rapidly. For instance, big multi-national companies may carry out petroleum operations in a number of different countries. They may not see a need to rapidly develop fields and produce petroleum. Considering the history of the petroleum industry governments have adopted policies of mandatory relinquishment of land so that IOCs do not merely ‘sit’ on the land. Whether mandatory or voluntary, IOCs attempt to carry out thorough investigations to keep hold of the most lucrative areas of land within a given block or blocks.

is for the project to be successful, although the measure of success may mean different things to the parties. Both parties aim to develop oil and gas fields for the purpose of using or selling these resources to generate revenue. However, it is the bargaining positions of each party that changes at different stages of oil and gas operations. Typically, at the beginning stages of (exploration), the IOC is in a strong position but once commerciality is declared and oil and gas fields are developed, the state's bargaining strength increases. Furthermore, exploitation of petroleum may result in steady and reliable income for the duration of exploitation from a commercial well. IOCs and governments have an interest in developing the skill and competencies of locals employed by the petroleum sector. This would result in a greater pool of skilled persons for the IOC to draw from and be beneficial for the government as more of its citizens are employed. Both parties have distinct commercial considerations but eventually the parties compromise, which is reflected in the agreement that they enter into.[493]

4.2.3 The Federal and Regional Governments

Objectives of the state and its sub-national entities may also differ depending on the constitutional structure of the country. Iraq's parallel structure of competing jurisdictions is a manifestation of the different objectives of the IFG and KRG. The IFG aims to centralise and manage exploitation of petroleum at a sovereign level, incorporating petroleum from the KRI into its own national framework via organisations such as the State Organisation for Marketing Oil (SOMO) as well as its public petroleum companies.[494]

[493] David A. Wood, 'Petroleum Economics, Risk and Opportunity Analysis: Some Practical Perspectives' in Russel E. Simkins and Betty J. Simkins (eds) *Energy Finance and Economics: Analysis and Valuation, Risk Management and the Future of Energy* (John Wiley & Sons 2013) 232.

[494] State owned oil and gas companies North Oil Company, South Oil Company and Missan Oil Company.

Kurdish objectives, however, can be split into two distinct scenarios:

a) Kurdistan declaring independence as a sovereign nation, governing every aspect of petroleum operations,

b) Remaining part of Iraq, with recognition that it is responsible, together with the IFG, for governing petroleum operations in KRI areas.

KRG policy has persistently demanded decentralisation, vying for Kurdish control of petroleum deposits in the KRI in pursuit of economic independence from Baghdad.[495]Commentators have indicated that this policy is not solely for economic reasons but for political reasons also.[496] A number of examples can highlight the differing objectives of the KRG and IFG with respect to the governance of petroleum. First, efforts to implement petroleum provisions of the IC 2005 have been slow. Second, the IFG has failed to include Kurds into federal government owned oil companies and organisations, such as SOMO. Third, the relationship between Baghdad and Erbil has suffered due to the lack of cooperation and coordination between the two governments over governance of petroleum operations in Kurdish territories. The IFG has claimed that KRG desire to solely govern petroleum operations in its region is unconstitutional. The Kurds however, point to central government marginalisation of Kurdistan's constitutional rights and inability of the federal government to implement constitutional provisions. Another longstanding point of contention between KRG and Baghdad is over revenue sharing. The absence of agreed revenue

[495] In fact the Kurdistan Region carried out a referendum in the KRI and disputed territories, where citizens of the KRI went to the polling stations to vote on independence from the Iraqi state. Although 93% voted in favour of independence, the results were not recognised by regional and international powers. Although Kurds were not able to secede from Iraq, the results of the vote highlight Kurdish ambitions of an independent Kurdistan.
[496] Yaniv Voller, 'Kurdish Oil Politics in Iraq: Contested Sovereignty and Unilateralism' (*Middle East Policy Council* 2013) https://mepc.org/kurdish-oil-politics-iraq-contested-sovereignty-and-unilateralism accessed on 27 February 2016.

sharing mechanisms from proceeds of petroleum resources has contributed to IFG cutting and refusing to forward KRG's share of the national budget.[497]

To date, neither side has fully achieved their objectives. On the one hand, the IFG has not been able to incorporate the Kurdish petroleum sector coherently under its federal framework, nor has it managed to present solutions to resolve disputes between the federal and regional government. On the other hand, the KRG has failed to reach its primary objective of economic self-sufficiency that is independent from Baghdad.

4.3 The Rule of Law

There are numerous definitions of the rule of law that are typically grouped in two main categories: formal and substantive definitions of the Rule of Law. The formal definition focuses on law as an instrument and a basis of government but does not offer any prescription as to the content of the law, whereas the substantive definition sets substantive standards that the law should respect and enforce.[498] For the purpose of this thesis a substantive definition is chosen so as to highlight the crucial role played by the Rule of law in a legal regime, society, governance and regulation of politics. To this end, the definition given by the United Nations Security council seems the most suitable: "a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights

[497] Baghdad's failure to pay the Kurdistan Region's fair share of the national budget is not borne out of financial constraint but political unwillingness to distribute revenues from petroleum to the region in an effort to show Erbil that Kurdish self-sufficiency cannot work and that Baghdad will not tolerate such a move. From a legal perspective, Baghdad's decision to unilaterally withhold the KRI's share of the national revenue is unconstitutional.
[498] Adrian Bedner, 'An Elementary Approach to the Rule of Law' 2 Hague Journal on the Rule of Law 48.

norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency." [499]

This 'thick' definition of the Rule of Law will help frame our examination of this principle and of its implementation in the KRI. It will allow us to concentrate on both the enforcement and respect of (primary and secondary) legislation as well as contractual obligations, to investigate processes of accountability and assess the independence of the judicial system. Indeed, several studies have suggested that there is a strong correlation between effective Rule of law and the enhancement of institutional capacity.[500] As institutions are tasked with assisting in the governance of petroleum operations, their role can either increase the likelihood of good petroleum governance or hamper them. Well-functioning institutions are more likely to improve the chances of increased economic prosperity whereas low-quality institutions can hinder the development of petroleum governance and compromise economic gains, by not restraining powerful elites from fraudulent practices or rent-seeking behaviour.[501] Now that the concept of the Rule of Law has been clarified, we will be looking at its implementation in the KRI.

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[499] UNSC Report of the Secretary General (23 August 2004) UN Doc S/2004/616, available at <https://www.un.org/ruleoflaw/files/2004%20report.pdf> accessed 12 January 2015.

[500] Halvor Mehlum, Karl Moene, Ragnar Torvik 'Institutions and the Resource Curse' (2006)116 The economic Journal pp1-20

[501] Khazal Abdullah Auzer, *Institutional Design and Capacity to Enhance Effective Governance of Oil and Gas Wealth: The Case of the Kurdistan Region* (Springer 2017) 24.

4.3.1 The Rule of Law in the KRI

Although the KRI benefits from an effective legal system, the KRI's governance structure has not always followed the principles promoted by the Rule of Law as will be discussed below.[502] Whilst political settlements form the basis of the Baghdad-Erbil relationship, ultimately it is the law and the state institutions that implement and hold such settlements to account. In principle, the Rule of law allows elected representatives and the courts to hold government officials and any number of institutions invested with public interests or state missions to account. For instance, as the courts are tasked with interpreting and applying the law, the Iraqi constitutional courts help to clarify and determine the constitutionality of legislation or acts with respect to petroleum exploitation at a federal or subnational level.

Unfortunately, the current Iraqi and KRI systems of governance do not reflect strong rule of law. For instance, some constitutional provisions are disregarded[503], corruption charges can be trumped up or quashed,[504] violations of the law may be ignored[505] and judicial institutions may be used for political purposes.

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[502] Erland Paasche, 'The Role of Corruption in Reintegration: Experiences of Iraqi Kurds Upon Return From Europe' (2015) 42 Journal of Ethnic and Migration Studies 1076 https://www.tandfonline.com/doi/full/10.1080/1369183X.2016.1139445?scroll=top&needAccess=true accessed 17 August 2016.

[503] Scott Anderson, 'The constitutional Context for Iraq's Latest Crisis' (*brookings.edu,* 7 November 2017) https://www.brookings.edu/blog/markaz/2017/11/07/the-constitutional-context-for-iraqs-latest-crisis/ accessed 2 February 2018.

[504] Ghaith Abdul-Ahad, 'Corruption in Iraq: 'Your son is being tortured. He will die if you don't pay' *Th Guardian* (16th January 2012) <https://www.theguardian.com/world/2012/jan/16/corruption-iraq-son-tortured-pay> accessed 1 December 2018.

[505] Ghaith Abdul-Ahad, 'Iraq is dying': Oil flows freely but corruption fuels growing anger' *The Guardian* (27 August 2018) <https://www.theguardian.com/world/2018/aug/27/iraq-is-dying-oil-corruption-protest-basra> accessed 29 November 2018.

Also, the Rule of Law's requirement of accountability means that Parliaments plays a significant monitoring role. However, the parliament of the KRI and its oversight of petroleum operations are weak.[506] Members of parliament do not have the expertise, knowledge or experience of petroleum matters required to undertake such control.[507] This is an area that should be addressed so that parliament can discharge its duties in the most effective way.

In the KRI, two main political parties, the Kurdistan Democratic Party (KDP) and the Patriotic Union of Kurdistan (PUK), have dominated regional politics. Whilst there are many examples around the world of two main parties competing for power in a country, in the KRI, the KDP and the PUK have become embedded in the governance structures of the region.[508] Furthermore, each political party is ruled by a single family: the Barzanis (for the KDP) and the Talabanis (for the PUK). Consequently, the political competition has become a competition between two factions, with strong emphasis on loyalty based on family ties. In turn, this has favoured the emergence of a system of patronage and clientelism. Finally, competition between the two families has not been evenly balanced with the Barzanis commanding greater authority in the region.[509] Indeed, a Barzani family member has held the posts of KRI President, Prime Minister and Chancellor of the Kurdistan Security Council since the inception of the KRG.[510] Consequently, a deeply entrenched system of patronage and clientelism has dominated the political landscape of the KRI and reached

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[506] Khazal Abdullah Auzer, 'Institutional Design and Capacity to Enhance Effective Governance of Iraqi-Kurdistan's Oil and Gas Wealth' (DPhil thesis, University of Warwick 2016) 187.
[507] Auzer (n 501) 137.
[508] Christine Van Den Toorn, 'Kurdistan Politics at a Crossroads' (*Carnegieendowment.*org, 26 April 2018) https://carnegieendowment.org/sada/76195 accessed 17 February 2019.
[509] Crispin Smith 'Kurdish Referendum: Barzani's Dominance Threatens Future Stability' (*Carnegieendowment.*org, 22 August 2017) https://carnegieendowment.org/sada/76195 accessed 6 June 2016.
[510] Francis Owtram. 'The state we're in', in Michael Gunter (ed), *Handbook on the Kurds* (Routledge 2019) 523.

the judiciary, government institutions and the military.[511] Although the KRI projects an image of adherence to the Rule of Law, in practice, clientelism, nepotism and corruption have adversely affected the KRI governance structure and its legal system.[512]

4.3.2 Judiciary

The implementation and enforcement of primary and secondary legislation are a vital component of the Rule of law. As such public institutions, the court system, and the judiciary play a crucial role in the rational, fair and consistent application of legal rules. For this to occur, the judiciary must be objective and maintain its independence from political, social and other pressures.

In countries where Rule of law is strong, the courts play a vital role in keeping the executive and legislature within the bounds of the law.[513] Judicial independence is therefore a guiding component of the rule of law. Unfortunately, in the KRI, the judiciary and the court system are weak. As a result, the standing and legitimacy of the courts is undermined; the courts are sometimes a tool for promoting the interests of individuals and groups.[514] Although labelled independent by the IC 2005 and protected by both the IC 2005 and by KRI laws, the judiciary is not free of the influence of the political establishment.[515] Loyalty to political parties, individuals and elite groups has resulted

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[511] Michiel Leezenberg, 'Iraqi Kurdistan A Porous Political Sphere' (2017) 8 Open Edition Journals 114 <https://journals.openedition.org/anatoli/608> accessed 14 May 2016.
[512] Paasche (n 502).
[513] Cheryl Saunders, 'The Rule of Law in Comparative Prospective' in Cheryl Saunders and Katherine Le Roy (eds), *The Rule of Law* (The Federation Press 2003) 2.
[514] Dlawer AlaAldeen, 'Building A Roadmap for the Rule of Law and Institutionalisation in the Kurdistan Region' (*Meri-k.org,* 12 June 2018) <http://www.meri-k.org/publication/state-building-a-roadmap-for-the-rule-of-law-and-institutionalisation-in-the-kurdistan-region/> accessed 16 August 2018.
[515] Kamal Chomani, 'Judiciary in Kurdistan Region in Peril' (*The Tahrir Institute For Middle East* Policy, 1 November 2019) https://timep.org/commentary/analysis/judiciary-in-kurdistan-region-in-peril/ accessed 12 December 2019

in a weak judicial independence.[516] In particular, political patronage and nepotism continue to influence the judiciary.[517] The judiciary's connection with political elites has impacted the judiciary in the KRI adversely and led to a degree of corruption over a long period.[518] Without moving towards a legal framework where judicial independence becomes a reality, the oil and gas legal regime in the KRI will suffer.

The KRG's process of judicial appointment mirrors that of the Iraqi state. Judges are appointed by the Ministry of Justice from a pool of nominees selected by the Supreme Judicial Council. This leads to concerns that judges are influenced by the executive branch.[519] While judges in the KRI have requisite university-level legal training, there is currently no body charged with judicial training in the KRI.[520] Furthermore, the judiciary has yet to produce a pool of expert judges in petroleum matters. Judges are selected without reference to a specialization but as their careers develop, they are expected to specialize in a particular area.[521] None of the judges in KRI have a background in petroleum law and few local judges and lawyers have any experience in international petroleum arbitration. Training and professional development of judges, governmental lawyers and other legal practitioners in petroleum matters is vital[522] to ensure the

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[516] Michael J Kelly, 'The Kurdish Regional Constitution within the Framework of the Iraqi Federal Constitution: A Struggle for Sovereignty, Oil, Ethnic Identity, and the Prospects for a Reverse Supremacy Clause' (2010) 114 Penn State Law Review 707.
[517] Kawa Hassan, 'Kurdistan's Politicized Society Confronts A Sultanistic System' (*Malcolm H. Kerr Carnegie Middle East Center*, August 2015) < https://carnegie-mec.org/2015/08/18/kurdistan-s-politicized-society-confronts-sultanistic-system-pub-61026> accessed 14 October 2019.
[518] Kamal Said Qadir, 'Iraqi Kurdistan's Downward Spiral' (2007) 14 Middle East Quarterly 19 https://www.meforum.org/1703/iraqi-kurdistans-downward-spiral accessed 19 July 2015.
[519] American Bar Association, 'Judicial Reform Index For Iraq: Kurdistan Supplement' (American Bar Association, October 2006) available at <http://gjpi.org/wp-content/uploads/2009/01/jri-iraq-kurdistan-2006.pdf> accessed 17 December 2016.
[520] Ibid.
[521] Ibid.
[522] Coralie Pring,'Kurdistan Region of Iraq: Overview of Corruption and Anti-Corruption' (*Transparency.org*, 24 March 2015)

observance of legal procedures. To this end, a dedicated training and development program for judges and lawyers would be welcome. Whilst there are a number of universities and legal colleges operating within the KRI, few provide specialist guidance for legal practitioners and judges with respect to petroleum exploitation. Furthermore, in-country professional development courses in petroleum law training are sub-standard, out-dated and scarce.[523] Without investing in legal education and training in the petroleum sector, the KRG will struggle to reach the level of competency required for an effective legal infrastructure that can support a prosperous petroleum sector in the region. This judicial expertise is all the more important given the large gaps in petroleum expertise together with influence of the executive branch and political elites that makes them vulnerable to corruption.

4.3.3 Corruption and Mismanagement

Corruption and mismanagement of proceeds of petroleum revenue are one of the most problematic issues in resource-rich countries, often called 'the resource-curse'.[524] Although not unique to wealthy petroleum nations such as Iraq, corruption is an important impediment to the development of the country's petroleum resources. Corruption in the petroleum sectors of Iraq and of the KRI is rife[525], along with abuse of power, bribery and extortion[526] due largely to entrenched network of

<https://knowledgehub.transparency.org/assets/uploads/helpdesk/Kurdistan_Region_of_Iraq_overview_of_corruption_and_anti-corruption_2015.pdf> accessed 18 November 2019.

[523] Jim Freedman and Abas Balasem, 'Iraq – Support to the Rule of Law and Justice Project: Final Project Evaluation' (*UNDP.org*, 2016) 16 < https://erc.undp.org/evaluation/units/174> accessed 18 August 2018.

[524] The resource curse is reference to a situation where countries that have an abundance of natural resource wealth experience a static economy usually due to the neglect of other forms of revenue in favour of one dominant natural resource.

[525] Leezenberg (n 511).

[526] Qadir (n 518) 22.

patronage[527]. Under such conditions, corruption and weak Rule of law endanger the public interest.[528]

Even though corruption in the KRI is arguably lower than that of Iraq,[529] public dissatisfaction with patronage and corruption is strong in the KRI.[530] In fact corruption has been analysed as the KRI's biggest economic problem.[531] It has been estimated that since 2003 $100billion-$300billion have gone missing from oil and gas operations throughout Iraq,[532] with the loss of such revenue to the state having severely hindered state building efforts. Corruption has been identified at the highest levels of power in Iraq, with ministers being accused of embezzling sums as high as US $900million.[533] In fact, the Corruption Perception Index ranks Iraq amongst the most corrupt countries in the world.[534] In 2012 the Index ranked Iraq 169 out of 175 countries, with a score of 18 out of 100.[535] Nearly a decade later, Iraq is scoring 20 out of 100 and ranking 162 out of 180 countries.[536] As there are several constitutional provisions on the subject of corruption, this suggests that these provisions have remained dead letter for the most part. For instance, article 102[537] stipulates that the Commission on Public Integrity is independent despite the fact that this

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[527] Robin Mills, 'Under The Mountains: Kurdish Oil and Regional Politics' (2016) The Oxford Institute For Energy Studies OIES Paper: WPM 63 https://www.oxfordenergy.org/wpcms/wp-content/uploads/2016/01/Kurdish-Oil-and-Regional-Politics-WPM-63.pdf accessed on 1 February 2017.
[528] Auzer (n 501) 26.
[529] Mills (n 527).
[530] Leezenberg (n 511).
[531] Michael Rubin, 'The Continuing Problem of KRG Corruption' in Michael Gunter (ed), *Handbook on the Kurds* (Routledge 2019) 577.
[532] Luay Al-Khatteeb, 'Corruption in Iraq: Where Did All the Money Go?' (*The National Interest* 2016) <http://nationalinterest.org/feature/corruption-iraq-where-did-all-the-money-go-16279> accessed 11 February 2018.
[533] Rudaw, '10 Iraqi ex-ministers convicted for multi-billion-dollar embezzlement' (*Rudaw*, 2015) <http://rudaw.net/english/kurdistan/261020156> accessed 27 October 2015.
[534] Maxime Afator, 'Iraq: Overview of Corruption and Anti-Corruption' (*Transparency International* 2013) https://www.u4.no/publications/iraq-overview-of-corruption-and-anti-corruption.pdf accessed 2 October 2015
[535] Ibid.
[536] Transparency International, 'Corruption Perception Index: Iraq' (*Transparency.org,* 2018) <https://www.transparency.org/en/countries/iraq#> accessed 19 June 2019.
[537] Article 102 The Constitution of the Federal Republic of Iraq 2005.

Commission has been placed under the authority of the Council of Ministers.[538] Indeed, a former commissioner, Judge Radhi Hamza Al-Radhi has testified before the United States Congress of Prime Minister Nouri Al-Maliki's refusal to recognize the independence of the Commission and of the continual interference in the Commission's work.[539] This testimony highlights the pressures placed on independent bodies and the adverse effects on the rule of law.

Consequently, adoption and implementation of legislation that would mitigate risks associated with corruption, waste, mismanagement and lack of transparency would be welcome. Curbing corruption and waste would not only participate in good governance, but it will also provide financial benefits for the people of Iraq/the KRI. Both are in debt and need to rebuild parts of the country after the conflict with IS. Similarly, both need to invest in their oil and gas sector and infrastructure. Recouping some of the loss of revenue would make a notable difference.

As a matter of policy, the KRG should seek to impose the adoption and enforcement upon its own institutions and the IOCs effective anti-corruption compliance programs. Although this will not eliminate all risks associated with corruption, it can help mitigate some. For example, specific petroleum legislation focused on anti-corruption and transparency should be promulgated. In 2018 Lebanese legislation came into force for this purpose.[540] The legislation aims to achieve

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[538] Stuart Bowen, *Learning From Iraq: A Final Report From The Special Inspector For Iraq Reconstruction* (Hearing Before The Sub-comittee On The Middle East And North Africa Of The Committee On Foreign Affairs House of Representatives, 113th Congress, First Session 9 July 2013, Serial No. 113-48) https://www.govinfo.gov/content/pkg/CHRG-113hhrg81868/pdf/CHRG-113hhrg81868.pdf accessed on28 January 2015.

[539] House Committee on Oversight and Government Reform, 'Testimony of Judge Radhi Hamza Al-Radhi' (4 October 2007) <https://web.archive.org/web/20071101065442/http://oversight.house.gov/documents/20071004103646.pdf> accessed 22 March 2016.

[540] Law No.84 Transparency in the Oil and Gas Sector 2018.

transparency in the oil and gas sector and reduce/prevent corruption. It does so by recognising that corruption can occur at different stages of petroleum operations (from contractual negations and exploration activities through to production) and by creating a legal framework that increases transparency and accountability, limits abuse of authority and helps prosecute perpetrators. In the KRI, the provisions of OGL that institutionalise petroleum governance and promote transparent practices should be implemented and enforced.

Finally, corruption has not been the sole issue that has adversely affected the governance of petroleum in the KRI. Ineffective management, poor institutional design and quality and ineffective quality control have also plagued KRI petroleum sector development.[541] Ineffective and inadequate institutional design has resulted in the poor management of Kurdistan's oil and gas resources as there is a lack of skilled workforce, experience and managerial capabilities.[542] Prudent and sound institutional policies together with requisite qualified human resources would certainly help establish better governance of the petroleum sector.[543]

4.3.4 Investment and the Rule of Law

The United Nations[544] has recognised that Rule of law and development are strongly interrelated and mutually reinforcing.[545] Enforcement of legislation, subsidiary legislation and contracts are

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[541] Auzer (n 501) 131.
[542] Auzer (n 501) 133.
[543] Auzer (n 501) 100.
[544] United Nations, *High-level Meeting on the Rule of Law, 24 September 2012* (*UN.org, 2012)* <https://www.un.org/ruleoflaw/high-level-meeting-on-the-rule-of-law-2012/#:~:text=The%20High%2Dlevel%20Meeting%20of,York%20on%2024%20September%202012> accessed on 23 October 2016.
[545] It has declared "the advancement of the rule of law at the national and international levels is essential for sustained and inclusive economic growth, sustainable development…". Member States have expressed that fair, stable and predictable legal frameworks are important "for generating inclusive, sustainable and equitable development, economic growth and employment, generating investment and facilitating entrepreneurship".

important factors in identifying states with strong Rule of law. Similarly, knowledge, expertise, experience and efficiency of the judiciary and judicial system are important to ensure that the law is upheld.

It has been argued that current petroleum practice shows a desire to invest in states where there is strong Rule of law.[546] The law serves to ensure stakeholders are accountable for their actions when pursuing project goals and implementation of such goals. However, strong Rule of law is not always the first point of consideration for investors and nor is it usually the most decisive element of IOCs' decision to invest in a state. For most IOCs potential profits are typically the first consideration.[547] Robust petroleum legal framework may not attract investment in itself but it can avoid being an obstacle to investments that would otherwise occur.[548] Then again, there is favourable correlation between strong Rule of law and good governance of petroleum exploitation. With a strong Rule of law, investors have greater confidence operating in a legal system that is likely to safeguard their investment.

With each country having its own social, political, economic and security challenges, there will be risks associated with exploitation of petroleum resource for IOCs. These risks will trigger concerns for IOCs in several areas ranging from political[549] and economic to fears of violence and

546 Jay Park, *Kurdistan Region's Emerging Oil and Gas Regime* (CWC 2014).
547 Michael Bunter, *The Promotion and Licensing of Petroleum Prospective Acreage* (Kluwer Law International 2002) 47.
548 Park (n 546).
549 IOCs operating in Venezuela in the past decade have lost some or all of their investment in the past decade because of political risks. See Ed Crooks, 'Foreign oil companies in Venezuela feel the strain' *The Financial Times* (New York, 3rd December 2017) Oil <https://www.ft.com/content/3264b33e-d680-11e7-a303-9060cb1e5f44> accessed 1st December 2018.

terrorism.[550] In turn, the language and detail of legal provisions protecting investment directly influences investor decisions.[551] To alleviate these concerns and provide protection for the parties, credible sanctions or incentives need to be incorporated into petroleum contracts to provide stable fiscal, technical and legal provisions.

4.4 Legislative Approaches

Legislatures around the world employ different styles when structuring and promulgating legislation. This section will present the main legislative approaches employed by host governments, namely, general legislative system, individually negotiated agreements and hybrid system.[552] The purpose is to identify options available to legislatures when deciding how much detail should be incorporated into legislation. This is important because use of these systems to detail rules, obligations and responsibilities will directly affect how petroleum resources are governed.

4.4.1 General Legislative System

General legislative system is one where legislation outlines conditions for carrying out petroleum operations in advance, fixing procedural steps that need to be taken before state approval is given. In this system, legislation pertaining to petroleum operations are comprehensively detailed and can

[550] IOCs operating in some areas of Iraq and Syria for example have faced considerable risk in those areas when IS took large areas of territories in the two countries, including oil fields.
See Luay Al-Khatteeb and Elaine Gordts, 'How ISIS Uses Oil To Fund Terror' (*The Brookings Institution* 2014) <https://www.brookings.edu/on-the-record/how-isis-uses-oil-to-fund-terror/> accessed 2nd December 2018.
[551] Organisation for Economic Cooperation and Development, *Policy Framework for Investment User's Toolkit* (2011)http://www.oecd.org/investment/globalforum/40300205.pdf accessed on 12 October 2016.
[552] Hossain (n 482) 100.

include, amongst others, determination of maximum size of an exploration area or block, the minimum number of wells to be drilled, how taxes and royalties are determined, relinquishment requirements, ring-fencing, minimum work obligations and minimum expenditure at different phases of operations.

From a state perspective, the general legislative system is advantageous for several reasons. For instance, legislation can be amended and replaced by subsequent legislation and the state is able to continually enact and enforce legislation that may change terms and conditions of petroleum exploitation. A further advantage of this approach is that it allows the state to incorporate specific policies and objectives[553] into the legal framework. However, there are also disadvantages. Primarily, writing too much into the law could lead to inflexibility, which may be detrimental in dealing with the petroleum industry. This is especially a concern if legislation stipulates high standards that most international companies cannot abide by, which may deter investment. Examples of this type of system can be found in the United States, Australia, Canada and many countries in the European Union.[554]

4.4.2 Individually Negotiated Agreements

Here, legislation is purposefully vague, lacking the detail one would find in the general system. Typically, legislation leaves much of the detail required for governance of petroleum to regulation and contractual arrangements. This method relies on host governments granting rights to explore for and exploit petroleum resources on a case-by-case basis. Typically, a state oil minister or

[553] For instance, the Iranian Petroleum Act of 1957 stipulated that one-third of exploitable territory had to be conserved at all times.
[554] Taverne (n 467) 113.

ministry will conduct such negotiations with potential investors on behalf of the state. In contrast to the general system, individually negotiated agreements leave majority of the issues open for negotiation, at its extreme, there is little or nothing fixed in law. Examples of this system were typical in early concessions awarded in countries such as Iran and Iraq.[555] Other examples include countries that declared independence from USSR in the early 1990s.[556]

Of course, there are no guarantees that political, economic and legal situation in a country will develop in a reasonable manner. Petroleum companies recognise that many resource-rich countries experience volatile political, legal and economic climates.[557] In order to exploit petroleum resources in these countries, IOCs began to negotiate with states on a contract-by-contract basis. This meant terms of the agreement were fixed for a certain period of time as per the contract and not according to detailed legislation, which could be amended, repealed or replaced depending on social and political issues.[558] Furthermore, it has been argued that in the past IOCs have generally preferred individually negotiated agreements so that they are protected by a contract rather than unilateral decisions made by the state.[559]

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[555] At the time that these contracts were negotiated, power in these countries resided in strongmen that controlled every aspect of the state. It may have been easier for petroleum companies to work with one authority rather than different branches of the state apparatus so that they could carry out petroleum activities.

[556] These countries did not have enough time to employ a fixed content system, as promulgating detailed legislation would have taken a much longer time period than negotiating with IOCs. Given that these states were economically reliant on exploiting petroleum resources, time was a major factor in favouring the individually negotiated agreement approach.

[557] Taverne (n 467) 115.

[558] Companies began to incorporate stabilisation clauses to provide contractual protection for their investment. Because oil and gas projects are usually long-term investments, during the life of the contract, the laws, rules and regulations in the host state with respect to petroleum operations may change. These changes may not always be advantageous to the project and some may even have adverse financial effects for the investor. In an effort to limit risks, petroleum companies typically incorporate stabilisation clauses to protect to the petroleum project from disadvantageous changes to the legal and fiscal environment in the host country.

[559] Hossain (n 482) 104.

Individually negotiated contracts provide flexibility in that the parties can discuss, bargain and agree on terms and conditions that are not already fixed in legislation. However, considering the volatility, inexperience and lack of administrative capacity and knowledge in developing countries, it could be argued that there is an unfair starting point for negotiations. IOCs could pressure governments to accept terms that may not result in the host state receiving a fair share of the benefits from petroleum exploitation. Furthermore, due to the fact that individually negotiated agreements take place behind closed doors, there is greater prospect of corruption taking place. Petroleum companies and government officials could abuse the system, working it to their advantage. Corruption could take on many forms as companies could offer money, houses, cars or other material goods in exchange for favourable terms for the company when negotiating the contract. Bribes or other incentives could be offered to government officials in return for obtaining different contractual terms that amend existing petroleum contracts (if they exist) without good reason for doing so. Furthermore, government officials in return for material rewards could also make addenda in petroleum contracts.[560] Then again government officials could ignore acts by IOCs that could be considered a breach of contract or if the IOC does not perform its contractual obligations.

4.4.3 Hybrid System

The hybrid system, as its name suggests, is a combination of the general and individually negotiated agreement systems. This approach sets out minimum conditions for IOCs prior to

[560] In Subsaharan countries, this has occurred on a number of occasions. In Tanzania for instance, a leaked document allowed opposition parties to examine and notice that addendums to Production Sharing Contracts had deviated from the model contract. Had the document not been leaked, some of the corruption and abuse of power may not have come to light. See Rasmus Hundsbaek Pedersen, *Policies and Finance for Economic Development and Trade: Danish Institute for International Studies, 2014* (2014).

commencement of petroleum operations but leaves other issues to be determined by negotiation. For example, legislation could require granting of a licence to be conditional upon state participation but not detail to what extent state participation should occur. Such participation would be left to the parties to negotiate. Similarly, legislation could fix the maximum duration of an exploration and production licence but allow the parties to negotiate the extent of state participation in petroleum operations or the size of the exploration programme and what is included in it (which may be approved as a condition of the grant of a production licence).

The biggest advantage of this system is that it incorporates positive elements of the other two systems above, providing flexibility and negotiating capacity for governments and IOCs to reach a mutually beneficial agreement. There is a continuing trend for governments around the world to employ the hybrid system.[561] The adoption of this approach by states has increased over time and is expected to rise in the future. Over the past fifty years countries such as the UK, Malaysia, China, Norway and New Zealand have used this strategy at one time or another.[562]

With respect to petroleum governance, the KRI currently employs the hybrid approach and considering that most petroleum producing countries are shifting towards this system, the KRI should continue to embrace this approach. By doing so, it can avoid potential pitfalls, which stem from KRI's lack of capacity to make general system and individually negotiated agreements in their purest forms work.

[561] Thomas W Wålde and George K Ndi, '*International Oil and Gas Investment: Moving Eastwards?*' (Graham & Trotman/M. Nijhoff 1994) 32.
[562] Hossain (n 482) 101.

Petroleum exploitation is a new practice in the KRI and has led to widespread corruption. Its institutions are inexperienced and under skilled, lacking the competencies needed to regulate and oversee IOC petroleum activities in the region. If we hypothesise that the KRI would adopt a general approach, it will mean that its government would rely on a number of factors working efficiently to protect the state's interests. For example, the parliament and state institutions such as the RCOG and the five institutions[563] would need to be active, knowledgeable and administratively capable to discuss, draft and enact petroleum legislation or issue regulations that are able to provide detailed rules for the governance of petroleum exploitation. At present Kurdish institutions and the Parliament are not in a position to do so. However, this does not mean that the KRG cannot increase the capabilities of its workforce in the future.

The KRG cannot solely rely on individually negotiated agreements either because of its inexperience and capacity to negotiate comprehensive petroleum agreements. Although the KRI employs international advisors to assist in negotiating with companies, there are not enough specialist lawyers, commercial negotiators and contractual managers to ensure that this approach is successful. Therefore, the hybrid approach is best suited to KRI as it provides flexibility to the parties and relieves pressure on both government and parliamentary officials to obtain the most favourable outcome for the state.

Although the hybrid approach has been identified as the most suited approach, the role of legislation is fundamental in the governance of oil and gas. This approach will require the KRG to

[563] Kurdistan Exploration and Production Company (KEPCO), Kurdistan Oil Marketing Organisation (KOMO), Kurdistan, Kurdistan Oil Trust Organisation (KOTO), Kurdistan Organisation for Downstream Operations (KODO), Kurdistan National Oil Company (KNOC).

promulgate new legislation and amend existing legislation where appropriate. If we hypothesise that the Hybrid approach is the best system for the KRG, we must determine what kinds of issues should be detailed in legislation and what should be up for negotiation between the KRG and IOCs. During the exploration phase for example, the KRG may grant access for firms to explore through direct negotiation or a bidding process according to Article 26 of the OGL. Concessions may be awarded to explore in a particular geographical area, with contracts governing exploitation rights if/when commerciality is declared. Whilst most topics of consideration do not need to be written into legislation, durations and sub-periods and extensions should be considered. Although every contract is unique, the total licence period for petroleum operations may amount to thirty or forty years. Breaking this down the maximum duration of exploration for example is generally ten years in petroleum contracts.[564]

The OGL does not set maximum duration for licences, allowing durations to be agreed by contract. However, the KRG has set an initial exploration term of five years, extendable on a yearly basis for a maximum of seven years in its model contract.[565] Considering KRG policy and requirement for prompt exploration it is understandable why it has employed a policy of an initial five-year exploration phase. The KRG wanted to attract companies to its region to invest in petroleum operations and as such wanted IOCs to rapidly engage with its exploration activities. The five-year term has become a benchmark for IOCs because of KRG policy.[566]

[564] Taverne (n 467) 125.
[565] Article 6.2 Kurdistan Regional Government Model Production Sharing Contract.
[566] The Petroleum (Exploration and Production) Act 2016 (Act919) of Ghana prescribes that the duration of an exploration licence should be no longer than seven years. The Petroleum Activities Law of Angola at Article 12 states that the duration of such a licence should be three years.

At the appraisal phase, where infrastructure is installed and exploratory wells are drilled, KRI legislation should determine a maximum duration of 6 months for necessary appraisal work to be carried out. Legislation should also detail that data from mapping of oil and gas reserves should be given to the KRG. Environmental and social impact assessments and conditions for carrying out such studies should be negotiated by the parties at this stage because the next three phases of operations have the potential to disrupt communities and adversely affect the environment.

Considering that the development phase could take between 3 and 10 years to complete depending on the complexities of the petroleum project, legislation should incorporate a fixed period together with the production phase. This may prompt IOCs to closer attention to the development of a petroleum field so that it has longer to produce petroleum. Together, it is not uncommon for duration of 25-30 years to be set for the completion of the two phases with a period of extension set by RCOG if it considers that it is in the KRG's benefit to grant such an extension. Durations for the decommissioning phase should also be set by legislation. During the decommissioning phase legislation should also set minimum environmental and infrastructure conditions so that the site of operations is, as much as possible, returned to its original state.

