
The Iraq Paradox: Minority and Group Rights in a Viable Constitution

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INTRODUCTION

On October 15, 2005, an Iraq ravaged by a civil war spawned by the 2003 American invasion and subsequent occupation voted to decide the fate of a permanent constitution for the country.¹ Although many Sunni Arabs took part in the vote, the referendum lost in the three governorates where they form a majority.² But the constitution was approved because opponents only succeeded in recording “No” votes larger than two-thirds in only two of Iraq’s eighteen provinces, in effect one province short of a veto.³ A two-thirds rejection in three of the provinces would have doomed the charter and the transition to a regime more autonomous of the American occupation forces.⁴ However, Iraq teeters on the brink of

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1. See Dexter Filkins & Robert F. Worth, *Monitors in Iraq Review the ‘Yes’ Vote*, N.Y. TIMES, Oct. 18, 2005, at A1; Editorial, *Iraq’s Referendum*, WASH. POST, Oct. 16, 2005, at B6.

2. See Edward Wong, *Referendum Results; Iraqi Constitution Vote Split on Ethnic and Sect Lines; Election Panel Reports No Major Fraud*, N.Y. TIMES, Oct. 23, 2005, § 1, at 4; see also, IRAQ CONST., available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/12/AR2005101201450.html>.

3. See Anne Barnard, *Constitution Passes Amid Sunni Opposition*, BOSTON GLOBE, Oct. 26, 2005, at A14.

4. See *id.*

collapse months after the referendum, national elections, and the formation of a so-called government of national unity.⁵ The American ouster of President Saddam Hussein and the dominant Sunni minority from power opened a Pandora's Box that may force the partition of Iraq into three separate states.⁶ This Essay argues that only a popularly legitimate accommodation of minority and group rights in a democratic constitutional framework, a virtually impossible challenge, can avert the disintegration of Iraq.

Virtually all states have minority populations that belong either to a national, ethnic, religious, cultural, or linguistic group, and which may be distinguished from the numerical majority.⁷ Even so, the international regime for the protection of minorities has faced an arduous path fraught with innumerable difficulties.⁸ Nevertheless, a body of legal norms for the protection of minorities, many of them anchored in the human rights corpus, has coalesced over the last century. The highlight of these efforts was the adoption in 1992 by the United Nations of a declaration on the rights of minorities.⁹ In addition to basic human rights, which are guaranteed to all individuals and groups, international human rights law now requires that minorities be treated in accordance with certain norms and standards.

Although there is no formal definition in international law of who constitutes a minority, there appears to be a consensus that a "numerically smaller, non-dominant group distinguished by shared ethnic, racial, religious, or

5. See Dana Priest & Mary Jordan, *Iraq at Risk of Civil War, Top Generals Tell Senators*, WASH. POST, Aug. 4, 2006, at A1; Jim Rutenberg, *'Civil War' is Uttered, and White House's Iraq Strategy is Dealt a Blow*, WASH. POST, Aug. 6, 2006, at A4.

6. See PETER W. GALBRAITH, *THE END OF IRAQ: HOW AMERICAN INCOMPETENCE CREATED A WAR WITHOUT END* (2006).

7. See Hurst Hannum, *Contemporary Developments in the International Protection of the Rights of Minorities*, 66 NOTRE DAME L. REV. 1431, 1431 (1991).

8. See THOMAS BUERGENTHAL ET AL., *INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL* 10-14 (3d ed. 2002).

9. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, G.A. Res. 47/135, Annex, U.N. Doc A/Res/47/135/Annex (Dec. 18, 1992) [hereinafter Declaration on the Rights of Minorities].

linguistic attributes” captures the meaning of the term.¹⁰ Indeed, that is the definition implied by the Declaration on the Rights of Minorities.¹¹ In 1979, Francesco Capotorti, who was the Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, formulated the most widely used definition of a minority.

A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members—being nationals of the state—possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.¹²

Historically, the 1648 Treaty of Westphalia attempted the first regime for the international protection of minorities, even though parties to it only agreed to respect the rights of certain, but not all, religious minorities.¹³ But it was not until after WWI, when the political maps of Europe and the Middle East were substantially redrawn, that in 1919 the League of Nations developed the first modern regime for the protection of minorities. Thus a number of new states, including Albania, Turkey, Austria, Greece, Poland, Hungary, Czechoslovakia, Yugoslavia, Bulgaria, and Romania were required by the victors to sign special treaties for the protection of the ethnic, linguistic, and religious minorities within their borders.¹⁴

Even though it was limited by time and place, the so-called League of Nations minorities system established the first effective set of norms, processes, and institutions for the protection of minorities. The League Council and the Permanent Court of International Justice combined to hear

10. Hannum, *supra* note 7, at 1431.

11. Declaration on the Rights of Minorities, *supra* note 9, at Art. 2.

12. U.N. Econ. & Soc. Council [ECOSOC] Sub-Comm. on Prevention of Discrimination and Protection of Minorities, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, 96 U.N. Doc.E/CN.4/Sub.2/384/Rev.1, U.N. Sales No.E.78. XIV.1 (1979) (*prepared by* Francesco Capotorti) [hereinafter Capotorti].

13. *See* Hannum, *supra* note 7, at 1431.

14. *See generally*, HURST HANNUN, *AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION* (1990).

the petitions of minorities from which a body of law for their protection took root.¹⁵ Jurisprudentially, the League's system protected a wide array of minority rights, including the right to equal treatment and non-discrimination; the right to citizenship, with an option to retain a second citizenship; the right to use the group's language; the right to establish and control charitable, religious, and social institutions; a duty on the state to support minority schools, in which the medium of instruction was the minority language; the primacy of laws protecting minorities over ordinary statutes; and a limited degree of territorial autonomy in some select cases.¹⁶

There can be little doubt, however, that the League's minorities system was an attempt by the victorious powers to soothe and assuage minority groups whose claims for self-determination—construed as the right to form their own nation-states—were rejected. A number of problems were obvious. For example, the treaties on minorities were not applicable to the victors, nor was there any such suggestion. Secondly, the treaties largely dealt with the right to cultural survival: religion, language, and other cultural matters. Except in several minor cases, the treaties did not give minorities economic freedom or political power. Thus minorities were largely confined to existing states in which they were both politically and economically dominated by majorities, and in essence were limited to a second-class status.

