

On Legal Aspects of the Independence Referendum of Iraqi Kurdistan

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In the referendum held on 25 September 2017, the voters of the Kurdistan Regional Government of Iraq (KRG) went to the polls to decide whether they wanted an independent state. In this independence referendum, the voters were asked the following question: “Do you want the Kurdistan Region of Iraq (KRI) and Kurdistan territories that are outside KRI to become an independent state?” [With a turnout around 72 %, more than 90% of the voters voted for independence.](#) This note aims to provide a brief analysis on the legal nature of this referendum. For this purpose, I will first define the concept of the independence referendum in general and locate the Kurdish referendum within this concept. Then I will analyze the decision of the KRG to hold the independence referendum from both aspects of constitutional and international laws.

The Concept of “Independence Referendum”

Referendums held for the approval of secession of a territory for the creation of a new state are called [independence referendums](#). Three sub-types may be distinguished. The first type of referendums concerns the territories that are subject to the [international law on decolonization](#). East Timor (1999) and the future referendum in New Caledonia (2018) may be included in this category. The second type of referendums include those that are held to approve a secession of a territory, to which international law does not explicitly bestow that right. The formal-legal basis is then provided by the agreement of the main actors, which may be the secessionist groups, central states, and regional or global international community. The referendum held during the accession of [Montenegro](#) to independence (2006), the one that led to the independence of [South Sudan](#) (2011), and the independence referendum in [Scotland \(2014\)](#) are the most significant examples. The third type of independence referendums encompass the ones unilaterally held by secessionist groups or territories. The distinctive feature of such referendums is the lack of a valid legal base or formal acceptance of the all parties to the conflict. Examples include the referendums held in Quebec (1980 and 1995) in its attempt to secede from Canada and the referendums held during the dissolution of Yugoslavia in the early 90’s. While the first two sorts of referendums are *de jure* referendums, since they are held according to and in compliance with existing legal provisions (e.g. Constitution, international treaty or a UN Resolution), the referendums of the third type are held *de facto* as a strategic move in an attempt of secession.

Having said this, it is easy to classify the independence referendum held by Kurdistan Regional Government (KRG) as a *de facto* unilateral referendum. Neither the Constitution of Iraq (“Constitution”), nor international law provides a valid legal base for this referendum.

Constitutional Law

The main question in terms of constitutional law may be this: Under the Constitution of Iraq, does the KRG have a right to start an independence referendum unilaterally?

The Constitution includes referendums on both national and regional levels. There are also some transitory provisions specifying referendums but I ignore them for the purpose of this note. Federal units are called “regions” akin to the states in the US. The Constitution recognizes only the KRG as a region but leaves the door open for the creation of new regions.

On the national level, Article 126 requires a mandatory referendum for a change in the Constitution. According to this provision, any amendment to the Constitution should first be approved by, at least, 2/3 majority of the total

members of the Council of Representatives, and then be submitted to a nationwide referendum. Moreover, the amendments to the most fundamental provisions, including the unity, independence, and sovereignty of the Iraqi state, should undergo two separate approvals to be made over two separate and consecutive electoral terms of parliament.

As to the regional referendums, we may group them under three headings. According to the first, referendums may be held in a federal unit to adopt a local language as an official language (Art. 4 Al.5). The second sort of referendums may be held in one or more governorates for their integration to form a new region. (Art.119) Thirdly, the Constitution confers a veto power to the regions that includes a regional referendum, whenever there is a Constitutional amendment that reduces the powers of the regions to the advantage of the federal government. (Art 126, Al.4) There is a fourth sort of referendum to be held in Kirkuk and other “disputed regions” of Iraq specified by Article 140 but it will be explained below.

So according to these provisions, all the referendums – both national and regional – involve some sort of constitutional issues as subject matters, but not the “independence”.

Does Iraqi Constitution permit any of the constituent units to secede?

Speaking of “independence” as a subject matter of the referendum, another important question arises here: Does Iraqi Constitution permit any of the constituent units to secede? First, it is useful to remember the principle of territorial integrity which prohibits secession, a common feature that may be seen in almost all the constitutions of the world. The exceptions are Ethiopia, St Kitt and Nevis, Uzbekistan, and the interim constitution of Serbia-and Montenegro. Apart from these exceptions, the principle of territorial integrity, either explicitly regulated or gleaned by means of constitutional interpretation, is omnipresent in the comparative constitutional law, and the Constitution of Iraq displays no instance of an exception, at least at first glance.

