

The relationships between states and non-state peoples: a comparative view of the Kurds in Iraq

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Introduction

Few political topics exercise scholars and policy-makers, and also the public, more than the relationship between states and their majority and minority groups. Whatever the issues involved, whether immigration or secession, competition over natural resources or access to public services, or the competing demands of central state control and group self-governance, few states can claim that they are uncontentious, easy to resolve or without significant potential for conflict.

In this light, the management of relationships between states and non-state peoples¹ is not unique to the Kurds in Iraq and in Turkey, Iran and Syria. At the same time, it is clear that managing the relationships between Kurds and the states in which they live is a far more complex undertaking than, for example, addressing the needs of the Roma populations in central and eastern Europe or the concerns of the Lusatian Sorbs in eastern Germany. The situation of the Kurds is geopolitically much more important: it has greater potential for violence and serious regional and international instability and it requires different approaches and mechanisms to ensure its successful management.²

This chapter will outline a variety of dimensions that can help to specify the situation of particular non-state peoples. This situational mapping is important in determining appropriate arrangements for managing the relationships between states and non-state peoples. The Kurds in Iraq will be located within each of these dimensions and the arrangements under the Iraqi constitution of 2005 for the Kurdish region's self-governance and its sharing of power and wealth in Iraq will be discussed. The conclusion will offer observations about the situation of the Kurds in Iraq under that constitution, indicate gaps in their constitutional relationship with the Iraqi state and suggest how these might be filled without disrupting the new institutional framework in Iraq.

¹ A non-state people is distinguished from other peoples in that it does not have its own state.

² This is not to say that dealing with the situation of other stateless peoples is unimportant or does not deserve sustained commitment by states, international organizations and civil society actors.

Mapping the situation

The situations of non-state peoples are best categorized in the first instance according to demographic and territorial criteria. These criteria include the size of non-state peoples (both in absolute terms and relative to the population of the state in which they live), their settlement patterns (compact, with or without exclaves, or dispersed, with or without local concentrations), the size of the territory they occupy (again in absolute and relative terms), whether this territory is ethnically more homogeneous or more heterogeneous and whether they straddle existing international boundaries. The size of non-state peoples and their settlement patterns are the key factors in establishing the need for, and feasibility of, various institutional arrangements that address their concerns adequately.

Establishing the basic indicators of a situation is important. Accurate data both on demographic indicators and on the demands of non-state peoples derived from them is crucial to thinking about possible institutional designs that ensure violent conflict can be prevented or resolved. A basic range of non-violent institutional means for managing the relationships between states and non-state peoples include territorial and non-territorial forms of self-governance, power-sharing between the centre and the local level, cross-border institutions and para-diplomacy, and provisions for minority and human rights. These can be implemented individually and in combination.

The following cases, which include groups such as national minorities that are not considered non-state peoples,³ can be considered for illustrative purposes. Chechens live in a largely homogeneous region in the northern Caucasus in the south of Russia and number about one million people (95 per cent of the local population). Their demands range from independence to self-governance. Short of Russia agreeing to the region's secession, substantive autonomy for Chechnya and local arrangements to ensure fair treatment of non-Chechens (for example through local power sharing, minority protection, local cultural autonomy and rights for public participation) would be elements of a reasonable settlement, and they are similar to the agreement achieved after the first Chechen war (1994–6). A relatively homogeneous region such as the island of Corsica, part of France, where the relevant group does not straddle existing boundaries either, normally requires only substantive autonomy. And as the agreement on Northern Ireland in both its original, 1998 version and its revised, 2006

³ National minorities are groups of people that are part of a larger nation living outside the state in which this nation is the titular group, such as Germans in Poland, Hungarians in Romania, or Russians in Baltic republics.

version exemplifies, heterogeneous regions in which at least one of the groups concerned straddles international boundaries require a broader range of institutions: substantive autonomy, regional power sharing and other local mechanisms to manage inter-community relationships and also cross-border institutions and para-diplomatic competences. The very homogeneous and, in demographic terms, small region of the Swedish-populated Åland Islands, which are part of Finland, has survived very comfortably for almost a century under a regime of substantive territorial autonomy and cross-border institutions.