Although the League's minorities system ultimately failed and died with it, many of its norms were carried forward in the human rights corpus created after WWII. It is important to note, however, that the UN and other international organs were, until the end of the Cold War, more interested in protecting individual rights within the framework of non-discrimination and equal protection than in developing a specific regime for the protection of minorities. But the end of the Cold War gave rise to nationalism and sub-nationalism, shaking the foundations

15. See, e.g., *Minority Schools in Albania*, Advisory Opinion, 1935 P.C.I.J. (ser. A/B) No. 64, at 4 (Apr. 6); *Access to German Minority Schools in Upper Silesia*, Advisory Opinion, 1931 P.C.I.J. (ser. A/B) No. 40, at 4 (May 15).

16. See Inis L. Claude Jr., *National Minorities: An International Problem* 17-20 (1955); see also, Hannum, *supra* note 7, at 1432-33.

of many states, and leading to the collapse and disintegration of others. The Soviet Union, Yugoslavia, Afghanistan, Ethiopia, Rwanda, and Somalia provided the most poignant examples of the combustible mix of nationalism, post-colonial trauma, ethnicity, race, religion, language, and the persistent problem of minority rights.

Today, largely due to this tortured history, there is recognition that the state must accord certain rights to minorities. Contemporary minority rights jurisprudence is drawn mostly from the norms of the League's system, the UN Charter itself, the international human rights corpus, and the Declaration on the Rights of Minorities.¹⁷ As the single most important site for the vindication of both individual and group rights, the state, which is the obligor of international norms, is required to provide for the protection of minorities both in its basic and other laws. Thus a state's constitution must, within the framework of the bill of rights and other ordinary statutes, provide for the norms, processes, and institutions for the protection of the rights of minorities. To be sure, the scope and bases for some of these rights are far from settled; but the bottom line is not in dispute. In addition to equal protection and non-discrimination in garden-variety bills of rights, certain other rights and arrangements may be necessary for the full protection of minorities. These include cultural survival rights, although in certain cases the historical context may require particular constitutional and political arrangements to empower and protect minorities. These could be autonomy regimes for minorities, federalism, or an option for separation or secession.

This Essay contends that unless Iraq uses these international norms to craft a rights regime that is acceptable domestically and internationally to address the rights and fears of minorities and vulnerable groups, the country may fall apart. The Essay suggests several options and devices, and outlines the floor below which both international and human rights law will not permit a state to fall. It argues that flexibility in contemplating various options is particularly essential in post-conflict societies

17. See also the European Framework Convention for the Protection of National Minorities, *opened for signature*, Feb. 1, 1995, Europ. T.S. No. 157, which further codifies the rights of minorities.

where groups are deeply divided by chasms of race, religion, history, region, ethnicity, and the asymmetries of political power and control over economic resources. In the particular case of Iraq, there are schisms on at least three different levels. The first is ethnic, with the Arab population estimated at 75%, the Kurds at 15-20%, and the smaller groups of Assyrians, Turkmens, Armenians, and others at 5%.¹⁸ The second divide is religious: 96% of all Iraqis are Muslims, and of those, 60% are Shia, and 40% are Sunni Arabs and Sunni Kurds. Christians make up most of the rest of the population.¹⁹ The third faultline is regional: the Shia live largely in the central and southern region, the Sunni in the north, and the Kurds in the northern highlands.²⁰

The differences among the various Iraqi groups were exacerbated by decades of violent repression under former President Saddam Hussein who was deposed by the U.S. invasion in 2003. But the U.S. invasion has spawned untold violence and pushed Iraq to the edge of collapse. In addition to its wanton destruction of life, limb, and property, the occupation has engendered a civil war among the three major identities, the Shia, the Sunni, and the Kurds, that now threatens the survival of the state.²¹ These cataclysmic chasms can only be addressed in the context of the reconstruction and reconstitution of Iraq. But to be credible, stable, and legitimate, any post-Hussein, post-occupation state must deal fairly and intelligently with the competing claims, fears, and aspirations of the Shia, the Sunni, and the Kurds. In other words, any credible solution must accommodate the anxieties of Iraqi minorities.

I. MINORITY RIGHTS: THE BASIC LEGAL FRAMEWORK

Contemporary international human rights law, which forms the basis for the protection of the rights of minorities, is a post-WWII phenomenon. In fact, human rights law

18. Encarta Encyclopedia, http://Encarta.msn.com/text_761567303_0/Iraq.html (last visited Sept. 11, 2006).

19. *Id.*

20. *Id.*

21. See Nicholas Sambanis, *It's Official: There is Now a Civil War in Iraq*, N.Y. TIMES, July 23, 2006, § 4, at 13.

rises from the ashes of the Holocaust, the attempt by the Third Reich to completely eradicate Jews, a European minority, from the face of the earth. The UN Charter itself proclaimed, in part, that one of its “purposes” was to promote and encourage “respect . . . for fundamental freedoms for all without distinction as to race, sex, language, or religion.”²² These obligations are further spelt out in Articles 55 and 56 of the UN Charter. The importance that the UN Charter places on equal protection and non-discrimination on the grounds of race, religion, and language, three of the most important identities that have historically been the pretext for the repression of minorities, cannot be overstated. While it is true that the UN Charter does not even once mention the rights of minorities, it would be incorrect to argue that the drafters were oblivious to the problem. In 1947, the UN established the Sub-Commission on Prevention of Discrimination and Protection of Minorities, known by that name until 1999 when it became the Sub-Commission on the Promotion and Protection of Human Rights. In 1978, the UN Commission on Human Rights [Human Rights Council]²³ established the open-ended Working Group on Minorities, the body that drafted the 1992 Declaration on the Rights of Minorities.²⁴ The Declaration drew on Capotorti’s 1979 report, the leading study on the treatment of minorities.²⁵

The UN, unlike the League of Nations, was not preoccupied with minority rights. Instead, the UN seemed to think that the problem of minorities could be resolved if their individual rights to equality and non-discrimination were guaranteed, along with those of individuals in the majority groups. But this individualization of the rights of minorities, ostensibly denying them of their group or collective character, was clearly a mistake. In addition, the UN Charter’s language of the “principle of equal rights and

22. U.N. Charter art. 1, para. 3.

23. On March 15, 2006, the United Nations General Assembly transformed the UN Commission on Human Rights into the Human Rights Council through General Assembly resolution A/Res/60/251. See Amnesty International, “UN Human Rights Council: A New Beginning for Human Rights,” AI Index: IOR40/017/2006 (Public), May 10, 2006.

