A BRIEF CRITICAL ANALYSIS OF THE APPLICATION OF THE DOCTRINE OF SELF-DETERMINATION IN THE CASE OF IRAQI KURDS

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Introduction

Speaking on 2 February 2016, the president of Kurdistan region of Iraq and leader of the Kurdistan Democratic Party stated that "the issue of self-determination" should be considered "a right" for the Kurdish people, and presented to call referendum and deciding their own future.[1]

In the light of this new and open demand for increased self-determination, it is extremely timely to examine the legal basis that the Kurds may wish to make their claim for increased devolution or independence on. The Kurds occupy a unique position in Iraq. The Kurdish state within Iraq has been an oppressed non-entity, a quietly accepted dominion, a Western protectorate and now a part of a federal and fragmented Iraqi state. This paper will aim to examine the modern state of the Kurds, focusing in particular on the question of if the Iraqi constitution's recognition of the rights of the *Hikûmetî Herêmî Kurdistan (*Kurdistan Regional Government/"KRG") can be said to have granted them a true measure of self-determination within the Iraqi state. The historical recognition provided for the Kurds in the Treaty of Lausanne offers the possibility of legal effect and offers some parallels to the recognition of the Quebecers within Canada. This parallel will be examined, assessing the relationship between international and municipal law in assessing self-determination claims and how this has been changed by Kosovo. This will be combined with an initial assessment and application of the current state of self-determination law, examining the logic of both the Canadian case on Quebec and the more limited findings of the ICJ case on the independence of Kosovo.

The Principle of Self-determination

The principle of self-determination as an issue of international law is relatively recent; it was not included in the League of Nations Covenant, and seems not to have been

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[1] http://rudaw.net/english/kurdistan/02022016 (5 February 2016).

treated as a legal rather than political concept.[2] For a long time, it was regarded mostly and exclusively political concept, and the 1921 *Aaland Islands* case also establishes that the principle was not a feature of customary law at the time that the case was heard, with both the International Commission of Jurists and the Committee of Rapporteurs treating the issues as primarily political and more importantly novel.[3] The Commission did make the famous finding that "the separation of a minority from the State of which it forms a part and its incorporation in another state can only be considered as an altogether exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees."[4] This appeared to accept that the forcible separation of territory might be an acceptable solution to a sufficiently serious issue (such as the *Aaland Islands* repression of culture), and indeed it is argued by *Crawford* that the hypothetical cases that would allow for this separation is the start of a chain of law that connects to the Bangladeshi claim of independence based on *carence de souveraineté*[5] and directly influenced the decision to mention the principle in UN Charter, Article 1 para. 2. Aside from Crawford's citation of Bangladesh, *Finkelstein et al.* identified the independence through self-declaration Croatia, Slovenia, Bosnia and the Baltics as further evidence that the principles of this chain of law are increasingly accepted.[6]

If this line of law is accepted, it would thus be clear that the situation may exist (even setting aside the Kosovo law) where a proto-state may have the right to claim that their non-representation[7], or, on a different reading of *Aaland Islands*, the right to minority cultural identity as expressed as a matter of "the struggle for the preservation of their ethnical heritage"[8] can result in the right to be disconnected from the main state. This was prevented in the *Aaland Islands* case by the provision of guarantees from the Finnish government of political and cultural autonomy, and the hearing thus rejected the right on the facts of the islands to seek a greater, true independence.

It was thus established that independence based on *carence de souveraineté* may be prevented by provisions for political and cultural protection, and indeed this is the situation of most of the world's minorities. The Quebecers and Basques are given substantial cultural freedoms, and exist within democracies with protections that apply

[2] Miller, David Hunter: *The Drafting of the Covenant*. New York, G.P. Putnam's Sons, 1928. pp. 12-13.

[3] Shaw, Malcolm: *International Law*, Cambridge University Press, Cambridge, 2010. p. 251.

[4] Beyens, Calonder, Elkus: *Report of the Commission of Rapporteurs*. Council of the League of Nations, Doc. B7/21/68/106. 16 April 1921. p. 28.

[5] Crawford, James: *The Creation of States in International Law*, Clarendon Press, Oxford, 1979. pp. 85-87.