4.5 The legal Framework in KRI and Iraq

Historically, petroleum legislation in Iraq had always been centralised without powers being devolved to regions. However, this changed with adoption of the IC 2005, which created a parallel legislative system (Figure 3.2). Notable concerns include potential conflicting approaches in the governance of petroleum resources and legislations enacted by the respective parliaments. This

could result in delays and complications adversely affecting the harmony of Iraq/KRI's governance of petroleum operations.

Figure 3.2: Overview of Iraq's legal framework with respect to petroleum governance

However, problems do not stem from the Iraqi petroleum sector being split between federal and sub-national levels. Rather, the relationship and coordination between Baghdad and Erbil is weak and fragile, leading to the emergence of two distinct and independently operating regimes. Although there is no universal standard for petroleum legislation, there are a number of key provisions that underpin petroleum laws throughout the world. Before discussing these provisions, it is necessary to also address federal legislative framework with respect to petroleum operations.

4.5.1 The Status of Iraq's Petroleum Laws

It is important to examine the status of Iraq's petroleum laws as the Kurdish legislative framework forms part of the Iraqi legal system. Furthermore, considering the differing interpretations of petroleum provisions in the IC 2005, it is necessary to analyse the national petroleum legislation in an effort to find gaps in the law, identify difficulties facing the petroleum industry in Iraq and

explore possible solutions as to how the KRI and the IFG can govern petroleum resources together. Currently, Iraq does not have a federal petroleum law, despite a number of drafts. For the purposes of this thesis, specific details of the drafts are not required. However, it is important to acknowledge the following points:

- The draft Hydrocarbon Law (Draft Law)[567] is the closest Iraq has come to passing a hydrocarbon law.
- None of the drafts have adequately resolved disagreements, especially when considering KRG's role and competencies in petroleum exploitation.
- Status of other laws and regulations are holding up the enactment of the hydrocarbon law.
- Composition, duties and authority of the Federal Oil and Gas Council are disputed.
- There are disagreements over the types of petroleum contracts awarded and definitions of such contracts.

Previously, one comprehensive law did not solely govern Iraq's petroleum resources. Instead, the petroleum sector was governed by the following legislation:

1. Law of the Iraqi National Oil Company Law No.23 of 1967[568]
2. Law for Identification of Hydrocarbon Producing Areas Law No. 97 of 1967.
3. Law of the Ministry of Oil Law No.101 of 1976.
4. Law for the Protection of Hydrocarbon Resources Law No. 84 of 1985.

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[567] Prepared by the Oil and Energy Committee of the Council of Ministers of IFG prepared for discussion on 15th February 2007.

[568] When Saddam Hussein came to power, he repealed this legislation through a Presidential decree, which paved the way for new laws and regulations establishing the North Oil Company, South Oil Company and Missan Oil Company. In effect, the Iraqi National Oil Company was dissolved, and its assets, duties and responsibilities were distributed amongst these newly formed entities.

In the absence of petroleum legislation, the default position of Iraqi law is to revert back to the last legislation governing a particular topic. The Article 130 IC 2005[569] states that existing laws shall remain in force, unless amended or annulled. Of the four Iraqi laws above, only the Iraqi National Oil Company Law (No. 23) of 1967 was annulled, the other three laws remain active.

In the KRI, federal government law is not automatically implemented upon enactment. For federal law to take effect, the Kurdistan Parliament must either approve legislation or enact its own modified version of federal law. In most cases, the Kurdistan Parliament enacts laws that mirror that of the federal legislature for the sake of expediting the implementation of federal law in an effort to avoid unnecessary conflict. Then again, the Kurdistan Parliament chooses[570] whether it will pass similar legislation. Whilst not directly related to petroleum, the example of law passed by the Iraqi Federal Parliament[571]forbidding the import, production or selling of alcoholic beverages on 23rd October 2016[572] demonstrates that the KRI does not always have to mirror Iraqi legislation or implement the same. For an Iraqi Hydrocarbon Law to be passed, certain steps need to be taken as summarised in Figure [3.3].[573]

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[569] Article 130 The Constitution of the Federal Republic of Iraq 2005.

[570] There are two ways that draft bills, amendments to legislation and comments on federal legislation can be processed in the Kurdistan Parliament. In the Kurdistan Parliament only 10 parliamentarians are needed for a draft bill, Federal Law or amendments to current legislation to be discussed and debated. The KRG Council of Ministers can also present such drafts and proposed amendments to the Kurdistan Parliament. However, this must be done as a collective as no individual Minister is authorised to make proposals.

[571]Associated Press, 'Iraqi Parliament Passes Bill Banning Alcohol' (*Voice of America* 2016) <https://www.voanews.com/a/ap-iraqi-parliament-passes-bill-banning-alcohol/3563529.html> accessed 11th April 2018.

[572]Associated Press, 'Iraq's Parliament Passes Law Banning Alcohol' *The Guardian* (23 October 2016) <https://www.theguardian.com/world/2016/oct/23/iraqs-parliament-passes-law-banning-alcohol> accessed on 19 December 2016.

[573] The Presidency Council of Iraq consists of the President of the Republic of Iraq and two Vice Presidents, usually representing one each of the three biggest communities in the country, Shiite Arab, Kurd, Sunni Arab.

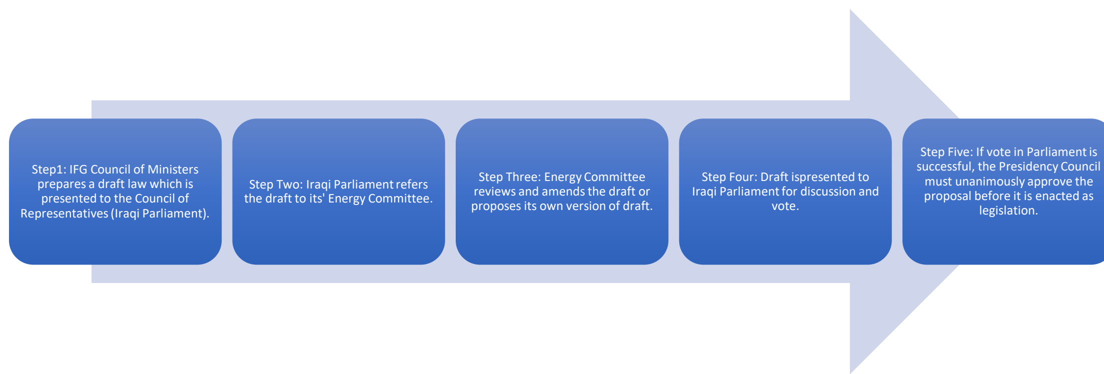

Figure 3.3- Required steps for the enactments of a Hydrocarbon legislation

Although the path towards enactment of legislation is clear, the detail of legislation articulating the roles, responsibilities, rights and authority of national and sub-national governments remains unclear. These steps should only be taken once the IFG and KRG have agreed on the divisions, roles and responsibilities above. Unilateral actions and lack of consultation between the governments will either result in the legislation not being passed in parliament or non-implementation.

4.5.2 Iraq's Draft Hydrocarbon Laws

As the most recent draft, the Draft Law is the main focus of this section. The biggest points of contention as already discussed in this chapter and previous chapters derive from the mechanism through which oil and gas operations will be governed under this draft law as well as constitutional interpretation of the present/future fields debate. The Kurds believe that the current provisions of the Draft Law will ultimately lead to ceding greater management control of petroleum operations in the KRI to IFG.[574] In particular, the Kurds oppose the provisions of four Annexes that form part

[574] Lionel Beehner and Greg Bruno, 'Why Iraqis Cannot Agree on Oil Law' (*Council on Foreign Relations* 2008) https://www.cfr.org/backgrounder/why-iraqis-cannot-agree-oil-law accessed on 12 January 2018.

of the Draft Law, which limits KRG authority and grants wide-ranging powers to the federal government through the Iraqi National Oil Company.[575] Furthermore, the Draft Law does not delve into specifics of revenue sharing, which the Kurds see as a crucial factor in settling current oil and gas disputes. The Kurds continue to seek constitutional and legislative guarantees that they will play a prominent role in the governance of oil and gas operations, specifically in their region.

The Draft Law proposed the establishment of a Federal Oil and Gas Council made up of 11 members, headed by the Iraqi Prime Minister.[576] Although each region is entitled to have a representative, the KRI is the only region recognised by IC2005. Thus, of the proposed 11 members council, only one seat would be reserved for the Kurds. Governorates, producing more than 150,000 bpd, are also given representation on the Council. At present, only Basra and Kirkuk produce more than this amount. The remaining vacancies are reserved for "experts' or others[577] who can help facilitate petroleum operations. This disproportionate representation would result in the federal government always reaching the requisite two thirds majority vote required to make key decisions.[578] Kurdish attempts of obtaining requisite votes for key decisions would be rendered futile.

[575] The wording in the Annex states that the Federal Government, together with regional authorities will determine the management of untapped fields, which is not acceptable to the KRG.
[576] The Draft Law proposes that the Iraqi Prime Minister may appoint another person instead of himself to head the Federal Oil and Gas Council.The other members comprise of three ministers: of oil, planning and finance respectively and the Governor of the Central Bank of Iraq.
[577]These other experts include specialists in the fields of finance and economics and other experts that the government deem of value for the exploitation of petroleum resources.
[578] The proposed Federal Oil and Gas Council's composition was such that the federal government would appoint 8 of the 11 members. Such appointments generally leads to members voting on party or sectarian lines in tune with those who had appointed them through what is generally seen as a system of patronage.

The Draft Law also contained provisions that the Ministry of Oil will consult regions and governorates when formulating policy, making and executing decisions. However, there are no guarantees or assurances that the outcome of such consultations would reflect the recommendations of the region(s), governorates and other governmental bodies. Taking these points into consideration, the Draft Law was rejected by the Kurds, as they did not believe that this was a true proportionate representation of Kurdish rights in petroleum governance.

4.6 Oil and Gas Law of the Kurdistan Region

Prior to and in the aftermath of its enactment, the OGL was criticised by some in the KRI and Iraq.[579] The MNR and a team of international lawyers drafted this legislation and submitted the same to parliament. The suspicion was that the MNR and its minister had incorporated far-reaching powers for the ministry and the minister himself. Kurdish parliamentarians, politicians and academics believed that the first draft should have been written by parliament with consultation of the MNR.

Considering the Draft Law was put before the Iraqi Parliament around the same time as OGL was drafted, the KRG maintains that the OGL is compatible with the IC 2005 and proposed Draft Law. However, some commentators[580] argue that earlier drafts[581] of the OGL, including that of 2006,[582]

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[579] Klaas Glenewinkel, 'Priority is on the Kurdistan Oil Law' (*Niqash.org*, 10 September 2007) https://www.niqash.org/en/articles/society/1997/ accessed 16 April 2016.
[580] Zedalis (n 133) 81.
[581] Klaas Glenewinkel, 'Draft of Kurdistan Oil Law Published' (*Niqash* 2006) https://www.niqash.org/en/articles/society/1635/1-Draft-of-Kurdistan-Oil-Law-published.htm accessed on 19 December 2016.
[582] In The Legal Dimensions of Oil and Gas in Iraq: Current Reality and Future Prospects, Zedalis argues that the scope of the OGL is too broad and affords greater authority to the KRG when compared federal authority. Similarly Article 3 of the OGL is worded such that the KRG has a constitutional right to receive a share of revenue from producing fields all across Iraq, whereas the draft of the law in 2006 focused on the need for the KRG to provide Iraqis

were more compatible with the IC 2005 than the actual law promulgated in 2007. It would appear that this is indeed the case, as the OGL did not contain the three Annexes that existed in the original draft of 2006. These Annexes addressed a number of crucial issues including revenue from current and future fields and conditions where federal authorities could directly interfere in petroleum activities in the KRI.

4.6.1 Definition of Petroleum and Scope of the Law

The OGL begins with a 'definitions' section detailing key terms, defining technical and legal terms. The definitions attributed to these words have major consequences for the authority of federal and regional governments and rights to own, manage and receive revenue from petroleum exploitation. The OGL in Article 1 defines a number of terms, the most significant among which are:

- Petroleum[583]
- Petroleum Field[584]
- Petroleum Contract[585]
- Petroleum Operations[586]
- Prospecting authorisation[587]

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with a share of revenues from petroleum operations in the KRI. Similarly, the establishment and authority of public entities such as KOTO, KODO, KOMO and KEPCO by according a status that is distinct to that of the draft federal law.

[583] Petroleum is described as "any natural hydrocarbons, or any mixture of natural hydrocarbons, whether in gaseous or liquid state; including hydrocarbons that have been returned to a reservoir.

[584] Defined as "a Reservoir or a group of Reservoirs within a common geographical structure or feature from which Petroleum may be commercially produced under the prevailing technical and economic conditions"

[585] Defined as "a contract, licence, permit, or other authorisation, made or given pursuant to Article 24 of this Law".

[586] Defined as "activities including prospecting, exploration for, development, production, marketing, transportation, refining, storage, sale or export of Petroleum; or constructions, installation or operations of any structures, facilities or installations for the transportation, refining storage, and export of Petroleum, or decommissioning or removal of any such structure, facility or installation."

[587] Defined as "an Authorisation granted by the Minister pursuant to Article 22 of the Law"

- Current and Future Fields[588]
- Other terms.[589]

From the definitions section, it is evident that the underlying legal instrument used to govern petroleum operations in the region is a petroleum contract. However, the term "petroleum contract" is an umbrella term used to incorporate licenses, permits and contracts under one heading. Therefore, reference to licence and contract holders are in effect those who have been awarded the right to carry out a specific petroleum activity through a contractual mechanism. Much like the recent UK case of Dean v Secretary of State for Business, Energy and Industrial Strategy[590] in 2017,[591] where the issue of whether a licencing regime was a contract or not was discussed, the OGL considers permits and licences to be contracts also.

The scope of the act is also incorporated into the legislation to identify the purpose of the OGL. Article 2, First states that the law applies to "both public and private companies" involved in "all activities related to petroleum operations".[592] Although the language attempts to cover all aspects

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588 Current fields are defined as "Petroleum Field that has been in Commercial Production prior to 15 August 2005. Future Field has been defined as "a Petroleum Field that was not in Commercial Production prior to 15 August 2005, and any other Petroleum Field that may have been, or may be, discovered as a result subsequent exploration.

589 Terminology, among others also defines access, commercial production, revenue, petroleum contract, production sharing contract, operator and environment fund.

590 *R(Dean) v The Secretary of State for Business Energy and Industrial Strategy* [2017] 4 WLR 158

591 The claimant sought judicial review of a deed of variation, or a declaration that the deed had no legal effect on the grounds that the Secretary of State had no power to vary the terms of a licence once granted. It was argued by the claimant that such licenses are statutory and governed by the statutory code of the 1998 Act, which conferred no such power. It was held that "that the grant of a licence was essentially a property transaction akin to a mining licence or lease, which, according to established principles, had to be created by deed and could only legally be transferred by deed; that it involved the grant of exclusive rights to search for, bore and get petroleum, being exclusive property rights with the normal incidents of property ownership, including the right to assign the interest created by the licence and the ability of the parties to the licence to vary its terms by agreement so far as those rights were not excluded or modified by the terms of the legislation or of the relevant licence; that there was nothing in the 1998 Act, or the regulations made thereunder, which indicated that a licence granted under the 1998 Act could not be varied subsequently by an agreement between the parties".

592 Article 2, First (a) and (b) Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.

of petroleum operations, it remains silent on the geographical area(s) applicable to this law. This is perhaps because of the contested ownership of the disputed territories between the federal and regional governments. Amendments to the OGL or new legislation should attempt to incorporate geographical areas to identify KRG jurisdiction to govern petroleum operations.

Article 2, Second reiterates the KRG's position, that pursuant to Article 115 and Article 121(1) and (2) IC 2005 no contract, agreement, federal legislation or other federal instruments relating to petroleum operations shall be applicable unless by express agreement of the "relevant authority of the region".[593] Here the KRG attempts to embed provisions of the constitution in legislation for the purpose of declaring that federal legislation, regulation contracts or memorandums of understanding are not valid in the KRG held territories unless agreed by the KRG.

4.6.2 Ownership of Petroleum

As highlighted in Chapter Two ambiguity over ownership of petroleum resources can lead to disputes. These disputes may be between private entities, the state and private entities, differing state actors (federal and subnational governments) or a mix of these. In most cases, legislation addresses the issue of ownership of oil and gas either in situ or if and when extracted.

[593] Article 2, Second, Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.

Almost without exception,[594] countries around the world vest ownership of petroleum deposits in the state and detail this in legislation.[595] Although constitutions attempt to tackle this issue, in some cases it is left to legislation to define or echo the provisions of the constitution.[596] However, in other cases, such as that of Norway,[597] the constitution does not provide details on ownership. Instead, legislation declares state ownership of petroleum deposits.[598] With respect to the KRI, Article 3 of the OGL aims to reaffirm Articles 111, 112 and 115 of the IC 2005 respectively, stating that the provisions of the OGL are consistent with the Iraqi constitution. Article 3, First[599] reiterates that ownership of petroleum is vested in the Iraqi people as per Article 111[600] of IC 2005. Furthermore, the same article explains that KRG is entitled to a share of the proceeds from "producing fields, consistent with the share of all Iraqi people" as per the law and Article 112 of the IC 2005. However, at Article 3 Seventh, the OGL stipulates, "A Person[601] may acquire title to Petroleum exclusively at the Delivery Point".[602]Defined in the OGL at Article 1 (23) as "a natural person, or other legal entity", reference to a natural person suggests that title to petroleum could

[594] The most notorious exceptions are the United States and Canada. The laws of the United States stipulate that ownership of petroleum resources whether on the surface or in situ is vested in the private or public owner of the land. In Germany, according to the Federal Mining Law of August 20 1980, petroleum is considered *res nullius.* Here, no one person or entity is allowed to claim ownership of the resources. The petroleum resources are considered to not be anybody's unless an exploration licence had previously been obtained.

[595] Taverne (n 467) 123.

[596] For example, in the Constitution of Afghanistan at Article 9 ownership of "subterranean resources" belongs to the state. This provision is supported by the Afghanistan Hydrocarbon Law of 2009 which at Article 3 explains that all resources whether on or below ground belongs to the state. The same law at Article 3(5) further describes that in the event that petroleum deposits are discovered in or on private lands, then the state shall acquire such lands within the provisions of the law.

[597] Norway Petroleum Law S1, Act 29 November 1996 No. 72 relating to petroleum activities: "The Norwegian state has the proprietary right to subsea petroleum deposits and the exclusive right to resource management".

[598] Norwegian Petroleum Law, S1 Act 29, November 1996 No. 72.

[599] Article 3, First Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007 stipulate "Petroleum in the Region is owned in a manner consistent with Article 111 of the Federal Constitution. The Regional Government is entitled to a share from revenues from producing fields, consistent with the share of all Iraqi people, in accordance with this law and Article 112 of the Federal Constitution".

[600] Article 111, The Constitution of the Federal Republic of Iraq 2005.

[601] Article 3, Seventh, Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.

[602] Delivery point is defined as "the point, after extraction, at which the Crude Oil and Natural Gas is ready to be taken and sold, consistent with international practice; the point at which a person a Person may acquire title in the Region to Petroleum in accordance with Article 3(7) of this Law.

also be transferred to a private citizen. Such interpretation is contrary to Article 111 of the IC 2005. To what extent title to petroleum can be transferred to a natural person is constitutional in Iraqi law requires constitutional review, as it remains unclear whether this OGL provision is compatible with IC 2005.

4.6.3 Current and Future Fields

The interpretation of and distinction between present/current and future fields is one of the most contentious legal issues in the KRI petroleum legislative framework. In an effort to assign shared competency of petroleum operations (between the IFG and KRG), the IC 2005 refers only to "present" fields. However, the OGL refers to "current" fields instead of present fields and introduced the term future fields.

Whilst it is not known why the KRG refers to present fields under the term "current" fields, it is my opinion that the KRG wanted to define current fields as the constitution had failed to do so. The Kurdish interpretation and the new terminology introduced could become a point for legal discussion should Baghdad attempt to challenge Kurdish competence of what it has labelled as present fields under the IC 2005. The term "present" and "current" fields refer to the same concept but KRG applied the latter term to highlight its own interpretation. The distinction between present/current and future fields does not exist in the constitution of any other country. Clarification over who has the competency to govern current fields and future fields would give the respective governments legal authority to award contracts/licenses, receive revenue from petroleum exploitation, market and export petroleum and ultimately regulate petroleum operations. In short, the government that is recognised to have the right to govern petroleum resources in

current or future fields would have significant resources at its disposal, which may affect the political, economic, and security balance of Iraq. Settling this debate requires answers to both a substantive question and a procedural question. The substantive question will clarify, as a matter of law, who will govern present and future fields. The procedural question will find processes of how such governance is to take place.

The OGL in Article 1 defines “current and future fields”,[603] whereas IC 2005 only refers to “Present Fields”.[604] This would suggest that both the constitution and OGL, despite using differing language, have deemed it necessary to incorporate present/current fields into legal documents. The IC 2005 allows IFG to share governance of petroleum operations in 'present fields’ but language regarding 'future fields' is omitted. Moreover “present” fields have not been defined by the IC2005, leaving room for interpretation as to what the term means.

The OGL defines the term “Current Field” as fields that were in commercial production before 15th August 2005. Since the IC 2005 and Iraqi federal government kept silent on defining what these words meant, the Kurds took the initiative, to define current fields and future fields unilaterally. Future Fields has been defined in the OGL at Article 1 as a “Petroleum Field that was not in Commercial Production prior to 15 August 2005, and any other Petroleum Field that may have been, or may be, discovered as a result of subsequent exploration”.[605]

[603] Definitions Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.
[604] Article 112, First The Constitution of the Federal Republic of Iraq 2005.
[605] Article 1 Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.

Article 115 of the IC 2005 states that "powers not stipulated in the exclusive powers of the federal government belong to the authorities of the regions and governorates".[606] This, the Kurds argue, grants Kurdish authority over resources, which do not fall under the definition of 'present fields'. The IC 2005 does not identify competency over petroleum governance as an exclusively federal power. Furthermore, the language of Article 121[607] of the IC 2005 empowers regions to override federal legislation that are outside of the exclusive authority of the federal government. As the KRI is afforded legislative, executive and judicial powers to enact and implement its own laws, the validity of the OGL has not been challenged robustly in federal courts.

Iraqi lawmakers and politicians[608] argue that absence of a constitutional definition of future fields should not result in Kurds claiming authority over such fields. However, whilst a unilateral definition of future fields is not ideal, Baghdad has not officially offered any alternative definitions to counter the Kurdish interpretation. This matter is legal in nature and requires submission to Iraqi constitutional courts so that legal experts are tasked with interpreting the constitution as a matter of law and not to serve competing political agendas. Whether this distinction was a known concession by Arab political leaders or an oversight, the wording of the IC 2005 leaves room for a strong Kurdish legal claim that the IFG does not have sole competence over fields post 2005.

In the absence of guidance, competing interpretations and disparity between the definitions of current and future fields, I would suggest that the IFG should govern petroleum operations of current fields with the Kurds as per the constitution but forward to the Kurds an agreed share of

[606] Article 115 The Constitution of the Federal Republic of Iraq 2005.
[607] Article 121 The Constitution of the Federal Republic of Iraq 2005.
[608] The author attended a public meeting of the Kirkuk Provincial Council on September 13, 2015, when the Arab and Turkomen blocs of the Council spoke out against KRG governance of petroleum operations.

such exploitation. However, the Kurds would be entitled to control and manage the exploration, development, production and sale of oil in the Kurdish territories with respect to future fields (I.e. post 2005). The Kurds should work with Baghdad to market and export petroleum from "future fields" as this would expedite sales of Kurdish petroleum on the international market.

It is submitted that the distinction between present and future fields was borne out of compromise by political actors. The differences in terminology were to alleviate Kurdish concerns over the fledgling petroleum operations they had begun with petroleum companies prior to 2005.[609] Regardless of whether the Kurdish interpretation is correct, it is important to recognise that had the KRI waited for the Iraqi state to offer official definitions, it would have been to its detriment. Development of petroleum fields in the KRI would have been stagnant, limiting opportunities for KRG and IOCs to conduct petroleum operations in Kurdish territories, inevitably obstructing growth of Kurdistan's petroleum industry. The Iraqi state has had over a decade to amend the constitution, enact legislation, work with Kurdish authorities or offer differing interpretations. However, none of this has happened and it is not surprising that the legislature in Kurdistan decided to create and establish its own definitions of what it perceives to be Kurdish oil.

With respect to revenue sharing from proceeds of petroleum operations, the KRG and IFG should come to an agreement whereby proceeds from current fields are handed over to federal institutions. The federal government should after calculating costs and KRG contributions to sovereign

[609] At the time, the Kurds were in a strong position and much better organised than the rest of Iraq. Powers in Baghdad realised that if concessions were not made, the Kurds would either secede from Iraq or continue to govern the KRI independent of Baghdad. Such a move would weaken the Iraqi state where resources and territory would be lost. Furthermore, calls for independence or complete autonomy without input from Baghdad may encourage other groups within Iraq to do the same.

expenses forward the KRG's share based on an agreed estimation of the population in KRG territories. As for proceeds from future fields a reversal of this process should be administered. The KRG should collect revenue in a fund and send Baghdad's share based on sovereign expenses together with an agreed percentage that takes into account the KRI's share of the national budget.

4.7 Commercial Discovery

Commercial discovery can be defined as the "deposit of petroleum resources large enough to economically justify expenses of development and production".[610] Commercial discovery of petroleum resources is an important and significant milestone in a project because petroleum fields can only be developed once commercial discovery is declared. Therefore, whoever has authority to declare commerciality of a field will pre-determine whether the project will continue. Commercial discovery can be completely undefined, defined in general terms[611] or defined with reference to specific criteria.[612] Defining commerciality has its advantages and disadvantages. For instance, a general definition provides flexibility, but it could also be too general to be meaningful, whereas a narrow definition may be too rigid but it may provide clarity.

[610] Norman J. Hyne, 'Commercial Discovery', Dictionary of Petroleum Exploration, Drilling & Production (2nd edn, PennWell 2014) 84.

[611] Turkmenistan's petroleum law at Article 1 defines commercial discovery (commercial production is not defined) as "discovery of Petroleum, which, after consideration of all relevant data and of the operative, technical and economical factors could be developed commercially" (Chapter 1, Article 1 Petroleum Law of Turkmenistan 1996). In Brazil, commercial discovery is stated as "discovery of oil or natural gas under such conditions that, at market prices, allow return on investments in development and production" (Law No. 9478 of August 6, 1997 (Petroleum Law) Art 6, XVIII). Angolan law defines commercial discovery as " the discovery of a petroleum deposit deemed able to justify development" (Article 2 (7) Law No. 10 of November 12 2004).

[612] For example government legislation may determine that commerciality can only be declared if seismic exploration data can show that the amount of oil and gas in reservoir of a field can be no less than a specific figure.

In the OGL, commercial discovery has not been defined but Commercial Production is defined with specific criteria as "daily production of no less than five thousand (5,000) barrels over any twelve (12) month period"[613]. This language in itself does not make clear whether the production period is a consecutive 12-month period or any 12 months. Furthermore, no explanation has been given as to why commercial production has been set at 5,000 barrels over a period of twelve months. No direct link exists between commercial discovery and commercial production but considering that the OGL only refers to production levels, it is submitted that the OGL infers that commercial discovery cannot be determined if data cannot support that an oil and gas field can produce at least 5,000bpd of oil.

Declaration of commerciality can be determined either by the host state or IOCs. On the one hand, it has been argued by governments that because of sovereign ownership, the state should decide as can be seen in Angola.[614] On the other hand, others advocate for IOCs to determine commerciality because it is the IOC that bears the risk[615] of losing the investment in case of non-commercial discovery. IOCs therefore take out insurance policies at great cost to reduce losses that they may incur.[616]

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[613] Article 1 Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.

[614] Article 62(1) of the Republic of Angola Petroleum Activities Law stipulates that the state has the authority to declare commerciality.

[615] The most extreme risk that IOC will face is that it will lose its investment after spending considerable amounts of money. At the exploration phase, there is a risk that it will spend large sums without finding petroleum in commercial quantities, which would result in the termination of operations. At the Appraisal stage, areas identified as potentially containing viable petroleum sources are examined by IOCs in more detail and shared with the state. At this stage work may be carried out on infrastructure to access these areas. Thereafter, site drilling is planned and exploratory wells are drilled to seek to discover and map petroleum reserves. Again, if no commercially viable reserves of petroleum are found, the project is terminated and costs are not recovered. At the development, production and decommissioning phases a host of other risks including health and safety, environmental, political and security risks may arise.

[616] Steven. A Mucci, *Political and Investment Risk in the International Oil and Gas Industry* (Lexington Books 2017) 36.

As there is no definition of what commercial discovery means in the OGL, it is left to contracts to define commerciality. The current practice is for the contractor to offer its opinion and determine whether a commercial discovery has been made, taking into account technical and financial data collected from the exploration and appraisal stages of operations.[617] Considering the KRG's lack of transparency and concerns of KRI citizens that the nation's wealth is being squandered, it is submitted that a consultation procedure between the IOC and KRG should take place when attempting to determine commercial discovery. If the parties cannot reach an agreement, the matter should be referred to a third-party expert whose findings are final and binding on the parties.

4.8 Regulation and Regulatory Bodies

Regulation can be defined as 'a sustained and focused control exercised by a public agency over activities that are valued by a community'.[618] Host states typically regulate petroleum activities based on a series of policy choices to compliment and add detail to existing legislation. Several bodies within KRG assist in the petroleum regulatory framework of the KRI. Figure 4.4 demonstrates the RCOG to be the highest regulatory authority within the KRI.

[617] The KRG Model PSC provides that such data includes recoverable reserves of petroleum, sustainable regular production levels and other material technical and economic parameters, all in accordance with standard practices in the international petroleum industry.
[618] Phillip Selznick, 'Focusing Organizational Research on Regulation' in R. Noll (eds), *Regulatory Policy and the Social Sciences*' (University of California Press 1985) 363.

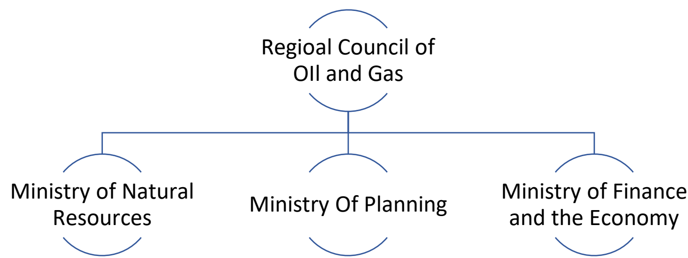

Figure 4.4 Regulatory authority of KRG Institutions

4.8.1 Regional Council for Oil and Gas

To ensure the OGL's compatibility with Iraq's draft Hydrocarbon Law, Article 4 OGL established the RCOG.[619] This council is the highest authority governing petroleum activity in the KRI. It comprises five members, bringing together the most appropriate ministries and decision-makers in governance of petroleum in the KRI.[620] Article 5 of the OGL sets out the "function and authority" of the RCOG, which includes the formulation of petroleum policy, prospect planning and field development.[621] The RCOG has the power to limit or change petroleum production levels,[622] as well as to give final approval for the KRG to enter into petroleum contracts.[623] In short, the RCOG is tasked with making strategic decisions that may have a significant impact on the governance of petroleum operations in the KRI.

[619] Like much of the legal framework in Kurdistan, this council is created to mirror that of its federal counterpart. The difference is that the OGL Law was passed in the Kurdistan Region but remains in draft at a federal level.
[620] The Prime Minister and Deputy Prime Minister of the KRG are the Council's President and Deputy President, respectively. The other three members are the ministers of Natural Resources, Planning and Finance and Economy who act as ordinary members. Since the enactment of the OGL a sixth member has been added under the title of "Secretary" to facilitate and schedule meetings and to put forward the agenda thereto. Indeed, the government plans to add appropriate advisers and staff as required and where necessary. However, the number of such staff competent to deal with oil and gas related issues as well as logistic and administrative matters is underwhelming.
[621] Article 5, First Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.
[622] Article 5, Third Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.
[623] Article 5, Second Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.

Until recently, RCOG involvement in petroleum operations had been limited.[624] At present, the RCOG does not have the administrative and skilled support base necessary to supervise and check MNR activities. There are few, if any, legal, engineering or finance experts in the field of petroleum operations.[625] The lack of expertise and capability of RCOG has meant that it cannot make effective policies and oversee MNR activities.[626] However, efforts have been made for meetings to be held frequently to form policy and expedite administrative and bureaucratic procedures.[627]

In 2015, the RCOG signalled a move towards transparency and accountability when it announced it would work with reputable international auditors to audit KRG's oil and gas activities in the region.[628] These activities include verification by auditors of the MNR monthly reports concerning production and sale of oil. Furthermore, the audits also investigate IOC cost recovery procedures by auditing their accounts.[629] Initially, this initiative identified a few other audits required

[624] When the RCOG was established in 2007, it rarely met. Even when it did, the meetings were not sufficient in terms of both frequency and content. In the aftermath of the oil-price drop in 2014 and 2015, the MNR (which had been governing the petroleum sector in the KRI) faced a great backlash because of issues regarding mismanagement, corruption, and lack of transparency and what many saw as abuse of power. The RCOG in an attempt to ease some of this pressure started to convene more often and began making decisions so as to show a more inclusive approach to the governance of petroleum in the Kurdistan Region.

[625] The researcher formerly worked as a legal adviser to the secretary of the KRG Council of Ministers. During this period, the researcher was aware and had intimate knowledge of the frequency of RCOG and MNR staff capacity, meetings, meeting agendas and policies. These assertions are underpinned by the researcher's experience and work whilst he worked as a legal adviser.

[626] Auzer (n 506) 177.

[627] From personal observations whilst carrying out research in the KRI.

[628] A closed tendering process was observed, where Deloitte and Ernest and Young were awarded contracts to audit petroleum activities in the region based on specific projects identified by the RCOG.

[629] Nevertheless, the frequency of meetings has not led to robust discussions about regulating the petroleum industry in the KRI. Far too often the RCOG has acted as a rubber stamp for the MNR as it would agree with or revert matters to the MNR, undermining the checks and balances in place to question the MNR's policies and practice.

including, audit of the MNR, environmental audit and health and safety. However, these audits have yet to commence.

Whilst in agreement with the distribution of responsibilities between the RCOG and MNR, it is submitted that RCOG's ability to formulate policy remains weak[630] and petroleum policy remains unclear. As the RCOG does not convene regularly to carry out its tasks, a vacuum for policy and strategic planning can emerge which is usually either heavily influenced by or formulated by the MNR[631] without a robust process of investigation or questioning as to whether these plans and policies are fit for the purpose of achieving KRG objectives.

Considering the composition of the RCOG, this council should not only spearhead policy and strategy but identify ways in which public expectations are managed. Furthermore, the RCOG should implement a consultation procedure with the MNR, where they can discuss the most sensitive elements of a proposed petroleum contract.[632] Although not granted powers of oversight in the OGL, amendments to the law should be made so that the RCOG has a supervisory role over the MNR. The RCOG should be tasked to oversee the implementation of MNR policies, investigate and identifying flaws and critically assess current MNR procedures. This would increase accountability and transparency of the MNR, providing the RCOG with a much better understanding of the day-to-day governance of petroleum operations in the region.

[630] Auzer (n 506) 180.
[631] Observed by the researcher during his time in the Kurdistan Region.
[632]Discussions should center on the fiscal aspects of the contract such as tax, how revenue from petroleum production are divided between the KRG and contractor. Environmental concerns as well as work programs should also be considered here. As the RCOG comprises of three different ministries together with the Prime Minister and Deputy Prime Minister, it would be better informed to readjust policies and planning considerations of the KRG with respect to petroleum operations.

4.8.2 Ministry of Natural Resources

The MNR is the most powerful governmental body in the KRI after the RCOG with respect to petroleum operations. It is responsible for the day-to-day governance of petroleum operations in the region, providing advice and recommendations to the RCOG. Studies[633] suggest that the ministry overseeing petroleum operations should have three basic characteristics:

1. Acting as the guardian of the nation's mineral resources.
2. Awarding authorisations such as licences to third parties for the purpose of carrying out petroleum operations.
3. Regulating petroleum commerce in a way that protects the interests of the nation's citizens, the workers operating in the petroleum industry and the state itself.