24. UNITED NATIONS, *THE UNITED NATIONS AND HUMAN RIGHTS* 116-17 (1984).

25. Capotorti, *supra* note 12.

self-determination of peoples²⁶ was initially restricted to the right of the peoples under colonialism to their own independent sovereign state. But this restriction only contemplated separation from the colonial power, and not a solution to the problem of minorities within the newly independent states. Nevertheless, it became in the post-Cold War period a basis for imagining more robust claims by minorities and other peoples.²⁷

Not surprisingly, the Universal Declaration of Human Rights, arguably the single most important human rights document, did not specifically address minority rights either, choosing instead to underscore the respect for individual rights through the principles of equal protection and non-discrimination without regard to "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."²⁸ Again, it is important to note that many of these distinctions have been the basis for abominations against minorities. In 1960, the United Nations Educational, Scientific and Cultural Organization [UNESCO], adopted the Convention Against Discrimination in Education, which recognized the right of minority groups to carry out their own educational activities, establish their own schools, and instruct students in their own language.²⁹

It was not until 1966 that the human rights corpus directly addressed the rights of minorities through the adoption of the International Covenant on Civil and Political Rights [ICCPR], easily the most important general scope human rights treaty.³⁰ Article 26 of the ICCPR, in its equal protection clause, prohibits discrimination on various grounds, including race, sex, language, religion, and

26. U.N. Charter art. 1, para. 2.

27. See Richard A. Falk, *The Right of Self-Determination Under International Law: The Coherence of Doctrine Versus the Incoherence of Experience*, in SELF-DETERMINATION AND SELF-ADMINISTRATION 47, 55-56 (Wolfgang Danspeckgruber & Arthur Watts eds., 1997).

28. Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 2, U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR].

29. See Convention Against Discrimination in Education, art. 5, Dec. 14, 1960, 429 U.N.T.S. 93.

30. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 [hereinafter ICCPR].

national origin. In a provision that has been celebrated as the first explicit recognition of the rights of minorities in a human rights treaty, the ICCPR provides that, “[i]n those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”³¹

Noteworthy here is the fact that the ICCPR only recognizes a very narrow and traditional range of minority rights, those relating to culture, religion, and language, without imagining others.³² Perhaps more disturbing is the fact that the rights are granted to individual members of the group, and do not explicitly attach to the group itself, which signifies a reluctance to recognize the groups in their collective identity. However, it is not possible to enjoy cultural or linguistic rights as an atomistic individual. Thus Article 27 of the ICCPR should really be read to imply group rights as well, and therefore a tacit recognition of the corporate rights of minority groups.³³ In 1994, the Human Rights Committee, the ICCPR’s treaty body, issued General Comment 23 on Article 27 of the ICCPR.³⁴

General Comment 23 was at pains to assure states that Article 27 did not envision the grant to minorities the right of self-determination—defined as secession or separation—from an existing state. In that sense, it sought to reaffirm the traditional reading of common Article 1 of the ICCPR and the International Covenant on Economic, Social and Cultural Rights which states, in part, that “[a]ll peoples

31. ICCPR, *supra* note 29, art. 27.

32. See Louis B. Sohn, *The Rights of Minorities*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 270, 270-87 (Louis Henkin ed., 1981).

33. See Henry J. Steiner, *Ideals and Counter-Ideals in the Struggle Over Autonomy Regimes for Minorities*, 66 *NOTRE DAME L. REV.* 1539, 1546-47 (1991).

34. The General Comment is the authoritative jurisprudential interpretation of the ICCPR, and clarifies and expounds the meaning of the treaty, although the quality of general comments has been uneven. See DOMINIC MCGOLDRICK, *THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* 94 (1991).

have the right of self-determination.”³⁵ That provision has not been construed to grant minorities an open-ended right of secession. General Comment 23 explained that the enjoyment of rights under Article 27 “does not prejudice the sovereignty and territorial integrity of a State party.”³⁶ But the Human Rights Committee stressed that although the rights protected under Article 27 were individual, they “depend . . . on the ability of the minority group to maintain its culture.”³⁷ The Human Rights Committee here is treading carefully between the traditional conception of the right to self-determination, which excluded minority groups, and contemporary pressures to more fully recognize the rights of minorities.

Several other regional and universal human rights documents continue the theme of equal protection and anti-discrimination. In 1990, the Conference on Security and Cooperation in Europe affirmed minority rights in the areas of language, education, and political participation in the Copenhagen principles.³⁸ The Council of Europe undertook similar commitments in the 1995 Framework Convention for the Protection of National Minorities.³⁹ The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) outlaws racial discrimination which it defines as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin” which impairs the enjoyment of the entire gamut of human rights.⁴⁰ The 1981 UN anti-discrimination declaration on religion or belief also made a useful contribution to minority rights

35. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, Annex, art. 1, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966).

36. U.N. Human Rights Comm., General Comment 23: The rights of minorities (Art. 27), ¶ 3.2, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (Aug. 4, 1994).

37. *Id.* ¶ 6.2.

38. See *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, June 29, 1990*, 11 HUM. RTS. L.J. 232 (1990).

39. Framework Convention for the Protection of National Minorities, *opened for signature* Feb. 1, 1995, Europ. T.S. No. 157.

40. International Convention on the Elimination of All Forms of Racial Discrimination, art. 1, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195, 5 I.L.M. 352 [hereinafter CERD].

jurisprudence.⁴¹ Finally, of course, the UN adopted the Declaration on the Rights of Minorities in 1992. Although not formally binding, the Declaration on Minorities restates long held principles and standards on the rights of minorities. Several of its norms have entered into the general corpus of international law as *opinio juris*.

Note should be taken of the fact that the Declaration on Minorities neither uses the terms “peoples,” nor “self-determination,” nor “autonomy.” It states “[n]othing in [it] may be construed as permitting any activity contrary to . . . sovereign equality, territorial integrity and the political independence of States.”⁴² Again, this is a reaffirmation of the traditional understanding of the right to self-determination, and a rejection of the construction of that right as entitling minority groups the right to secession. But the Declaration also gives “[p]ersons belonging to minorities the right to participate effectively in cultural, religious, social, economic and public life.”⁴³ It guarantees individual members of minority groups the right “to participate effectively” in national and regional decisions concerning them.⁴⁴ But the Declaration does not define the term “minority” and generally protects individual, not group rights. By restating internationally acceptable standards, the Declaration essentially establishes the floor below which states cannot fall in their treatment of minorities. Suffice it to note that the Working Group on Minorities continued to report on problems faced by minorities and to further elaborate on their rights.⁴⁵

It is not possible to discuss the rights of minorities without any reference to the rights of indigenous peoples, a category of peoples whose issues are analogous to those of minorities. Although many indigenous peoples also tend to

41. See Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, G.A. Res. 36/55, U.N. GAOR, 36th Sess., Supp. No. 51, U.N. Doc. A/RES/36/55 (Nov. 25, 1981).