[6] Finkelstein, Neil – Vegh, George – Joly, Camille: Does Quebec Have the Right to Secede at International Law? *Canadian Bar Review*, Vol. 74 (1995) 225.

[7] Crawford: *op. cit.*

[8] Beyens: *op. cit.*

to both majority and minority populations. It must be a question of fact as to if this is provided to the Kurds in Iraq, however.

The Principle within the UN System

Aside from this basis of law based purely on a pre-UN case and state practice, treaty law has moved the right of self-determination from the airy "hand-waving" of Article 2 para. 1 of the UN Charter to something far more tangible.

The first truly clear statement of a right to self-determination arises in the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, which states in Article 2 that "[a]ll peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[9] This was then strengthened by the 1966 International Covenants on Human Rights, which contain further references to the "right" of self-determination. The 1970 Declaration on Principles of International Law Concerning Friendly Relations then further cements this, was passed unopposed, and states that all peoples are entitled to self-determination. It must be noted that this was consistently held to be a matter of self-determination within inviolable state boundaries, and is almost invariably dealt with in this context precisely to prevent a right of secession arising.[10]

Indeed, this was discussed in the context of Quebec, and the Canadian Supreme Court commented that "international law expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states."[11] This presents a considerable obstacle to independence, and yet the Court also noted that unilateral succession, whilst it "arises only in the most extreme of cases and, even then, under carefully defined circumstances",[12] can be valid.

The Principle within the International Jurisdiction

ICJ law has moved on since this point, and *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion)*[13] and

[9] *United Nations General Assembly Resolution 1514*, XV. 1960.
[10] Franck, Thomas: *Fairness in the International Legal and Institutional System*. Oxford University Press, Oxford, 1998.
[11] *Reference re Secession of Quebec of* 1998, 161 DLR (4th) 385. p. 436.
[12] *Ibid.* 438.
[13] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion)*, General List No. 141, International Court of Justice (ICJ), 22 July 2010.

Case Concerning East Timor (Portugal v. Australia)[14] represent the most developed (and authoritative)synthesis of both treaty and customary law.

East Timor established that "Portugal"s assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable."[15] The only question at issue is thus the inviolability of borders. The facts around *Kosovo* relate to a declaration of independence that was made by a province within a state, and it was found that "general international law contains no applicable prohibition of declarations of independence. Accordingly, [the Court] concludes that the declaration of independence of 17 February 2008 did not violate general international law."[16] This means that the right to self-determination may exist within a state, and may result in legal independence.

The pure question of if a declaration may be made is not greatly related to municipal law; indeed the Kosovo findings include the fact that an explicit local monopoly on foreign relations by UNMIK against the local government was circumvented by merely having a member of the public who was not in government declare independence. This was a matter of international law over municipal law, as the court accepted that the declaration was legal based purely on international law. The court does not deal with the question of recognition, and thus this remains a political issue. It is therefore apparent that a right to independence exists, but no duty to recognize exists. Accordingly, state practice must be looked to in this matter, and it is apparent that the one widely recognized state to have gained self-determination was denied political and cultural control by the previous controlling state. This seems analogous to the threats against culture and political freedom in *Aaland Islands*, and the "extreme circumstances" mentioned in the *Quebec* case.

Since Kosovo specifically spoke of the right of independence in general, state practice must be the only guide to recognition, and thus the application of the *Aaland Islands* and *Kosovo* standards seem the best yardsticks. Relating to the *carence de souveraineté* test, it is notable that a similar test of a clear political break from the host state exists. It therefore seems likely that the Kurds will only be *recognized* as potentially independent if they are i) a non-state people within a majority state (hereinafter: Test A), and; ii) clearly being denied self-determination within that state (hereinafter: Test B). Both of these are matters that may be examined on the facts and law.

[14] *Case Concerning East Timor (Portugal v. Australia)*, International Court of Justice (ICJ), I.C.J. Reports 1995.

[15] *Ibid.* 102.

[16] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion)*, General List No. 141, International Court of Justice (ICJ), [84] 22 July 2010.