The MNR has failed to fulfil points 1 and 3 above. This ministry has been accused of corruption,[634] squandering KRI wealth and depleting the nations resources for a handful of political elites.[635] The MNR has been held partly responsible for what many consider KRG's ineffective petroleum policy (of economic self-sufficiency)[636] as the income from petroleum exploitation is not enough to pay public salaries.[637]

[633] Bunter (n 547) 44.
[634] Kurdistan Tribune, 'Kurdistan's 'Natural Resources' and reputation damaged by corruption' (*Kurdistantribune.com*, 5 March 2014) <https://kurdistantribune.com/special-report-kurdistans-natural-resources-reputation-damaged-by-corruption/> accessed 17 December 2015.
[635] Pring (n 522).
[636] Denise Natali, 'Stalemate, not statehood, for Iraqi Kurds' (*Brookings.edu,* 2 November 2015) <https://www.brookings.edu/blog/markaz/2015/11/02/stalemate-not-statehood-for-iraqi-kurdistan/> accessed 17 April 2016.
[637] Joe Snell, 'Unpaid Salaries Fuel Protests in Iraqi Kurdistan' (*Al-monitor.com*) <https://www.al-monitor.com/pulse/originals/2020/08/iraq-kurdistan-krg-protests-barzani-kadhimi.html> accessed 28 August 2020.

Article 6 OGL outlines responsibilities of the Ministry, which include policy formation, issuing regulations as well as supervision and inspections and auditing of petroleum operations.[638] Article 6, Second allows the MNR or its nominee to "negotiate, agree and execute all Authorisations, including Petroleum Contracts, entered into by the Kurdistan Regional Government."[639] Article 9, First also allows MNR to "encourage public and private sector investment in Petroleum Operations to ensure efficient management of the Petroleum resources of the Region".[640] It is submitted that this provision has been drafted loosely to give the MNR greater say in investments made in the KRI petroleum sector, reserving an opportunity for the ministry to be a stakeholder in the promotion and formulation of investment policies. The MNR was created for the purpose of establishing and regulating petroleum operations in the KRI. However, the vision of the ministry and its powers were built around then minister Ashti Hawrami. As one of few Kurds who had worked in the petroleum sector abroad, this individual was tasked with creating a petroleum sector.[641] To this end he was pivotal in policy formation and creating the regulatory format within the MNR through which the KRG governs petroleum operations in its region. The powers given to the MNR are crucial to both upstream and downstream[642] operations. Currently, due to infrequency of RCOG meetings and a lack of required support staff, MNR actions are almost always approved without close scrutiny.[643]

[638]Article 6, First Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.

[639]Article 6, Second Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.

[640]Article 9, First Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.

[641]Ashti Hawrami was brought back to the Kurdistan region for the sole purpose of realising KRG objectives of establishing the MNR and developing the petroleum industry in the region.

[642] Although downstream activities are not the focus of this study, it is noteworthy that Article 8 OGL specifically reserves the power to oversee and regulate all infrastructure used directly or indirectly in petroleum operations for the MNR. Article 8, Second allows the MNR to regulate all downstream petroleum operations, while Article 8, Third authorises the MNR to assist the IFG and its federal bodies in using national infrastructure. The MNR, via Article 8, Fourth, grants authorisation to the MNR to make available pipelines that are not used or not at full capacity to any person lawfully conducting petroleum operations in Iraq.

[643] The researcher observed this during the course of the research carried out in the KRI.

KRG efforts are hamstrung by the power and influence of the two main political parties in the region, the KDP and PUK. These two parties are the real powers behind the KRG and have been in a coalition government together since the conception of the KRG. They each administer a zone of influence, the KDP being dominant in Erbil and Duhok and the PUK in Sulaimani. Petroleum operations are carried out in both zones of influence (although the vast majority of operations are in the KDP zone of influence) and depending on MNR decisions, operations in a particular area may be affected if these two ruling parties are at a disagreement. For the IOCs and the MNR to work effectively with one another, it would be prudent for the MNR to detail in regulation that IOCs must open an office in the city or town of their operations. This would allow locals direct access to the IOCs when applying for jobs and raising grievances and create a connection between the people of the area, the IOC and the KRG.

However, the MNR's role and efforts should not be discredited. The MNR has carried out some significant tasks in managing petroleum operations. For instance, an environment department was established in September 2013, which has been relatively successful. This department has issued instructions and guidelines on corporate social responsibility issues such as environmental and social impact assessments. Furthermore, instructions and guidelines regarding abandonment and reclamation have been completed and forwarded to the KRG Council of Ministers for approval before adoption. This department[644] has also created a team for the purpose of health and safety, monitoring and inspecting oil fields, surrounding land and water resources. Before any environmental instructions and guidelines are drafted or approved, the department holds a number

[644] Reasons for the environmental department's success are numerous and include good leadership on part of the department head, competent staff and the nature of environmental issues not being a political priority for politicians in the KRI. Another reason why this department has been successful is its culture of consultation and cooperation with IOCs and other petroleum contract holders.

of round-table discussions, seminars and workshops, inviting representatives from oil and gas companies to participate and give feedback on the proposed work.[645]

In 2016, the MNR also launched an electronic database called the "MNR portal", which aims to incorporate all petroleum operations in the region whereby contract holders can send, update and receive information regarding petroleum operations on a given block. Furthermore, the MNR has created and maintained an "approved vendor's list" which have been vetted according to competence and technical understanding for the purpose of bidding for and carrying out projects related to petroleum operations.

4.8.3 The Minister of the MNR

The OGL has given the minister a broad range of powers.[646] Article 53 provides a list of thirteen sub-articles where the minister can issue regulation. These issues include petroleum exploration and production, health and safety,[647] audits,[648] the environment,[649] abandonment and decommissioning,[650] work programs and budgets [651] among others.[652] The Minister's power also includes approving authorisation holder's choice of using the services of local business for the purposes of advancing petroleum operations.[653] Furthermore, lack of transparency and corruption

[645] For example, the department forwards health and safety forms relating to emergency responses which companies fill, identifying risks and possible mitigation of such risks. Of significant note is the MNR's drive towards a more professional and capable ministry for overseeing petroleum operations in the KRI.
[646] Although the text is written as the "Ministry shall" in some instances rather than the "Minister shall", the effect in practice is one and the same; the Ministry is the Minister and the Minister is the Ministry.
[647] Article 53, Fifth Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.
[648] Article 53, Twelfth Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.
[649] Article 53, Sixth Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.
[650] Article 53, Tenth Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.
[651] Article 53, Eleventh Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.
[652] The minister of the MNR can also make regulation on other issues such as the use of data, information and reports, measurement and sale or disposal of petroleum, clean up operations and resource management.
[653] Article 44, First (1) (c) Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.

has laid further blame at the MNR.[654] However, some maintain that granting powers of this nature to a minister is befitting of a strong legal framework for the petroleum sector.[655]

Then again, Article 7 OGL imposes a number of conditions on ministerial powers regarding petroleum operations. Article 7, First stipulates that the minister can use his powers and discharge his functions provided that it is in pursuit of "sound management of the petroleum industry".[656] Similarly, Article 7, Second states that the minister must ensure the "petroleum industry is developed in a way that minimises damage to the natural environment, is economically sustainable, promotes further investment and contributes to the long term development of the Region; and is reasonable and consistent with good oil industry practices."[657] These conditions are aimed at checking ministerial power but no definitions or quantifiable measurements are given to determine what is meant by minimal damage, contribution to the long-term development of the region or good oil industry practices. It is submitted that through its institutions, the KRG define or outline what such terms mean. For instance, the RCOG could set out what is meant by long-term development and produce annual reports to determine whether the KRG is on course for long-term development.

The authority and power of the executive branches of government over petroleum operations differs around the world. In some jurisdictions, strict parliamentary oversight is observed with respect to governmental participation in oil and gas operations. In Egypt and Azerbaijan for

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[654] NRT, 'Corruption and Transparency in Kurdistan Oil Sector' (*NRTtv.com* 2016) http://www.nrttv.com/en/Details.aspx?Jimare=6220 accessed on 17 November 2016.
[655] Bunter (n 547) 44.
[656] Article 7 First Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.
[657] Article 7, Second Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.

example, a Minister or Ministry within the executive branch cannot unilaterally enter into contracts with IOCs or other oil and gas companies for the purposes of oil and gas exploitation. Before any such contract can become valid, the legislative branch of must ratify the contracts. In contrast, in other jurisdictions such as the case of Yemen, the executive branch solely assumes this role. In Kurdistan, the RCOG is given this authority, although in practice it usually delegates such power to the Ministry of Natural Resources, specifically the Minister.[658]

Whilst the current MNR minister has been credited for "single-handedly"[659] creating a petroleum sector in the KRI, the system should not be built around individuals. It should be built on institutions that safeguard the exploitation of petroleum resources for the benefit of the people.[660] Reliance on individuals whether it is in a legal, political or social context has not worked in Iraq or Kurdistan, as illness, death, resignation or transfer of the individual could lead to a vacuum that is not easily filled. Successors may be a poor substitute or be hamstrung by staff working at the ministry. Rather, focus should be on the establishment and cooperation of the five institutions set out in the OGL.

Ministerial power is broad with not much oversight. Even when the KRI Parliament[661] was active, critics of the MNR and its Minister did not believe that there was enough scrutiny. For them, the

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[658] From researchers own observations whilst in the KRI.

[659] KRG, 'KRG Deputy Prime Minister Qubad Talabani Says Kurdistan Vital Economic Reforms, Values Continued Partnership With International Oil Industry' (*KRG* 2016) http://mnr.krg.org/index.php/en/press-releases/583-krg-deputy-prime-minister-qubad-talabani-says-kurdistan-continues-vital-economic-reforms,-values-continued-partnership-with-international-oil-industry accessed on 29 December 2016.

[660] There are no guarantees that the next minister will be as knowledgeable or competent as the current minister. That is why the system needs to move towards a more narrow and rigid structure so that the law does not protect incompetence and mismanagement.

[661] The KRG Parliament has been convened since October 2015 and the Speaker of Parliament has since been refused entry into the capital city of Erbil. Rudaw, 'Kurdish parliament still in deadlock a year after deadly riots' (*Rudaw,* 2016) <http://www.rudaw.net/english/kurdistan/13102016> accessed 15th March 2017.

data put forward by the Ministry was either incomplete or inaccurate, which meant that any attempt of oversight by the Parliament was futile because the information they were given was incorrect.[662] In absence of strong and competent institutions, the reality is that the MNR and its Minister make key decisions on important petroleum matters without required consultation. Such managerial authority over petroleum operations although common in other jurisdictions, is not appropriate for the political and economic environment of the KRI without a robust monitoring process. To check MNR and ministerial power, curb corruption and limit the effects of mismanagement in petroleum governance, KRG institutions together with the Parliament should provide oversight. To determine exactly what this process should encompass requires a full review of current MNR and ministerial authority and its processes. To what extent the MNR[663] has been successful in the governance of petroleum is open to debate[664] and remains matter of contention both politically and economically in the KRI.

4.9 The Five Institutions

Chapter 5 of the OGL in Articles 10-15 establishes a few public bodies for the purpose of facilitating petroleum operations in the region, stating their authority and function. These bodies are regulated by the MNR[665] and include:

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[662] Sherko Jawdat, 'Reforming the Energy Sector' (MERI Economic Forum 2016) <http://www.meri-k.org/multimedia/mef-2016-reforming-the-energy-sector/> accessed 29 March 2017.

[663] Dr. Ashti Hawrami was the first person to be appointed as Minister of the Ministry of Natural Resources when the ministry was established. He has since continually served in his role as minister and is currently not only the Minister of the MNR but has taken on the role of Acting Minister for the Ministry of Electricity. The KRG is amidst a restructuring program, which may see the MNR and Ministry of Electricity being merged into an organ that deals with all matters relating to energy in the KRI.

[664] Advocates of the MNR and its ministers point out that he has been able to create an oil and gas industry from scratch in the KRI, attracting a number of high profile multi nationals which have advanced the KRI's position in the Middle East and on the international stage. However, internal actors within the KRI point out that the KRG's petroleum policies (via the MNR and its minister) have been unsuccessful as the region is experiencing economic collapse. Furthermore, they refer to the KRG's disputes and subsequent arbitration with companies such as Dana Gas as an example of the MNR's mismanagement and failure to regulate the petroleum industry in the KRI.

[665] Article 14, First Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.

- Kurdistan Exploration and Production Company[666] (KEPCO).
- Kurdistan National Oil Company[667] (KNOC).
- Kurdistan Oil Marketing Organisation[668] (KOMO).
- Kurdistan Organisation for Downstream Operations[669] (KODO).
- Kurdistan Oil Trust Organisation[670] (KOTO).

The reason for establishing these bodies was so that the KRI would move towards institutionalisation of the system, creating a more professional, transparent and effective mechanism of governing petroleum resources.

Articles 10-15 relating to these bodies are structured to mirror one another. In each of the articles, the first sub article pronounces the establishment of the public body. The second relates to the composition and membership of the respective public body and the third states a fixed duration of five years for each member. The fourth sub-article lays out the function and competencies of the public body.

Since OGL's enactment, these public bodies have either not been formally established or established but inactive. The KRG has maintained that this is because of the lack of technical, managerial and administrative expertise among the Kurdish population. More recently, the MNR has pointed to the financial collapse of the KRI's economy as another reason. Critics of the

[666] Article 10, Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.
[667] Article 11, Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.
[668] Article 12, Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.
[669] Article 13, Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.
[670] Article 15, Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.

government suggest that the reason for not establishing these public bodies and putting them to work is political in nature.

Without any independent institutions[671] to corroborate the data forwarded by the MNR to the Parliament or other oversight bodies, it is difficult to ascertain whether the MNR data is accurate. The Kurdistan Parliament, through its Oil and Gas Committee is supposed to act as an oversight body, checking the authority of the RCOG and MNR.

Considering the discussion above, we can conclude that development of KRI petroleum sector has been hindered by the politization of regulatory and oversight functions of the MNR.[672] Furthermore, the KRI lacks effective institutional framework and suffers from poor institutional design of its governance of oil and gas.[673] Absence of a national oil company, non-establishment of institutions (as prescribed by OGL) together with a weak policy making body in the form of RCOG has led to a ministry (MNR) dominant model.[674]

4.10 Method of Selecting Companies

As discussed in this chapter, host governments require the technical experience and expertise of IOCs to conduct petroleum operations. However, companies are vetted to determine their suitability prior to the award of a contract. A process ensues where negotiations of a technical,

[671]Although the KRG has what it terms as the Supreme Audit Office, established as an independent body to audit the accounts of the executive and other public bodies, in reality it has little power. The Supreme Audit has concentrated its efforts on limiting corruption and has been successful to some degree. However, these efforts have been aimed the low to mid-manager levels and do not attempt to tackle corruption by powerful politicians.
[672] Auzer (n 501) 179.
[673] Auzer (n 506) 177.
[674] Auzer (n 501) 180.

financial, and contractual nature take place. There are several different approaches used by host governments to determine who is awarded exploration and production rights. These methods include bidding rounds (whether competitive or discretionary) and special invitations. Generally, host governments can reject any or all bids received.[675]

4.10.1 Bidding

The steps involved in bidding processes are of great significance. If contracts and licenses are awarded to companies that do not have the capacity to carry out the work, it could lead to huge financial losses and have important non-financial implications. Because of this concern, some countries such as Norway have modified legislations to increase the level of state participation via national oil companies. The KRI must therefore consider a range of biddable items beyond financial issues.

4.10.2 Competitive Bidding

Competitive bidding is often used to refer to a purely financial automatic type auction or a bidding process for work programmes, where the company with the highest bid secures the tender. In competitive bidding a minimum threshold of conditions is predetermined by the government. Companies wishing to bid for exploration and production rights will have to meet these minimum requirements and enter a bidding process, competing with other companies (known as pre-qualification process). Competitive bidding is typically advantageous for the state as it gives a higher financial income when compared to other bidding processes. It may also assist with

[675] Bunter (n 547) 96.

transparency as there are open and documented bids by companies wishing to secure a license. States typically use the competitive bidding system when the government prioritises revenues above all other considerations.

4.10.3 Discretionary Bidding

The discretionary system awards are based on conditions and predetermined criteria set by a host government. Doubts have been expressed as to the transparency of the discretionary method but this has been mitigated by the need for an objective and fair process of awarding licenses mainly in the European Union. The main advantage here is that states can choose the most suitable IOCs for the award of rights based on the objectives of the state.

In discretionary bidding, room is left for the state to exercise some discretion but there can be different degrees of discretion:

1. A fully discretionary system, where criteria may not be advertised by the state or they are advertised but no points system is attached. Here, the state decides as it wishes with little or no transparency. If there is a robust selection mechanism, the host government can choose companies based on what it considers to be the most important criteria.
2. Semi-discretionary is a semi-automatic system where criteria are set out and bidders know how many points are attached to each criterion. However, the state has discretion on deciding what points to give to each bidder per criteria. Once the points are tallied, the process is automatic as the bidder with the most points wins.

4.11 Authorisations

For the purpose of this section, authorisations are granting instruments in the form of licenses, contracts or permits given by the host state to petroleum companies for specific operations according to a particular set of rules. Authorisations[676] awarded, usually set out the size and shape of the area of operations (usually in a geometric grid), which is often referred to as a "block" or "parcel of land".[677] Awarding authorisations (known usually as exploration and production rights) are normally given by host governments to petroleum companies to carry out petroleum operations by entering into a licence (either exclusive[678] or non-exclusive) or a contract.[679]

The OGL permits the MNR to issue three types of authorisations[680] for the purpose of carrying out petroleum operations:

1. Prospecting Authorisations; these are granted by the MNR minister to perform geological, geophysical and geochemical surveys in a specified area for a defined period of time.[681]
2. Development Authorisations referred to as "Petroleum Contracts for exploration and development"; permits, licences or other authorisations made or given under the terms of the OGL, specifically Article 24.
3. Access Authorisations; These are notifications granted by the MNR minister and approved by the RCOG for companies to "construct, install and operate structures",[682] facilities, and installations and other works that may be necessary for petroleum operations.

[676] When applying for authorisation, most petroleum legislations aim to showcase a non-discriminatory approach based on policies of non-bias or favouritism.
[677] Article 21 Oil and Gas Law of the Kurdistan Region-Iraq (No.28) 2007.
[678] Exclusive licenses are in reference to the right or permission to carry out all petroleum operations during the exploration, prospecting, drilling, production and decommissioning stages.
[679] Taverne (n 467) 122.
[680] Article 24, Third(4) Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.
[681] Article 22, Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.
[682] Article 25, First Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.

Even though authorisations are given for a specific period, Article 34, First of the OGL permits the MNR minister to terminate authorisations on condition that he notifies the RCOG.[683]

In the OGL, the term authorisation is distinct and separate from the award of a petroleum contract. The term "authorisation" is permission given by the MNR Minister on behalf of the KRG to carry out specific tasks as highlighted above. The award of petroleum contracts is one such permission. Once authorisations have been granted, other provisions of the OGL are triggered. For instance, the KRG has title to information, data whether raw or processed[684] on all blocs. Authorised parties can use some or all of the data and retain copies but cannot claim ownership thereof.[685] Furthermore, Article 33 OGL stipulates those authorised to carry out petroleum operations must make available company books and accounts for the purpose of inspection and auditing.[686] In addition, all authorised entities will defend, indemnify and hold harmless the KRG of all third party claims[687] and maintain insurance for the purpose of protection as determined by the MNR.[688] During the decommissioning phase, whether upon termination[689] or where petroleum operations are no longer required,[690] all holders of contracts, licences or other such authorisations are bound to remove all equipment, tools, machinery and other instruments that may have been used during the petroleum operations.

[683] Article 34 Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.
[684] Article 32, First Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.
[685] Article 32, Second Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.
[686] Article 33 Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.
[687] Article 35, First Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.
[688] Article 35, Second Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.
[689] Article 34, First(1) Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.
[690] Article 34, First(2) Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.

In the KRI, the MNR can, by public notice, invite "applications for Authorisations"[691] and the Minister of Natural Resources may elect to "award authorisations through direct negotiations",[692] provided that it is deemed to be in the public interest. Any invitations issued by the MNR must detail the area where the authorisation is to take place, the proposed activities that will take place in the defined area and how any such applications will be assessed, together with any applicable fee.[693] Applications for authorisation must also include, where necessary, conditions relating to health and safety,[694] the protection of the environment,[695] training programs[696] and priority given to persons[697] and goods and services[698] provided in the KRI.

The process of awarding authorisations in the KRI is typically secretive. In most cases, only a small group of individuals are aware of the negotiations between IOCs and the MNR. Even when authorisations are awarded, details of the agreement are not made available to those (such as parliamentarians, KRG lawyers and senior government officials) that should have intimate knowledge of the agreements that are made. This lack of transparency and unwillingness to present the terms of an agreement continues to be a point of suspicion against the MNR. In the interests of transparency and good governance, the KRG must devise a process where parliamentary and key government officials are presented with the agreement as well as a justification of why a particular company was awarded a specific authorisation.

[691] Article 26, First(1) Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.
[692] Article 26, First(2) Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.
[693] Article 26, Second Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.
[694] Article 26, Third(1) Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.
[695] Article 26, Third(2) Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.
[696] Article 26, Third(3) Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.
[697] Article 26, Third(4) Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.
[698] Article 26, Third(4) Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.

4.12 Choice of Contractual model

There are a number of contractual models governments can adopt, including:

- Concessions
- Production Sharing Contracts/ Agreements (PSC/PSA)
- Risk Services Contracts/Agreements
- Joint Ventures
- Hybrid arrangements

Types of contractual models will be considered in more detail in Chapter Four but at this stage, it is worth noting that the OGL does not limit KRG's ability to enter into different contractual models for conducting petroleum operations. It is submitted that this provides the KRG with the flexibility it may need if it chooses to amend or pursue different policies.

The OGL details terms and conditions for PSCs. Article 24, Second allows the Minister to enter into a PSC or "other contracts" so long as the minister considers the respective contractual model to provide "good and timely returns to the people" of the Kurdistan Region.[699] In addition, Article 39 is so broad that the minister may enter into many different contracts including service contracts, consulting contracts, supply and instillation contracts, field management contracts or any other contracts, which may contain an "element of risk to reward the contractor" provided that the aim is to efficiently manage the petroleum resources of the KRI.[700] Emphasis is put on PSC contracts in the OGL for two main reasons. First, the KRG wanted to show that it owned the petroleum

[699] Article 24, Second Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.
[700] Article 39 Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.

fields and the petroleum deposits in situ. Second it believed that this was the best way to attract foreign investment.

Article 37 sets out a number of conditions of a standard PSC "that must be met before a PSC is concluded between the KRG and a contractor, including:

- Duration of the exploration term (5 years).
- Relinquishment of 25% after the initial exploration term with a further 25% of the remaining area at the end of each renewal period.
- An exploration commitment, which is negotiated with the MNR.
- A development period of 20 years after discovery of petroleum.
- A royalty rate of 10%.
- Cost recovery from a portion of production after deduction of the royalty, a maximum not exceeding 45% for crude oil and 60% for natural gas.
- Commitment to an agreed amount into the KRG's "Environmental fund"[701]
- Cost oil[702]/profit oil.[703]

Only details of PSCs are included in the OGL, which include exploration terms, relinquishment provisions a time limit on development period, rate of royalties, cost recovery provision, government participation, commitment to environmental and health and safety. The act remains

[701] Article 37, First Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.

[702] Cost Oil (sometimes referred to as cost recovery), is the process whereby a contractor is reimbursed for the costs it in incurred whilst carrying out petroleum operations through the sale of extracted petroleum. In the OGL, Article 37 First(6) states that cost recovery from a portion of production after deduction of the Royalty, to a maximum not exceeding 45%. Cost Oil will be discussed in greater detail in Chapter IV of this research.

[703] After an IOC has recouped its costs from carrying out petroleum operations (Cost Oil), the remaining petroleum is shared between the host state and the IOC in what is termed Profit Oil in the petroleum industry. Profit Oil is typically designed in such a way so that the hosts state takes an increased share of the revenue in the production and latter phases of the petroleum life cycle. Profit oil has not been defined in the OGL, leaving the matter to be agreed by the parties and incorporated into the contract. Profit oil and Cost Oil will be discussed in detail in Chapter IV of this research. Profit Oil will be discussed in greater detail in Chapter IV of this research.

silent on conditions of all other contractual models. This would suggest PSCs are KRG's preferred contractual model without restricting its ability to enter into other models.

4.13 Dispute Resolution

Due to a number of complexities involved in exploration, production, logistics and revenue from petroleum operations, there may come a time where stakeholders find themselves in disagreement. Disputes may arise and a resolution will be required. As the most popular dispute resolution and enforcement mechanism in the oil and gas industry, arbitration[704] is widely used internationally and incorporated into legislation and/or contracts. For this reason and because KRI courts are not experienced to deal with oil and gas disputes, the KRG has incorporated arbitration as an alternative dispute resolution mechanism in legislation.

Article 50 OGL details the process for resolving oil and gas disputes and is split into four categories. The first category at Article 50, First(1) stipulates that the MNR Minister may "inquire into and decide all disputes involving Persons engaged in Petroleum Operations" including among "Persons themselves" involved in petroleum operations, "where agreements between them do not specify a dispute resolution mechanism."[705] The lack of precision with respect to the definition of "Person"[706]presents a problem. By nature of the definition given, a "Person" is considered a legal entity in the form of a natural person, company or other legal entity, organisation, agency or governmental body. Taking this definition, it is not clear whether the MNR Minister has the

[704] Arbitration is an alternative dispute resolution mechanism whereby one or more arbitrators make a binding decision regarding a dispute once it has been submitted. Parties agree in advance to settle disputes as a way of avoiding going to court, potentially reducing costs.
[705] Article 50, First(1) Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.
[706] Article 1 Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007 defines "Person" as "a natural person, or other legal entity".

authority to adjudicate oil and gas disputes between different governmental bodies, IOCs or subcontractors or other private entities. If the aim is for the MNR Minister to adjudicate such disputes, what is the significance of the courts?

The second category at Article 50, First(2) specifies that the MNR Minister will resolve disputes "in relation to other parties (other than the regional government) not so engaged."[707] Again, this sub-Article does not provide clarification on what "other parties not so engaged" means. It could be interpreted that the MNR Minister has the power to settle disputes between private and public entities as long as they are not KRG public bodies. This could be a problem should disputes between IOCs and the IFG arise. It is submitted that Article 50 OGL should be amended to remove the current powers of the MNR minister to decide all disputes between petroleum companies, their subcontractors, or other legal entities. The minister should not have a judicial function, as he is neither a judge nor arbitrator. In the interest of the separation of powers, the executive branch should not be permitted to perform the functions of the judiciary. However, the MNR and its Minister acting as a representative of the government should negotiate with IOCs and other legal entities for the purpose of settling the dispute. If dispute resolution mechanisms are not identified in contractual agreements, the next appropriate course of action should be for Kurdish or federal courts of law to intervene. This would support the theory that the MNR through its minister was instrumental in the drafting process of the OGL and its subsequent enactment.

[707] Article 50, First(2) Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.

The third category is related to disputes arising between the MNR Minister and an "Authorised Person"[708]. If such disputes arise Article 50 Second(2) stipulates that the parties will attempt to resolve the dispute through negotiations.[709] Although negotiations are a typical vehicle through which the parties can settle disputes before seeking other forms of settlement, it is not clear why this article centres on disputes between the Minister and other entities. It is suggested that Article 50 First(1) should relate directly to the MNR and not its minister. Although the minister is the leading representative of the MNR, it is submitted that it is the MNR and not its minister that would be party to a potential dispute. In my opinion, the reason why this article cites the minister and not the MNR is because it gives the minister a great deal of discretion when representing the KRG in negotiations in the aftermath of disputes arising. Involving the MNR minister into such disputes could lead to procedural unfairness, bias and corruption. The minister may agree to settle a dispute to gain favour with one party over another. Furthermore, there is no mechanism for the minister to hear or adjudicate such disputes. This would suggest that the minister would have total discretion on such disputes.

The fourth category focuses on arbitration should negotiations fail. The OGL identifies various acceptable arbitral institutions and organisations that can be utilised for the purposed of reaching a binding settlement between parties to an oil and gas contract including:

[708] Article 1 Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007 defines Authorised Person: "in respect of a Petroleum Contract, a contractor; or the Person to whom the responsibility has been granted in accordance with the "Authorisation" and Access Authorisation.

[709] Article 50, Second(2) Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.

- 1965 Washington Convention (Convention on the Settlement of Investment Disputes Between States and Nationals of Other States - International Centre for Settlement Of Investment Disputes, Washington 1965),[710]
- Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL),[711]
- London Court of International Arbitration (LCIA).[712]

However, if parties to the arbitral process agree, other “rules of recognised standing” can be adopted.[713]

Arbitration is a new concept in the Kurdish legal system. There are few or no arbitration specialists, especially in petroleum matters. The region relies heavily on internationally law firms to represent the KRG throughout arbitration proceedings. This in itself is not problematic, as specialists on the international stage will always be needed for both their knowledge and experience. The problem arises from lack of local lawyers with the required competencies. Like other areas of law, contractual disputes in petroleum operations will continually occur. Therefore, KRG must ensure that a team of lawyers is trained for this purpose and given exposure to arbitral proceedings. Furthermore, the number of accepted Arbitral bodies at Article 50 Second(3) should be reduced. Such a move would concentrate the focus of lawyers and the KRG to familiarise themselves with a smaller number of arbitration bodies to better understand the processes and rules and regulations of such bodies.

[710] Article 50, Second(3)(b) Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.
[711] Article 50, Second(3)(c) Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.
[712] Article 50, Second(3)(d) Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.
[713] Article 50, Second(3)(e) Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.

At Article 43 OGL, the minister is granted permission to waive claims to sovereign immunity on behalf of the KRG regarding legal and enforcement proceedings. Here it is important to note that the minister does not need to obtain consent from any other governmental body or organ. Although the Minister of the MNR would, almost all cases, waive sovereign immunity, there is no guarantee that sovereign immunity will be waived, causing investors great anxiety.

4.14 Fiscal Regime and Taxation

To safeguard state economic interest from petroleum exploitation, an appropriate fiscal regime must be designed and implemented. Because petroleum resources are finite, states must try to maximize the greatest yield possible. Host governments will have to balance their need for urgent short-term revenue streams vis-à-vis its long-term ambitions without scaring off potential investors. These rules can be incorporated in one or more legislative instruments for the purpose of setting out minimum conditions for investors to pay different fees and taxes to the state.

As a key component of a petroleum fiscal regime, tax as it is one of the most lucrative ways of establishing revenue for the state. Legislation determines the value of petroleum resources in terms of applicable payments such as Corporate Tax,[714] Royalties,[715] Bonuses,[716] Surface Fees[717] and Production shares[718] (if the contractual model is a PSC). However, there are country-specific

[714] Corporate tax is a direct tax imposed on licences/contract holders on the income of the company.
[715] Royalties are the share of petroleum extracted to which the host state is entitled and are calculated as a percentage of production. Typically, the state can agree with the licensees/contractors to take payment in kind or in cash.
[716] There are different types of Bonuses such as signature bonus, discovery bonus, and production bonus, which will be detailed in Chapter Four. Within the context of this research, a bonus can be defined as a sum of money given by a licensee/ contractor to the host state upon reaching previously agreed milestones throughout the project.
[717] Surface fees are yearly fees paid per square mile by the holder of a licence/contract to the host government for use of the land (surface area) that they work in.
[718] Production shares sets out the production share between the host government and the licence/contract holder.

elements that shape fiscal regimes ranging from environmental taxes[719] and ring fencing[720] to Special Petroleum Tax[721] and State's Direct Financial Interest.[722]

Some studies have linked petroleum taxation to petroleum prices, indicating that where oil prices are high government take is typically greater and its taxation policy much stricter.[723] Conversely, where petroleum prices are low, host governments typically find themselves in a weak financial position[724] and are dependent on IOCs for investment. In this scenario governments usually increase the available acreage and reduce taxes.[725]

Because of complexities associated with petroleum taxation, some states enact specific legislation in an attempt to create and implement a workable model to calculate and collect taxes. Others prefer to incorporate tax provisions in a petroleum law. Some commentators[726] argue that because no perfect models of petroleum taxation exist ideal tax frameworks can only exist in theory.[727] However, comparisons of different fiscal and legislative systems can provide useful insights into how other jurisdictions approach the issue of tax in petroleum operations. In some countries, the

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719 Environmental taxes are taxes imposed where negative impact on the environment has or could occur as a result of petroleum operations. In Germany, revenue received from environment taxes were used to fund sources of renewable energy.

720 Ring fencing applies where a part of a company's assets or profits are separated financially without these parts operating as a separate financial entity. The UK uses ring-fencing as part of their petroleum taxation framework.

721 This tax was introduced in Ghana so that a host government could receive extra revenue.

722 This form of taxation is part of the Norwegian system for petroleum taxation. SDFI is a portfolio of the Norwegian government's direct ownership of petroleum exploration and production licences.

723 In the period between 2003-2008 the governments of Bolivia, Kazakhstan, UK, Alberta and Alaska introduced strict fiscal and taxation terms on IOCs because oil prices were high, putting host governments in a position of strength.

724 This is especially true if they do not have a fund that acts as a buffer until prices rise again.

725 Kjell Lovas and Petter Osmundsen, 'Petroleum Taxation: experiences and Issues' (2009) UIS Working Papers in Economics and Finance University of Stavanger 2009/8 https://core.ac.uk/download/pdf/7097415.pdf accessed 15 February 2018.

726 Carole Nakhle, *Petroleum Taxation, Sharing the Oil Wealth A Study of Petroleum Taxation Yesterday, Today and Tomorrow*, (Routledge 2008) 30.

727 Lovas and Osmundsen (n 725).

issue of petroleum taxation is addressed in separate legislation as can be seen in Angola,[728] Timore Leste[729] and Ghana.[730] In other countries such as India,[731] tax associated with petroleum is not only identified and detailed in legislation but a guide to petroleum taxation is also written for the purpose of clarity and to help stakeholders identify their obligations to the state.[732] The Norwegian petroleum tax system for example is designed in such a way that an investment project, which is profitable for an investor before tax, can also be profitable after tax.[733] This system attempts to harmonise aspirations of securing considerable revenue for the state whilst creating an environment where IOCs remain profitable post tax.[734] In the United Arab Emirates, petroleum tax is heavily reliant on revenue from corporation tax, although royalties also feature heavily.

Comparing oil and tax obligations in countries above to that of the KRI, contractors[735] and authorised persons carrying out petroleum operations are liable to pay a number of taxes under the laws of the KRI.[736] Under Article 40, First,[737] contractors carrying out petroleum operations are liable to pay surface tax, personal income tax, corporate income tax, customs duties, windfall profits or "any other tax, levy or charge expressly included in its Petroleum Contract". However, despite clear obligation on part of companies to pay tax, all Kurdish PSCs have "tax exemption"

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[728] Law No. 13/04 of 24 December 2004 Law on Taxation Of Petroleum Activities.

[729] Timor Leste Petroleum Taxation Law, law No.8/2005.

[730] Ghanaian Petroleum Income Tax Law 1987.

[731] Taxation Guide India 2009.

[732] The guide compiled specific provisions of laws connected with the prospecting for or extraction or production of petroleum in the upstream sector. These included taxes such as income tax, customs duty, central excise, royalties and licence/lease fees as applicable to upstream petroleum operations.

[733] Lovas and Osmundsen (n 725).

[734] Petroleum taxation in Norway is based on Corporation tax. However because of lucrative potential profits, a special tax is placed on petroleum activities. The ordinary corporation tax rate is 28%, however the special tax rate increases this to 50%. When calculating taxable income, for both ordinary and special taxes, an investment is subject to depreciation on a linear basis over six years from the date it was made. Petroleum companies can deduct relevant expenses for exploration, research and development, net finance, operation, decommissioning and so forth. For exploration costs, oil companies receive a refund for the value of exploration costs when they submit tax returns.

[735] Article 1 Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007 defines contractors 'a Person with whom the Ministry has entered into Petroleum Contract in the petroleum sector.

[736] Article 40, Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.

[737] Article 40, Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.

provisions. This presents a problem for contractors who, *prima facie*, are liable to pay the taxes of the KRG. The problem for contractors is that they are not legally exempt from paying taxes. As the KRG government changes, there may come a time when the ruling political elites of the Kurdistan Region may demand payment of these taxes.

The KRG has three options to solve this problem:

1. Continue with status quo (not tax IOCs).
2. Tax IOC's despite tax exemption clause in their PSC.
3. Pass a tax exemption law and not tax IOCs.