42. Declaration on the Rights of Minorities, *supra* note 9, art. 8(4).

43. *Id.* art. 2(2).

44. *Id.* art. 2(3).

45. See, e.g., Comm’n on Human Rights, Sub-Comm’n on the Promotion & Prot. of Human Rights, *Prevention of Discrimination and Protection of Minorities: Report of the Working Group of Minorities on its Tenth Session*, U.N. Doc. E/CN.4/Sub.2/2004/29 (June 8, 2004).

be minorities, they have pressed for, and been accorded, a separate regulatory regime under international law. Thus, the two categories have different standard setting processes. While the Declaration on the Rights of Minorities governs in one case, two International Labor Organization (ILO) conventions⁴⁶ and the Draft Declaration on the Rights of Indigenous Peoples are regarded as the most important documents on indigenous peoples.⁴⁷ The Draft Declaration, which is still under discussion at the UN Human Rights Council, controversially provides that “[i]ndigenous peoples have the right of self-determination” by which “they freely determine their political status.”⁴⁸ This is a paradigmatic departure from the timidity of the Declaration on the Rights of Minorities, and one of the reasons why states are unlikely to approve the Draft Declaration in its current formulation.⁴⁹ Nevertheless, debates on the rights of indigenous peoples, especially their insistence on the right of self-determination, have forced states and international law to evolve towards a somewhat less negative view.⁵⁰ This development in international law can only benefit minorities because of the analogy between the two categories of peoples.

In sum, this basic legal framework for the protection of minorities should provide a basic signpost for virtually all states, including Iraq, in their treatment of minorities. Several of the norms governing the protection of minorities are either part of customary international law, human rights, or both. It is incumbent on each state therefore to formulate domestic legal regimes to vindicate these norms. The scope of the norms, and the manner and extent of their guarantee, will depend on historical and contextual

46. Indigenous and Tribal Populations Convention, ILO 107, which was revised by the Convention Concerning Indigenous and Tribal Peoples in Independent Countries, ILO 169, 72 ILO OFFICIAL BULL. 59, entered into force September 5, 1991.

47. Comm’n on Human Rights, Sub-Comm’n on the Promotion & Prot. of Human Rights, *Technical review of the United Nations draft declaration on the rights of indigenous peoples*, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (Apr. 20, 1994).

48. *Id.* art. 3.

49. See HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 1302 (2d ed. 2000).

50. See Falk, *supra* note 26, at 61.

circumstances in each country. How deeply and robust a state entrenches the protection of the right of minorities will depend on many factors, including the size of the minority population, its historical relationship with the state and the majority, and the stability of the state. A number of options are possible, including the traditionalist approach in which minority rights are protected through the generic bill of rights in the constitution, the creation of a federal state, the formulation of various autonomy regimes, or the eventual separation or secession and the establishment of an independent sovereign state for the minority population. What is clear is that states cannot simply ignore the rights of minorities, or worse still, violate them with impunity.

Iraq is today a deeply divided and violent society. Unfortunately, these gaping cleavages are ethnic, religious, cultural, and linguistic. Sunni Arabs, a minority that had long dominated the Iraqi state to the exclusion of the Shia and the Kurds until the American invasion in 2003, are at risk of being relegated to the status of the traditional minority, one without political power and adequate representation in the post-occupation state. This was precisely the outcome of the national elections held on December 15, 2005 under which Iraqis voted for a full-term government.⁵¹ Predictably, the majority of the seats went to the Shia, an Arab religious majority that has historically been repressed and marginalized by the Sunni.⁵² Out of a total of 275 seats in the legislature, the Shia received 140, or more than half, the Kurds seventy five, and the Sunni most of the rest.⁵³ The legislature was charged with the responsibility of drafting Iraq's permanent constitution. But neither the election nor the constitution did anything to end violence.

The matrix of Iraqi minority populations makes political democracy, and the resultant Shia domination, both a blessing and a curse. The Kurds, long autonomous even under the reign of Saddam Hussein, are not anxious

51. See Robert F. Worth, *Top Coalitions Fall Just Short in Iraq Voting*, N.Y. TIMES, Jan. 21, 2006, at A1.

52. See John F. Burns & James Glanz, *Iraqi Shiites Win, But Margin is Less than Projection*, N.Y. TIMES, Feb. 14, 2005, at A1.

53. See *id.*

for Shia domination, or their forced inclusion and participation in a violent Iraqi state. As such, the Kurds, a non-Arab minority, may opt for separation in the event of a deepening civil war, or a suffocating domination of the state by the Shia. Unfortunately, the permanent constitution did not adequately address the anxieties of the Sunnis and the Kurds, let alone those of the Christian, Assyrian, Turkmen, Armenian, and other minorities. That is why the legislature must utilize every tool in the box of options to draft a constitutional and legal dispensation that protects the rights of all and reconstructs a viable state.

II. THE BILL OF RIGHTS: A MINIMALIST APPROACH

The liberal constitution, the fundamental document for a modern political democracy, is now viewed as the best vehicle for protecting individual rights.⁵⁴

A political democracy built on the protections of the liberal constitution is the best guarantee for the enjoyment of a wide gamut of human rights.⁵⁵ Liberal theory is premised on the liberty and rights of the individual on whose consent the legitimacy of the state is founded. The human rights regime is rooted in liberal theory. Thus, for example, Article 21 of the UDHR provides that the “will of the people shall be the basis of the authority of government”⁵⁶ and Article 25 of the ICCPR states that only “genuine periodic elections” can guarantee the “free expression of the will of the electors.”⁵⁷ Among other things, both liberal theory and human rights are attentive to the proclivity of the state to abuse the individual, hence the formulation of norms and a state typology that limit the reach of state power. In effect, therefore, the rights language acts as a guarantee against state despotism.

This skepticism of state power is contained in a genus of constitutional system known as constitutionalism.

54. See generally, VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* (1999).

55. See Makau wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT'L L. 589 (1996); Henry J. Steiner, *Political Participation as a Human Right*, 1 HARV. HUM. RTS. Y.B. 77 (1988).

56. UDHR, *supra* note 27, art. 21.

57. ICCPR, *supra* note 29, art. 25.

Constitutionalism is a reference to several essential features of a democratic constitution, the foundation for a political democracy. The constitution is based on the concept of popular sovereignty. The essential features are: accountability of the state to the people through a number of techniques and mechanisms, the most important of which is periodic, regular, and genuine elections in a multiparty system; a scheme of checks and balances, usually through the separation of powers; an independent judiciary that is the guardian of the rule of law; and a guarantee of individual rights, normally in the Bill of Rights.⁵⁸ These features, which were first developed in Western Europe and the United States, are now increasingly common in African, Asian, and Latin American countries. The adoption of the liberal constitution accelerated rapidly after the Cold War in the former Soviet Bloc and the previously one-party states and military dictatorships in Africa.