These and other self-determination disputes are among the most intractable, violent and destructive forms of conflict that societies, states and the international community face. Perhaps with the exception of the Åland Islands, none of the cases mentioned has seen a straightforward path to settlement. The Northern Ireland agreement was preceded by 30 years of conflict, costing over 3,000 lives. Attempts to endow Corsica with adequate self-governance have repeatedly faced stiff resistance in a state whose very foundations are built upon the assumption of an indivisible French republic. And after years of war with terrible atrocities, Chechnya is now experiencing a period of calm and stability, based mainly on the presence of Russian security forces. Beyond these few European cases, the view that self-determination conflicts are intractable, violent and destructive is further substantiated empirically when one looks at the apparently unending conflicts that have plagued places as diverse as Sri Lanka, north-eastern India, the Great Lakes region of Africa, Sudan and the Middle East. The conflicts in these areas have cost millions of lives, displaced many times more people, wrecked entire national economies for decades, and they seem to be 'solution-proof', notwithstanding the occasional glimmer of hope in the form of a short-lived peace deal.

A corrective understanding of this bleak picture is necessary. Not all self-determination conflicts are violent and destructive: Quebec and Belgium are two cases in point, and there was no serious violence in Ukraine, Romania, Slovakia and the Baltic states either despite the highly charged atmosphere between these countries' majority and minority populations. Nor do all self-determination conflicts defy solution. Northern Ireland has already been mentioned as a case in point, but there are other examples as well. South Tyrol in Italy is often mentioned as one of the most successful instances of accommodating the claims of minority groups in autonomy and power sharing institutions. The western Balkans, despite many other shortcomings, have not returned to the excessive violence it experienced in the 1990s

and early 2000s. Constitutional arrangements in, for example, Bougainville (Papua New Guinea), Mindanao (the Philippines) and Gagauzia (Moldova) may not be perfect, but they have provided an institutional setting in which ethnic groups can pursue their self-determination claims by non-violent, political means. The Comprehensive Peace Agreement for Sudan of 2005 offers similar opportunities, as do the as yet unimplemented proposals in the Annan Plan for Cyprus⁴ and the various proposals for Sri Lanka.⁵ The Ahtisaari Plan for Kosovo also offers a range of excellent proposals to accommodate the competing self-determination claims of Serbs and Albanians in Kosovo in its vision of conditional independence for that region, most of which have now been implemented in the constitution of the Republic of Kosovo.

The challenges faced in Iraq and specifically Kurdistan are but one example of a specific type of self-determination conflict. The successful cases of conflict settlement in Northern Ireland, the western Balkans, Bougainville, Mindanao, Gagauzia and elsewhere offer three instructive lessons for reaching a sustainable solution in Kurdistan-Iraq. First, they all acknowledge the significance of groups' self-determination claims and the need to give them an institutional expression. Second, they all recognize the benefits of channelling the conflicts generated by those claims into institutions in which the relevant parties can participate in, and influence, a political process able to deliver an acceptable outcome. Third, the settlements on which these institutions are based recognize the complexity of the conflicts they are meant to deal with. They are not one-dimensional arrangements offering 'just' autonomy or power sharing or minority rights bills or improved economic development etc. Instead, they combine a range of different mechanisms so as to address the concerns of all relevant parties.

Experience elsewhere of settlements of self-determination conflicts provides the background against which the situation in Iraqi Kurdistan needs to be assessed. It will help to determine how much that situation is similar to or distinct from other cases and to assess how the current institutional arrangements enshrined in the Iraqi constitution of 2005 measure up to the requirements for a sustainable settlement of this self-determination conflict.

⁴ For the full text of this document, see http://www.hri.org/docs/annan/Annan_Plan_Text.html.

⁵ See documentation at <http://www.peaceinsrilanka.lk/>. This website is run by the Secretariat for Coordinating the Peace Process, set up by the government of Sri Lanka.

The Kurds in Iraq

The indicators outlined above show that the situation of the Kurds in the Middle East exceeds in complexity the examples just given. The Kurds are the largest non-state nation living in its historic settlement area. This area stretches across four contiguous states: Iraq, Turkey, Iran and Syria.⁶ Thus although the Kurds inhabit a compact area, it is not entirely homogeneous, nor does it incorporate all Kurdish-populated areas in the region. The most contested of the Kurdish exclaves in Iraq is Kirkuk. In total, the Kurdish population in the Middle East is estimated to be about 25 million. There are between 4 and 5 million Kurds in Iraq (roughly 20 per cent of the Iraqi population), and approximately 3.7 million of them live in the Kurdistan region in the north bordering Turkey, Iran and Syria. Kurds are predominantly Sunni Muslims, with small religious minorities of Shi'as, Yezidis, Christians and Jews.