The KRI will have to confront the issue of taxing current PSC holders as it is increasingly under pressure to increase its revenues following near-economic collapse. Continuing with the status quo is the least attractive option for the Kurdish public, as exploitation of petroleum resources in the current manner has not delivered the prosperity that people of KRI anticipated.

Alternatively, taxing IOCs would result in an increase in revenue but may also lead to legal challenges from IOCs. PSC holders may have a claim against the KRG, including the right to invoke fiscal stability clauses.[738] Contractors may recover costs under cost oil but it is uncertain whether IOCs will be willing to do this, as they would be paying large sums upfront that they had not anticipated. Taxing each PSC holder will be a time consuming and resource draining process, which may not be feasible because currently the KRG does not have the resources to carry out this

[738] Stabilisation clauses are specific commitments by the host state to not alter the terms of a petroleum agreement by legislation or otherwise. IOCs are keen to cement terms of their PSC's with host states based on the legal regime in effect at the time of the investment. The purpose is to create an environment of predictability as much as possible, which is a critical concern for the investors when attempting to recover the costs of the project that it has undertaken.

task. This is not to say that taxing IOCs is not worthwhile but rather that the potential consequences may be more detrimental than initial monetary gains.

The only way that a company may avoid paying tax is if legislation exempts it from doing so.[739] An exemption law would immediately address the problem of current PSC holders being taxed and is consistent with KRG policy, fulfilling representations made to IOCs under PSCs. If the KRG does not pass an exemption law, it could be seen as unpredictable by current and future investors. However, exempting IOCs could be viewed as the KRG covering up policy failure at a time when the region is facing enormous financial challenges.

None of the options above are ideal. Passing a tax exemption law for current PSC holders is perhaps the least damaging option for the KRI as the alternative is to renegotiate multiple contracts, which could be financially costly. Whilst a tax exemption law would result in less revenue for the KRG, it may lead to more efficient management and better foresight by those involved in planning petroleum policy in the future. A carefully drafted text in legislation can deal retrospectively with contracts already signed whilst also forward looking to develop a mechanism, which determines whether companies will be tax exempt.

In order to address the concerns of paying "double taxes",[740] the OGL explicitly states that the taxes of the KRG are the only applicable taxes with respect to petroleum operations.[741] Even

[739] Art 40, Third Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.
[740] Double taxes is in reference of paying the same tax twice; one to the federal government and the other to the KRG. Similarly IOCs are wary of paying the same tax twice with respect to the taxes imposed by the host government where they carry out petroleum operations and the tax of their own governments. For instance, expatriate employees working for an IOC may be liable to pay income tax both in their country of residence and also the country where they work.
[741] Article 40, Third Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.

though Article 40 OGL clearly states that all companies engaged in petroleum operations are liable to pay taxes, petroleum companies operating in the KRI have not paid such taxes. Furthermore, no exemption law has been passed by the Kurdistan Parliament to waive this obligation.

The KRI has not promulgated specific legislation for petroleum taxation similar to countries. KRG policy during the time of the OGL's conception was to attract foreign investment by offering favourable terms to incentivise investors. At contractual negotiations, the KRG, represented by the MNR, favoured accepting signature and other bonuses, widely referred to as "sweeteners", instead of collecting tax as it was considered a more fastidious process to collect revenue. In short, tax exemption offered simplification of KRG revenue stream from PSCs. Going forward, it is submitted that the KRG should promulgate tax legislation specific to petroleum operations.

4.15 Local Participation

One of the objectives of host governments is to encourage foreign investment for the benefit of the local population. The intention is to create new jobs and use services of local companies for the purpose of strengthening the economy. In the OGL, petroleum companies and holders of authorisations must give preference to "competent" local companies from the KRI and Iraq.[742] However, these companies must be non-governmental, private companies not related to public offices or officers, whether "directly or indirectly".[743] In practice, however, many local companies are owned by or affiliated with political parties or individuals associated with or related to high-ranking politicians.

[742] Article 44, First(1) Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.
[743] Article 44, First(1)(a) Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.

Companies authorised to engage in petroleum operations must employ local people on the condition that they have requisite experience, qualification and competence to carry out the work.[744] However, in the absence of regulation setting out what is deemed to be the necessary qualifications, experience and competence, the default position is to revert to what is deemed best petroleum operational practice. Many countries place great emphasis on job creation and skilling up their workforce to improve their economy. For example Qatari, Indonesian and Angolan legislation encourages employment and skilling up of the local workforce.[745] The KRI model is more forceful in that companies must employ locals if they have the right experience, expertise and qualifications whereas the countries aforementioned simply allow companies to employ locals.

The OGL also encourages companies to use local products and services provided that these products and services are "competitive in terms of price, quality and timely available".[746] Much criticism has been aimed at the KRG for not doing enough to implement and enforce OGL provisions relating to local participation. Only a small fraction of the petroleum workforce/service providers are Kurdish/Iraqi. Vague conditions placed on local participation means the MNR often overlooks the needs of the local population in favour of keeping petroleum companies content. Then again, the MNR has stated that current workforce, services and products in the KRI are not adequate, a view supported by some of the IOCs. However, efforts have been made to build human capacity training programs as per OGL stipulations that authorisations given for petroleum

[744] Article 44, First (2) Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.
[745] Eduardo G. Pereira and Kim Talus, 'Upstream Regulation: An Introduction' in Eduardo G. Pereira and Kim Talus (ed), *Upstream Law and Regulation: A Global Guide* (2nd edn, Globe Business Publishing 2017) 9.
[746] Article 44, First (3) Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.

operations must include defined training programs[747] for local employees.[748] In an effort to promote cooperation and implement use of local labour and services, companies that carry out petroleum operations must establish an office[749] within the borders of the KRI.

In order for the KRG to benefit from IOC funded training programs, the MNR should establish a specific unit to oversee such programs and to intervene where necessary to ensure that locals are being trained, that they are trained to international standards and track the development of those trained in job applications.

4.16 Cooperation between the KRG and IFG

The debate between national and sub-national governments is not unique to Iraq. In Sudan, one of the main causes of violence in Darfur was over how proceeds from petroleum exploitation were to be distributed among the differing regions and tribes. Similarly, disputes over revenues from petroleum resources have erupted in Somalia and Angola.[750] In Russia, the national government continues to face arguments over petroleum proceeds as highlighted in oil-producing regions such as Tartarstan.

[747] This includes, "where possible", commitment by companies carrying out petroleum operations in the region to maximise knowledge transfer and establish necessary facilities and technical work programs, including interpretation of data.
[748] Article 45, First Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.
[749] Article 46 Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.
[750] However, in each of these countries, one of three things have occurred; either rule of law has prevailed and legal instruments have found a mechanism through which the interests of all parties are represented or the same has been achieved through political dialogue or a conflict.

With respect to Iraq, and in an effort to show KRG's willingness to settle on-going petroleum disputes with Baghdad, the OGL dedicated an entire section of the legislation titled Chapter 7 "Cooperation With Federal Government". Articles 18-20 OGL are inter-related and address management and revenue sharing of petroleum, attempting to rely on the principles set out in IC 2005. Before Articles 18 and 20 can be implemented, however, these articles must be "consistent"[751] with or "until conditions set out in Article 19" OGL[752] are met. In short the OGL places a condition that Article 19 OGL must first be implemented and enforced in full before Articles 18 and 20 OGL can be implemented.

Article 18 OGL proposes joint management of petroleum from current fields[753] in the KRI but remains silent on future fields. The same article stipulates that the KRG must cooperate with IFG in formulating strategic petroleum policies in the KRI.[754] Furthermore, the KRG will cooperate with federal government agencies and bodies such as the Federal Oil and Gas Council to establish model contracts, commercial terms for negotiations and contract award procedures.[755] Finally, the Article states that the KRG agrees that all revenues obtained by the KRG from petroleum operations will be deposited in a petroleum revenue fund for Iraq.[756] Article 20, however maintains that until conditions of Article 19 are met and fully implemented, the KRG has the right to receive

[751] Article 18 Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007 begins with " The Regional Government, consistent with the conditions stated in Article 19 of this law shall:"
[752] Article 20 Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007 states "Until the conditions set out in Article 19 of this Law are met in full, the Regional Government shall proceed with its rights on the basis of Articles 112, 115, and 121(3) of the Federal Constitution, with Revenue received by KOTO pursuant to Article 15 of this Law".
[753] Article 18 First Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.
[754] Article 18 Second Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.
[755] Article 18 Third Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.
[756] Article 18 Fourth Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.

petroleum revenue through KOTO.[757] This is an attempt at legal recourse in case the conditions in Article 19 are not met.

Article 19 forms the core of the KRG's view towards cooperation with Baghdad. Before "cooperation and permission referred to in Article 18" can commence with the IFG, Article 19 sets out five conditions:

1. A petroleum revenue fund must be established for the purpose of gathering revenue from petroleum exploitation. This fund must be managed by a joint commission between KRG and IFG and maintained at a reputable international bank. Furthermore, a sub-account, under the authority of the KRG will be created where an agreed share of revenue produced will be deposited through KOTO. The article also proposes that a federal law is passed for this purpose.[758]
2. Iraqi petroleum industry must be restructured for the purpose of encouraging private investment in accordance with Article 112(2) of the constitution, with a "fair role" for the Iraq National Oil Company, so the greatest revenue is obtained in a timely manner.[759]
3. KRG and IFG must manage current fields jointly so long as the KRG has proportionate representation on the Federal Oil and Gas Council and be a partner in the management of Iraq National Oil Company, consistent with Article 115 of the IC2005.
4. IFG must not carry out any petroleum operations in disputed territories without consent from the KRG until a referendum on the future of these areas takes place as per Article 140 of the IC2005.[760]

[757] Article 20 Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.
[758] Article 19, First Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.
[759] Article 19, Second Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.
[760] Article 19, Fourth Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.

5. If petroleum operations are carried out in the disputed territories in contradiction to Article 19, Fourth of the OGL, the matter will be dealt with according to the provisions of the OGL and Article 112(2) of the IFG 2005, once a decision on these territories re-joining the KRI is made through the process of Article 140 of the IC2005.[761]

These conditions could provide a platform for both governments to reach a settlement. What is certain is that the people of the KRI have a constitutional right to benefit from Iraqi petroleum. Although these conditions do not contradict the IC 2005, it nevertheless may take a long time to implement. For example, point four above refers to the settlement of disagreements regarding the disputed territories, which is a very divisive and controversial issue in its own right. Nearly twenty years after the adoption of the IC 2005, Iraq is no closer to resolving the disagreements over the disputed territories. Therefore, it looks highly unlikely that cooperation with federal government can be effective as the five points above have yet to be implemented.

In some federal systems such as Nigeria, revenues obtained from petroleum are distributed among the federal government (56%), the sub-national states (24%) and local government councils (20%).[762] These percentages are shared among the different layers of government and among localities on the basis of indices.[763] Revenue from petroleum exploitation in Iraq should follow a similar approach. The KRI should be allocated a percentage of national petroleum proceeds that is codified in law at both the federal and sub-national level. Alternatively, revenues obtained from petroleum exploitation in KRI could be treated separately, whereby the KRG collects the revenue

[761] Article 19, Fifth Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.
[762] Allocation of Revenue (Federation Account) Act 2014.
[763] Equality (equal shares to each state or locality) 40 percent; population 30 percent; social development needs 10 percent; land mass and terrain 10 percent; and internal revenue generation effort 10 percent.

and sends a percentage to Iraqi authorities for sovereign expenses[764] plus another percentage as contribution to the Iraqi national budget.

Attempts to reach a political agreement have been made for over a decade but these have either failed or not been honoured. The first agreement in February 2011 meant that the KRG and IFG evenly (50:50) shared revenue[765] from export of petroleum in the Kurdish region. Although the IFG and KRG did not enter into an explicit agreement in 2011, there was an understanding that revenue from exploitation of Kurdish oil would be shared. However, this did not address major issues such as ownership and management of these resources and who had the authority to enter into petroleum agreements. It has been suggested that the withdrawal of American military weakened the leverage of its diplomats,[766] who could no longer pressure the political elite in Iraq to reach consensus. Another agreement was reached in September 2012, which also failed. Two months later, the creation of the Dijla Force[767] threatened to spill over to civil war. The Kurds then aimed to export petroleum independently.[768] Turkey attempted to intervene with a proposal that revenues collected through export of Kurdish petroleum would be divided, 17% would go to the KRG and 83% to the Iraqi state.[769] The revenues were to be held in an escrow account at Halkbank

[764] Sovereign expenses are the expenses the Iraqi state incurs for the upkeep of the main offices and ministries in the country. For example, the offices of the Iraqi President, Prime Minister, Speaker of Parliament as well as the Supreme Court would fall under such expenses. Furthermore, ministries such as Defence, Foreign Affairs and Interior would also fall under such costs. The KRG is expected to pay a portion of the upkeep of these costs from the budget it is given. This is usually cut by the IFG with the proceeds sent to the KRG.
[765] The Iraqi Prime Minister of the day, Nouri Al-Maliki had stated in a number of statements that the signed Kurdish PSCs would be respected. Again, however, there was silence regarding a settlement as to what and future petroleum agreements between the KRG and potential investors could be facilitated.
[766] Mills (n 527).
[767] The Dijla Force was created by former Iraqi Prime Minister Nuri Al-Maliki to what the Iraqi government described as “maintaining security” in oil rich areas such as Kirkuk and Diyala. The Kurds saw this as a provocative move to take land and petroleum resources by force. In response, the Kurds sent their own military, the peshmerga, to the area.
[768] In May 2013, Turkey announced that it would facilitate the transport of Kurdish petroleum export without needing the consent of Baghdad.
[769] This arrangement, it was thought, would increase the Kurdish share from revenues, as it did not take into account the sovereign expenses Baghdad had been cutting from the Kurdish budget.

in Turkey. Baghdad rejected this outright stating that this was a sovereign issue in which Turkey had no say.

In January 2014, Baghdad made an offer to the Kurds.[770] The KRG countered by insisting that a separate account within the DFI be created. This offer was rejected by Baghdad,[771] and led to Baghdad cutting off KRI's share of the national budget in 2014. The last agreement came in December 2014, when the KRG agreed to export 250,000bpd together with 300,000bpd from the Kirkuk field on condition that these exports would flow through SOMO. In return the KRG would receive 17% of Iraq's national budget as its own regional budget.[772] Six months later, this agreement broke down with both the KRG and IFG citing that the other had not met its obligations as under the agreement.

4.17 Environment

Currently, there is little or no data available on how oil and gas operations have affected the KRI environment. There are no detailed studies as to how gas flaring, soil and water contamination, waste and hazardous materials from oil and gas operations have impacted the KRG environment. In fact, no clear agenda or policy exists to mitigate and safeguard against adverse effects of oil and gas operations on KRI environment.

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[770] This offer suggested that Baghdad would accept Kurdish export of petroleum so long as the KRG would abide by federal government conditions. These conditions dictated that SOMO would handle the sales and revenues passing through the Development Fund of Iraq (DFI), the source of all Iraqi petroleum sales.

[771] Kirk Sowell, 'Iraq Prime Minister Steps Down as the State is Fracturing' (*Petroleum Economist*2014) https://www.petroleum-economist.com/articles/politics-economics/middle-east/2014/iraqi-prime-minister-steps-down-as-state-is-fracturingaccessed on 23 January 2016.

[772] The 17% was based on estimates of Kurdish share of Iraq's total population, reflecting a fiscal arrangement set out in the IC 2005.

Although OGL permits the MNR minster to make regulation with respect to the environment,[773] there is little detail in the OGL determining how KRI should protect and mitigate adverse effects on the environment. Similarly, the Environmental Protection and Improvement in Kurdistan Region-Iraq Law[774] only refers to petroleum resources in one article,[775] which stipulates the Ministry of Environment[776] must coordinate with related governmental ministries and entities to establish rules and regulations to protect Kurdistan's environment from adverse effects of exploration, mining and petroleum activities.

Due to the lack of data, the KRG is not able to prioritise environmental concerns related to petroleum exploitation. However, the KRG is aware that it lacks the infrastructure to deal with daily problems such as general waste, solid waste, liquid waste, waste produced at camps and hazardous waste from petroleum operations. General waste facilities for example are very small in scale and number and there are no hazardous waste facilities.

Although the KRG has a zero-gas flaring policy,[777] the MNR allows IOCs to flare associated gas because the KRG does not have the capacity to capture the gas. Ultimately, IOCs are left with no choice but to flare the gas. The KRG must consider building gas treatment facilities in the future to limit gas flaring. Capturing associated gas is important for two reasons. First, the captured gas can be sold or reused in local and internationals markets. Second, from an environmental

[773] Article 53 Thirteenth (4) Oil and Gas Law of the Kurdistan Region – Iraq (No.28) 2007.
[774] Law No.(8) of 2008 Environmental Protection and Improvement in Kurdistan Region-Iraq
[775] Article 30 Law No.(8) of 2008 Environmental Protection and Improvement in Kurdistan Region-Iraq.
[776] The Ministry of Environment was downgraded in 2010 and is no longer a ministry. In its place the Kurdistan Environmental Protection and Improvement Board was established.
[777] When oil and gas resources are extracted from the subsoil and number of mixed, unwanted and associated gas is also extracted. Where no facilities are in place to treat these gases, the gas is burned in a controlled manner to release the gas so that pressure is not built up in the well.

viewpoint, gas flaring contributes to air pollution, which may adversely affect surface water, soil, eco-systems in the area and the environment in general. Pollution could also damage monuments and historical and archaeological sites.

The KRG should be more proactive in addressing environmental concerns and should commission as environmental survey by experts to determine the damage caused by petroleum operations. Only then can the KRG identify the environmental problems associated with petroleum operations and evaluate this for the purpose of getting IOCs to fund environmental projects for the purpose of preventing or limiting environmental damage.

In my opinion, there is not enough detail in legislation to highlight the potential environmental challenges that the KRI could face as a result of oil and gas exploitation. The KRG should amend the OGL to incorporate specific provisions relating to waste, pollution, gas capture, gas flaring and KRG infrastructure needed to be established to counter the adverse effects of petroleum operations on the KRI environment.

4.18 Recommendations

To remedy challenges facing the KRI legislative framework for petroleum governance several related issues must be considered together. For instance, corruption is a major impediment to development of the petroleum industry. To tackle corruption, KRG authorities and judiciary must implement and enforce anti-corruption provisions embedded in legislation. Such provisions should be detailed in amendments to OGL or in a specific law aiming to curb corruption in governance of

petroleum operations. Failure to do so will not correct current practice of squandering Kurdistan's oil and gas wealth.

It is imperative the KRG moves towards a more transparent system of petroleum governance, like the efforts undertaken in Lebanon as discussed above. Although implementation and enforcement of such legislation continues to be problematic in Lebanon, the country has nevertheless identified corruption and lack of transparency as an obstacle in the development of the country's oil and gas industry.

A full review of the current petroleum legislative framework for the purpose of identifying strengths and weaknesses must be carried out by a parliamentary committee, in conjunction with RCOG, MNR and experts from legal, petroleum and financial sectors. Consultations with the business community, academics, politicians and reputable institutions such as the World Bank should also take place.

A comprehensive legislative package is also required, followed by detailed regulations. Such a package should incorporate a revenue sharing law, a petroleum tax law, a petroleum anti-corruption and transparency law, a federal hydrocarbon law, a revised regional law and a state oil company law. This package will underpin the legal framework of the petroleum sector in the KRI and address the most crucial problems.

The KRG must adopt clear and realistic policies so that it can develop the petroleum sector. This requires better planning and strategic overview of the petroleum sector at both national and

subnational levels. KRG policies have often lacked the foresight of changing market conditions, political and social unrest and developments in the petroleum sector. Whatever policy the KRG wishes to pursue must be considered alongside contingencies. The formulation process of policy should see MNR and RCOG working closely together, setting up a specialist joint policy unit which includes petroleum experts, lawyers and politicians. Furthermore, as a matter of policy, the KRG should establish petroleum specific capacity building initiatives to train legal practitioners, judges and court officials in petroleum law.

The KRG should continue to embrace this approach as the fixed content and individually negotiated approaches are not appropriate. Currently, the KRG does not have the capacity to codify necessary provisions of petroleum operational governance in legislation but this should not mean that it could not make steps towards remedying this problem. The current Kurdistan Parliament is not sufficiently competent to discuss, draft and enact petroleum legislation based on sound rules for the governance of petroleum exploitation. Similarly, the KRG does not have the necessary experts to obtain favourable terms when negotiating with IOCs. However, should the KRG wish to do so, a comprehensive training programme alongside transparency provisions in legislation should be established to rectify the issue.

As discussed earlier in the chapter, the KRG currently employs a hybrid approach to securing investment in petroleum operations. However, for the hybrid approach to be successful, the KRG must employ required numbers of qualified personnel to regulate petroleum operations. By utilizing the hybrid approach, the KRG can fix the most important terms in legislation. The current system grants the MNR great flexibility as it has the discretion to issue orders and decrees to fill

the gaps of the OGL. Whist the MNR should continue its duties as a regulator, it is nevertheless important for legislation to detail the following:

- Initial durations and possible extensions for exploration and production licenses.
- Licenses for all stages of petroleum operations as well as a petroleum contracts should not be awarded until the RCOG has approved such licences.
- A proposed work programme as part of the bidding stage needs to be evaluated and decided upon by the RCOG.
- Once the IOC has won the bid and begun operations on the ground, it should draft a work programme for a specific stage or time period of petroleum operations and send the same for MNR approval.
- A prescribed rental fee for the land being used by the IOC.
- The IOC must have an office or centre of operations for all activities it carries out in the KRI.
- The contractor must use local goods and services where appropriate in carrying out petroleum operations.
- Upon securing a license or a petroleum contract at any stage of operations, the IOC must submit a detailed petroleum training program for the benefit of local citizens.

This would leave issues such as determining size of exploration programmes and extent of state participation open for negotiation.

In a climate of political volatility and weak rule of law, unilateral MNR negotiations with potential investors could have a few pitfalls. First, power to award lucrative contracts could lead to

corruption if such power is vested in one person or select few. Second, if there are no bidding rounds, there is less competition, which may not result in obtaining best results for the region. Finally, bidding rounds would showcase technical expertise, capability and experience of the investor. The KRI would then be able to choose what it deems to be the best option.

It is submitted that the most suitable bidding system for the KRI is semi-discretionary bidding system, as KRG would have discretionary control on setting criteria and assigning points to each criterion. Companies would compete to obtain the highest number of points possible. Clarity of award criteria improves transparency and objectivity of the award and allows bidders to structure their offers accordingly.

Efforts to obtain exploration licences should be biddable based on work programmes submitted. Companies would submit work programmes which define the work, such as amount and type of seismic data to be acquired and number of exploration wells to be drilled. A monetary value is normally assigned to each activity. The standard monetary value of each unit of work may be defined in the bidding procedure to improve the transparency of the bid evaluation. Where work programs are the determining factor in license awards, investors have an incentive to bid more than they would otherwise. Successful bids may be much larger than the optimal bid from a technical point of view. The competitive nature of bidding tends to push the value of the winning bid higher.

Another reason why the KRG must embrace the hybrid system is that the current approach allows individuals to wield great power in determining important issues in petroleum governance. As

explained, the Minister of Natural Resources has wide ranging discretionary powers, including quasi-judicial functions. Whilst ministerial discretion may be suitable in some areas, it is not appropriate when settling disputes between companies. This role is judicial in nature and as such should be left for law courts to determine. RCOG, together with the KRI parliament, needs to be more proactive in holding the MNR to account. Such oversight will need coordination and consultation with KRG institutions, appropriate parliamentary committees on energy, economy and the courts.

Thee KRG needs to take the subject of transparency much more seriously as petroleum exploitation is not only point of contention between Baghdad and Erbil but manifests itself between the public and the two governments. KRI public believe there is one rule for the general public who are at the mercy of the law and one rule for the political elites and powerful leaders who are considered above the law. Public mistrust of the MNR is of particular concern. The KRI Parliament should make amendments to the OGL by incorporating transparency provisions that task the RCOG and MNR to publish records of oil exports and revenues obtained after audits have been carried out. Regarding KRI's petroleum taxation system, it is evident that the current system has not worked. There is conflict between the OGL, which states that all companies are liable to pay tax and the PSCs, which exempt them from paying tax. The OGL does not stipulate how tax should be calculated.[778] The law has largely been ignored and only relied upon whenever the KRG has chosen to employ it. Although IOCs have made advanced payments to the KRG, not all payments have been documented or disclosed, meaning that official channels for taxing companies operating in the petroleum sector have been bypassed. Due to political pressures of transparency

[778] Only Royalties are calculated at Article 41, First of OGL as "The volume of Petroleum constituting the Royalty shall be calculated by applying the percentage specified in the Petroleum Contract".

and anti-corruption, the KRI should employ detailed petroleum tax legislation. It may be too late to retrospectively tax those IOCs that have previously faced the problem of having tax-free contracts but going forward new legislation could exempt old contracts and give new direction for tax going forward.

Going forward, the KRG cannot manage petroleum affairs in a unilateral manner. Unilateral actions, whether on part of the KRG or the federal government, has been the main cause of Iraq failing to enact a hydrocarbon law. Both sides must work closely together to reach an agreement as to how to manage Kurdistan's petroleum resources and how to share proceeds from petroleum exploitation. The starting point for cooperation should begin by recognising that revenues obtained through petroleum operations in Kurdish territories should be dealt with at source and not forwarded to the IFG. If revenue is dealt with in this manner, the KRG must be transparent and open as to its production rates, operational costs and how much it collects as total revenue. It can then take its share (according to an agreed percentage with the IFG) and forward any remaining balance to the IFG. This could resolve the issue of KRG mistrust of IFG and may result in Baghdad receiving a share of what it believes to be Iraqi oil.

4.19 Conclusion

KRG governance of petroleum operations faces difficult economic, legal, regulatory, policy and institutional challenges.[779]Discussions in this chapter have illustrated how challenges in the

[779] Sibel Kulaksiz and others, 'Kurdistan Region of Iraq: Reforming The Economy For Shared Prosperity And Protecting The Vulnerable' (2016) World bank Group Working Paperhttp://documents1.worldbank.org/curated/en/992661468195837755/pdf/106109-WP-P159972-KRG-Reform-Roadmap-PUBLIC-v2-Executive-Summary.pdf accessed on 2 February 2017.

legislative framework have hindered development of the energy sector in the region. The current KRI legislative system is not reactive enough to address such challenges as few laws are enacted due to lack of political will and political instability. The OGL and other legal instruments have not been used effectively to develop petroleum resources in the region. Provisions of the OGL have not been implemented or have been ignored, including the establishment of five institutions. No substantive discussions to promulgate new legislation to compliment or amend current legislation has taken place, illustrating that legislation could play a bigger role.[780] However, legislation and comprehensive regulation alone will not solve legal problems in the petroleum industry.

To determine whether OGL is a suitable law for the KRI, the KRG's objectives as highlighted previously in the chapter need to be borne in mind. KRG struggles to export oil as the political environment in which they operate, is heavily reliant on sales through the port of Ceyhan in Turkey. The KRG has been unable to reach its objective of self-sufficiency via petroleum exploitation.[781] Much of the revenue received from petroleum exploitation was squandered. It was either invested in unnecessary or ill-conceived projects, managed poorly or fell victim to corruption. KRI plans were based on the premise of high oil prices, which brought considerable oil revenue to the region. However, a drastic drop[782] in oil prices, rise of the Islamic State group,

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[780] The KRI Parliament was suspended for just under two years between 2015 and 2017. During this period no sessions were held and no laws promulgated. Since the end of 2017, although parliamentary sessions have been conducted, there have been no constructive steps to amend the OGL, promulgate new legislation to complement it or begin discussions on the Kurdish Constitution.

[781] KRG leaders had announced KRG's vision was to follow in the footsteps of Dubai to create an economically powerful and prosperous region. Dubai and UAE invested their revenue from petroleum heavily into infrastructure and building a system that was economically viable. When it became apparent that reliance on petroleum resources would not be sustainable, UAE leaders changed policies, strategy and laws.

[782] The price of oil over the past few years has fluctuated spectacularly ranging from $100pb to under $30pb from 2011 to 2017.

the aftermath of the Kurdish referendum and internal Kurdish politics has left the KRI in a difficult economic position.

KRI lacks an adequate institutional structure [783] to make far sighted and pragmatic policies based on effective checks and balances. This chapter has highlighted the low technical and expert capabilities of KRG and its institutions. In addition, political interference in KRG governance of oil and gas together with KRG being unable to manage expectations of the public has resulted in the KRI public viewing oil and gas governance as contemptuous and suspicious.

[783] Auzer (n 506) 216.

CHAPTER FIVE: THE CONTRACTUAL FRAMEWORK

The primary aim of this chapter is to analyse the KRI petroleum contractual framework for the purpose of highlighting main provisions, identifying flaws, assessing strengths and weaknesses and presenting recommendations for improving said framework. Given the objectives of the KRG and IOCs discussed in previous chapters, this chapter aims to examine whether the petroleum contractual framework in the KRI is fit for purpose. The KRG has not published all PSCs it has concluded with IOCs. Confidentiality clauses[784] in these contracts prohibit detailed discussions of contracts not published and because each contract has been individually negotiated, it is unknown how the published contracts compare to the unpublished ones. Therefore, the focal point of analysis in this chapter will be the Model PSC.[785]

Discussions in this chapter will begin by showcasing why contractual frameworks are important in the governance of petroleum operations. A brief overview of how contracts have evolved in the petroleum industry will be highlighted before identifying the main elements of petroleum contracts and detailing the main types of petroleum contracts available to host governments and IOCs. Due to the fact the KRG has chosen PSCs as its contractual model of choice, PSCs will be examined in much greater detail than other contractual forms. Analysis will also focus on why the KRG has opted to use PSCs as its contract of choice and whether this model is suitable for KRI in pursuing

[784] Confidentiality clauses in petroleum contracts serve to protect data, records and information relating to petroleum operations as well as details of the petroleum contract itself. The parties agree not to disclose any information or data within the petroleum contract or as part of petroleum operations for the term of the contract without consent of the other party.

[785] The model PSC is a template that the KRG uses as a canvas from which it negotiates and finalizes PSCs. See Kurdistan Regional Government, 'Model Production Sharing Contract' (2007) Kurdistan Regional government http://mnr.krg.org/images/pdfs/KRG_Model_PSC_production_sharing_contract_20071112.pdf accessed 3 December 2018.

its petroleum policies. I will then focus of Model PSC to examine the strengths and weaknesses of its provisions and where appropriate make recommendations for amendments to said model. Throughout this chapter I will draw on the experience of other jurisdictions for the purpose of putting the Kurdish contractual framework in context to identify the strengths of the Kurdish contractual regime and offer recommendations as to how it can be improved.

5.1 Contractual Framework

Petroleum contracts are widely used as a way of structuring the relationship and legal arrangement between parties, namely a state (or entity acting on behalf of the state) and IOC. As the source and evidence of agreement, contracts record and document agreed terms and conditions for the purpose of safeguarding the interests of the parties through legally binding written provisions. Contracts aim to provide a clear outline of each party's legal rights, obligations and liabilities throughout the term of the contract. Commercially, contracts can provide a roadmap for the outcome of the project, which can include agreement on a number of issues[786] including financial provisions such as costs and profit sharing. Expectations and obligations of the parties are set out to mitigate risk of disputes, which may hinder their objectives.

5.2 History of Petroleum Agreements in Iraq

During the 20th Century, the geo-political world order changed from colonial dominance by European countries in early 1900s to the postcolonial world, which ushered in newly formed independent sovereign states. The shift towards an international economic order in 1970s aimed

[786] Other issues include but are not limited to terms of payment, measuring performance of either or both of the parties, management of the project, auditing, insurance, price of goods and services, use of sub-contractors and financial penalties for non-performance of a task.

to restore balance, pride, equality, and sovereignty to these independent states. Consequently, the financial markets changed as new concepts emerged for trade and investment, affecting the way states and multinational companies worked with each other. One of the driving forces behind this change in the economic order was to restore balance of power between western world and developing world generally and trans-national cooperation more specifically.

The evolution of international petroleum agreements is closely linked with the political evolution of the relationships between industrialised (developed nations) and developing countries. IOCs from industrialised nations have increased both the number of operations in developing countries as well as the countries in which they operate. This expansion has been the result of recognition by petroleum companies that in order to carry out petroleum operations in developing countries, there must be a degree of flexibility on part of the IOC to enter into different types of petroleum agreements.[787]

Political relationships between states, IOCs and international financial markets have also heavily influenced petroleum contracts over time. This has led to the construction of a number of different contractual models, namely Modern Concession Contracts (MCC), PSCs, Risk Services Contracts (RSC), Joint Ventures (JV) and hybrids contracts. The structures of petroleum contracts have evolved for a number of reasons including political symbolism, a need to accommodate political agendas of governments and to adapt to petroleum price fluctuations.[788] However, the fundamental

[787] Zhiguo Gao, *International Petroleum Contracts: Current Trends and New Directions* (Kluwer Law International 1994) 68.
[788] During the years where petroleum production was low and the price of oil was high (especially 1979/1980), IOCs were locked in fierce competition with one another to secure a petroleum contract. In some cases IOCs were forced to accept very harsh terms and conditions.

reason for the evolution of petroleum contractual structures has been the pursuit of finding a way to balance the interests (which are often competing) of the state and IOCs.

With respect to Iraq, exploration and production of petroleum formally began in the 1920s where concessions were granted in the aftermath of World War I. However, in 1925 following the promulgation of Iraq's first constitution, a 75-year concession was granted to the Turkish Petroleum Company (TPC),[789] covering most of Iraqi land including the two biggest provinces, Baghdad and Mosul but excluding the third biggest province Basra.[790] With significant discoveries of oil in 1927 in Baba GurGur, Kirkuk, Iraq continued to draw international attention to its vast oil wealth as American companies now looked to exploit Iraqi petroleum.[791] The TPC was renamed as the Iraq Petroleum Company, securing another concession on 24th March 1931 in Iraqi territory that covered the areas east of the Tigris River. The Iraq Petroleum Company continued its lucrative petroleum activities in Iraq until 1958, when King Faisal II was killed in a coup that changed Iraq from a monarchy to a republic. In 1961, Iraq expropriated 95% of Iraq Petroleum Company shares under Public Law 80.[792] The Iraqi National Oil Company was created to develop the assets seized from the Iraq Petroleum Company. Nationalisation of petroleum continued steadily until 1972

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[789] The post-war Iraqi government awarded a concession to the Turkish Petroleum Company (TPC) on 24th March 1925. The TPC was established in London by an Armenian petroleum investor called Gulbenkian. Here it is important to stress the importance of political and economic influences in petroleum operations. After the Turkish Petroleum Company was founded in 1914, it soon became apparent that the company would need to be restructured to factor in the interests of differing nations (not Iraq's). The initial shareholding of the TPC was:
Anglo-Persian Oil Company 50% share
Anglo Saxon Oil Company (Royal Dutch Shell) 25% share
Deutsche Bank 25% share (in 1920 after World War I, shareholding of Deutsche Bank was transferred to the Campagnie Francaise des Petroles).

[790] Jaffe(n 131) 18.

[791] US companies were excluded by British and French governments from participating in the petroleum exploitation in Iraq or from obtaining a share of the TPC. However, after considerable pressure by the US, France and Britain agreed to transfer 23.75% share owned by Anglo-Persian Oil Company to a US group of petroleum companies. This group soon reduced itself to two companies, Standard Oil Company of New Jersey and the Socony-Vacuum Oil Company each with a share of 11.875% of the TPC.

[792] Toyin Falola and Ann Genova, *The Politics of the Global Oil Industry* (Praeger Publishers 2005) 182.

when the Iraqi government completely nationalised the Iraq Petroleum Company and opened up Iraq's oil wealth to interests from French and Russian companies.

In the aftermath of the 1974 UN Charter of Economic Rights and Duties of States,[793] host governments were in a stronger position to exercise their sovereignty over petroleum resources. Iraq was no exception. Consecutive Iraqi governments continued the policy of complete state control of petroleum governance. In the aftermath of the 2003 Iraq War, the Iraqi petroleum market was reopened to IOCs. Consequently, the IFG began to award risk service contracts whilst in the Kurdish north, PSCs were preferred.

5.3 Objectives and Common Core Provisions of Petroleum Contracts

As there are different types of petroleum contracts, the conclusion that has been drawn is that no perfect contractual model exists.[794] However, depending on requirements of the state and the IOC for a specific project, different contractual models could be favoured to realise each party's objectives. Regardless of the types of contractual model, there are a number of key considerations that the state must bear in mind including but not limited to:

- Applicable Law.
- Attracting investment from petroleum companies.
- Maintaining a high degree of control and management over petroleum resources in the country.