Perhaps no other basic law more elaborately provides for the Bill of Rights than the 1996 South Africa post-Apartheid constitution, which is now regarded as a model document.⁵⁹ In it, the Bill of Rights guarantees protections from the state which are non-derogable,⁶⁰ and which the majority populations cannot easily abrogate.⁶¹ The Bill of Rights is therefore an anti-democratic device in the sense that it limits and may even prohibit majorities from altering it to the detriment of individual rights.⁶² In its equal protection clause, the South African Constitution provides that the state may not “unfairly discriminate” against anyone on the basis of race, color, religion, culture, language, or ethnic or social origin, among others.⁶³ But it permits the passage of legislation and the adoption of other measures “to protect or advance persons, or categories of

58. See STEINER & ALSTON, *supra* note 48, at 990.

59. S. AFR. CONST.

60. *See id.* § 37.

61. *See id.* Ch. 2.

62. The South African Constitution provides that the Bill of Rights can only be amended by a combination of two-thirds of the members of the National Assembly and the National Council of Provinces, with at least 6 provinces, which is two-thirds of the provinces. *See id.* § 74(2).

63. *See id.* § 9(3).

persons, disadvantaged by unfair discrimination.”⁶⁴ Human rights law authorizes this nod to affirmative action and other measures to alleviate the historical legacy of discrimination, exclusion, or marginalization.⁶⁵ In other words, the state may discriminate with reason. It is important to note that the Bill of Rights here binds all branches of the state, including the legislature, the executive, and the judiciary, and may be applicable to both natural and juristic persons.⁶⁶

The South African Bill of Rights, like all others, is largely a manifesto for the protection of individual, and not group, rights. In that sense, it grants fundamental rights to individuals on the assumption that the rights of all, whether individuals or groups, can be protected through a regime of equal protection and anti-discrimination. This is the same logic that directs the international regime for the protection of groups and minorities. Even so, the South African Bill of Rights explicitly protects the right of individuals to “use the language and to participate in the cultural life of their choice.”⁶⁷ In fact, the constitution recognizes the seven major African languages, in addition to English and Afrikaans.⁶⁸ More importantly, the Bill of Rights protects the cultural, religious, and linguistic rights of “persons belonging to a cultural, religious or linguistic community” to enjoy these rights “with other members of that community.”⁶⁹ Clearly, this provision was meant to protect the rights of the formerly dominant white—Boer and English—minorities after the investiture of a democracy under Black majority rule. But it is, of course, applicable to other minority groups, most of them African.

Although South Africa was a deeply divided society, particularly along racial lines, it chose a unitary state without any special arrangements for the protection of

64. *Id.* § 9(2).

65. *See, e.g.*, Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, 34 U.N. GAOR, 34th Sess., Supp. No. 46 at 194, U.N. Doc. A/34/830 (Dec. 21 1979) [hereinafter CEDAW]; CERD, *supra* note 39, art. 1(4).

66. *See* S. AFR. CONST. § 8(1)-(2).

67. *Id.* § 30.

68. *See id.* § 6(1).

69. *Id.* § 31.

minorities in its constitutional framework. Nor did it recognize group rights as such, opting instead to vest rights in individuals within groups and communities. Therefore, minority groups do not enjoy an explicit legal status in South Africa. However, there is some recognition for traditional authorities and leaders in the constitution. Such leaders, understood as customary law heads of some African ethnic groups, are allowed to function subject to the constitution and the Bill of Rights.⁷⁰ As such, traditional authorities can only apply African customary laws to the extent that they are not inconsistent with the Bill of Rights or the Constitution. The South African approach to the protection of groups is oblique in the sense that their rights are only impliedly recognized in their individual members.

The 2005 Iraqi Constitution provides a wide array of both civil and political rights, as well as economic, social, and cultural liberties.⁷¹ However, many of these are limited by claw back clauses, or exceptions that permit derogation. Nor does the constitution use the term “bill of rights” to describe these rights, or grant them a special legal status in the document. It is true, however, that it provides for a generic equal protection clause for all irrespective of gender, race, ethnicity, origin, color, religion, creed, belief or opinion, or economic and social status.⁷² Thus all groups, particularly the minorities—Sunni, Kurds, Christians, and other smaller groups—must be guaranteed equal protection under the law in which all discrimination is outlawed. But these rights should have been insulated from the whims of the majority by setting a virtually impossible threshold for constitutional amendments. For example, amendments to the constitution and basic rights should require not only a super-majority, but also approval by the major administrative units, including the minority groups. But in addition to equal protection and anti-discrimination requirements, a proper Bill of Rights must guarantee to minority groups, such as the Assyrians, Christians, and Armenians, the right to use their own language, the right to practice their own religion, and the right to enjoy their culture. The state should support, or at least not hinder or

70. *See id.* ch. 12.

71. *See IRAQ CONST.* ch. 2.

72. *See id.* art. 14.

prohibit, the efforts of minority groups to establish educational institutions in which their languages are the primary media for instruction.

The new Iraqi Constitution should have been a secular document in which there is separation of state and religion. However, it provided that "Islam is the official religion of the state" and a "basic source of legislation."⁷³ This formulation establishes Islam, or a particular sect of it, over other faiths. It is also inconsistent with equal protection notions, and may even favor Shia Islam over others. State favoritism or establishment of one faith over another, or any other formal or quasi-formal domination of the state by one faith, can be the basis for the intolerance of difference. State and constitutional structures that either resemble or institute a theocracy substantially negate if not nullify a bill of rights in Iraq. An Iran-style Shia state, in which Islamic clerics wield influence over the state, is inconsistent with the protection of minorities. Even the domination of an ostensibly secular Iraqi state by Shia religious political parties would have compromised equal protection norms. Thus, every effort must be made to work for the separation of religion from the state, and to diminish both the formal and informal influence of the mullahs in the state and its institutions.

III. AUTONOMY REGIMES FOR MINORITIES

Autonomy regimes may be the best solution for countries with strong willed and historically antagonistic groups. Within such schemes minority groups are able to defend, advance, and enjoy their basic rights as a collective or group entity. As such, the cultural survival of the group, which may not otherwise be guaranteed in a state dominated by a majority group, can be assured. It is important to note, however, that neither the international law regime on minorities nor the human rights corpus directly and explicitly authorize autonomy regimes. However, one can argue that both regimes of law imply some autonomy regimes for minorities.

73. *Id.* art. 2.