The Self-determination in the Iraqi Legal System

It must first be noted that the first words of the Iraqi constitution refer to "the people of Mesopotamia"[17] and the fact that the constitution uses the singular might appear to the cynical observer to be an attempt to undermine the potential Kurdish claim to be an independent people. Indeed, this unitary theme is a constant repetition of the constitution, which also describes ethnic diversity as "Shiite and Sunni, Arabs and Kurds and Turkmen and from all other components of the people"[18] and appears very much to wish to reject the claims of nationalities to be separate peoples. This is particularly clear when it is considered that the drafts did have more explicit references to peoples and a federal structure.

As a matter of formal recognition, the definition of a 'people' was historically somewhat problematic. *Katangese Peoples' Congress v. Zaire*[19] established that a people must be considered within the boundaries of a state rather than being capable of existing within a non-colony state, but even though this was the established view[20] this is apparently no longer good law. Kosovo's self-determination establishes that this colony status is no longer essential, and the independent area may be geographically separate within a state; Kosovo is enclosed by Serbia in large part, but touches a foreign country in a similar way to the KRG. The KRG is thus not banned from being considered geographically separate for the purposes of being considered a separate people. The Arab/Kurd split is considerable, and is both an ethnic and cultural divide.

Interestingly, the deliberations regarding the Kurds during the drawing up *Treaties of Sevres and Lausanne* now have no real bearing on the status of the Kurds as a people; both the Kosovo and UNESCO tests are not based on the opinions of other states, but are objective criteria.

The *UNESCO meeting of Experts on Further Study of the Rights of Peoples*[21] list the criteria for determining if a group is a people as possessing

1. A common historical tradition;
2. Racial or ethnic identity;
3. Cultural homogeneity;
4. Linguistic unity;
5. Religious or ideological affinity;
6. Territorial connection;
7. Common economic life,[22]

[17] *Iraqi Constitution of 2005*, www.uniraq.org/documents/iraqi_constitution.pdf, (17 December 2016).

[18] *Ibid.*

[19] Case *Peoples Congress v. Zaire* in 1995, No. 75/92: see 13 NQHR, 1995, p. 478.

[20] Gudeleviciute, Vita: Does the Principle of Self-determination Prevail over the Principle of Territorial Integrity?, *International Journal of Baltic Law*, Vytautas Magnus University School of Law, Volume 2, (2005) No. 2.

[21] *UNESCO meeting of Experts on Further Study of the Rights of Peoples,* Paris. February 1990.

with the "belief of being a distinct people"[23] and "institutions or other means of expressing its common characteristics and will for identity."[24]

The Kurdish state existed in a de facto independent state from the end of the first Gulf War to the end of the second Iraq invasion. It therefore seems clear that the institutions existed (and, indeed, exist under the Iraq constitution ("IC") Article 117 provision that "[t]his Constitution, upon coming into force, shall recognize the region of Kurdistan, along with its existing authorities, as a federal region"). The Kurds also possess a common history and ethnic identity, have cultural homogeneity and linguistic unity, and have a history of 20 years of independent economic life and thousands of years of territorial connection. The Kurds must thus be viewed as a people, with rights under international law. Thus, "Test A" is passed.

The remaining test is thus if self-determination is, as a matter of fact, being denied within the existing Iraqi structure. The Kurdish people are provided with linguistic protection under IC Article 4, which states that "the Arabic language and the Kurdish language are the two official languages of Iraq. The right of Iraqis to educate their children in their mother tongue, [...] shall be guaranteed in government educational institutions in accordance with educational guidelines."