[793] Article II of Chapter II of UN Charter: "Every state has and shall freely exercise full and permanent sovereignty including possession, use and disposal over all of its wealth and natural resources.
[794] Gao (n 787) 143.

- Maximising economic and financial benefits from petroleum operations and petroleum produced.
- Reaching but not exceeding the Maximum Efficient Production Rate (MEPR).[795]
- Training and development of local expertise.
- Meeting domestic consumption and ensuring security of supply to the domestic market.
- Attracting companies in which the government has confidence.[796]
- Environmental considerations.
- Social considerations and objectives.[797]
- Procurement of local goods and services.
- Technology transfer/ Research and Development.
- Decommissioning.

However, the most fundamental issues for petroleum companies are financial in nature as they seek to maximise profits from petroleum projects. IOCs attempt to retain as much flexibility and control over petroleum operations, seeking contracts in areas with proven reserves where prospect of finding commercially viable oil wells are high. The state and the IOC have distinct objectives as well as a common overarching goal. State concerns are much broader than IOCs, which is predominantly profit-driven. This in itself can create tension between the contracting parties as

[795] The MEPR is the maximum sustainable daily petroleum extraction rate from a petroleum field, which will aloe economic development and depletion of the said petroleum field without detriment to recovery of the petroleum.
[796] This could vary depending on the country. For some countries, the most important factor is the revenue generated from the life of the contract. Others, look to reputable IOCs as they are considered more competent and have a proven track record around the world. In some countries, familiarity and previous working relations with a petroleum company may be a driving force for specific petroleum companies being awarded countries. For example in Trinidad, even though Talisman submitted a higher bid than rivals to secure a contract, BHP was awarded the contract because the government was familiar and comfortable with the company.
[797] Landowners and local populace feel they are entitled to greater share of oil and gas where they are. Petroleum activities can affect tribalism in an area, infrastructure or lack of, upsetting social dynamics of an area e.g. one tribe being favoured ahead of another tribe for employment etc. using land for oil and gas.

IOCs are concerned about losing control over their investment and governments are worried about the loss of control over investors.[798]

5.3.1 Common Core Provisions

Regardless of the contractual model employed, there are several key issues that should be addressed in any petroleum contract, which may be referred to as "common core" provisions. These provisions form the foundations of all contractual models and include but are not limited to applicable law, contract area, duration, area rentals, relinquishment provisions, commercial discovery, work programmes and budgets, bonuses, taxation, local content, environment, insurance provisions, confidentiality provisions, dispute resolution, termination and remedies for breach of contract. Only the most significant provisions from the list above will be discussed in greater detail below.

5.3.2 Relinquishment

Relinquishment[799] is a feature of all modern contractual models at the exploration phase, providing for two types of surrender: mandatory and optional. Under mandatory provisions the IOC must surrender an agreed percentage or all of the contract area after specific periods of time, which can be negotiated between the parties at intervals (as practiced in Indonesia)[800] or governed by a mandatory program[801] where timelines are specifically set.[802] Optional relinquishment (also

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[798] Gao (n 787) 67.

[799] Relinquishment provisions in petroleum contracts are whereby the contractor returns part or all of the predefined area of petroleum operations to the lessor, usually a host government, under the terms and conditions of a contract signed between the parties.

[800] Gao (n 787) 75.

[801] Hossain (n 482) 216.

[802] For example, Clause 5.2 of the Nigerian Model Production Sharing Contract states that "the following relinquishment provisions shall apply:

(a) 25% of the Contract Area shall be relinquished at the end of Phase I….

known as voluntary relinquishment) however, permits IOCs to surrender parts of the contract area voluntarily.

Relinquishment provisions are incorporated into petroleum contracts so petroleum companies can concentrate on parts of the contract area where petroleum deposits are found in commercial quantities. The rationale for incorporating relinquishment provisions into petroleum contracts differs depending on whether relinquishment is mandatory or voluntary. Where mandatory relinquishment provisions are concerned, the state determines what percentage of the contract area has to be relinquished by a set timeframe. The purpose is for the IOC to carryout seismic and other exploration activities to determine the most potentially lucrative parts of a contract area. The IOC must work efficiently to explore the whole contract area, identifying the most lucrative parts to develop, and the least lucrative, which it would determine as areas to surrender under relinquishment provisions. Furthermore, mandatory relinquishment provisions were developed in response to extensive practice of multinationals sitting on concessions in many petroleum-producing countries.[803] Voluntary relinquishment provisions however are regarded as investor friendly tools that are utilized by the state to give the IOC a right to give up or relinquish parts of land.

5.3.3 Commercial Discovery

Commercial discovery is an important milestone in a petroleum project, as a contract area cannot be developed until commerciality has been declared. Typically, the process begins with the

(b) A further 25% of the Contract Area shall be relinquished upon converting to an Oil Mining Lease.

[803] After the new international economic order commenced, petroleum states were eager to introduce relinquishment provisions so that petroleum companies did not continue to sit on concessions.

petroleum company informing the state that petroleum resources have been found. If the discovered petroleum is considered significant, an appraisal work program will be presented to the state for approval. Thereafter, the state or the petroleum company, depending on the contractual model or the way commerciality is defined (if at all) and the prescribed decision-making process, may declare commercial discovery. The declaration of commerciality signals the end of the exploration phase and the beginning of the development phase.

5.3.4 Work Programmes and Budgets

All operations during the different phases of the petroleum project will be carried out in accordance with an approved work programme and budget. The IOC or the operator[804] prepares work programmes and budgets and submits to the state for approval (or in some cases a management committee). These documents present minimum work that must be carried out and the minimum financial expenditure required at each stage of the project cycle. Some contracts allow IOCs to carry forward their financial and work obligations, meaning if they have overspent or carried out more work than required at one phase of the project cycle, they can carry the additional money spent and additional work carried out to the next stage of operations. In principle, the same process could work for under-expenditure and carrying out less work than required but countries are typically strict on this issue as they want the IOC to perform the tasks in an efficient manner and spend the required sums of money to increase the chances of the project's success.

[804] For example, in Risk Service Contracts, as the work explains later, the state party can takeover the operatorship from the production phase. It is also possible (but rare) for IOCs to subcontract the operatorship functions and duties to another company.

Usually, carrying forward only applies to over expenditure but there is a link between minimum expenditure and minimum work obligations in that money and work carried forward may affect one another. It may be the case that the IOC carries out all the work required but with less money than initially required. In some cases, if a IOC performs less work, or does not meet minimum expenditure thresholds required, they may be permitted to carry forward any work that has not been performed in the previous stage[805], or any minimum expenditure that has not been spent in the previous phase of the project. Work programs and budgets can vary drastically depending on the stage of petroleum operations, the contractual model employed and the country where the petroleum operations are carried out.[806]

5.3.5 Royalty

Whilst royalty payments are a feature in differing contractual models, the incorporation of royalties in PSCs is controversial. It has been argued that royalties should not be paid in a PSC[807] because the contractor is not entitled to petroleum as an automatic right, rather it is paid in petroleum from cost oil and a portion of profit oil. Royalty payments have been defined in various ways[808] but the traditional principle is that royalties are a payment made by a petroleum company to the state for the right to access, own and deplete the natural resource of the state.[809] This definition works in

[805] For example the Indonesian PSC allows the contractor to carry forward any work that it has not carried out in one stage and add it to the work it is obligated to carry out at the next stage.
[806] For example crude oil in situ may be much easier to extract in one country when compared to another. Similarly, geological, technical and environmental issues may mean that the cost of petroleum extraction in one country is generally higher than another.
[807] Carole Nakhle, 'Petroleum Fiscal Regimes: Evolution and Challenges ' in Phillip Daniel, Keen Michael and McPherson Charles (eds), *The Taxation of Petroleum and Minerals: Principles Problems and Practice* (Routledge 2010).
[808] Hossain (n 482) 203 defines royalty as the "delivery in kind of a specified part of the resources extracted to the ultimate owner of mineral rights, which in most cases is the state. However, Bernard Taverne defines Royalty as the most basic and oldest from of taxation where the state receives payment in cash or in kind from the licensee. See Taverne, *Petroleum, Industry and Governments: A Study of Involvement of Industry and Governments in Exploring for and Producing Petroleum.*
[809] Hossain (n 482) 203.

harmony with concessions and licensing regimes as the concessionaire/licensee is entitled to the petroleum from the point of production. Therefore, if the traditional definition is applied, it is not appropriate to use royalties in PSCs. Instead, it is argued, royalties should be utilized as a form of tax levied on the petroleum company or as another form of financial payment.

In fact, the earliest royalties were paid in cash[810] in concessions contracts but with the development of other contractual models, royalties in the modern era can be paid in cash or in kind. Royalties can be charged on production levels or based on an *advalorem* basis based on the price of petroleum.[811] The main advantage of royalties for host governments is that irrespective of whether the contractor/concessionaire makes a profit, the state is guaranteed payment as compensation for the depletion of its resources. In addition, royalties provide immediate payments to the state as soon as production begins until the end of the petroleum field's life cycle. That said, because royalties are levied prior to profits, they could be a marginal cost to IOCs. The higher the royalty rate, the greater the cost to the petroleum company, meaning that significantly high royalty rates may result in unprofitability of a field for the petroleum company, which may ultimately lead to abandonment. Such a scenario heavily affects petroleum fields that are considered marginal,[812] as the petroleum company may not invest its resources and expertise if there is a high risk of not being able to profit from the project.

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[810] As an example of one of the early concessions contacts, the Turkish Petroleum Company Concession of 1925 in Iraq provided for payment by the concessionaire to the state in form of a fixed four-shilling fee.
[811] Taverne (n 467) 130.
[812] In consideration of the technical and economic conditions at the time, marginal petroleum fields refer to petroleum fields that may not produce enough net income to cover the costs of the petroleum operations and ultimately make a profit (or such profits are so low that it is not considered a worthwhile project).

To add a degree of flexibility and counter fixed royalty payments, some petroleum contracts have incorporated royalties based on a sliding scale into their contract. The premise is that the higher the production volume then the higher rate of royalty can be charged. This would protect smaller and marginal fields from the pitfalls of fixed royalty payments, which may have disastrous financial implications for the petroleum company. However, sliding scale payments may cause problems of their own as petroleum companies may not increase production so that they remain within the threshold of production levels linked with royalty payments.

As Table 4.1 shows, in all the contractual arrangements above except in modern concessions, the IOC is classified as a contractor. Risk is predominantly borne by IOCs and profit-sharing mechanisms attempt to be heavily in favour of the state. Managerial control of petroleum operations varies but is usually in the hands of the state in theory but in practice, it is the IOC that spearheads and carries out the day to day operational tasks of the project with oversight being provided by the government.

5.4 Types of Petroleum Contracts

Having identified common core provisions of petroleum contracts, discussions in this section focus on the unique characteristics of each contractual model. Table 4.2 illustrates the breakdown of the types of petroleum contract used throughout the world. As can be seen, the most popular petroleum contracts are concession contracts and PSCs. However, the trend over the past decades has seen more countries embracing the PSC, Joint Venture and Hybrid models.[813] Discussions in this section will focus on these five contractual models. Whilst there are variations of each of these

[813] Gao (n 787) 227.

contracts in different countries, there is a general set of standard provisions of the contractual models, which are outlined below.

The advantages and disadvantages of different contractual models will be presented from the point of view of a developing country because in the current international order Iraq is deemed a developing country by international organisations such as the United Nations.[814] Discussion and analysis of the positive and negative features of the contractual models will assist in identifying the most appropriate model for the KRI.

5.4.1 Concessions

Concession contracts were introduced in the early 1900s with terms of the contracts generally advantageous for IOCs from major world powers of the day.[815] Traditionally, the duration of these contracts was lengthy, ranging between 50-100 years. Early concessions contracts were first used in the United States and derived from contracts used in the mining industry. The three core elements of such contracts were:

1. Land owner (in the case of the United States) or the state would award a license for exclusive exploration and production rights in a specific area for a specific duration with the possibility to extend the duration.
2. The concessionaire would pay a royalty (or "rental" in case of earliest concession contracts) corresponding to a fractional share of the production payable in cash or in kind to the landowner.

[814] United Nations, 'World Economic Situation And Prospects' (*UN.org,* 2014) https://www.un.org/en/development/desa/policy/wesp/wesp_current/wesp2014.pdf accessed 15 May 2016.
[815] These contracts were predominantly one-sided in favour of IOCs against resource-rich nations that were dependencies, colonies or protectorates of empires and nation states.

3. The concessionaire has an obligation to carry out petroleum operations as soon as practicable, without undue delay, or otherwise the lease/contract could be terminated.

IOCs and newly established sovereign states recognised that the traditional concessions model had to be amended to balance the interests of the parties as states that had a colonial past were no longer content with the structure of such contracts. Although structured similarly to old concession contracts, the terms of MCCs are more favourable to the state.[816] Such contracts often grant IOCs exclusive rights to explore, develop, sell and export petroleum from specified parcels of land for a fixed period of time. IOCs offer bids for licenses to such rights. In short, the IOC bears all the risks of the project but enjoys operational freedom with little or no host government input. The IOC will typically have operational control and management of the project, receiving financial benefits to produce petroleum. In return, the state receives a number of financial sums as compensation.[817]

There are distinctive features of the MCC. The IOC enjoys the legal status of "concessionaire"[818] and is responsible for all operations. All risks associated with the contract including loss of the investment (in case of non-commercial discovery) rest with the concessionaire. The state retains title to petroleum while petroleum resources are in situ. However, title passes to the concessionaire

[816] In fact in some cases the actual contract may be labelled something completely different as the term concession implies rights have been conceded or given away. Terms such as exploration and production contract/agreement may be favoured instead.
[817] Article 2.2 of the Model Concessions Contract of Brazil 2002 for example states that "The Concessionaire shall always exclusively assume all costs and risks related to the performance of the Operations and its consequences, and shall receive in return, only and exclusively, the ownership of the Oil and Natural Gas that will be effectively produced and received by it at the Production Metering Point, pursuant to this Agreement, being subject to the taxes and charges and financial compensation as set out in Annex VI……according to the applicable Brazilian legislation."
[818] A concessionaire is an individual or a company that conducts business operations on premises belonging to another under the terms of a concession. The concessionaire typically has proprietary right to production of petroleum at the point of extraction at the wellhead.

once petroleum is extracted (usually at the well-head).[819] Once petroleum is produced,[820] title is transferred, and the state receives payments in return. These may, *inter alia,* include royalties, applicable taxes, and bonus payments at different stages of the contract. For example, upon execution of the contract, a signature bonus may be triggered, during the appraisal and development phase environmental taxes may be payable and at the production phase, the IOC may be required to pay production bonuses. Typically, the state does not have access to production, unless the expressly stipulated in the contract.[821]

MCCs offer a few advantages for the state. Primarily, host governments of developing countries find MCCs easier to manage as the state has fewer duties and is less involved in petroleum operations whereas the concessionaire is ultimately responsible for the project. A typical concessions contract incorporates few control mechanisms that would allow the state to have input in the management of petroleum projects. For instance, when compared to PSCs where management committees (incorporating state representatives) are established to oversee petroleum operations, such committees or managerial authority are rare in MCCs.[822] The state monitors and approves plans and programmes and can send in its own inspectors. Provided that the state has entered into a contract with a competent and reliable concessionaire, the state benefits from the experience and expertise of the concessionaire without heavy reliance on its own local workforce.

[819] For example, the Model Concessions Contract of Brazil at Article 2.3 states "Oil and Natural Gas Deposits which exist in the Brazilian national territory belong to the Federal Government, in accordance with Article 3 of the Petroleum Law. The Concessionaire shall only own the Oil and Natural Gas, which are actually produced and received by it at the Production Metering Point, pursuant to paragraph 2.2."
[820] If production is obtained, the state receives a royalty based upon the value of the petroleum produced. A royalty percentage may also be paid based upon levels of production or profitability of said petroleum sold.
[821] Such stipulations could include obligations for the IOC to sell some of the production in the domestic market or if provisions allow a national oil company or the state to purchase production. Furthermore, the contract could provide an option for the state to join in the petroleum operations once the project has reached the production phase.
[822] An example of management committees existing in concession contracts can be seen in Namibia but this an exception to the trends seen across the world. See Namibian Model Modern Concessions Contract.

Conversely, one of the main disadvantages of MCCs from the point of view of developing countries is the political symbolism associated with this contractual structure. States that have a colonial past, which many developing countries do, are reluctant to accept IOC ownership of petroleum resources. Concessions give IOCs right of ownership over petroleum from the moment of production, signifying the state's approval for foreign entities to own the nations resources. Thus, the image and message that is projected is one where the IOC dominates as the concessionaire takes the petroleum resources of the state. This is considered by developing countries as a step back to the colonial era, which is unacceptable to many countries. Developed countries that employ the concessions/licensing model such as the United Kingdom do not have these concerns as they do not have the same historical grievances.

Similarly, the term concession derives from the word to concede. Against the backdrop of a country that has been under colonial dominations or that has had dependency status, developing countries do not want to use a legal arrangement that is based on conceding the nation's wealth to foreign or private entities as this may trigger political sensitivities and resentment in the national collective memory.

5.4.2 Risk Service Contracts

In RSCs the IOC is paid a fee in cash for services rendered, typically covering costs and allowing a margin of profit. In this arrangement, the IOC acts as a 'contractor', meaning that it does not have a proprietary right to petroleum. Ownership of petroleum belongs to the state and the IOC is not entitled to receive petroleum produced.

If commerciality is not declared, the IOC bears all the financial costs associated with the exploration phase. If commerciality is declared however, the IOC is reimbursed and remunerated for the work carried out in cash. In some cases, the state may offer the IOC an option to participate in the production phase of the project, tasking the IOC with work that falls under the remit of the operator. However, a unique feature of the RSC is that once the production phase begins, the state (usually through a national oil company) takes over operations. The state ousts the IOC and becomes the operator at the production phase and pays for all costs associated with the production phase.

Although contractors are typically paid in cash, a variation of RSCs, known as a buy back contracts, allows the contractor to be paid in petroleum produced. In this arrangement, a contractor is reimbursed for costs and compensated for services rendered via a long-term sales agreement. The terms of this sales agreement allows the contactor to buy back the production at a discounted rate over a lengthy period of time. The most notorious example of this arrangement is the Iranian buy back model.[823] However, a buy back option in a pure RSC (such as the Brazilian RSCs) does not work to reimburse and remunerate the IOC but acts as a sales contract, giving IOCs access to petroleum.

The main advantage of this arrangement is that this type of contract is considered less complex as the contractor is not involved in all the phases of the petroleum project as the state takes over operational control at the production phase. Payment by the state to the contractor is made at a predetermined rate for services rendered. Although the RSC model provides host states with great

[823] See for example M. Me, 'The Iranian Buyback Model and its Efficiency in the International Petroleum Market' (2009) 7 OGEL 25 www.ogel/article.asp?key=2856 accessed on 17 May 2017.

managerial control, particularly at the production phase, it is the least favoured model by IOCs for a number of reasons. First, the IOC acts a contractor, which is considered as a downgrade when compared to the status of a concessionaire as already explained. The only way that title passes is if it buys back petroleum from the state. Second, the IOC loses operational and management authority at the production phase of the project. Finally, the IOC is paid in cash (unless it enters into a buy back contract or provisions in the contract stipulate otherwise) and is not given access to the petroleum produced.

5.4.3 PSCs

PSCs are particularly common in Middle Eastern, African and Asian countries such as Iraq (via KRI), Algeria Indonesia, Thailand, and India. The PSC concept was first introduced to the petroleum industry in Indonesia in the mid-1960s, where the Indonesian government created a new contractual framework for the purposes of exploiting petroleum resources in the country.

There is no universal definition of PSCs but nevertheless there is a common understanding that in its most basic form PSCs represent a division in kind between the state and the contractor (typically an IOC). Some have offered that under PSCs petroleum is "divided between the government and the foreign operator."[824] Others define PSCs as agreements under which petroleum companies (serving as contractors) recover costs annually from petroleum production and are entitled to receive a share of the remaining production as payment in kind for the exploration risks and development services performed if commercial discovery of petroleum is declared.[825] This latter

[824] Gordon Barrows, 'A Survey of Incentives in Recent Petroleum Contracts' in Nicky Beredjick and Thomas Walde (eds), *Petroleum Investment Policies In Developing Countries* (Graham and Trotman 1988) 226.
[825] Gao (n 787) 66.

definition offers a more comprehensive characterization of PSCs and as such will be applied for the purpose of this research.

Due to the importance of political symbolism, the legal status of petroleum companies is that of contractor. From the perspective of a developing country, IOCs are hired to carry out work for and on behalf of the state. Typically, the national oil company represents the state and bears the ultimate responsibility for the petroleum project. Unlike concessions, PSCs do not facilitate the transfer of title (ownership) to petroleum at the point of extraction. PSCs are often silent on title to petroleum resources passing from the state to the contractor altogether or declare that title is transferred in time. For instance, in the Indonesian model PSC, ownership of petroleum passes to the contractor at the point of export of said petroleum. Mongolian PSCs stipulate that title to petroleum is passed to the contractor at the point of delivery.[826] The reason for this is that in most PSCs title to petroleum is not a proprietary right but a contractual right that allows the state to pay IOCs in petroleum produced rather than cash. The legal relationship between the parties is therefore one of contractorship, meaning that the contractor has a contractual right to the petroleum produced and not ownership.

In most countries that adopt the PSC model, petroleum resources in situ are owned by the state. However, the state aims to project an image that petroleum resources are owned by the state and exploited for the benefit of a country's population. The Indonesian PSCs for instance mirror the country's constitutional provisions stating that petroleum resources "are national riches controlled by the state".[827] In practice and considering the contractor is paid in petroleum production, title to

[826] Article 25.8 Kurdistan Regional Government Model Production Sharing Contract.
[827] Recitals Indonesian Model Production Sharing.

petroleum must pass at some stage to clarify a fundamental contractual and property question as to who owns the petroleum. The answer to this question may have adverse consequences for the parties as it may influence the passage of risk being transferred from one party to another. For example if during transportation petroleum and its by-products are damaged or spilled a question arises on who bears responsibility and pays for such damage. As a general rule passage of risk is linked to the passage of property.

PSCs do not grant contractors rights to petroleum except for the right to receive an allocation of production for risks assumed and services rendered. Therefore, the scope of PSCs is twofold:

1) The state is responsible for the overall management of petroleum operations, and
2) The contractor is awarded exclusive rights to conduct petroleum operations in a defined area and responsible to the state for execution of such operations.[828]

The role of the National Oil Company, management clauses,[829] cost recovery, and profit oil form the core of PSCs. Management clauses refer to the provisions in the contract whereby the state asserts its competency on administrative and procedural aspects of the contract. For instance, the contractor would be obliged to submit a work programme, and a budget for approval as well as submission of information when requested. However, in modern PSCs, it is recognised that most states in developing countries do not possess adequate managerial resources to implement

[828] The contractor is responsible to the state with its own capital, technology, manpower and equipment its sole risk and cost which will be reimbursed from the production of petroleum.
[829] National aspirations of developing countries to control and manage their resources were the main reason for the birth of the PSC. As such control and management as was the case in Indonesia, was expressed in three ways. First the state owned the petroleum resources, second, the state owned the production facilities in petroleum operations and finally the state has overall managerial control of the petroleum operations in its jurisdiction.

meaningful managerial control, which has led to most states refraining from interfering in a contractor's operation.

5.4.3.1 National Oil Company (NOC) and Management Committees

In PSCs, the state is more involved in the petroleum project as it monitors the project, approves plans and programmes and sends inspectors to the field of operations and also participates in the meetings of the management committee. Typically, in PSCs, the state is more active in petroleum projects compared to concessions but not as active as RSC where it becomes the operator at the production phase and not as active as joint ventures where it may act as both regulator and operator.[830] The role of the NOC is important for two main reasons. First, the NOC bears the ultimate responsibility to the sate for the petroleum projects. Second, the state uses the NOC as a symbolic tool to showcase and assert its control of the petroleum operations.

Management Committees are also a key feature of PSCs. The functions of management committees are typically broad and includes among other things the following subject areas:

- Approval of annual work programmes and budgets
- Appointment of auditors
- Proposals for relinquishment, surrender or abandonment
- Determination of the development area

[830] Much would depend on whether the Joint Venture is a contractual or equity Joint Venture. If it is an equity joint venture, the company that is created jointly by the state and the IOC assumes the managerial responsibility of the project and becomes the operator. However, in contractual Joint Ventures, either the IOC or the state would be nominated to become the operator. Although the state in principle could become the operator, the IOC usually takes on this role because of its expertise. However, as illustrated by the Chinese Hybrid model and the Brazilian Joint Venture model, the state could takeover in the production phase of operations. In the Chinese Hybrid Contract, the state has the option to incrementally takeover the management of the production phase. However, in the Brazilian model, there are no incremental steps as the state invariably takes over.

- Activity reports from the contractor
- Accounts detailing expenses for the purpose of cost recovery

In short, the management committee is responsible for supervising the petroleum activities carried out and provides a forum for the state and the contractor to discuss crucial aspects of the project. Typically, the management committee comprises of representatives from both the state and the contractor, with the chairman being appointed by the state. A voting mechanism is established so that management committee meetings can conclude important decisions that could have significant ramifications for the petroleum project. Once a decision is made the intentions of the management committee are sent to the state for final approval.

In some cases, state control of the petroleum project is more theoretical than real. In Indonesia for example, the state does not possess adequate managerial resources required to implement meaningful management control. Furthermore, the state as a matter of practice usually refrains in interfering in the operations, typically signing off on suggestions and recommendations made by the contractor.[831]

5.4.3.2 Cost Oil and Profit Oil

Cost oil/profit oil is perhaps the main feature of PSCs. Cost Oil, which can also be referred to as cost recovery, is where the contractor recovers all operating costs it has incurred throughout the

[831] Gao (n 787) 71.

duration of the contract (if there is commercial discovery). PSCs usually define two main types of operating costs; non-capital costs, which are capital[832] and non-capital costs.[833]

As there are variations of model PSCs in different jurisdictions, there is no perfect model to determine how cost oil is determined. Much depends on the objectives of the host state in attracting investment. The more investor-friendly a state wishes to be, the more costs incurred from petroleum operations will be treated as cost recoverable. Regardless of whether generous or limited cost recovery mechanisms are implemented, a number of questions arise for the parties. First, the cost oil rate needs to be determined as the higher the cost oil rate is, the quicker the contractor can recover costs (the lower the rate the longer it will take). From the contractor's point of view this is very significant, as it wants to recoup its money as soon as possible because political, security, environmental and economic conditions in a state might change, potentially resulting in circumstances where it may not be able to recover its costs. Second, the parties need to determine what costs can be recovered as not all costs may be considered as costs incurred for the purposes of the project. Finally, cost recovery needs to be prioritised so that the contractor can recover its costs in a systematic and orderly manner. Once cost oil deductions have been made from petroleum production, the remaining petroleum is known as profit oil. The purpose of profit oil is to enable the contractor and the state to financially profit from the petroleum project.

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[832] Capital costs are costs of items that have use beyond the years of the petroleum contract such as equipment, buildings and other tangible property.

[833] Non-capital costs are expenditure incurred which are related to the current year of operation such as salaries and administrative expenses. Non-capital costs can usually be recouped as soon as income from the contract area permits. Capital costs, however, are recovered in the form of depreciation, which is carried out by a specific depreciation mechanism that is predetermined.

Profit oil is shared between the contractor and a host state based on a predetermined ratio, which is either fixed or based on a sliding scale (also known as a progressive scale or variable scale). Countries increasingly use sliding scale formula. A concise and clear definition on profit oil together with a set ratio is crucial for both the host state and the contractor as this is usually the most lucrative aspect of PSCs.

5.4.4 Joint Ventures

A JV could be considered as a contractual model where one or more parties wish to pursue a joint undertaking of a project with the premise that the risks, rewards, management and control of the petroleum project are shared between the parties.[834] In other words, the parties to the petroleum contract are both active rather than passive participants of the petroleum project. JVs can be contractual[835]as illustrated in Russia, Colombia and Mauritania or equity[836] as seen in countries such as Saudi Arabia and Nigeria. Generally, the contractual joint venture is preferred around the globe but this may not be possible in some jurisdictions as some state require a legal entity to be established where both the state and IOC have shares in the newly established company.

In its purest form, JVs are a distinct standalone contractual model. Historically, JVs existed in their purest forms as could be seen in Middle Eastern countries during the new international economic movement in the 1970s.[837] However, as the relationships between IOCs and states developed, a

[834] Peter Roberts, *Joint Operating Agreements: A Practical Guide* (Globe Law and Business 2012) 298
[835] In contractual Joint Ventures the partnership between the state and IOC does not require the creation of a company where each party has a share of said company. Rather the relationship between the parties is governed by the terms of the contract that they sign.
[836] Equity joint ventures, a company is established whereby each partner (the state and the IOC) owns a defined share of the company. The company is then tasked with carrying out the work required at the exploration, appraisal, development, production and decommissioning phases.
[837] Hossain (n 482) 120.

debate began as to whether JVs should be considered as a standalone contractual model or whether it always had to operate under the umbrella of some other arrangements such as concessions or PSCs. This is the reason why it is often not considered as a stand-alone petroleum arrangement.[838] However, and as history has proved, there is nothing in principle that prevents JVs from being considered as a stand-alone granting instrument.

Over the last two decades, there has been an increase in Joint Ventures throughout the world. By 1993, in Indonesia for example, the national oil company, Pertamina, had signed over 21 Joint Ventures contracts with foreign oil companies. Similarly, the Malaysian national oil company Petronas has entered into JVs in more than 34 countries.[839] These contracts obliged IOCs to invest an amount equal to the money previously spent by Pertamina on exploration in the same area. Thereafter all costs are shared equally between the parties and production is divided equally. After the contractor recovers the costs it has incurred in the project the remainder of the petroleum is split 85:15 in favour of Pertamina.[840]

The main advantages of Joint ventures is that because the proposed petroleum is a joint project, the host state is not alone in making key decisions and bearing responsibility for the project. The host government can rely on the experience and expertise of IOCs whilst taking a share of profits as well as revenue from taxes or royalties.

[838] See EE Smith, JS Dzienkowski, OL Anderson, JS Lowe, BM Kramer, JL Weaver, *International Petroleum Transactions* (3rd edn, Rocky Mountain Mineral Law Foundation 2010) 492.
[839] Mushtak Parker, 'Petronas Expands With Major Joint Ventures' (*Saudi Research & Publishing Company* 2005) https://www.arabnews.com/node/269597accessed 3 May 2015.
[840] Gao (n 787) 87.

5.4.5 Hybrid

Since most modern JVs are not utilised in their purest form, they are considered a feature of a hybrid arrangement because they incorporate features from other granting instruments such as concessions and PSCs. Usually, hybrid contracts are transformed from a pure concession or PSC into a JV. For example a concessions or licensing framework may form the structure of hybrid contract but the state may have an option to join in petroleum operations at a particular phase, which would mean that the state or a state party can become a co-concessionaire/co-licensee. If this occurs the state becomes both a regulator, as it monitors performance of the petroleum project, and co-concessionaire/co-licensee. An example of such an arrangement can be seen in Greenland licensing agreements, which transforms into a JV when the state exercises its option to join in petroleum operations.

In the 1980s, the hybrid model was introduced so political objective of retaining what a host government perceives to be sufficient control of petroleum resources without adversely affecting the investments made by IOCs. The hybrid contractual model takes features from the other contractual models and creates a new arrangement that is typically tailored to the needs of the host state. As there is no ideal contractual model, states adopt the hybrid approach to suit the different political, economic and security situations of a given country. It is difficult to determine a set of characteristics that are truly representative of the hybrid model as numerous combinations of elements from other models could be incorporated.

Although there are examples of hybrid contracts around the globe, the best-known example is the Chinese hybrid contract adopted from 1982 onwards. Adoption of the hybrid contract was the

result of extensive studies commissioned by the Chinese government to determine what contractual model would effectively and sufficiently protect Chinese sovereignty over petroleum resources whilst encouraging IOC investment. The Chinese government believed that the hybrid model could benefit from the advantages of other types of contracts whilst avoiding the disadvantages. Although this type of contract has been referred to by other names[841] in China, the most widely used label internationally has been “hybrid contract” or “comprehensive contract.”[842] In this arrangement, the state is the owner of the petroleum resources and the national petroleum companies CNOOC and CNPC have exclusive rights to explore for, develop and produce petroleum. The Chinese hybrid arrangement deliberately combines elements from two or more contractual arrangements, each serving a particular need or interest of the state. At its core, the structure of the Chinese hybrid model is based on a JV but incorporates elements from the PSC arrangement. At the exploration phase, the IOC is a contractor but as soon as commerciality is declared, the project becomes a JV between the parties.

The main advantage of a hybrid system is that it incorporates the best provisions from the other petroleum contractual models. For it to incorporate various elements from other models shows that it is a flexible contractual structure. Nonetheless, there are disadvantages, which may affect some states more than others. Hybrid contracts can be very complex and diverse, requiring expertise and highly competent negotiators. Furthermore, estimating optimal government/contractor take that allows both sides to consider their share as fair can be difficult. This type of contractual model is

[841] Terms such as “risk contract”, “shared risk contract” and more recently a “compound contract” have been used.
[842] Pedro Van Meurs, ‘Economic Analysis of Selected Offshore Petroleum Arrangements’ 10 United Nations Sustainable Development Journal 107-123.

therefore appropriate for countries that have competent experts with necessary experience at the state level to exploit petroleum in a manner that benefits the state.

5.5 KRG Production Sharing Contracts

In the years after the adoption of the IC 2005 and the OGL, the Kurds were quick to draw investment to the region and developed a reputation as the safest place in Iraq to conduct petroleum operations. This coupled with commercial discovery of fields early on, led to a rapid increase of investment in the petroleum sector. At one point, it was thought that the entire area controlled by the KRG was licensed.[843] The KRG has signed over 50 PSCs with petroleum companies.[844] Although the OGL permits the KRG to conclude other forms of contractual models, to date PSCs are the only contractual model employed by the KRG. The KRG, through the MNR, negotiates key contractual provisions with IOCs (or other contractors) based on the Model PSC.[845]

English Law governs all KRG petroleum contracts, together with any relevant rules, customs, and practices of international law, as well as principles and practices generally accepted in petroleum producing countries and the international petroleum industry".[846] In most states, the country's' own laws govern petroleum exploitation. However, due to the KRG's infancy as a recognised region, its inexperience in petroleum exploitation and its inadequate legal system (with respect to petroleum exploitation), the government adopted the policy of accepting English law as the

[843] Mills (n 527).
[844] See Appendix B for breakdown of Kurdistan Region's published PSCs.
[845] The latest version of the KRG Model PSC is available at:http://mnr.krg.org/images/pdfs/KRG_Model_PSC_production_sharing_contract_20071112.pdf
[846] Article 42.1 Kurdistan Regional Government Model Production Sharing Contract.

governing law for all KRG petroleum contracts, primarily because it was viewed that this would attract potential investors.

Since the adoption of PSCs as a model contract for KRI petroleum sector, the KRG has made changes to these contracts over the years. The first model contract has been labelled as "first generation contracts", which was followed by the "pre-Exxon contracts" and finally the current form of the model contract, which is widely referred to as "post-Exxon contracts".[847] There are differences between these contracts[848] but for the purposes of this thesis, I will focus on the current PSC model contract and begin by analysing the most important provisions below:

5.5.1 Scope of the contract and Ownership of Petroleum

The Model PSC stipulates that the KRG, in accordance with the Iraqi Constitution, has the right to regulate and oversee petroleum operations within a defined area. The contract identifies the rights, obligations of the parties as well as the terms and conditions under which the KRG grants the contractor "exclusive right and authority" to carry out all petroleum operations.[849] According to Article 2.2, the KRG is to provide and procure all authorisations relating to petroleum operations as required by the contractor so that the contractor may fulfil its obligations under the PSC. In addition, the KRG covenants that it will "do or omit to do anything that would cause the cancellation or suspension of the contract". For its part, the contractor will conduct petroleum

[847] Exxon Mobil's incursion into the KRI petroleum sector was an important milestone for the KRG. It had attracted one of the world's biggest and most influential oil companies. Because of the importance placed on Exxon Mobil's arrival and lengthy negotiations with KRG, the terms "pre Exxon" and "post Exxon" were used to signal how Exxon Mobil's arrival had changed the negotiating process as well as provisions in the Model PSC.
[848] The differences are primarily changes made to the Model PSC to reflect the provisions of the OGL. Prior to the promulgation of the OGL, a Model PSC had been adopted.
[849] Article 2.1 Kurdistan Regional Government Model Production Sharing Contract.

operations at its sole cost, risk and peril on behalf of the KRG including matters pertaining to technical,[850] financial[851] and administrative[852] services. From the outset of the contract, it can be seen that the KRG's intention is to act as regulator, whilst the contractor is tasked with not only operational command of the exploration (including appraisal and development stages) but also as operator during the production and decommissioning phases.