Articles 1, 25, and 27 of the ICCPR⁷⁴ provide the best case for an argument of autonomy regimes for minorities. Similarly, Articles 2, 3, and 4 of the Declaration on the Rights of Minorities could be interpreted to support autonomy regimes.⁷⁵ Although Article 1 of the ICCPR on self-determination has generally been applied to decolonization, the right of a people to be free from *external* domination, it could also be read to support *internal* self-determination under which a minority group could base a claim for some autonomy. Article 25 of the ICCPR, which gives citizens the right to political participation, could likewise be used to support autonomy by exposing the deficits of winner-take-all majoritarian democracies which either marginalize minorities or deny them political power and any effective leverage over the political process. Article 2(3) of the Declaration on the Rights Minorities also stresses their “right to participate effectively” in national decisions.⁷⁶ Finally, Article 27 of the ICCPR grants individuals of minority groups the right to “enjoy their own culture, . . . profess and practice . . . their religion, or to use their own language,”⁷⁷ which is echoed by Article 2(1) of the Declaration on the Rights of Minorities. In certain cases, only an autonomy regime could assure the group and its culture’s survival.⁷⁸

These arguments, which imagine three types of autonomy schemes for minorities, should be attractive to Iraqi legislators as they reform the country and tweak the new Iraqi constitution because autonomy regimes could substantially defuse group tensions, especially from the viewpoint of minorities. The first autonomy regime involves various power-sharing arrangements between minority groups and dominant majorities. In the case of Iraq, such arrangements would at least include the most important minority groups such as Sunni, Kurds, Christians, Turkmen, Assyrians, Armenians, and maybe others, in power-sharing arrangements with the Shia. Here, minority groups within the state would be identified either by

74. ICCPR, *supra* note 29, arts. 1, 25, 27.

75. Declaration on the Rights of Minorities, *supra* note 9, arts. 2-4.

76. *Id.* art. 2(3).

77. ICCPR, *supra* note 29, art. 27.

78. See Steiner, *supra* note 32, at 1546-47.

ethnicity, religion, or language. Through some statistical matrix, the minority groups would then be entitled to participate in the political, social, and economic life of the state. For example, the Kurds could be constitutionally entitled to elect a certain percentage of the members of the national legislature from a list that is internal to them and which would not be open to competition from other groups. Perhaps the minority legislators could be entitled to vote as a bloc on certain measures. Minority groups could hold a veto over an amendment to constitutional provisions on basic rights, the constitution, or ordinary laws, particularly in matters that may affect their status. Or a certain percentage of the civil service jobs could be reserved for the members of minority groups such as the Sunni, Kurds, Christians, and others. Maybe certain ministerial positions and slots in the judiciary could be earmarked for certain minorities.⁷⁹ How resources are shared could also be problematic. The Iraqi Constitution gives the Shiite and Kurdish regions more allotments of oil revenues because they were “unjustly deprived by the former regime.”⁸⁰ This could inflame Sunnis and arrest any attempts at national reconstruction. But specially targeted constitutional arrangements could empower minorities, give them a meaningful voice in the state, and ensure their preservation as a group. Belgium and Lebanon offer two tales of both the success, and difficulty, of such power-sharing arrangements between groups.

Another autonomy regime for minorities that Iraq should consider involves the devolution of powers from the central government to a given territory of the country in which the minority group predominantly resides.⁸¹ The 2005 Iraq Constitution provides for a federal structure in which the central government relinquishes control over certain matters to a given regional territorial structures dominated by specific minority groups.⁸² But the scheme, which was hotly contested, was left intentionally vague. The national legislature is supposed to define the division of powers between the central government and the regions. An

79. *See id.* at 1541-42.

80. IRAQ CONST. art. 109.

81. Steiner, *supra* note 32, at 1542.

82. *See* IRAQ CONST. arts. 106-122.

autonomy that devolves powers from the center may not necessarily contemplate a federal structure, but a unitary state in which the devolved units exercise some power over a limited range of matters, but are still largely subject to the center. However, a federal structure, such as that of Quebec in Canada or Catalonia in Spain, would give substantial powers to the minority group. Depending on negotiations between minorities and the dominant group, the federal units could establish regional governments, a local police force, manage their schools and natural resources, and other internal matters. The federal government would carve for itself exclusive jurisdiction over foreign affairs, the armed forces, and national finances, among others. In Iraq, the most likely candidates for either devolution or federalism are the Sunni who reside in the north, and the Kurds in the northern highlands. Effectively, the Kurds already enjoy an autonomy regime in the highlands far from the reach of the central government in Baghdad. Interestingly, the Shia have also advocated for a federal state, seeing in it an opportunity for them to exercise more control over the vast deposits of oil in the south where most of them live. The Kurds are unlikely to accept any arrangement that diminishes their autonomy.

The final autonomy regime relevant for Iraq would be to permit a minority group to be governed by a law specific to it.⁸³ These include personal family laws that the constitution already permits.⁸⁴ Such personal laws are usually religious and pertain to family matters. Applied by religious courts or courts based on religious jurisprudence, personal laws may provide the minority group substantial autonomy in matters that are internal to the group without disturbing the balance of power in the state. Perhaps the most famous example of such a regime is the case of Muslims in India. But personal laws, particularly those based on religion, could permit a minority to oppress its members from within. Since many personal laws address family law matters, more often than not they tend to oppress women and entrench the patriarchy with the protection of the state. To cure this problem, such laws would have to be subject to equal protection clauses or a

83. Steiner, *supra* note 32, at 1542.

84. See IRAQ CONST. art. 39.

Bill of Rights in the constitution. Unfortunately, the Iraqi constitution is extremely vague on how these are to be applied and regulated. In Iraq, this regime may be most relevant to Sunnis, Kurds, and non-Muslim minority groups such as Christians.

But autonomy regimes for minorities must be viewed with a caveat. The purpose of the protection of minorities is both to ensure their survival and to enrich the entire body politic. Respect for difference, contact with otherness, and openness are central themes in the human rights corpus. Autonomy regimes therefore cannot erect barriers against outsiders, or seal off all exits to forcibly deny its members the opportunity to opt out. Nor should they establish systems of tyranny against even smaller minorities among them. For example, a Sunni or Kurdish autonomous region cannot be permitted to discriminate against the Shia, Christians, Assyrians, Chaldeans, Turkmen, and others among them. Such illiberal, autocratic, and exclusivist practices would frustrate the norms of the human rights movement and render indefensible the logic of the autonomy regime itself. These are complex and problematic questions that must be addressed in crafting autonomy regimes for Iraqi minorities.