According to the Constitution, The Republic of Iraq is a “single” (?) federal, independent and fully sovereign state and the Constitution is a guarantor of the unity of Iraq (Art 1.). The Constitution is the preeminent and supreme law in Iraq and shall be binding in all parts of Iraq without exception (Art.13). Even if the rule of territorial integrity is not explicitly stipulated, the concepts of the “unity of Iraq”, “full sovereignty” and the supremacy of the Constitution over all the regions of Iraq, may serve as necessary constitutional bases for the federal government to invalidate any unilateral attempt or demand of secession from Iraq. Any dispute may be subject to a final settlement by the Federal Supreme Court of Iraq. Similar situations occurred in the constitutional history of [US](#) and [Canada](#), where the federal courts thwarted the attempts of unilateral secessions, by broad and [teleological](#) interpretations of general constitutional principles such as federalism, constitutionalism, and democracy, in the absence of an explicit constitutional prohibition of secession. So, the Constitution of Iraq seems to fit in the general category of constitutions that prohibit secession.

However, the Article 140 may let us think the opposite way. It specifies a preliminary condition for the all-Iraq government to be constitutionally competent in Kirkuk and “other disputed territories”. This is a referendum “to determine the will of the citizens” of these regions. Yet, referring to this provision as a legal base for the current Kurdistan referendum is problematic for two reasons. First, the article does not give the power to start unilateral referendums to the regional governments. Moreover, the reading of the article may somewhat be interpreted as: starting a referendum is the priority of the federal executive and this should only be used after the “normalization” and a “census” in the relevant regions. The deadline set by the Constitution (31st of December 2007) may be taken to be indicative-only and the passing of this deadline does not automatically entitle the regions to secession. Second, the article does not explicitly articulate the words “secession” or “independence.” Even if one may be tempted to think whatever is not prohibited by the constitution is permitted, this does not include eliminating the Constitution in Kurdistan by means of secession. So, when we read the articles 1, 13 and 140 together, the “free will of the citizens” meet its limit set by the Constitution and it precludes unilateral secession.

One of the [legal arguments](#) held by the KRG when arrogating itself the right to start the independence referendum is the federal/regional power-sharing regulations. According to KRG, the Constitution enumerates the federal powers exhaustively, whereas the regional powers are residual. As KRG claims, the competence to hold regional referendums on any matter is not listed as a reserved power of the federal government, so the KRG may hold a referendum on independence. This is also problematic since federal power-sharing agreements are made for implementing [normal politics](#). On the contrary, in a [rigid constitution](#), decisions of constitutional nature should be taken by following the constitutionally regulated path, including the input by the federal government and the consent to be given by the whole people of Iraq in a nationwide referendum (cf. Article 126 above). And needless to say, secession of a constituent unit is a problem which is more constitutional than any other issues in a state.

Does Kurdistan have a right to secede under international law?

There is no plain answer for that. We should first discuss the right to self-determination in international law and consider where to locate the Kurdish issue in this framework. The legal nature of the right to self-determination, and whether this right automatically entails the right to secession, may be explained, by recalling the issue of [decolonization](#). International law confers the unconditional right to secede and create an independent state only in the formerly colonized regions.

These regions are determined according to the decolonization law, and the relevant legal framework may be derived from the [Chapters XI, XII and XIII of the Charter of the United Nations](#) regulating the International Trusteeship System and the non-self-governing territories. Also, there are the General Assembly resolutions [1514 and 1541](#) that further clarify the legal nature of the non-self-governing territories. As of today, there are around two million people living in 17 different [non-self-governing territories](#). (E.g. [Western Sahara, New Caledonia and Guam](#)) To this, one could also add former colonized territories of which status is subject to dispute either among the international community or by the relevant entities ([Puerto Rico, Mayotte, and Cyprus](#)).