In addition to these purely demographic factors, it is important to bear in mind that Kurds in the Middle East did not envisage at the end of the First World War that they would be divided between four separate states. They rejected the idea of incorporation into states dominated by other ethnic and linguistic groups. In Iraq, there is also a long history of discrimination against Kurds – the Anfal campaign of the Saddam regime in the 1980s marks a genocidal high – and now the existence for ten years of Iraqi Kurdistan as a de facto state under British and American protection. Both these factors have contributed to strengthening a Kurdish identity that is keenly aware of its separateness from Arabs in Iraq and of the vulnerability that comes with being a minority. As a result, from the beginning of the post-Saddam period in Iraq Kurds have demanded guarantees for their physical, political, economic and cultural security as a group and as individuals.

Kurdish demands for comprehensive security guarantees map relatively easily on to a structural assessment of their situation in Iraq: they are a large group in a large, heterogeneous region. Their area of settlement is compact but it straddles state boundaries and there are exclaves. In an effort to accommodate Kurdish demands for security within this structural setting, one might thus expect there to be institutional arrangements including territorial and non-territorial self-governance (for the Iraqi Kurdistan region and for some of its local minorities, as well as for Kurds outside the Iraqi Kurdistan region); local-centre power sharing (between groups in the Iraqi Kurdistan region, between Iraqi Kurdistan and the rest of Iraq and possibly between Kurds and other groups outside Iraqi Kurdistan); wealth sharing; Kurdish control over

⁶ There are also Kurdish communities in Armenia, Azerbaijan and Georgia.

local security forces; elements of cross-border institutions; and para-diplomacy (for example, to empower Kurds in Iraq to establish a range of formal relations with their kin in neighbouring countries).

The Iraqi constitution of 2005

How do the provisions in the Iraqi constitution of 2005 hold up against this expectation? ⁷ The designers of the constitution did a good job in addressing many facets of the situation of Kurds in the country, and a majority of Iraqis were wise enough to accept the bargain on offer. The three provinces and small additional areas that make up the Kurdistan region have been recognized as a distinct entity within the federation created by the constitution. ⁸ The powers that Kurdistan enjoys, i.e. the degree to which its autonomy can be called substantive, are extensive. Moreover, residual authority is placed with the federal entities in Iraq: any competence not expressly reserved for the centre is automatically considered to belong to the entities. It is also remarkable that the federal entities are deemed to be hierarchically superior to the federal government in all areas where they share competences. In other words, the government of a federal entity can overrule the central government in any dispute over the exercise of power in an area of concurrent competences. ⁹

Although territorial self-governance for Kurds in the Kurdistan region is thus well established and constitutionally guaranteed, no similar provision exists (at the moment) for local minorities in Kurdistan or for Kurds outside the Kurdistan region, as in Mosul. The constitution does make some provision on non-discrimination, ¹⁰ on mother-tongue acquisition and teaching for smaller minorities and on the use of minority languages as additional official languages in areas of compact minority

⁷ I rely on the final draft of the Iraqi constitution submitted to, and approved by, the people of Iraq on 15 October 2005 in a version translated by the UN Office for Constitutional Support (last-minute amendments translated by the Associated Press) and available online at http://portal.unesco.org/ci/en/files/20704/11332732681iraqi_constitution_en.pdf/iraqi_constitution_en.pdf.

⁸ The Kurdistan region is mentioned specifically in Articles 4(3), 113(1) and 137. See http://www.uniraq.org/documents/iraqi_constitution.pdf.

⁹ Article 111 states: 'All powers not stipulated in the exclusive authorities of the federal government shall be the powers of the regions and governorates that are not organized in a region. The priority goes to the regional law in case of conflict between other powers shared between the federal government and regional governments.'

¹⁰ Although articles 2 and 3 affirm Iraq's Islamic and Arab character, they guarantee 'full religious rights for all individuals' and accept that 'Iraq is a multiethnic, multi-religious and multi-sect country.'

settlement.¹¹ But short of well-crafted implementation legislation, especially constitutions in the federal entities with relevant provisions, none of the Iraqi constitutional provisions afford much protection for local minorities (non-Kurds in Kurdistan and Kurds and other minorities outside Kurdistan). Those provisions do not provide for the kind of local territorial and non-territorial self-government that would be expected in a pre-emptive effort to assure minorities that their rights and identity are safeguarded.