The Model PSC does not specifically state that the Kurdish people or the Kurdistan Region own petroleum resources but reiterates the concept of petroleum belonging to the people in Article 111 of the IC 2005. The Model PSC states that the KRG wishes to develop petroleum resources in a way that "achieves the highest benefit to the people[853] of the Kurdistan Region and all of Iraq".[854] Furthermore, it attempts to echo provisions of the OGL that grants rights to the KRG to oversee petroleum operations within a contract area.[855] This would suggest that the contractual model aims to show that its provisions are in sync with the Iraqi constitution and that it is the state (including the KRG) that is the owner of petroleum resources in its region.

The Model PSC does not directly offer explanations as to who owns petroleum resources in situ mainly because of the political sensitivities and controversy associated with KRG claiming

[850] Article 2.3(a) Kurdistan Regional Government Model Production Sharing Contract defines technical services as "implementation of all technical, human, and material resources reasonably required for the execution of the petroleum operations, in accordance with prudent international petroleum industry practice".

[851]Article 2.3(b) Kurdistan Regional Government Model Production Sharing Contract defines financial services as "funding for exploration operations and, in the even of commercial discovery, Development, Production and Decommissioning Operations" pursuant to the contract.

[852] Article 2.3(c) Model PSC defines administrative services as "implementation of all appropriate management and administration techniques for execution the petroleum operations under the contract, in accordance with prudent international petroleum industry practice".

[853] This wording in the recitals of the Model PSC is very similar to the words used at Article 111 of the Iraqi Constitution 2005.

[854] Recitals of t Kurdistan Regional Government Model Production Sharing Contract.

[855] Article 2.1 Kurdistan Regional Government Model Production Sharing Contract.

ownership of petroleum resources in its region. However, throughout the Model PSC, reference is made to title to petroleum passing[856] at delivery point.[857] The Model PSC separates when title passes to each party to the contract for the purpose of cost oil, profit oil and royalty. Article 25.8[858] states that title passes to contractor for cost oil at delivery point. Article 24.3[859] stipulates that if royalty rates are paid in kind, the contractor shall deliver such royalties to the KRG at delivery point, where title is transferred. With respect to profit oil, title to petroleum passes to both the KRG[860] and the contractor[861] at delivery point.

As discussed at section 4.4.3 above, title to petroleum must pass at some stage of the petroleum cycle. Therefore, to address concerns of contractors, the KRG has incorporated a mechanism whereby it transfers title to petroleum to contractors after extraction and at the delivery point. This presents the image that the state is the owner of the petroleum until the delivery point where it has to pay the contractor for its work. The argument is that most PSCs are constructed in such a way that the state does not pay in cash but in kind. Considering the KRG's economic troubles and its inability to pay cash, this arrangement is one that is mutually beneficial to both parties.

[856] In the definitions section at Article 1.1 of the Kurdistan Regional Government Model Production Sharing Contract, the delivery point is defined as " the point after extraction specified in the approved development plan for a production area at which…the crude oil is metered…valued…and ready to be taken and disposed of, consistent with prudent international petroleum industry practice, and at which a party may acquire title to its share of petroleum under this contract…..

[857] Article 26.9 Kurdistan Regional Government Model Production Sharing Contract states that title to profit petroleum shall be transferred to the contractor at the delivery point.

[858] Article 25.8 Model Kurdistan Regional Government Model Production Sharing Contract.

[859] Article 24.3 Model Kurdistan Regional Government Model Production Sharing Contract.

[860] Article 26.11 Model Kurdistan Regional Government Model Production Sharing Contract.

[861] Article 26.9 Model Kurdistan Regional Government Model Production Sharing Contract.

5.5.2 Duration of Contract and Contract Area

Each contract at Article 3 clearly defines the proposed work area for petroleum operations, which is referred to as the "contract area". This provision also determines the area for proposed petroleum operations to take place and details the same on a map that is attached to the contract.[862]

Article 6 of the model contract outlines the duration of the contract, identifying maximum periods for the exploration and development phases of operations and any right of extensions. The initial duration for exploration is set at 5 years, extendable on a yearly basis for up to 7 years from the contract being signed by the parties[863] provided that certain conditions have been met.[864] The initial 5-year terms is split into two sub-periods; an initial sub-period of three years (First Sub-Period)[865] and a second sub-period of two years (Second Sub-Period)[866].

If commercial discovery is declared, the development period[867] of the petroleum project is set at 20 years, commencing on the date that commercial discovery is made for both oil and gas. The contractor is given an automatic right to a 5-year extension.[868] With respect to termination, during the exploration phase, the contractor can request to terminate the PSC at the end of each contract

[862] Article 3 Kurdistan Regional Government Model Production Sharing Contract states that at Annex A, which is to be attached to the contract, must show on a map the exact area of operations.
[863] Article 6.2 Kurdistan Regional Government Model Production Sharing Contract.
[864] These conditions refer to Articles 6.5 and 6.6 of the Kurdistan Regional Government Model Production Sharing Contract. At Article 6.5 the Contractor is automatically entitled to an extension provided that it has met its minimum exploration obligations for a Sub-Period of the exploration phase but may need to carry out additional work before submitting an appraisal work program and budget (Article 6.5(a)) or deciding to declare commercial discovery (Article 6.5(b)). Article 6.6 stipulates that upon expiry of the initial exploration period, if the contractor considers it has not completed its exploration evaluation, it will be entitled to an extension for the second Sub-Period provided it informs the government in writing 30 days prior to the expiry of the initial term of the exploration period.
[865] Article 6.2(a) Kurdistan Regional Government Model Production Sharing Contract.
[866] Article 6.2(b) Kurdistan Regional Government Model Production Sharing Contract.
[867] The Model PSC considers the production phase to be part of the "development period" for the purpose of duration and time limits.
[868] Articles 6.10 and 6.11 Kurdistan Regional Government Model Production Sharing Contract.

year.[869] However, during the development period the contractor is entitled to terminate the PSC at any time.[870] In total the maximum contract period (if all extensions are granted) is 39 years.

5.5.3 Relinquishment

The model PSC obliges contractors to surrender portions of the initial contract area. In all cases, Article 7.6 states that all communication with respect to relinquishment must be made to the government at least 30 days in advance of the relinquishment of land. At the end of the initial exploration period, 25% of the net area must be given back to the government. If an extension to the initial exploration period has been awarded at the end of the first extension period, a further 25% of the contract area must be surrendered. Once the exploration period has finished, including any extensions thereto, all remaining areas within the contract area that is not determined a "Production Area"[871] must be surrendered.[872] However, the contractor has the right to determine the area, shape and location of the contract area to be kept, provided that the areas surrendered are in contiguous blocks.[873] Voluntary relinquishment provisions are also provided at Article 7.4 which states that a contractor may choose to surrender part or all[874] of the contract area provided that it provides notice in writing. Such voluntary surrender during the exploration phase will be deducted from the mandatory relinquishment set.[875]

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[869] Article 45.3 and 7.4 Kurdistan Regional Government Model Production Sharing Contract.
[870] Article 45.4 Kurdistan Regional Government Model Production Sharing Contract.
[871] Under the Model Contract, Production Area has been defined as "areas within the contract area designated as a production area in an approved Development Plan".
[872] Article 7.1(c) Kurdistan Regional Government Model Production Sharing Contract.
[873] Article 7.2(b) Kurdistan Regional Government Model Production Sharing Contract.
[874] If all of the contract area is surrendered, the contract will be automatically terminated. If this occurs, the contractor will compensate the government any relevant outstanding amounts as set by the conditions of the contract.
[875] Article 7.2(a) Kurdistan Regional Government Model Production Sharing Contract.

The contractor is obliged to pay an area rental, referred to in the model PSC as surface rental for use of state lands in pursuit of the exploitation of petroleum in a defined area. During the exploration period, the contractor is obligated to pay this fee, which is reduced by a rate of $10 per square kilometre for areas that have been surrendered under relinquishment provisions.[876] This rental fee is not uncommon in PSCs and the KRG should continue to charge contractors for payment to increase income from petroleum operations.

5.5.4 Commercial Discovery

Commercial discovery is defined in the model PSC as “a Discovery which is potentially commercial when taking into account all technical, operational, commercial and financial data collected when carrying out appraisal works or similar operations, including recoverable reserves of Petroleum, sustainable regular production levels and other material technical, operational, commercial and financial parameters, all in accordance with prudent international petroleum industry practice.”[877] Although set out in the definitions section of the Model PSC, the definition offered does not present a specific explanation of what commercial discovery is. In other countries more detailed definitions are given. For instance, in Peru and Egypt commercial discovery is defined based on the extraction of barrels per day over a period of time.[878]

Whilst the definition of commerciality in the Model PSC offers a level of specificity it does not explain what some of the terms used mean. For instance, “sustainable regular production levels” are not defined. The KRG could quantify an acceptable estimation of minimal production levels

[876] Article 6.3 Kurdistan Regional Government Model Production Sharing Contract.
[877] Article 1 Kurdistan Regional Government Model Production Sharing Contract.
[878] Claude Duval and others, *International PetroleumExploration and Exploitation Agreements: Legal, Economic and Policy Aspects* (2nd Edition edn, Barrows Company Incorporated 2009).

based on the data collected during the exploration phase. In early Indonesian PSCs the benchmark for commerciality was that the contractor had to demonstrate to the government that the government would receive a minimum of 49%[879] of the total revenue for the life of the oil field.[880] Although such a cumbersome condition may not be suitable in modern petroleum negotiations, the KRG could nonetheless quantify acceptable minimum revenue or production levels. The advantages of this are that it provides clarity for investors. If the definition is met, the state will not be able to reject the IOC beginning the next phase of operations without breaching the contract. In the current political and economic climate in the KRI, it is my submission that commercial discovery should be defined. This is mainly because the current definition is too wide, allowing the KRG to have great discretionary powers. Although this may not be a problem in some countries, it presents a challenge in the KRI. There are not have enough checks on KRG power to scrutinise whether discretionary power to determine whether a block is commercial is justified. Such discretion should benefit the KRI, but the danger is that it would only serve private and political party interests and encourage corruption.

Having said this, there are disadvantages to clearly defining commercial discovery, as it is not known how the international petroleum industry would operate in the decades to come. As petroleum agreements have lengthy durations, a specific definition may be too rigid, and thresholds assigned to commercial discovery may be too high or too low. Furthermore, the state loses flexibility in determining what is considered commercial discovery. Furthermore, the KRG utilizes the term “prudent international petroleum industry practice” in many of its provisions as a safety

[879] This minimum was reset to 25% after 1984 as it was considered too cumbersome on IOCs and the Indonesian government could not risk losing investment in its petroleum industry.
[880] Gao (n 787) 68.

net to demonstrate that it is complying with norms of the petroleum industry. As highlighted in the previous chapters there is no universal definition that could be applied to this term as there are many varying interpretations. Nonetheless, the model PSC definition does attempt to incorporate crucial factors such as financial, technical, operational, and commercial considerations when determining commercial discovery. To this end, the definition offered, although not ideal allows the KRG together with IOC to determine what commercial discovery means.

The model PSC grants the contractor the right to determine commercial discovery. However, the contractor must submit a written statement to the management committee together with an appraisal report to specify whether commercial discovery has been met.[881] Nothing in the Model PSC suggests that the contractor has to obtain final approval of commercial discovery from the state directly. It is only when the development plan is submitted to the management committee that there is an indirect link whereby the development plan is considered approved by the state if the government through its representative on the management committee indicates its approval in writing. As the party to the contract that bears the risk, invests money into the project, has technical, operational and commercial expertise, the contractor is best placed to determine whether commercial discovery has been met. Although the contractor is well placed to determine commercial discovery, the parties ultimately have different perspectives and needs. For this reason, both parties together should determine commerciality of a petroleum field. As such, it is submitted that the KRG should continue to allow the contractor to determine whether commercial discovery is made but, final approval for such determination should be given directly by the KRG through a

[881] Article 12.6 Kurdistan Regional Government Model Production Sharing Contract.

governmental institutions such as the Regional Council of Oil and Gas or the Ministry of Natural Resources.

5.5.5 Management Committees

Once a PSC has been signed, a management committee will be established within 30 days to provide "orderly direction" to all matters relating to petroleum operations and work programs.[882] During this time, KRG and the contractor will nominate and inform the other of said nominations in writing. For the purpose of balancing the interests of the parties, both the KRG and the contractor are represented by two individuals each. The KRG will determine who will be appointed chairman of the committee and the contractor will appoint the vice-chairman. Such an arrangement balances the interests of the parties but as the KRG appoints the chairman it retains slightly greater oversight as the Chairman is head of the committee and has the deciding vote.

The main functions and duties of the management committee focus on making decisions, reviewing and giving advice to the parties with respect to the petroleum project,[883] particularly in the following matters:

- Work programs and budgets.[884]
- Contractor activity reports.[885]
- Production levels submitted by the contractor[886]
- Accounts of petroleum costs.[887]

[882] Article 8.1 Kurdistan Regional Government Model Production Sharing Contract.
[883] Article 8.2 Kurdistan Regional Government Model Production Sharing Contract.
[884] Article 8.2(a) Kurdistan Regional Government Model Production Sharing Contract.
[885] Article 8.2(b) Kurdistan Regional Government Model Production Sharing Contract.
[886] Article 8.2(c) Kurdistan Regional Government Model Production Sharing Contract.
[887] Article 8.2(d) Kurdistan Regional Government Model Production Sharing Contract.

- Procurement procedures for potential subcontractors nominated by the subcontractor.[888]
- Development plan and budget for production areas.[889]

Furthermore, the management committee may also deliberate, make decisions or give advice to the KRG on any matters that it believes adversely affects petroleum operations[890] or any other subject of a material nature that the parties are "willing to consider".[891] These last two points are subjective as the managing committee must decide whether petroleum operations have been "adversely affected" or whether both parties to the contract are willing to consider their input, advice or comment. However, the important factor here is that the management committee can bring forward any subject matter to the parties' attention, to keep both parties informed.

Each member of the management committee has one vote but no meeting for deliberations can be held unless there is one representative from each party in attendance.[892] The model contract attempts to encourage the parties to reach unanimous approval on all decisions made by the management committee. Where votes are tied, the chairman will have the tie-breaking vote. However, if the management committee does not reach agreement in its meetings at the exploration period, the proposal made by the contractor will ultimately prevail. At Article 8.5(a-k), the model contract stipulates that unanimous approval by the management committee will be required for ten

888 Article 8.2(e) Kurdistan Regional Government Model Production Sharing Contract.
889 Article 8.2(f) Kurdistan Regional Government Model Production Sharing Contract.
890 Article 8.2(g) Kurdistan Regional Government Model Production Sharing Contract.
891 Article 8.2(h) Kurdistan Regional Government Model Production Sharing Contract.
892 Article 8.3 Kurdistan Regional Government Model Production Sharing Contract.

subject matters[893] as well as any matter that has material adverse effects on petroleum operations.[894]

Although the KRG has representatives (including the chairman) on the management committee, it does not mean that such representatives always act in the best interests of the KRG. In theory, this mechanism should be sufficient to protect KRG's interests. In practice however, there are two main concerns that need to be addressed. First, government representatives on the management committees are political appointments without much consideration of the competency, qualification and experience of the individual in petroleum operations. Without the requisite knowledge and experience, KRG representative on the management committee may rely heavily on contractor representatives without bearing in mind the interests of the state. Second, individuals on the management committee could be receptive to bribes and other financial incentives to push through motions tabled by the contractor. It is submitted that the Kurdistan Parliamentary Committee for Oil and Gas should approve appointments to the management committee, so that the Parliamentary Committee may evaluate the suitability of candidates before they are appointed.[895] Furthermore, as current appointments to the management committee are made via patronage and nepotism, there is greater likelihood for corruption. Although, this may not be the most efficient approach, the need to curb corruption together with the necessity to appoint suitable

[893] These matters include approval or material revisions to any exploration work program, development plan or decommissioning plan, establishment of the rules of procedure for the management committee, insurance issues over which the management committee has authority and approval for any costs incurred in excess of 10% above approved budgets. Other matters include approval of and any material revisions of procurement procedures for goods and services and proposed pipeline projects, any terms of reference, which are required to be prepared and agreed for purposes of expert determinations.
[894] Article 8.5(k) Kurdistan Regional Government Model Production Sharing Contract.
[895] There are of course no guarantees that the Parliamentary Committee for Oil and Gas would limit corruption and appoint appropriate individuals to the management committee, it does present a check to the powers of the Ministry of Natural Resources. The Parliamentary Committee for Oil and Gas usually comprises of individuals from different political parties representing parties in government as well as opposition groups.

individuals with experience and expertise to the management committees trumps efficiency considerations. It is therefore crucial for the MNR to monitor and evaluate the work of KRG representatives on the management committee. The MNR should require government representatives on the management committees to provide justifications for why the said representative(s) have voted the way they have.

5.5.6 Work Programmes and Budgets

The model PSC requires the contractor to submit work programs and budgets for each stage of the petroleum project. An exploration work program must be submitted to the management committee within forty-five days of the contract coming into force. Thereafter, in October of each year that exploration operations are carried out an exploration work program and budget must be submitted to the management committee.[896] For each of the work programs and budget details of the following must be incorporated:

- Work to be undertaken.[897]
- Materials, goods and equipment to be acquired.[898]
- Cost estimates of services provided including those carried out by third parties.[899]
- Estimated expenditures with a breakdown of such costs according to accounting procedures determined.[900]

[896] Article 11.1 Kurdistan Regional Government Model Production Sharing Contract.
[897] Article 11.2(a) Kurdistan Regional Government Model Production Sharing Contract.
[898] Article 11.2(b) Kurdistan Regional Government Model Production Sharing Contract.
[899] Article 11.2(c) Kurdistan Regional Government Model Production Sharing Contract.
[900] Article 11.2(d) Kurdistan Regional Government Model Production Sharing Contract.

Article 11.2 of the model PSC does not limit details of the exploration work program to the bullet points above, allowing the KRG to make modifications as required. Although not an exhaustive list, the wording of these provisions is sufficiently drafted to inform the KRG via the management committee of the most crucial steps during this stage of the operations.

As long as commercial discovery is declared, the contractor is obliged to submit an appraisal and work program budget to the management committee within ninety days of said commercial declaration.[901] Thereafter, the management committee has thirty days to examine the work program and budget, during which time, the KRG may request for changes to be made. The model PSC stipulates that the appraisal work program and budget must adhere with "prudent international petroleum practice"[902] and requires the contractor to include an estimated time-frame for completion of appraisal works[903] as well as the delimitation of the area to be evaluated.[904] The wording of the provisions is generic, relying on the understanding that there is an international standard of petroleum practice. Whilst such wording is not uncommon in PSCs around the world, it is submitted that as a minimum, the text should give examples of the most crucial works that need to be carried out. Once the appraisal work program and budget are approved, the contractor must submit an appraisal report,[905] which must include crucial data[906] as set out in the model PSC.[907]

[901] Article 12.2 Kurdistan Regional Government Model Production Sharing Contract.
[902] Article 12.2(a) Kurdistan Regional Government Model Production Sharing Contract.
[903] Article 12.2(b) Kurdistan Regional Government Model Production Sharing Contract.
[904] Article 12.2(c) Kurdistan Regional Government Model Production Sharing Contract.
[905] Article 12.4 Kurdistan Regional Government Model Production Sharing Contract.
[906] Data on geological conditions, physical properties of liquids, type of substances obtained, a production forecast per well, an estimate of recoverable reserves as well as sulphur, sediment and water content.
[907] Article 12.5 Kurdistan Regional Government Model Production Sharing Contract.

With respect to the development the contractor must submit a development plan to the management committee within 180 days of the declaration of commercial discovery.[908] The management committee is to "use its best efforts" to approve the development plan within 60 days after receiving the plan. However if the management committee cannot approve the plan within the 60 day period then the development plan will be extended for the number of days in excess of the 60 day period that it takes for the management committee to approve the development plan.[909] However, the state can make modifications to the development plan should it wish to do so.[910] The development plan must provide details of the following, except where the contractor has obtained consent from the state[911] to not include such topics:

- Drilling and completion of development wells.[912]
- Drilling and completion of water or gas injection wells.[913]
- Installation of separators, tanks, pumps and other injection and production facilities required.[914]
- treatment and transportation of Petroleum to the processing and storage facilities.[915]
- laying of export pipelines inside or outside the contract area to the storage facility or delivery point.[916]
- construction of petroleum storage facilities[917]

[908] Article 12.8 Kurdistan Regional Government Model Production Sharing Contract.
[909] Article 12.9 Kurdistan Regional Government Model Production Sharing Contract.
[910] Article 12.10 Kurdistan Regional Government Model Production Sharing Contract.
[911] Article 12.8 Kurdistan Regional Government Model Production Sharing Contract.
[912] Article 12.8(b) Kurdistan Regional Government Model Production Sharing Contract.
[913] Article 12.8(c) Kurdistan Regional Government Model Production Sharing Contract.
[914] Article 12.8(e) Kurdistan Regional Government Model Production Sharing Contract.
[915] Article 12.8(f) Kurdistan Regional Government Model Production Sharing Contract.
[916] Article 12.8(g) Kurdistan Regional Government Model Production Sharing Contract.
[917] Article 12.8(h) Kurdistan Regional Government Model Production Sharing Contract.

- training commitments.[918]
- a preliminary decommissioning and site restoration plan.[919]
- Each contractor entity's plans for financing its interest, if any.[920]

Upon approval of the development plan, the contractor must submit a development and work program budget to the management committee within ninety days, which include the works to be carried out,[921] material and equipment[922] required for this stage of operations, the type of service to be provided[923] as well as details of general and administrative expenditure.[924]

With regard to the production phase, the contractor must submit a work program and budget to the management committee no later than "1 October of the year preceding the estimated commencement of production".[925] Details of the production work program and budget[926] mirror that set at the development stage highlighted above.

At all stages of petroleum operations except the decommissioning phase the contractor is authorised to incur expenses not budgeted for provided that such expenditures do not exceed 10% of the budget approved in each calendar year for each stage. The only condition placed on the contractor for extra expenditures is that it must report the extra expenditures to the management committee as "soon as reasonably practicable". These extra costs are cost recoverable. In addition,

[918] Article 12.8(j) Kurdistan Regional Government Model Production Sharing Contract.
[919] Article 12.8(k) Kurdistan Regional Government Model Production Sharing Contract.
[920] Article 12.8(n) Kurdistan Regional Government Model Production Sharing Contract.
[921] Article 13.2(a) Kurdistan Regional Government Model Production Sharing Contract.
[922] Article 13.2(b) Kurdistan Regional Government Model Production Sharing Contract.
[923] Article 13.2(c) Kurdistan Regional Government Model Production Sharing Contract.
[924] Article 13.2(d) Kurdistan Regional Government Model Production Sharing Contract.
[925] Article 13.6 Kurdistan Regional Government Model Production Sharing Contract.
[926] Articles 13.6(a) to (d) Kurdistan Regional Government Model Production Sharing Contract.

the contractor may make extra expenditures above the 10% limit provided that it obtains unanimous approval of the management committee. It is submitted that a 10% limit for extra expenditure should be acceptable to the KRG. Expenditures above the 10% limit set should only be approved directly by the government through the MNR provided that a detailed reasoning is provided as to why this extra amount is required.

5.5.7 Fiscal Terms and Taxation

The Model PSC obliges contractors to pay a number of taxes, bonuses, royalties and other payments to generate revenue for the state. Analysis of some of the key fiscal elements will be carried out below.

5.5.7.1 Cost Oil and Profit Oil

Subject to declaration of commercial discovery, the contractor is entitled to recover costs incurred in the process of carrying out petroleum operations under the PSC.[927] Labelled as "petroleum costs" in the model PSC, the definition of cost oil is stated as "all costs and expenditure incurred by the contractor for the Petroleum Operations, and which the contractor is entitled to recover under this Contract and its Accounting Procedure, including Decommissioning Costs, Development Costs, Exploration Costs, Gas Marketing Costs and Production Costs".[928] However, if petroleum operations are carried out and petroleum is not found or not found in commercially viable quantities, the contractor bears all petroleum costs.[929]

[927] Article 2.6 Kurdistan Regional Government Model Production Sharing Contract.
[928] Article 1.1 Kurdistan Regional Government Model Production Sharing Contract.
[929] Article 2.6 Kurdistan Regional Government Model Production Sharing Contract.

Petroleum costs can only be recovered through "available crude oil"[930] within the contract area,[931] after deductions of any applicable taxes, royalties and bonuses payable to the KRG. Petroleum costs under each contract are not recoverable against other contract areas held by the contractor. For instance, if a contractor holds more than one PSC in the KRI territory it cannot recover costs from one block against another (a ring-fencing mechanism). If the contractor does not recover the costs it is permitted to recover in a calendar year, such costs can be carried forward[932] under the cost limits and until all costs are recovered[933] but not beyond the end of the contract.[934]

A maximum limit is set for the recovery of petroleum costs but not defined leaving the percentage limit to negotiations between the parties.[935] However, from published PSCs, it can be seen that maximum rate of petroleum recovery is typically 40% of the total produced oil in each fiscal year. Although this rate allows the contractor to recoup a sizeable chunk of its investment and leaves a greater share of profit oil for the parties, the rate is too generous. In fact the Model PSC has reached the upper limits of what can be considered cost recoverable by law under the provisions of the Kurdistan Oil and Gas law, which is set at 45%.[936] However, when comparing the Model PSC to those in other jurisdiction, it can be seen that 40% cost recovery ceiling is neither considered too

[930] Available crude oil has been defined as "all Export Crude Oil produced and saved from the Contract Area shall, after deduction of any quantities of Export Crude Oil due for Royalty.
[931] Article 25.1 Kurdistan Regional Government Model Production Sharing Contract.
[932] If during a calendar year, the contractor does not recover costs it is permitted to recover, such unrecovered costs will be added to the costs of the next calendar year for the contractor to recover. This process continues until the contractor recovers all of its costs under the terms of the PSC.
[933] Article 25.6 Kurdistan Regional Government Model Production Sharing Contract.
[934] Pedro Van Meurs, 'Comparative Analysis of Ministry of Oil and Kurdistan Fiscal Terms As Applied To The Kurdistan Region' (2008) 3 OGEL 7 www.ogel.org/article.asp?key=2794 accessed 29 April 2017.
[935] Article 25.4 Kurdistan Regional Government Model Production Sharing Contract.
[936] Article 37(6) Oil and Gas Law of the Kurdistan Region-Iraq (No.28) 2007.

high nor too low,[937] if analysed as a single provision. However, what is important is to consider cost recovery caps considering the whole financial package of a given petroleum contract.

Although the contractor would prefer no cap or much higher cost recovery mechanisms, as it would accelerate the process of it recovering its costs, the KRG has acted prudently to not permit this. If there are no limits to cost recovery or much higher cost recovery rates, the concern is that contractors may consider testing costly and complex technologies to assess the success of such practices and apply them elsewhere. The Model PSC is structured to allow the contractor to recover costs incurred throughout the duration of the PSC at the exploration, appraisal, development, production and decommissioning phases. During the exploration phase, rental fees paid by the contractor to the KRG are recoverable.[938] During all phases costs incurred by the contractor are recoverable.[939]

Aside from the costs directly associated with physically conducting petroleum operations, there are a number of elements that are also considered as cost recoverable. These include, but are not limited to audits,[940] accounts and accounting procedures,[941] exchange rate fluctuations,[942] all

[937] Cost recovery percentages are typically between 30%-60%. For example, cost recovery rates in Egyptian PSCs range between 25%-40%, in Iraq cost recovery is capped at 50% of petroleum revenue. However, in countries such as Sri Lanka and Indonesia, the ceiling for cost recovery can go up to 80% of the petroleum produced. In other countries such as Lao, the parties will negotiate the level of cost recovery, as no such limits are set by law or in model contracts.
[938] Article 6.3 Kurdistan Regional Government Model Production Sharing Contract
[939] Articles 1 and 225 Kurdistan Regional Government Model Production Sharing Contract.
[940] Article 15.4 Kurdistan Regional Government Model Production Sharing Contract.
[941] Article 15.2 Kurdistan Regional Government Model Production Sharing Contract.
[942] Article 29.5 Kurdistan Regional Government Model Production Sharing Contract.

"reasonable" training costs for Iraqi nationals,[943] VAT[944] and contributions to an environmental fund,[945] technological and logistical assistance by the contractor to the KRG.[946]

It is submitted that current physical and direct cost recovery provisions associated with the PSC such as seismic surveys, installation of equipment, drilling, extraction of petroleum and decommissioning activities should remain cost recoverable. However, the concern is some of the indirect, non-physical elements of the cost recovery mechanism. For instance, and as discussed at sections 4.5.7.8 and 4.5.7.9, payments by the contractor with respect to training and environmental issues should not be cost recoverable. The contractor could beneficially profit greatly from profit oil and is in a position to provide some training and education contributions as a 'gift' to develop the KRG petroleum sector. Of course, IOCs cannot provide all trainings to the local workforce, they can nonetheless provide specific trainings and educational packages to the KRG. This would be beneficial for both sides. On the one hand the KRG workforce would benefit from the trainings offered, skilling up the local workforce without the financial burden to the government. On the other hand, such a gesture would elevate the IOC's standing amongst the KRG and local populace, enhancing its reputation as a company with generous corporate social responsibility initiatives. This may foster better cooperation and understanding between the parties and counter local perceptions that IOCs are depleting the nation's wealth without offering much in return.

[943] Article 23.7 Kurdistan Regional Government Model Production Sharing Contract.
[944] Article 31.2 Kurdistan Regional Government Model Production Sharing Contract.
[945] Article 23.9 Kurdistan Regional Government Model Production Sharing Contract.
[946] Article 23.11 Kurdistan Regional Government Model Production Sharing Contract.

The Model PSC clearly outlines the order in which contractors can recover petroleum costs. Priority is given to the production phase[947] followed by the exploration phase (including appraisal),[948] gas marketing costs,[949] development costs[950] and finally decommissioning costs.[951] Furthermore, consideration has also been given to the duration of project life cycle so that decommissioning costs are recovered last.

After the recovery of cost oil by the contractor and deductions of royalty, bonuses and any applicable taxes, the remaining petroleum is shared between the contractor and the KRG. Referred to as "profit petroleum"[952] in the Model PSC, the contractor is entitled to take a percentage share of profit petroleum in consideration of the investment it has made in petroleum operations from first production of petroleum.[953]

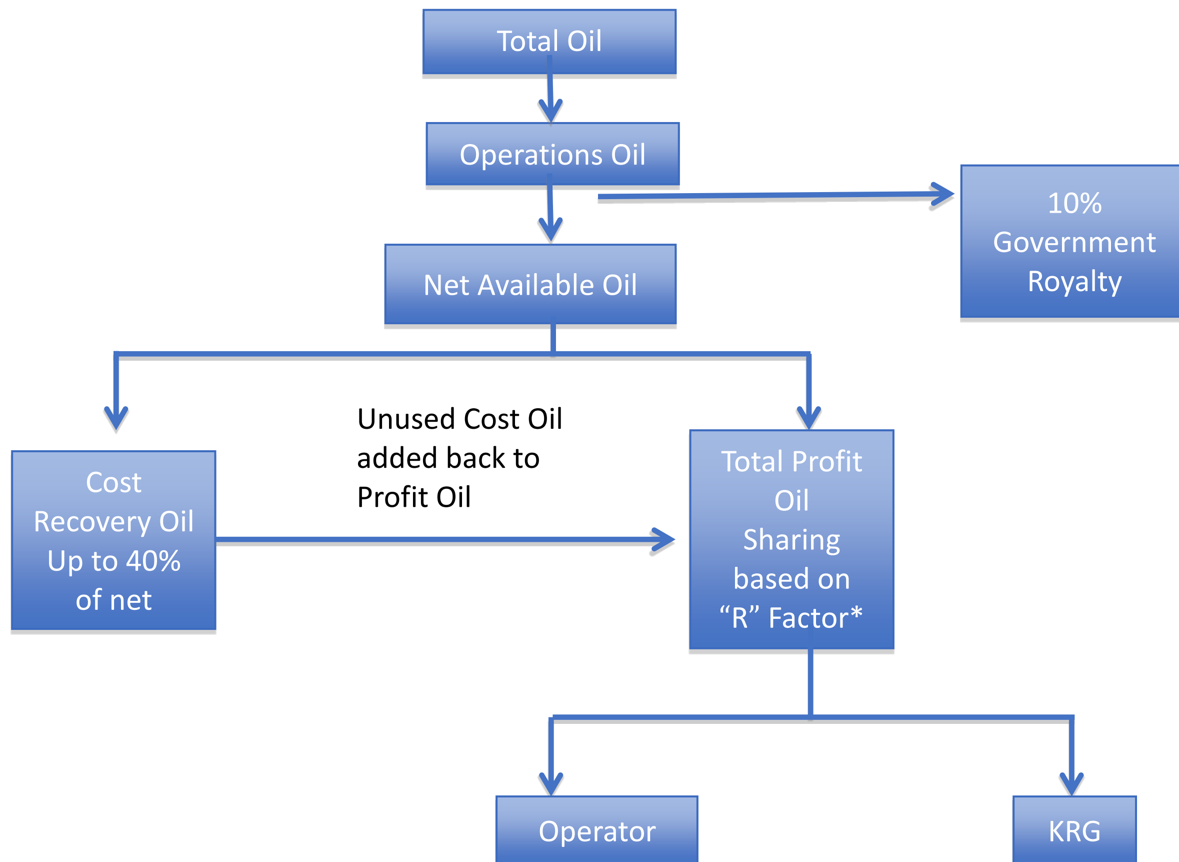
A formula is used to calculate the KRG and contractor share of the profit oil where an "R factor" determines such shares, where $R = X/Y$.[954] The X is equal to the cumulative revenues actually received by the contractor and Y is equal to cumulative costs actually incurred by the contractor from the effective date of the contract. In short, the R-factor is determined as the portion of gross revenues received by the contractor divided by the costs incurred by the contractor.[955] The conclusion reached from the adoption of this formula and the KRG published PSCs is that the KRG share of Profit Oil is 65% to 70% below an R-factor of 1.00, 84% to 86% over an R-factor

[947] Article 25.5(a) Kurdistan Regional Government Model Production Sharing Contract.
[948] Article 25.5(b) Kurdistan Regional Government Model Production Sharing Contract.
[949] Article 25.5(c) Kurdistan Regional Government Model Production Sharing Contract.
[950] Article 25.5(d) Kurdistan Regional Government Model Production Sharing Contract.
[951] Article 25.5(e) Kurdistan Regional Government Model Production Sharing Contract.
[952] Article 26.1 Kurdistan Regional Government Model Production Sharing Contract.
[953] Article 26.2 Kurdistan Regional Government Model Production Sharing Contract.
[954] Article 26.4 Kurdistan Regional Government Model Production Sharing Contract.
[955] Van Meurs (n 934) 25.

of 2.00 and between 1.00 and 2.00, the percentage increases linearly based on the R-factor.[956] The quantities of profit petroleum for both the KRG[957] and the contractor[958] are given at the delivery point. It is submitted that given the 40% recovery cost rate as well as the 10% royalty payments and KRG's policy of not taxing IOCs, the KRG share of profit oil needs to be relatively high so that it can generate much needed revenue. To this end the current formula in place, when considering the other fiscal provisions is sufficient to meet KRG's objectives discussed earlier in the chapter.

In some jurisdictions such as Ivory Coast, the government share of profit oil is determined by a sliding scale based on production. For example, if the daily production rate from a petroleum field is between 0-100,000bpd the government share of profit oil is 45%. However as daily production rates increase, the government's share of profit oil increases (If production levels are above 300,000bpd then government share increases to 60%). Although, this may be a profit sharing mechanism that the KRG could review in the future, it is submitted that this approach is not suitable for the KRG at this moment in time. One of the main reasons for this is production levels in KRI petroleum fields are not currently at significant enough levels to warrant classification of profit oil division by production. However, as KRI petroleum fields develop, production levels may rise, giving the KRI another option for profit oil division. Fig[4.1] below is an illustration of how revenues from petroleum are shared between the KRG and IOCs.