Autonomy regimes permit antagonistic groups, particularly where the minorities are deeply aggrieved, the chance to peacefully co-exist within the state. They ensure the cultural survival of the minority as a group and may give them an effective voice within the state, lifting them from the shadows of the society. But a constitution-making process need not be limited to only one autonomy regime. In the case of Iraq, it may be necessary to cobble together different autonomy regimes for different minority groups. For example, while personal laws may be relevant to one group, power-sharing arrangements might make more sense for another. Still, a federal structure might be most appropriate for yet another minority. A combination of different autonomy regimes for different minority groups may be the best solution to a complex situation. But autonomy regimes are not a panacea for all situations. Note should be taken of Cyprus where the failure of co-existence between groups has demonstrated the limitations, if not the futility, of autonomy regimes.

IV. SELF-DETERMINATION: SECESSION OR SEPARATION

The most controversial and problematic question for the international law regime on minorities is whether minority groups have any legal basis to claim a right to self-determination understood as separation or secession from an independent, sovereign state. The crux of this debate is whether minorities can be regarded as “peoples” in the language of the UN Charter, a construction that would permit them to exercise the right of self-determination. The matter is most urgent in states where co-existence between groups seems either impossible or fraught with extreme difficulties. Consider, for example the ethnic, religious, and racial conflicts in Sri Lanka, India, the former Yugoslavia, Tibet in China, Rwanda and Burundi, Nigeria, Northern Ireland and the United Kingdom, Israel and Palestine, Chechnya, Kashmir, Eritrea and Ethiopia, Black Africans in Sudan, and many others. As correctly stated by Henry Steiner, “[m]any of those conflicts have an ethnic character, involving minorities and indigenous peoples. Many raise an urgent and ultimate question about the principle of self-determination: if, and if so under what conditions, it legitimates secession and the creation of a new state or adherence to an existing one.”⁸⁵

One basic problem is the convoluted history of the doctrine of self-determination and its application. Early in the life of international law, the principle of self-determination applied only to select European powers that regarded themselves as “civilized nations.”⁸⁶ At the Treaty of Versailles after WWI, the victorious powers again redefined the principle of self-determination and redrew the map of Europe largely along national lines, creating more nation-states. But the principle was not fully universalized. It left out some European groups and certainly was not applicable to the colonies and the dependent territories in Africa, the Middle East, Asia, the Caribbean, and the Pacific. After WWII, decolonization movements again deployed the principle of self-determination to coalesce a

85. See STEINER & ALSTON, *supra* note 48, at 1249; see also BEREKET H. SELLASIE, *THE MAKING OF THE ERITREAN CONSTITUTION: THE DIALECTIC OF PROCESS AND SUBSTANCE* (2003).

86. Diane F. Orentlicher, *Separation Anxiety: International Responses to Ethno-Separatist Claims*, 23 *YALE J. INT'L L.* 1, 28 (1998).

right by colonial territories to break away from the colonial, metropolitan European powers and form their own independent sovereign states.⁸⁷

The extension of the principle of self-determination to colonial territories did not, however, apply to individual groups within those territories, but rather to the territory itself.⁸⁸ Put differently, international law did not extend the right of self-determination to different "peoples" within the former colonies, but rather to entire "peoples" in the territory as a single entity. In fact, newly independent African states quickly adopted the principle of *uti possidetis*, developed first in post-colonial Latin America, to sanctify the inviolability of the colonial borders.⁸⁹ The 1963 Charter of the Organization of African Unity validated the colonial state as the basic unit for self-determination.⁹⁰ States in Asia, the Middle East, and in other regions of the world adopted the same rigid view of the principle of self-determination. Clearly, this was a rejection by states of the secessionist proclivities of national sub-groups within their borders. But did this rejection amount to *opinio juris*, a customary rule of international law, or are there circumstances under which secession and separation of national sub-groups is permitted?

Scholars are divided on whether, and if so, under what circumstances, national sub-groups, including minorities and indigenous peoples, can exercise the right to self-determination, understood as secession, from existing sovereign states. The practice, however, would seem to point to the existence of a limited right of secession under certain circumstances. Even Justice Higgins of the International Court of Justice who reads the right to self-

87. See, e.g., Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), at 121, U.N. GAOR, 25th Sess., 1883th plen. mtg., U.N. Doc A/8082 (Oct. 24 1970).

88. Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), at 66, U.N. GAOR, 15th Sess., 947th plen. mtg., (Dec. 14, 1960).

89. See generally Makau wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT'L L. 1113 (1995).

90. See Orentlicher, *supra* note 83, *passim*.

91. See Charter of the Organization of African Unity, arts. I-II, May 25, 1963, 479 U.N.T.S. 39.

determination more strictly than most jurists, reluctantly concedes that there could be some exceptions. But she rejects the notion that the right of self-determination belongs to all national or sub-national groups. She argues that the right to self-determination, as used in Article 1 of the UN Charter, should properly be understood to apply only to “peoples” and not minorities.⁹¹ According to her, minorities are not “peoples” in the language of the UN Charter. Higgins contends that minorities possess only “minority rights” that are granted under Article 27 of the ICCPR.⁹² She asserts that Quebec, for example, has no right to secede from Canada on the ground that it is a linguistic minority. But she concedes that there is what she calls a “perceived need [to secede]” where minority rights are suppressed. She argues that:

Croatia and Bosnia-Herzegovina had no automatic legal right to secede by [the] the invocation of a right [to self-determination] of ethnic or religious groups who formed a minority in the larger federal state of Yugoslavia. The *perceived need* of secession is understandable when minorities are denied their right as minorities or where they cannot participate, as part of the entire peoples of a country, in the political and economic life of the country.⁹³

Higgins is driven partly by the liberal project of diversity, pluralism, multinationalism, and tolerance in her rejection of what she calls illiberal “uninational and unicultural states that constitutes postmodern tribalism.”⁹⁴ To be sure, an open-ended right to self-determination could be problematic. One could imagine the explosion of mini tribal states, or nation-states in embryo, with no real chance of viability. But such a suggestion demagogues genuine cases that should be recognized. Situations of extreme exploitation and repression come to mind. It would be unconscionable to deny minority groups the right to secede where they were subject to genocidal or racist majorities and where the state was so repressive that there

92. R. Higgins, *Comments*, in PEOPLES AND MINORITIES IN INTERNATIONAL LAW 29, 32 (Catherine Brölmann, René Lefebvre & Marjorie Zieck eds., 1993).

93. *Id.* (emphasis added).

94. *Id.* at 33.