The constitutional status of power sharing is even less encouraging. Iraq's three-member presidency (the Presidential Council) is elected by a qualified majority of two-thirds of members of parliament (the Council of Representatives).¹² It must then ask a nominee from the largest party in parliament to form an executive (the Council of Ministers), which requires simple majority support in parliament. In combination with a party list–proportional electoral system in which Iraq is a single constituency, this ensures that all Iraqi government institutions are broadly inclusive in their membership, provided there is no boycott of elections by particular groups. There are no formal rules for power sharing in the executive, but even small parties are likely to have a relatively high degree of influence because a number of legislative initiatives require qualified majorities for their passage.¹³ For power sharing at the local level in different federal entities, regional constitutions will be the appropriate place to address this issue, but such arrangements do not yet exist. Given the tense relations

¹¹ Article 4(1) stipulates that the 'The right of Iraqis to educate their children in their mother tongue, such as Turkmen, Syriac and Armenian, in government educational institutions in accordance with educational guidelines, or in any other language in private educational institutions, is guaranteed.' Article 4(4) guarantees that the 'Turkmen language and Syriac language are two other official languages in the administrative units in which they represent density of population.' And Article 4(5)n provides that 'each region or governorate may adopt any other local language as an additional official language if the majority of its population so decide in a general referendum.'

¹² This procedure is at present envisaged to be operational only during a four-year transition period.

¹³ This includes the ratification of international treaties and agreements (Article 58/4), consent to a joint presidential–prime ministerial declaration of war or of a state of emergency (Article 58/9a), the establishment and functioning of the federation council (Article 62) and of the Federal Supreme Court (Article 89/2), and the dissolution of the property claims commission. According to Article 67(1), the election of the president (Presidency Council in the transition period as per Article 134/2a) will confirm any candidate as winner who receives a two-thirds majority. This is watered down, however, by offering a run-off between the two strongest candidates if no one achieves that majority in the first round. In the second round, a simple majority is sufficient (Article 67/2). A three-fourths majority is required for the removal of a member of the Presidency Council in the transition period (Article 134/2c); a replacement can be voted into office with a two-thirds majority (Article 134/2d). A three-fifths majority is necessary to overrule a veto by the Presidency Council in the transition period (Article 134/5b).

between the different groups in Iraq, the lack of formal power sharing arrangements does not bode well for the future of the country as a whole (especially when the few provisions of the transitional period expire). The lack of any such arrangements in relation to the federal entities does not inspire much confidence about the future of local minorities.

The status of the Kurdish security forces, the peshmerga is covered in two articles of the constitution, but in a somewhat contradictory manner: Article 9(1b) provides that 'the formation of military militia outside the framework of the armed forces is prohibited.' Article 117(5) stipulates that 'the Regional Government [of Kurdistan] shall be responsible for all the administrative requirements of the region, particularly the establishment and organization of the internal security forces for the region such as police, security forces and guards of the region.'

Provisions for wealth sharing are established in two articles of the constitution, but again with a degree of ambiguity. Whether this is constructive has yet to be tested. Article 108 declares that 'oil and gas are the ownership of all the people of Iraq in all the regions and governorates.' Article 109 stipulates in its first two paragraphs that the production and distribution of oil and gas wealth are a joint undertaking by the federal government and the producing governorates and the regional governments, as is also the setting of strategic priorities for the development of oil and gas reserves. Ambiguity arises from the placement of these two articles in the section on the powers of the federal government. Although not included in the category of exclusive federal competences (Article 107), wealth sharing also does clearly not fall into the area of concurrent or regional competences, i.e. the two areas in which regional authorities' decisions are superior to those of the federal government.

The final expectation about the Kurdistan region in Iraq is that, because of the large number of Kurds settled in a compact area and in sizeable numbers in three contiguous states, there should be significant cross-border institutions in place, and the Kurdistan region should enjoy a range of para-diplomatic powers. But foreign policy, diplomatic representation and negotiating international accords and agreements are among the few exclusive federal competences, i.e. these are policy areas in which the governments of federal entities have no powers at all. Moreover, the provision in Article 117(5) that 'offices for regions and provinces are to be established in embassies and diplomatic missions to follow up on cultural, social and local development affairs' is a constraining rather than an enabling mechanism as far as para-diplomatic competences for the Kurdish region are concerned. It limits representation abroad to countries in which Iraq is diplomatically represented and it confines the scope of the activities that any such office can undertake only to the areas of cultural, social and local development.