Yet, the KRG does not fall into this category. So, we should consider the right to secession for the regions that are outside of the decolonization context. The legal nature of the right to self-determination for the regions that are not subject to the decolonization law is controversial. [It may be gleaned from several international legal documents and state practices that there is no absolute right to secession of a region on its pure initiative and will. Yet there is also not an explicit prohibition of secession in international law.](#) Rather, the international community prefers to take a “wait and see” attitude until the secessionist actors have gained ultimate control of the territory and the act of secession has proved to be irreversible. This is what happened, for example, during the dissolution of Yugoslavia. The Badinter Commission (the acting representative body on behalf of the EC states in Yugoslavia) requested referendums for the recognition of Slovenia, Croatia, Bosnia-Herzegovina, and Macedonia by the European Community. It is necessary to note here that the dissolution was already under way and the referendums were merely used to rubber stamp the inevitable and de facto process of dissolution.

In the absence of certainty in international law on secession, the public opinion in the international community and regional and global power relations determines the process of [creation of new states](#). In this framework, the effect of unilateral referendums merits to be reminded.

In the context of international law, a unilateral referendum may be: 1) a referendum with no explicit legal base in international law, which could be an international treaty or an act of an international organization, 2) a referendum which is held contrary to the explicit requirements of the international community.

Historical evidence shows that such unilateral referendums have always been inconclusive. Post-communist experience may be recalled again. During the process of dissolution of Yugoslavia and the USSR, the international recognition for independence was only granted to the titular constituent republics of the USSR or states in Ex-Yugoslavia, and subsequent secessions from these newly recognized states were banned. Indeed, independence referendums held in these regions were all declared as invalid either by the international community or by the

central states. Examples may be listed as follows: Abkhazia (1999) and South Ossetia (2007) from Georgia, Nagorno-Karabakh (1991) from Azerbaijan, Transnistria (2006) from Moldova

Iraq is not in the process of dissolution, as was the case of USSR and Yugoslavia, despite all the turmoil it has been facing. Also, it is a sovereign and independent state and a member of the UN since 1946. However, the country is under the scrutiny of the United Nations, particularly the Security Council. [The United Nations Assistance Mission for Iraq UNAMI](#), mandated by the Security Council, has been actively working in Iraq since 2003. Its mandate, includes among others to: “Advise support and assist the Government of Iraq in constitutional review and the implementation of constitutional provisions, as well as on the development of processes acceptable to the Government of Iraq to resolve disputed internal boundaries”.

The reactions of the international community against the independence referendum may not be described as accommodating. Following the decision of the KRG to hold the referendum, the UNAMI publicly [declared](#) that, “it would not be engaged in any way or form in the referendum”. Global powers such as Germany, Russian Federation and the United States “reiterated their support for the unity and territorial integrity of Iraq and emphasized the need for dialogue within the framework of the Constitution of Iraq”. “The Foreign Secretary of the United Kingdom noted that such a (referendum) would first need to be agreed with the federal Government and cautioned that unilateral moves towards independence would harm the Kurdistan region of Iraq and regional stability”. “On 19 June 2017 the Foreign Affairs Council of the European Union issued a statement stressing that unilateral steps must be avoided and that all open questions must be resolved through consensual positions based on the full application of the provisions of the Constitution of Iraq. The European Union also called on the federal Government and the Kurdistan Regional Government to engage in dialogue on all issues across the political and economic spectrum, including disputed internal boundaries.”

The Secretary-General of the UN [commented](#): “Unilateral steps, especially those that do not conform to the Constitution and laws of Iraq and the Kurdistan region of Iraq, would escalate the situation and lead to tensions and crisis, as well as create conditions for the re-emergence of violent extremist groups.”

In short, the international community is against the possible secession of Kurdistan region from the rest of Iraq and skeptical regarding the referendum held for this purpose. Such a referendum to this end will be probably deemed invalid in [international law](#).

Conclusion

I am quite convinced to conclude that the independence referendum held in the Kurdistan Region of Iraq on 25 September 2017 is legally groundless, both in terms of the Constitution of Iraq and international law. It may not be taken as a legally valid procedural element on the probably planned path of the KRG for secession. Even if the results are non-binding, it may not be referred as a genuine articulation of the will of the people of the region. Particularly because the hasty and unilateral nature of this referendum, in a region torn by conflict, generates serious [doubts](#) regarding the fairness and accuracy of the vote. Yet, this is another issue to discuss in a separate note.

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