95. *Id.* at 35.

was no possibility of freedom or respect for human rights. The cases of Black Africans in the south of Sudan, or its Darfur region in the west, most poignantly come to mind. Alan Buchanan has identified three bases under which the right to secession should be allowed as a remedy of last resort. These are: persistent and serious violations of human rights; historically unjust and unaddressed seizures of territory, like annexation; and discriminatory redistribution through internal colonialism or regional exploitation.⁹⁵

In spite of the views of some traditional jurists, international law now treats sub-national groups, including minorities or indigenous populations, as "peoples." The Supreme Court of Canada declared in the 1998 Quebec secession case that "[i]t is clear that a 'people' may include only a portion of the population of an existing state" who could exercise the right to self-determination.⁹⁶ The opinion suggests that minorities can secede as a last resort if the government does not represent all the people on the basis of equality and non-discrimination.⁹⁷ Thus "when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession."⁹⁸ It seems clear that under international law minorities have no right to secede in political democracies that respect basic human rights and in which minority rights are guaranteed. However, that right may be granted in situations of extreme marginalization, exploitation, and abuse.

Arguably, only two Iraqi groups could contemplate secession if a Shia-dominated state became abusive, dictatorial, and denied them an effective voice in the governance and the administration of the state. Unlike the Kurds, the Sunnis may not be anxious to secede because they inhabit areas that are not endowed with oil, the country's principal resource. Even so, the Sunnis and the

96. See Allen Buchanan, *Self-Determination, Secession, and the Rule of Law*, in *THE MORALITY OF NATIONALISM* 301, 310 (Robert McKim & Jeff McMahan eds., 1997).

97. Reference Re Secession of Quebec, [1998] S.C.R. 217, ¶ 124.

98. See *id.* ¶ 130.

99. *Id.* ¶ 134; see also Abdullahi A. An-Na'im & Francis M. Deng, *Self-Determination and Unity: The Case of Sudan*, 18 *LAW & POL'Y* 199, 205 (1996).

Kurds could exit the state unless the new constitutional framework adequately addresses and secures the rights of minorities and gives them a meaningful role in the state. It is important that equal protection and anti-discrimination norms, including the internationally recognized rights of minorities within states, be an integral part of the developing constitutional framework in Iraq. Otherwise, the Kurds and the Sunnis could secede, leaving the international community with little choice but to ratify the secession.

V. GENDER AND MINORITY RIGHTS

It is beyond the scope of this Essay to fully address the rights of women in the new Iraqi constitution. However, the protection of the rights of minorities raises complex questions about various sub-groups within them. More often than not, minority girls and women are violated at multiple levels as members of a minority, as women, and by the patriarchy within the minority. Regimes for the protection of minority groups from the majority cannot be a license for the minority to violate the basic human rights of some of its members. In other words, the cultural survival of a minority group, which is essential to its continuity, cannot be achieved at the expense of a sub-category of the group. The right to *internal* self-determination, which is the basis for the regimes for the protection of minorities, must also be the basis for the guarantee of equal protection and anti-discrimination norms within the group. Thus the group's practices and institutions cannot operate outside the ambit of the Bill of Rights and human rights norms.

This may particularly be a problem where autonomy regimes for minorities are established. Such regimes, be they power-sharing arrangements, personal laws, or devolved or federal units, give minority groups substantial power. Minority groups could wield executive power within their regions, preside over their own courts in family law matters, or elect a protected bloc to the national legislature. This is where the patriarchy and religions could collude to discriminate against girls and women, to exclude and repress them. Practices that would offend human rights law, particularly CEDAW, the women's convention, include the denial of the right to political participation, equality before the law, segregation of women and girls, physical

abuse of women, including marital rape, restrictions on access to public life, and social and educational services, among others.⁹⁹ For instance, a power-sharing arrangement between the minority and the majority must reserve a certain number of seats and positions for women from the minority group. Similarly, an autonomous minority region must permit the full participation of women in the political, social, and economic life of the region. Nor can personal laws be used to dispossess and unjustly punish or discriminate against women.

The danger for Iraq, which was largely a secular state under Saddam Hussein, and in which women had made some advances, is that the domination of the state by religious political parties could retard women's rights. That is why the new constitution needs to be amended and interpreted to unambiguously protect the rights of women. Regrettably, it is vague on the rights of women and the effect of Islam on their rights. While the equal protection clause guarantees textual equality based on gender, it says nothing about the conflict between particular Islamic values and practices and women's rights.¹⁰⁰ Similarly, any regimes for the protection of the rights of minorities, such as the Sunnis or the Kurds, must be subjected to CEDAW and a Bill of Rights. Otherwise, the new dispensation will only protect the rights of men, in effect half of the minority populations.

CONCLUSION

Since the American invasion and occupation of Iraq in 2003, the country has been at a crossroads. Although a repressive dictatorship was dismantled, the aftermath has brought Iraq to the brink of disintegration. The collapse of the regime of Saddam Hussein and the American occupation have released competing aspirations, loyalties, and conflicts. Tensions, which were masked by the iron hand of the former regime, have exploded into the open. Different Iraqi groups have responded in varying ways to the American occupation. Nevertheless, each group seeks to influence the character of the Iraqi state after the

99. See generally CEDAW, *supra* note 64.

100. See IRAQ CONST. art. 14.

occupation. These are the sources of the conflict that is pervasive in Iraq today. What is a legitimate Iraq state? How will such a state be crafted, and what role will various Iraqi groups play in it?

This Essay attempted to answer some of these questions with a particular emphasis on the rights of minorities. Unfortunately, Iraq has three major groups that have different interests within the state. The fact that Iraq has never been a political democracy means that the institutions of accountable government and the culture of the open society will have to be established from scratch. These processes are further complicated by tensions and suspicions among the groups in the context of the occupation. What is clear, however, is the fact that the new Iraqi constitutional dispensation, if the country is to survive as one, will have to address adequately the question of minorities, particularly the Sunnis and the Kurds. In a positive development, Iraq's transitional basic law adopted a secularist, individual rights approach in a Bill of Rights in which equal protection norms were presumed central to the reconstruction of the country.¹⁰¹ In some respects, the 2005 Iraqi Constitution is step backwards from the TAL. The legislature, which is dominated by the Shia, ought to step back from the temptation of a theocracy and instead look to equal protection and anti-discrimination norms coupled with autonomy regimes for minorities as it constructs a lasting constitutional framework. Otherwise, the failure to address the question of minority and group rights will result in the disintegration of Iraq as a single state.

101. LAW OF ADMINISTRATION FOR THE STATE OF IRAQ FOR THE TRANSITIONAL PERIOD (TAL) (promulgated by the U.S. Iraq Coalition Provisional Authority on March 8, 2004).