[956] Van Meurs (n 934) 25.
[957] Article 26.11 Kurdistan Regional Government Model Production Sharing Contract.
[958] Article 26.9 Kurdistan Regional Government Model Production Sharing Contract.



5.5.7.2 Bonuses and Royalty

The model PSC outlines a number of bonuses that the contractor is obligated to pay the KRG. The contractor is obligated to pay a signature bonus[959] and capacity building bonus[960] upon the PSC being signed by the parties. If commercial discovery is declared, a production bonus[961] as well as royalty[962] are payable. None of the bonuses below are cost recoverable under the terms of the model PSC.[963] In my opinion this is the correct approach because if companies are to pay bonuses in a meaningful way, such payments should not be returned to it. Although the significance of

[959] Article 32.1 Kurdistan Regional Government Model Production Sharing Contract.
[960] Article 32.2 Kurdistan Regional Government Model Production Sharing Contract.
[961] Articles 32.3 and 32.4 Kurdistan Regional Government Model Production Sharing Contract.
[962] Article 24.1 Kurdistan Regional Government Model Production Sharing Contract.
[963] Article 32.6 Kurdistan Regional Government Model Production Sharing Contract.

bonuses should not be considered as individual payments but as a package of bonuses,[964] it is nevertheless important to analyse how individual bonuses work and why they are incorporated into PSCs.

5.5.7.3 Signature Bonus

Upon execution of the PSC, the contractor is obligated to pay a signature bonus to the KRG within thirty days.[965] Signature bonuses are incorporated to PSCs to provide an injection of cash to the state so that the state does not wait to incur financial benefits at a much later date. The Model PSC does not provide a fixed figure and leaves payment of a signature bonus as a negotiable provision of the PSC.[966] Signature bonuses are not linked to the potential profitability of the contract and as such some developing countries such as Ghana[967] refrained from incorporating signature bonuses into the contract, opting to find other ways of increasing income for the state. For this reason, some have argued that the importance of signature bonuses has decreased over time.[968] The Indonesian government for example had previously incorporated a signature bonus in its PSCs but has since shifted in pursuit of other bonuses and provisions that in their view would yield greater financial benefits to the state.[969]

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[964] Analysing bonuses as a package rather than individual payments is important as each bonus is incorporated for a specific reason. By considering all the bonuses together one can determine the benefits of bonuses to the state.
[965] Article 32.1 Kurdistan Regional Government Model Production Sharing Contract.
[966] From the signed PSCs published by the KRG Ministry of Natural Resources, it can be seen that typically signature bonuses range from $1million to $5million.
[967] Isaac, Sarpong, 'Global Oil and Gas Tax Guide' (*E&Y* 2015) https://www.ey.com/Publication/vwLUAssets/EY-2015-Global-oil-and-gas-tax-guide/$FILE/EY-2015-Global-oil-and-gas-tax-guide.pdf accessed on 30 June 2016.
[968] Hozan Saleh, 'Oil and Gas Fiscal Regimes: A Critical and Comparative Analysis of the Petroleum Fiscal Regime in Iraqi-Kurdistan (LLM Robert Gordon University 2015) 53.
[969] Ibid 54.

5.5.7.4 Capacity Building Bonus

Similar to the signature bonus, the contractor is liable to pay to the state a capacity building bonus within thirty days of the contract being signed by the parties.[970] Again the model PSC is silent on how much this sum should be and leaves it to negotiations between the parties. Due to the goals of the KRG discussed throughout this thesis, capacity building bonuses are important for the KRG to educate and train the local workforce whilst providing income to fund infrastructural projects that will assist in the development of the region's petroleum industry. By examining PSCs that have been published by the KRG, it can be seen that capacity building bonuses vary considerably depending on the petroleum block where petroleum operations are carried out. For instance, Western Zagros paid $40million for the *Garmiyan* block,[971]Repsol paid $65million for the *Piramagrun* block[972] whilst only $10million was paid by the same company for the *QalaDze* block.[973] Determining the petroleum in situ and the potential production rates of petroleum are difficult if not impossible during the negotiations to conclude a PSC, especially if no data is available. To balance the interests of the parties, the KRG should attempt to divide capacity building payments and link such payments to the potential profitability of the petroleum project. That being said, the KRG should also receive an initial lump sum. To this end, the model PSC should incorporate text that includes a one-off payment up front upon execution of the contract with other payments being made once the production phase begins. Thereafter, payments can be made according to levels of production that are predetermined between the parties. For example, if production in a field reaches a cumulative amount of 100,00 barrels another payment should be

[970] Article 32.2 Kurdistan Regional Government Model Production Sharing Contract.
[971] See <http://cabinet.gov.krd/p/p.aspx?l=12&r=296&h=1&s=030000&p=12 >accessed 13 March 2016.
[972] See <http://cabinet.gov.krd/p/p.aspx?l=12&r=296&h=1&s=030000&p=18 >accessed 13 March 2016.
[973] See <http://cabinet.gov.krd/p/p.aspx?l=12&r=296&h=1&s=030000&p=43 >accessed 13 March 2016.

made but if the production levels increase then so should the capacity building payment. In short production milestones linked to capacity building payments should be set.

5.5.7.5 Production Bonus

The model PSC also outlines production bonuses to be paid by the contractor to the KRG upon first production of oil.[974] Thereafter, production payments must be made when production of oil from the contract area reaches a cumulative of ten million barrels,[975] twenty five million barrels[976] and finally fifty million barrels.[977] Monetary value is not assigned to any of these payments in the model PSC and is left to negotiations between the parties.

In some countries such as Indonesia and Equatorial Guinea production bonuses are linked to the cumulative daily production rate from petroleum fields.[978] In these examples production volumes must be sustained for a predetermined number of days. Although this approach may be suitable in some countries, it is not appropriate for the KRG. The reason for this is that it requires more procedural oversight by the government, which it may not be able to competently carry out. Furthermore, in this situation, daily fluctuating levels of productions may mean that a production bonus may not be triggered as often as it should. Therefore, the current provisions in the model PSC, which are based on cumulative amounts of petroleum production, are the most suitable way of calculating the bonus due to the state.

[974] Article 32.3(a) Kurdistan Regional Government Model Production Sharing Contract.
[975] Article 32.3(b) Kurdistan Regional Government Model Production Sharing Contract.
[976] Article 32.3(c) Kurdistan Regional Government Model Production Sharing Contract.
[977] Article 32.3(d) Kurdistan Regional Government Model Production Sharing Contract.
[978] Saleh (n 968) 54.

5.5.7.6 Royalty

Royalty is defined in the model PSC as a payment to the government by the contractor on a portion of the petroleum produced and saved from the contract area.[979] Furthermore, royalty is applied to all petroleum "produced and saved from the contract area which is crude oil and non-associated gas, except for petroleum used in petroleum operations, re-injected in a petroleum field, lost, flared or for petroleum that cannot be used or sold".[980] This definition is far removed from the traditional definition of royalty and therefore triggers the debate of whether the term royalty should be incorporated in the model PSC. In the author's opinion the royalties should remain as part of the model PSC but should not be labelled as a tax because in practice, as the discussion in section 4.5.7.7 highlights, contractors are exempt from paying a majority of taxes.

The Model PSC stipulates that royalty can be paid either in cash or in kind unless the KRG gives the contractor written notice that payment must be made in kind.[981] If the KRG does not provide such notice it is deemed to have accepted that royalty payment will be made in cash. Payments are made quarterly and the KRG can choose whether royalties are paid in cash or in kind in each quarter so long as ninety days prior written notice to the commencement of the relevant quarter is given to the contractor. These provisions, in the author's opinion, are necessary and important for the KRG to maintain as it provides flexibility to receive payments, allowing the KRG to adapt to local demands for petroleum or cash according to its priorities, which may change from time to time.

[979] Article 24.1 Kurdistan Regional Government Model Production Sharing Contract.
[980] Article 24.2 Kurdistan Regional Government Model Production Sharing Contract.
[981] Article 24.3 Kurdistan Regional Government Model Production Sharing Contract.

The royalty rate is determined daily at a fixed rate of 10%, which is applied regardless of the "gravity" of the oil produced.[982] Royalties are levied by the governments of a number of developing countries such as Iraq (15%), Nigeria (0%-20%), Ghana (3%-12.5%), Malaysia (10%) and Algeria (10%-20%).[983] Comparing this royalty rate with the royalties these countries, it can be concluded that the 10% royalty rate in KRG PSCs are competitive.

If the KRG receives royalty payment in cash, the 10% royalty payment will be valued at the international market price obtained at the delivery point.[984] However, if royalty payments are made in kind and the KRG requests the contractor to assist in the sale of part or all of the of the royalty received in kind, then KRG will pay a commission fee in barrels of oil to the contactor. Such commission is based on prudent international petroleum practice and must be mutually agreeable by the parties.[985] In my opinion, if the parties cannot mutually agree, then the matter should be resolved via expert independent third-party determination.

Considering the status of KRG's current capabilities in the petroleum industry, the royalty provisions are appropriate because, although royalty provisions in the model contract can lead to high monitoring and administrative costs,[986] the other options for calculating royalty rates are just as onerous and may have other disadvantages. For instance, critics of the sliding scale royalty structure highlight that sliding scales are used under the assumption that large fields are more profitable than smaller fields. However, this may not be the case as profits made from large fields

[982] Article 24.4(a)Kurdistan Regional Government Model Production Sharing Contract.
[983] Ernest & Yung, 'Global Tax Guide' (*Ernest & Young* 2018) https://www.ey.com/Publication/vwLUAssets/ey-global-oil-and-gas-tax-guide/$FILE/ey-global-oil-and-gas-tax-guide.pdf accessed 7 January 2019.
[984] Article 24.7(a) Kurdistan Regional Government Model Production Sharing Contract.
[985] Article 24.6 Kurdistan Regional Government Model Production Sharing Contract.
[986] Thomas Braunsgaard, 'A Primer on Mineral Taxation' (2001) IMF Working Paper WP/01/139, 15-23 https://www.imf.org/external/pubs/ft/wp/2001/wp01139.pdf accessed on 29 December 2016.

can be marginal.[987] Furthermore, larger fields typically require development side-by-side with large pipelines, which need to be constructed early in the project.[988] Smaller fields may not require pipelines with transportation of petroleum being conducted through the use of tankers, which, as current practice shows in the KRI is adequate for the transportation of oil.

5.5.7.7 Tax

As stated in the Kurdistan Oil and Gas Law, petroleum companies are liable to pay a number of taxes.[989] However, in absence of petroleum taxation law or tax exemption law to attract IOC investment, the model PSC[990] is structured to grant contractors *de facto* tax exemption, contrary to the provisions of the OGL. Table [4.3] is an illustration of what taxes a contractor is obliged to pay and which taxes it is exempt from paying under the model PSC.

Both contractors and subcontractors are subject to payment or withholding of the personal income tax and social security contributions for which they are liable for under the Kurdistan Tax legislation[991] in respect of employees that are Iraqi nationals.[992] The Model PSC however is silent on employees that are categorized as foreign nationals. The practice in the KRI had always been for foreign employees working in petroleum operations to not pay income tax. For avoidance of doubt, the MNR issued a decree[993] in 2017 to exempt all foreign employees from income tax on wages earned while working in the KRI petroleum sector. This example shows that the MNR can,

[987] For example, if the petroleum in situ is located in deep water or if there are technical risks that derive from the extraction of petroleum.
[988] Hossain (n 482) 205.
[989] Article 40 Oil and Gas Law of the Kurdistan Region-Iraq (No.28) 2007.
[990] Article 31 Kurdistan Regional Government Model Production Sharing Contract.
[991] Kurdistan Region-Iraq Law of Taxation (No. 5) 1999.
[992] Article 31.8 Kurdistan Regional Government Model Production Sharing Contract.
[993] Kurdistan Region of Iraq Ministry of Natural Resources Decree 3773.

if it chooses to do so, clarify areas of legal ambiguity arising from legislation or the model PSC. However, it has been very slow in addressing some of the major problems highlighted in this research including tax exemptions.

Prima facie, contractors are also obligated to pay Corporate Income Tax from petroleum operations.[994] Payment of such tax is made for the entire duration of the contract directly to the KRG tax authorities. However, the Model PSC stipulates that such payment are made by the KRG for the account of the contractor from the KRG's share of profit oil,[995] meaning that in reality the tax obligation is borne by the KRG and not the contractor in practice. Similarly, the contractor is obligated to pay applicable VAT[996] but such payments are cost recoverable, meaning that the KRG does not financially benefit from such taxes.

The Model PSC, as Table [4.3] shows, expressly grants exemptions for Additional Profit Tax,[997] Surface Tax,[998] Windfall Profits[999] and customs[1000] that by law should be collected. With respect to customs taxes, 'All services, material, equipment, goods, consumables and products imported into the KRI and other parts of Iraq by the contractor" or subcontractor in the course of petroleum operations are exempt from customs taxes.[1001] Additionally, employees of the contractor (including their families) and subcontractor are also exempt from paying customs tax on importing/exporting their personal belongings to and from the KRI.[1002] If customs taxes are applied

[994] Article 31.2 Kurdistan Regional Government Model Production Sharing Contract.
[995] Article 31.2 Kurdistan Regional Government Model Production Sharing Contract.
[996] Articles 31.10 and 31.11 Kurdistan Regional Government Model Production Sharing Contract.
[997] Article 31.5 Kurdistan Regional Government Model Production Sharing Contract.
[998] Article 31.6 Kurdistan Regional Government Model Production Sharing Contract.
[999] Article 31.7 Kurdistan Regional Government Model Production Sharing Contract.
[1000] Article 30 Kurdistan Regional Government Model Production Sharing Contract.
[1001] Article 30.1 Kurdistan Regional Government Model Production Sharing Contract.
[1002] Article 30.2 Kurdistan Regional Government Model Production Sharing Contract.

for any of the above, the KRG is obligated under the Model PSC to indemnify the parties.[1003] Exemptions for contractors from paying customs taxes on materials, equipment and other products required for petroleum operations is understandable but the extent of the exemption in the author's opinion goes too far. For instance, the KRG could separate what is taxable and not taxable into two categories, a tax levied on anything that directly contributes to petroleum operations and those that indirectly contribute. For instance, taking customs tax as an example, the KRG could provide tax exemption on materials, equipment, goods, and other products that are determined by the parties as essential for carrying out petroleum operations. However, employees of the contractor could pay customs tax on importing and exporting their personnel material possessions such as furniture, fixtures and fittings and other goods. It would be up to the contractor to decide whether it would reimburse employees for such taxes.

The Model PSC exempts subcontractors from paying all taxes. In practice, however, such exemptions have not been implemented and subcontractors make payments to the state subject to applicable taxes in the KRI. Although this practice is not consistent with the terms of the PSC, it is consistent with the laws of the Kurdistan Region, specifically the OGL. This is contrary to the practice of taxing contractors who are liable to pay taxes according to legislation but are exempt from doing so under the Model PSC. This approach by the KRG is a way of incentivising contractors to make investments in petroleum projects but at the same time signals an attempt to increase revenue streams for the government. By doing so, the KRG highlights that its priority is to implement rules and terms of the Model PSC where it favours the contractor. Such actions

[1003] Article 30.4 Kurdistan Regional Government Model Production Sharing Contract.

undermine the laws of the KRI. The KRG must take steps to implement provisions of both the OGL and the Model PSC and harmonise the two with one another.

It is submitted that tax provisions in the Model PSC do not strike the proper balance required between attracting investment (via generous tax exemptions) and the state's need for tax revenue. In most petroleum arrangements, tax is one of the most lucrative financial provisions for the state and as such many states see tax provisions as a key focal point of generating revenue for their country. The level of tax exemptions offered in the model PSC are too generous. The KRG should not provide such tax exemptions.

5.5.7.8 Local Content

Local content provisions in petroleum contracts present a policy dilemma for the state. One the one hand, the state wants to advance its social and environmental policies as well as its infrastructural needs. The state would like to use petroleum projects to gain employment and help the local workforce to gain qualifications and expertise as well as requiring contractors to use local goods and services as much as possible to benefit the local economy. On the other hand, the state wants to be investor friendly and not make local content provisions so onerous that potential investors are discouraged from investing in the petroleum project. Therefore, the state must strike a balance between these considerations and prioritise its policies.

With respect to the KRG, policy priorities in the energy sector have been to encourage investment so that the region can use such investment to grow its economy and ultimately benefit its citizens. Local content provisions are incorporated into the Model PSC at Articles 22 and 23 under the

headings “subcontracting” and “personnel training and technological assistance”. Like most local content provision in PSCs, the Model PSC obliges IOCs to give preference to local goods and services such as employment,[1004] subcontractors[1005] and materials where available. Furthermore, as part of the KRG’s capacity building drive, training, secondment and educational funding have been incorporated into the Model PSC.

With respect to local employment, the Model PSC mirrors the OGL. Provided that the Iraqi workforce meets the necessary qualifications, contractors and subcontractors are obliged to give preference to local manpower.[1006] Furthermore, where possible, training, including funding for education and scholarships must be provided to Iraqis for the purpose of transferring knowledge to the people of the region.[1007] Similarly, secondment[1008] of KRG employees to IOCs (where possible) should also occur for the same reason. Training costs that are determined in the training plan are recoverable under cost oil provisions,[1009] meaning that ultimately KRG natural resources fund such initiatives.

However, contractors and subcontractors are permitted to hire personnel if it is deemed that the local workforce does not possess technical capabilities or do not have requisite qualifications and/or experience.[1010] The IOC makes determinations of whether workers possess such qualities.

[1004] Article 23.1 Kurdistan Regional Government Model Production Sharing Contract.
[1005] Article 22.2 Kurdistan Regional Government Model Production Sharing Contract.
[1006] Article 44(1) Oil and Gas Law of the Kurdistan Region Iraq (No.28) 2007 and Article 23.1 Kurdistan Regional Government Model Production Sharing Contract.
[1007] Article 45 KOGL and 23.4 Kurdistan Regional Government Model Production Sharing Contract.
[1008] Article 23.2 Kurdistan Regional Government Model Production Sharing Contract.
[1009] Article 23.4 Kurdistan Regional Government Model Production Sharing Contract.
[1010] Article 23.3 Kurdistan Regional Government Model Production Sharing Contract.

The local content provisions in the Model PSC are advantageous to the KRG in theory. In practice, knowledge transfer is not achieved to the level required. The Model PSC does not specify who makes a determination as to whether personnel form the local workforce are qualified or meet requisite experience. In practice, it is left to IOCs to determine such matters. Although IOCs are in a position to make such a determination because of their experience and expertise from other petroleum projects, there is a concern that IOCs will choose to hire foreign nationals regardless, as the likelihood is that they would be better qualified and have more experience. Foreign nationals currently carry out most of the top jobs in the petroleum sector in the KRG and Iraq as IOCs find it difficult to recruit locals that are qualified for such positions or do not receive clearance from the MNR to do so. Most of the local work force employed by IOCs are for lower skilled jobs such as security, drivers and administrative staff compared to much of the foreign workforce that comprise of managers, engineers, technicians and machine operators. The only way that the KRG may prevent foreign nationals from working in the KRI instead of locals is for the MNR to not endorse residency permits, which is required before the Ministry of Interior can issue such permits to foreign nationals. It is submitted that this approach is not effective.

The KRG's aim is to create and develop a petroleum sector within the KRI that will benefit the local populace. However, it can be argued that the general public has benefited little. Too often the local workforce finds it difficult to gain employment in Kurdistan's petroleum sector. Even when they do, such employment is through political or tribal patronage. This may suggest that it is not the fault of the Model PSC but rather the implementation of local content provisions and local politics. However, considering that in practice, the MNR must give final clearance on an Iraqi/Kurdish national working for a contractor, the issue becomes more complex. To alleviate this

problem, the KRG should consider issuing regulations and also incorporate provisions in the Model PSC as an annex to set minimum requirements and qualifications for some roles such as engineers, managers and technicians and other highly skilled jobs. Once such requirements have been identified the KRG should leave the matter of employment to the contractors with a proviso that if a foreign and national worker who has the same qualifications and experience applies for a job, preference should be given to locals.

In an effort to meet the requirements for domestic consumption of oil, the KRG reserves the right for any amount of crude oil produced to be sold and transferred by contractors as long as the KRG makes such a request in writing.[1011] This provision is important as they KRG sometimes struggle to meet the demand for refined petroleum in the region.

5.5.7.9 Environmental Issues

The true scale of how the petroleum sector is affecting the KRI environment is so far unknown. The Model PSC includes a number of conditions for protecting the environment, preventing, minimising and remedying pollution whilst adhering to international petroleum industry practices with respect to the environment.[1012] In fact the Model PSC obliges contractors to "take reasonable measures" to relinquish or abandon areas of petroleum operations in accordance with "prudent" international petroleum industry practice.[1013] Whilst the wording is vague, such language is not uncommon in most PSCs.

[1011] Article 16.15 Kurdistan Regional Government Model Production Sharing Contract.
[1012] Article 37.1 Kurdistan Regional Government Model Production Sharing Contract.
[1013] Article 37.2 Kurdistan Regional Government Model Production Sharing Contract.

Whilst the KRG has incorporated environmental, health and safety provisions similar to the Kurdistan Oil and Gas Law in the Model PSCs, there is a disconnect between the petroleum sector and the institution within the KRG that is responsible for environmental affairs, the Kurdistan Environment Protection and Improvement Board (KEPIB). For instance, contractors are obliged to make payments to an environmental fund[1014] but once this money is received by the KRG, the KEPIB does not have access to this fund. As a matter of good practice and institutionalising the KRG, it is submitted that the KEPIB should have access to the fund as it has the necessary competence to determine environmental projects that require funding in the KRI.

For every contract year during the exploration and development periods, the contractor is obliged to make a payment to the environmental fund. However, the Model PSC does not define an amount, leaving the matter to negotiations between the parties. This is prudent as it allows flexibility for the KRG to charge higher fees for blocks that have vast reservoirs and are more lucrative.

Of concern however is that the Model PSC allows for the cost recovery of all "reasonable expenditure" by contractors with respect to the environmental issues.[1015] Similarly, payments made into the environmental fund are also cost recoverable.[1016] It is suggested that the KRG should not agree for both of these expenditures to be cost recoverable as there is a way to balance the interest of the state and the contractor. As decommissioning is part of the petroleum cycle, environmental costs associated with this stage should be incorporated into the cost recovery procedure. However,

[1014] Article 23.9 Kurdistan Regional Government Model Production Sharing Contract and Article 37(1)(10) Oil and Gas Law of the Kurdistan Region-Iraq (Law No.28) 2007.
[1015] Article 37.8 Kurdistan Regional Government Model Production Sharing Contract.
[1016] Article 23.9 Kurdistan Regional Government Model Production Sharing Contract.

payments made by contractors to the environmental fund should be considered as a contribution to Kurdistan's environment and not cost recoverable. Similarly, costs associated from accidents that have adverse effects on employees and the environment should not be considered as cost recoverable because the contractor as operator is in control of the project area and should take reasonable endeavours to mitigate or prevent such incidents. That said, if an act or event that is considered as a *force majeure,* the parties should meet as soon as practicably possible to mitigate the effects thereof as stated in Article 40.1 of the Model PSC.

5.5.7.10 Dispute Resolution

Article 42 of the Model PSC sets out a number of dispute resolution mechanisms. If disputes[1017] between the parties arise, the parties must use "reasonable endeavours to negotiate promptly and in good faith" to find a mutually acceptable resolution. No definitions are offered as to what is considered reasonable or what constitutes prompt negotiations, leaving such terms to be subjectively interpreted by the parties. If the parties cannot resolve the dispute, the dispute resolution process commences by one of he parties presenting a notice of dispute, where it is requested in writing that negotiations take place between senior representatives.[1018] The parties have thirty days to resolve the dispute but if after sixty days from when the notice was sent, the issue has not been settled, the parties may seek a settlement of the dispute by mediation in accordance with LCIA Mediation Procedure. However, if during the mediation process the dispute

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[1017] Article 42.1 Kurdistan Regional Government Model Production Sharing Contract has defined disputes as "any dispute, controversy or claim (of any kind or type, whether based on contract, tort, statute, regulation or otherwise) arising out of, relating to, or connected with this Contract or the operations carried out under this Contract, including any dispute as the construction, existence, validity, interpretation, enforceability, breach or termination of this Contract, which arises between the Parties (or between any one or more entities constituting the contractor and the government".

[1018] Article 42.1(a) Kurdistan Regional Government Model Production Sharing Contract defines senior representatives as "any individual who has authority to negotiate the settlement of the dispute for a party to the dispute, which for the government shall mean the Minister of Natural Resources.

remains unsolved, any party can seek final resolution by arbitration under the LCIA rules. The Model contract incorporates the rules of the LCIA for mediation and arbitration into the contract but also determines that:

- three arbitrators[1019] will conduct the arbitration.[1020]
- the arbitration will take place in London, England.
- the arbitral award is final and binding on the parties and not subject to any appeal, including appeals in the courts of England on issue of law.
- the arbitral award may be enforced by any court of competent jurisdiction, including in the KRI.

It is clear from the above that the KRG has placed great emphasis on dispute resolution procedures. Although, the OGL allows for many other mechanisms and arbitral procedures to be used as highlighted in Chapter Three, the Model PSC only mentions mediation and arbitration rules of the LCIA, suggesting familiarity with this body.

The model PSC also outlines the procedure for expert determination should disputes arise within the context of audits and accounting procedures[1021] and valuation and metering of oil and gas including but not limited to the international market price for oil and gas.[1022] Such disputes, should they arise, will be automatically referred to third party experts. The process for expert determination begins by the Management Committee submitting an agreed terms of reference

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[1019] Article 42.1(i) Kurdistan Regional Government Model Production Sharing Contract.
[1020] According to Article 42.1(ii) Kurdistan Regional Government Model Production Sharing Contract, where the dispute is just between the KRG and one contractor, each party will appoint one arbitrator. A third arbitrator who will chair the arbitration will be appointed by agreement of the parties but if the parties cannot agree then LCIA rules regarding such appointment will come into effect.
[1021] Article 15.9 Kurdistan Regional Government Model Production Sharing Contract.
[1022] Article 27.7 Kurdistan Regional Government Model Production Sharing Contract.

relating to the disagreement to the expert within thirty days of the dispute arising. If the parties cannot agree on the expert within the thirty-day period, the President of the Energy Institute in London, England will appoint the expert. The findings of the expert will be final with no right of appeal.

Considering that mediation and arbitration procedures ultimately follow the rules of private dispute resolution procedures of institutions based in England would suggest that the KRG prefers English institutions and organisations for resolution of disputes. Whilst this may be surprising as much of the investment that the KRG has attracted has not been from British companies, it is submitted that because of the current MNR minister's experience and knowledge of the energy sector in the UK (having worked in Britain for many years), he made special preference for the model PSC to incorporate private dispute resolution procedures to which he was accustomed. In my view, the Model PSC should reiterate the menu of options provided by the OGL.[1023] This would allow flexibility for future ministers and employees of the MNR to determine which institutional rules and regulations the parties should abide by in cases of mediation and arbitration.

5.5.7.11 Government and Third-Party Participation

The KRG reserves the right to participate in petroleum operations through one of its public companies. Whilst the Model PSC remains silent on the maximum government interest, it does determine a minimum of 5% of the contract area should the KRG exercise its option to participate in petroleum operations.[1024] However, the KRG must inform the contractor of its intention to participate within 180 days after commercial discovery is declared. If the KRG fails to notify the

[1023] Article 50, Second(3) Oil and Gas Law of the Kurdistan Region-Iraq (No. 28) 2007.
[1024] Article 4.1 Kurdistan Regional Government Model Production Sharing Contract.

contractor during this time, it will be deemed to have waived its right to participate.[1025] However, due to capacity and competency issues, KRG public companies are not currently in a position to perform the roles required of a contractor under a PSC. The reality is that the KRG has been unable or unwilling to create, establish and develop a public company that is capable of performing this role. However, The KRG public company can assign part of its government interest to a third party provided that it retains a minimum 5% share in the PSC.[1026] Where possible, the KRG has created consortiums consisting of IOCs and local Kurdish companies to participate in the PSC via assignment of public companies shares in the PSC.

The delay in establishing public entities for the purpose of carrying out petroleum operations derives from a lack of political will. The KRG has been slow in creating such companies/institutions so that high-ranking officials and political parties can benefit from this. Public companies by their very nature are subject to much more scrutiny and criticism when compared to private Kurdish companies. Therefore, powerful figures within the KRG are more comfortable in awarding government interest to private companies. Furthermore, in most cases powerful businessmen affiliated to a political party/powerful political figure own the private Kurdish companies. The potentially lucrative profits obtained from a share in a PSC can therefore be embezzled for the benefit of political parties and government officials indirectly.

5.5.7.12 Assignment of Rights

The model PSC adheres to the provision of the OGL which state that the MNR should approve or be notified of and control in the contractor as a company and any assignment of rights whether by

[1025] Article 4.2 Kurdistan Regional Government Model Production Sharing Contract.
[1026] Article 4.3 Kurdistan Regional Government Model Production Sharing Contract.

transfer, merger or other form.[1027] In practice the Model PSCs have given the KRG the right to approve such assignments. However, in the case of a transfer or an assignment to a third party,[1028] the contractor must give evidence of the assignee's technical and financial capability.[1029]

The change of control provisions in the model PSC apply to any "direct or indirect change in control of a contacting entity", where the market value of entity's participating interest in this contract represents more than 75 per cent of the aggregate market value of the assets of such entity and its affiliates that are subject to the change in control.[1030] If there is a change in control described above, KRG must give written consent for such changes. However, consent is not required if the change of control is to an affiliate or another contracting entity. The Model PSC does not oblige the new controlling entity to provide evidence of financial or technical competency. In the interest of limiting risks associated with the project, the KRG should as a matter of good practice require the new entity to provide evidence that it can discharge its technical and financial obligations for the petroleum project as significant changes have been made.

5.6 Recommendations to Meet KRG Objectives

To measure the success of the Model PSC, three main questions need to be answered:

1. Is the Model PSC suitable for the KRG to meet its objectives?

[1027] Article 30 Oil and Gas Law of the Kurdistan Region-Iraq (No.28) 2007.
[1028] This requirement is not applicable to an assignment to an affiliate or to another contracting entity.
[1029] Article 39.2 Kurdistan Regional Government Model Production Sharing Contract.
[1030] Article 39.6 Kurdistan Regional Government Model Production Sharing Contract.

2. Does the Model PSC achieve a fair balance between the interests of the IOC and the state?
3. How can the Model PSC be improved?

KRG objectives with respect to petroleum operations in its region as highlighted in previous chapters are many-fold but focus primarily on economic and political considerations. One of the primary objectives for the KRG was to establish a petroleum industry, which in turn would attract investment to the region, provide revenue for the state, increase employment and build training and educational capacity with respect to petroleum operations. Through adoption of the Model PSC, KRG has met the objectives above to some extent as a petroleum industry has been established, the state has earned revenue, employment has increased in the private sector (albeit not to the desired level) and training and education of locals in the petroleum industry has been carried out. With respect to political objectives, the KRG has encouraged investment leading to a number of IOCs operating in the region, which in turn has played a part in many countries opening consular and political offices. Kurdish politicians have always believed that they can obtain the protection of major regional and international powers if they attract IOCs who hold influence with their own governments.[1031]

It is also important for petroleum contracts to balance and protect the interests and objectives of both the state and IOC, as this would increase the chances of a petroleum project's success. In particular, fiscal terms need to be attractive and profitable to investors whilst also providing the state with significant revenue from petroleum operations. If profitability to investors is not aligned with state goals, there is the potential for significant revenue loss for the state. The KRG PSCs

[1031] Hemin Malazada, 'The Politics of Oil in Kurdistan' (*Niqash.org,* 2008) <http://www.niqash.org/en/articles/politics/2256/> accessed 3rd May 2016.

consider the interests of investors and the government in several ways. First, both parties have a strong incentive to find large, low cost petroleum fields, as this would increase the potential profits of the project. Second, the investor is incentivized adequately to conduct operations in a low-cost manner, as there is a cap on cost recovery. Third, experts have determined that KRG PSCs would be considered in the national interest by many governments as it creates a significant revenue stream for the state whilst providing a structural framework for optimal levels of production and recovery of oil and gas from petroleum reservoirs.[1032] Although a structural framework is present for conducting petroleum operations, it is still not clear whether KRG's current governance of petroleum is in the KRI/Iraq's national interest. As the disputes between Erbil and Baghdad continue, no detailed study has been conducted as to whether the KRI would be in a better financial position if it either handed over governance of petroleum to the IFG or delivered oil produced from Kurdish oil fields to Iraq's Ministry of Oil. Furthermore, the national interest would denote that Kurdistan is a sovereign nation, which it is not. Kurdistan's struggle to market and sell petroleum has been a long-standing problem for the region and has affected KRG's revenue stream as it has sold petroleum at a discounted rate when compared to international oil prices.

As can be seen in the last decade, most IOCs have been motivated heavily by profitable opportunities of projects in the KRI rather than strategic considerations such as security, economic and legal risks.[1033] These petroleum companies are small in size, hoping to make substantial discoveries of petroleum in the KRI so that larger IOCs can either buy their interest in the project or buy their company outright.[1034] This could explain why many companies have been enticed by

[1032] Van Meurs (n 934) 34.
[1033] Mills (n 527).
[1034] For example Addax was acquired by the Chinese company Sinopec in 2009. Other smaller such as Gulf Keystone and Western Zagros have drawn a lot of interest in recent years, with many IOCs looking to acquire said companies.

the potential to maximise profits in the KRI, even though they face the possibility of being blacklisted from Iraqi federal government contracts.

There are however, ways that the Model PSC can be improved. First, the KRG could differentiate between small and large petroleum fields, define them, and create a mechanism to increase government take in each of these fields. As there is a decline of production from existing petroleum fields in the world and as petroleum resources become scarcer, the KRG needs to act prudently when it enters into petroleum agreements. To this end, differentiating between small and large fields is necessary because larger fields are more lucrative and less of them are discovered. The KRG should therefore treat larger fields differently as they are more sought after. Big multinational petroleum companies may compete more aggressively for bigger fields than smaller ones and as such the KRG would be in a better bargaining position when negotiating petroleum contracts. Similarly, the price of oil should be considered in more depth to protect government take when oil prices are low. This has been a particularly crucial factor as the KRG witnessed between the years of 2014 and 2018 when oil prices drastically fell, affecting the KRI economy so much that the government could not pay the salaries of its' employees.

Second, the issue of water in KRI and the Middle East is a concerning topic, especially in years where severe drought causes water shortages as discussed in Chapter Four. As a matter of public policy, the KRG could include provisions similar to the Ukrainian PSC for "special water use".[1035] The concept of this provision is that petroleum companies pay royalties for the special use of water

[1035] Vladimir Kotenko, 'Ukraine' (*E&Y Global Oil and Gas Tax Guide* 2018) https://www.ey.com/Publication/vwLUAssets/ey-global-oil-and-gas-tax-guide/$FILE/ey-global-oil-and-gas-tax-guide.pdf accessed on 2 February 2019.

depending on the volume of water consumed during the petroleum project. Income from special water use could fund water projects to safeguard Kurdistan's water infrastructure.

Although the Model PSC can be improved, there are a number of considerations that need to be borne in mind that do not directly result from the adoption of the Model PSC. For example, the KRG has only published some of its PSCs, which begs the question as to why the remainder of such contracts have not been published. In the interest of transparency, the KRG should publish all PSCs as failure to do so will continue to raise questions about corruption. Furthermore, and as explained in Chapter Two, politics plays a significant role in oil and gas governance in the KRI. Even though the KRI presents the image of a unified region under the banner of the KRG, the reality remains that the KRI remains under two spheres of political influence; a zone that is governed by the Patriotic Union of Kurdistan (PUK) which is known as the Green Zone and the zone governed by the Kurdistan Democratic Party, known as the yellow zone. To alleviate current tension between these two political parties, it is submitted that a provision should be incorporated into the Model PSC to allow citizens of the respective zones to benefit from petroleum exploitation. For instance, all of the offices of IOCs are based in Erbil by decree of the MNR. Incorporating a provision that obliges IOCs to establish an office based on geographical location of their operations may alleviate some of the tension. By doing so, each political party would not only be aware of petroleum projects in its geographical area but would see a direct benefit to the local population in terms of jobs and training.