In summary, the Kurds in Iraq are a large, non-state people in a large, heterogeneous region; they are settled in a compact area but they straddle state boundaries and there are exclaves. As a minority, they have suffered high levels of discrimination and persecution throughout the existence of Iraq as an independent state, and they were practically asked to reintegrate into post-Saddam Iraq after enjoying over a decade of quasi-independence and relative political stability. In order for the Kurds to contribute to peace and stability at the local, state and regional levels, there need to be in place

arrangements for territorial and non-territorial self-governance (in relation to Kurds and to groups in their region), for power sharing at the central and local level, and for cross-border institutions and para-diplomatic competences. Sadly, the only well-developed arrangement is that for the territorial self-governance of the Kurdistan region in Iraq. Comparative experience from a wide range of cases elsewhere suggests that this is unlikely to be a sustainable situation in the longer term. This raises the question of the nature of alternative and additional arrangements that should be put in place.

A new 'package' for Kurds and Kurdistan in Iraq

There are two main problems with the current constitutional arrangements. They do not establish sufficient incentives for Kurds to participate in the affairs of the central government and the Iraqi state more generally. Also, they do not create a regime of relationships between Kurds and local minorities in the Kurdistan region that addresses existing and potential concerns of the latter. The existing arrangements also do not consider the situation of the Kurds as a stateless people whose area of settlement stretches across four contiguous states in the region (even though they might well be said to consider the concerns of these four states in relation to their respective Kurdish populations).

How can these problems be resolved? First of all, in relation to the situation in the Kurdistan region itself, a regional constitution must provide for possibilities of local territorial and non-territorial self-governance of non-Kurdish groups. Wherever necessary, local-level power sharing mechanisms should be established to allow non-Kurds meaningful participation in the political affairs of the Kurdistan region and/or any of its provinces. This needs particularly careful consideration in the case of Kirkuk given the expectation that this city and adjacent areas will become integrated into the Kurdistan region after a local referendum. One possibility here would be to give Kirkuk a special status within Kurdistan, similar to that of existing provinces, and to formalize the existing informal power sharing governance arrangements while incorporating political leaders from Kirkuk into the running of the Kurdistan region as a whole.

Second, the Kurdistan region itself, the people living there and their political elites, must be given a clearer share of power at the centre. In view of the size of the region and its population as well as the number of Kurds living in Iraq, it would be more sensible to find ways in which power sharing at the centre can be put on a more solid footing. This need not happen in an ascriptive, Bosnia- or Lebanon-style way, but it can be ensured by way of specific rules of executive formation (using mathematical allocation formulae such as d'Hondt or St Laguë) and more extended use of qualified and concurrent majority voting in parliament and in the executive on a set of pre-determined policy areas and/or following a specific trigger procedure.

Third, Kurdistan's right to maintain and control its own security forces must be firmly enshrined in the constitution, but there should also be provisions that envisage a gradual integration of the Kurdish peshmerga into democratically controlled Iraqi security forces.

Fourth, provisions for wealth sharing need to be established more clearly by law and in a broad Arab–Kurdish consensus. Any future revisions of such a law must be subject to qualified or concurrent majority voting in the Iraqi parliament.

Finally, for the Kurdistan region to discharge all the competences that it enjoys under the constitution in an effective and efficient way, it is of great importance that the regional government should be given more powers to participate in international affairs. Trade agreements, independent representation abroad and the ability to attract foreign investment are three key areas in which the federal government and the regional government should at a minimum have shared competences. Other relevant fields would include education (including exchanges), culture (including possibilities to promote Kurdish identity) and environmental protection (including issues of a cross-border nature).

Achieving any of these changes (and possibly others) will not be easy. The situation in Iraq today, and for that matter the wider region, is not conducive to constitutional change along the lines just proposed. However, responsible political elites in Kurdistan, Iraq and beyond must realize that the current arrangements are insufficient and prone to instability. Kurds and Kurdistan deserve and must establish a ‘special’ relationship with the rest of Iraq. But although their position in Iraq may be special, it is not unique compared to other cases, and the comparative experience of those cases suggests that if too little is done to establish arrangements that take full account of the situation of Kurds and Kurdistan in Iraq, instability and insecurity are bound to result. This would not be a happy prospect for an already volatile country and region.