As Kurdish is an official language, a full set of freedoms is necessarily entailed. Linguistic restrictions might otherwise constitute an infringement of community rights under the 1966 International Covenant on Civil and Political Rights ("ICCPR"), where Article 19 (2) allows that "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice"[25], working in combination with the ICCPR Article 27 requirement that "linguistic minorities [...] shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."[26] These are judicable matters before the Human Rights Committee (*Korneenko and Milinkevich v. Belarus*[27] and *Mavlonov and Sa'di v. Uzbekistan*[28]), and as such could form evidence of human rights restrictions of the type required to demonstrate cultural repression for the purposes of *Aaland Islands* or clarifying the status of the repression of human rights as an "extreme case" for *Quebec*. IC Article 4(3) also guarantees this right, stipulating that "the federal and official institutions and agencies in the Kurdistan region shall use both

[22] Raič, David: *Statehood and the Law of Self-determination*. Martinus Nijhoff Publishers, The Hague, 2002. p.262.
[23] *Ibid.*
[24] *Ibid.*
[25] Article 19 para. 2 of 1966 *International Covenant on Civil and Political Rights.*
[26] *Ibid.* Article 27.
[27] *Case Korneenko and Milinkevich v. Belarus Human Rights Committee*, 1553/2007, 2009.
[28] *Case Mavlonov and Sa'di, v. Uzbekistan Human Rights* Committee, 1334/2004, 2009.

[Arabic and Kurdish] languages." As mentioned above, IC Article 117 guarantees the right to Kurdistan's territory and existing authorities to be considered a federal region, granting considerable powers under the IC's structure.

Article 120 allows that "each region shall adopt a constitution of its own that defines the structure of powers of the region, its authorities, and the mechanisms for exercising such authorities, provided that it does not contradict this Constitution." This grants an effective power of self-governance over almost all areas, and the ability to remake the governmental structure of the federal region as desired.

Indeed, IC 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 organized in a region in case of dispute." It is thus clear that in all matters that are not explicitly a matter purely for the federal authorities, political self-determination exists. Kurdistan is a region with a people in it, and is treated as a federal area. It is thus hard not to conclude that the laws are largely determined by local lawmakers, and that these are elected by the Kurdish people almost exclusively. Article 121 also gives the right for the regions to "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" [IC Article 121(1)] to "amend the application of the national legislation within that region" [Article 121(2)] when it does not relate to an exclusive authority, and stipulates that that "the regional government 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."[29] This is quite an astonishing amount of power for the regions compared to most states; the center cannot make law relating to most areas, and does not hold the monopoly on force.

The amount of freedom this actually grants is of course dependent on the competencies deemed to be exclusive to the central government, but these are delineated by IC Article 110, and appear restrained. Specifically, the exclusive competencies are foreign policy;[30] formulating national security and military policy;[31] formulating customs and fiscal policy and running the central bank;[32] regulating standards and measures;[33] regulating citizenship and immigration;[34] regulating broadcast

[29] See, IC Article 121 (5).
[30] *Ibid.* 110 (1).
[31] *Ibid.* 110 (2).
[32] *Ibid.* 110 (3).
[33] *Ibid.* 110 (4).
[34] *Ibid.* 110 (5).

frequencies and mail;[35] drawing up the central budget;[36] planning international water management,[37] and population statistics and census[38].

Conclusion

The afore-mentioned issues leave huge areas unrestricted. To note a few, it is perfectly possible to raise local taxes, invest in security forces, determine the local curriculum for education, and pass local laws and measures as may be necessary to regulate day to day trade and maintain the peace. It is notable that the government does not have the right to regulate political assembly, for example (although, as with most states, there remains a potential future issue of stretching what is covered under national security) and the amount of freedom to act that the Kurds have is remarkable. The situation the Kurds find themselves in is thus being part of a looser federal state than almost all in Europe, possessing the right to speak their own languages, make their own laws in most areas, tax as they wish, control the local police and other security forces, and determine their own administrative requirements such as provision of education and other services. This is strongly analogous to the deal eventually given to the islanders in *Aaland Islands*. The provisions against further infringements of rights are constitutional, and are thus extremely difficult to remove without Kurdish agreement.

The rights of self-determination that are possessed by the Kurds are thus somewhat more generous than those possessed by the Quebecers. The logic of the *Quebec* and *Aaland Islands* cases thus applies to show that the Kurds do possess self-determination under international law, although it should be noted that this also applied to the Kosovars without preventing them from declaring independence. It is thus clear that a unilateral declaration of independence by the Kurds would not be unlawful.

[35] *Ibid.* 110 (6).
[36] *Ibid.* 110 (7).
[37] *Ibid.* 110 (8).
[38] *Ibid.* 110 (9).