With respect to the adoption of a petroleum contractual model, concessions contracts, risk service contracts and JV/hybrid contracts may not be appropriate models of choice. Concessions for

instance would not be suitable for the KRG primarily because as concessionaires private petroleum companies would have exclusive rights to not only control and manage Kurdish petroleum fields but also own petroleum from said fields at point of extraction. Considering Kurdistan's history and political symbolism associated with ownership and managerial control of petroleum operations, it is difficult to envisage that this would be acceptable to the local population and political leaders. Awarding concessions contracts would be seen as a return to the past for most Kurds, whereby the resources of the region would be exploited with little oversight by the state and minimal benefit to the local populace. RSCs are also not appropriate for the KRI, as they are not as desirable by IOCs when compared to PSCs and concessions contracts. As the state has absolute ownership of petroleum resources, the IOC typically provides a service in return for cash. IOCs would generally prefer to conclude contracts whereby they gain access to petroleum, gain title of ownership or in a position to sell such resources. As RSC model does not allow the IOC to do this, the desire of IOCs to invest in the KRI would fall significantly if the RSC were adopted. JV and hybrid contracts are also not suitable for KRI at present because such contracts require great input from the state. Aside from regulating petroleum operations, the state is usually expected to participate in the development and/or production of petroleum. The KRG's national oil company KNOC has not been established and other institutions and public companies are not in a position to carry out such activities because they neither have the experience, technical competency or expertise needed to discharge their obligations under such contractual models.

Therefore, it is submitted that the KRG should continue to adopt the PSC, at least in the short term, for several reasons. First, although not explicitly stated in the Model PSC, KRG retains ownership of petroleum in situ. The idea of a petroleum company owning the nations resources may have

negative political implications for the KRG and does not adhere to the Iraq constitution nor OGL, both of which stipulate state ownership of petroleum resources. Second, the Model PSC is investor friendly, especially when compared to Iraq's Service Contracts. The KRG PSC has attracted a lot of investment despite political and legal challenges, suggesting that it provides adequate incentives to IOCs. Third, by attracting IOCs, the KRG believes that it has safeguarded its political future, as the international community is more likely to stand up to threats against the region.

5.7 Conclusion

This chapter has showcased the reasons why the KRG should continue adopting PSCs as the contractual model of choice for the purpose of petroleum exploitation. One of the primary reasons why the KRG embraced PSCs as a contractual model of choice was because it has no national oil company to operate petroleum fields or partner with IOCs for the same purpose. However, KRG has met its policy objectives of establishing a petroleum industry, attracting investment, and obtaining revenue from petroleum operations. However, implementation of contractual provisions and oversight of petroleum operations by the KRG can be improved. Although KRG Model Contract are similar to standard industry practice, there is room for improvement, specifically in terms of transparency and management of public expectations. Amendments to the Model Contract presented in the Chapter may improve the said model.

Whilst the KRG Model PSC consists generally of adequate provisions, clarifications are nevertheless required on tax provisions, capacity building bonuses and payments made by IOCs to the KRG petroleum fund. In addition, local content and capacity building provisions need to be

amended to truly reflect benefit to the population of local areas. KRG internal mechanisms adopted to appoint members of Management Committees are not adequate and require significant changes.

Much of the challenges that the KRG petroleum sector faces is not borne out of the structure and content of the Model Contract but rather from implementation of PSCs, payments made to the KRG and how the KRG spends such income.

CHAPTER SIX: CONCLUSIONS AND RECOMMENDATIONS

6.1 Introduction

The overall aim of this research has been to examine the petroleum legal framework of the Kurdistan Region of Iraq (KRI), identify current challenges and propose recommendations to overcome such challenges. Within the parameter of these general objectives, this research has evaluated the petroleum legal framework of the KRI, debated whether petroleum agreements between IOCs and the KRG are constitutional, provided comparisons of petroleum regimes in other jurisdictions, examined composition and structure of current KRG petroleum contracts and identified the current challenges facing the KRI petroleum sector.

As highlighted throughout this research, petroleum resources are of paramount importance to the KRG and IFG as both governments are heavily reliant on revenue from petroleum exploitation. Aside from socio-economic benefits, determining who has authority to govern petroleum operations in the KRI is also important politically because governance of a country's petroleum industry can encourage investment, strengthen diplomatic ties and enhance a country/region's standing in the international community. The governance of petroleum resources in Iraq can be a uniting factor for the country's differing communities and fragmented political order if an agreed petroleum revenue sharing mechanism is implemented and sustained, roles, responsibilities and duties of federal and sub-national governments are clearly outlined and implemented. However, rather than being the glue that holds Iraq together, disputes between the KRG and IFG over ownership, managerial and access rights together with the concept of revenue sharing from

petroleum operations could be the catalyst that breaks Iraq apart. For this reason, as well as other reasons discussed in previous chapters, it is vital that the parties reach a settlement on the governance of KRI's petroleum resources. The two most pressing factors that could influence the outcome of such settlement is political will and a robust legal framework, which in theory should put in place mechanisms that safeguard and implement political agreement on governance of petroleum. This chapter will summarise some of the key factors that have adversely affected the KRI's petroleum sector and where appropriate, offer recommendations to resolve current challenges.

6.2 Politics

Competent governance of the petroleum sector in the KRI is inherently linked to politics as much of the current problems in the region's petroleum sector derive either directly or indirectly from the politics of the region. The decisions taken by politicians in KRI and Iraq have had a profound impact on petroleum operations in the region. How politics affects the KRI petroleum sector can be classified in three distinct categories.

6.2.1 Internal Politics of KRI

Over the past decade, the KDP has increased its political representation in Parliament and has had one of its cadres as the Minister for the MNR.[1036] Considering that the KRI has always had a coalition government, other political parties that had formed part of this coalition complain that they are rarely consulted or unaware of petroleum policy formulation, how PSCs are awarded, what the provisions of some PSCs are (as they are not published), how much revenue is generated

[1036] Since the KRG was established in 2005, the KDP has continually won the biggest share of seats in the KRI Parliament, which in turn has translated as the biggest block in the formation of KRI governments.

and how such revenues are distributed. Since 2006, a KDP cadre has always served as MNR minister.[1037] In the interest of good governance and development of the MNR and KRG oil and gas sector, it is crucial for the minister of the MNR to change from time to time. The KRG must ensure that institutional knowledge and ministerial experience does not rest with in one person.

Furthermore, KDP control of the petroleum sector has resulted in its cadres benefiting from most jobs, training, business opportunities and revenues from petroleum operations. In the interest of transparency and checks and balances, it is important that the MNR is treated as a governmental ministry and not a tool that political parties use for their own interests. For this reason, it is imperative that the MNR is more diverse when hiring civil servants and other governmental employees. Diversity may bring fresh ideas on how to regulate the oil and gas sector more efficiently as well identifying and resolving existing problems within the ministry.

To address the current political imbalance with respect to petroleum governance, the KRG should devolve some powers to local governments. For instance, local governments could be represented or consulted when negotiating PSCs to address local concerns.[1038] Furthermore, employment at KRG oil and gas institutions should not be based on political party membership or affiliation. KRG institutions and leaders should ensure that a fair and transparent system based on meritocracy is created to ensure diversity with the aim of developing the oil and gas sector.

[1037] In fact, the minister has always been Dr.Ashti Hawrami until he was removed from this office in 2018.
[1038] For example, the Provincial councils in Erbil, Slemani and Duhok could be consulted or represented in negotiations where a block is within their geographical jurisdiction.

It would also be prudent for IOCs to establish an office in the geographical area of their operations. The OGL requires PSC holders to establish an office in the region but does not detail where these offices should be located.[1039] Whilst it is logical for PSC holders to establish headquarters in Erbil (as the capital city and seat of government), the region could benefit from establishing offices or sub-offices in the geographical location of their oil and gas project. This could address some of the grievances of political parties and assist PSC holders to better understand the political, security, environmental and social dynamic of the area where petroleum operations are conducted.

6.2.2 Iraqi Politics

This research has highlighted a number of fault lines with respect to disagreements between the IFG and KRG over petroleum governance. In particular tensions between the IFG and KRG[1040] regarding the latter awarding exploration and production contracts to IOCs. To further develop the KRI petroleum sector it is imperative that the relationship between the two governments improves. The KRI is not an independent sovereign state and must find a workable mechanism to govern its petroleum sector within the Iraqi federal structure. In the past, the KRG has collected revenue from oil and gas exploitation without forwarding a share to Baghdad whilst at the same time receiving a share of the Iraqi national budget. The Iraqi government has warned that it would cease to forward the KRG's share of the national budget if the KRG continues to exploit oil and gas unilaterally without giving a share of revenues to Baghdad.

[1039] Article 46 Oil and Gas Law of the Kurdistan Region-Iraq stipulates "A Contractor shall establish an office in the Region".

[1040] Janan Al-Asady, *Iraq's Oil and Gas Industry: The Legal and Contractual Framework* (Routledge 2020) 32.

A durable and lasting agreement with the IFG will bring benefits to the KRG and could lead to higher levels of investment in the region, potentially attracting large multinational oil companies to invest in the KRI. Furthermore, the KRG would benefit from Iraq's resources, experience and international connections to develop its own oil and gas sector. KRG could also use Iraqi ports to export its oil and gas to international buyers. Resolving petroleum disputes could also pave the way for dialogue and lead to a settlement on other disputes between the parties. However, this is not an easy feat to achieve. Political leaders must unite to support a Kurdish political party agenda with respect to oil and gas governance before negotiating with Baghdad.

For any lasting agreement to be realised, there must be political willingness by both the IFG and KRG to settle oil and gas governance disputes. The KRG must try harder to find legal recourse for disputes by utilising the Iraqi federal courts and IC 2005. Kurdish efforts since 2005 remain unsuccessful but this does not mean that an agreement cannot be reached. If long-lasting political agreement cannot be reached and in the absence of Iraqi courts resolving the current oil and gas disputes, the IFG and KRG could, where appropriate, settle matters through a binding mediation or arbitration process or refer matters to third party mediation such as the United Nations.

6.2.3 Regional and International Politics

Regional and international politics has also affected the way in which the oil and gas sector is governed in the KRI. As a landlocked region, the KRI needs to establish and maintain good political relations with neighbouring countries as Kurdish oil, gas and their by-products are either sent to markets in Europe via pipelines or trucked through these countries. In the past decade Turkey has had a great stake in the development of the KRI oil and gas sector as a number of

Turkish companies have been awarded PSCs in the region. Furthermore, Kurdish oil and gas is exported via Turkish pipelines to the port of Ceyhan where it is distributed to international buyers. Turkey has also imported oil and gas from the KRG to fuel its own economy and meet domestic demand. Because of this Turkish influence in the governance of the Kurdish petroleum sector remains high. It is likely that any steps that the KRG makes towards settling disputes with the IFG would be met with Turkish objections as the Turkish state could lose its influence over the KRI. However, poor political relations between the KRG and neighbouring countries may impede or halt KRG exports abroad, crippling the region's oil and gas sector. If political relationships breakdown, Iran and Turkey could either close borders thus making trucking defunct or deny that Kurdish oil and gas be pumped via pipelines through their country.

The KRG finds itself in an unenviable position as it seeks to develop its oil and gas sector. On the one hand it has been using its oil and gas industry to foster better relations with its neighbours and the international community, which requires a high degree of autonomy when governing its oil and gas sector. On the other hand, the KRI remains part of Iraq and does not agree with Iraq's vision for the KRI oil and gas sector, making it difficult to reach a settlement with Baghdad. The KRG is in great financial difficulty as it is in debt and struggles to pay government employees. If the KRG does not receive a share of the Iraqi national budget and its oil and gas sector cannot produce enough revenue to maintain the KRG (which currently it does not), the region may face financial collapse. It is therefore crucial for the KRG to review its foreign relations objectives vis-à-vis its relationship with Baghdad.

6.3 The IC 2005

The findings in this research suggest that the IC 2005 has not provided clear answers to key questions with respect to oil and gas governance in the KRI. Whilst the IC 2005 has attempted to address the role of the KRG in oil and gas governance, points of contention remain regarding competencies, responsibilities and rights of the Iraqi state vis-à-vis the KRI. There are four main reasons why this is the case; the language used in the text of the constitution, interpretation of such text, implementation and enforcement of the constitution.

6.3.1 Constitutional Text

Whilst constitutions do not exist to detail specific provisions for oil and gas governance, they should nonetheless clearly outline provisions that are deemed national interests. Oil and gas resources in Iraq form the backbone of the country's economy and are of great national interest. The Iraqi constitution should therefore clarify the roles and responsibilities of stakeholders. To this end, provisions relating to ownership of oil and gas, managerial rights, authority to conclude petroleum contracts, what are considered current and future fields and oil and gas revenue sharing mechanisms should be determined so that a solid legal platform is established to govern oil and gas resources.

The language used in the IC 2005 is vague in several areas. Ownership of oil and gas for example are vested in "all of the people of Iraq in all the regions and governorates".[1041] This language does not clarify competing oil and gas ownership claims of the IFG and KRG. Moreover, the constitution does not determine how managerial authority over oil and gas projects will be shared

[1041] Article 111 The Constitution of the Federal Republic of Iraq 2005.

between the federal government and sub-national governments. Whilst the constitution stipulates shared managerial authority, it is not clear whether the managerial role of sub-national governments applies to petroleum projects throughout Iraq or is limited to the geographical area of specific governorates or regions.[1042]

Furthermore, the constitution does not provide geographical jurisdiction for the KRG and IFG to govern petroleum resources. The Kurds claim ownership and managerial rights over oil and gas fields that are currently not within the borders of the KRG administered areas. These areas, as this research as highlighted, are disputed between the federal government and KRG. Amendments to the IC 2005 should incorporate provisions that relate to geographical jurisdiction of KRG and IFG competency.

The introduction of the term "present fields" in IC 2005, whilst omitting text related to future fields has further complicated matters. Questions arise as to whether the managerial role of sub-national governments are limited to those oil and gas fields being exploited when the IC2005 was adopted. With respect to revenue obtained from oil and gas exploitation, the constitution is clear that the federal government proportionate to population shall distribute revenue on the condition that it does so "fairly".[1043]

[1042] Article 112 The Constitution of the Federal Republic of Iraq 2005.
[1043] Article 112 The Constitution of the Federal Republic of Iraq.

6.3.2 Interpretation

As explained in this research, the KRG and IFG interpret oil and gas provisions of the IC 2005 differently as both rely on legal claims to ownership and managerial control. At the core of the differing constitutional interpretations is the current structure of the Iraqi state, the classification of current and future fields and competency over oil and gas governance. The Kurds have argued that federalism denotes far-reaching devolution of powers in favour of sub-national governments including authority/shared authority to own, manage and collect revenue from oil and gas operations. However, consecutive federal governments in Iraq have not embraced this, favouring a more centralised system where Baghdad oversees petroleum governance, limiting sub-national governments authority. The KRI is an officially recognised region under the IC 2005 with its own powers and competency. According to the IC 2005, Iraq is a Federal Republic and there can be no debate that some powers of the federal government are devolved to sub-national governments. However, whether oil and gas governance are a part of such devolved powers continues to be debated. Considering the contextual backdrop of KRI's petroleum industry, the IC 2005 and political agreements between the Kurds and IFG, it can be concluded that the Kurds, at the very least, have shared rights (with the IFG) to govern oil and gas in the KRI. However, shared management of petroleum operations between IFG and KRG only applies to "current fields", those oil and gas fields that were being exploited at the time of adopting the IC 2005. Considering discussion in this research together with the fact that there is no mention of future fields in the IC 2005, no federal hydrocarbon legislation, no Federal Supreme Court ruling to the contrary, the KRG has de facto managerial competence over all fields other than present oil and gas fields in its region.

6.3.3 Implementation & Enforcement

Agreed interpretation or determination of the constitutional text has been an impediment to and a key factor of Iraq's inability to implement and enforce constitutional provisions relating to oil and gas. Political will of ruling elites continues to be a huge obstacle in implementing and enforcing the constitution. The KRG argues that before it can share ownership and managerial authority of oil and gas resources the IFG must show that petroleum revenue is distributed proportionally to population statistics and that the federal government will compensate the Kurdistan Region and its population for unjustly being deprived of revenue from Iraq's oil and gas revenue under the previous Iraqi regime.[1044]

The KRG has accused the federal government of cherry-picking constitutional provisions that serves the interests of dominant political groups within Iraq, whilst ignoring the rights afforded to the KRI under the constitution. This argument is well founded, as there are examples of the IFG undermining or ignoring the implementation of constitutional provisions. For example, the IFG has pursued an aggressive policy of implementing the exclusive powers afforded to it by the constitution but has yet to implement constitutional provisions relating to the status of the disputed territories[1045] and has yet to establish the Federation Council.[1046] Furthermore, the Iraqi state has yet to promulgate legislation for shared management of oil and gas projects under Article 112 of the constitution. Furthermore, implementation and enforcement of constitutional provisions has been difficult due to the weakness of the court system.

[1044] Article 112 The Constitution of the Federal Republic of Iraq.
[1045] Article 140 The Constitution of the Federal Republic of Iraq.
[1046] Article 65 The Constitution of the Federal Republic of Iraq.

Cementing clear principles and mechanisms of oil and gas governance in the constitution would assist in determining an agreed foundation from which an effective legal structure could be established. To date, the KRG has attempted to find lasting political agreement on the role of the KRG in the region's oil and gas governance without success. Although agreements have been made in the past, they have been ad hoc and short termed. Therefore the KRG should pursue legal recourse, which can be obtained by one of two ways; to petition for amendments to the constitution so as to determine clearly the authority of the KRG and IFG in petroleum governance or submit constitutional claims to the Federal Supreme Court.

6.4 Legislation

Legislation in the KRI has not been promulgated in response to problems that have been identified in this research. To date, only the OGL directly addresses oil and gas governance in KRI. Furthermore, Iraq has yet to enact legislation for the same purpose at a federal level. Lack of national and sub-national legislation has created gaps in the petroleum legal framework, which need to be addressed. For this purpose, a comprehensive legislative package is required, followed by detailed regulations. At the federal level, legislation required includes a hydrocarbon and a revenue sharing law. At the sub-national level, the KRI should amend the OGL to incorporate strict provisions regarding adverse environmental effects from petroleum operations. Furthermore, petroleum tax law, anti-corruption and transparency law, and public petroleum institutions law should be promulgated at both governmental levels. This package would underpin the legal framework of the petroleum sector in the KRI and address the most crucial problems.

In the absence of clearly defined parameters for the governance of oil and gas under the constitution, a federal hydrocarbon legislation is a necessity. Such legislation should be drafted in consultation with the KRG for the purpose of identifying the roles, responsibilities and rights of the IFG and KRG. This law should focus on ownership, management and access rights of the parties and where appropriate identify areas of shared competence that are clearly detailed.

In addition and considering the importance of revenue sharing, Iraq should encourage the promulgation of a petroleum revenue law that defines the share of petroleum revenues for the KRG and IFG and establish a mechanism through which such revenue is distributed. For example, revenues from oil and gas operations in KRG administered geographical locations could be collected by the KRG, who take a share of such revenue and transfers the remainder to Baghdad. Conversely, revenues from oil and gas fields under federal control should be collected by the IFG with the remainder being sent to the KRG. This proposed mechanism could alleviate Kurdish fears of all revenues being collected by Baghdad and not transferred to the KRG. Furthermore, the IFG will obtain a share of revenue from Kurdish oil exports, which it currently does not. However, this will only work if both the KRG and IFG are committed to international standards of transparency in the governance of oil and gas operations.

At a sub-national level legislation addressing key aspects of petroleum governance is needed and amendments to the OGL are required. As highlighted in the previous chapters transparency and corruption are an obstacle to the development of the KRI oil and gas sector. Whilst efforts have been made to curb corruption in the KRI previously,[1047] it has not had the impact needed to improve

[1047] Iraq ranks at 168 according the International Corruption Perceptions Index. See Transparency International, 'Corruption Perecption Index 2018' (*Transparency.org*, 2018) <https://www.transparency.org/cpi2018> accessed 3 January 2019.

transparency and limit corruption in the oil and gas sector. Although specific data is not available for the KRI, Iraq continually ranks low in international transparency and corruption indexes, faring much worse than other oil and gas producing countries in the Middle East (The United Arab Emirates ranks at 23, Qatar at 33 and Saudi Arabia at 58.[1048]

Allegations of corruption are not helped by KRG's unwillingness to full transparency. Whilst the KRG has published some (but not all) PSCs, it has yet to publish its arrangement with Turkey regarding the export of Kurdish oil. Furthermore, complete financial accounts that are in line with international accounting procedures of income from oil and gas operations are not published. The way in which the KRG has governed the oil and gas sector has increased the risk of corruption, which can be highlighted by a number of examples. First, power and decision-making authority with respect to oil and gas is concentrated in a few individuals, namely the MNR minister and members of the RCOG. Second and perhaps more importantly there is little to no information about KRG policy formulation, decision-making and enforcement of such policies. Third, the checks and balances required to hold government officials in decision-making positions are inadequate.[1049]

Whilst the KRG would point to a number of initiatives setup to address corruption,[1050] these initiatives have done very little to solve corruption. It is submitted that in order to tackle corruption in a meaningful way, the KRG must encourage the promulgation of new anti-corruption laws

[1048] Ibid.
[1049] Auzer (n 506) 216.
[1050] The KRG has employed internationally renowned auditors for specific auditing projects. However, these projects do not audit crucial areas such pipeline meter readings and full calculations of income from oil and gas revenue. Furthermore, the Kurdistan Commission of Integrity has previously taken a number of people to court on corruption charges. However, much of the KRI public believes this to be a publicity stunt as no high profile KRG official to date has been charged with oil and gas corruption offences.

specific to the oil and gas sector and enforce the same. Furthermore, new access to information legislation should be promulgated to encourage transparency. The enactment of such laws would allow the courts, media, opposition parties to the government and the citizens of the KRI to hold the government to account.

With respect to the environment, the KRG does not have enough data to determine what affects petroleum operations have had on the environment of the region. The KRG should require oil and gas companies to commission and fund internationally recognised environmental assessments before, during and after the completion of a petroleum project. By incorporating this in the OGL the KRG will have sufficient data to identify and remedy the adverse effects that petroleum operations could have on the environment.

Petroleum taxation is another area that requires closer scrutiny. Despite being required to pay petroleum taxes by law, IOCs do not currently pay such taxes. Income from petroleum taxation is much needed for a debt ridden KRG and its economy. Petroleum taxation is a complex topic that requires stringent and detailed legislative provisions. As such, the KRI should enact legislation that deals with petroleum taxation separately. This proposed legislation should specify all applicable taxes, how such taxes are calculated and task the KRG Ministry of Finance to collect such taxes.[1051]

[1051] The KRG Ministry of Finance is the responsible for the KRG economy, collecting revenues for the government and distributing funds according to legislation and executive orders. Because of this and because they are not engaged with petroleum companies, it would be prudent for the Ministry of Finance to collect petroleum taxes.

The provisions of the OGL establish five public entities to assist in the development and enhancement of petroleum governance in the KRI. All five of these institutions are established with independent financial and managerial authority. Four of these institutions are regulated by the MNR.[1052] However, only KOTO is subject to parliamentary oversight.[1053] Moreover, the OGL requires separate legislation to be promulgated for the purpose of regulating KOTO.[1054] Considering that these entities are established as independent bodies, and in the interest of separation of powers, separate legislation should determine the structure, function and competencies of all five entities. These entities should not be regulated by the MNR but rather work as independent bodies with parliament providing oversight.

6. 5 KRG Policy & Institutions

KRG policy and the role that its institutions play in the governance of oil and gas are crucial in the development of the KRI petroleum sector. Discussions in this research have illustrated that weak rule of law, corruption, lack of transparency and institutional mismanagement has hindered potential development of the petroleum sector in the KRI. The KRG must continually publish its policies for the purpose of clearly identifying the government's vision for the petroleum sector and communicate this to the KRI public and IOCs. In the interest of good petroleum governance, the KRG should review five key points before formulating KRG policy. First, the objectives, roles and responsibilities of stakeholders should be identified. Second, the KRG must ensure that the courts, government and the parliament are able to implement, follow up and enforce rules set out in legislation and regulation. Third, mechanisms should be put in place to improve transparency and

[1052] Article 14 Oil and Gas Law of the Kurdistan Region-Iraq (No.28) 2007.
[1053] Article 17 Oil and Gas Law of the Kurdistan Region-Iraq (No.28) 2007.
[1054] Article 16 Oil and Gas Law of the Kurdistan Region-Iraq (No.28) 2007.

anti-corruption measures. Fourth, the KRG must ensure that actors, including IOCs and government officials are held accountable for their actions in petroleum operations. Finally, the KRG must always consider the sustainability of its policies in maintaining and developing its oil and gas sector.

At a practical level, the KRG must improve the skills, expertise and experience of its workforce in the petroleum sector. To this end polices aimed increasing institutional capacity through training in areas such, as petroleum taxation, environment, arbitration, administration and management should be prioritized. Similarly, through its work with IOCs, KRG policy must aim to benefit from the technological knowledge of IOCs and ensure that this is transferred. In addition, KRG policies should consider how to develop and maintain oil and gas infrastructure. For instance, the KRI needs gas capturing facilities so that gas flaring is reduced. Similarly, facilities for the treatment of general and hazardous waste are required.

With regard to institutions, the MNR is all-powerful with institutional knowledge and expertise vested in one individual, the minister. Wide ranging discretionary power of the minister must be limited to ensure that it is KRG institutions and not individuals that provide regulatory oversight. For this purpose, the RCOG must play a more active role in petroleum governance in the future. In particular, the RCOG should take on a larger role in concluding petroleum contracts with IOCs as it is a combination of different ministries and departments of the executive that typically represents a spectrum of political parties in the KRI.

6.6 PSCs

This research has concluded that petroleum agreements between the KRG and IOCs are constitutional and that, in the absence of a Federal Supreme Court ruling to the contrary, the KRG has competence to conclude such agreements. KRG should continue to adopt the PSC as its contractual model of choice for the foreseeable future because it has allowed the KRG to meet most of its objectives with respect to petroleum exploitation. The KRG has managed to attract investment to the region, establishing a petroleum sector in the KRI that previously did not exist. Furthermore, the KRG retains ownership of petroleum in situ and IOCs generally considered PSCs investor friendly when compared to most other contractual arrangements.

Although the findings in this research suggest that the PSC is currently the best available contractual model for the KRG, it does not mean that the KRG should continue with these contractual arrangements in the future. Whether it does so will depend upon the KRG objectives, KRI market conditions and IOCs' appetite for other contractual agreements. Regardless, it is important for the KRG to conduct or commission extensive studies of the differing contractual arrangements, identifying strengths and weaknesses of each. Only then can the KRG determine which contractual model would best suit them.

The Model PSC has been an important instrument for the purpose of securing KRG objectives with respect to the governance of oil and gas. It has played an important role in the establishment of a petroleum industry in the KRI, identifying the roles and responsibilities of the KRG and IOC, how KRG can earn revenue from PSCs, how employment can be increased and how training and education of locals in the petroleum industry can be beneficial. Through the Model PSC, the KRG

has attracted investment in the region, which has played a part in some countries opening consular and political offices in the KRI. Just as importantly, the Model PSC has been able to balance and protect the interests and objectives of both the state and IOC. To the KRG's credit, the Model PSC has been amended several times to reflect some of the needs of the IOCs whilst protecting the KRG's interests. Fiscal terms are attractive and profitable for investors but the state also benefits from significant revenue from petroleum operations.

However, there are ways that the Model PSC could be improved. For instance, future amendments to the Model PSC could differentiate between small and large petroleum fields, define such fields and apply specific rules and conditions to each. This differentiation of fields could attract more investment in the region if petroleum companies are adequately incentivised. Since it is likely that smaller fields would typically (but not always) yield lower profit margins compared to larger fields, incentives should be given to encourage IOCs to develop smaller fields that may otherwise not get developed. For example, companies developing smaller fields could benefit from lower tax rates, pay less royalties and bonuses.

The price of oil in the international market should be a big consideration for the KRG to protect government take when oil prices are low. There are ways to try and limit the damage caused to the project by fluctuations of the price of oil in the PSC. However, for now, the KRG should incorporate a Mean-Reverting Process into PSCs. This mechanism allows the price of oil to revert to its mean value if there are extremely high or low fluctuations on the international market.

Water resources are another topic that requires more attention when amending the Model PSC. As discussed in previous chapters, there are some similarities between the way in which water and petroleum resources are governed in the KRI and Iraq. Both need promulgation of new laws, amendments to existing laws and a robust political agreement between the federal and sub-national government. However, considering the importance of water in Iraq, water usage in petroleum operations must be capped. A way to incentivise IOCs to limit water usages in petroleum operations would be to introduce a "special water use" tax similar to that of the Ukraine.[1055] This could limit water usage and income from special water use could be invested back into the KRI water infrastructure.

Cost recovery provisions in the Model PSC are generous as nearly all activities associated with a petroleum project are cost recoverable. For instance, contributions to an environmental fund should not be cost recoverable or at the very least shared between the parties as both the IOC and the KRG together are benefiting from exploitation of oil and gas whilst potentially harming the environment. Furthermore, training of local personnel should not be considered as cost recoverable either as highlighted in previous chapters of this research. Whilst it is acknowledged that the KRG needs to offer an attractive cost recovery package, it must nonetheless calculate the potential revenue it continually loses because of generous cost recovery provisions in the Model PSC. For this purpose, the KRG must ensure that cost recovery is applied strictly, and that IOCs do not abuse the system in place by claiming expenditures that are not cost recoverable. Furthermore, the KRG should commission a study to see how cost recovery impacts the profitability of PSCs in the KRI so that it can negotiate more favourable cost recovery terms in future negotiations with IOCs.

[1055] Kotenko (n 1035).

APPENDIX A

[1056] **DATE (M/D/Y) LOCATION MEANS DEATHS**

1. 4/15/87 Sergalou-Bergalouair not known
2. 4/15/87 Gojar mountain, Mawat*rajima** not known
3. 4/15/87 ZewaShkan air not known
4. 4/16/87 Sheikh Wasan, Balisan air 225-400**
5. 5/?/87 Ja'faran (QaraDagh)*rajima* --
6. 5/?/87 Serko (QaraDagh) air --
7. 5/27/87 Bileh, Malakan (village and air 1+valley)
8. 5-7/87 Bergalou, Haladin, air + 7+ Yakhsamar, Sekaniyan and *rajima* surrounding areas (repeated attacks)
9. 2/?/88 Sheikh Bzeini area air --
10. 2/?/88 Takiyeh, Balagjar air --
11. 3/16/88 Halabjaair 3,200-5,000

FIRST ANFAL (JAFATI VALLEY)

12. 2/23/88 Yakhsamar*rajima* 5
13. 2/23-3/18/88 Sergalou, Bergalou, Haladin air + and neighboring villages and *rajima* not known mountains (constant attacks)
14. 3/22/88 Shanakhseh air up to 28

SECOND ANFAL (QARA DAGH)

15. 3/22/88 SaywSenan*rajima* 78-87
16. 3/23/88 Dukan*rajima* not known
17. 3/24/88 Ja'faran*rajima* --
18. 3/24/88 Masoyi helicopter --
19. c.3/30/88 Zerda Mountain (QaraDagh) *rajima* –

THIRD ANFAL (GERMIAN)

20. 4/10/88 Tazasharair 15-25

[1056] Human Rights Watch, 'Genocide in Iraq: The Anfal Campaign Against the Kurds' (1993) https://www.hrw.org/reports/1993/iraqanfal/ accessed 15 December 2014.

FOURTH ANFAL (LESSER ZAB VALLEY)

21. 5/3/88 Askarair 9

22. 5/3/88 Goktapaair 154-300

FIFTH, SIXTH AND SEVENTH ANFAL (SHAQLAWA-RAWANDUZ)

23. 5/15/88 Waraair 37

24. 5/23/88 Seran; Balisan, Hiran and air 2+ Smaquli valleys

25. 5/26/88 Akoyan, Faqian, Rashki*rajima* -- Baneshan mountain

26. 7/31/88 Malakan, Seran, Garawan; air 13+ Balisan, Hiran, Smaquli and Benmerd valleys

27. 8/8-8/26/88 Balisan valley and adjacent air not known areas (constant attacks)

*FINAL ANFAL (BADINAN)****

28. 8/24/88 ZewaShkan air + not known *rajima*

29. 8/25/88 Birjinniair 4

30. 8/25/88 Tilakru air not known

31. 8/25/88 Gelnaski air --

32. 8/25/88 Tuka, Barkavreh air 14-15

33. 8/25/88 Warmilleh, Bilejaneh air --

34. 8/25/88 Ikmala, Heseh, Khrabeh air 3-6

35. 8/25/88 Ruseh, Nazdureh air 1+

36. 8/25/88 Berrabareh air --

37. 8/25/88 Swareh, Spindar, Avok, Sidara air 2+ (south side of Gara Mountain)

38. 8/25/88 Mergeti, BawarkehKavri and air not known other villages (north side of Gara Mountain)

39. 8/25/88 Gizeh, Rodinya, Shirana and air 9+ other villages (center of Gara Mountain)

40. 8/25/88 Baluka air not known

APPENDIX B

	Block	Contractor	Date approved
1	Ain Sifni	Hunt Oil	08/09/2007
2	AkreeBajeel	GKP/MOL Kalegran	06/11/2007
3	Arbat	Shamaran Petroleum B.V.	28/08/2009
4	Atrush	General Exploration Partners Inc.	10/11/2007
5	Baranan	Talisman	15/06/2009
6	Barda Rash	Komet Group S.A.	20/06/2008
7	Bazian	KNOC Bazian Ltd	10/11/2007
8	Ber Bahr	GenelEnerji	31//03/2009
9	BinaBawi	Oil Search (Iraq Limited) Hawler Energy Ltd A&T Petroleum Company Ltd	06/03/2008
10	Central Duhok	Murphy Central Duhok Oil Company Ltd Petroquest Petrol	14/10/2010
11	Chia Surkh	Genel Energy International Limited Forbes & Manhattan (Kurdistan) Inc. Petoil Petroleum	11/06/2009
12	Dinarta	Hess Middle East New Ventures Limited Petroceltic Kurdistan Limited	17/06/2011
13	Duhok	DNO	13/03/2008
14	Erbil	DNO	13/032008
15	Garmian	Western Zagros	25/07/2011
16	Harir	Marathon Petroleum	20/10/2010
17	Hawler (Erbil)	Norbest Limited	10/11/2007
18	Kurdamir	Western Zagros	28/02/2008
19	Mala Omar	OMV	06/11/2007
20	Miran	Heritage	01/10/2007
21	Piramagrun	Repsol	26/07/2011

22	Pulkhana	Shamaran Petroleum B.V. Petoil Petroleum	28/08/2009
23	QalaDze	Repsol	26/07/2011
24	Qaradakh	Niko Resources (Kurdistan) Limited Vast Exploration (Kurdistan) Inc. Groundstar Resources Kurdistan Ltd	28/04/2008
25	Qushtapa	Korea National Oil Corporation	21/06/2008
26	Rovi	Reliance Exploration and Production DMCC	22/12/2006 06/11/2007
27	Safeen	Marathon	20/10/2010
28	Sarsang	HKN Energy Ltd	06/11/2007
29	Shaikhan	Gulf Keystone Petroleum International, Texas Keystone Inc. Kalegran Limited	06/11/2007
30	Shakrok	Hess Middle East New Ventures Limited Petroceltic Kurdistan Limited	26/07/2011
31	Sangaw North	Sterling	10/11/2007
32	Sangaw South	Korean National Oil Corporation	21/06/2008
33	Sarta	Reliance Exploration and Production DMCC	22/12/2006
34	Shakal	Shakal Production Ltd Oil Search (Iraq) Ltd Petoil Petroleum	06/03/2008
35	Sheikh Adi	Gulf keystone Petroleum International Limited	16/07/2009
36	Shorish	OMV	06/11/2007
37	SindiAmedi	Parenco	02/10/2007
38	Sulevani	Petroquest	14/10/2010
39	TaqTaq	Genel Energy International Limited Addax Petroleum international Limited	26/02/2008

40	Tawke	DNO	13/03/2008
41	Taza	Oilsearch (Iraq) Limited Shamaran Petroleum B.V.	27/07/2011
42	Topkhana	Talisman	19/06/2008

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